

## GUIDELINES FOR "OPTING OUT" OF MEDICARE

Effective January 1, 1998, a physician or practitioner may enter into a private contract with a beneficiary for furnished services for Medicare. As provided in section 4507 of the Balanced Budget Act of 1997, a private contract is a contract between a Medicare beneficiary and a physician or other practitioner who has opted out of Medicare for two years for **all** covered items and services he/she furnishes to Medicare beneficiaries. In a private contract, the Medicare beneficiary agrees to give up Medicare payment for services furnished by the physician or practitioner and to pay the physician or practitioner without regard to any limits that would otherwise apply to what the physician or practitioner could charge. If you are a physician or practitioner who wishes to "opt out" of Medicare, then you must first terminate your Medicare Part B participation agreement, then notify your Medicare patients of your intent to "opt out" of Medicare. Then you must file a copy of an affidavit with each carrier that has jurisdiction over the claim that a physician or practitioner would otherwise file with Medicare. (A sample affidavit is provided at the end of this document.) You must then enter into a private contract for rendering any covered services to a Medicare beneficiary, and this contract must be written and signed prior to rendering any covered service to a beneficiary. (A sample contract is provided at the end of this document.) Then you must establish procedures in your office to ensure that your staff never files a Medicare claim, and never provides information to a patient that will enable him to file a Medicare claim. The exception to this would be for emergency or urgent care, or for a covered service that Medicare would deem unnecessary. This exception should be handled with extreme caution. Below are a number of questions and answers pertaining to opting out of the Medicare program.

### **What has to be in a private contract and when must it be signed?**

The private contract must be signed by both the beneficiary and the physician or practitioner before services can be furnished under its terms. It must state plainly and unambiguously that by signing the private contract, the beneficiary or the beneficiary's legal representative agree to the following terms:

1. Gives up all Medicare coverage of, and payment for, services furnished by the "opt out" physician or practitioner.
2. Agrees not to bill Medicare or ask the physician or practitioner to bill Medicare.
3. Is liable for all charges of the physician or practitioner, without any limits that would otherwise be imposed by Medicare.
4. Acknowledges that Medigap will not pay towards the services and that other supplemental insurers may not pay either.
5. Acknowledges that he/she has the right to receive services from physicians and practitioners for whom Medicare coverage and payment would be available.

The contract must also indicate whether the physician or practitioner has been excluded from Medicare. A contract is not valid if it is entered into by a beneficiary or by a beneficiary's legal representative when the Medicare beneficiary is facing an emergency or urgent health situation.

### **Who can "opt out" of Medicare under this provision?**

Physicians and practitioners can "opt out" of Medicare. For purposes of this provision, the term "physician" is limited to doctors of medicine and doctors of osteopathy who are legally authorized to practice medicine and surgery by the state in which such function or action is performed. No other physicians may "opt out". For purposes of this provision, the term "practitioner" means any of the following to the extent that they are legally authorized to practice by the state and otherwise meet Medicare requirements: physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, clinical psychologist, or clinical social worker.

The "opt out" law does **not** define "physician" to include optometrists, chiropractors, podiatrists, dentists, and doctors of oral surgery. **Therefore, they may not "opt out"**. Physical therapists and occupational therapists in independent practice cannot "opt out".

### **Can physicians or practitioners who are suppliers of durable medical equipment (DME), independent diagnostic testing facilities, clinical laboratories, etc., "opt out" of Medicare for only these services?**

No. If a physician or practitioner chooses to "opt out" of Medicare, it means that he or she opts out for all covered items and services he/she furnishes, even if those items or services are covered under a different benefit. Physicians and practitioners cannot have private contracts that apply to some covered services they furnish, but not to others. If a physician or practitioner provides laboratory tests or durable medical equipment and chooses to "opt out" of Medicare, then he/she has opted out of Medicare for payment of lab services and DME as well as for professional services. If a physician who has opted out refers a beneficiary for medically necessary services, such as laboratory, DME or inpatient hospitalization, those services would be covered.

### **How can participating physicians and practitioners "opt out" of Medicare?**

Participating physicians and practitioners may "opt out" if they file an affidavit that meets the criteria and which is received by the carrier at least 30 days before the first day of the next calendar quarter showing an effective date of the first day in

that quarter. They may not provide services under private contracts with beneficiaries earlier than the effective date of the affidavit.

Non-participating physicians and practitioners may "opt out" at any time. The affidavit must be filed with all Medicare carriers to which he/she would submit claims, advising that he/she is opting out of Medicare. The affidavit must be filed within 10 days of entering into the first private contract with a Medicare beneficiary. The "opt out" affidavit is for a period of two years. It may be extended for two more years after the end of the first "opt out" period.

