



Medicare, COBRA and Coordination Benefits

A guide for employers with employees reaching retirement age

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Part I. Primary Payers:

Employers and Medicare Secondary Payer Rules

When current employees have Medicare in addition to other insurance coverage, such as an employer-sponsored group health plan (GHP), the question of which plan should pay first needs to be answered. The decision on whether Medicare will pay for health costs either primary or secondary is determined by federal law.

Primary insurance pays medical bills initially, to the limits of its coverage. Then, secondary insurance pays some or all remaining costs after primary insurance has paid (such as deductibles, coinsurance, and copays). Sometimes, secondary insurance may pay when primary insurance denies coverage. If an individual does not have primary insurance, it is also possible secondary insurance will not pay any costs.

When Medicare is primary, the secondary insurance (e.g., a GHP) may not pay until Medicare pays. In certain circumstances, this could mean that employees who are eligible but not enrolled in Medicare would be responsible for paying costs out of pocket. However, whether Medicare is the primary payer is situation dependent. For a better understanding about how Medicare coordinates with different types of insurance, see the chart on the page 6.

Who pays first?

- Medicare is a secondary payer for employees and their dependents if they elect GHP coverage available to them through an employer that employs 20 or more employees (“large employers,” for purposes of Part I of this guide). As a result of these rules if an employee of a large employer wishes to have Medicare as their primary payer, they should waive coverage in the group health plan, as they cannot enroll in both and select Medicare as their primary.
- For employers with less than 20 employees (“small employers” for purposes of Part I), Medicare pays primary for eligible employees that enroll. Because Medicare has primary status, small employers are not subject to additional restrictions under the Medicare Secondary Payer (MSP) rules, discussed in further detail on the next page.

Rules for Counting Employees

An employer is considered to have 20 or more employees for purposes of the Medicare Secondary Payer rules if:

- employer¹ has 20 or more employees*
- for each working day
- of 20 or more calendar weeks
- in the current or preceding year

Medicare Secondary Payer Rules

- **Prohibited Discrimination:** Large employers are required to offer the same GHP coverage and benefits, under the same conditions, without respect to age-related Medicare eligibility of an employee (and/or their spouse). Younger employees and employees 65 and older must be offered the same coverage.
- **Prohibited Incentives:** Large employers are prohibited from incentivizing an active employee age 65 or older to elect Medicare as their primary insurance, or otherwise discouraging employees from enrolling in their GHP.
 - Prohibited incentives may be financial, such as reimbursing employees for Medicare premiums (Part B, Part D, Medigap) and providing opt-out bonuses for waiving the GHP. However, other forms of incentives exist and should also be avoided.
 - As a result, it is generally unfeasible for large employers to use a Medicare premium reimbursement arrangement because it also constitutes a prohibited financial incentive. However, for small employers, there is a limited circumstance in which the Patient Protection and Affordable Care Act (ACA) premium payment arrangement rules permit employer reimbursement, discussed later in this guide.

¹The controlled group rules under the IRS definitions apply in defining "employer" for MSP rules. Employers should seek counsel if they are unsure if they are or are not a controlled group.

*There is no difference between full-time and part-time employees for purposes of the headcount; each individual is one full employee. Employees are also included in the headcount even if they are not enrolled in a GHP. However, self-employed individuals participating in the GHP are not counted. MSP is determined at the time an employee incurs a claim, therefore, employers who are close to 20 employees must actively monitor their employee headcount.



Reporting and Penalties for Noncompliance

- **Reporting Requirements:** Medicare requires a “responsible reporting entity” (RRE) to collect data from plan sponsors and participants. The RRE is either the:
 - Insurer (fully insured plans)
 - Third-party administrator (self-funded plans)
 - Plan administrator/employer (self-funded, self-administered plans)
- A self-funded self-administered GHP that fails to report the required information (which allows for coordination of benefits) is subject to a civil monetary penalty of \$1,232 per each day of non-compliance per each individual for whom information should have been submitted.
- **Additional Penalties Not Related to Reporting:** An entity that offers or gives a prohibited incentive to an employee is subject to a civil monetary penalty of up to \$9,639 per offer. In addition, employers who contribute to a “nonconforming” GHP are subject to an excise tax equal to 25 percent of the GHP’s expenses for the relevant year. A GHP is nonconforming if it:
 - Improperly takes into account that an individual is entitled to Medicare;
 - Fails to provide the same benefits under the same conditions to employees and spouses who are 65+ and younger employees and spouses;
 - Improperly differentiates individuals with ESRD; or
 - Fails to refund erroneous conditional Medicare payment
- As an example, this penalty would be triggered if an employer with 35 employees provided Medicare-eligible employees with a stipend to help cover their Medicare premiums or had a spousal surcharge for spouses who were Medicare eligible that were enrolled in the GHP.

