

# COMPLIANCE OVERVIEW

## Paying Employees' Medicare Premiums

Employers that sponsor group health plans and have employees who are Medicare-eligible may be interested in reimbursing their employees' Medicare premiums. In general, when an employee is eligible for Medicare due to age, an employer may reimburse his or her Medicare premiums only when:

- The employer's group health plan is a **secondary payer** to Medicare because the employer has fewer than 20 employees; AND
- The reimbursement arrangement complies with the Affordable Care Act (ACA) because it satisfies certain design requirements (or covers fewer than two employees).

However, employers may offer an individual coverage health reimbursement arrangement (HRA) to reimburse their eligible employees for insurance policies purchased in the individual market, or for Medicare premiums, as an alternative to traditional group health plan coverage, subject to certain conditions.

### LINKS AND RESOURCES

- **MSP Rules:** Centers for Medicare & Medicaid Services (CMS) [website](#), including the [Medicare Secondary Payer Manual](#)
- **ACA Restrictions on Employer Payment Plans:** [IRS Notice 2015-17](#)
- **Individual coverage HRAs:** [Final rules](#) issued by the Departments of Labor, Health and Human Services and the Treasury
- **IRS webpage:** [Employer Health Care Arrangements](#)

## Legal Obstacles

The two main legal obstacles to reimbursing employees' Medicare premiums are:

- The MSP rules; and
- The ACA's market reforms.

## General Rules

- Group health plan sponsors with 20 or more employees risk violating the MSP rules if they pay employees' Medicare premiums.
- Group health plan sponsors with fewer than 20 employees may be able to pay employees' Medicare premiums if the ACA's integration rules are satisfied.
- Employers may use an individual coverage HRA to reimburse eligible employee's Medicare premiums, subject to certain conditions.

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## Medicare Secondary Payer Rules

The Medicare Secondary Payer (MSP) rules are designed to shift costs from the Medicare program to private sources of payment (such as employer-sponsored group health plans) in certain situations. The MSP provisions govern the coordination of benefits rules for determining when an employer-sponsored group health plan will pay primary or secondary to Medicare.

The MSP provisions vary based on a number of factors, including the source of the other health coverage and why an individual is entitled to Medicare (for example, age, disability or end-stage renal disease). This discussion focuses on the MSP rules for employer-sponsored group health coverage for employees (or their spouses) who are entitled to Medicare due to age.

### Primary Payer Status

Medicare pays secondary to an employer-sponsored group health plan for individuals age 65 or older who have group health plan coverage as a result of:

- Their own current employment status with an employer with 20 or more employees; or
- The current employment status of a spouse of any age with an employer with 20 or more employees.

The 20-employee threshold is met if an employer has 20 or more full-time and/or part-time employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Aggregation rules apply for companies that have common ownership.

SITUATION	EMPLOYER SIZE	PAYS FIRST	PAYS SECOND
Individuals age 65 or older who are covered by a group health plan because they (or their spouses) are still working	20 or more employees	Group health plan	Medicare
	Fewer than 20 employees	Medicare	Group health plan

### Restrictions

Due to their primary payer status, employers with 20 or more employees that sponsor group health plans must comply with the following requirements:

- The group health plan must provide a current employee (or a current employee's spouse) who is age 65 or older with the **same benefits, under the same conditions**, that are provided to employees and spouses who are under age 65;
- The group health plan **cannot take into account** the Medicare entitlement of a current employee (or a current employee's spouse); and
- The employer **cannot offer any financial or other incentive** for a Medicare-entitled individual not to enroll (or to terminate enrollment) under a group health plan which would be a primary plan if the individual were enrolled.

***Small employers (fewer than 20 employees) are not subject to these restrictions because Medicare has primary payer status.***

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## Cannot Offer Incentives

Medicare beneficiaries are free to reject employer plan coverage, in which case they retain Medicare as their primary coverage. However, when Medicare is the secondary payer, employers cannot **discourage employees from enrolling** in their group health plans.

Also, employers cannot offer any “**financial or other incentive**” for an individual entitled to Medicare “not to enroll (or terminate enrollment) under” a group health plan that would pay primary. A violation of the prohibition on offering incentives can trigger financial penalties of **up to \$11,162** per violation.

CMS has [advised](#) that an employer cannot offer, subsidize or be involved in the arrangement of a Medicare supplement policy where the law makes Medicare the secondary payer. Because this type of arrangement takes into account the Medicare entitlement of the employee, CMS has warned that it would subject the employer to **possible excise taxes** under the Internal Revenue Code.

### Key Point

Unless the small employer exception applies, paying an employee’s Medicare premiums (Part B, Part D or supplement policy) likely violates the prohibition on an employer offering a financial incentive not to enroll in a group health plan that would otherwise pay primary to Medicare.

**ICHRA Option:** As of 2020, employers may use an individual coverage HRA (or ICHRA) to reimburse eligible employees for their individual health insurance premiums and Medicare premiums (as an alternative to a traditional group health plan) without violating the MSP rules, subject to certain conditions.

## ACA Reforms

[IRS Notice 2015-17](#) provides that an arrangement under which an employer reimburses (or pays directly) for some or all of Medicare premiums for employees constitutes an employer payment plan. If the arrangement covers **two or more active employees**, it is a group health plan subject to the ACA’s market reforms.

Employer payment plans that reimburse employees’ Medicare premiums do not comply with several ACA market reforms that took effect beginning in 2014. Violations of these market reforms can result in excise taxes of **\$100 per day** for each employee. To avoid violating the ACA, an employer payment plan must satisfy certain integration requirements.

