

COMMERCIAL INSURANCE

EMPLOYEE BENEFITS

PERSONAL INSURANCE

RISK MANAGEMENT

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Q&A FROM ASSUREX GLOBAL WEBINAR

JANUARY 24, 2019

MEDICARE AND EMPLOYEE BENEFITS

Q. What happens when a person enrolls in COBRA when they retire rather than signing up for Medicare. Is Medicare still primary even if the person hasn't signed up for Medicare yet?

A. If a group health plan would be considered the secondary payer to Medicare, the group health plan can choose to pay the amount toward the claim that would have been left over had Medicare paid primary to the group health plan. This is true even if the individual doesn't actually enroll in Medicare. For this reason, individuals should be careful when choosing to delay Medicare and remain enrolled in the group health plan if the group health plan would be considered the secondary payer (e.g. employer with less than 20 employees, retiree coverage, COBRA).

Q. Can an employee drop the group plan to enroll in Medicare outside of open enrollment, or must they wait for open enrollment?

A. If the employee will be enrolling in Medicare, then the group health plan coverage may be dropped mid-plan year to coincide with Medicare entitlement (it's not necessary to wait until open enrollment). Section 125 election change rules permit a mid-year election change to correspond with an individual enrolling in Medicare or losing eligibility for Medicare.

Q. Who is CMS?

A. The Center for Medicare and Medicaid Services.

Q. Can employees receive employer contributions to an HSA if they are on Medicare? What if they have dependents covered who are not on Medicare?

A. All parts of Medicare are considered disqualifying other coverage. If an individual has any Medicare coverage, the individual cannot make contributions, or receive contributions from an employer, to an HSA. However, if an individual is merely eligible for Medicare (not enrolled), HSA-eligibility is not affected.

If the spouse and dependents are also enrolled in the HDHP coverage and are not covered by Medicare, or any other disqualifying other coverage, and cannot be claimed as a tax dependent, they could make contributions to their own HSAs. Then, they could take an "above the line" tax deduction in the amount of these contributions.

Q. If an employee's spouse is enrolled in Medicare, is the employee's maximum HSA contribution based on single or family coverage when the HSA account holder is enrolled in family coverage?

A. In this case, the individual will be eligible to contribute up to the family maximum. An individual's HSA maximum contribution is determined by the level of HDHP he or she is enrolled in, and in some cases the level the individual's spouse is enrolled in. The HSA eligibility of those enrolled as a spouse or dependent on the individual's HDHP coverage, will not affect the HSA holder's maximum contribution.



- Q.** If an employer did not distribute the Medicare Part D Notice to employees, should they still make a CMS disclosure within 60 days of their plan year?
- A.** Yes. These are two separate requirements, and both should be complied with. The employer is still obligated to report to CMS even if they are not reporting to employees. However, while there are no penalties for failing to do so, the employer should report creditable coverage status to employees within the required timeframes going forward. Creditable coverage information can be crucial for individuals who are trying to avoid late enrollment penalties under Medicare.
- Q.** If we are self-funded and offer COBRA to dependents when employees elect Medicare, is this a problem?
- A.** MSP rules prohibit most employers from conditioning eligibility under their group health plans on Medicare eligibility or entitlement. As a result, Medicare eligibility and entitlement for the employee is not technically a COBRA qualifying event for the spouse or dependents in most cases and will not trigger a COBRA continuation right. However, nothing in the regulations prevent group health plans from offering COBRA in more situations than are required under the regulations. Group health plan sponsors should be careful to ensure that carriers and/or stop-loss carriers will agree to cover claims from these individuals before offering this additional COBRA opportunity. In other words, even for a self-funded plan, there could be risk that the stop-loss carrier would refuse to provide claims coverage.
- Q.** What if the group doesn't know the employee has Medicare when they retire? How do we ensure Cobra is offered correctly to the spouse and dependents?
- A.** One way to correct this issue is to include a question in COBRA election forms used when the COBRA qualifying event is retirement or termination, asking whether the employee became entitled to Medicare within 18-months prior to the qualifying event. The notice could include information informing the spouse and dependents that they are eligible for 36-months of continuation coverage beginning at the time of Medicare entitlement when this is the case.
- Q.** The employee can opt out of Medicare and contribute to an HSA, correct?
- A.** In most cases an individual can opt-out of Medicare in order to continue making and receiving contributions to an HSA. However, if the individual is receiving Social Security benefits, opting out of Medicare Part A will result in a loss of Social Security benefits. This could potentially result in the individual being required to pay back amounts already received. Further, if a person chooses to delay Social Security, they can be retroactively entitled to Medicare up to six months prior to when they enroll in Medicare.
- Q.** If an employer has less than 20 employees and hires an individual who has Medicare, is the employer required to offer group health insurance to that person?
- A.** Since the employer's plan would be considered the secondary payer under the Medicare Secondary Payer (MSP) Rules, the employer could write its eligibility rules to exclude those who are enrolled in Medicare and then would not be required to offer group health plan coverage.



Q. If an employee retires and his wife enrolls in COBRA will this affect her Medicare if she signs up at the end of her COBRA maximum coverage period (18-months)?

A. If the wife is not yet eligible for Medicare, her coverage will not be negatively affected by enrolling in COBRA upon the employee's retirement. However, if the wife becomes eligible for Medicare at any point while she is covered under COBRA (or is already Medicare eligible at the time the employee retires) and does not enroll, her ability to enroll in coverage could be delayed to the annual open enrollment period and she may pay late enrollee penalties.

