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OPTING OUT OF MEDICARE:

How to Get Out and Stay Out



Physicians can cut ties with Medicare and privately contract with Medicare beneficiaries, but doing it incorrectly can be costly.

For many physicians, the administrative side of practicing medicine has grown increasingly complex in recent years. The challenges are particularly evident in the Medicare program, where a host of initiatives (e.g., meaningful use, the Physician Quality Reporting System, Value-based Payment Modifier, the Medicare Access and CHIP Reauthorization Act, and now the Quality Payment Program) require tracking more information, submitting more data, and working more closely with electronic health record (EHR) systems. For physicians who are too overwhelmed or unprepared to successfully participate, these programs threaten payment penalties and potential exposure to false claims liability. Family physicians' Medicare participation rates have remained stable despite the demands,¹ but opting out remains a viable

option for those who want to set their own fees free of Medicare's limiting charges and are prepared to navigate the complicated requirements. This article explains how.

The basics of Medicare participation

A physician who opts out of Medicare may set his or her own fees but may not submit claims to Medicare or receive any payment from Medicare. When the physician sees a Medicare beneficiary, the physician and patient must enter into a private contract (discussed below) that prevents either side from submitting any claim to Medicare for what would otherwise be a covered service. Opted-out physicians and their patients may not receive payments under Medicare Advantage plans either. ►

About the Author

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A physician who opts out of Medicare may set his or her own fees but may not receive any payment from Medicare.

Note that opting out differs from “non-participating” status. Non-participating physicians may accept Medicare assignments on a claim-by-claim basis. They are paid 95 percent of the fee schedule amount by Medicare for assigned claims. For unassigned claims, they can charge their Medicare patients up to the “limiting charge,” which is 115 percent of the Medicare-allowed amount for non-participating providers.

Only individuals may opt out of Medicare; a corporation cannot. As a practical matter, however, if all the physicians or other providers in a group opt out individually, then the corporation will have effectively opted out.

Opting out applies to almost all settings in which a physician treats Medicare patients, so physicians should carefully consider all arrangements in which their participation might be necessary. For example, if a physician moonlights as an independent contractor for another practice, he or she could still see Medicare patients in that role, but neither the physician nor the entity for which the

physician works could receive any payments from Medicare for the physician’s services.

These prohibitions do not include emergency or urgent care services. (See “Opt-out status exceptions: emergency and urgent care.”)

How to opt out

Opting out requires a physician to take two steps:

1. Submit an affidavit formally opting out of Medicare to any Medicare contractors that normally process the physician’s claims. Physicians currently participating in Medicare must file the affidavit at least 30 days before the next calendar quarter begins and include an effective date of the first day of that calendar quarter (i.e., Jan. 1, April 1, July 1, or Oct. 1). The affidavit must meet certain requirements, including the following (see the full list of requirements in the Medicare Benefit Policy Manual, Chapter 15, Section 40.9, <http://go.cms.gov/2usS8eb>):

- Be in writing and signed by the physician,
 - Contain the physician’s full name, address, telephone number, and national provider identifier (NPI) or Tax Identification Number if an NPI has not yet been assigned – information that sufficiently identifies the physician so that a Medicare contractor can ensure that no payment is made to the physician during the opt-out period,
 - State that during the opt-out period the physician will provide what would have been Medicare-covered services to Medicare beneficiaries only through private contracts, will not submit a claim to Medicare for those services, and will not allow any entity acting on the physician’s behalf to submit a claim for those services.

Physicians who opt out of Medicare can charge beneficiaries what they want but cannot bill or receive payments from the program.

Opting out prevents the physician’s employer from billing Medicare on his or her behalf.

The physician must formally notify the local Medicare contractor that he or she is opting out for a two-year period.

OPT-OUT STATUS EXCEPTIONS: EMERGENCY AND URGENT CARE

Providing emergency or urgent care to a Medicare beneficiary will not jeopardize the physician’s opt-out status if he or she follows Medicare billing requirements, which are the same for both types of care. The opted-out physician can bill Medicare up to the limiting charge amount for the service and cannot bill the patient. The claim must be submitted with a “GJ” modifier, which indicates that the service involved emergency or urgent care provided by an opted-out physician. Note that this modifier is necessary only when the patient does not already have a private contract with the opted-out physician.

Medicare defines emergency services as inpatient and outpatient hospital care necessary to prevent death or serious impairment of health. Urgent care services are defined as care furnished within 12 hours in order to avoid the likely onset of an emergency medical condition.

Several Medicare contractors, such as Novitas (<http://bit.ly/2u7R67R>), offer sample opt-out affidavits on their websites.

Each opt-out period lasts two years. However, after receiving the initial affidavit, the Centers for Medicare & Medicaid Services (CMS) will automatically renew it every two years unless the physician requests to terminate the opt out at least 30 days before the start of the next two-year period.

