GBS Health Benefits Compliance

COBRA and the Impact of Medicare Secondary Payer (MSP) Rules

The **Consolidated Omnibus Budget Reconciliation Act (COBRA)** is a federal law that allows certain employees and their dependents to continue group health coverage for a limited time after coverage would otherwise end due to specific qualifying events, such as termination of employment or a reduction in hours.

While COBRA provides an important continuation coverage right, it does not operate in isolation. Other legal rules, including **Medicare Secondary Payer (MSP)** rules, can affect how COBRA coverage works and when it pays in relation to other coverage.

MSP: Background

If an individual is covered under more than one health plan, when that individual incurs a claim for medical care the plans must determine which plan will pay primary and which will pay secondary. This process is called "coordination of benefits" or COB.

When one of the plans is Medicare, the Medicare Secondary Payer (MSP) rules dictate the COB process. The MSP rules generally provide that Medicare will be the *secondary payer* for medical claims incurred by a person who is on Medicare and also on a "group health plan" as defined in IRC section 5000(b)(1).

Note that "group health plan" definition under the IRC is broader than the ERISA definition. Thus, unlike ERISA, the MSP rules apply not only to private-sector employers, but also to religious, charitable and educational institutions; the federal government; and state government employers (including state agencies and political subdivisions).

Employer size and Medicare classification also affect whether MSP rules apply.

- Medicare based on Age (MSP rules apply to employers with 20+ employees)
- Medicare based on Disability (MSP rules apply to employers with 100+ employees)
- Medicare based on End State Renal Disease (MSP rules apply to any size employer)

MSP: Rules Overview

The MSP rules prohibit a "group health plan" from "taking into account" that a *current employee* or family member is entitled to (enrolled in) Medicare. In other words, the plan cannot require Medicare to pay first when the individual is currently employed.

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The MSP rules also: 1) require plans to provide the same benefits, under the same conditions (including cost) to current employees (or their spouses) who are age 65 or older, as it provides to other employees, and 2) prohibit employers from offering financial or other incentives for Medicare-eligible individuals to opt out of employer group coverage.

Impact of MSP rules on COBRA

The MSP rules apply to individuals who are in "current employment status," and therefore generally do not apply to individuals enrolled in Medicare who also have coverage through COBRA. When evaluating how the MSP rules impact COBRA, employment status is key.

Notably, individuals on **Medicare and COBRA** are not considered to be in "current employment status" for MSP purposes— even if they are still employed due to a reduction in hours (i.e., there has been no termination of employment).

The following summarizes how this applies in practice.

- MSP Rules Apply and **Group Health Plan** Pays Primary when:
  - Current employee is on Medicare and group health plan
  - Current employee's spouse is on Medicare and group health plan
- MSP Rules Apply and **Medicare** Pays Primary when:
  - Current employee is on Medicare and COBRA (e.g. due to reduction in hours)
  - Current or former employee's spouse or dependents are on Medicare and COBRA
  - Former employee is on Medicare and COBRA

Note that if an individual is receiving medical care for end-stage renal disease (ESRD), see Medicare website and get legal advice regarding interaction of COBRA and ESRD. In some cases, COBRA coverage may be primary during the first 30 months the individual is eligible for Medicare due to ESRD.

May an Employer (Plan Sponsor) terminate a Medicare eligible or entitled individual from COBRA coverage?

Timing and Medicare status is important when determining whether an individual may remain on COBRA.

When eligible and **enrolled**:

- If an individual becomes entitled to (i.e., actually enrolled in) Medicare on or *after the date the individual enrolls in COBRA*, the plan may terminate COBRA as of the date of Medicare entitlement (enrollment).
- However, if an active employee (and/or their spouse) is enrolled in Medicare and also in group health plan coverage and *then the employee terminates employment*, COBRA must be offered.

When eligible and **not enrolled**:

- If an individual becomes eligible for Medicare (but is not enrolled), on or after the date the individual enrolls in COBRA, the plan may NOT terminate COBRA merely because the individual is eligible for COBRA.
- If an active employee (and/or their spouse) is eligible for Medicare (but does not enroll) and also is enrolled in group health plan coverage *and then the employee terminates employment*, COBRA must be offered.

Keep in mind that COBRA coverage may also end for reasons other than Medicare entitlement, such as when the maximum COBRA coverage period expires, when the employer terminates all group health plan coverage for employees, or when the qualified beneficiary fails to timely pay the required premium. Because this resource is focused specifically on the interaction between COBRA and MSP rules, it does not address COBRA requirements more broadly.

Practical Application

COBRA costs an individual 102% of the regular group plan premium, so many generally healthy individuals do not enroll in both Medicare and COBRA, even if they were enrolled in both Medicare and the employer group health plan when they were in "current employment status." For example, where an individual is enrolled in both Medicare and COBRA, and Medicare pays first and the COBRA plan pays second (the difference between what it would have paid and what Medicare paid), the secondary payment in this situation usually is a small amount, if anything. (The exception of course would be if an individual has high medical expenses and their COBRA plan covers their Medicare cost-sharing or pays other benefits that are not covered under Medicare.)

Although most employees who lose group health plan coverage will not elect COBRA if they are also enrolled in Medicare, family members often DO elect COBRA if they are not eligible to enroll in Medicare. Thus, questions about family members often arise, specifically relating to the spouse who may also be close to Medicare eligibility or have Medicare entitlement. For more information and examples of how these rules apply, please see our additional resource entitled "*COBRA and Medicare Interaction: Reference Guide*."

This document is not intended to be exhaustive, nor should any information be construed as tax or legal advice.

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