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Employee Benefits – Question of the Month

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Q: We're a small company with only 15 employees, and we offer our employees a basic PPO-style health plan. We pay 100 percent of the employee-only premium for our full-time employees. Our top salesperson is turning 65 next month and wants to continue working. We are happy to have her, but the owner has asked whether we can drop her from our group health plan since she is going to be enrolling Medicare?

A: The short answer is "probably not." There are two different laws to consider here: the Medicare Secondary Payer (MSP) law and the Age Discrimination in Employment Act (ADEA).

The MSP rules determine which coverage – the employer's group health plan or Medicare – is the primary payer when an employee has both. In general, Medicare is considered primary to the group health plan of an employer that has fewer than 20 employees but is secondary to those that have 20 or more employees. When Medicare is secondary (i.e., >20 employees), the MSP rules prohibit the employer from involuntarily terminating an employee's health coverage because he or she is enrolled in Medicare.

Assuming you've been under 20 employees for the past year or so, your plan would be considered secondary to Medicare. So, technically, the MSP rules would not prohibit you from terminating the employee's coverage if she enrolls in Medicare. Do not, however, assume that the employee enrolled in Medicare just because she turned 65. There's a lot of confusion about this, but she will only be automatically enrolled if she files a claim for Social Security retirement benefits. If she doesn't do that, and she doesn't otherwise enroll in Medicare, then you shouldn't terminate her group health coverage.

In addition, you have to consider whether terminating the employee's coverage would violate the ADEA. While most federal employment laws apply to companies that have at least 10 or 15 employees, the federal Age Discrimination in Employment Act (ADEA) applies regardless of how many employees you have. And, generally, it prohibits group health plans from excluding active employees (or their spouses) from coverage solely because they are Medicare beneficiaries.

There is an exception called the "equal benefit or equal cost" standard, but it is narrowly construed and difficult to meet. This is obviously not a simple issue, and we strongly recommend you consult your employment or benefits attorney before deciding how to proceed.

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