

CLIENT ALERT

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Counting is easy, the hard part is who and how you count.

THRESHOLD OF 20 IS USED TO DETERMINE IF AN EMPLOYER MUST FOLLOW FEDERAL COBRA REGULATIONS AND WHETHER MEDICARE PARTS A AND B ARE THE PRIMARY OR SECONDARY COVERAGE FOR ACTIVE EMPLOYEES WHO ARE 65 AND OLDER.

THRESHOLD OF 50 IS USED TO DETERMINE IF AN EMPLOYER IS AN APPLICABLE LARGE EMPLOYER (ALE) UNDER THE ACA AND RESPONSIBLE FOR 1095/1094 REPORTING.

THRESHOLD OF 100 IS USED TO DETERMINE IF MEDICARE PARTS A AND B ARE THE PRIMARY OR SECONDARY COVERAGE FOR PARTICIPANTS WHO ARE ELIGIBLE FOR MEDICARE DUE TO A DISABILITY.

Under the federal COBRA and ALE determination, part time employees are counted as a fraction of an employee based on the hours they work compared to the hours for a full-time employee. Under the Medicare determination, part time employees are counted as one. You must know whether to base your head count off of this year, or last year or either. To further complicate matters, you must count employees of common controlled employers even if those employees are not part of the insurance policies.

COUNTING EMPLOYEES FOR MEDICARE PRIMARY/SECONDARY PAYER DETERMINATION

WHO PAYS FIRST FOR MEDICARE ELIGIBLE INDIVIDUALS DUE TO AGE

Simply put - Medicare is the Secondary Payer (MSP) for employers with 20 or more employees.

The Details:

- Medicare is secondary for employers with 20 or more employees for each working day for at least 20 calendar weeks in either the current or preceding calendar year.
- Medicare is primary if the employer has less than 20 employees for each working day for less than 20 calendar weeks in either the current or preceding calendar year.
- Weeks do not have to be consecutive.

- Where employers are subject to the MSP rules based on the current-year employee count for at least 20 calendar weeks, the MSP rules will apply immediately and through the subsequent calendar year.
- If an employer drops below 20 employees while subject to the MSP rules, it will remain subject to the MSP rules through at least the remainder of current calendar year.

WHO PAYS FIRST FOR MEDICARE ELIGIBLE INDIVIDUALS DUE TO DISABILITY

Simply put - Medicare is the Secondary Payer (MSP) for employers with 100 or more employees.

The Details:

- Medicare is secondary for employers with 100 or more employees on 50% or more of its business days in the previous calendar year.
- Medicare is primary for employers with less than 100 employees on 50% or more of its business days in the previous calendar year.

WHEN MEDICARE IS PRIMARY

- Participants must enroll in Medicare Parts A and B. Failure to do so may cause gaps in coverage and penalties in the future upon enrolling in Medicare.
- Once a carrier determines that they are the secondary payer to Medicare, the insurance carrier will deduct from benefit payments the amount Medicare would have paid as the primary payer for covered services for any Medicare eligible individual.

COUNTING EMPLOYEES and DETERMINING EMPLOYERS:

- Count both all full and part time employees as one.
- 411.106 Aggregation rules - The following rules apply in determining the number and size of employers, as required by the MSP provisions for the aged and disabled:
 - (a) All employers that are treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code (IRC) of 1986 (26 U.S.C. 52 (a) and (b)) are treated as a single employer.
 - (b) All employees of the members of an affiliated service group (as defined in section 414(m) of the IRC (26 U.S.C. 414m)) are treated as employed by a single employer.
 - (c) Leased employees (as defined in section 414(n)(2) of the IRC (26 U.S.C. 414(n)(2)) are treated as employees of the person for whom they perform services to the same extent as they are treated under section 414(n) of the IRC.

EXCEPTIONS:

End Stage Renal Disease and Employers participating in a multiple employer plan follow other guidelines not outlined here. Contact us for additional information.

Foreign companies with US employees must include the number of employees worldwide.

COUNTING EMPLOYEES FOR FEDERAL COBRA COMPLIANCE

Simply put – Employers with 20 or more employees must comply with Federal COBRA legislation.

The details:

- Employers with at least 20 employees on more than 50 percent of its typical business days in the previous calendar year.

COUNTING EMPLOYEES:

- Count both all full and part time employees.
 - Unlike your Medicare count, Part time Employees are counted as a fraction of a full-time employee, with the fraction equal to the number of hours worked divided by the hours an employee must work to be considered full time. (Usually based on a 40 hour work week)
- Count employees for all employers with common ownership or part of a controlled group pursuant to IRC sections 414(b), (c), (m), or (o).
- Do not count.
 - Self-employed individuals (within the meaning of section 401(c)(1));
 - Independent contractors (and their employees and independent contractors); and
 - Directors (in the case of a corporation).

STATE MINI COBRA OR STATE CONTINUATION PLANS FOR EMPLOYERS WHERE COBRA DOES NOT APPLY

At current count, 45 states, plus Washington DC have some version of health insurance continuation for employers with less than 20 employees or who may be exempt from COBRA Regulations. Locally, this includes Delaware, Maryland, New Jersey, New York, and Pennsylvania. In most circumstances, unlike COBRA, only Medical is covered under these programs.

COUNTING EMPLOYEES FOR ACA REPORTING COMPLIANCE

Simply put – Employers with 50 or more employees must comply with Federal ACA reporting.

The details: Employers with at least 50 employees on average in the prior calendar year are considered an Applicable Large Employer (ALE) subject to ACA reporting.

COUNTING EMPLOYEES:

- Count both all full and part time employees.
 - Full-time employees are those working 30 hours or more per week or at least 130 hours per month.
 - Combine Part time Employees' hours for the month then divide by 120 to get equivalent number of full-time employees. Do not count more than 120 hours per person.
 - Add full-time and equivalent full-time employees and if the total is not a round number, round down to obtain the monthly total.
- Seasonal workers may be excluded from the headcount. (See Section 4980H of IRC (c)(2)(B))
- Count employees for all employers with common ownership or part of a controlled group pursuant to IRC sections 414(b), (c), (m), or (o).

EMPLOYER AGGREGATION RULES

If the combined number of full-time employees and full-time equivalent employees for the group is large enough to meet the definition of an ALE, then each employer in the group (called an ALE member) is part of an ALE and is subject to the employer shared responsibility provisions, even if separately the employer would not be an ALE.

PENALTIES FOR NON-COMPLIANCE

It is critical that you are administering your plan correctly. Penalties for non-compliance can be costly.

COBRA Non-Compliance - The DOL can impose civil penalties of up to \$110 per day, per employee for each day of non-compliance and the IRS can impose an excise tax of \$100 per day, per participant (maximum of \$200/day/family). You may also be subject to costly lawsuits by employees or employee class action lawsuits.

Penalties for failure to provide ACA 1095/1094 forms to the IRS and to your employees – The IRS may impose penalties up to \$280 per form for failure to provide an accurate form to the employee and a separate \$280 per form penalty for failure to provide an accurate form to the IRS.

CHB COMMENT

Though we are your broker, we are not always aware of all your circumstances that must be taken into consideration when counting employees, such as how many part time employees you have or if there are employers under common control whose employees must be counted. It is important that you keep us advised of changes in your employee demographics. If you are not sure if multiple employers are to be aggregated under these headcounts, please discuss this with your accountant.

We will touch base with you over the next several weeks to ensure that we have your company size documented correctly.

Disclaimer: This Client Alert is provided as for informational purposes only and is not meant as legal or tax advice. If you would like more complete information, please do not hesitate to contact our office, your accountant, or your attorney.