

MEDICARE PART D DISCLOSURES: A GUIDE FOR EMPLOYERS

The requirement of plan sponsors to disclose the plan's Medicare Part D creditable status to CMS within 60 days after the start of the medical plan year, and to Medicare eligible individuals and their families by each October 14, applies to group health plans that offer prescription drug coverage to Medicare eligible individuals.

Employers of all sizes that sponsor group health plans have two separate annual compliance obligations regarding the creditable status of the employer's prescription drug plan(s) relative to Medicare Part D. They must report the creditable status of the plan(s) to the Centers for Medicare & Medicaid Services (CMS) within 60 days after the start of the medical plan year (policy year or contract year, regardless of the ERISA plan year), and they must notify employees and their family members regarding the creditable status of the plan(s) by each October 14. This publication provides an overview of these annual requirements and describes the process for achieving compliance. It includes a **Chart of CMS Disclosure Due Dates** (Appendix A) and a **Sample Employee Communication** to accompany the annual distribution of the Medicare Part D Creditable/Non-Creditable Coverage Disclosure Notice (Appendix B).

Currently there are no specific penalties for failing to complete the CMS disclosure or provide the Medicare Part D creditable/non-creditable coverage notice, except that employers that fail to complete both requirements will be unable to claim retiree drug plan subsidies. Also, CMS does not have a correction process for any such failures. Note, however, that plan sponsors have a fiduciary duty under ERISA to comply with all federal laws related to their plans. A Medicare eligible individual who suffered a penalty for a delayed Part D enrollment could pursue an ERISA remedy if the employer neglected to provide notice of the creditable/non-creditable status of the plan's prescription drug coverage, as described in the Disclosure to Medicare Part D Eligible Individuals section below.

For these reasons, employers that previously failed to make either or both of the required Medicare Part D disclosures should make the most recently missed disclosure(s) as soon as possible and ensure that they make future disclosures in a timely manner going forward.

Note that while it is important for employers to recognize how the Medicare Part D creditable status of their plan's prescription drug coverage affects Medicare-eligible employees (and enrolled dependents), employers should not advise individual employees regarding whether they should enroll in Medicare and should instead direct employees to contact CMS about their specific circumstances.

BACKGROUND

Pursuant to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, entities that offer prescription drug coverage (including employer provided group health plans) must disclose to CMS and to Medicare Part D eligible individuals whether the coverage is "creditable" or "non-creditable." Creditable coverage is prescription drug coverage that is actuarially valued at or above the value of Medicare Part D coverage. In other words, creditable coverage is expected to pay – on average – as much as or more than Medicare Part D. The creditable status of the coverage can be determined through actuarial analysis or by meeting CMS's Creditable Coverage Simplified Determination.



The requirement of plan sponsors to disclose the plan's Medicare Part D creditable status to CMS and to Medicare eligible individuals applies to group health plans that offer prescription drug coverage to Medicare eligible individuals. For these purposes, "group health plans" encompass any employee welfare benefit plan that provides medical care and prescription drug coverage, including HRAs, but excluding qualified retiree prescription drug plans, long-term care plans, health flexible spending accounts (FSAs), health savings accounts (HSAs) and Archer medical spending accounts (MSAs). HRAs are generally integrated with the major medical plan, and employers can issue a single, combined disclosure notice covering both an HRA and another group health plan sponsored by that employer, provided the Medicare eligible individual is enrolled in both the HRA and the major medical plan (as is usually the case).

Unlike some compliance requirements, the requirement to disclose a plan's Medicare Part D creditable status to CMS and to Medicare eligible individuals pertains regardless of employer size, plan funding type (i.e., fully insured or self-insured) or whether the plan is primary or secondary to Medicare. The disclosure requirement also applies to church plans and federal, state and local government plans. For entities that are part of a controlled group and participate in the same plan, the requirement applies to the plan sponsor, not necessarily to each participating entity. For further information about benefits compliance considerations related to an entity's controlled group status, see PPI's publication [Health Benefits Compliance Considerations in Mergers and Acquisitions: A Guide for Employers](#).

DISCLOSURE TO CMS

Plan sponsors must disclose to CMS whether the prescription drug coverage offered through their plan(s) is creditable, non-creditable, or includes both creditable and non-creditable prescription drug coverage offerings. Plan sponsors must also disclose the number of Part D eligible individuals expected to be covered by the plan(s) at the start of the plan year for which the disclosure is being made. An estimate of this number, such as one based on the total number of covered individuals who were age 65 or older at the start of the plan year, may be used if the insurance carrier or TPA cannot provide an exact headcount. The total should include Medicare eligible active, disabled, COBRA, and retired individuals (employees or former employees and dependents) covered under the employer's plan(s).

