



# Medicare Secondary Payer Rules

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## After Windsor

The Medicare Secondary Payer (MSP) Act lays out coordination of benefit rules between group health plans and Medicare. These rules apply to age-based, disability-based, and end-stage renal disease (ESRD)-based Medicare entitlement and dictate the primary and secondary payer.

With respect to aged-based Medicare entitlement (typically effective the month an individual turns 65), a group health plan of an employer with 20 or more employees for each working day in each of 20 or more calendar weeks in the current calendar year or the preceding calendar year is the primary payer. The plan is prohibited from taking into account the aged-based Medicare entitlement of a current employee and/or a current employee's spouse. Examples of actions that constitute "taking into account" include:

- Failure to pay primary benefits.
- Imposing limitations on benefits for a Medicare-entitled individual that do not apply to others enrolled in the plan such as providing less comprehensive health care coverage, excluding benefits, reducing benefits, charging higher deductibles or coinsurance, providing for lower annual or lifetime benefit limits, or more restrictive pre-existing illness limitations.
- Terminating coverage because the individual has become entitled to Medicare.

Pursuant to the Supreme Court's decision in Windsor, the federal government now recognizes any same-sex marriage legally performed in a state or foreign country. The Department of Health and Human Services (HHS) has adopted a policy to treat same-sex marriages on the same terms as opposite-sex marriages. Consistent with this policy, HHS issued an Alert that announces for purposes of MSP rules the term "spouse" will apply equally to same-sex and opposite-sex spouses effective January 1, 2015.

### ■ Why is this Important?

Pre-Windsor, the group health plan was the primary payer for an opposite-sex spouse who was also enrolled in age-based Medicare. Since federal law did not recognize same-sex spouses, if a group health plan covered the same-sex spouse, Medicare (as opposed to the group health plan) would pay primary if that same-sex spouse was enrolled in aged-based Medicare.

Under the Alert, same-sex and opposite-sex spouses will be treated the same. This means the group health plan will be the primary payer of any legal spouse enrolled in age-based Medicare who has coverage as a result of his/her spouse's current employment. Medicare will be the secondary payer. The Alert also indicates that where a group health plan has a broader or more inclusive definition of a spouse than what

is recognized under federal law (for example, the definition of a spouse includes a domestic partnership or civil union), the plan may (but is not required to) assume primary payment for the spouse in question. To the extent that individual is reported as a “spouse” to Medicare, Medicare will pay secondary and pursue recovery (if applicable).

In addition, Responsible Reporting Entities (RREs) (generally carriers and TPAs) will want to ensure their disclosures to CMS are updated to reflect the new rules.

## ■ Effective Date

The expanded rules for the definition of spouse must be implemented with a start date for the coverage in question no later than January 1, 2015. Plans are permitted to implement the change prior to 2015.

## ■ Does this Affect Disability-Based Medicare Entitlement or ESRD-Based Medicare Entitlement?

Probably not. Large plans, defined as a plan of an employer with 100 or more employees, will pay primary for an individual, or a “member of the individual’s family,” who is enrolled in disability-based Medicare and is covered by the group health plan due to the individual’s current employment status. If the employer has fewer than 100 employees, Medicare is the primary payer. Disability-based MSP rules use a broader definition than aged-based Medicare (which is limited to a “spouse”). In a pre-Windsor environment, a same-sex spouse may have had a group health plan pay primary as a result of disability-related Medicare entitlement as the term “family member” includes a spouse, domestic partner, son, daughter, or grandchild who has coverage under the plan as a result of an individual’s current employment status. Thus, post-Windsor, significant change is unlikely to the extent the same-sex spouse is covered by the group health plan.

Regarding ESRD-based Medicare entitlement, if “any individual” is covered by a group health plan of any size, the plan pays primary for the first 30 months of Medicare eligibility or entitlement and then Medicare pays primary (and the plan, secondary). The status of the individual as a spouse is not relevant.

