SUGGESTED MODEL PROCEDURES FOR MULTI-EMPLOYER/MULTIPLE EMPLOYER (MULTI-EMPLOYER) GROUP HEALTH PLAN (GHP) SMALL EMPLOYER EXCEPTION ISSUES

The working aged provisions of the Medicare secondary payer (MSP) statute and implementing regulations are intended to make Medicare a secondary rather than a primary payer of health benefits for beneficiaries age 65 and over who have GHP coverage based on their own or a spouse's current employment status. This is referred to as the working aged provision.

The term GHP is to be construed broadly to include associations and any other arrangement made by one or more employers to provide health care directly, or through other methods such as insurance, that is contributed to or sponsored by the employers, provides for common administration, and provides substantially similar benefit options. For the purpose of requesting the small employer exception, the term multi-employer GHP shall mean any trust, plan, association or any other arrangement made by one or more employers to contribute, sponsor or directly provide health benefits. However, the GHP can, by agreement or otherwise, delegate the responsibility for requesting the small employer exception to the insurer, or the insurer may condition its insurance contracts on the GHP electing the small employer exception where appropriate.

Note: All employers, GHPs, insurers, third party administrators (TPAs), and other plan sponsors must be aware that the small employer exception applies only to the working aged provision. The provisions governing Medicare as a secondary payer for the disabled apply only to large GHPs (LGHPs) that cover employees of an employer with 100 or more employees. All employers, regardless of size, which participate in a multi- employer plan must comply with the disabled provision if any participating employer has at least 100 employees. It should also be noted that MSP provisions for individuals with End Stage Renal Disease (ESRD) apply to GHPs of any size. Thus, the law provides no exception from the MSP disability or ESRD provisions for small employers in a multi-employer plan.

Outlined below are selected statutory and regulatory cites which govern the Medicare as secondary payer program. This is not intended as an exhaustive list, but only as a guide to the most often cited MSP provisions relating to GHPs.

In addition to the MSP statute and regulations, guidance is published by CMS in the Internet Only Manual (IOM), Pub. 100-05, and on the Coordination of Benefits section of the CMS.Gov website (see below for links). For clarification purposes, CMS is providing additional procedures which employers, insurers, TPAs, GHPs, other plan sponsors, or any other entity involved in the administration or provision of health benefits for an employer may elect to follow in determining employer size for the purpose of complying with the MSP statute and regulations as they apply to small employers, multi-employer plan provisions and the small employer exception election.

I. STATUTORY PROVISIONS GOVERNING THE WORKING AGED, DISABLED, AND ESRD UNDER GHPs

A. 42 U.S.C. 1395y(b)(1)(A)(i) (§1862(b)(1)(A)(i) of the Social Security Act (the Act))states in general the following:

1. A GHP may not take into account that an individual or the individual's spouse who is covered under the plan by virtue of the individual's current employment status is entitled to Medicare benefits; and

2. A GHP shall provide any individual age 65 or older and the individual's spouse age 65 or older who has current employment status with an employer shall be entitled to the same benefits under the plan and under the same conditions as an individual or spouse under age 65.

B. 42 U.S.C. 1395y(b)(1)(A)(ii) (§1862(b)(1)(A)(ii) of the Act) governs the exclusion of a GHP of a small employer and states the following:

1. The statutory provisions which govern the working aged under GHPs do not apply to the GHP unless the plan is a plan of or contributed to by an employer that has 20 or more employees for each working day in each of 20 or more calendar weeks in the current calendar year or the preceding calendar year.

   Note: Counting member contracts or insured lives does NOT constitute a proper employee count by an employer, insurer or any other entity. Broadly speaking, an "employee" is anyone carried on the payroll, whether currently working or not.

C. 42 U.S.C. 1395y(b)(1)(A)(iii) (§1862(b)(1)(A)(iii) of the Act) governs the exception for small employers in a multi-employer GHP and states the following:

1. The statutory provisions governing the working aged under a GHP do not apply in the following situation:

   a. An individual is enrolled in a multi-employer GHP and the individual's coverage is by virtue of current employment status with an employer that does not have 20 or more individuals in current employment status for each working day in each of 20 or more calendar weeks in the current calendar year and the preceding calendar year; **and**

   b. The plan elects to have individual employees of specifically identified employers receive Medicare as their primary coverage.

