

Guidance: Employers/Unions & Medigap Issuers – Which Notice of Creditable Coverage to Provide?

When a Beneficiary has Drug Coverage Purchased in the Medigap Market, and an Employer or Union is Involved, Which Notice of Creditable Coverage Should be Provided?

Issue

Some employers or unions purchase Medigap insurance for beneficiaries, or otherwise facilitate the beneficiaries' purchase of the coverage. This raises the question whether, during the period ending May 15, 2006, the beneficiaries should receive a general notice of creditable or noncreditable coverage, as required under Section 101 of the MMA, or the Medigap-specific notice of creditable or noncreditable coverage, specified under Section 104 of that Act. The following Guidance clarifies that, if the Medigap issuer has direct contact with the employer or union with respect to the coverage, the Medigap-specific notice should not be sent.

Background

Creditable Coverage Disclosure Requirements

As explained in more detail under http://www.cms.hhs.gov/CreditableCoverage/01_Overview.asp, section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) added a new Medicare Prescription Drug benefit to the Social Security Act (the Act). The statute provides that a Medicare beneficiary who signs up for the new Medicare coverage after the initial enrollment period will pay a penalty unless he or she has maintained creditable prescription drug coverage.

To help beneficiaries make an informed choice about if and when to enroll in a Medicare prescription drug plan, section 1860D-13 of the Act requires that certain entities that provide prescription drug coverage to Medicare-eligible individuals notify those individuals whether the coverage is creditable. The list of entities includes employers that sponsor group health plans, and companies that issue Medigap policies. In addition, section 1882(v)(2)(B) of the Act, as added by section 104 of MMA, requires issuers of Medigap policies that include drug coverage ("Medigap Rx policies") to provide, before November 15, 2005, a one-time disclosure notice to all policyholders. This notice must disclose the creditable coverage status of the policy and explain the individual's Medigap options.¹

¹ For example, the notice must explain that if an individual enrolls in Part D, the prescription drug benefits will be removed from the Medigap policy, and if the individual enrolls during the initial open enrollment period, he or she will also have a right to switch to another Medigap

Because section 101 of the MMA added the general creditable coverage notice requirement, and section 104 of the MMA added the Medigap notice requirement, we will refer to these, respectively, as the "Section 101" notice and the "Section 104" notice. In instances through May 15, 2006, when a Medigap issuer is required to send a Section 101 notice, it must satisfy that requirement by sending the Section 104 notice. (The Section 104 notices are the notices designated as the Medigap creditable coverage notice, and the Medigap noncreditable coverage notice, both of which are posted at www.cms.hhs.gov/Medicarereform/CCguidances.asp).

Medigap Definition

Medicare supplemental insurance (also known as Medigap or Medicare supplement insurance) is a term of art referring to any health plan or policy that meets the definition in section 1882(g)(1) of the Act. The basic definition encompasses any health coverage, offered by a private entity to Medicare beneficiaries, that reimburses for Medicare deductibles or coinsurance and certain other items or services not paid for by Medicare. While this part of the definition would technically include certain employer or union plans, the definition expressly excludes "any such policy or plan of one or more employers or labor organizations."

We understand that employers and unions often refer to the supplemental coverage they provide to Medicare beneficiaries as "Medigap." However, if the employer/union's involvement is sufficient to make the coverage part of a "policy or plan of" the employer/union, the coverage will never be a Medigap policy. This is because, by definition, it will always come within the statutory exclusion for a plan of one or more employers or labor organizations. This is true whether the coverage --

- Is self-insured or fully insured;
- Is designed only for Medicare beneficiaries, to fill specific gaps in Medicare's coverage, or is available more broadly within the plan, with a coordination of benefits clause that applies to enrollees who are, or who become, Medicare beneficiaries; or
- Does or does not conform to the Medigap standardization requirements.

Discussion

There are many possible ways for an employer/union to provide or arrange for health coverage for its employees or retirees. This guidance is intended to help employers, unions, and Medicare Supplement (Medigap) issuers determine which creditable coverage disclosure notice to provide

policy (without drug coverage) offered by the same issuer.

when a beneficiary has drug coverage purchased in the Medigap market, and an employer/union is involved.² The guidance also addresses the difference between an employer/union plan, and an “association” plan.