PRIMARY AND SECONDARY PAYERS BY INSURANCE TYPE

TYPE OF INSURANCE			PRIMARY	SECONDARY
65+ with insurance based on current employment (or that of spouse)	Less than 20 employees	Enrolls in Medicare + elects GHP	Medicare	GHP
		Does not enroll in Medicare + elects GHP	None	GHP
	20 or more employees	Enrolls in Medicare + elects GHP	GHP	Medicare
		Enrolls in Medicare + does not elect GHP	Medicare	N/A
		Does not enroll in Medicare	GHP	N/A
COBRA	COBRA before Medicare eligibility		Medicare	N/A; COBRA rights for the employee ends upon election of Medicare. However, not for spouse/dependent children who were also on COBRA, rather their coverage may be extended.
	Medicare before COBRA eligibility		Medicare	COBRA
Medicare based on disability with insurance based on current employment (or that of spouse)	Less than 100 employees		Medicare	GHP
	100 or more employees		GHP	Medicare
Medicare based solely on End Stage Renal Disease (ESRD) and covered by a GHP (including current and former employees)	Beneficiary has GHP at the start of coordination period	Within a 30-month coordination period	GHP (all services) not just ESRD-related)	Medicare
		Outside of a 30-month coordination period	Medicare	GHP
	Beneficiary obtains GHP during coordination period	Length of coordination period before GHP coverage	Medicare	N/A
		Balance of coordination period after GHP coverage	GHP	Medicare
Liability insurance	Liability-related medical claims		Liability	Medicare
	Unrelated medical claims		Medicare	N/A
Retiree Insurance	Medicare eligible		Medicare	Retiree
	Medicare ineligible		Retiree	N/A
Medicare and VA Benefits	Services at VA facility		VA benefits	N/A; Medicare does not pay any cost incurred at VA facilities
	Services at non-VA facility		Medicare	N/A; VA benefits do not usually work outside of VA facilities
Medicaid	Medicare-eligible		Medicaid	Medicaid

Part II. Employer Reimbursement of Medicare Premiums

According to IRS Notice 2015-17, an arrangement in which an employer reimburses or directly pays for Medicare premiums constitutes an employer payment plan. If the plan covers two or more active employees, it is considered a GHP and is therefore subject to ACA market reform rules (violations of which can result in an excise tax of \$100 per day per employee impacted).

- While a standalone employer payment plan will not itself satisfy ACA rules for GHPs, a reimbursement arrangement that is integrated with another GHP offered by the employer can be compliant.

However, such an arrangement that is available to active employees is also subject to restrictions under other laws, such as the Medicare secondary payer provisions. Thus, employers with 20 or more active employees cannot use a Medicare premium reimbursement arrangement because it will be considered an incentive to waive the GHP and elect Medicare as primary.

When is a reimbursement arrangement integrated?

- For a Medicare premium reimbursement arrangement to be integrated with another GHP offered by the employer, the following criteria must be met:
 - Employer must offer a minimum value GHP to all employees that does not consist solely of excepted benefits; Medicare-eligible employees can decline the plan, but coverage must be offered.
 - Employees participating in the employer payment plan (i.e., receiving premium reimbursements) must actually be enrolled in Medicare Parts A and B;
 - Employer payment plan is available only to employees who are enrolled in Medicare Part A and Part B, or Part D; and
 - Employer premium payment or reimbursement is limited to Medicare Part B, Part D, or Medicare Supplement Insurance (“Medigap”) premiums.