Note: This is not a unilateral election by the plan or the employer. A request for the small employer exception for the working aged must be submitted to CMS and approved by CMS. The exception is prospective only. See section IV on procedures.)

D. 42 U.S.C. 1395y(b)(1)(B)(i) (§1862(b)(1)(B)(i) of the Act) states in general the following:

1. An LGHP, defined as a plan that covers employees of an employer with 100 or more employees, may not take into account that an individual or the individual's spouse (or other family member) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to Medicare benefits.

   Note: All employers, regardless of size, which participate in a multi-employer GHP must comply with the disabled provision if any participating employer has at least 100 employees. That is, the law does not provide an exception from the disabled provision for small employers in a multi-employer plan.

E. The ESRD provision can be found at 42 U.S.C. 1395y(b)(1)(C) (§1862 (b)(1)(C) of the Act).

Note: All employers, regardless of size, must comply with the ESRD provisions. That is, the law does not provide an exception from the ESRD provision for small employers in a multi-employer plan.

II. REGULATORY PROVISIONS GOVERNING THE WORKING AGED, DISABLED AND ESRD UNDER GHPs

A. General GHP Provisions

1. 42 C.F.R. §§ 411.100 - 130

B. Special Rules: Individuals Eligible or Entitled to Medicare on the Basis of ESRD, Who Are Also Covered Under a GHP

1. 42 C.F.R. §§ 411.160 -165

C. Special Rules: Aged Beneficiaries and Spouses Who Are Also Covered Under a GHP

1. 42 C.F.R. §§ 411.170-175

D. Special Rules: Disabled Beneficiaries Who Are Also Covered Under LGHPs

1. 42 C.F.R. §§ 411.200 - 206

III. MSP RELATED INFORMATION COVERED ON THE CMS.GOV WEBSITE

A. See the Internet Only Manuals; MSP section at CMS.GOV: http://www.cms.hhs.gov/Manuals/IOM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS019017

B. See the Coordination of Benefits section at CMS.GOV:

http://www.cms.hhs.gov/COBGeneralInformation/

1. Small Employer Exception Election Information

http://www.cms.hhs.gov/EmployerServices/05_smallemployerexception.asp

2. ESRD Information

http://www.cms.hhs.gov/employerservices/04_endstagerenaldisease.asp

IV. ADDITIONAL SUGGESTED PROCEDURES RELATING TO EMPLOYEE COUNTS NECESSARY TO DETERMINE WHETHER MEDICARE IS PRIMARY OR SECONDARY TO MEDICARE IN GHP SITUATIONS

It is the responsibility of the GHP to inform its insurer/TPA of proper employee counts for the purpose of determining payment priority between Medicare and another insurer. However, it is the insurer's/TPA's responsibility to determine proper payment priority.

A. Employee count information is a critical element in determining whether Medicare is a primary or secondary payer for individuals and/or their spouses (or family members, as applicable) in the following situations:

1. Where an entity is a small employer (19 or fewer employees) it is generally excluded from the MSP provisions for the **working aged.**

2. Where a small employer is a participant in a multi-employer GHP with at least one participant with 20 or more employees, it is generally governed by the MSP provisions for the **working aged.**

3. Where a small employer that is a participant in a multi-employer GHP with at least one participant with 20 or more employees, it is eligible for the small employer exception offered to employers of the **working aged.**

4. Where a small employer is a participant in a multi-employer GHP with at least one participant with 100 or more employees, it is governed by the MSP provisions for the **disabled.**

5. Where an employer contributes to or sponsors a GHP and the employer has more than 100 employees, it is governed by the MSP provisions for the **disabled.**

Note: Employer size is irrelevant for MSP ESRD provisions. The critical issue is whether or not the applicable coordination of benefits period has expired.

B. Employee Count Information Collection: To facilitate proper employee counts for purposes of determining whether Medicare is a primary or secondary payer, an employer, insurer, TPA, plan, other plan sponsor or any other entity involved in the administration or provision of health benefits for an employer should, at a minimum, do the following:

1. Employee counts:

   a. Review employee counting procedures (whether written or historical practice) and determine whether you are correctly counting employees for purpose of complying with the Medicare secondary payer provisions. **You may not use insured lives or health benefits contract totals for a particular employer to determine employee count.** An employee count must comply with the provisions of 42 C.F.R. §§ 411.170 and 411.172.

   b. Perform employee counts on your employer clients (both those that contract directly for insurance and those that are insured through an association or other multi-employer plan) **with 19 or fewer employees** on not less than an annual basis.

