



ATTORNEYS AT LAW

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Choosing an MSP Compliance Vendor: How and Who

FACT: This Article will provide complete clarity to the Medicare Compliance process and Medicare Set-Asides (MSAs). It will also name the unequivocal and undisputed best MSA vendor in the Medicare Compliance Industry, provide a consensus opinion on the best pizza place in New York City (it is “Ray’s” of course, but which one?), a cure for baldness, and a diet plan that is guaranteed to help someone lose 10 pounds without cutting carbs, calories, sugar or alcohol.

All kidding aside, the tongue-in-cheek opening for this article is intended to preface the fact that, in the area of Medicare compliance, there is an array of Medicare compliance service providers/vendors for insurance carriers, self-insured entities, and other statutorily defined primary payers to choose from. A number of them are excellent companies with dedicated professionals that make up the core of the Medicare compliance industry, but they are not one size fits all—nor are the needs of the companies that retain them. As a result, companies utilizing Medicare compliance services should prepare themselves to vet Medicare compliance vendors to find the right fit for the company’s Medicare Secondary Payer (MSP) policies and to limit the company’s MSP liability.

The extent of competition and choice in the Medicare compliance industry is a blessing and a curse. It is a blessing because the level of competition between vendors and services ensures that the Medicare compliance industry is ever-evolving and well informed (if not overly informed sometimes). Typically, any change in the laws or policies that govern compliance with the MSP statute, be it substantial or trivial, is brought to the forefront by the Medicare compliance industry as “Breaking News.”

For companies who are required to comply with the MSP, and that utilize Medicare compliance services, the immediacy of the “Breaking News” updates is a helpful guarantee that the company is always up-to-date and informed about the MSP compliance process. However, the number of Medicare compliance companies in existence, the variation in the menu of services offered by each of those companies, and the volume of information put out by the Medicare compliance industry can be a curse or, maybe more accurately, a point of confusion for the industry’s consumers.

SPOILER ALERT: There is an inherent simplicity to Medicare compliance. Medicare compliance is governed largely by one statute (and offshoots thereof), one set of regulations, published guidance from CMS, and a limited amount of case law. When it is all boiled down, each and every Medicare compliance issue comes down to two questions. Was the MSP triggered and, if yes, then what Medicare compliance measures must be taken to comply with the triggering event? An MSA? Medicare reporting? Conditional payment reimbursement (including parts A, B, C & D)? Maybe all of the above? The difficult and sometimes confusing part comes in the “How.” Namely how to comply with each of the compliance areas noted. The “How” is the proverbial devil in compliance details.

Personally, I have served in the role of a Medicare Set-Aside vendor and a Medicare Set-Aside attorney to multiple self-insured entities and national insurance carriers for approximately 16 years. In my best estimate, I have worked on somewhere between 10,000 to 12,000 Medicare compliance claims/issues. In other words, I am an old guy in the Medicare compliance industry. I have the gray hair, extended waistline, and MSA tales of yesteryear to prove it.

In my role as national Medicare counsel, I frequently troubleshoot issues involving Medicare Set-Asides and

Medicare Set-Aside vendors. The experience of working with a wide array of Medicare Set-Aside vendors and their products, and my own claim-related experience, has provided me with a unique experience and resulting insight into the MSA industry. Because of my background and experience, in recent years I have assisted a number of insurance carriers and self-insured entities with vetting their MSP/MSA vendors, including assistance with choosing which vendors to put on a panel, when to remove a vendor from a panel, and with investigating potential errors and omissions. So when a client, prospective client, or just someone that I am having a casual conversation with at a workers' compensation industry event asks what type of MSP/MSA vendor it should use or consider putting on panel, I try to pull from my experience and give a detailed and objective response. Most times that response starts with questions.

The remainder of this article will be dedicated to highlighting the different vendor types that I see in the Medicare compliance industry and some questions that entities should consider asking as part of an MSP/MSA vendor assessment. Hopefully, the takeaway will be a roadmap that companies can utilize to secure a vendor that will give them confidence that the "How" of Medicare compliance is being fully and appropriately addressed. (However, I doubt that it will solve the mystery of the best "Ray's" pizza, cure baldness, or provide a foolproof diet plan as promised at the outset.)

