

GHP or LGHP is a nonconforming plan as provided in this section.

(b) CMS makes a determination of nonconformance for a GHP or LGHP that, at any time during a calendar year, fails to comply with any of the following statutory provisions:

(1) The prohibition against taking into account that a beneficiary who is covered or seeks to be covered under the plan is entitled to Medicare on the basis of ESRD, age, or disability, or eligible on the basis of ESRD.

(2) The nondifferentiation clause for individuals with ESRD.

(3) The equal benefits clause for the working aged.

(4) The obligation to refund conditional Medicare primary payments.

(c) CMS may make a determination of nonconformance for a GHP or LGHP that fails to respond to a request for information, or to provide correct information, either voluntarily or in response to a CMS request, on the plan's primary payment obligation with respect to a given beneficiary, if that failure contributes to either or both of the following:

(1) Medicare erroneously making a primary payment.

(2) A delay or foreclosure of CMS's ability to recover an erroneous primary payment.

§411.112 Documentation of conformance.

(a) *Acceptable documentation.* CMS may require a GHP or LGHP to demonstrate that it has complied with the Medicare secondary payer provisions and to submit supporting documentation by an official authorized to act on behalf of the entity, under penalty of perjury. The following are examples of documentation that may be acceptable:

(1) A copy of the employer's plan or policy that specifies the services covered, conditions of coverage, benefit levels and limitations with respect to persons entitled to Medicare on the basis of ESRD, age, or disability as compared to the provisions applicable to other enrollees and potential enrollees.

(2) An explanation of the plan's allegation that it does not owe CMS any amount CMS claims the plan owes as

repayment for conditional or mistaken Medicare primary payments.

(b) *Lack of acceptable documentation.* If a GHP or LGHP fails to provide acceptable evidence or documentation that it has complied with the MSP prohibitions and requirements set forth in §411.110, CMS may make a determination of nonconformance for both the year in which the services were furnished and the year in which the request for information was made.

§411.114 Determination of nonconformance.

(a) *Starting dates for determination of nonconformance.* CMS's authority to determine nonconformance of GHPs begins on the following dates:

(1) On January 1, 1987 for MSP provisions that affect the disabled.

(2) On December 20, 1989 for MSP provisions that affect ESRD beneficiaries and the working aged.

(3) On August 10, 1993 for failure to refund mistaken Medicare primary payments.

(b) *Special rule for failure to repay.* A GHP that fails to comply with §411.110 (a)(1), (a)(2), or (a)(3) in a particular year is nonconforming for that year. If, in a subsequent year, that plan fails to repay the resulting mistaken primary payments (in accordance with §411.110(a)(4)), the plan is also nonconforming for the subsequent year. For example, if a plan paid secondary for the working aged in 1991, that plan was nonconforming for 1991. If in 1994 CMS identifies mistaken primary payments attributable to the 1991 violation, and the plan refuses to repay, it is also nonconforming for 1994.

§411.115 Notice of determination of nonconformance.

(a) *Notice to the GHP or LGHP.* (1) If CMS determines that a GHP or an LGHP is nonconforming with respect to a particular calendar year, CMS mails to the plan written notice of the following:

- (i) The determination.
- (ii) The basis for the determination.
- (iii) The right of the parties to request a hearing.
- (iv) An explanation of the procedure for requesting a hearing.

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(v) The tax that may be assessed by the IRS in accordance with section 5000 of the IRC.

(vi) The fact that if none of the parties requests a hearing within 65 days from the date of its notice, the determination is binding on all parties unless it is reopened in accordance with §411.126.

(2) The notice also states that the plan must, within 30 days from the date on its notice, submit to CMS the names and addresses of all employers and employee organizations that contributed to the plan during the calendar year for which CMS has determined nonconformance.

(b) *Notice to contributing employers and employee organizations.* CMS mails written notice of the determination, including all the information specified in paragraph (a)(1) of this section, to all contributing employers and employee organizations already known to CMS or identified by the plan in accordance with paragraph (a)(2) of this section. Employers and employee organizations have 65 days from the date of their notice to request a hearing.

§411.120 Appeals.

(a) *Parties to the determination.* The parties to the determination are CMS, the GHP or LGHP for which CMS determined nonconformance, and any employers or employee organizations that contributed to the plan during the calendar year for which CMS determined nonconformance.

(b) *Request for hearing.* (1) A party's request for hearing must be in writing (not in facsimile or other electronic medium) and in the manner stipulated in the notice of nonconformance; it must be filed within 65 days from the date on the notice.

(2) The request may include rationale showing why the parties believe that CMS's determination is incorrect and supporting documentation.

(3) A request is considered filed on the date it is received by the appropriate office, as shown by the receipt date stamped on the request.

§411.121 Hearing procedures.

(a) *Nature of hearing.* (1) If any of the parties requests a hearing within 65 days from the date on the notice of the

determination of nonconformance, the CMS Administrator appoints a hearing officer.

(2) If no party files a request within the 65-day period, the initial determination of nonconformance is binding upon all parties unless it is reopened in accordance with §411.126.

(3) If more than one party requests a hearing the hearing officer conducts a single hearing in which all parties may participate.

(4) *On the record review.* Ordinarily, the hearing officer makes a decision based upon review of the data and documents on which CMS based its determination of nonconformance and any other documentation submitted by any of the parties within 65 days from the date on the notice.

(5) *Oral hearing.* The hearing officer may provide for an oral hearing either on his or her own motion or in response to a party's request if the party demonstrates to the hearing officer's satisfaction that an oral hearing is necessary. Within 30 days of receipt of the request, the hearing officer gives all known parties written notice of the request and whether the request for oral hearing is granted.

(b) *Notice of time and place of oral hearing.* If the hearing officer provides an oral hearing, he or she gives all known parties written notice of the time and place of the hearing at least 30 days before the scheduled date.

(c) *Prehearing discovery.* (1) The hearing officer may permit prehearing discovery if it is requested by a party at least 10 days before the scheduled date of the hearing.

(2) If the hearing officer approves the request, he or she—

(i) Provides a reasonable time for inspection and reproduction of documents; and

(ii) In ruling on discovery matters, is guided by the Federal Rules of Civil Procedure. (28 U.S.C.A. Rules 26-37)

(3) The hearing officer's orders on all discovery matters are final.

(d) *Conduct of hearing.* The hearing officer determines the conduct of the hearing, including the order in which the evidence and the allegations are presented.

(e) *Evidence at hearing.* (1) The hearing officer inquires into the matters at