

to FICA taxes except that the employer is exempt from those taxes under the Internal Revenue Code.

*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, the governments of the United States, the individual States, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the District of Columbia, and the agencies, instrumentalities, and political subdivisions of these governments.

*FICA* stands for the Federal Insurance Contributions Act, the law that imposes social security taxes on employers and employees under section 21 of the Internal Revenue Code.

*Group health plan (GHP)* means any arrangement made by one or more employers or employee organizations to provide health care directly or through other methods such as insurance or reimbursement, to current or former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families, that—

(1) Is of, or contributed to by, one or more employers or employee organizations.

(2) If it involves more than one employer or employee organization, provides for common administration.

(3) Provides substantially the same benefits or the same benefit options to all those enrolled under the arrangement.

The term includes self-insured plans, plans of governmental entities (Federal, State and local), and employee organization plans; that is, union plans, employee health and welfare funds or other employee organization plans. The term also includes employee-pay-all plans, which are plans under the auspices of one or more employers or employee organizations but which receive no financial contributions from them. The term does not include a plan that is unavailable to employees; for example, a plan only for self-employed persons.

*IRC* stands for Internal Revenue Code.

*IRS* stands for Internal Revenue Service.

*Large group health plan (LGHP)* means a GHP that covers employees of either—

(1) 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

(2) 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.

*MSP* stands for Medicare secondary payer.

*Multi-employer plan* means a plan that is sponsored jointly by two or more employers (sometimes called a multiple-employer plan) or by employers and unions (sometimes under the Taft-Hartley law).

*Self-employed person* encompasses consultants, owners of businesses, and directors of corporations, and members of the clergy and religious orders who are paid for their services by a religious body or other entity.

*Similarly situated individual* means—

(1) In the case of employees, other employees enrolled or seeking to enroll in the plan; and

(2) In the case of other categories of individuals, other persons in any of those categories who are enrolled or seeking to enroll in the plan.

**§ 411.102 Basic prohibitions and requirements.**

(a) *ESRD*. (1) A group health plan of any size—(i) May not take into account the ESRD-based Medicare eligibility or entitlement of any individual who is covered or seeks to be covered under the plan; and

(ii) May not differentiate in the benefits it provides between individuals with ESRD and other individuals covered under the plan, on the basis of the existence of ESRD, or the need for dialysis, or in any other manner.

(2) The prohibitions of paragraph (a) of this section do not prohibit a plan from paying benefits secondary to Medicare after the first 18 months of ESRD-based eligibility or entitlement.

(b) *Age*. A GHP of an employer or employee organization of at least 20 employees—

(1) May not take into account the age-based Medicare entitlement of an individual or spouse age 65 or older who is covered (or seeks to be covered) under the plan by virtue of current employment status; and

(2) Must provide, to employees age 65 or older and to spouses age 65 or older of employees of any age, the same benefits under the same conditions as it provides to employees and spouses under age 65.

(c) *Disability*. A GHP of an employer or employee organization of at least 100 employees may not take into account the disability-based Medicare entitlement of any individual who is covered (or seeks to be covered) under the plan by virtue of current employment status.

#### §411.103 Prohibition against financial and other incentives.

(a) *General rule*. An employer or other entity (for example, an insurer) is prohibited from offering Medicare beneficiaries financial or other benefits as incentives not to enroll in, or to terminate enrollment in, a GHP that is, or would be, primary to Medicare. This prohibition precludes offering to Medicare beneficiaries an alternative to the employer primary plan (for example, coverage of prescription drugs) unless the beneficiary has primary coverage other than Medicare. An example would be primary coverage through his own or a spouse's employer.

(b) *Penalty for violation*. (1) Any entity that violates the prohibition of paragraph (a) of this section is subject to a civil money penalty of up to \$5,000 as adjusted annually under 45 CFR part 102 for each violation; and

(2) The provisions of section 1128A of the Act (other than subsections (a) and (b)) apply to the civil money penalty of up to \$5,000 as adjusted annually under 45 CFR part 102 in the same manner as the provisions apply to a penalty or proceeding under section 1128A(a).

[60 FR 45362, Aug. 31, 1995, as amended at 81 FR 61561, Sept. 6, 2016]

#### §411.104 Current employment status.

(a) *General rule*. An individual has current employment status if—

(1) 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

(2) The individual is not actively working and—

(i) 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

(ii) Retains employment rights in the industry and has not had his employment terminated by the employer, if the employer provides the coverage (or has not had his 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 disability benefits from Social Security, and has GHP coverage that is not pursuant to COBRA continuation coverage (26 U.S.C. 4980B; 29 U.S.C. 1161–1168; 42 U.S.C. 300bb–1 et seq.). Whether or not the individual is receiving pay during the period of nonwork is not a factor.

(b) *Persons who retain employment rights*. For purposes of paragraph (a)(2) of this section, persons who retain employment rights include but are not limited to—

(1) Persons who are furloughed, temporarily laid off, or who are on sick leave;

(2) Teachers and seasonal workers who normally do not work throughout the year; and

(3) Persons who have health coverage that extends beyond or between active employment periods; for example, based on an hours bank arrangement. (Active union members often have hours bank coverage.)

(c) *Coverage by virtue of current employment status*. An individual has coverage by virtue of current employment status with an employer if—

(1) 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