

How to Count Employees Determining Group Size Under the Medicare Secondary Payer Regulations

1. Who is an Employee?

An employee is an individual who works for an employer or an individual who, although not actually working for an employer, is receiving from an employer payments that are subject to FICA taxes or would be subject to FICA taxes, except that the employer is exempt from those taxes under the Internal Revenue Code (IRC). If the individual is listed on the payroll forms that the employer submits to the IRS, the individual is considered an employee. (This includes both full and part-time employees, not just those covered under the group health plan.)

Note: For purposes of determining the number of employees for employer size, the employees of affiliated employers should be counted.

2. We lease employees. Do we include them in our employee count?

Leased employees (as defined in §414(n)(2) of the IRC) are treated as employees of the recipient. The term "leased employee" means any person who is not an employee of the recipient of the services, but who provides services to the recipient if the:

- Services are provided based on an agreement between the recipient and any other person (i.e., the leasing organization).
- Person has performed such services for the recipient on a substantially full-time basis for at least one year. (In general, an employee who works 30 hours or more is considered to be full-time.); and
- Services are of a type historically performed in the business field of the recipient by employees. An example of a leased employee is an employee of a temporary agency who is assigned to work full-time for at least one year doing bookkeeping for an accounting firm.

3. We have a Board of Directors. Do we include them in our employee count?

Directors of corporations (i.e., persons serving on a Board of Directors of a corporation who are not officers of the corporation) are considered self-employed and not employees. Officers of a corporation would be considered employees. Directors who receive remuneration for serving on a board are considered to have current employment status. Remuneration may be of a monetary or nonmonetary nature. Benefits, including health benefits that a corporation provides to a board member, are considered remuneration if they are subject to FICA taxes under the IRC.

4. We belong to a multi-employer group health plan (GHP). How do we count our employees?

The term "multi-employer GHP" means a plan that is sponsored jointly or contributed to by two or more employers (sometimes called a multiple-employer plan) or by employers and unions (as under the Taft-Hartley law). Under the Medicare Secondary Payer rules, employers must count all employees. This includes, but is not limited to, all full- and part-time employees, not just those covered under the GHP.

In addition, there are additional requirements regarding when a GHP is primary to Medicare depending on if the covered individual is age 65 or older (working aged); under age 65 and eligible for Medicare due to a disability (Disability); or eligible for Medicare on the basis of end stage renal disease (ESRD).

Note: An employer that participates in a multi-employer plan should count individuals in current employment status as defined below.

5. Is our GHP primary to Medicare for our working-aged employees?

The working-aged Medicare Secondary Payer provisions apply only to GHPs of employers with 20 or more employees and to multi-employer and multiple-employer GHPs in which at least one employer employs 20 or more employees. Medicare is secondary for Medicare beneficiaries age 65 or older who are covered under the plan by virtue of their own current employment status with an employer or the current employment status of a spouse of any age.

This requirement is met if an employer has 20 or more full- and/or part-time employees for each working day in each of 20 or more calendar weeks in the current or preceding year. An employer is considered to have 20 or more employees for each working day of a particular week if the employer has at least 20 full- or part-time employees on its employment rolls each working day of that week. This condition is met as long as the total number of individuals on the employer's rolls add up to at least 20, regardless of the number of employees who work or who are expected to report for work on a particular day. Self-employed individuals participating in a GHP are not counted as employees for purposes of determining if the 20-or-more employee requirement is met. An individual is considered to be on the employment rolls even if the employee does not work on a particular day. An employer may not have different employment rolls for different days reflecting those scheduled.

Where an employer does not have 20 or more employees in the preceding year, it is required to offer its employees and spouses age 65 or over primary coverage, beginning with the point in time at which the employer has had 20 or more employees on each working day of 20 calendar weeks of the current year. The employer is then required to offer primary coverage for the remainder of that year and throughout the following year, even if the number of employees drops below 20 after the employer has met the requirement.

The 20-or-more employees requirement must be met at the time the individual receives the services for which Medicare benefits are claimed. If at that time the employer has met the 20-or-more employees requirement in the current year or in the preceding calendar year, the GHP is primary payer. An employer that meets this requirement must provide primary coverage even if fewer than 20 employees participate in the GHP.

Note: An employer that participates in a multi-employer plan should count individuals in current employment status as defined below. Also, it should meet the employer size threshold in the current and preceding years.

6. We offer our employees coverage through a multi-employer GHP. However, we have fewer than 20 employees. Is our GHP primary to Medicare for our working-aged employees?

A multi-employer GHP having at least one employer participating that has 20 or more employees, may **prospectively request an exception** for those employees (and their spouses) of identified employers with fewer than 20 employees from the working-aged provision. Once the exception is approved by Medicare (COBC), Medicare would then become the primary payer for such employees and their spouses, as long as the employer continues to meet the requirements for the exception.

Be advised that it is the employer's responsibility to provide written updates of any information that may affect the original exception request (updates should include identification of any employees not previously identified as well as information on any terminated coverage issues, etc.) to WPS Health Insurance as soon as any changes take place.

7. We offer our employees coverage through a GHP. Is our GHP primary to Medicare for our employees eligible for Medicare due to a disability?

Under the law, a large group health plan (LGHP) may not "take into account" that such an individual is eligible for, or receives, Medicare benefits based on disability. Medicare benefits are secondary to LGHP benefits for individuals under age 65 entitled to Medicare on the basis of disability and whose LGHP coverage is based on the individual's current employment status or the current employment status of a family member.

