

## **MUNICIPALITIES AND MEDICARE: WHAT’S THE LAW?**

Indiana municipalities often ask whether it is permissible to take Medicare “into account” when determining eligibility under a group health plan. This article provides an overview of this complicated area of law.

When Medicare law was enacted in 1965, Medicare was the primary payer for items and services with the exception of those specified under workers’ compensation. In 1980, Congress began to enact the Medicare Secondary Payer (MSP) provisions.

The provisions were created with the intent of protecting the Medicare trust fund by shifting costs from Medicare to the appropriate private sources of payment. To that extent, the MSP provisions ensure that Medicare does not end up paying for items and services if payment has already been made, or if payment can reasonably be expected to be made from a number of primary plans (upon satisfaction of certain circumstances). These primary plans include: group health plans, workers’ compensation plans, liability insurance, and no-fault insurance.

The MSP provisions are enforced by the Centers for Medicare and Medicaid Services (CMS). It is estimated that the provisions help save the Medicare program billions of dollars annually on claims that are paid by insurers or self-funded employers primary to Medicare. The MSP provisions also serve to increase provider, physician, and other supplier revenue. Correctly billing a primary plan prior to billing Medicare may result in more favorable reimbursement rates, and correctly filed claims prevent future MSP recovery efforts on the claim.

### **What Are The Medicare Secondary Payer Requirements?**

In general, MSP prohibits a group health plan from “taking into account” the Medicare entitlement of a current employee or a current employee’s spouse or family member. Examples of employer or insurer actions that would constitute an impermissible “taking into account” include but are not limited to: failure to pay primary, terminating coverage because the individual has become entitled to Medicare, and imposing limitations on Medicare-eligible employees that do not apply to other employees.

### **Who Must Comply With The MSP Requirements?**

The MSP requirements apply broadly to private and public sector employers, including Indiana municipalities. However, employers with group health plans with less than 20 employees generally are not subject to the MSP requirements.

### **What Are The Responsibilities Of Employers Under MSP?**

Employers that are subject to the MSP requirements must:

- Ensure that your plans identify those individuals to whom the MSP requirement applies;
- Ensure that your plans provide for proper primary payments where by law Medicare is the secondary payer;

- Ensure that your plans do not discriminate against employees and employees' spouses age 65 or over, people who suffer from permanent kidney failure, and disabled Medicare beneficiaries for whom Medicare is secondary payer; and
- Accurately complete and submit Data Match reports timely on identified employees.

### **How Are The MSP Provisions Enforced?**

The CMS utilizes the IRS/SSA/CMS Data Match Program to identify Medicare beneficiaries who are employed and may therefore be covered by a group health plan that should pay primary to Medicare.

Through this program, the Social Security Administration (SSA) provides the IRS with a list of the Social Security numbers of Medicare beneficiaries. The IRS proceeds to match those numbers against beneficiary income tax return data. Those results are finally sent to the CMS for further analysis. If the tax records show that a Medicare beneficiary received payments from an employer, the CMS may contact the employer to find out if that Medicare beneficiary was covered by the employer's group health plan.

Employers that are contacted must complete the IRS/SSA/CMS Data Match Questionnaire supplying information about the employer's group health plans and the individuals identified by the CMS.

Employers must complete the Data Match Questionnaire within 30 days, unless an extension has been requested and approved.

Failing to comply with CMS's request may result in:

- Civil monetary penalties of \$1,000 for each person for whom the employer has neither responded to nor has provided incomplete information;
- Subpoenas of business records and members of the organization; and
- An investigation of the employer's group health plan for a determination of nonconformance, which may result in a referral to the IRS for imposition of an excise tax on the employer.

### **Further Reading**

The information above is a high level overview of the MSP provisions. For more information, please visit <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Medicare-Secondary-Payer/Medicare-Secondary-Payer.html>

**Table 1. Analysis of Common MSP Coverage Situations**

Individual	Condition	Pays First	Pays Second
Is age 65 or older, and covered by a Group Health Plan (GHP) through current employment or spouse's current employment	The employer has less than 20 employees	 <b>Medicare</b>	 <b>GHP</b>
Is age 65 or older, and covered by a GHP through current employment or spouse's current employment	The employer has 20 or more employees, or the employer is part of a multi-employer group with at least one employer employing 20 or more individuals	 <b>GHP</b>	 <b>Medicare</b>
Has an employer retirement plan and is age 65 or older	The individual is entitled to Medicare	 <b>Medicare</b>	 <b>Retiree Coverage</b>
Is under age 65, disabled, and covered by a GHP through his or her current employment or through a family member's current employment	The employer has less than 100 employees	 <b>Medicare</b>	 <b>GHP</b>
Is under age 65, disabled, and covered by a GHP through his or her current employment or through a family member's current employment	The employer has 100 or more employees, or the employer is part of a multi-employer group with at least one employer employing 100 or more individuals	 <b>GHP</b>	 <b>Medicare</b>

**Table 1. Analysis of Common MSP Coverage Situations (cont.)**

Individual	Condition	Pays First	Pays Second
Has End-Stage Renal Disease (ESRD) and GHP coverage	Is in the first 30 months of Medicare eligibility or entitlement	 <b>GHP</b>	 <b>Medicare</b>
Has ESRD and GHP coverage	After 30 months of Medicare eligibility or entitlement	 <b>Medicare</b>	 <b>GHP</b>
Has ESRD and Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) coverage	Is in the first 30 months of Medicare eligibility or entitlement	 <b>COBRA</b>	 <b>Medicare</b>
Has ESRD and COBRA coverage	After 30 months of Medicare eligibility or entitlement	 <b>Medicare</b>	 <b>COBRA</b>
Is covered under Workers' Compensation (WC) because of a job-related illness or injury	The individual is entitled to Medicare	<p>For health care items or services related to job-related illness or injury</p>  <b>Workers' Compensation</b> <p>See section titled, "When May Medicare Make a Conditional Payment?"</p>	 <b>Medicare</b>

**Table 1. Analysis of Common MSP Coverage Situations (cont.)**

Individual	Condition	Pays First	Pays Second
Was in an accident or other situation where no-fault or liability insurance is involved	The individual is entitled to Medicare	No-fault or liability insurance for accident- or other situation-related health care services claimed or released   <b>Accident</b>  See section titled, "When May Medicare Make a Conditional Payment?"	 <b>Medicare</b>
Is age 65 or older or is disabled and covered by Medicare and COBRA	The individual is entitled to Medicare	 <b>Medicare</b>	 <b>COBRA</b>

Source: *CMS Medicare Secondary Payer for Providers, Physicians, Other Suppliers, and Billing Staff*, available at [https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/MSP\\_Fact\\_Sheet.pdf](https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/MSP_Fact_Sheet.pdf)