



January 6, 2020

Memo to: David Torian

Subject: Implied Coverage: Medicare and COBRA

I have some additional comments and recommendations on the subject of Medicare, COBRA, and the NAIC COB Model Regulation based on questions I received from task force members at the national meeting in Austin.

At the meeting I informed the Task Force of the conflicts that exists in regard to Medicare eligible individuals who have COBRA protection; Medicare eligible individuals who work for small employers; and the subsequent treatment of their health benefits based on the NAIC Coordination of Benefits Model regulation.

The COBRA Model Notice contains no information that pertains to the interaction of coverage between Medicare and COBRA. CMS provides no information in any of its consumer facing materials that pertains to being eligible for Medicare simultaneously with COBRA. The NAIC Coordination of Benefits exception pertaining to people who are eligible or who could be eligible for Medicare benefits is unfairly discriminatory.

Each of the 3 systems that control these benefits, Department of Labor, CMS, and the NAIC, is independent of the other. Corrective action in one of these systems is not dependent on any action taken by any of the other systems.

The NAIC should delete the exception for Medicare Part B in the Coordination of Benefits Model Regulation. There is no rationale for this exception in the NAIC historical record and it unfairly penalizes and discriminates against Medicare beneficiaries. The action specified in the exception, “is or could have been covered,” produces a result that is expressly prohibited in the same subsection for any other form of health benefits.

If the Task Force cannot come to consensus to remove this exception we recommend amending the current language in the following way:

Section 5. Use of Model COB Contract Provision

D. A COB provision may not be used that permits a plan to reduce its benefits on the basis that:

- (1) Another plan exists and the covered person did not enroll in that plan;

- (2) A person is or could have been covered under another plan, ~~except with respect to Part B of Medicare; or~~ (delete as indicated)
- (3) A person has elected an option under another plan providing a lower level of benefits than another option that could have been elected; **or**
- (4) A person is eligible but not enrolled for benefits in Part B of Medicare. (add as indicated)**

This amended language is clear and would still allow insurers to pay secondary benefits when a person is actually enrolled and receiving benefits, but would not allow insurers to reduce benefits when an individual is eligible for Medicare but not yet enrolled for those benefits.

The Department of Labor still needs to revise the Model COBRA notice to inform former employees of how COBRA interacts with Medicare benefits and warn people of any potential conflicts in benefit payments.

CMS still needs to revise their consumer facing information and materials to warn Medicare eligible beneficiaries of the rules and the penalties regarding timely enrollment for benefits, and the consequences of inaction or ignoring enrollment in Medicare when exercising the right to continuation of employer health benefits.

The Senior Issues Task Force can inform the appropriate Committee Chairs of the need to amend the Model Regulation and propose this simple change in language. In addition, the SITF should consider drafting and making available documents that inform consumers, agents, and insurers of conflicts that currently exist between the two federal systems and the steps that Medicare eligible individuals should consider to make the best use of COBRA and Medicare benefits, avoid Medicare late enrollment penalties with delayed benefits, and the potential danger of recovery of mistakenly paid COBRA benefits.

In addition, recoupment actions based on eligibility for Medicare are increasingly common and needs scrutiny by state regulators to determine the legitimacy of these actions.

To summarize, here is a list of conflicting situations that effect Medicare eligible individuals:

- Medicare eligible individuals not yet enrolled for benefits under Part A or Part B prior to becoming eligible for COBRA cannot be refused COBRA coverage
- Individuals enrolled in either Medicare Part A or Part B prior to becoming eligible for COBRA cannot be refused COBRA coverage
- Medicare eligible individuals who enroll after becoming eligible for COBRA can be terminated from COBRA coverage

- Medicare eligible individuals who are actively working for employers of less than 20 employees are not covered by Medicare Secondary Payer rules and employer health care benefits are not required to be primary to Medicare coverage
- COBRA covered individuals who are eligible for Medicare but *not* enrolled in Medicare Part A or Part B are penalized under both COBRA and Medicare law
- COBRA benefits and Medicare eligible individuals who *are* enrolled in either Medicare Part A or Part B are penalized under both COBRA and Medicare law
- Medicare Secondary Payment rules do not require COBRA benefits to be primary to Medicare
- The National Association of Insurance Commissioners (NAIC) Coordination of Benefits Model Regulation establishes the order of payments for health benefits and as currently written allows insurers to reduce payment of COBRA and other health benefits, regardless of whether Medicare benefits have been activated.