Penalties for Noncompliance

- An employer that reimburses an individual's Medicare premiums through an arrangement that is not integrated with a GHP is subject to an IRS penalty for violating the ACA premium reimbursement rules. The penalty is \$100 per employee per day.
- Employers with less than 20 employees that reimburse Medicare Part B, Part D, or Medigap premiums without integrating the arrangement are subject to this penalty. Employers with 20 or more employees are also subject to this penalty, and likely additional penalties. Although there was a grace period for employers with less than 50 full-time or full-time equivalent employees, the penalty is imposed for violations following June 30, 2015.

Individual Coverage HRA Exception

- Employers may offer employees individual coverage HRAs (ICHRAs) in lieu of offering employees a GHP. ICHRA funds can be used to pay for Medicare Part B and D as well as supplementary premiums without issues, because ICHRAs are only offered to employees that are not offered the GHP. However, employers cannot offer a GHP to employees that are not Medicare eligible and only offer an ICHRA to employees that are Medicare eligible. Employers who wish to offer ICHRAs should consult with benefits counsel to ensure compliance with applicable regulations.



Part III. Medicare Coordination with COBRA

What is COBRA?

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a federal law that gives individuals an option to stay on an employer's GHP for a limited time after their employment ends. Former employees usually pay more for COBRA because employers no longer pay a portion of their premiums. Questions regarding coordination of benefits may arise when an employee who is Medicare-eligible retires (or plans to do so). Of the six qualifying events for COBRA coverage, two of the most relevant to employers with employees approaching retirement age are:

- Termination or reduction in hours of the covered employee's employment
- Covered employee's entitlement to Medicare

Coordination between Medicare and COBRA depends on which of the two forms of insurance an individual enrolled in first. Unless an individual enrolled in Medicare before they became eligible for COBRA, it is not usually possible to have both forms of insurance. See Part I, "Chart: Primary & Secondary Payers by Insurance Type."

1. COBRA, then Medicare

- Individuals are no longer eligible for COBRA once they are enrolled in Medicare. Thus, an employer can terminate COBRA coverage once an individual actually obtains Medicare coverage. If an individual delays Medicare enrollment based on their COBRA coverage, they may face late enrollment penalties if they wish to enroll in Medicare Part A and Part D outside the Initial Enrollment Period (IEP).
- What if a person is eligible for Medicare based on age, but wants to delay enrollment in Part B until after COBRA coverage ends?
 - COBRA is not "coverage based on current employment."
 - If an individual purchases COBRA coverage and delays Medicare enrollment, they will not be eligible for a Special Enrollment Period (SEP) for Part B when COBRA ends. The SEP is only available to individuals who delay Part B because they have "coverage based on

current employment.” COBRA does not fit this definition, so an eligible individual who delays Part B enrollment will not be able to enroll in Part B again until the next General Enrollment Period (GEP). Further, they will pay a lifetime late enrollment penalty of 10% for every 12 months of delayed enrollment.

- What if a person is eligible for Medicare based on age, but wants to delay enrollment in Part D until after COBRA coverage ends?
 - COBRA may not be creditable coverage.
 - If an individual delays enrollment in Part D because they have COBRA, they may be subject to a late enrollment penalty if the GHP does not offer creditable prescription drug coverage, discussed further in Part IV. If an individual’s prescription drug coverage through COBRA coverage is creditable, they will have a SEP to join a Part D drug plan without paying a penalty when COBRA ends.

2. Medicare, then COBRA

- An individual who is enrolled in Medicare before becoming eligible for COBRA must be permitted to purchase COBRA coverage. Because Medicare is usually the primary payer in this case, it is advisable to keep Medicare coverage, which is responsible for paying a majority of costs. As a secondary payer, COBRA coverage may be helpful to cover cost-sharing amounts or offer additional benefits such as prescription drug coverage.
- What if an individual only has Medicare Part A?
 - Such an individual can still purchase COBRA. However, per above, loss of COBRA coverage will not create an SEP to enroll in Part B. If an individual does not enroll in Part A and Part B at the same time, a late enrollment penalty may apply.
- What if an individual has Medicare, and wants Medigap after COBRA?
 - Individuals with Medicare and COBRA coverage have the right to purchase certain Medigap plans sold in their state (A, B, C, F, K, or L) within a guaranteed issue period. Individuals that have Medicare Part A and Part B (primary) and COBRA (secondary) have the option to purchase a Medigap policy before or after COBRA coverage ends. Individuals that wish to wait must apply for a Medigap policy no later than 63 calendar days after the latest of these dates:
 - Date the coverage ends
 - Date on the notice stating that coverage is ending (if applicable)
 - Date on a claim denial (if this is the only indication that coverage has ended)



