

CMS Finalizes Regulations Addressing Penalties for MSP Reporting Violations

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HHS Final Rule: Medicare Program; Medicare Secondary Payer and Certain Civil Money Penalties, 42 CFR Part 402, 45 CFR Part 102, 88 Fed. Reg. 70363 (Oct. 11, 2023)

Regulations

CMS Alert

CMS has finalized regulations specifying when and how it will calculate and impose civil money penalties for violation of the Medicare Secondary Payer (MSP) reporting requirements for group health plans and certain non-group health plan arrangements. As background for group health plans, responsible reporting entities (RREs)—typically insurers or third-party administrators (TPAs)—are required to report information to CMS about individuals who are both entitled to Medicare and covered under a group health plan. The reports help CMS determine whether a group health plan is primary to Medicare (that is, whether the plan pays first, while Medicare is the secondary payer). The Medicare statute authorizes penalties of \$1,000 per day for group health plans that do not comply with the MSP reporting requirements, and in February 2020, CMS proposed regulations to address the types of violations that would warrant penalties and how those penalties would be calculated.

The final regulations, which take effect December 11, 2023, but are not applicable until October 10, 2024, differ from the proposed regulations in several respects:

- **Audit Selection.** Instead of automatically monitoring all submissions for compliance, CMS will randomly select and audit 250 RRE submissions each calendar quarter.
- **Basis for Penalties.** The only basis for the imposition of penalties will be untimely reporting of required information. (The proposed rules would have also imposed penalties for inaccurate or contradictory reporting.) For group health plans, timeliness is generally defined as reporting to CMS within one year after the date coverage becomes effective.
- **Penalty Amount.** The penalty for any selected untimely submission by a group health plan RRE will be \$1,000 per day of noncompliance. (CMS has adopted a tiered penalty approach for non-group health plan RREs that could significantly lower the penalty amount, but it lacks statutory authority to extend that approach to group health plan RREs.)

EBIA Comment: RREs have a year in which to review the final rule and evaluate their reporting processes to ensure compliance. While relatively few employers are RREs, employers that are group health plan sponsors may be asked to assist their insurers or TPAs in compiling information about participants in their plans. With enforcement activity on the rise and soon to be enhanced by penalty imposition, employers' cooperation will be vital in ensuring RRE compliance. For more information, see

EBIA's Group Health Plan Mandates manual at Sections XXIV.J ("MSP Mandatory Reporting Requirement") and XXIV.K ("Enforcement"). See also EBIA's Self-Insured Health Plans manual at Section XXV.C ("Coordination of Benefits With Medicare, TRICARE, and Medicaid"), EBIA's Consumer-Driven Health Care manual at Section XXV.F ("HRAs and Medicare Secondary Payer (MSP) Requirements (Including Mandatory Reporting)"), and EBIA's COBRA manual at Section XXX.D ("Medicare Secondary Payer (MSP) Rules").

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