The Medicare Prescription Drug, Improvement and Modernization Act of 2003 makes prescription drug coverage (known as “Part D coverage”) available to certain Medicare-eligible individuals starting January 1, 2006. On January 28, 2005, the Centers for Medicare and Medicaid Services (CMS) issued final regulations on the Act. Under those regulations, most entities that currently provide prescription drug coverage to Medicare beneficiaries must disclose whether the entity’s coverage is “creditable prescription drug coverage” (the “Disclosure Notice”). The following is a summary of the Disclosure Notice requirements pursuant to the regulations and published CMS guidance.

What is the purpose of the Disclosure Notice?
In general, the Disclosure Notice is intended to inform participants about the following:
• Whether the plan sponsor’s prescription drug coverage, on average, is as generous as Part D coverage (i.e., whether it is “creditable coverage”);
• The regular enrollment period for Part D coverage;
• The late enrollment penalty for Part D coverage;
• If the plan sponsor’s prescription drug coverage is creditable coverage, an individual who drops or loses employer coverage can avoid the late enrollment penalty if he or she enrolls for Part D coverage within 62 days of the loss of employer coverage.

(See 42 CFR § 423.56(b) & (c))

How is creditable coverage determined?
A plan sponsor’s prescription drug coverage is creditable if its actuarial value is at least the actuarial value of standard Part D coverage. In general, this actuarial determination measures whether the expected amount of paid claims under the sponsor’s prescription drug coverage is at least as much as the expected amount of paid claims under the standard Part D coverage. (See 42 CFR § 423.56(a)).

For plans that have multiple benefit options, the actuarial value test must be applied separately for each benefit option. (See 42 CFR § 423.265).

Is attestation by a qualified actuary necessary?
For plan sponsors that are employers or unions, the determination of creditable coverage requires an attestation by a qualified actuary. (See 42 CFR § 423.884(d)). However, if an entity is not applying for the retiree drug subsidy, the CMS has provided the design of a simplified plan which will not require the attestation of an actuary. (See CMS “Creditable Coverage Guidance”).

Comment: If prescription drug coverage is through an insurer, verify with the insurance company that the coverage constitutes creditable coverage and request a copy of the actuary’s attestation.

Who must provide the Disclosure Notice?
The Disclosure Notice –
• must be provided by most entities that provide prescription drug coverage to Medicare eligible beneficiaries including the following (see 42 CFR § 423.56(b) for the complete list):
  • entities that sponsor group health plans such as employers, unions, multiple employer welfare arrangements (MEWAs), and the government;
  • certain health insurance issuers; and
  • state sponsored Medicaid programs and pharmacy assistance programs.

www.jacksonlewis.com
• may apply even if the plan does not cover retirees, such as where the plan covers active employees or their covered spouses who are Medicare eligible (see CMS “Creditable Coverage Guidance”);

• applies whether the entity’s coverage is primary or secondary to Medicare (see CMS “Creditable Coverage Guidance”);

• may be provided by a third party (such as by an insurance company in its insurance certificate), but the entity providing the coverage is ultimately responsible (see CMS “Creditable Coverage Guidance”); and

• does not apply to entities that contract with Medicare directly as a Part D plan or that contract with a Part D plan to provide qualified prescription drug coverage. (See 42 CFR § 423.56(b)).

Who must receive the Disclosure Notice?
The Disclosure Notice must be provided to all Part D eligible individuals who are covered under, or who apply for, the entity’s prescription drug coverage. (See 42 CFR § 423.56(b) & (c)). The Disclosure Notice requirement applies to all Medicare beneficiaries, including active employees and covered spouses. (See CMS “Creditable Coverage Guidance”).

An individual is a Part D eligible individual if:

• the individual is entitled to Medicare Part A and/or enrolled in Part B, as of the effective date of coverage under the Part D plan; and

• the individual resides in the service area of a Part D plan (this excludes individuals living abroad and prisoners). (See CMS “Creditable Coverage Guidance,” published on the Internet at the site referenced at the end of this article).

When must the Disclosure Notice be issued?
The notice of creditable coverage must be provided at the following times:

• prior to (but no more than 12 months before) each annual Medicare Part D enrollment period (which runs from November 15 to December 31 of each year);

• prior to (but no more than 12 months before) the individual’s initial Medicare Part D enrollment period –

• an individual who is first eligible to enroll in a Part D plan in or prior to February 2006 has an initial enrollment period beginning on November 15, 2005.

• an individual who is first eligible to enroll in a Part D plan on or after March 2006 has the same initial enrollment period for Medicare Part B (usually three months before an individual’s 65th birthday).

• prior to (but no more than 12 months before) the effective date of coverage for any Medicare eligible individual that joins the plan;

• whenever prescription drug coverage ends or changes so that it is no longer creditable or becomes creditable; and

• upon a beneficiary’s request. (See 42 CFR § 423.56(b) and CMS “Creditable Coverage Guidance”).

Comment: The CMS will deem the first two bullet points satisfied if the creditable coverage disclosure notice is provided to all plan participants.

