



Gallagher

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Medicare Part D Disclosure Notice to Individuals

Completing the Model Notice

1. **Where the model notice instructs the user to “insert name of entity,” what entity should be named? The plan sponsor/employer? The plan? The carrier or PBM?**

The name of the plan sponsor/employer.

2. **Where the model notice instructs the user to “insert name of plan,” what name should be used?**

Generally, the legal name of the plan.

3. **Does the employer need to include specific benefits information, such as the name of the carrier, or the co-insurance, co-pay or deductible amounts?**

No. The model notice does not include a provision for such specific language—either in the required or recommended provisions. However, it is not prohibited. Before including any benefit-specific information, an employer may wish to consider concerns about having to update the notice if the plan benefits change and the potential for conflicts with the plan document and SPD.

4. **The model notice includes the following language, “If you decide to join a Medicare drug plan, your current [Insert Name of Entity] coverage will [or will not] be affected.” How do I know if it should say “will” or “will not”?**

Because of the requirements of the Medicare Secondary Payer (MSP) law, active plans will almost always use “will not” since the active plan will be primary and Medicare secondary. When the employer’s health plan is primary, the employer’s health plan must pay its benefits without regard to what Medicare does or does not cover or pay. Retiree plans that are secondary payers under the MSP law may need to use “will.”

The instructions do not provide much information about what an employer should include here. If the plan covers retirees and dependents, then it appears that CMS intends for the employer to include some information about how the retiree medical plan and Part D coordinate. A retiree plan might

supplement what Medicare pays under Part D. For example, the plan might reimburse the Part D deductible, coinsurance or copayments, or it might pay for some brand name drugs that Medicare does not cover. In that case, the employer might want to include language explaining that the employer's plan supplements what Medicare pays.

5. **The model notice includes a sentence that says “If you do decide to join a Medicare drug plan and drop your current [Insert Name of Entity] coverage, be aware that you and your dependents you will [or will not] be able to get this coverage back” How do I know if it should say “will” or “will not”?**

Very few plans would use “will not.” Historically, many retiree plans have terminated plan coverage for early retirees when they become Medicare-eligible. So this could be a case where the “will not” option might apply. Generally, only retiree health plans might use “will not” under the model language.

For active plans (and retiree plans) where the employer uses “will” rather than “will not,” the employer may want to include additional language that briefly describes the plan's enrollment rules. For example, the employer may want to indicate if enrollment in Medicare is a status change under the employer's cafeteria plan that would permit the employee to drop coverage mid-year. Many, but not all cafeteria plans, include enrollment in Medicare as a change in status. In addition, employers may want to remind employees who choose to drop coverage when they enroll in Medicare that they will be able to re-enter the plan only at certain times such as annual enrollment or as the result of a HIPAA special enrollment event. This may be particularly important to non-calendar year plans where the employer's annual enrollment period and plan year beginning dates do not align with Medicare's enrollment period and coverage effective dates.

6. **The model notice includes the following language, “Contact the person listed below for further information [or call [Insert Alternative Contact] at [(XXX) XXXXXXX]. NOTE: You'll get this notice each year. You will also get it before the next period you can join a Medicare drug plan, and if this coverage through [Insert Name of Entity] changes. You may also request a copy of this notice at any time.” Is it permissible to list a number with Medicare or CMS?**

It appears that the intent of this section of the notice is to provide the recipient with a number to call about the notice *or their current employer-provided*

prescription drug coverage. As CMS could not provide information about the employer's plan it does not appear that the CMS number would be an appropriate number to include here. (Please note that elsewhere in the notice, it already includes a Medicare phone number.) Therefore, our recommendation is that this be a plan sponsor (e.g., HR, benefits, etc.) contact.

Delivering the Notice

1. Who must receive the notice?

All Medicare Part D eligible individuals who are covered under the plan or applying for coverage. This includes: (1) individuals age 65 or older and receiving monthly Social Security benefits or enrolled in Medicare Part A or Part B, (2) individuals of any age who are disabled (under the Social Security definition of disability) and have been receiving Social Security payments for 24 months, and (3) individuals with end-stage renal disease (ESRD). This also includes retirees, spouses and dependents who are Part D eligible and are covered or applying for coverage under the plan—not just active employees. All group health plans must provide these certificates regardless of whether the employer's plan is the primary or secondary payer under the MSP law.

Eligibility for Medicare generally occurs in the month in which the individual (employee or dependent) reaches age 65. Since the employer will generally have the employee's birthdate, the employer can determine when most employees will become eligible for Medicare Part A. If the employer has date of birth information for spouses, the employer will also be able to determine when spouses become Medicare eligible. However, eligibility for Medicare Part D is more complicated. Reaching age 65 by itself does not make an individual eligible for Part D. In order to be **eligible** for Part D, the individual must be **enrolled in** some part of Medicare – Part A, Part B or a Medicare Advantage plan. Some employees who are still working full-time may enroll in Medicare Part A because they do not need to pay monthly premiums for Part A, but delay enrolling in Part B, a Medicare Advantage plan or Part D. These individuals become Part D eligible as soon as they enroll in Part A. Unfortunately, if the employee is still working full-time the employer may not know when the employee becomes Part D eligible. Because of the difficulty in determining Part D eligibility, employers may want to send the Part D notices to a wider group of employees.

