Three categories of Medicare Secondary Payer (MSP) compliance to consider:

- Working Aged
- Disabled
- End-Stage Renal Disease (ESRD)

What group health plans are subject to MSP?

**Working Aged:**

- **Group Health Plans (GHPs) Subject to Medicare Secondary Payer Status (MSP) for the Working Aged**
  - The employer has 20 or more employees for each working day in each of 20 or more calendar weeks in the current OR preceding year, and no small employer exception election has been made.
    - The 20 weeks do not have to be consecutive.
    - Once an employer meets this threshold in any given year, the GHP is required to offer primary coverage to the working aged for the remainder of the year and throughout the following year, even if the number of employees subsequently drops below 20.

**Disabled:**

- **Large Group Health Plans (LGHPs) Subject to Medicare Secondary Payer Status (MSP) for the Disabled**
  - A single employer or employee organization that employed at least 100 full-time or part-time employees on 50 percent 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 percent or more of its regular business days during the previous calendar year.
  - It includes individual policies (including Medigap policies) purchased by or through an employer or former employer of the individual or family member.
End-Stage Renal Disease (ESRD):

- **GHPs subject to Medicare Secondary Payer Status for End Stage Renal Disease (ESRD)**
  - GHPs of all sizes
  - 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.

Who are the Working Aged?

- **Individuals who have GHP coverage as a result of:**
  - Their own current employment status with an employer that has 20 or more ees; or
  - The current employment status of a spouse of any age with such an employer

**Important Guidelines:**

- Medicare beneficiaries are free to reject employer plan coverage, in which case they retain Medicare as their primary coverage.
- When Medicare is primary payer, employers cannot offer such employees or their spouses secondary coverage for items and services covered by Medicare. Employers may not sponsor or contribute to individual Medigap or Medicare supplement policies for beneficiaries who have or whose spouse has current employment status.
- Health insurance plans for retirees or the spouses of retirees do not meet this condition and are not primary to Medicare.
- Employers are required to offer to their employees age 65 and over and to the age 65 and older spouses of employees of any age, the same coverage as they offer to employees and employee’s spouses under age 65. This equal benefit rule applies to coverage offered to all employees (full-time and part-time).

Who are the Disabled?

- **Individuals under age 65 entitled to Medicare on the basis of disability who are covered under a LGHP as a result of the individuals:**
  - Current employment status with an employer that has 100 or more employees; or current employment status of a family member of such employee
What employees are counted, and how?

- All classes of employees are counted regardless of whether the employees have enrolled in the GHP including:
  - Full-time employees (count as one)
  - Part-time employees (count as one - no fractional employees)
  - Officers of a corporation
  - Directors of a Board (in some cases - see definitions)
  - Leased employees of the entity (under IRC 414 (n) (2))
  - All employees of the members of an "affiliated service group" (under IRC 414 (m))
  - Do not count self-employed individuals

*See Rules Defining Employees Covered by GHPs and LGHPs for specific definitions

**Aggregation rules are applicable when determining employer size:**

For MSP purposes, the employer is the legal entity that employs the employees.

- Typically an individual, partnership or a corporation.

There are situations where it is not clear which corporation or individual is the employing entity for MSP purposes:

**Examples:**

When a corporation is owned or controlled by another corporation - Who is the employer?

When related individuals each have businesses and each claim to be a separate employer with either fewer than 20 or fewer than 100 employees it must be decided whether the individuals are separate employers or a single employer.

**Single Employer under Section 52 (a) or (b) of the IRC are defined as follows:**

- Employees of all corporations that are members of the same controlled group of corporations are treated as if employed by a single employer;
- All employees of trades or businesses (whether or not incorporated) e.g., employees of partnerships or proprietorships that are under common control, shall be treated as employed by a single employer.

In general, two or more individuals or corporations are considered to be separate employers under IRC 52 (a) or (b) if they file separate income tax returns. Two or more individuals are considered to be a single employer if they file a consolidated tax return.
Consequences of Non-Compliance

- **Beneficiary's Right to Take Legal Action Against A GHP**
  - Any claimant (including a beneficiary, provider, physician, or supplier) has the right to take legal action against, and to collect double damages from a GHP, that fails to pay primary benefits for services covered by the GHP.

- **If CMS gives a Plan a Determination of Non-Conformance**
  - Recovery of dollars paid incorrectly on claims
  - Double damages
  - Excise taxes

Rules Defining Employees Covered by GHPs and LGHPs

- **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 6 months (the first 6 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 their 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 6 months;
  - Is not receiving Social Security disability benefits; and
  - Has employment-based GHP coverage that is not COBRA continuation coverage.