#### **What happens if a physician who is a member of a group practice opts out?**

A member of a group practice may enter into a private contract under section 4507 and "opt out" of Medicare without affecting the ability of the other members of the group practice to provide and bill for services they furnish to Medicare beneficiaries. No Medicare payment may be made to the group directly or through an organization paid on a capitated basis for services furnished by the physician or practitioner who has opted out.

#### **Can organizations that furnish physician or practitioner services "opt out"?**

No. Corporations, partnerships, or other organizations that bill and are paid by Medicare for the services of physicians or practitioners who are employees, partners or have other arrangements that meet the Medicare reassignment-of-benefits rules cannot "opt out" since they are neither physicians nor practitioners.

Physicians and practitioners who reassign benefits to organizations that participate in Medicare may not "opt out" because they are bound by the participation agreement signed by the organization that bills and is paid for their services. If a physician or practitioner has reassigned benefits to an organization that participates in Medicare and wants to "opt out", either the organization should terminate its participation agreement or the physician or practitioner should terminate the reassignment of Medicare benefits to the organization.

#### **Can a physician or practitioner have "private contracts" with some beneficiaries but not others?**

No. The physician or practitioner who chooses to "opt out" of Medicare may provide covered care to Medicare beneficiaries only through private agreements, regardless of who bills and is paid for the services.

To have a "private contract" with a beneficiary, the physician or practitioner has to "opt out" of Medicare and file an affidavit with all Medicare carriers to which he or she would submit claims, advising that he or she has opted out of Medicare. The affidavit must be filed within 10 days of entering into the first "private contract" with a Medicare beneficiary. Once the physician or practitioner has opted out, such physician or practitioner must enter into a private contract with each Medicare beneficiary to whom he or she furnishes covered services (even where Medicare payment would be on a capitated basis or where Medicare would pay an organization for the physician's or practitioner's services to the Medicare beneficiary), with the exception of a Medicare beneficiary needing emergency or urgent care.

Physicians who provide services to Medicare beneficiaries enrolled in the new Medical Savings Account (MSA) demonstration created by the Balanced Budget Act (BBA) of 1997 are not required to enter into a private contract with those beneficiaries and "opt out" of Medicare for two years under section 4507.

#### **What has to be in the "opt out" affidavit?**

To be a valid "opt out" affidavit, it must:

1. Provide that the physician or practitioner 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 date the affidavit is signed;
2. Provide that the physician or practitioner will not receive any Medicare payment for any items or services provided to Medicare beneficiaries;
3. Identify the physician or practitioner sufficiently that the carrier can ensure that no payment is made to the physician or practitioner during the "opt out" period. If the physician has already enrolled in Medicare, this would include the physician or practitioner's uniform provider identification number (UPIN) if one has been assigned. If the physician has not enrolled in Medicare, this must include the information necessary to be assigned a UPIN;
4. Be filed with all carriers who have jurisdiction over claims the physician or practitioner would otherwise file with Medicare and must be filed no later than 10 days after the first private contract to which the affidavit applies is entered into; and
5. Be in writing and be signed by the physician or practitioner.

#### **Where and when should the "opt out" affidavit be filed?**

The "opt out" affidavit must be filed with each carrier that has jurisdiction over the claims that the physician or practitioner would otherwise file with Medicare and must be filed within 10 days after the first private contract to which the affidavit applies is entered into.

In Florida, all affidavits must be mailed to the following address:

Medicare Registration  
P. O. Box 44021  
Jacksonville, FL 32231-4021

**How often can a physician or practitioner "opt out" or return to Medicare?**

Pursuant to the statute, once a physician or practitioner files an affidavit notifying the Medicare carrier that he or she has opted out of Medicare, he or she is out of Medicare for two years from the date the affidavit is signed. After those two years are over, a physician or practitioner could elect to return to Medicare or to "opt out" again.

**Can a physician or practitioner "opt out" for some carrier jurisdictions but not others?**

No. The "opt out" applies to all items or services the physician or practitioner furnishes to Medicare beneficiaries, regardless of the location where such item or service is furnished.

**What is the effective date of the "opt out" provision?**

A physician or practitioner may enter into a private contract with a beneficiary for services furnished at any time after January 1998. The physician or practitioner must submit the affidavit to all pertinent Medicare carriers within 10 days of the date the first private contract is signed by a Medicare beneficiary.