In my experience and research, the Medicare compliance industry is comprised of the following types of Medicare compliance companies/services:

- Medicare Compliance/MSA Service Companies – Medicare compliance/MSA services are typically the core business of these companies. These types of companies typically offer a full menu of Medicare compliance services, with some potential limitations on legal services.
- Legal-Based Medicare Compliance Services – Legal-based Medicare compliance services are typically housed in a law firm and are a defined "practice group" within the firm. Most legal-based services provide most of the services that Medicare Compliance Service companies provide; however, they are also able to act as counsel and to provide legal advice.
- Medical-Based Medicare Compliance Service – Most commonly these are companies that are owned/operated by nurses, life care planners, certified MSA specialists or other medical professionals.
- Analytics-Based MSP/MSA Providers – Analytics-based MSA services are the new (newer) kids on the block. Just as the title states, these products are more analytics and technology driven.
- In-house Services – In-house services are most commonly seen as an add-on to TPA services or a service that an insurance carrier provides in-house. Some in-house services also rely on the assistance of outside Medicare attorneys or other service providers for assistance with certain issues or claim types.
- Private Label MSA/MSP Services – Some MSA providers offer to "private label" MSAs for other companies. In the event of an unanticipated influx of work, or just as a standard practice, an MSA company may outsource their client's work to another MSA company who does the work-up on the referring template/under the name of the referring company.

Are any of the above noted services wholly better than another? It probably depends on who you ask. Do each have advantages and disadvantages for potential clients based upon each client's individual needs? Of course. As a result, when advising clients on what Medicare compliance company may be appropriate for them to use, I ask them to consider coming up with a list of questions specific to their needs as a client. The first question is usually what type of vendor service best fits their needs? Are they trending towards analytics-based services? Do they prefer to have lawyers or nurses working on their claims, or do they prefer to explore in-house options?

In asking that question, I remind the client to remember that the MSP/MSA vendors that they are considering should not have services or mandates that become the tail that wags the dog in the claims process. The service should conform to what is needed for legal compliance on behalf of the client with a federal statute (the MSP) and not what

is easiest or best for the vendor. The service should also become part of the claims process and not something that dominates or dictates the claims process.

When considering a vendor type, I also urge clients to think about how their choice in a vendor may impact the company's liability. As consumers of MSP/MSA services, companies should never lose sight of the fact that MSP liability stays with the entity that is statutorily defined as a primary payer. A vendor's liability for Medicare reporting fines, arguable MSA liability, and conditional payments really only extends to the amount of coverage available under the vendors E&O policy. Direct MSP liability from the Federal government will go to the statutorily defined payer (carrier, self-insured, etc.), claimant, or claimant's counsel depending on the area of compliance that was violated and government's policy on enforcement.

For example, say a Medicare reporting vendor commits errors in reporting on behalf of a client. The client, as a statutorily defined payer, and not the MSP/MSA vendor, faces fines of up to \$1,000 per day, per claim that is in non-compliance. To put that into perspective, if a Medicare reporting vendor reports even three claims incorrectly and those errors go uncorrected, the potential liability to the client could be north of \$1,000,000 over the course of a year. Multiply that example out by 30,300, or 3,000 claims, and the potential for direct fines to a company as a result of their vendor's negligence/errors could be astronomical. Similar examples of potential liability could also be provided for conditional payments and MSAs.

Given the potential liability to a company that could result through their MSA/MSP vendor's actions, it is imperative that MSA/MSP service consumers properly vet potential vendors. After the initial question of what type of vendor a company may want to retain (legal, medical, service company, etc.), the next set of questions that I recommend asking are specific to the vendor's services. These questions may include, but are certainly not limited to, the following:

- What type of services does the vendor perform? MSA, Medicare reporting, conditional payment identification and reimbursement, auditing, legal services, etc.?
- Do all of the vendor's services remain in-house? If not, where is the work being sent?
- What is the vendor's industry presence? Are they regional? National? Involved in industry groups, legislative efforts, etc.?
- Does the vendor have legal counsel on staff?
- Is the legal counsel able to provide legal advice to the client if the vendor is not a law firm? (Ethics opinions may be requested.)
- What type of technology is in use by the vendor that is industry standard, or unique to the vendor? Is the technology in use "owned" by the vendor, or is it contracted through another company?
- What is the vendor's industry reputation in the MSP/MSA industry? How do their peers and competitors perceive them?
- Can the vendor provide a copy of their E&O coverage and any other insurance required by the client at the client's required policy limits for the vendor?

