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The New Medicare Part D Creditable Coverage Notice Requirement: All Employers Who Provide Prescription Drug Coverage (Including Those Not Providing Retiree Coverage) May Need to Act By November 15, 2005

By Eric Keller

Medicare Part D's new prescription drug benefit becomes available on January 1, 2006. Employers sponsoring group health plans that provide prescription drug coverage must notify Medicare-eligible participants by November 15, 2005 as to whether the employer's prescription drug coverage is "creditable" with Medicare Part D's new prescription drug benefit. This notification requirement potentially applies to all employers offering prescription drug coverage – not just those offering retiree prescription drug coverage. This Client Alert explains this new notification requirement.

Effective January 1, 2006, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 expands Medicare coverage by adding a voluntary prescription drug benefit ("Medicare Part D").¹ Individuals are Medicare Part D-eligible if they are entitled to benefits under Medicare Part A and/or are enrolled in benefits under Medicare Part B, and live in a service area of a Medicare Part D plan.

Eligible individuals can first sign up for Medicare Part D coverage during an initial enrollment period from November 15, 2005 to May 15, 2006. To preserve the actuarial soundness of the Medicare Part D program, eligible individuals who do not enroll during their initial period of eligibility will pay a financial penalty in the form of permanent higher monthly Part D premiums. But this late enrollment penalty will be waived if the individual had creditable prescription drug coverage from another source, including an employer-sponsored group health plan, and the individual did not have a gap in such coverage for 63 days or longer before enrolling in Part D.

To help Medicare-eligible individuals avoid the penalty for late enrollees and establish that they had creditable coverage, every employer that provides prescription drug coverage for active employees or retirees must notify all individuals who are eligible for Medicare Part D and enrolled in (or seeking to enroll in) the employer's prescription drug coverage, whether the employer's prescription drug benefit is creditable coverage or not. Employers who provide prescription drug coverage

are required to comply with this requirement even if they do not provide coverage to retirees.

Pursuant to guidelines recently published by The Centers for Medicare and Medicaid Services ("CMS"), prescription drug coverage is creditable if it is "actuarially equivalent" to the Medicare Part D Benefit, which means that the employer's plan must, on average for all participants, be expected to pay out as much as the Medicare Part D prescription drug benefit. Fortunately, CMS has published a safe harbor, whereby prescription drug benefits are deemed to be creditable if they meet of these requirements:

- Provide coverage for brand name and generic prescriptions;
- Provide reasonable access to retail providers and, optionally, for mail order coverage; and
- Are designed to pay on average at least 60% of participant's drug expenses; and
- Satisfy at least one of the following:
 - The prescription drug coverage has an annual benefit maximum of at least \$25,000;
 - The prescription drug coverage is actuarially expected to spend at least \$2,000 per Medicare eligible individual in 2006; or
 - For health plans that integrate prescription drug coverage with other benefits (e.g., medical or dental), the integrated health plan has no more than a \$250 deductible per year, an annual benefit maximum of at least \$25,000 and has no less than a \$1,000,000 lifetime combined benefit maximum.

CMS has published two forms of model notices that may be used to satisfy this notice requirement – one is for creditable coverage and the other is for non-creditable coverage. Employers that choose not to use the model notice forms must provide notices that meet the specific standards

described in CMS's guidance. Both the guidance and the model notice forms are available at <http://www.cms.hhs.gov/medicarereform/CCGuidance.pdf>.

Employers must provide the notice to Medicare Part D eligible individuals in each of the following cases:

- Prior to the Medicare Part D annual coordinated election period (November 15-December 31 of each year);
- Prior to an individual's initial enrollment period for Medicare Part D;
- Prior to the effective date of coverage for any Medicare eligible individual that enrolls in the plan;
- Whenever the creditable status of the prescription drug coverage changes so that it is no longer creditable or becomes creditable; and
- Upon request by a Medicare beneficiary.

Because employers may not know which participants are Medicare eligible (particularly with respect to dependents), the notices may need to be distributed to all participants.

Creditable coverage disclosure notices may be provided with other plan participant information materials, such enrollment or renewal materials, if the disclosures are "prominent and conspicuous." The statements must be prominently referenced in at least 14-point type in a separate box, bolded or offset on the first page of the participant information. A single notice may be provided to a Medicare Part D-eligible individual and Medicare Part D-eligible dependents covered under the same plan, but a separate notice is required if it is known that any spouse or dependent resides at a different address than the participant. Creditable coverage disclosure notices can only be distributed electronically if consent has been obtained in advance from the employee or other addressee. Consent must be obtained from Medicare Part D-eligible individuals, regardless of whether they have regular access to computers through their employment.

Employers must also notify CMS of the coverage status of their plans each year and any time they make changes to their plans that affect whether the coverage is creditable. CMS has not yet issued guidance about providing this notification.

Employers who do not comply with the creditable coverage notice requirement may not be able to receive the Medicare subsidy if they provide prescription drug coverage to retirees and are applying for the tax-free subsidy from Medicare. CMS currently has not announced any penalties that would apply to other employers who do not deliver the notice.

Furthermore, although persons who don't receive the requisite notice may not enroll on time and thus incur late enrollment penalties, CMS can waive those penalties for those individuals who establish that their employer failed to tell them whether their coverage was creditable.

To comply with the Medicare Part D creditable coverage notice requirement, employers will need to determine whether their prescription drug coverage qualifies as creditable coverage. Employers will then need to provide the appropriate form of notice before November 15, 2005 and later as required under CMS's guidelines. **SC**

NOTE

1. In 2006, the Medicare Part D benefit covers 75% of the first \$2,250 of enrollees' prescription drug costs. Enrollees pay a monthly premium of approximately \$37 and a \$250 deductible. Enrollees also pay 100% of their prescription drug costs between \$2,250 and \$5,100. Medicare Part D pays 95% of prescription drug costs after enrollees pay \$3,600 in-out-of-pocket prescription drug costs.

If you have any questions regarding the new Medicare Part D Creditable Coverage Notice requirement, or employment law matters in general, please contact:

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