A person aged 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.
EXAMPLE: Adam Green stopped working because of disability in December 1999 at age 66. His employer began paying him disability payments January 2000. Since disability payments are taxed under FICA for 6 months after the last month in which the employee worked, Medicare is the secondary payer through June 2000. Beginning with July 2000, Medicare becomes the primary payer as the disability payments are no longer considered wages under FICA.

- **Retain Employment Rights**

Persons who retain employment rights include but are not limited to:

- Those who are furloughed, temporarily laid off, or who are on sick leave;
- Teachers and seasonal workers who normally do not work throughout the year;
- Those who have health coverage that extends beyond or between active employment periods (e.g., based on an “hours bank” arrangement). (Active union members in certain trades and industries (e.g., construction) often have “hours bank” coverage); and
- Those who take an employer-approved temporary leave of absence for any reason. Temporary leaves of absence include, but are not limited to, periods when an individual qualifies for short-term or long-term medical disability.

- **Coverage by Virtue of Current Employment Status**

An individual has coverage as a result of current employment status with an employer if the individual has:

- GHP or LGHP coverage based on employment, including coverage based on a certain number of hours worked for that employer or a certain level of commissions earned from work for that employer at any time; and
- Current employment status with that employer, as defined in first section above.

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**Important Definitions**

**Affiliated Service Groups** - All employees of the members of an affiliated service group (as defined in Section 414(m) of the IRC) are treated as employed by a single employer.

**Directors of corporations** - (i.e., persons serving on a Board of Directors of a corporation who are not officers of the corporation) are self-employed. (Officers of a corporation are 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.

Directors who receive no remuneration for serving on the Board (unpaid directors) are not considered to have current employment status. However, remuneration may consist of deferred compensation (i.e., amounts...
earned but not payable until some future date usually when the individual reaches age 70 and is no longer subject to the Social Security

**Employee** - An individual who is working 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).

**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 1 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.

**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, and educational institutions. Included are the governments of the United States, the individual States, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the District of Columbia, and foreign governments.

**Entitled** - An eligible individual becomes entitled to Medicare by filing the appropriate application. Upon approval of the application, the individual is entitled. It may also be necessary to enroll for certain services in order to get them.

**Family Member** - Family member means a person enrolled in a GHP based on another person's enrollment. Family members may include, but are not limited to, a spouse (including a divorced or common law spouse); a natural, adopted, or foster child; a stepchild; a parent; or a sibling.

**GHP (Group Health Plan)** - The term "GHP" means any arrangement of, or contributed to by, 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 and Medicare is not secondary to it. Thus, if an insurance company establishes a plan solely for its self-employed insurance agents, other than insurance agents, the plan is not considered a GHP. However, if the plan includes insurance agents or other employees or former employees, it is considered 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. Employee-pay-all plans are also included (i.e., GHPs which are under the auspices of one or more employers or employee organizations but which do not receive any contribution from the employer). Individual policies (including Medigap policies) purchased by or through an employee organization, employer or former employer of the individual or family member of the individual are considered employer offered GHPs. However, coverage under the TRICARE, formerly known as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) is not considered to meet the definition of a GHP. It is secondary to Medicare since the law makes Medicare primary to TRICARE.

Any health plan (including a union plan) in which a beneficiary is enrolled because his/her employment or a family member’s employment meets this definition.

**LGHP (Large Group Health Plan)** - LGHP means a GHP that covers employees of either:

A single employer or employee organization that employed at least 100 full-time or part-time employees on 50 percent 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 percent or more of its regular business days during the previous calendar year.

It includes individual policies (including Medigap policies) purchased by or through an employer or former employer of the individual or family member.

**Multi-employer Group Health Plan** - The term "multi-employer group health plan" 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).

**Primary Payer** - When used in the context in which Medicare is the secondary payer, any entity that is or was required or responsible to make payment with respect to an item or service (or any portion thereof) under a primary plan. These entities include, but are not limited to, insurers or self-insurers, third party administrators, and all employers that sponsor or contribute to group health plans or large group health plans.

**Primary Plan** - When used in the context in which Medicare is the secondary payer, a group health plan or large group health plan, a workers’ compensation law or plan, an automobile or liability insurance policy or
plan (including a self-insured plan), or no-fault insurance.

**Secondary** – The term "secondary", when used with respect to Medicare payment, means that Medicare is the residual payer to all plans that are primary plans with respect to services provided to a Medicare beneficiary.

**Self-Employed Person** - An individual is considered to be self-employed during a particular tax year only if the individual's self-employment income, as determined by the IRS, was at least equal to the amount specified in §211(b)(2) of the Act, which defines self-employment income for Social Security purposes.

**Working Aged** – 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 provision applies to group health plans (GHPs) of employers and employee organizations, including multi-employer and multiple employer plans which have at least one participating employer that employs 20 or more employees.