For Medicare Set-Aide services, questions to consider asking a vendor may include:

- Who will be preparing the client's MSA proposal? A nurse, attorney, certified allocator, life care planner, other?
- Who will be reviewing the client's MSA proposal for medical and legal accuracy?
- Who is the point of contact for any issues, questions and/or concerns that may arise on a file? Is the point of contact experienced in preparing MSAs, handling workers' compensation claims, working with ancillary MSP/MSA vendors (rated age brokers, annuity brokers, defense counsel, CMS)?

- Is the work being assigned to the vendor guaranteed to stay in-house with the MSA/MSP vendor, or is it being sent to another vendor for handling?
- Does the MSA vendor have any vendor partners that must be used on a contractual basis, or are preferred by the MSA vendor? MSA vendors may include, but not be limited to, age rating companies, annuity companies, professional administration services, etc.
- What is the vendor's monthly or annual MSA/claim volume? Can the MSA vendor being retained handle the volume of MSAs that will be referred to them by your company?
- If you are a smaller account/client for the MSA vendor, how will your work be prioritized against the company's larger accounts?
- I also recommend that clients ask specific result-based questions such as the turnaround time from referral of an MSA file to a vendor for preparation and completion of an MSA, the average MSA submission approval time (in the event submission and approval is utilized by a client), the number of cases successfully closed utilizing the MSA vendor on behalf of the client, the typical approval success rate upon submission and the most common overages seen by the MSA vendor.
- Are the services being offered by the vendor "non-traditional" MSA services? These might include Evidence-Based Medicine (EBM) MSAs, "non-submit" MSAs, medical cost projections, analytics-based projections, insured MSAs, guaranteed MSAs, etc.
- If the services are non-traditional then what type of legal vetting has the vendor done for each service and what legal analysis can be provided to the client to document the limitations on MSP liability to the client for using the product? What legal advantages are there to utilizing the product?
- Finally and, of course, how does the vendor structure their fees? Flat fee (industry standard), hourly, bundled, etc.? As a consumer, it is recommended that when a company retains a vendor that the vendors have fee options that are in line with the client's expectations and needs.
- Okay there is a second "finally" question regarding fees. What is the value of the vendor's service in comparison to, or as a result of, their fees? Typically, an entity looking for an MSA vendor will fixate on price per file paid to the MSA vendor instead of the value derived from the MSA product produced by the vendor. For instance, a common story that you will hear in the MSA industry is that a vendor will take over a file from another vendor. The second vendor will cut hundreds of thousands of dollars out of the first vendor's MSA. Regardless of the second vendor's fee, the value on their fee is much higher than the first vendor's. When vetting potential MSA vendors, in addition to questions about fees, I also recommend questions about value. If a vendor is providing enough value to the client, then their value should far exceed their fees.

What should the answer to each of these questions be? That is really up to each individual vendor and company that is retaining the vendor. The real point is that the questions should be asked. I fully admit that a lot of the questions mentioned for a company to ask a vendor seem to be common sense, or evident to questions, that would be asked by a client to vendor. However, I also know from years of first-hand experience that most of the questions noted go unasked, initial answers are not probed further, substantiated by real life examples/client references.

Given the cost of MSA/MSP services and the potential exposure to liability that a faulty service may expose a company to, the benefit of a company finding an appropriate and lasting partner in the Medicare compliance process can be invaluable. Most of my longstanding clients have put me through the process of asking me detailed questions about my Medicare practice and MSA services. In turn, I ask them to continue to question me about my services, results, staffing, technology, etc. I ask them to hold my feet to the fire when it comes to their cases to make sure that their client needs are met, my services are evolving, and that we are assisting them with the appropriate amount of "How" for full MSP compliance.

The lawyer in me can also say that the answers provided by a vendor to a client at the outset of a relationship can also be strong evidence of a good company policy in regard to Medicare compliance and serve as part of a defense to any potential Medicare enforcement and litigation down the road. As someone who has been retained to assist in the defense or risk mitigation of companies involved in MSP litigation, I can speak to this point firsthand.

The MSP industry is diverse and full of excellent professionals who dedicate their careers to the practice of MSP compliance full time. The trick for companies who utilize MSP/MSA services is to perform diligence in finding the right company/firm in the industry that will provide them with a partner in the claims process and keep them out of trouble with the federal government. An ounce of prevention in this regard is truly worth a pound of cure.

One last closing comment—this article was written according to my own experiences and guidance that I have provided to clients on vendors and Medicare compliance issues. It was meant to be practical and as something to assist companies find partners in a diverse field of professionals. Comments, questions, or disagreements with my assessment and recommendations are welcome.

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