**Does the statute preclude physicians from treating Medicare beneficiaries if they treat private pay patients?**

No. Medicare does not preclude physicians from treating Medicare beneficiaries if they treat private pay patients, whether they are persons under age 65 or seniors who choose not to enroll in Part B.

**Do Medicare rules apply for services not covered by Medicare?**

If Medicare does not cover a service, Medicare rules, including "opt out" rules, do not apply to the furnishing of the non-covered service. For example, Medicare does not cover hearing aids; therefore, there are no limits on charges for hearing aids and beneficiaries pay completely out of their own pocket if they want hearing aids.

**Is a private contract needed for services not covered by Medicare?**

No. Since Medicare rules do not apply for services not covered by Medicare, a private contract is not needed. A private contract is needed only for services that are covered by Medicare and where Medicare may make payment if a claim were submitted.

A physician or practitioner may furnish a service that Medicare covers under some circumstances but which the physician anticipates would not be deemed "reasonable and necessary" by Medicare in the particular case (e.g., multiple nursing home visits, some concurrent care services, two mammograms within a twelve month period, etc.). If the beneficiary receives an Advanced Beneficiary Notice that the service may not be covered by Medicare and that the beneficiary will have to pay for the service if it is denied by Medicare, a private contract is not necessary to bill the beneficiary if the claim is denied.

**What rules apply to urgent or emergency treatment?**

The law precludes a physician or practitioner from having a beneficiary sign a private contract when the beneficiary is facing an urgent or emergency health care situation.

Where a physician or practitioner who has opted out of Medicare treats a beneficiary with whom he does not have a private contract in an emergency or urgent situation, the physician or practitioner may not charge the beneficiary more than the Medicare limiting charge for the service and must submit the claim to Medicare for the emergency or urgent care. Medicare payment may be made to the beneficiary for the Medicare covered services furnished to the beneficiary.

**Will Medicare make payment for services that are ordered by a physician or practitioner who has opted out of Medicare?**

Yes, provided that the "opt out" physician or practitioner ordering the service has acquired a Unique Provider Identification Number (UPIN).

**Clinical psychologists and clinical social workers are currently not recognized by and enrolled by Medicare unless they meet certain criteria specified by HCFA, some of which are voluntary. Are the requirements for opting out of Medicare different for these practitioners?**

No. A clinical psychologist or clinical social worker must meet the affidavit and private contracting rules to "opt out" of Medicare.

**What is the relationship between an Advanced Beneficiary Notice and a private contract?**

A physician or practitioner may furnish a service that Medicare covers under some circumstances but which the physician anticipates would not be deemed reasonable and necessary under Medicare program standards in the particular case (such cases are also referred to as medical necessity denials). If the beneficiary receives an Advanced Beneficiary Notice that the service may not be covered by Medicare and that the beneficiary will have to pay for the service if it is denied by Medicare, a private contract is not necessary to bill the beneficiary if the claim is denied.

**Are there any situations where a physician or practitioner who has not opted out of Medicare does not have to submit a claim for a covered service provided to a Medicare beneficiary?**

Yes. A physician who has not opted out of Medicare must submit a claim to Medicare for services that may be covered by Medicare unless the beneficiary, for reasons of his or her own, declines to authorize the physician or practitioner to submit a claim or to furnish confidential medical information to Medicare that is needed to execute a proper claim. Examples would be where the beneficiary does not want information about mental illness or HIV/AIDS to be disclosed to anyone. The balance billing limits applicable to the physician or practitioner would still apply. Moreover, if the beneficiary or their legal representative later decides to authorize the submission of a claim for the service and asks the physician or practitioner to submit the claim, the physician or practitioner must do so.

**How do the private contracting rules work when Medicare is the secondary payer?**

When Medicare is the secondary payer, and the physician has opted out of Medicare, the physician has agreed to treat Medicare beneficiaries only through private contract. The physician or practitioner must therefore have a private contract with the Medicare beneficiary, notwithstanding that Medicare is the secondary payer. Under this circumstance, no Medicare secondary payments will be made for items and services furnished by the physician or practitioner under the private contract.

**NOTE:** It is wise to keep a copy of all of the contracts and affidavits in case HCFA requests to see them. HCFA requires that the affidavits and contracts be re-executed for each "opt out" period.

