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OPTING OUT OF MEDICARE

Introduction

Since January 1, 1998, physicians have been permitted to opt out of Medicare and enter into private contracts with Medicare beneficiaries that allow them to set their own fees. A physician who opts out of Medicare agrees not to see any Medicare patients (barring emergencies or urgent services), except for those with whom she has entered into private contracts, for a period of two years.

This means that if you work in a situation where you must see Medicare patients as a part of your employment, you cannot opt out of Medicare. It also means that if there is any possibility that your life will change in the next two years, and you may have to see Medicare patients as part of new managed care contracts or new employment, you also should not consider opting out of Medicare.

The rules for opting out are very specific. In order to opt out you must file an opt-out affidavit with your Medicare Carrier, or Medicare Carriers (if you work in more than one Carrier jurisdiction). A template for this affidavit that conforms to Medicare rules follows. A private contracting template also follows, which you can use for entering into private contracts with your Medicare patients once you have opted out. These contracts must be kept on file in your office, available to be sent to the Carrier or to the Centers for Medicare and Medicaid Services (CMS), which oversees the Carriers, should they be requested. New affidavits and private contracts must be completed every two years.

NOTICE AND DISCLAIMER: Opting out has serious implications for your status, rights, and responsibilities as a Medicare provider. This summary and the attached sample affidavit and private contract template are based on sources believed to be reliable. The information contained herein doesn't constitute legal advice nor should it be relied on exclusively. The APA assumes no responsibility for any physician's decision to opt out or reliance on the sample agreements that follow. If you have any questions concerning these materials or opting out in general, please call the Managed Care Help Line (800-343-4671).

WHO MAY OPT OUT & WHEN

Non-participating physicians may opt out of Medicare at any time. Their two-year opt-out period begins the date the affidavit is signed, provided it is filed with the Carrier within ten-days after the physician signs his first private contract with a Medicare beneficiary.

Participating physicians must file their affidavits with their Medicare Carrier(s) at least thirty days before the first date of the next calendar quarter, with the affidavit showing an effective date of the first day of that quarter (i.e., 1/1, 4/1, 7/1, 10/1).

Physicians who have never enrolled in Medicare, but want to be able to treat Medicare patients under private contracts, must also file an affidavit with the Carrier that serves their area. The Carrier will provide these physicians with a UPIN (Unique Physician Identification Number), based on the physician tax identification number that must be entered on the affidavit, and maintain their affidavit on file.

ESSENTIAL THINGS TO KNOW ABOUT OPTING OUT

- The first time you opt out of Medicare, there is a ninety-day grace period during which you can change your mind about opting out. You just have to notify the Carriers you filed an opt-out affidavit with and refund any money you received from patients with whom you had private contracts that called for fees exceeding the Medicare-approved charges.
- Once you opt out of Medicare, you cannot see any patients under Medicare during the two-year period you have opted out for.
- If you have been seeing Medicare patients, once you have opted out, they will only be able to continue seeing you under a private contract. This means any payments from them to you will be out of pocket. Not only will Medicare not reimburse for your services, neither will any supplemental Medigap policies your patients have.
- If you mistakenly file a claim with Medicare during your opt-out period, or your patient does, and you are contacted by the Carrier with a request for an explanation, you must be certain to respond within the time period allotted. Otherwise, your opt-out status will be rescinded, and you will no longer be able to do private contracting. If this happens, you will once again be tied to the laws of Medicare, but Medicare will not pay for any of your claims that occur during your original opt-out period.
- Patients who reach Medicare age but are still employed and covered by their employers' insurance can choose not to enroll in Medicare Part B and will then not be Medicare beneficiaries for the purpose of their treatment by physicians.
- If a Medicare-eligible patient is covered under her employer's insurance, but chooses to enroll in Medicare Part B so that Medicare will serve as the secondary payer, you must still have an opt out contract with this patient or you will be bound to the Medicare-allowed fees (even though Medicare is not the primary payer).
- A new affidavit must be filed within thirty days of the date your old affidavit expires if you wish to maintain your opt-out status. New private contracts also need to be signed every two years.
- When a Medicare beneficiary signs a private contract with one physician, it does not mean Medicare will not cover medical services provided to the same beneficiary by others who

have not opted out. This means that if an opted out physician refers a patient to a lab to have blood work done, or to another specialist who has not opted out of Medicare, the services the patient receives as a result of the referral will be covered by Medicare (if they are services that Medicare ordinarily covers).

MEDICARE OPT-OUT AFFIDAVIT

TWO COPIES OF THIS AFFIDAVIT SHOULD BE COMPLETED—ONE MUST BE FILED WITH YOUR MEDICARE CARRIER (SENT BY REGISTERED MAIL, RETURN RECEIPT REQUESTED) AND THE OTHER SHOULD BE KEPT ON FILE IN YOUR OFFICE.

