

## Counting Employees Doesn't Always Add Up

### *12 Counting Methods Employers Must Know When Sponsoring a Health Plan*

Employee counts are used to determine what laws, rules, fees and penalties apply to a health plan and/or the employer sponsor. But the methods for counting employees are as varied as the laws that affect them. This creates confusion and frustration among employers and can significantly hinder their compliance efforts.

To make sense out of all this, we have put together a synopsis of twelve counting methods that employers must utilize to properly administer their health plans.

In addition, the last slide includes a link to a pdf that summarizes these counting methods in a convenient, easy-to-follow chart.<sup>1</sup>

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## Counting Method 1: Employers with at least 15 employees

### Law or Compliance Requirement Applied:

#### *Title VII of the Civil Rights Act, as Amended by the Pregnancy Discrimination Act (PDA)*

Employers may not consider a person's race, color, sex (including sexual orientation), national origin, religion or pregnancy in determining eligibility for, amount of, or charges for employee benefits. Denying coverage for a condition or treatment that disproportionately affects members of a protected group is also considered a violation of Title VII.

#### *Americans with Disabilities Act (ADA)*

An employer may not deny an individual with a disability equal access to insurance, or require such an individual to have terms and conditions of insurance different than those of employees without disabilities. The ADA also applies to wellness and disease management programs.

### Who to Count:

Employees in the current or preceding calendar year, including employees of affiliated employers that are part of an “integrated enterprise<sup>2</sup>”. Exclude individuals who are partners, officers, members of boards of directors, or major shareholders unless they are under the employer’s control. For example, a CEO who has no supervisor would not be counted; a senior vice-president who reports to the CEO probably would be counted.

### How to Count:

Count each full-time and part-time employee on the payroll<sup>3</sup> in each week as 1. If an employer has 15 or more employees in 20 or more weeks the current or preceding calendar year, it is covered<sup>4</sup>.

### Consequences of Noncompliance:

The EEOC may bring an action in court and individuals may file private lawsuits to correct violations and obtain appropriate legal or equitable relief (including attorney’s fees and other costs).

## Counting Method 2: Employers with at least 20 employees

### Law or Compliance Requirement Applied:

#### *Genetic Information Nondisclosure Act (GINA)*

Group health plans may not discriminate against individuals based on genetic information and may not use this information in underwriting or determining premiums or contributions. It also restricts questions that can be asked on a Health Risk Assessment (HRA) if an incentive is offered for its completion.

#### *Age Discrimination in Employment Act (ADEA)*

Benefits provided to older workers (40 years and older) must be the same as those provided to younger workers in all respects, including payment options, types of benefits and amount of benefits (although certain exceptions may apply).

### Who to Count:

Employees in the current or preceding calendar year, including employees of affiliated employers that are part of an “integrated enterprise<sup>2</sup>”. Exclude individuals who are partners, officers, members of boards of directors, or major shareholders unless they are under the employer’s control. For example, a CEO who has no supervisor would not be counted; a senior vice-president who reports to the CEO probably would be counted.

### How to Count:

Count each full-time and part-time employee on the payroll<sup>3</sup> in each week as 1. If an employer has 15 or more employees in 20 or more weeks the current or preceding calendar year, the law applies<sup>4</sup>.

### Consequences of Noncompliance:

The DOL may assess special penalties and the EEOC may bring an action in court against a plan sponsor for violations. Individuals may file private lawsuits to correct violations and obtain appropriate legal or equitable relief (including attorney’s fees and other costs).

## Counting Method 3: Employers with at least 20 employees

### Law or Compliance Requirement Applied:

#### **COBRA**

COBRA provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates.

### Who to Count:

Employees in the previous calendar year, including full and part-time common-law employees of all employers in a controlled group<sup>5</sup>. This may include leased employees. Exclude individuals who are partners, members of boards of directors, or major shareholders unless they are under the employer's control.

### How to Count:

Count each full-time employee as 1. Each part-time employee counts as a fraction, with the numerator equal to the number of hours worked by that employee and the denominator equal to the number of hours that must be worked in order to be considered full-time (but not more than 40 hours per week). If an employer does not wish to count a salaried worker as full-time, it must keep records to demonstrate actual hours worked. If the number of employees is 20 or more on more than 50% of the employer's working days, the law applies.

### Consequences of Noncompliance:

COBRA compliance failures can result in excise taxes and statutory penalties. Qualified beneficiaries may also file private lawsuits to correct violations and obtain appropriate legal or equitable relief (including attorney's fees and other costs).