2. After submitting the affidavit, the physician must enter into private contracts with Medicare patients. As with the affidavit, these contracts have specific requirements, including the following (see the full list of requirements in the Medicare Benefit Policy Manual, Chapter 15, Section 40.10):

- Be in writing and printed in a typeface large enough to ensure that the beneficiary can read it,
- State that during the opt-out period the beneficiary or his or her legal representative accepts full responsibility for paying the physician's charges.

Private contracts must also state that the beneficiary or legal representative understands the following:

- Medicare payment limits do not apply to what the physician may charge for items or services, and the beneficiary or his or her legal representative agrees not to submit a claim to Medicare or to ask the physician to submit a claim to Medicare on the beneficiary's behalf,
- Medicare payment will not be made for any items or services provided by the physician that would otherwise have been covered by Medicare,
- The beneficiary has the right to obtain Medicare items and services from other physicians or providers who have not opted out, and the beneficiary is not required to enter into private contracts for Medicare covered services provided by other physicians or providers who have not opted out.

The private contract must also state the expected effective date and expiration date of the current opt-out period. It must be signed by the physician and the beneficiary or the beneficiary's legal representative. The physician must retain an original copy with the original signatures of both parties for the duration of the current opt-out period. The contract must also be made available to CMS upon request.

The physician must provide a copy of the contract to the beneficiary or the beneficiary's legal representative before items or services are provided to the beneficiary under the terms of the contract. Finally, the contract may not be entered into during a time when the beneficiary requires emergency or urgent care services.

How to stay out

Physicians can voluntarily terminate a Medicare opt out as described earlier. However, a physician's opt-out will terminate involuntarily if he or she fails to properly maintain it, such as in the following cases:

- The physician knowingly and willfully submits a claim to Medicare during the opt-out period, except for emergency and urgent care services,
- An entity employing the physician submits a Medicare claim, and the physician is paid indirectly for the services,
- The physician fails to enter into an appropriate private contract with a beneficiary.

When a physician's opt-out status is considered nullified, so are all private contracts with beneficiaries. This change has profound financial consequences for the physician. Failure to maintain an opt-out means:

- Medicare will not pay the physician or the beneficiary for the physician's services for the remainder of the opt-out period, and the physician may collect only copays or deductibles from the beneficiary.
- The physician must still submit claims to Medicare, even though they will not be paid.
- The physician is otherwise treated as "non-participating" by Medicare, although still subject to the restrictions above.

Lastly, the physician will not be able to opt out again until the expiration of the two-year opt-out period that was not maintained.

If the Medicare contractor discovers after the two-year period has expired that the physician failed to maintain opt-out status, the contractor will apply the above factors retroactively beginning with the date of the failure through the date the opt-out period ended. The physician may be able to avoid many of these penalties by demonstrating a "good faith effort" to fix his or her mistakes within 45 days of notice from the Medicare contractor or within 45 days of the physician's discovery, whichever

■ The opted out physician must enter into private contracts with Medicare patients before providing services to them.

■ A physician may voluntarily terminate a Medicare opt out or lose the opt-out status by failing to maintain it.

■ Knowingly submitting a claim to Medicare, having one submitted on your behalf, or failing to enter into a private contract with a beneficiary may terminate an opt-out status.

is earlier. Medicare's manuals describe a good faith effort as including, but not being limited to, refunding amounts collected in excess of the limiting charge from beneficiaries who did not sign a private contract with the physician.

Medicare contractors will ask if the failure to maintain opt-out status involved providing emergency or urgent care service, which must be supported by documentation, or if the physician's employer filed a claim in error. If the claim was filed in error, the contractor will ask the physician to explain whether the filing was an isolated incident or a problem affecting multiple claims. In cases of system error, the contractor also will ask what steps the physician has taken to correct the problem.

Contractors generally do not consider claims submitted by a beneficiary to be a

Violating a Medicare opt out forces the physician back into the program and can include other penalties.

Opting out of Medicare can free the physician from many of the program's rules and reimbursement limits.

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failure by the physician to maintain opt-out status and will not nullify the contract with the beneficiary on this basis. However, if a substantial number of claims are submitted in error, the Medicare contractor will investigate to ensure that the physician has appropriate contracts with the beneficiaries.

Opting out isn't simple

Opting out of Medicare can be a complicated, detailed process. However, for physicians who are tired of navigating the Byzantine billing rules of Medicare, opting out allows them to ignore those rules and essentially operate on a "cash paying" basis with Medicare beneficiaries. But once out, physicians must carefully maintain that status or face being thrust back into the system – and under much less favorable terms. **FPM**

1. Martin S. AAFP member survey provides valuable perspective. *In The Trenches*. August 2017. <http://bit.ly/2wBK0fx>. Accessed Aug. 22, 2017.

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