Is there a model Disclosure Notice?
The CMS has produced sample Disclosure Notices for the initial enrollment period (November 15, 2005 – May 15, 2006). These sample notices may be found at:

• http://www.cms.hhs.gov/medicare改革/ CredCov-BeneDsclsreNtc.pdf for creditable coverage, and


For new plan enrollees with initial enrollment periods after May 15, 2006, the CMS will provide sample language at a later date.

What is the form and manner of the Disclosure Notice?
In general, entities have flexibility in the form and manner of providing Disclosure Notices to beneficiaries.

The Disclosure Notice –

• need not be sent as a separate mailing;

• may be provided with other plan participant information materials (including enrollment or renewal materials);

• may be provided in single mailing to a covered Medicare individual and his or her Medicare eligible spouse covered under the same plan unless it is known that the spouse resides at a different address than where the participant materials were mailed; and

• may be provided through electronic means only if the Medicare beneficiary has approved of such delivery and other certain requirements are met.

If the Disclosure Notice is incorporated with other plan participant information, then –

• the disclosure must be prominent and conspicuous;

• the disclosure (or a reference to the section in the document containing the disclosure) must be prominently referenced in at least 14-point font in a separate box, bolded, or offset on the first page of the document containing the disclosure; and
an entity may use the following example provided by the CMS for making a reference to the Disclosure Notice:

If you have Medicare or will become eligible for Medicare in the next 12 months, a new Federal law gives you more choices about your prescription drug coverage, starting in 2006. Please see page xx for more details.

(See CMS “Creditable Coverage Guidance”.)

Is there a penalty for failing to provide the Disclosure Notice?

There is no penalty imposed on plan sponsors who fail to provide the Disclosure Notice.

Must a disclosure also be made to the CMS?

Most entities that provide prescription drug coverage to Medicare eligible beneficiaries must also disclose to CMS whether the prescription drug plan is creditable or non-creditable. (See 42 CFR § 423.56(e)). The disclosure must be made on an annual basis, or upon any change that affects whether the coverage is creditable. CMS will provide the timing, format, and model language for the disclosure in further guidance. (See CMS “Creditable Coverage Guidance”).

How long must records be kept?

Records must be maintained by the plan and made available for audit by CMS or the Office of the Inspector General for six years.

Where can additional information be found?


The Jackson Lewis Employee Benefits Practice Group is available to assist employers with compliance with the requirements of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 and its implementing regulations. Please contact the attorney with whom you regularly work, or Benefits Group coordinators Michael D. Jacobster, (914) 514-6132; JacobsterM@jacksonlewis.com; Bruce H. Schwartz, (914) 514-6126; SchwartzB@jacksonlewis.com.

Federal Income Tax Relief Regarding Victims Of Hurricane Katrina

Employers and employees should be aware of two ways of providing relief to Hurricane Katrina victims, including employees affected by the disaster:

• the IRS issued Notice 2005-68 that provides that employees may donate on a non-taxable basis payments otherwise receivable for leave time to qualified charities;

• employers may make tax-free payments to employees affected by the disaster, if the payments meet the requirements of section 139 of the Internal Revenue Code.

Leave Donation Programs


Under leave donation programs covered by the Notice, employees may donate the value of their vacation, sick or personal leave in exchange for employer cash payments made to qualified tax-exempt organizations providing relief for the victims of Hurricane Katrina. The special tax treatment applies ONLY to donations:

• made before January 1, 2007

• to qualified charitable organizations described in Section 170(c) of the Internal Revenue Code

• for the relief of victims of Hurricane Katrina

The Financial Consequences

To Employees: Qualifying leave donations will NOT be treated as income or wages to the employees making the leave donations. However, the employee cannot take a charitable deduction for the amount of the donation. Also, benefits based on an employee’s income may be reduced.
To Employers: An employer will NOT have to treat the amount of the donations as wages subject to withholding and will NOT have to include the amount of the donations on IRS Forms W-2. An employer may deduct these donations as a business expense under Section 162 of the Code rather than as a charitable donation under the more stringent requirements of Section 170 of the Code.

**Disaster Relief Payments To Employees**

The IRS announcement does NOT affect the tax-free treatment of disaster relief payments made by an employer to its employees that meets the requirements of Section 139 of the Internal Revenue Code. In a nutshell, Section 139 provides that relief grants, which are intended to pay or reimburse individuals’ reasonable and necessary personal, family, living, housing, transportation, or funeral expenses incurred as a result of a qualified disaster, are not includible in gross income.

It is important to note that under Section 139, qualified disaster relief payments to employees are NOT subject to federal tax withholding and are NOT reportable on IRS Form W-2 or 1099.

The Committee Report makes clear that tax-free qualified disaster relief payments can be made from any source, including an employer or from a private foundation controlled by an employer.

The IRS does not require individuals to account for actual disaster-related expenses to qualify for tax-free treatment under Section 139 if the amount of the payments is reasonably expected to be commensurate with the expenses incurred.

**Additional IRS Guidance**

The IRS website for tax-relief issues for taxpayers residing in the Presidential Disaster Areas struck by Katrina is at: http://apps.irs.gov/newsroom/article/0,,id=147085,00.html. Note, the IRS is expected to provide further relief shortly, including the easing of requirements for hardship distributions and loans from retirement plans.