Getting Ready For Medicare Part D: Disclosure Requirements For Most Employer Plans

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By November 15, 2005, most employers sponsoring medical plans that provide prescription drug coverage (including HMOs and PPOs) must issue an initial "Disclosure Notice" to employees, retirees and their dependents who are eligible for the new Medicare Part D prescription drug program that becomes effective January 1, 2006. Employers must also provide subsequent Disclosure Notices, each year before November 15, upon change to the prescription drug coverage and upon request. **These disclosure requirements apply to most employer health plans offering prescription drug coverage, regardless of whether the plan covers retirees.**

Purpose of the Required Notice. The Disclosure Notice provides Part D eligible individuals with the information they need to assess whether they should enroll in Part D. Part D eligible individuals who do not enroll during the enrollment period will pay a higher premium (up to a 1% premium increase for each month without coverage) on a permanent basis if they later enroll in Part D. If, however, a Part D eligible individual is covered under a plan that provides "creditable" prescription drug coverage, without incurring a 63-day break in coverage, then the individual will not be penalized for late enrollment. The Disclosure Notice will tell Part D eligible individuals whether the coverage provided under the employer plan is "creditable."

"Creditable Coverage." Coverage is creditable if it is a comparable benefit, or "actuarially equivalent," to the Part D benefit, meaning that the coverage under the employers plan, on average for all participants, is expected to pay out as much as the Part D prescription drug benefit. A simplified safe harbor method is available for determining whether an employer's prescription drug coverage meets the actuarial equivalence test, as provided below.

Many plans will be able to rely on the safe harbor method, rather than retain an actuary to determine if their coverage is creditable. Actuarial analysis will be required for (1) plans that do not pass the safe harbor test and (2) employers applying for the retiree prescription drug subsidy offered by CMS. Applications for subsidy must be submitted, with a certification of actuarial equivalence, by September 30, 2005.

Delivery of the Disclosure Notice. The Disclosure Notice must be

provided—

- by November 15, 2005, and subsequently on an annual basis, with or without other employee communications, such as open enrollment materials;
- to all Part D eligible individuals, including spouses and dependents, whether eligible due to age or disability. Due to the difficulty in identifying these individuals, the best practice is to distribute the Disclosure Notice to all employees.

CMS has issued model Disclosure Notices — one for creditable coverage and one for non-creditable coverage. The models are available at http://www.cms.hhs.gov/medicarereform/CCguidances.asp. Specific information may be added to these models, such as plan-specific information if the plan has applied for the Part D retiree prescription drug subsidy.

Distribution. The Disclosure Notice can only be distributed electronically if consent has been obtained in advance from the employee or other addressee. Consent must be obtained from Part D eligible individuals, regardless of whether they have regular access to computers through their employment. This consent rule is therefore stricter than the rule for electronic distribution of summary plan descriptions, which only requires that consent be obtained from participants without computer access at work. Depending on the size of an employer's workforce, this may make electronic distribution unworkable.

Consequences of Noncompliance. Subsidies for retiree prescription drug plans may not be available if the employer fails to deliver the Disclosure Notice, however, to date, no penalties have been announced for failure to deliver the Disclosure Notice. Consequences for failure to deliver the Disclosure Notice will likely be at the individual level — those who do not receive the Disclosure Notice may not enroll on time, thereby incurring more expensive premiums, unless CMS waives those increases if an employer failed to notify whether their coverage was creditable.

Next Steps. To comply with the Disclosure Notice requirement, you first need to determine whether each of your medical plans constitutes creditable coverage. You should then evaluate how you will deliver the Disclosure Notice and how this new requirement fits with your overall strategy regarding the provision of prescription drug coverage to your employees and retirees.

Safe Harbor for "Creditable Coverage." Following is an excerpt from "Creditable Coverage Guidance" at http://www.cms.hhs.gov/medicarereform/CCGuidance.pdf regarding Benefit Designs for Simplified Determination of Creditable Coverage Status:

If an entity is not an employer or union that is applying for the retiree drug subsidy, it can determine that its prescription drug plan's coverage is creditable if the plan design meets all four of the following standards. However, the standards listed under 4(a) and 4(b) may not be used if the

entity's plan has prescription drug benefits that are integrated with benefits other than prescription drug coverage (i.e., Medical, Dental, etc.). Integrated plans must satisfy the standard in 4(c).

A prescription drug plan is deemed to be creditable if it:

1) Provides coverage for brand and generic prescriptions;

2) Provides reasonable access to retail providers and, optionally, for mail order coverage;

3) The plan is designed to pay on average at least 60% of participants' prescription drug expenses; and

4) Satisfies at least one of the following:

> a) The prescription drug coverage has no annual benefit maximum benefit or a maximum annual benefit payable by the plan of at least $25,000, or
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> b) The prescription drug coverage has an actuarial expectation that the amount payable by the plan will be at least $2,000 per Medicare eligible individual in 2006.
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> c) For entities that have integrated health coverage, the integrated health plan has no more than a $250 deductible per year, has no annual benefit maximum or a maximum annual benefit payable by the plan of at least $25,000 and has no less than a $1,000,000 lifetime combined benefit maximum.

If you have any questions about these new Medicare disclosure requirements, contact any of the attorneys in Holland & Hart's Benefits Law Group.