8. We offer our employees coverage through a multi-employer GHP. As an individual employer, we have fewer than 100 employees. Would our GHP be considered a LGHP for purposes of determining if our GHP is primary to Medicare for our employees eligible for Medicare due to a disability?

A LGHP means a GHP that covers employees of either:

- A single employer or employee organization that employed at least 100 full- or part-time employees on 50% or more of its regular business days during the previous calendar year; or
- Two or more employers or employee organizations, at least one of which employed at least 100 full- or part-time employees on 50% or more of its regular business days during the previous calendar year.

Medicare is secondary for all employees enrolled in the plan if a plan is a multi-employer plan, such as a union plan that covers employees of some small employers, and also employees of at least one employer that meets the 100-or-more employee requirement, including those that work for small employers. The exception discussed in

question six with respect to the working-aged provision does not apply to the Medicare as secondary for the disabled provision. An employer will be considered to employ 100 or more employees on a particular day if the employer has at least 100 full- or part-time employees on his/her employment rolls on that day. This condition is met as long as the total number of individuals on the employer's rolls add up to at least 100, regardless of the number of employees who work or who are expected to report for work on that day.

Self-employed individuals who participate in an LGHP are not counted as employees for purposes of determining if the 100-or-more employee requirement is met. If an employer does not meet the 100-or-more employees requirement in a particular year, the employer may offer employees coverage that is secondary to Medicare during the following year. If the employer meets the 100-or-more employee requirement at any time during the current year, the employer is required to provide employees with coverage that is primary to Medicare during the following year.

9. We offer our employees coverage through a GHP. Is our GHP primary to Medicare for our employees eligible for Medicare based on end-stage renal disease (ESRD)? Medicare benefits are secondary to benefits payable under a GHP for individuals eligible for or entitled to benefits on the basis of ESRD during a period of up to 30 months if Medicare was not the proper primary payer for the individual on the basis of age or disability at the time that this individual became eligible or entitled to Medicare on the basis of ESRD. The coordination period begins when the individual is eligible for Medicare based on ESRD. This provision applies to all Medicare covered items and services (not just treatment of ESRD) furnished to beneficiaries who are in the coordination period.

This provision applies regardless of the number of employees employed by the employer and regardless of whether the individual or other family member has current employment status. The ESRD provision applies to former as well as to current employees.

Definitions

Current Employment Status: An individual has current employment status if the individual is:

- Actively working as an employee, is the employer (including a self-employed person), or is associated with the employer in a business relationship; or
- The individual is not actively working and is receiving disability benefits from an employer for up to six months (the first six months of employer disability benefits are subject to FICA taxes); or not actively working but meets all of the following conditions:
 - Retains employment rights in the industry;
 - Has not had his/her employment terminated by the employer if the employer provides the coverage or has not had his/her membership in the employee organization terminated if the employee organization provides the coverage;
 - Is not receiving disability benefits from an employer for more than six months;
 - Is not receiving Social Security disability benefits; and
 - Has employment-based GHP coverage that is not COBRA continuation coverage
(See 29 U.S.C. 1161-1168).

A person age 65 or older and receiving disability payments from an employer is considered to have current employment status if such payments are subject to taxes under FICA. Employer disability payments are subject to FICA tax for the first six months of disability after the last calendar month in which the employee worked for that employer.

Employer: Employer means, in addition to individuals (including self-employed persons) and organizations engaged in a trade or business, other entities exempt from income tax, such as religious, charitable, or educational institutions.

FICA: The term "FICA" stands for the Federal Insurance Contributions Act, the law that imposes Social Security taxes on employers and employees under §21 of the Internal Revenue Code.

Group Health Plan (GHP): The term "GHP" means any arrangement of, or contributed to, one or more employers or employee organizations to provide health benefits or medical care directly or indirectly to current or former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. An arrangement by more than one employer is considered to be a single plan if it provides for common administration of the health benefits (e.g., by the employers directly or by a benefit administrator or by a multi-employer trust or by an insuring organization under a contract or contracts).

A plan that does not have any employees or former employees as enrollees (e.g., a plan for self-employed persons only) does not meet the definition of a GHP. The term "GHP" includes self-insured plans, plans of governmental entities (federal, state, and local, such as the Federal Employees Health Benefits Program), and employee organization plans. Examples of the latter are union plans and employee health and welfare funds.

Large Group Health Plan: A LGHP means a GHP that covers employees of either:

- A single employer or employee organization that employed at least 100 full- or part-time employees on 50% or more of its regular business days during the previous calendar year; or
- Two or more employers or employee organizations at least one of which employed at least 100 full-time or part-time employees on 50% or more of its regular business days during the previous calendar year.

Employers Responsibility

Please be advised that it is the employer's responsibility to provide written updates of any information that may affect the original employee count submitted to WPS Health Insurance. Updates should include identification of any employees not previously identified, as well as information on any terminated coverage issues, etc., as soon as any changes take place.

The above information was obtained from the CMS Medicare Secondary Payer Manual available at www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/msp105c01.pdf

The information provided above is not intended as legal advice, readers of this document should consult their own legal counsel when appropriate regarding questions they may have concerning the counting of employees, and the Medicare Secondary Payer Regulations.

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