## Counting Method 4: Employers with 20 or more employees

### Law or Compliance Requirement Applied:

#### *Medicare Secondary Payer (MSP) Rules Based on Age*

A group health plan is the primary payer and Medicare is the secondary payer for individuals age 65 or over if their group health coverage is by virtue of the individual's (or his/her spouse's) current employment status.

### Who to Count:

Employees<sup>6</sup> in the current or preceding calendar year, including individuals who, although not actually working for an employer, are receiving from an employer payments that are subject to FICA taxes.

### How to Count:

Count each full-time and part-time employee as 1. MSP rules apply if an employer has 20 or more full-time and/or part-time employees for each working day in each of 20 or more calendar weeks in the current or preceding year. An employer is considered to have 20 or more employees for each working day of a particular week if the employer has at least 20 full-time or part-time employees on its employment rolls each working day of that week.

### Consequences of Noncompliance:

Medicare can collect any incorrect claim payments directly from the employer, regardless of whether the employer's plan is fully insured or self-insured.

## Counting Method 5: Employers with at least 50 employees

### Law or Compliance Requirement Applied:

#### *Family and Medical Leave Act (FMLA)*

FMLA requires employers that sponsor group health plans to provide group health plan benefits to employees on a FMLA leave. Please note that public agencies and public and private schools are covered regardless of the number of employees.

### Who to Count:

Employees working in the current or preceding calendar year, including employees of related employers that meet an “integrated employer” test.

### How to Count:

Count each full-time and part-time employee who appears on the employer’s payroll on each day of a calendar week as 1. An employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

### Consequences of Noncompliance:

The EEOC may bring an action in court and individuals may file private lawsuits to correct violations and obtain appropriate legal or equitable relief (including attorney’s fees and other costs).

## Counting Method 6: Applicable Large Employers (ALEs)

### Law or Compliance Requirement Applied:

#### *Shared Responsibility Provisions of the Affordable Care Act (ACA)*

ALEs must offer minimum essential coverage that is “affordable” and that provides “minimum value” to their full-time employees and must report to the IRS information about the health care coverage, if any, they offered to full-time employees and must provide a statement to employees.

### Who to Count:

Full-time and part-time employees in the preceding calendar year, including full and part-time common-law employees of all employers in a controlled group<sup>5</sup>. This may include leased employees.

### How to Count:

For each month of the preceding calendar year:

- Determine the number of full-time equivalent employees (FTEs) by calculating the aggregate number of hours of service for that calendar month for employees who were not full-time employees (but not more than 120 hours of service for any employee) and dividing that number by 120.
- Add the number of full-time employees (i.e., those working more than 30 hours per week employed during that month).

Add the results of each monthly calculation and divide by 12.

The result, if not a whole number, is then rounded to the next lowest whole number.

If the result of this calculation is 50 or more, the employer is an ALE for the current calendar year, unless the seasonal worker exception applies<sup>7</sup>.

### Consequences of Noncompliance:

ALEs are subject to a penalty if one or more full-time employees are certified to the employer as having received an applicable premium tax credit or cost-sharing reduction, and either: 1) the employer fails to offer to its full-time employees (and their dependents) minimum essential coverage; or, 2) the employer's coverage is deemed to be unaffordable or does not provide minimum value (as defined by the ACA). Failure to file a return with the IRS or furnish a statement to employees can result in penalties up to \$250 per return/statement, with a maximum penalty of \$3 million.

**Counting Method 7:** Private employers with an average of at least 51 employees and nonfederal governmental employers with an average of at least 101 employees

**Law or Compliance Requirement Applied:**

***Mental Health Parity and Addiction Equity Act (MHPAEA)***

Group health plans that provide mental health coverage must provide parity between medical/surgical benefits and mental health/substance use disorder benefits.

**Who to Count:**

Employees during the preceding calendar year, including full and part-time common-law employees of all employers in a controlled group<sup>5</sup>.

**How to Count:**

Count each full-time and part-time employee as 1. An employer who employed an average of more than 50 employees (or 100 employees in the case of nonfederal governmental employers) on business days during the preceding calendar year is subject to the law. The government has not provided guidance on how to calculate this “average”.

**Consequences of Noncompliance:**

Individuals and the DOL may use ERISA's civil enforcement provisions to file lawsuits to enforce the MHPAEA's requirements. In addition, noncompliance with the MHPAEA can trigger an IRS excise tax.