**QSEHRA Option for Small Employers:** The [21st Century Cures Act](#) (Act) allows small employers (fewer than 50 full-time employees, including full-time equivalents) that do not maintain group health plans to establish stand-alone HRAs, called a “qualified small employer HRA” (or QSEHRA). A QSEHRA may be used to reimburse employees’ out-of-pocket medical care expenses, including premiums for individual health insurance policies, without violating the ACA’s market reforms. Medicare premiums are also reimbursable under QSEHRAs. Additional design requirements, including a maximum benefit limit, apply to these HRAs.

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## Integration with Employer's Group Health Plan – Small Employers Only

An employer payment plan that pays for or reimburses Medicare Part B or Part D premiums will satisfy the ACA's market reforms if it is **integrated with another group health plan offered by the employer**.

An employer's Medicare premium reimbursement program is considered integrated with another group health plan offered by the employer if **all of the following conditions are met**:

- The employer offers a group health plan (other than the employer payment plan) to the employee that does not consist solely of excepted benefits and offers coverage providing minimum value (*see below for a special exception for small employers*);
- The employer payment plan is available only to employees who are actually enrolled in Medicare Part A and Part B or Part D;
- The employee participating in the employer payment plan is actually enrolled in Medicare Parts A and B; and
- The employer payment plan is limited to reimbursement of Medicare Part B or Part D premiums and excepted benefits, including Medigap premiums.

An employer payment plan that has fewer than two participants who are current employees (for example, a retiree-only plan) on the first day of the plan year is not subject to the ACA's market reforms, and, therefore, integration is not necessary to satisfy the market reforms.

Notice 2015-17 cautions employers that this type of employer payment plan must also comply with the MSP rules. As explained above, unless the small employer exception applies, an employer that pays or reimburses current employees' Medicare premiums likely violates the MSP rules' prohibition on offering a financial incentive not to enroll in a group health plan that would otherwise pay primary to Medicare.

## Integration with Medicare – Small Employers Only

It may be difficult for employers with fewer than 20 employees to satisfy the group health plan integration requirements described above. These employers are not required by the MSP rules to offer group health plan coverage to their employees who are eligible for Medicare coverage. Also, some issuers do not allow these small employers to offer group health plan coverage to their employees who are eligible for Medicare coverage.

In response to these concerns, a [final rule](#) from Nov. 18, 2015, provides a **special exception for employers with fewer than 20 employees** that are not required to offer their group health plan coverage to their Medicare-eligible employees and that offer group health plan coverage to their employees who are not eligible for Medicare but not to their employees who are eligible for Medicare coverage. For these employers, a premium reimbursement arrangement for Medicare Part B or D premiums may be integrated with Medicare for purposes of satisfying the ACA's market reforms, if the employees who are not offered the other group health plan coverage would be eligible for that group health plan if not for their eligibility for Medicare.

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## Individual Coverage HRAs – All Employers

Employers of all sizes may implement an [individual coverage HRA](#) (or ICHRA) to reimburse their eligible employees for Medicare premiums (and other medical expenses, including individual insurance premiums), subject to the following rules:

- **Enrollment Requirement:** An employee covered by an ICHRA must be enrolled in individual health insurance coverage (or Medicare Parts A and B or Part C) for each month that he or she is covered by the ICHRA. This coverage requirement also applies to any family members (such as spouses and children) covered by the ICHRA.
- **No Choice of Traditional Group Health Plan:** An employer cannot offer a choice between an ICHRA and a traditional group health plan to any employee, including employees enrolled in Medicare. However, employers with ICHRAs may continue to offer a traditional group health plan provided these benefits are offered to different classes of employees.
- **Same Terms:** An employer must offer the ICHRA on the same terms to all employees within a class of employees (subject to a few specific exceptions), regardless of Medicare eligibility or entitlement. Classes of employees include, for example, full-time employees, part-time employees, salaried workers, non-salaried workers, seasonal employees, collectively bargained employees and employees whose primary employment site is in the same geographic rating area. The final rules for ICHRAs do NOT allow employers to create separate classes for employees who are eligible for or enrolled in Medicare.
- **Opt Out:** Employers must allow participants (regardless of whether they are covered by Medicare) to opt-out of and waive future reimbursements from the ICHRA annually and upon termination of employment.
- **Annual Notice:** Employers with ICHRAs must provide a notice to eligible participants regarding the ICHRA and its interaction with the ACA’s premium tax credit.

**Impact on MSP Rules:**  
According to the [final rules](#) on ICHRAs, offering this type of group health plan (that is, the ICHRA) does not violate the MSP rules’ prohibition on financial incentives. Thus, even employers with 20 or more employees can offer an ICHRA, subject to certain conditions, without violating the MSP rules.

An ICHRA may reimburse premiums for Medicare Part A, B, C or D, as well as premiums for Medigap policies. The ICHRA may be designed to also reimburse other medical care expenses. However, an ICHRA cannot limit reimbursement only to expenses not covered by Medicare.

## Employer Shared Responsibility Rules

The ACA’s employer shared responsibility rules, also known as the employer mandate or “pay or play” rules, require applicable large employers (ALEs) to offer minimum essential coverage that is affordable and provides minimum value to their full-time employees, or pay a penalty. According to IRS rules, **if an ICHRA may be integrated with Medicare, the offer of the HRA to an employee who is enrolled in Medicare constitutes an offer of coverage to the employee for purposes of the employer mandate rules.** In addition, because an individual enrolled in Medicare is not eligible for the premium tax credit (the receipt of which may trigger a penalty), an ALE will not be liable for a penalty for a month with respect to a full-time employee enrolled in Medicare for that month.