The disclosure to CMS for each new medical plan year must be completed annually within 60 days following the start of that plan year. (See Appendix A, [Chart of CMS Disclosure Due Dates](#).) Plan sponsors must also file a Disclosure to CMS Form within 30 days of making any plan modifications that change the creditable or non-creditable status of the plan's prescription drug coverage. The CMS disclosure is required regardless of whether the plan sponsor's prescription drug coverage is primary or secondary to Medicare.

Plan sponsors must complete the Disclosure to CMS Form via the CMS website. (A link to the Disclosure to CMS Form is available in the Resources section below.) The CMS disclosure must be signed (electronically) by an "entity's authorized individual," which is typically the Human Resources director or their designee. The signatory must be an employee of the plan sponsor or someone contracted by the plan sponsor to complete the disclosure on the plan sponsor's behalf.

For a full copy of the "Creditable Coverage Notice to CMS Guidance," including details on who must provide the disclosure to CMS, see the link to the Disclosure to CMS Guidance and Instructions in the Resources section below.

DISCLOSURE TO MEDICARE PART D ELIGIBLE INDIVIDUALS

In addition to submitting the annual disclosure to CMS within 60 days of the start of the plan year, plan sponsors must notify Medicare Part D eligible individuals prior to the October 15 start of the annual Medicare open enrollment period regarding the creditable or non-creditable status of the plan's prescription drug coverage as of the upcoming January 1. If a plan's status as of the following January 1 is unknown prior to October 15, then the plan sponsor should disclose the current status of the plan and distribute a revised Medicare Part D notice upon a future change to the plan's creditable coverage status.

The importance of notifying employees about the creditable or non-creditable status of the employer's prescription drug coverage cannot be overstated, as Medicare eligible individuals rely on the accuracy and timeliness of the employer's Medicare Part D notice to make decisions regarding their enrollment in Part D. Medicare eligible individuals who delay enrollment in Part D because they believe their group coverage is creditable based on an incorrect or missing notice may be penalized when they later enroll in Part D. This is because Medicare eligible individuals can only delay Part D enrollment without penalty if they have creditable prescription drug coverage. If they go without creditable coverage for 63 days or more, they will be limited as to when they can enroll in Part D (i.e., they must wait until the October 15 start of the annual Medicare open enrollment period). Further, late enrollees will receive a premium penalty based on the number of months that they were Medicare eligible but did not have creditable prescription drug coverage.

CMS provides both creditable and non-creditable model notices in English and Spanish for purposes of notifying employees about the Medicare Part D creditability status of the employer's prescription drug plan(s). The model notices are updated periodically, so plan sponsors should be sure to use the most current version. (A link to the Model Notice Letters is available in the Resources section below.) The notices are intended to help employees make informed and timely decisions about whether to enroll in a Medicare Part D plan and to compare the employer's coverage options with a Part D plan. Although there is no explicit guidance regarding whether employers can use a single Medicare Part D notice to inform employees about multiple prescription drug plans that share the same creditability status (i.e., all plans are creditable or all plans are non-creditable), it appears that this is permissible. However, employers that offer more than one plan, or that offer plans with different creditability statuses, may in any event need to complete separate Medicare Part D notices if different employee groups are eligible for different plans or if some employee groups are eligible for both creditable and non-creditable plans.

Identifying Medicare Part D Eligible Individuals

Individuals become eligible for Medicare due to age, end-stage renal disease or disability. Because employers cannot rely exclusively on an employee's age to determine the Medicare eligibility of the employee or that of any of the employee's dependents, employers should distribute the Medicare Part D notice to all individuals who are eligible to participate in the employer's plan(s), including COBRA participants and retirees, as applicable, regardless of age and regardless of enrollment status in any of the employer's plans. Importantly, the distribution of the notice should include a directive to share the notice with any dependents who are eligible for Medicare. (See Appendix B for a **Sample Employee Communication** to accompany the distribution of the Medicare Part D Notice.)

When Must the Medicare Part D Notice be Delivered?

