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Departments issue final and new proposed regulations addressing ACA's 90-day waiting period limitation

The Departments recently issued regulations addressing the ACA's 90-day waiting period limitation. Effective for plan years beginning on or after January 1, 2014, group health plans and insurers may not impose a waiting period for coverage that exceeds 90 days. The regulations address a variety of issues. These include how the waiting period limit affects other eligibility conditions that an employer may impose before allowing employees to obtain coverage under a group health plan — such as requiring employees to work a certain number of hours per pay period or a minimum number of cumulative hours of service. The final regulations generally track the proposed regulations issued in 2013, but include a new example of an orientation period eligibility condition and ask for comments on this example. Plan sponsors should review their current waiting period practices in light of the final regulations to ensure compliance.

Background

For plan years beginning on or after January 1, 2014, the Affordable Care Act (ACA) prohibits group health plans and health insurance issuers from imposing a waiting period that exceeds 90 days on individuals who are otherwise eligible for coverage. This 90-day waiting period limitation does not apply to HIPAA-excepted benefits, which include stand-alone, limited scope dental or vision plans. Nor does it apply to retiree-only plans.

The Departments of Treasury, Labor, and Health & Human Services (the Departments) issued proposed regulations on March 18, 2013 that defined the term "waiting period" as the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan becomes effective. (See our April 9, 2013 *For Your Information.*) The proposed regulations also set forth rules for calculating days in a waiting period, addressed the application of waiting periods on certain coverage eligibility conditions, and devised a safe harbor for issuers to rely on eligibility information received from plan sponsors.

Final and new proposed regulations

On February 20, 2014, the Departments issued final regulations on the 90-day waiting period. On the same day, they issued separate proposed regulations addressing the issue of a "bona fide and reasonable orientation period" that could delay coverage entitlement beyond 90 days, and asked for comments on the issue.

The final regulations adopt the definition of "waiting period" from the proposed regulations. They generally follow and build upon the proposed regulations in applying the waiting period to specific types of plan eligibility requirements. Nothing in the final regulations requires a plan or issuer to impose a waiting period, and waiting periods of fewer than 90 days are permitted.

Under the final regulations, coverage must be available on a date not exceeding 90 days after becoming eligible for such coverage, meaning by the 91st day following eligibility. The final regulations count "days" as all calendar days beginning on the eligibility date, including weekends and holidays.

> Buck comment. The 90-day waiting period limitation starts the clock at the date the individual is eligible for coverage and runs for 90 consecutive days from that date. Therefore, coverage that begins on the first day of the next calendar month following 90 days from eligibility may not comply with the 90-day limit. For example, if the 90th day after an individual becomes eligible occurs on March 15, an April 1 coverage start date would violate the 90-day limit. Plans and issuers wishing to allow enrollment only on the first day of a calendar month should consider beginning coverage on the (1) first day of the month following the date of eligibility, or (2) first day of the month following a 60-day waiting period.

Generally, a plan or issuer does not violate the waiting period rules if an individual takes time beyond the 90-day period to elect coverage, assuming coverage is available for that individual within 90 days of eligibility. If an individual enrolls as a late enrollee or special enrollee, any period before the late or special enrollment is not considered a waiting period for purposes of this rule. A plan may not impose any waiting period on an eligible special enrollee that would delay commencement of coverage beyond the effective date of HIPAA-mandated enrollment.

Shorter waiting period limit in California

California law imposes a shorter, 60-day maximum waiting period on insured group health insurance policies. However, this limit does not apply to self-funded plans. Sponsors of insured health plans that provide benefits to California residents should coordinate with their group policy issuers to ensure compliance with this 60-day rule. State law penalties apply in the case of violations. (See our November 11, 2013 *For Your Information*). Other states could impose waiting periods of shorter than 90 days on insured plans as well, although none have done so at this time.

Coordination with employer shared responsibility requirement

The 90-day waiting period limitation does not require an employer to offer coverage to any individual or class of individuals. Rather, it prohibits requiring otherwise eligible individuals from waiting more than 90 days before coverage begins. In contrast, the employer shared responsibility requirement generally requires large employers

to provide health coverage to full-time employees and their dependents or make an assessable payment. (See our February 11, 2014 *FYI Alert.*)

Accordingly, where the employer shared responsibility requirement requires an offer of coverage, imposing a waiting period of more than 90 days before coverage begins for an otherwise eligible employee not only violates the waiting period rule but could also result in the employer being assessed a shared responsibility payment.

On the other hand, unlike the employer shared responsibility requirement, the 90-day waiting period applies with equal force to plans covering part-time employees — even though the employer is not subject to a shared responsibility assessable payment if it fails to offer coverage to this class of employees. Thus, a waiting period of longer than 90 days is not permitted in the case of eligible part-time employees.

Eligibility Conditions

Like the proposed regulations, the final regulations provide that being otherwise eligible to enroll in a plan means having met the plan's internal eligibility conditions. Eligibility conditions based solely on the lapse of a time period are permissible for no more than 90 days.

- **Substantive eligibility conditions.** Additionally, substantive conditions for plan eligibility (meaning, those based not merely on the passage of time) are generally permissible unless designed to avoid compliance with the 90-day waiting period. The final regulations provide three examples of permissible substantive eligibility conditions: employment in an eligible job classification, achieving job-related licensure requirements, and satisfying a "reasonable and bona fide employment-based orientation period" — the last of which is a new example not included in the 2013 proposed regulations.

