

OCTOBER 12, 2015

THE MEDICARE PART D NOTICE REQUIREMENT

We have recently received a number of questions about the Medicare Part D notice requirement. Although this requirement is not new – it first took effect in November 2005 – we thought that, as we approach its ten-year anniversary, it might be worthwhile to review what is required. So here's our list of the "top 10" questions we've been asked about the Medicare Part D notice requirement:

- (1) **What Does It Require?** In a nutshell, employers that are providing coverage for prescription drugs as part of an employer-sponsored "group health plan" must tell individuals who are eligible to enroll in Medicare Part D whether or not their prescription drug coverage is "creditable."
- (2) **What's the Purpose of the Notice?** The notice is designed to help Medicare-eligible employees and their dependents decide whether they should remain on their employer's group health plan coverage or whether they should enroll in Medicare Part D.
- (3) **Why Does it Matter?** Individuals who do not enroll in Medicare Part D when they are first eligible to do so may be required to pay more for their Part D coverage when they finally do enroll. This "late enrollment penalty" does not, however, apply to individuals who enroll at a date after they first became eligible if they were receiving "creditable prescription drug coverage" through a current or former employer through the date when they did enroll. (Please note that there are other conditions for avoiding the late enrollment penalty; to keep this Alert from turning into a book-length treatise on Medicare, we have necessarily left out a number of details that could be important in certain factual situations.)
- (4) **What Plans Are Subject to the Notice Requirement?** If a group health plan provides coverage for prescription drugs, it is subject to the notice requirement. Because major medical plans almost always provide coverage for prescription drugs, this means that almost all major medical plans are subject to the notice requirement.

On the other hand, most dental plans and most vision plans are not subject to the notice requirement because they typically do not provide coverage for prescription drugs. Additionally, health flexible spending accounts ("Health FSA's") are not subject to the notice requirement, even though they typically do provide reimbursements for the cost of prescription drugs, because Health FSA's have specifically been exempted from the notice requirement.

- (5) **Who Is Responsible for Sending Out The Notice?** The employer that is sponsoring the plan is responsible for making sure that the notice is provided. If an insurance company, a third party administrator, or some other third party provides the notice, the requirement will be satisfied. But the "buck stops" with the employer.

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This means that an employer offering a plan with prescription drug coverage should not simply assume that someone else is taking care of the notice requirement. The employer needs to make sure that the insurance company (if its plan is fully insured), or the third party administrator (if the plan is self-insured), has assumed the obligation of sending out the notice and will take responsibility if this is not done. Alternatively, if the insurance company or third party administrator is not willing to do this, then the employer needs to send out the notice itself.

- (6) **Who Does the Notice Have to be Sent To?** Technically, the notice only has to be provided to those individuals (a) who are enrolled in or seeking to enroll in the plan and (b) who are also entitled to Medicare. However, because an employer will not always know the age of an employee's spouse, and because individuals may be entitled to Medicare due to "end stage renal disease" or some other basis that is not directly related to their age, many employers take a cautious approach by providing the disclosure to all participants and eligible employees.
- (7) **Does a Separate Notice Need to Be Provided to Each Spouse and Each Dependent?** A single notice can be provided to an employee and all of the employee's dependents as long as they are living at the same address. If, however, the employer knows that a spouse or dependent is residing at a different address than the employee, a separate notice will need to be provided to that spouse or dependent.
- (8) **Can the Notice Be Sent Out Electronically?** The notice can be sent out electronically if an employee has access, on a daily basis, to the employer's "electronic information system" as part of his/her work duties or if an employee or other individual affirmatively consents to receiving notices and other documents in electronic form and that consent has not been withdrawn.

There are some conditions that apply. If the notice is sent out electronically, the employer must inform the plan participant that the participant is responsible for providing a copy of the notice to any Medicare-eligible dependents who are covered under the plan. The employer may also need to post a non-personalized version of the notice on its website.

Additionally, the federal regulatory guidance regarding the Medicare Part D Notice refers to the Department of Labor's regulations addressing the use of e-mail and other forms of electronic communication to distribute notices and other documents required by ERISA. There are some specific, complicated, and potentially cumbersome requirements that must be met in order to satisfy the conditions in these regulations. A more detailed summary of these requirements is outside the scope of this particular Alert.

- (9) **Can the Notice Be Included in a "New Hire Packet," Plan Enrollment Materials, and/or an SPD?** Many employers choose to include the Medicare Part D notice in the "new hire packet" that is given to new employees, in the enrollment materials for their group health plan, and/or in the summary plan description ("SPD") for their plan. If, however, an employer is relying on this to satisfy the distribution requirement, the employer needs to make sure that the materials containing the notice are distributed to all of the individuals (not just employees) who need to receive the notice within the applicable deadlines (as summarized in more detail in Q&A #6 above).

Additionally, if an employer intends to satisfy the Medicare Part D notice requirements by including the Medicare Part D notice with other materials that are given to an employee, such as an SPD, the federal regulatory guidance agency requires a “prominent and conspicuous” disclosure that materials contain an important notice. According to federal regulatory guidance:

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.

Given this requirement, some employers may find that it is simpler to provide the notice separately, even if they also choose to include the notice in their “new hire packets,” enrollment materials, and SPD along with other legally required notices.

(10) **What is the Deadline for Sending Out the Notice?** The short answer is that the notice needs to be provided:

- (a) When a Medicare-eligible individual first becomes covered under the plan;
- (b) If and when coverage changes from “creditable” to “non-creditable” (and vice versa);
- (c) Whenever it is requested by an individual; and
- (d) By October 15 of each year.

As you can see, the Medicare Part D notice requirement is more complicated than it might appear and we do not have enough space in this Alert to point out every aspect of the notice requirement that might be important to a given employer in a given situation. If you have questions about the notice requirement or about employee benefit plans in general, please feel free to call Eric Namee, Steven Smith, or Brad Schlozman at (316) 267-2000.