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HEALTH CARE LAW

Employers beware: Medicare may come calling

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The old adage "no good deed goes unpunished" has never been more relevant than today. Employers who sponsor or contribute to an employee group health plan who also have employees eligible for Medicare benefits may find themselves paying far more than just monthly Medicare premiums. Medicare is stepping up its enforcement efforts to ensure that they are not the payer of first resort when a group health plan covers the same services. They are not, however, only looking to the health insurance carriers to recoup costs, but sometimes to the employer as well.

The Centers for Medicare and Medicaid Services entered into an agreement with a Medicare Secondary Payer Recovery Contractor to identify employees covered by group health plans for which Medicare health benefits have also been paid. On the face of it, this may appear to be a good way for the federal government and, in turn, the taxpayer to recoup monies which should have been paid by private insurance plans. However, it is often not that simple.

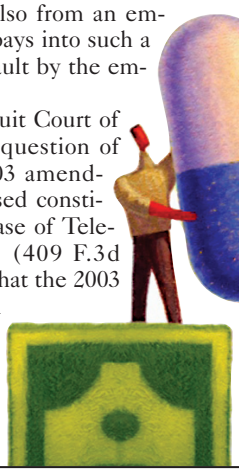
On or about 1980, Congress passed legislation which provides that where beneficiaries are covered for medial expenses by both a group health plan and Medicare, Medicare would be the "secondary payer" of those medical expenses. This provision is known as the Medicare Secondary Payer statute and is found at Section 1862 of the Social Security Act. Medicare would then be responsible to pay remaining amounts not satisfied by the group health plan. However, in some instances, Medicare makes payments as if it is the primary payer. This can be the result of a mistake or due to insufficient information at the medical provider level concerning other insurance coverage. Many times, however, the employer will have nothing to do with the fact that Medicare has mistakenly paid as the primary. Nevertheless, the government has the right to reimbursement.

It would seem logical that Medicare would seek reimbursement from the beneficiary or the group health plan. However, the statute was amended in 2003 to specifically allow the government to recoup the payment from any and all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third party administrator, as an employer that sponsors or contributes to a group health plan or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. Thus, the federal government has the ability to seek reimbursement, with interest, from not only a group health plan but also from an employer who sponsors or pays into such a plan, regardless of any fault by the employer or provider.

In 2005, the 9th Circuit Court of Appeals addressed the question of whether or not this 2003 amendment to the statute passed constitutional muster in the case of Telecare Corp. v. Leavitt (409 F.3d 1345). That court held that the 2003 Amendment, which brings employers into the scope of responsibility is, in fact, enforceable. With stepped-up enforcement and a need for Medicare to effect enormous savings to keep the system afloat, there will no doubt be further challenges to the statute and perhaps even attempts to expand its scope.

Medicare's use of private contractors to recoup money reimbursed for medical benefits is becoming more frequent and has come under a good deal of criticism for overreaching and outright mistakes. Many of these contractors are offered incentives in that they are compensated on a percentage basis for the funds they recover. Accordingly, they are becoming more and more aggressive in their attempts to recoup these funds, especially in situations as described herein.

Employers should keep two very important points in mind when dealing with these issues. First, whenever possible, they should seek specific language in their health insurance contracts that allows them to seek reimbursement in the event that Medicare comes after them for payment. Second, just because a Medicare contractor alleges that the employer owes money to Medicare doesn't necessarily make it so. A comprehensive and organized approach should be undertaken with competent health law counsel to defend against these demands, as many times there is a legitimate defense. Finally, consideration should be given to the support of lobbying efforts on behalf of employers to amend the law to protect against abuses and overreaching by Medicare and their contractors.



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