      Perform employee counts on your employer clients (both those that contract directly for insurance and those that are insured through an association or other multi-employer plan) who you have acknowledged have **20 to 99 employees,** on not less than an annual basis, unless your policies,

      - Do not offer coverage to any person other than the employee and his/her legal spouse; or

- Do offer coverage to someone other than the employee and his/her legal spouse but your payment system is set to always pay primary for that person.

The employee count could be obtained in any manner which you deem effective, including but not limited to:

- Require the employer to fill out a questionnaire.

- Require the employer to forward a listing of all persons it employs. The count must not merely identify employees on a particular date, but must provide sufficient information to determine if the employer had: (1) 20 or more employees for 20 weeks in the current or preceding calendar year; and (2) 100 or more employees on 50 percent or more of business days in the preceding calendar year.

c. In the event the employer fails to respond, reasonable follow-up efforts will be made. In the absence of employer-provided employee counts consistent with these suggestions, the GHP should consider itself primary to Medicare.

d. Employee counts should be updated when any of the following occurs:

- Re-enrollment of GHP enrollees; or

- Notification of a new GHP enrollee; or

- It has been 12 months since the last employee count was performed.

e. Retain employer counts in a database by employer and calendar year.

2. Reminder -- The small employer exception does not apply to persons entitled to Medicare based on disability or eligible or entitled to Medicare on the basis of ESRD.

C. Once a review of employee counts is completed, determine whether employers are participants in a multi-employer plan through which an employer obtains health insurance for employees and their spouses (or other eligible family members, as applicable) and others. A multi-employer GHP includes, but is not limited to any type of association through which an employer provides health benefits to its employees.

1. For purposes of determining primary or secondary payment for the working aged an employer with 19 or fewer employees that is a participant in a multi-employer GHP with at least one employer who has 20 or more employees is a primary payer of medical items and services unless the **small employer exception** is elected (that is, both requested and granted); and

2. For purposes of determining primary or secondary payment for the disabled an employer with 99 or fewer employees that is a participant in a multi-employer GHP that has at least one employer with 100 or more employees is a primary payer of medical items and services.

3. For purposes of determining primary or secondary payment for individuals eligible or entitled based upon ESRD, employer size is not relevant. The GHP is primary during the applicable coordination of benefits period.

D. Exception for Small Employers in a Multi-Employer GHP:

1. For the purpose of requesting the small employer exception, the term multi-employer GHP shall mean any trust, plan, association or any other arrangement made by one or more employers to offer, contribute to, sponsor or directly provide health benefits.

2. It is the responsibility of the multi-employer GHP to request the small employer exception. However, the GHP may designate, by agreement or otherwise, another entity to make the exception election on behalf of its members or clients. This may include an insurer, third party administrator, plan sponsor or any other entity involved in the administration or provision of health benefits for an employer.

3. Any of the above noted entities that has a member or client with at least one employer with twenty (20) or more employees may <u>prospectively</u> request an exception for identified employers with fewer than twenty (20) employees from the working aged provision. The GHPs (or their designated entity) may request that Medicare approve the GHPs election that Medicare be the primary payer for services provided to aged Medicare beneficiaries covered through qualified employers participating in the plan that have fewer than twenty (20) employees. Such members and their aged spouses are not subject to the working aged provision once an exception has been granted as long as the employer continues to meet the requirements for the exception.

5. The multi-employer GHP must notify its health benefits insurer or TPA and the working aged employees affected if it successfully elects the small employer exception for its working aged employees.

6. The procedures for electing the small employer exception are found at

http://www.cms.hhs.gov/EmployerServices/05_smallemployerexception.asp

E. Discovery of a Mistaken Primary Payment by Medicare: An employer, insurer, TPA, GHP, other plan sponsor or any other entity involved in the administration or provision of health benefits for an employer may discover that it has made a determination based on an inaccurate employee count (or otherwise) that Medicare is a primary payer. In order to properly notify and refund Medicare the improper payments, the following should be done:

1. Notify the Coordination of Benefits Contractor. See procedures outlined at

http://www.cms.hhs.gov/EmployerServices/05_smallemployerexception.asp.

2. Comply with the regulation at 42 C.F.R. § 411.25 by notifying CMS.

3. Refund Medicare's mistaken payment amount to the Medicare contractor that paid the claim.