

Attorney's Guide to Medicare Conditional Payments

What are they? Payments made by Medicare for medical treatment where a primary payer (insurer or self-insurer) has or may have an obligation to make the payment but does not. Example: Medicare pays the hospital bill of an injured worker because the workers' comp insurer denied liability for the injury. ¹

Who must reimburse Medicare for conditional payments it has made? Primary payers must reimburse Medicare for conditional payments it has made. Primary payers include workers' compensation, liability and no-fault insurers and self-insured entities.² Also, individuals and entities that receive payment from a primary payer must make reimbursement, including claimants and claimant's attorneys.³

Can responsibility as a primary payer arise even if liability for the medical expense is contested? Yes. Federal statute provides that status as a primary payer and thus the obligation to reimburse conditional payments can be demonstrated by entry of a judgment or by payment conditioned on a release or waiver of payment (i.e. settlement of a claim- even if liability is denied).⁴

What rights does Medicare have related to collecting reimbursements? Medicare has a direct right of action against all primary payers responsible for making payment. And, Medicare has a direct right of action against any person or entity that received a primary payment. That includes the Medicare beneficiary, medical provider, physician, attorney, state agency or private insurer.⁵ Medicare can collect interest on the conditional payment and can seek double damages.⁶

What other obligations do primary payers have besides reimbursement of conditional payments? Primary payers must give Medicare notice when it is demonstrated that Medicare made a payment the primary payer owed.⁷ That "demonstration" is considered to have occurred when underlying liability for paying a beneficiary's medical expenses has been established by acceptance of the claim or by entry of a judgment or by settlement of the claim.⁸

Do primary payers (or potential primary payers) have an obligation to try to determine if one of its claimants is a Medicare beneficiary? Yes. Senate Bill 2499 (signed into law by President Bush on December 29, 2007) requires- effective July 2009- primary payers to determine if a claimant is entitled to Medicare and to provide information to Medicare about the claim.

In settling a claim with a Medicare beneficiary, can a primary payer provide the funds to the claimant and require the claimant to make reimbursement to Medicare? No. A primary payer cannot extinguish its obligations to Medicare by paying the Medicare beneficiary or the medical provider when it should have reimbursed Medicare. ⁹

What practical steps can a primary payer take to comply with the federal rules related to the obligation to reimburse conditional payments? Primary payers should revise their claims systems to (a) identify claimants who are potential Medicare beneficiaries, (b) confirm Medicare entitlement of claimants, (c) notify Medicare of claims of Medicare beneficiaries, (d) determine if conditional payments have been made, and (e) determine if reimbursement is owed.

¹ 42 C.F.R. § 411.21.

² 42 U.S.C. § 1395y (b)(2)(B)(ii) – "Medicare Secondary Payer" statute.

³ Example: insurer settles claim and pays claimant and claimant's attorney. Medicare could seek reimbursement from claimant and claimant's attorney as they "received payment from" a primary payer.

⁴ Id.

⁵ 42 C.F.R. § 411.24(g).

⁶ 42 U.S.C. § 1395y (b)(2)(B)(ii); 42 C.F.R. 411.24(c)(2).

⁷ 42 C.F.R. § 411.25(a).

⁸ 73 Fed. Reg. at 9683 (February 22, 2008).

⁹ 42 C.F.R. § 411.22; 73 Fed. Reg. at 9680 (February 22, 2008).

How is the CMS reimbursement amount calculated? 42 CFR 411.37 provides that Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement when the claim was disputed and the costs were borne by the party against whom CMS seeks to recover.

If the conditional payments are less than the settlement amount, the recovery is computed by determining the ratio of the procurement costs (attorney fees and expenses) to the total settlement, applying the ratio to the conditional payment total, subtracting the Medicare share of the procurement costs and using the remainder as the Medicare recovery amount. If Medicare payments equal or exceed the settlement amount, CMS can recover the total settlement less total procurement costs.

Can Medicare waive recovery of all or part of the conditional payments due to hardship on the claimant? Yes. 42 CFR 411.28 provides that CMS may waive recovery in whole or in part if the probability of recovery or the amount involved does not warrant pursuit of the claim.

42 CFR 401.613 provides that CMS, in considering whether to grant a waiver, may consider the age and health, present and potential income, and assets of the claimant. Bases for compromise may include inability to pay, difficulty in prevailing in court and the cost of collecting.

42 CFR 405.376 provides in relevant part that CMS will also consider applicable exemptions available to the claimant under state or federal law, and provides that the compromise of collection actions rules were adopted under the authority of the Federal Claims Collection Act- 31 USC 3711.

Waiver and compromise determinations are made by the applicable CMS regional office, which typically makes use of the Social Security Administration "Request for Waiver" form SSA-632-BK.