## Counting Method 8: Employers with 100 or more employees

### Law or Compliance Requirement Applied:

#### *Medicare Secondary Payer (MSP) Rules Based on Disability*

A group health plan is the primary payer and Medicare is the secondary payer for individuals under age 65 entitled to Medicare on the basis of a disability, if their group health coverage is by virtue of the individual's (or his/her spouse's) current employment status.

### Who to Count:

Full-time and part-time employees<sup>6</sup>, including individuals who, although not actually working for an employer, are receiving from an employer payments that are subject to FICA taxes.

### How to Count:

Count each full-time and part-time employee as 1.

### Consequences of Noncompliance:

Medicare can collect any incorrect claim payments directly from the employer, regardless of whether the employer's plan is fully insured or self-insured.

## **Counting Method 9: Welfare plans that cover at least 100 employees**

### **Law or Compliance Requirement Applied:**

#### ***Form 5500***

Employee benefit plans must file the Form 5500 reporting and disclosure document on an annual basis with the Department of Labor (DOL). Please note that the Form 5500 requirement applies to ERISA plans only.

### **Who to Count:**

Employees enrolled in the plan at the beginning of the plan year.

### **How to Count:**

Count each full-time and part-time employee as 1.

### **Consequences of Noncompliance:**

The penalty for failing to file a Form 5500 is \$1,100 per day, which is cumulative from the filing deadline. Lesser penalties may be assessed for incomplete or otherwise deficient Form 5500s.

## **Counting Method 10: Employers that filed 250 or more W-2s**

### **Law or Compliance Requirement Applied:**

#### ***Reporting the Cost of Health Benefits on Form W-2***

The Affordable Care Act (ACA) requires employers to report the total cost of employer-provided health coverage on Form W-2.

### **What to Count:**

W-2s filed with the IRS in the preceding calendar year.

### **How to Count:**

W-2s for full-time and part-time employees count as 1.

### **Consequences of Noncompliance:**

Penalties for compliance failures range from \$30 to \$250 per form.

## Counting Method 11: All self-insured medical plans

### Law or Compliance Requirement Applied:

#### *Transitional Reinsurance Program Fee*

The ACA requires self-insured group health plans to make contributions to help stabilize premiums for coverage in the individual market during the years 2014 through 2016.

### Who to Count:

Covered lives, which includes both employee and dependent lives.

### How to Count:

The fee is calculated based on the average number of covered lives, which can be determined using one of the following four methods:

*Actual Count:* Add the total number of lives covered for each day of the first nine months of the calendar year and divide that total by the number of days in the first nine months.

*Snapshot Count:* Add the total number of lives covered on any date during the same corresponding month in each of the first three quarters of the calendar year, and divide that total by the number of dates on which a count was made.

*Snapshot Factor:* Use the same method as in Snapshot Count, except that the number of lives covered on a given date is calculated by adding the number of participants with self-only coverage to the product of the number of participants with coverage other than self-only coverage and a factor of 2.35. This method can be used to estimate the number of total lives included in coverage that is not self-only coverage.

*Form 5500 Method:* The number of participants as of the beginning and end of the plan year as reported on Form 5500 for the last applicable time period.

### Consequences of Noncompliance:

As with any amount owed to the federal government, an unpaid/underpaid Reinsurance Program Fee will be subject to federal debt collection rules.

## Counting Method 12: All self-insured medical plans

### Law or Compliance Requirement Applied:

#### *Patient-Centered Outcomes Research Institute (PCORI) Fee*

The PCORI fee supports the Patient-Centered Outcomes Research Trust Fund and will be imposed for each policy year ending on or after October 1, 2012 and before October 1, 2019.

### Who to Count:

Covered lives, which includes both employee and dependent lives.

### How to Count:

The fee is calculated based on the average number of covered lives, which can be determined using one of the following three methods:

*Actual Count Method:* Add the total lives covered for each day of the plan year and divide that total by the total number of days in the plan year.

*Snapshot Method:* Add the total number of lives covered on one date during the first, second or third month of each quarter, and divide that total by the number of dates on which a count was made.

*Form 5500 Method:* The number of participants as of the beginning and end of the plan year as reported on Form 5500 for the last applicable time period.

### Consequences of Noncompliance:

As with any amount owed to the federal government, an unpaid/underpaid PCORI Fee will be subject to federal debt collection rules.