Arrangements Involving Employers or Unions

An Employer or Union is the Policyholder of an “Off-the-Shelf” Medigap Policy

A question has been raised about which notice should be sent when an employer/union is involved in facilitating prescription drug coverage for its retirees through an “off-the-shelf” Medigap policy. One example of such involvement would be if the employer/union is the policyholder of a group policy that is sold in the Medigap market and meets all federal and state Medigap requirements. In such cases, the employer/union’s direct involvement strongly suggests that the policy is part of its plan, just as if the employer/or union had negotiated the terms of a policy with an insurance company, rather than buying what was already available in the market. The policy essentially becomes “a policy of” or part of “a plan of” the employer/union, and is therefore exempt from Medigap requirements. In this situation, the employer/union is responsible for sending the Section 101 notice, and the Section 104 notice should not be sent. It is important that the correct notice be sent to beneficiaries. If, for example, the policy is part of an employer plan, then the beneficiary should not be advised that he or she has rights to switch to certain Medigap policies.

Other Forms of Direct Contact Between an Employer or Union and a Medigap Issuer

If an employer negotiates lower premiums or more favorable underwriting terms for its retirees who purchase an individual Medigap policy, and/or arranges to withhold premiums from the individual’s retirement benefits and remit them to the issuer, these actions should also be indicia that the policy has essentially become a “policy of” or part of “a plan of” the employer/union, and is therefore exempt from Medigap requirements. In these situations, a Section 104 notice should not be sent. However, a Section 101 notice should be. We note, however, that there is a statutory obligation on both employers and Medigap issuers to send the correct notices. Therefore, we recommend that the issuer confirm that the employer/union will be sending a Section 101 notice, especially if it is not entirely clear whether the policy is part of the employer/union plan.

Situations Where an Employer or Union Reimburses Premiums Paid by Retirees or Employees

If an employer simply reimburses employees or retirees for the cost of a Medigap policy they choose and purchase themselves, or offers Medicare-eligible retirees an amount of money to buy any Medigap policy of their choice, the Medigap issuer would probably have no reason to know that there is any arrangement between the individual and the employer/union, and the policy would most likely not fall within the employer plan exclusion to the Medigap definition. In other words, the coverage is a Medigap policy, and the Section 104 notice must be sent. However, if

² This Guidance only is intended to define which creditable coverage disclosure notice should be used by employers/unions and Medigap issuers when plan participants also have Medigap policies and is not intended to address, and does not address, whether a “group health plan” exists for any purpose including but not limited to the Employee Retirement Income Security Act or the Internal Revenue Code.

the issuer has reason to know that there may be employer/union involvement, even if the issuer has no direct contact with the employer or union with respect to the coverage, it would be advisable to contact the employer/union to confirm that the Section 101 notice is being sent. (This type of after-the-fact interaction between a Medigap issuer and an employer or union would not in and of itself cause the policy to be “a policy or plan of” an employer/union.)

We encourage employers, labor unions and Medigap issuers to work together to determine which notice must be sent (pursuant to the above guidance), and who will send the notice. As long as the correct notice is sent, it is irrelevant, for purposes of compliance with Section 101 and 104 requirements, who actually sends the notice. So, for example, if the Section 101 notice must be sent, it would be acceptable if the employer or union arranged for a third party, such as the issuer, to send the Section 101 notice.

Arrangements Involving Associations

Some associations comprised entirely or partially of Medicare-eligible individuals facilitate the purchase of off-the-shelf Medigap policies for their members. Unless the association coverage is part of an employer or union plan, the Section 104 notice must be sent. Thus, even if under State law, the coverage is considered to be “group” coverage, if it is not a policy or plan of an employer or union, as described above, the coverage is subject to the Medigap requirements.

The following table illustrates the ramifications of coverage being a Medigap policy vs. an employer/union Policy or Plan

	If it is a Medigap Policy	If it is a Policy or Plan of an Employer or Union
Which creditable coverage notice is sent	Section 104	Section 101
Can policies be sold after 1/1/06 if they include drug coverage?	No	Yes
Does the individual have a guaranteed right to purchase, during the period of November 15, 2005 through May 15, 2006, another (non-Rx) Medigap policy sold by the same issuer?	Yes	No
Does the prescription drug coverage have to be removed from the policy if the individual enrolls in Part D?	Yes	No