

EMPLOYEE COUNT ANALYSIS

Various state and federal laws have requirements based on employee counts. When counting employees, it's important to conduct a related employer analysis.

The information detailed below does not constitute legal advice and is intended only for informational purposes. Please reach out to your benefits counsel to discuss your individual circumstances.

1. RELATED EMPLOYER ANALYSIS requires counting all employees of all members of the employers in a controlled group of companies or affiliated service group to determine employee count. Below is a summary of those groups.

A controlled group may exist when two or more companies have any of the following:

- **A Parent-Subsidiary Relationship:** Exists when one or more chains of organizations are connected through ownership of a common parent company and 80% or more of the voting power or total value of each member of the group is owned by another member of the group, except for the common parent.
- **A Brother-Sister Relationship:** Exists when at least 50% of the voting power or total value of two or more organizations is owned by the same 5 or fewer persons taking into account only the ownership of each such organization that is identical for each other organization.
- **A Combination Relationship:** Exists when two or more organizations are members of a group that has common ownership which includes both parent-subsidiary relationships and brother-sister relationships, in which case all such organizations are considered the same controlled group of business.

An affiliated service group may exist when two or more organizations have a service relationship and/or ownership relationship with one another as satisfied by 1 of 3 tests (A-Org Test; B-Org Test; or Management Group Test).

More information about Controlled and Affiliated Service Groups can be found in the following IRS publication:
<https://www.irs.gov/pub/irs-tege/epchd704.pdf>

2. GROUP SIZE FOR A FULLY INSURED PLAN OFFERING UNDER OHIO LAW

Under Ohio law, a small, Ohio-based employer, for purposes of a group health plan and with respect to a calendar year and a plan year, is an employer who employed an average of at least two but no more than fifty eligible employees on business days during the preceding calendar year and who employs at least two employees on the first day of the plan year. With "Eligible Employee" being defined as an employee who works a normal work week of thirty or more hours. Eligible employee does not include a temporary or substitute employee, or a seasonal employee who works only part of the calendar year on the basis of natural or suitable times or circumstances. Ohio Rev. Code § 3924.01

3. CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT (COBRA) ANALYSIS

COBRA generally applies to all private sector group health plans as well as plans sponsored by state and local governments. To be subject to COBRA, employers need to have at least 20 employees on more than 50% of their typical business days in the previous calendar year. When counting employees for COBRA purposes, both full- and part-time employees are counted, taking into consideration the above Related Employer Analysis. Each part-time employee counts as a fraction of a full-time employee. The fraction should be equal to the number of hours worked divided by the number of hours required to be considered full-time. (For example, a company requires a full-time employee work 40 hours a week. A part-time employee who works 20 hours a week is considered $\frac{1}{2}$ of a full-time employee.) If you have fewer than 20 employees, you may be subject to state continuation of coverage requirements under ORC 3923.38 depending on whether your group health plan is subject to state regulation. These plans typically include Insured, MEWA plans, and self-funded public employers.

For more information, visit <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/an-employers-guide-to-group-health-continuation-coverage-under-cobra.pdf>

4. MEDICARE SECONDARY PAYER (MSP) ANALYSIS

MSP is a federal law that requires Medicare pay secondary to group health plans unless certain circumstances apply. These exceptions are based on group size and the scenarios are listed below. This is not intended to be a comprehensive guide to the MSP law. As an employer group sponsoring a group health plan, you are required to maintain documentation regarding your total employee counts during the year. **Please use the above Related Employer Analysis to report your employee count.**

If Medicare requests a review of MSP status, AultCare will reach out to obtain information regarding your group size during the period in question. Medicare can inquire about claims that are several years old, so it's imperative to maintain accurate records.

MSP SUMMARY RULES

Medicare Beneficiary	Employer Characteristics		Primary Payer	Secondary Payer
Age 65 or older (employee or spouse) and group health plan due to current employment of the Medicare beneficiary or the beneficiary's spouse	Employer with fewer than 20 employees		Medicare	Group Health Plan
	Employer with at least 20 employees full or part-time in at least 20 weeks of the preceding or current year (the 20 weeks do not have to be consecutive)		Group Health Plan	Medicare
Age 65 or older (employee or spouse) and group health plan not due to current employment (e.g. through a retiree health plan or COBRA) of the Medicare beneficiary or the beneficiary's spouse	All employers regardless of the number of employees		Medicare	Group Health Plan
Disabled under age 65 (employee, spouse, or dependent) and group health plan due to current employment of the Medicare beneficiary or the beneficiary's spouse or parent	During at least half the year of the employer's regular business days in the previous calendar year, the employer had:	Employer with fewer than 100 employees	Medicare	Group Health Plan
		Employer with at least 100 employees during at least half the year of the employer's regular business days in the previous calendar year	Group Health Plan	Medicare
Disabled under age 65 (employee, spouse, or dependent) and group health plan not due to current employment (e.g. through a retiree health plan or COBRA) of the Medicare beneficiary of the beneficiary's spouse or parent	All employers regardless of the number of employees		Medicare	Group Health Plan
ESRD patient (employee, spouse, or dependent) during the first 30 months of Medicare ESRD coverage	All employers regardless of the number of employees	If, when ESRD coverage begins, the employer plan is already primary payer according to MSP provisions	Group Health Plan (Active and COBRA coverage)	Medicare
		If, when ESRD coverage begins, the employer plan is correctly secondary payer because it is not subject to the applicable MSP provisions for working aged or for disability	Medicare	Group Health Plan (Active and COBRA coverage)
ESRD patient (employee, spouse, or dependent) regardless of age beginning with the 31st month of Medicare ESRD coverage	All employers regardless of the number of employees		Medicare, regardless of coverage for age 65 or disability, for the duration of ESRD coverage	Group Health Plan (Active and COBRA coverage)

More information about Medicare Secondary Payer rules can be found in the following publication:

https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/MSP_Fact_Sheet.pdf