Note: Since individuals must live in a Part D service area to be Part D eligible, notices do not need to be sent to individuals living abroad.

2. Must the notice also be delivered to COBRA participants that are Part D eligible?

Yes.

3. Can the employer choose to send the notice to all employees, even if they are not covered or applying for coverage under the health plan?

There is no prohibition against doing so; however, the employer may wish to customize the language in the notice to reflect that this notice pertains to coverage under the plan for those who are enrolled in the plan as plan participants, to avoid potential confusion about whether the notice applies to the recipient.

4. Is the employer required to send a separate notice to the employee's spouse or dependent?

The employer is required to send a separate notice only if the employer is aware that the spouse or dependent resides at a different address from the employee.

5. Can the notice be included with other participant materials, or does it have to be a separate mailing?

The notice can be included with other participant materials, such as enrollment materials, COBRA notices, etc., if certain requirements are met. One of these requirements is that the disclosure be "prominent and conspicuous." This means that the notice language (or a reference to the section in the document being provided to the recipient) **must be prominently referenced in at least 14-point font in a separate box, bolded, or offset on the first page that begins the plan participant information being provided.** (See Q#6 for sample language.)

If the notice is sent to the employee with other participant materials using the Department Of Labor's (DOL) electronic disclosure requirements, the employer must inform plan participants that the plan participant is responsible for providing a copy of the notice to a spouse or dependent who is Part D eligible and covered or applying for coverage under the plan. (See Q#9 for information on electronic disclosures)

6. Has the government provided an example of language referencing the creditable or non-creditable coverage requirements included with other participant materials?

Yes. CMS has provided the following as an example of reference language referencing the section in the document(s) being provided to the participant:

If you have Medicare or will become eligible for Medicare in the next 12 months, a Federal law gives you more choices about your prescription drug coverage. Please see page __ for more details.

7. Can the notice be distributed at work, or does it have to be mailed to the home?

Employers may use hand delivery as a qualified method for delivering the Part D certificates of creditable/non-creditable coverage for both the Medicare-eligible employee and the Medicare-eligible spouse or dependents. CMS illustrated this with an example of an employer who included the certificates as a payroll stuffer that the employee would take home. However, if the notice is hand delivered the employer must inform the employee that the employee is responsible for providing a copy of the notice to a spouse or dependent who is Part D eligible and covered or applying for coverage under the plan.

This may be good news for many employers who do not want to incur the expense of mailing the certificates. However, employers should be reminded that the purpose of the certificates is to inform Part D eligible individuals about their prescription drug choices so that they can make an informed decision about whether or not to elect Part D. Before deciding on the delivery method that will work best for the employers, one of the factors they should consider is the likelihood of a certificate reaching its intended audience.

8. Is it permissible to hand deliver some and mail others?

Yes. There is no prohibition against using a hybrid approach.

9. Can the notice be sent electronically?

The notice may be sent electronically pursuant to the DOL electronic distribution rules. The DOL's electronic disclosure rules require that: (1) the plan administrator use appropriate and reasonable means to ensure that the system for furnishing documents results in actual receipt of the transmitted information and protects the confidentiality of any personal information related to an individual's accounts and benefits; (2) the electronic materials be prepared and furnished in accordance with otherwise applicable requirements; (3) notice is provided to each recipient, at the time the electronic document is furnished, of the significance of the document; and (4) a paper version of the document must be available upon request. This means that the notice may be sent to employees who have the ability to access electronic documents through the plan sponsor's electronic information system as part of their work duties on a daily basis. The notice may also be provided to other individuals who have adequate access to electronic information as long as the applicable notice and consent requirements are satisfied.

If the notice is sent electronically to an employee who has access to electronic documents through the plan sponsor's electronic information system on a daily basis, the employer must inform the employee that the employee is responsible for providing a copy of the notice to a spouse or dependent who is Part D eligible and covered under the plan.

In general, if the notice is provided to employees who do not have access to the employer's electronic information system as part of their work duties on a daily basis or to other individuals such as a spouse, those individuals must be provided with a notice that: (1) advises them of any hardware or software requirements needed to access and retain the creditable coverage disclosure, (2) informs them of their right to obtain a paper copy; (3) explains how to update address information; and (4) indicates how to withdraw their consent to receive this information electronically. After receiving the notice the individual must provide a valid email address and affirmatively consent. The consent must be sent electronically to ensure that the individual has the ability to access the information. The employer must also post the notice on its website with a link on its home page to the disclosure notice. Unfortunately, it is not clear if it would be acceptable to post the notice on the employer's internal website.

Timing

1. When must the employer send the notice to individuals covered under the plan or enrolling for coverage?

There are five times when the employer must send the Part D notice:

1. Prior to beginning of Medicare's annual enrollment period beginning on October 15 of each year;
2. Prior to the beginning of an individual's Initial Enrollment Period for Medicare Part D;
3. Prior to the individual's effective date of coverage under the employer's plan;
4. When the employer no longer offers prescription drug coverage or when the employer's prescription drug coverage changes from creditable to non-creditable or from non-creditable to creditable; and
5. Upon request by a Part D eligible individual.

If the Part D notice is provided to all plan participants annually each year, CMS will consider items 1 and 2 to be met.

The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.