

# Benefit Brief



SUBJECT: Counting Employees for Purposes of the Medicare Secondary Payer Rules

DATE: February 1, 2005

## BACKGROUND

Generally, the Medicare Secondary Payer rules prohibit a group health plan from "taking into account" an employee's or spouse's eligibility for Medicare. Taking Medicare eligibility into account includes not paying primary when required to under these rules. In most situations, Medicare should be considered secondary to any other group insurance plan in which an employee or spouse is enrolled. However, **these rules do not apply, and Medicare will become primary**, in the following situations:

- For employees or dependents eligible for Medicare based on their age: When the Employer has fewer than 20 employees for each working day in at least 21 weeks in either the current or preceding calendar year. This test must be run at the time the individual receives the services for which Medicare benefits are claimed.
- For employees or dependents eligible for Medicare based on a disability (not including end stage renal disease): When the Employer employed fewer than 100 employees on at least 51% of its regular business days during the previous calendar year. This test can be run once per year.
- For employees or dependents eligible for Medicare due to end-stage renal disease: Only after the first 30 months of the individual's eligibility for Medicare. This is true regardless of whether or not the individual is on COBRA or a retiree health plan.
- When the individual is covered by COBRA, except in the case of an individual with end-stage renal disease.
- When the individual is on a retiree health plan, except in the case of an individual with end-stage renal disease.
- When the individual chooses not to enroll in the health plan.

## DISCUSSION

### Calculating the Number of Employees

All common law employees of the employer are counted in determining the number of employees, regardless of the number of hours worked. The calculation should include employees who are receiving disability benefits (but only during the first 6 months that they are receiving benefits), employees who are temporarily laid off, who are on sick leave, or who are seasonal workers. Employees include anyone who is working for the employer and for whom the employer is paying FICA taxes (social security and Medicare taxes) for that employee (including situations where the employer would pay FICA taxes except that the employer is exempt from those taxes under the Internal Revenue Code).

There are also special rules for calculating the number of employees in situations where two companies have the same or similar owners. Whether to include the employees of both employers in the calculation will depend on the particular circumstances.

## Special Rules for Employers Participating in Multiemployer or Multiple Employer Plans

A **multi-employer plan** is a single (separate) plan that is established to comply with one or more **collective bargaining agreements**. In this type of plan, each participating employer contributes to the plan on behalf of its employees.

A **multiple employer plan** is a single plan maintained by more than one employer. The only multiple employer plan maintained by clients of Benecon is the Capital Region Insurance Trust.

### Age Based Medicare Entitlement Rules

If the employer participates in a multi-employer or multiple employer plan and at least one of the employers is subject to the Medicare Secondary Payer rules (has more than 20 employees as calculated above), then the entire plan and all employers will be subject to the rules. However, in this case, an employer can affirmatively opt out if the rule applied during the preceding calendar year and applies during the current calendar year. In order to opt out the plan must send a letter to the Center for Medicare and Medicaid Services (CMS).

### Disability Based Medicare Entitlement Rules

If the employer participates in a multi-employer or multiple employer plan and if any employer has more than 100 employees on at least 50% of its regular working days during the previous calendar year, then the plan will be considered a large group plan and will be subject to the Medicare Secondary Payer rules for disabled employees.

If you have any questions or would like more specific advice or information about these rules, please call Judy Griffith ([jgriffith@benecon.com](mailto:jgriffith@benecon.com)), Director of Compliance and Special Projects at The Benecon Group. This memo provides general information about the laws and regulations and should not be considered legal advice.