



Q&A: AVOID MEDICARE DESPAIR | WEDNESDAY, SEPT. 6, 2017

Your questions answered by Pete Iverson, Esq., our in-house ERISA counsel

We received several questions relating to how the Medicare Part D notice is to be provided to individuals. Therefore, we are including the general guidelines to address distribution options.

Distribution Guidelines

- » Entities have flexibility in the form and manner of providing Disclosure Notices to beneficiaries. The notice need not be sent as a separate mailing. The Disclosure Notice may be provided with other plan participant information materials (including enrollment and/or renewal materials). The entity may provide a single disclosure notice to the covered Medicare individual and all his/her Medicare eligible dependent(s) covered under the same plan. However, the entity is required to provide a separate disclosure notice if it is known that any spouse or dependent that is Medicare eligible resides at a different address than the participant/policyholder.
- » If entities choose to incorporate disclosures with other plan participant information, the disclosure must be prominent and conspicuous. This means that the disclosure notice portion of the document (or a reference to the section in the document being provided to the individual that contains the required statement) must be prominently referenced in at least 14-point font in a separate box, bolded, or offset on the first page of the provided plan participant information.
- » Plan Sponsors may use electronic disclosure requirements to meet the creditable coverage disclosure requirements provided the recipients have adequate access to electronic information

Electronic Distribution

- » Plan Sponsors may use electronic disclosure requirements to meet the creditable coverage disclosure requirements provided the recipients have adequate access to electronic information.
- » **Active At-Work Plan Participants:** The disclosure requirements allow the entity sponsoring a group health plan to provide a creditable coverage disclosure notice electronically to plan participants who have the ability to access electronic documents at their regular place of work if they have access to the plan sponsor's electronic information system on a daily basis as part of their work duties. If this electronic method of disclosure is chosen, the plan sponsor must inform the plan participant that the participant is responsible for providing a copy of the electronic disclosure to their Medicare eligible dependents covered under the group health plan.
- » **Retirees:** An entity can also provide a Disclosure Notice through electronic means to retirees only if the Medicare eligible individual has indicated to the entity that s/he has adequate access to electronic information. An entity must not take the right to provide materials to an individual via electronic means as a permissible way to deliver documents to all individuals. Before individuals agree to receive their information via electronic means, they must be informed of their right to obtain a paper version, how to withdraw their consent, how to update address information, and be advised of any hardware or software requirements needed to access and retain the creditable coverage disclosure.
- » If the individual consents to an electronic transfer of the notice, a valid e-mail address must be provided to the entity and the consent from the individual must be submitted electronically to the entity. This ensures the individual's ability to access the information as well as ensures that the system for furnishing these documents results in actual receipt.
- » **Web Site Posting:** In addition to having the disclosure notice sent to the individual's email address, the notice (except for personalized notices) must be posted on the entity's website, if applicable, with a link on the entity's home page to the creditable coverage disclosure notice.

Q: If you have an employee has elected NOT to carry spousal/family coverage. Do I need to to send to an eligible spouse/family if they are not on the plan but qualify for Part D.

A: The notice must be sent to all Part D eligible individuals including active employees, disabled employees, COBRA participants, retirees, spouses and dependents **that are eligible for your plan.**

Q: Can you review the guidelines for the notice when we include it with other plan information like a Benefits Guide? We put the notice in the back of the guide and want to confirm that is compliant.

A: See Distribution Guidelines (Page 1).

Q: Did you say we could email the disclosure “Medicare Part D” to Retirees electronically?

A: See Distribution Guidelines (Page 1).

Q: Is posting the Medicare Part D notice online so that employees and spouses and anyone can access it via online from any computer sufficient?

A: See Distribution Guidelines (Page 1).

Q: Does the notice have to be mailed to the employee or can it be handed out with the employee’s paycheck?

A: See Distribution Guidelines (Page 1).

Q: Will you repeat the electronic delivery statement you made? If all our employees can receive electronic delivery, how would the spouse and dependent see it?

A: The plan sponsor must inform the plan participant that the participant is responsible for providing a copy of the electronic disclosure to their Medicare eligible dependents covered under the group health plan. See Distribution Guidelines (Page 1).

Q: I understand an HDHP is not creditable coverage for prescriptions. Does this mean someone will have to pay a penalty even if they did not have a lapse in coverage before enrolling in Medicare?

A: Whether or not the medical plan is an HDHP or not doesn’t determine whether or not the prescription drug coverage offered under that HDHP is creditable or not. The creditability would need to be determined for prescription drug coverage offered through an HDHP just as any other plan would be required.

Q: If you distribute the Employee Notice at the time of open enrollment do you have to do it again in October?

A: As long as the notice is provided prior to October 15 according to CMS guidelines, it does not need to be distributed again.

Q: When you are filing with CMS, are you filing for the previous plan year or the upcoming plan year?

A: The Disclosure to CMS is due within 60 days after the start of a plan year, so you would filing for the current plan year.

Q: Can you confirm the timing of both activities? If we provide notice to our EEs in October 2017 for our 2017 plan year, can we also provide disclosure to CMS in October 2017?

A: The Medicare Part D notice to employees and the Disclosure to CMS have different requirements.

The Medicare Part Notice to Employees must be provided by:

1. October 15 of each year;
2. prior to an individual’s initial enrollment period for Part D;
3. prior to the effective date of coverage for any Part D-eligible individual who enrolls in the employer’s prescription drug coverage;
4. when the plan no longer provides any drug coverage or when the coverage is no longer “creditable”; or
5. upon request.

Sending the notice to all plan participants annually satisfies 1 & 2 above.

The Disclosure to CMS must be made:

1. within 60 days after the start of a plan year;
2. whenever Rx coverage is terminated; or
3. whenever the creditability of the Rx coverage changes.

Q: Are there any entities that are NOT subject to disclosing this information to CMS?

A: All entities that offer prescription drug coverage to Part D eligible individuals must file the Disclosure to CMS. This includes employer-sponsored plans, government plans, church plans and union plans. There are no exemptions for small plans. The term “plan” includes High Deductible Health Plans and HRAs. It does not include health FSAs or HSAs. If an individual participates in both the HRA and the employer’s group health plan, then for purposes of determining whether the individual has creditable coverage, amounts credited to the HRA in a given year should be treated as increasing the expected prescription drug claims payable from the non-account benefit for that year. Existing funds in the HRA that have been rolled-over from prior years are factored into the value of the arrangement. For HRAs that pay for both prescription drugs and other medical costs, a portion of a year’s allocation should be reasonably estimated and allocated to prescription drugs.

- » If an individual who participates in an HRA is not covered by the employer’s group health plan, the analysis of whether the HRA’s coverage is creditable in a given year is determined by treating the HRA as if it were a plan with no deductible and an annual limit equal to the amount of the credit for that year.
- » FSAs and HSAs may not be used to determine whether coverage is creditable.

Q: How does government know you did not have coverage before you enrolled?

A: The government would not know. That is the purpose of the Medicare Part D notices that you provide to employees. An individual will use this notice to document that they did, in fact, have creditable coverage, if that is the case.

Q: Is the period covered for 2017 or 2018?

A: I’m not sure exactly what “period covered” you are asking about, but assuming you are referencing the disclosure to CMS, the period of coverage is referring to the plan year. This may or may not be a calendar year. For example: a plan year might be 5/1 through 4/30.

Q: If a drug program is not carved out but is a part of the medical plan, wouldn’t that plan be considered creditable, as well?

A: Rx coverage is not automatically creditable just because it is part of the medical plan. There would still need to be a determination of creditability whether the Rx is a stand-alone plan or whether it is included as part of the medical plan.