  New proposed regulations published alongside the final regulations provide for "one month" as the maximum length of such an orientation period (which is separate from the waiting period), and define this term by adding one calendar month and subtracting one day from the employee's start date in a position otherwise eligible for coverage. For example, if an employee's start date for an otherwise eligible position is January 1, the last permitted day of the orientation period is January 31. The 90-day limitation period would begin on January 31. Comments on the new proposed regulations are due on April 25, 2014.

- **Number of hours worked per pay period.** The final regulations also address the scenario where a plan conditions eligibility on an employee working a set number of hours per pay period (or working full time), where it cannot be determined from the outset whether a newly-hired employee's hours are reasonably expected to meet this threshold (e.g., a new variable hour employee). Adopting the approach set out in the proposed regulations, the final regulations provide that the plan may take a reasonable period of time, not to exceed 12 months, to determine whether the employee meets this eligibility condition. The 12-month measurement period may begin on any date between the employee's start date and the first day of the first calendar month following the employee's start date. This method for determining number of hours worked is consistent with the time frame for identifying full-time employees for purposes of the employer shared responsibility requirement.

  The time period for determining eligibility is permissible in these circumstances where coverage is effective no later than 13 months from an employee's start date (plus the remainder of the calendar

month, if the employee's start date was not the first day of the calendar month). That is to say, the employer cannot impose a 90-day waiting period on top of the 12-month measurement period.

- **Cumulative hours of service.** Also consistent with the proposed regulations, plan provisions that condition eligibility on the completion of a specified number of cumulative hours of service are permissible if the cumulative hours-of-service requirement does not exceed 1,200 hours. The waiting period must begin on the first day after the employee satisfies the cumulative hours-of-service requirement, and cannot exceed 90 days following that date. However, a cumulative hours-of-service requirement may be imposed only once on the same individual.

  Buck comment. Some plans impose different waiting periods for different plan options. For example, employees may be eligible for one option on their start date and then eligible for a richer option only after completing a year of service. Neither the proposed nor final regulations address this scenario. Because the ACA prohibits any waiting periods in excess of 90 days from the time an employee is otherwise eligible for coverage, however, an eligibility condition based solely on the lapse of time that requires an employee to wait more than 90 days appears to be impermissible — even if the employee can elect less generous coverage within the 90-day period.

Rehired employees and employees moving between job classifications

The final regulations provide that, so long as it is reasonable under the circumstances, a former employee who is rehired may be treated as newly eligible for coverage upon rehire — whether or not there was a break in service.

Buck comment. This provision contrasts with the employer shared responsibility rules as applied to rehired employees, who may be treated as new employees only where they have a break in service of 13 or more weeks (or 26 weeks in the case of an educational organization).

Subject to an anti-abuse rule, the employee may be required to meet the plan's eligibility criteria and satisfy the plan's waiting period anew, even if the individual was previously subject to the same waiting period. This arrangement would not be considered reasonable, however, where, for example, the employer fires and then rehires an individual for the specific purpose of avoiding compliance with the 90-day waiting period limitation.

Likewise, an individual who moves jobs within the same employer from a classification that is ineligible for plan coverage to one that is eligible may be treated as newly eligible for coverage and subject to a 90-day waiting period.

Special rule for multiemployer plans

Many multiemployer plans maintained pursuant to a collective bargaining agreement feature unique plan eligibility conditions. In particular, collective bargaining agreements in the multiemployer context often condition eligibility for coverage on working a certain number of hours across multiple contributing employers, and then aggregating those hours by calendar quarter in what is known as an hours bank. Consistent with prior guidance, the final regulations permit a multiemployer plan operating pursuant to an arm's-length collective bargaining agreement to

impose a plan eligibility provision that allows employees to become eligible for coverage by working hours of covered employment across multiple contributing employers.

Safe harbor for insurance issuers

In the case of insured plans, the insurance issuer typically depends on the plan sponsor to provide employee eligibility information. Also consistent with the proposed regulations, the final regulations allow an issuer to rely on eligibility information provided by the plan in administering the 90-day waiting period if the issuer (1) requires the plan sponsor to make a representation about the terms of any eligibility conditions or waiting periods before the individual is eligible for plan coverage (and requires the plan sponsor to update this representation with any applicable changes), and (2) has no specific knowledge of the imposition of a waiting period that would exceed 90 days.

Certificates of creditable coverage

Beginning in 2014, the ACA generally prohibits group health plans and group insurance issuers from imposing preexisting condition limitations. These final regulations amend existing HIPAA portability regulations, removing the requirement to provide certificates of creditable coverage. Until December 31, 2014, however, certificates of creditable coverage are required upon request or when an individual's health coverage ends.

Effective date and noncompliance penalties

The final regulations apply to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2015. For plan years beginning after January 1, 2014, the Departments will consider compliance with either the proposed regulations or the final regulations to constitute compliance with the 90-day waiting period limitation.

Penalties for noncompliance can be severe, depending on the nature and duration of noncompliance. A Code penalty of as much as $500,000 could apply, and DOL and affected participants have the right to bring lawsuits under ERISA. (See our February 28, 2014 *FYI In-depth* for more information on these and other ACA-related noncompliance penalties.)

In closing

Sponsors of plans with waiting periods should confirm that they do not require otherwise eligible individuals to wait more than 90 calendar days before coverage becomes effective. They should also ensure that none of the plan's eligibility conditions can be construed as designed to avoid compliance with the 90-day waiting period limitation.

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