I, _____, being duly sworn,

Full Name of Physician

depose and say:

1. I promise that, except for emergency or urgent care services (as specified in 42 C.F.R. §405.440), during the opt-out period I will provide services to Medicare beneficiaries only through private contracts that meet the criteria of 42 C.F.R. §405.415 for services that, but for their provision under a private contract, would have been Medicare-covered services.
2. I promise that I will not submit any claim to Medicare for any item or service provided to any Medicare beneficiary during the 2-year period beginning on the following effective date: _____; nor will I permit any entity acting on my behalf to submit a claim to Medicare for services furnished to a Medicare beneficiary, except as specified in 42 C.F.R. §405.440.
3. I understand that, during the opt-out period, I may receive no direct or indirect Medicare payment for services that I furnish to Medicare beneficiaries with whom I have privately contracted, whether as an individual, an employee of an organization, a partner in a partnership, under a reassignment of benefits, or as payment for a service furnished to a Medicare beneficiary under a Medicare + Choice plan.
4. I acknowledge that, during the opt-out period, my services are not covered under Medicare and no Medicare payment may be made to any entity for my services, directly or on a capitated basis.
5. I promise that during the opt-out period I will be bound by the terms of both this affidavit and the private contracts that I enter into with Medicare beneficiaries.
6. I acknowledge that the terms of this affidavit apply to all Medicare-covered items and services furnished to Medicare beneficiaries by me during the opt-out period (except for emergency or urgent care services furnished to the beneficiaries with whom I have not previously privately contracted) without regard to any payment arrangements I may make.
7. I understand that a beneficiary who has not entered into a private contract and who requires emergency or urgent care services may not be asked to enter into a private contract with respect to receiving such services and that the rules of 42 C.F.R. §405.440 apply if I furnish such services.

8. *[Section 8 should be used only for those physicians who have signed a Part B participation agreement.]* I acknowledge that my Part B participation agreement terminates on the effective date of the affidavit.

Signature of Physician

Principal Office Address

Telephone Number

National Provider Identifier (NPI)

Uniform Provider Identification Number (UPIN), if one has been assigned

Sworn to and subscribed before me

this _____ day of _____

Notary Public

MEDICARE PRIVATE CONTRACT

This agreement is entered into by and between _____
(hereinafter called "Physician"), whose principal medical office is located at

and _____
(a beneficiary enrolled in Medicare Part B, hereinafter called "Beneficiary"), who resides at

_____.

Background

A change in the Social Security Act, effective January 1, 1998, permits Medicare beneficiaries and physicians to contract privately outside of the Medicare program. Under the law as it existed prior to January 1, 1998, a physician was not permitted to charge a beneficiary more than a certain percentage in excess of the Medicare fee schedule amount (limiting charge). The law now permits physicians and beneficiaries to enter into private arrangements through a written contract under which the Beneficiary may agree to pay the Physician more than that which would be paid under the Medicare program.

However, beneficiaries and physicians who take advantage of this provision are not permitted to submit claims for payment or to expect payment for those services from Medicare. The Physician has certain other obligations, such as filing an affidavit with the appropriate Medicare carrier(s), a copy of which is attached to this contract. The purpose of this contract is to permit the Beneficiary and the Physician to take advantage of this change in the Medicare law, and it sets forth the rights and obligations of each. Furthermore, this agreement is limited to the financial agreement between Physician and Beneficiary and is not intended to obligate either party to a specific course or duration of treatment.

Obligations of Physician

1. Physician agrees to provide such treatment as may be mutually agreed upon by the parties and at mutually agreed upon fees.
2. Physician agrees not to submit any claims for payment under the Medicare program for any items or services even if such items or services are otherwise covered by Medicare.
3. Physician acknowledges that (s)he will not execute this contract at a time when the Beneficiary is facing an emergency or urgent healthcare situation.
4. Physician agrees to provide the beneficiary or his/her legal representative with a copy of this document before items or services are furnished to the beneficiary under its terms.

5. Physician agrees to submit copies of this contract to the Centers for Medicare and Medicaid Services (CMS), upon the request of the CMS.

Obligations of Beneficiary

1. Beneficiary or his/her legal representative agrees to be fully responsible for payment of all items or services furnished by Physician and understand that no reimbursement will be provided under the Medicare program for such items or services.
2. Beneficiary or his/her legal representative acknowledges and understands that no limits under the Medicare program (including the limits under section 1848 (g) of the Social Security Act) apply to amounts that may be charged by Physician for such items or services.
3. Beneficiary or his/her legal representative agrees not to submit a claim for payment to Medicare and further agrees not to ask Physician to submit a claim for payment to Medicare.
4. Beneficiary or his/her legal representative understands that Medicare payment will not be made for any items or services furnished by Physician that would have otherwise been covered by Medicare if there were no private contract and a proper Medicare claim had been submitted.
5. Beneficiary or his/her legal representative enters into this contract with the knowledge and understanding that he/she has the right to obtain Medicare-covered items and services from physicians and practitioners who have not opted out of Medicare, and that the Beneficiary is not compelled to enter into private contracts that apply to other Medicare-covered services furnished by other physicians or practitioners who have not opted out of Medicare.
6. Beneficiary or his/her legal representative understands that Medigap plans (under section 1882 of the Social Security Act) do NOT, and other supplemental insurance plans may elect not to, make payments for such items and services not paid for by Medicare.
7. Beneficiary or his/her legal representative acknowledges that the Centers for Medicare and Medicaid Services (CMS) has the right to obtain copies of this contract upon request.

Physician's Status

Beneficiary or his/her legal representative further acknowledges his/her understanding that Physician [has/has not] been excluded from participation under the Medicare program under section 1128, 1156, 1892 or any other section of the Social Security Act.

Term and Termination

This agreement shall become effective on _____ and shall continue in effect until _____. Despite the term of the agreement, either party may choose to terminate treatment with reasonable notice to the other party. Notwithstanding this right to terminate treatment, both Physician and Beneficiary or his/her legal representative agree that the obligation not to pursue Medicare reimbursement for items and services provided under this contract shall survive this contract.

Successors and Assigns

The parties agree that this agreement shall be fully binding on their heirs, successors, and assigns. The parties hereto, intending to be legally bound by signing this agreement below, have caused this agreement to be executed on the date written below.

Name of Physician (printed)

Name of Beneficiary (printed) or
his/her Legal Representative

Signature of Physician

Signature of Beneficiary or his/her Legal
Representative

Date of Signature

Date of Signature