

## Everything You Need to Know About Opting Out of Medicare

Here's an inside look at this complicated process.

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Podiatrists now have the right to “opt-out” of Medicare. This stands as one of the great victories of the new millennium for the APMA. The significance of this provision, passed as part of the 2003 Medicare Reform Bill, was to put DPM's on parity with MD's and DO's, who have had this right since 1997.

While most DPM's will elect not to opt-out of Medicare, it is nevertheless important to understand what this provision means and how it is activated.

### What Opting Out Means

Opting-out means removing yourself from the Medicare system. This is far different from non-participating. Non-participating Medicare providers do not accept Medicare payments directly from the government. They simply charge Medicare patients, who in turn are reimbursed by the government. Non-participating providers are still subject to fee and coverage limitations. In addition, non-participating providers can still be audited.

When you opt-out, you can charge whatever fee you wish irrespective of whether a procedure is “covered” or not. Additionally, since you have entered into a private contract with the patient, you cannot be audited by Medicare.

So why wouldn't you want to opt-out. The fly in the ointment is the private contract you must enter into with your Medicare patients. This contract, among other things, informs your patients that you are no longer part of Medicare and therefore, neither they nor the provider will receive any government funds.

Since most patients are used to either 1) not paying for services (except for the deductible and co-insurance) or 2) Paying and being reimbursed, it is likely that you will lose a large percentage of your Medicare patients.

### On the Plus Side

For many providers, this loss of patients is no big deal. This is particularly true if either 1) you have a busy practice and derive higher income from non-Medicare patients 2) your reputation is such that Medicare patients are willing to forego reimbursement for superior podiatric services or 3) most of the services you provide are routine foot care and thus not eligible for reimbursement.

### The Two-Year Rule

It's important to note that opting out is an irreversible all-or-nothing two-year decision. The two-year period commences with the effective date of the affidavit you must file with CMS and your local Medicare carriers.

## Bureaucratic Complexity

Once you are fully aware of the implication of opting-out, you are faced with the complexities of getting this done. Unfortunately, there are no simple forms to accomplish this goal. We will lay out the general requirements as mandated by the USC (see Table 1), but this article should not be construed as legal advice. Because there are consequences for violating the provisions and because this procedure must be done Meticulously, we advise you seek the services of a healthcare attorney to oversee this process.

## Contract Requirements

As part of the opt-out process a contract must be entered into with every Medicare patient. According to [Steven M. Harris, JD](#), “if a physician fails to properly opt out of Medicare, then the private contracts the physician executed are null and void.” He lists the following technical requirements for the opt out patient contract:

Pursuant to federal regulations, the private contract must:

- Be in writing and in print sufficiently large to ensure that the beneficiary is able to read the contract.
- Clearly state whether the physician is excluded from Medicare.
- State that the beneficiary or his or her legal representative accepts full responsibility for payment of the physician's charge for all services furnished by the physician.
- State that the beneficiary or his or her legal representative understands that Medicare limits do not apply to what the physician or practitioner may charge.
- State that 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.
- State that the beneficiary or his or her legal representative understands that Medicare payment will not be made for any items or services furnished by the physician or practitioner that would have otherwise been covered by Medicare if there was no private contract and a proper Medicare claim had been submitted.
- State that the beneficiary or his or her legal representative enters into the contract with the knowledge that he or she has the right to obtain Medicare-covered items and services from physicians 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 who have not opted out.
- State the expected or known effective date and expected or known expiration date of the opt-out period.
- State that the beneficiary or his or her legal representative understands that Medigap plans do not, and that other supplemental plans may elect not to, make payments for items and services not paid for by Medicare.
- Be signed by the beneficiary or his or her legal representative and by the physician.

