

### **Important Note**

Under federal law, it is the employer's responsibility to annually inform its insurer or third-party administrator of proper employee counts for the purpose of determining payment priority between Medicare and another insurer. In the absence of employer-provided employee counts, CMS requires that the employer's group health plan coverage be considered **primary to Medicare**.

### **Background**

When an individual is covered by both Medicare and an employer's group health plan (GHP), Medicare secondary payer (MSP) rules specify that the employer's total size, not group health plan enrollment size, is a factor in determining whether Medicare benefits are primary or secondary. Employer size is a factor in MSP order of payment determinations when the covered individual is Medicare-entitled due to either age ("working aged") or disability.

### **Employer information — Who is the Employer?**

For MSP purposes, the employer is the legal entity that employs the employees. For example, the employer may be an individual, a partnership, or a corporation. In some situations, it may not be clear which corporation or individual is the employer for MSP purposes. In these cases, employers must use Internal Revenue Service aggregation rules provided in the Internal Revenue Code [IRC 26 U.S.C. Sections 52(a), 52(b), 414(n) (2)]. In general, these rules specify that single employers include

- all employees of all corporations that are members of the same controlled group of corporations, and
- all employees of trades or business (whether incorporated or not), e.g., employees of partnerships, LLCs, proprietorships that are under common control.

The Centers for Medicare & Medicaid Service's (CMS) *MSP Manual* provides additional guidance about aggregation for affiliated service groups and religious orders, as well as authoritative information about employer size and other MSP topics. The *MSP Manual* is available online at <http://www.cms.hhs.gov/Manuals/IOM/list.asp>.

### **Questions 1 and 2 — Employer Size from Your Federal Tax Return Information**

How many employees did all the entities listed on the tax return have on the payroll (whether full-time, part-time, seasonal, or partners) during the prior calendar year? It is important that you enter the total number of employees for all entities on the tax return, since this may determine whether or not Medicare will be the primary payer of claims.

### **Question 3 — Are you part of a multi-employer group health plan?**

Authoritative guidance for determining multiple employer group health plan participation can be found in the Code of Federal Regulations at 29 CFR § 2510.3-37

### **Questions 4 and 5 — Working Aged Rule & Employer Size**

Under the MSP "working aged" rule, Medicare is secondary to the employer's GHP coverage if the employer's size equals 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. This also applies to multi-employer and multiple employer group health plans in which at least one employer employs 20 or more employees.

- *Counting individuals for the "20-or-more" employer size*
  - Employees counted in the 20-or-more employer size include the total number of nationwide full-time employees, part-time employees, seasonal employees, and partners who work or who are expected to report for work on a particular day.
  - Those not counted in the 20-or-more employer size include retirees, COBRA qualified beneficiaries and individuals on other continuation options, and self-employed individuals who participate in the employer's group health plan.

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*The information in these instructions should not be construed as legal advice or as a legal opinion on any specific facts or circumstances, and is not intended to replace advice of independent legal counsel.*

- *Employer size increases to 20 or more during the year*

If the employer's size was below 20 during the preceding year, the employer's GHP coverage becomes primary as soon as the employer has had 20 or more employees on each working day of 20 calendar weeks of the current year. The 20 calendar weeks do not have to be consecutive. Then, the employer's GHP coverage is primary for the remainder of the year and during the following year.

For example, the employer's size meets the 20-or-more-employee requirement as of Oct. 1, 2006. The employer's GHP coverage becomes primary for services provided from Oct. 1, 2006 through December 31, 2007.

**Please note:** If you answer "No" to **Question 4** of the Annual MSP Employer Acknowledgement Form, you must promptly notify BCBSNM if your answer changes to "Yes" at any time.

- *Employer size drops below 20 during the year*

If the employer's size drops below 20 during the year, the employer's group health plan remains primary for the remainder of that year and throughout the following year, even though the employer's size has dropped below 20.

For example, the employer's size drops below 20 on July 15, 2007. The employer's group health plan coverage remains primary through December 31, 2008.

- *Individuals affected by the working aged rule.*

The "working aged rule" applies to individuals who are Medicare-entitled due to age (age-65 or older) and

- Are covered under their employer's GHP and have "current employment status" and the employer meets the "20-or-more" employer size requirements (above), or
- Are covered under their spouse's (of any age) employer's GHP and the spouse has current employment status and the employer meets the "20-or-more" employer size requirements (above).

### **Questions 6 and 7 — Disability Rule & Employer Size**

Under the MSP "disability" rule, Medicare benefits are secondary to an employer's large group health plan (LGHP) benefits when the employer size equals 100 or more full-time and/or part-time employees on 50 percent or more of the employer's business days during the previous calendar year. The business days do not have to be consecutive.

If the plan is a multi-employer plan, Medicare is the secondary payer for individuals enrolled in the plan as long as at least one of the employers meets the 100-or-more employee requirement.

- *Counting individuals for the "100-or-more" employer size*

- Employees counted in the 100-or-more employer size include the total number of nationwide full-time employees, part-time employees, seasonal employees, and partners who work or are expected to report for work on a particular day.
- Those not counted in the 100-or-more employer size include retirees, COBRA qualified beneficiaries and individuals on other continuation options, and self-employed individuals who participate in the employer's group health plan.

- *Employer size increases to 100 or more during the year*

If the employer's size meets the 100-or-more employee requirement at any time during the current year, the employer's group health plan coverage will be primary to Medicare during the following year.

For example, an employer meets the 100-or-more employee requirement on May 1, 2006. The employer's GHP coverage will be primary for services provided from January 1, 2007 through December 31, 2007

**Please note:** If you answer "No" to **Question 6** of the Annual MSP Employer Acknowledgement Form, you must promptly notify BCBSNM if your answer changes to "Yes" at the beginning of the calendar year.

- *Employer size drops below 100 during the year*

If the employer's size does not meet the 100-or-more requirement in a particular year, the employer's GHP coverage is secondary to Medicare during the following year.

For example, an employer's size drops below 100 on June 22, 2006. The employer's group health plan coverage will be secondary to Medicare for services provided from January 1, 2007 through December 31, 2007.

- *Individuals affected by the disability rule.*

The "disability rule" applies to individuals who are Medicare-entitled due to a Social Security Administration determination of disability and

- Are covered under their employer's GHP and have "current employment status" and the employer meets the "100-or-more" employer size requirements (above), or
- Are covered under their spouse's (of any age) employer's GHP and the spouse has current employment status and the employer meets the "100-or-more" employer size requirements (above).