Plan sponsors must provide the Medicare Part D notice at each of the following times:

- Annually by October 14 (prior to the October 15 start date of the Medicare open enrollment period); note that October 14 is a fixed date deadline that is not extended to the next business day even if it falls on a weekend or federal holiday
- Prior to an individual's Medicare Part D initial enrollment period (this is satisfied if the notice is provided annually by October 14)
- Prior to the effective date of the individual's coverage under the group plan
- Upon a change in the plan's creditable coverage status
- Upon termination of the plan's prescription drug benefit
- Upon an individual's request

Delivery of the Medicare Part D Notice

The Medicare Part D notice may be combined with other informational materials, such as open enrollment information or summary plan descriptions, provided the notice is "conspicuous and prominently presented." This means that the Medicare Part D notice, or a reference to the section that includes the notice, must be prominently referenced in at least 14-point font in a separate box and must be bolded or offset on the first page that begins the plan participant information being provided. Employers whose Summary Annual Report (SAR) distribution deadline is close to the October 14 deadline for distributing Medicare Part D notices may wish to distribute both required notices at the same time. This is permissible, provided each notice is separately accompanied by the appropriate employee communication.

Employers may distribute the Medicare Part D notice by hand, by mail or by electronic delivery (e.g., email) in a manner that complies with the DOL's electronic disclosure safe harbor. In general, employers must "use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals." The DOL's safe harbor rules allow for electronic distribution to employees who have computer access as an integral part of their job (e.g., work email address or regular access to laptop/phone or other device). Employees without computer access as an integral part of their job must consent to electronic distribution of notices (usually using a personal email address). While electronic delivery can include posting to an employer's intranet or benefits portal or sending via email (among other electronic means), these measures alone do not satisfy the DOL's distribution requirements. The employer must also notify employees that the notice has been posted and must describe the significance of the notice and the employee's right to request a paper copy.

Importantly, employers should routinely document all methods of delivery used for each required notice and should retain these records in accordance with the employer's record retention policy. In general, records related to ERISA plans should be retained for eight years. For more detailed information about electronic distribution rules, including a **Sample Employee Communication** and a **Sample Employee Consent to Receive Plan Disclosures**, see the PPI publication **Electronic Distribution Rules: A Guide for Employers**.

SUMMARY

Employers that sponsor group health plans that include prescription drug coverage should be closely attentive to the Medicare Part D disclosure rules that pertain respectively to CMS and to Medicare eligible individuals.

RESOURCES

[Creditable Coverage Guidance](#)

[Disclosure to CMS Guidance and Instructions](#)

[Disclosure to CMS Form](#)

[Model Notice Letters](#)

APPENDIX A

Plan sponsors must submit a Disclosure to CMS Form annually “within 60 days after the beginning date of the Plan Year for which the entity is providing the Disclosure to CMS Form” (see “Creditable Coverage Notice to CMS Guidance” on the CMS website).

The following chart shows the CMS disclosure due date that corresponds to each first of the calendar month plan year start date. Note that the due date is adjusted in leap years for plan years that start in January and February.

Chart of CMS Disclosure Due Dates

Plan Year Start Date	CMS Disclosure Due Date*
January 1	March 2 (March 1 in leap years)
February 1	April 2 (April 1 in leap years)
March 1	April 30
April 1	May 31
May 1	June 30
June 1	July 31
July 1	August 30
August 1	September 30
September 1	October 31
October 1	November 30
November 1	December 31
December 1	January 30

*When the due date falls on a weekend or federal holiday, the due date is extended to the next business day.

APPENDIX B

Sample Employee Communication

Please see the attached Medicare Part D Creditable Coverage Disclosure Notice, which contains important information about our company's current prescription drug coverage and your options under Medicare's prescription drug coverage (Medicare Part D).

[Insert Option A (Creditable Coverage) or Option B (Non-Creditable Coverage), as applicable.]

[Option A (Creditable Coverage)]: We have confirmed that prescription drug coverage offered under our prescription drug plan(s) is, on average for all plan participants, expected to pay out at least as much as standard Medicare prescription drug coverage pays and is therefore considered Creditable Coverage.

[Option B (Non-Creditable Coverage)]: We have confirmed that prescription drug coverage offered under our prescription drug plan(s) is, on average for all plan participants, NOT expected to pay out at least as much as standard Medicare prescription drug coverage pays and is therefore considered Non-Creditable Coverage.

You are responsible for providing a copy of the Notice, electronically or in hard copy, to any of your dependents who are eligible for Medicare.

Plan participants have a right to receive a paper version of the above-referenced document upon request. Where applicable, the Plan sponsor reserves the right to charge a reasonable fee to cover the cost of furnishing the document. To request a paper copy of the document, or for any questions about the document, please contact [HR Department or other employer information].

Please keep a copy of the attached Notice for your records.