Q. What if an employer offers a waiver incentive to all employees who waive coverage?

A. It is clear under the MSP rules that incentives offered only to Medicare eligible/entitled individuals is prohibited. However, the answer is less clear in situations where the employer offers opt-out or waiver incentives to all employees who choose to waive coverage. If the employer is not aware of the individual's Medicare eligibility/entitlement, the employer could possibly argue that the incentive is not due to the employee's eligibility/entitlement. The most conservative approach is to offer the incentive only to those who enroll in other group health plan coverage, or to all who waive except those who are eligible/enrolled in Medicare.

Q. How is eligibility for the additional \$1,000 (catch-up) contribution impacted by Medicare entitlement?

A. If an individual is entitled to Medicare, the individual is not eligible to make or receive HSA contributions, including the \$1,000 catch-up. Keep in mind, the maximum contribution is determined by multiplying the number of months during the year the individual is HSA-eligible by 1/12th of the annual contribution maximum (HSA annual maximum for the applicable HDHP coverage tier, plus \$1,000 for individuals age 55 or older).

Q. Whose responsibility is it to make sure the Medicare folks are or are not contributing to an HSA?

A. In general, eligibility to contribute to an HSA, as well as the maximum annual contribution amount, is the responsibility of the individual. Employers who make HSA contributions or who permit employees to make contributions to their HSAs through the employer's cafeteria plan are only responsible for ensuring that employees are (a) enrolled in a qualifying HDHP; (b) not enrolled in any other disqualifying coverage sponsored by the employer; and (c) eligible based on their age for any catch-up contributions claimed. While the responsibility for eligibility and contributions falls primarily on the employee, employees will often look to employers to better understand HSA-eligibility and contribution limits, so we recommend that employers attempt to provide some education for employees on these things.

Q. Is eligibility for Health FSA plans, or HRA plans, affected in the same way as HSA plans by Medicare entitlement?

A. There are no federal regulations restricting participation in Health FSAs or HRAs to individuals without other disqualifying coverage like there are for HSAs. Further, Medicare Secondary Payer (MSP) rules prohibit most group health plans from conditioning eligibility on eligibility for, or entitlement to, Medicare. Therefore, Medicare entitlement will not affect HRA or FSA eligibility in most cases.



- Q.** If COBRA prescription drug coverage is creditable, will enrolling in COBRA shield individuals from late-enrollee penalties under Medicare Part D?
- A.** For Medicare Parts A & B, COBRA coverage is not considered coverage due to active employment status. Therefore, delaying enrollment in Parts A & B and enrolling in COBRA may result in a delayed effective date and late enrollee penalties under Medicare Part B. However, if the prescription drug coverage provided under COBRA is considered creditable, individuals who enroll in COBRA coverage may delay enrollment in Part D and then qualify for special enrollment and would not be subject late enrollee penalties upon enrolling in Medicare Part D.
- Q.** If an employee is enrolled in Medicare Part A only, does that disqualify them from an HSA account?
- A.** Being entitled to any part of Medicare (Parts A, B, D or any other Medicare benefit) will make an individual ineligible to make or receive contributions to an HSA.
- Q.** For a full-time employee who is over 65 and signed up for Medicare, is the employer plan always primary while the employee is working or is that dependent on the employer's plan document? If a spouse is covered on the employee's plan and the spouse is enrolled in Medicare, same question.
- A.** The Medicare Secondary Payer Rules (MSP Rules) control which plan pays primary between the group health plan and Medicare. The employer's plan document cannot shift responsibility to pay primary back to Medicare when the group health plan is considered primary under the MSP rules. For individuals enrolled in active coverage (both employees and spouses), the group health plan will be primary to Medicare when the employer has: (i) over 20 employees and the individual is entitled to Medicare due to age; and (ii) over 100 employees and the individual is entitled to Medicare due to disability. Further the group health plan will be primary for both active, retiree and COBRA coverage for the first 30-months an individual is entitled to Medicare due to ESRD (end-stage renal-disease).
- Q.** Can someone use an HRA, an FSA, or an HSA for their Medicare premiums?
- A.** Medicare premiums cannot be reimbursed through an HRA or a health FSA. Amounts contributed to HSAs are generally prohibited from being used to reimburse insurance premiums, however there is an exception for individuals age 65 and older for Medicare Parts A, B, C, and D (HSA funds cannot be used to pay for Medicare supplement premiums).
- Q.** We have benefit packages with and without prescription coverage. Do we need to send the Part D Creditable Coverage notice for plans that do not have prescription drug coverage?
- A.** No. Part D Creditable Coverage Notices are only required for plans that provide prescription drug coverage.



Q. Can you provide the Notice of Creditable Coverage electronically following the DOL Electronic Disclosure Requirements and then in the email ask participants to share with any Medicare eligible spouse or dependents, if any?

A. Yes, if the employer follows the DOL electronic disclosure requirements, the Creditable Coverage Notice can be provided electronically and the disclosure can include instructions to share with any Medicare eligible spouse or dependents. This would satisfy the disclosure requirements, although the DOL has expressed a preference for disclosure through paper documents.

Q. Do insured employers have to submit the Creditable Coverage Notice to CMS? Doesn't the carrier do this?

A. While it is possible to contractually agree with a carrier or a TPA that they will be responsible for creditable coverage disclosures to CMS, the employer plan sponsor is ultimately responsible for ensuring the disclosure is submitted. Insured employers should not assume that carriers are completing this requirement on their behalf.

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