Medicare, then COBRA: Coverage for Spouses and Dependents

Per above, both a covered employee’s entitlement to Medicare and termination of employer sponsored coverage are qualifying events. However, as a practical matter, entitlement to Medicare is not usually a qualifying event for active employees because the MSP rules (discussed in Part I) restrict employers’ ability terminate GHP coverage.

When entitlement to Medicare (first qualifying event) is followed by termination of employment or reduction of hours, such as retirement (subsequent qualifying event), the maximum COBRA coverage period for the employee is 18 months. For spouses and dependent children covered by the GHP at the time of the events, special rules apply that may extend the maximum coverage period for those individuals up to 36 months.

QUALIFYING EVENTS		COVERAGE PERIOD
Medicare entitlement causes loss of coverage		36 months from date of retirement
Medicare entitlement does not cause loss of coverage, and is followed by retirement (subsequent qualifying event)	If retirement occurs within 18 months or less of Medicare entitlement	36 months minus the number of months of entitlement
	If retirement occurs more than 18 months after Medicare entitlement	18 months from date of retirement

For example, if an employee enrolls in Medicare and then retires three month later, his spouse and dependents will have 33 months of COBRA. However, if the employee enrolls in Medicare and retires longer than 18 months afterwards, the spouse and dependents will just get the regular 18 month of COBRA. In any event (other than due to a disability extension), the employee is only entitled to 18 months of COBRA upon retirement.

Part IV. COBRA and Medicare:

Creditable Coverage

What is creditable coverage?

Prescription drug coverage is creditable if its actuarial value equals or exceeds the actuarial value of the defined standard prescription drug coverage under Medicare Part D. This means that the expected amount of paid claims under the GHP must be at least equal to the total expected paid claims for the same beneficiaries under Part D.

In simple terms, to be creditable, the GHP drug coverage must on average be at least as good as, or pay as much as, the basic Medicare drug benefit.

Creditable Coverage and Medicare Part D

- If an individual does not maintain creditable coverage for a period of 63 days or longer after their initial enrollment period for Part D, the Medicare Modernization Act (MMA) imposes a late enrollment penalty that results in higher premiums. The penalty is 1% of the annual national base beneficiary premium times the number of full months an individual was eligible for Part D and lacked creditable drug coverage.
- However, some GHPs offer creditable coverage. Employees that maintain enrollment in a GHP that provides creditable drug coverage will not incur the penalty for delaying Part D enrollment. Additionally, employees with creditable coverage have a two-month SEP to enroll in Part D after learning that they are going to lose such coverage.

Notice Requirements for Employers

- The MMA requires GHP sponsors to provide notice of whether the plan's coverage is creditable. If coverage is not creditable, the notice must explain that there are limitations on the periods during the year during which an individual can enroll in Part D, and that a late enrollment penalty may be imposed. Employers are also required to complete the online Disclosure to CMS Form to report their creditable coverage status on an annual basis.



- To whom must notice be provided?
 - Medicare eligible active employees and their dependents
 - Medicare eligible COBRA individuals and their dependents
 - Medicare eligible individuals covered under an employer’s prescription drug plan
 - Retirees and their dependents
- When must notice be provided?
 - GHP sponsors must provide notices each year to Part D eligible employees (and some former employees) at a minimum:
 - Before Medicare Part D annual election period (Oct 15 - Dec 7) therefore by October 14.
 - Before an individual's IEP for Part D
 - Before the effective date of coverage for a Medicare-eligible individual who joins an employer plan.
 - Any time prescription drug coverage ends or creditable coverage status changes.
 - Upon request.
- When must disclosures be made to CMS?
 - Annually, no later than 60 days from the beginning of the plan year (March 1 if a calendar year plan)
 - Within 30 days after a change in creditable coverage status
 - Within 30 days after the termination of a creditable prescription drug plan



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