## SAMPLE AFFIDAVIT FOR OPTING OUT OF MEDICARE

I, \_\_\_\_\_, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am a physician licensed to practice medicine in the state of \_\_\_\_\_. My address is at \_\_\_\_\_, my telephone number is \_\_\_\_\_, and my [national provider number (NIP) or billing number, if one has been assigned, uniform provider identification number (UPIN) if one has been assigned, or, if neither an NIP or UPIN has been assigned, my tax identification number (TIN)] is \_\_\_\_\_. I promise that, for a period of two years beginning on the date that this affidavit is signed (the "opt out" Period), I will be bound by the terms of both this affidavit and the private contracts that I enter into pursuant to this affidavit.
2. I have entered or intend to enter into a private contract with a patient who is a beneficiary of Medicare pursuant to Section 4507 of the Balanced Budget Act of 1997 for the provision of medical services covered by Medicare Part B. Regardless of any payment arrangements I may make, this affidavit applies to all Medicare covered items and services that I furnish to Medicare beneficiaries during the "opt out" period, except for emergency or urgent care services furnished to beneficiaries with whom I had not previously privately contracted. I will not ask a Medicare beneficiary who has not entered into a private contract and who requires emergency or urgent care services to enter into a private contract with respect to receiving such services, and I will comply with 42 C.F.R. § 405.440 for such services.
3. I hereby confirm that I will not submit, nor permit any entity acting on my behalf to submit, a claim to Medicare for any Medicare Part B item or service provided to any Medicare beneficiary during the "opt out" period, except for items or services provided in an emergency or urgent care situation for which I am required to submit a claim under Medicare on behalf of a Medicare Beneficiary, and I will provide Medicare covered services to Medicare beneficiaries only through private contracts that satisfy 42 C.F.R. § 405.415 for such services.
4. I hereby confirm that I will not receive any direct or indirect Medicare payment for Medicare Part B items or 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, during the "opt out" period, except for items or services provided in an emergency or urgent care situation. I acknowledge that during the "opt out" period, my services are not covered under Medicare Part B and that no Medicare Part B payment may be made to any entity for my services, directly or on a capitated basis, except for items or services provided in an emergency or urgent care situation.
5. A copy of this affidavit is being filed with [the name of each local Medicare carrier], the designated agent of the Secretary of the Department of Health and Human Services, no later than 10 days after the first contract to which this affidavit applies is entered into. [For participating physicians add: My Medicare Part B participation agreement terminates on the effective date of this affidavit.]

Executed on [date] by [physician name]  
[Physician signature]

## SAMPLE CONTRACT WITH BENEFICIARY

This agreement is between Dr. \_\_\_\_\_, whose principal place of business is \_\_\_\_\_, and patient \_\_\_\_\_, who resides at \_\_\_\_\_ and is a Medicare Part B beneficiary seeking services covered under Medicare Part B pursuant to Section 4507 of the Balanced Budget Act of 1997. The physician has informed patient that physician has opted out of the Medicare program effective on \_\_\_\_\_ for a period of at least two years, and is not excluded from participating in Medicare Part B under Sections 1128, 1156, or 1892 or any other section of the Social Security Act.

Physician agrees to provide the following medical services to the patient:  
[List Services Here]

In exchange for the services, the patient agrees to make payments to physician pursuant to the attached fee schedule. Patient also agrees, understands and expressly acknowledges the following:  
(Patient please initial each line)

\_\_\_\_ Patient agrees not to submit a claim (or to request the physician submit a claim) to the Medicare program with respect to the services, even if covered by Medicare Part B.

\_\_\_\_ Patient is not currently in an emergency or urgent health care situation.

\_\_\_\_ Patient acknowledges that neither Medicare's fee limitations nor any other Medicare reimbursement regulations apply to charges for the services.

\_\_\_\_ Patient acknowledges that Medigap plans will not provide payment or reimbursement for the services because payment is not made under the Medicare program, and other supplemental insurance plans may likewise deny reimbursement.

\_\_\_\_ Patient acknowledges that he/she has a right, as a Medicare beneficiary, to obtain Medicare covered items and services from physicians and practitioners who have not opted out of Medicare, and that the patient 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.

\_\_\_\_ Patient agrees to be responsible, whether through insurance or otherwise, to make payment in full for the services, and acknowledges that physician will not submit a Medicare claim for the services and that no Medicare reimbursement will be provided.

\_\_\_\_ Patient understands that Medicare payment will not be made for any items or services furnished by the physician that would have otherwise been covered by Medicare if there were no private contract and a proper Medicare claim were submitted.

\_\_\_\_ Patient acknowledges that a copy of this contract has been made available to him/her.

\_\_\_\_ Patient agrees to reimburse physician for any costs and reasonable attorney fees that result from violation of this agreement by the patient or his/her beneficiaries.

Executed on by (patient name) and (physician name).

(PATIENT SIGNATURE)

(PHYSICIAN SIGNATURE)