



## Counting Employees For Regulatory Accuracy

### Overview

As we projected in our 2011 Legislative Update number 04, Health Care Reform has resulted in stricter compliance by most insurance companies. In some cases the compliance requirements are a direct result of the Patient Protection and Affordable Care Act of 2010 (PPACA) and in others the insurers are simply enforcing prior regulations more carefully in an effort to limit their potential liability. One of the areas that most employers noticed in 2012 was the constant monitoring of “employee counts”. Employers are asked each year, sometimes more than once, to report the number of individuals they employ. Who you count and when you count them can vary from one regulation to the next. Employers should be aware of these regulations, especially if their employee population hovers near a critical threshold such as 20 or 50 employees. Employers with union or leased employees should pay particular attention to how these categories of employment impact their “counts”. Owners with ownership interests in other businesses that have employees of their own may need to count those employees under Controlled Group or Affiliated Service Organization rules.

### Regulations

There are a number of Federal and State regulations that impact group insurance contracts. Generally the following comments refer to fully insured (as opposed to self-funded plans) medical plans but prescription, dental and vision may also be included. There are also other regulations that the primary insurers in this area handle for fully insured plan sponsors and we will not cover them here. A self-funded plan however should review additional compliance responsibilities that are likely to apply.

The chart below reflects nine regulations of which every employer should be aware. The intent of this article is to show the differences in counting methods and time periods that are used to determine who must comply. Some laws count part time employees on a pro-rata basis and others give equal weight to part-time and full-time status. For example, two employees working 20 hours each may count as only one employee for purposes of COBRA, but count as two under FMLA or the Federal Mental Health Parity Act. Some regs include union or leased employees and others exclude them in their counting formula. In addition, while COBRA is based upon prior year only, many of the other regulations look at the current year or the prior year.

LAW	COUNTING METHOD	TIME PERIOD
Federal COBRA	20 or more common law employees on more than 50% of the typical business days including part-time, seasonal, union or leased employees. Part-time and seasonal workers are counted on a pro-rata basis.	Prior Calendar Year
PA Mini COBRA	2 to 19 common law employees including part-time, seasonal, union or leased employees. Part-time and seasonal workers are counted on a pro-rata basis.	Prior Calendar Year
Medicare Secondary Payer Status	20 or more employees each working day for at least 20 weeks, including full or part time (regardless of hours worked).	Current or Prior Calendar Year
Medical Loss Ratio	1 to 100 employees average including full-time, part-time and seasonal for small group. Large group subject to 85% MLR and small 80%.	Each business day of prior calendar yr plus minimum of 1 on 1 <sup>st</sup> day of current plan yr for small group (2 for large group)
Controlled Group & Affiliated Service Organization	A combination of 2 or more corporations that are under common control, or for an ASO have a service or ownership relationship.	Seek legal counsel for full understanding of applicability
PA Autism Insurance Act	PA insured group health plans with 51 or more employees including full and part time	None disclosed in the Act. Generally look at the count as of the plan's renewal date.
Federal Mental Health Parity Act	51 or more employees including full and part time	Prior Calendar Year
Family & Medical Leave Act	Private sector employers with 50 or more full or part time employees for at least 20 workweeks	Current or Prior Calendar Year
Form 5500 Filings	100 or more participants including current and former employees	Beginning of Plan Year

At various times during the year, your insurer is likely to contact you for an updated count of your employee population. The accuracy of your count dictates what benefits they include, how they administer your plan, and what they report to regulatory authorities. One of the most confusing, and potentially costly areas, is Medicare Secondary Payer Status. If you report your count as less than 20 employees, the insurance company will expect to receive reimbursements from Medicare for claims submitted by anyone who is Medicare eligible (generally age 65 or older). If the employee has not elected Medicare B, the insurance company will not receive a Medicare reimbursement and will deny that portion of the claim for your employee. COBRA is also a critical area to monitor. While most employers are aware of the Federal COBRA regulations, some smaller employers fail to properly administer PA-Mini COBRA, or other state continuation programs. Giving qualified COBRA beneficiaries their proper rights to continued coverage is a critical part of Health Care Reform's intent to grant individuals continued access to health insurance coverage while protecting the insurer's interests by preventing individuals from going without coverage until they need care (commonly known as "adverse selection").

### **Action Steps**

Be aware you will likely receive several questionnaires from your insurer each year, and that each "count" verification response may require a different answer. Pay particular attention to the methodology for counting and the time periods that apply. If owners have additional ownership interests in other businesses with employees, consult with legal or tax counsel to determine if you have a Controlled Group or Affiliated Service Organization. Document your communication of employee rights and responsibilities in this process by collecting a signed HIPAA Special Enrollment Rights Notice, acknowledging their understanding of their part in the overall compliance process. These HIPAA Notices are provided to you at each open enrollment period for distribution to your employees. If you need copies, please contact Fredonna Smith at (610) 889-9500 extension 103 or at [fredonna.smith@conestoga.biz](mailto:fredonna.smith@conestoga.biz).

*The Conestoga Group is an insurance, investment and employee benefits broker and consulting firm based in Frazer, PA. Conestoga specializes in providing financial products and services to small businesses and their owner/executives and other employees. Founder and President Brad Palmer is an Investment Advisory Representative of Commonwealth Financial Network-a Registered Investment Adviser and member firm of the FINRA/SIPC. Brad can be reached at 610-889-9500 extension 101 or at [brad.palmer@conestoga.biz](mailto:brad.palmer@conestoga.biz).*

#### **NOTICE**

These legislative comments are our interpretations of information provided to us by various legal and other resources as of 01/31/13. It is possible the information was presented incorrectly or that we have misunderstood the presentation. The purpose of this communication is to provide you with basic summary information on the subject matter to assist you in determining if you may need to seek legal or other professional assistance. This update and its attachments should not be construed as legal, tax, investment, or other advice and does not take into consideration specific factors unique to the reader's situation.