- Not be entered into by the beneficiary or by the beneficiary's legal representative during a time when the beneficiary requires emergency or urgent care services.
- Be provided (a photocopy is permissible) to the beneficiary or to his or her legal representative before items are furnished to the beneficiary under the terms of the contract.
- Be retained (original signatures of both parties required) by the doctor for the duration of the opt-out period.
- Be available to CMS on request.
- Be entered into for each opt-out period.

Also, both the private contracts and the physician's opt-out are null and void for the remainder of the opt-out period if the physician fails to remain in compliance with the conditions of the opt-out statute or rules.

#### Physician's Affidavit

The next major requirement of opting out is the requirement to complete and timely submit a physician's affidavit. To be valid this affidavit must be in writing, signed by the physician, and contain the physician's full name, address, telephone number, uniform provider identification number (if one has been assigned), or the physician's tax identification number.

The affidavit should state that during the opt-out period:

- Except for emergency or urgent care services, the physician will provide services to Medicare beneficiaries only through private contracts that meet specific criteria.
- The physician or his/her agent will not submit a claim to Medicare for any service furnished to a Medicare beneficiary.
- The physician understands that he/she may receive no direct or indirect Medicare payment for services furnished to Medicare beneficiaries with whom he/she has privately contracted.
- The physician acknowledges that his/her services are not covered under Medicare and that no Medicare payment may be made to any entity for these services, directly or on a capitated basis.
- The physician promises to be bound by the terms of both the affidavit and the private contracts into which he/she has entered.
- The physician recognizes that the terms of the affidavit apply to all Medicare-covered items and services furnished to Medicare beneficiaries by the physician during the opt-out period.
- The physician understands 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.

The physician's affidavit must be filed with all Medicare carriers no later than 10 days after the first private contract into which the affidavit applies is entered.

## Timing Considerations

Most DPM's are participating physicians in Medicare. CMS has set rather strict timing guidelines for this class of providers who wish to opt out. "To opt out of Medicare, a participating physician must first terminate his or her Medicare Part B participation agreement." CMS allows termination on the following quarterly basis: Jan. 1, Apr. 1, July 1, and Oct. 1. Note, however, that a participating physician must give his or her carrier 30-days' prior notice by sending in the opt-out affidavit with an effective date of the beginning of the next quarter. For example, the carrier must receive the notice from the physician by March 1 if the physician seeks to provide private contracting services beginning on April 1.

Non-participating providers, as well as those who have never enrolled are not bound by these timing rules.

## To Opt-Out or Not?

Before deciding to opt out, do your homework. Review your managed care agreement to determine whether private contracting will have any adverse consequences. For example, credentialing requirements of managed care plans should be reviewed to confirm that participation in Medicare is not required.

One idea suggests Kenneth Malkin, DPM, noted Medicare expert, is to switch to non-participating status before opting-out. "See how your patients react to having to lay out funds first," he cautions.

For other podiatrists, such as Lowell Weil, Sr., D.P.M. of Des Plaines, IL, the decision to opt-out was an easy one to make. "My practice is in a high socioeconomic area with patients who will pay for perceived/real quality and service. At the same time, I will not turn away someone who cannot afford my reasonable and customary fees. I will treat them the same way that I did 30 years ago when we could decide "who" to charge "what."

The process to opt-out is statutorily complex and must be followed meticulously. Failure to "dot your i's and cross your t's" in either your affidavit or private patient contracts can result in the voiding of the entire opt-out process. If this occurs, you could be faced with a bureaucratic paperwork nightmare. Imagine having to code and refund money to hundreds (or thousands) of patients! In addition, you could be subject to both civil and criminal prosecution.

While it is technically possible for providers to opt-out by themselves, it is wise for any practitioner considering this pathway to consult a healthcare attorney to oversee this process. This small investment will enable you to sleep better at night and will provide you with recourse if your opt-out status is ever challenged.

Editor's note: PM will keep you apprised as to the percentage of DPM's who elect to opt-out when these statistics become available. In addition, we will relate the experiences, both positive and negative of those who exercise this option.