May 1, 2014

Direct action may be required.

Health Reform Update:
90 Day Waiting Period Limitation Final Rules

Recently the Department of Treasury, Department of Labor, and Department of Health and Human Services (Departments) issued final regulations regarding the prohibition of excessive waiting periods as outlined in the Affordable Care Act. The final regulations take effect as of the first day of the 2015 plan year. Plans that begin this year have the option to comply with either the 2013 proposed regulation or the recent 2014 final regulations.

At the same time the 2014 final regulations were issued, the Departments issued a separate proposed rule regarding an orientation period as a condition of eligibility (see plan eligibility section below). The new proposed regulations for the orientation period may be relied upon at least through the end of 2014. Future regulations may change how plans comply with the orientation period but would be effective no earlier than the 2015 plan year.

This provision does not preempt state laws that require a more restrictive waiting period.

A waiting period, defined in the final regulations as the period that must pass before coverage for an individual who is otherwise eligible to enroll under the terms of the group health plan can become effective, is considered excessive if it exceeds 90 calendar days. All group health plans and health insurance carriers must comply with this provision, including grandfathered plans. This provision does not apply to HIPAA-excepted benefit plans.¹

The period of time before a late enrollee or special enrollee enrolls is not a waiting period.

Counting Days
Waiting periods must not exceed 90 days per federal law. All calendar days, including weekends and holidays, are counted. The final regulations confirm that 90 days does not equal 3 months. As of the first day of the 2014 plan year, it is not permissible to begin coverage on the first day of the month following a 90 day waiting period. Coverage, if elected by an employee, must begin no later than the 91st day of eligibility.

Example: A group health plan provides that full-time employees are eligible for coverage under a plan after a 90 day waiting period. Employee begins full-time employment on January 19.

In this example, the 90 day waiting period ends on April 18. Coverage, if elected by Employee, must begin on April 19 (February is assumed to have 28 days).

ACTION ITEM: For administrative ease, plans that currently begin coverage on the first day of the month following a 90 day waiting period will want to revise their waiting period to 60 days to retain the effective date of coverage as the first of the month following the completion of the 60 day waiting period.
Individual in Waiting Period on Plan Effective Date

Individuals may be in their waiting period prior to the applicability date (the first day of the 2014 plan year). The waiting period can be no more than 90 days for such an individual, even though the date of hire or eligibility date is prior to this new requirement.

Example: A group health plan is a January plan year. Prior to January 1, 2014, Employer offers coverage to full-time employees after a 6 month waiting period. Employee begins work as a full-time employee on October 1, 2013.

In this example, the first day of Employee's waiting period is October 1, 2013. Beginning January 1, 2014, the plan may not apply a waiting period that exceeds 90 days. On that date, Employee will have satisfied a 93 day waiting period so Employee's coverage must become effective on January 1, 2014 if coverage is elected; otherwise the plan would apply a waiting period that exceeds 90 days. The plan is not required to make coverage effective before January 1, 2014.

ACTION ITEM: Plans that currently have a 90 day waiting period with an effective date on the first day of the following month and plans that have a waiting period longer than 90 days should review the waiting period language in the summary plan description and ensure that it clearly addresses the effective date of coverage for individuals in their waiting period as of the first day of the 2014 plan year. The statement “Effective as of ____________ (insert first day of the plan year), the group health plan waiting period may not exceed 90 days.” may be sufficient to address the waiting period.

Plans that currently have an effective date of coverage on the first day of the month following the 90 day waiting period may reference the following chart to show the last day an employee can become eligible for coverage and satisfy the current waiting period. Employees hired after this date shown in the middle column of the chart below must have a revised waiting period so coverage will begin no later than the 91st day of eligibility.

<table>
<thead>
<tr>
<th>Start of Plan Year (when plans must make coverage effective by the 91st day of eligibility)</th>
<th>Last day an employee can begin a true 90 day waiting period with coverage beginning on the first of the month following the waiting period</th>
<th>The 91st day of eligibility (coverage effective date) is</th>
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<tbody>
<tr>
<td>February 1, 2014</td>
<td>November 3, 2013</td>
<td>February 1, 2014</td>
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<tr>
<td>March 1, 2014</td>
<td>December 1, 2013</td>
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<td>May 1, 2014</td>
<td>January 31, 2014</td>
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<td>June 1, 2014</td>
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Plan Eligibility

Eligibility for coverage means meeting the plan’s eligibility conditions, such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan’s terms. The final regulations add a third permissible category to the eligibility conditions, satisfaction of a reasonable and bona fide employment-based orientation period.
Eligibility Based on Satisfaction of an Orientation Period
The circumstances of a reasonable and bona fide employment-based orientation period are not given in the final regulations. The simultaneously issued proposed regulations indicate the Departments envision that an employer and an employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin.

The proposed regulations state the maximum length of such an orientation period is one month. The orientation period may be shorter than one month. For this purpose, one month is determined by adding one calendar month and subtracting one calendar day.

Example: Employee begins working full-time for Employer on October 16. Employer sponsors a group health plan in which full-time employees are eligible for coverage after the completion of a one month orientation period. Employee completes the orientation period on November 15.

In this example, Employee becomes eligible for coverage at the end of the orientation period, but then must satisfy the waiting period. The waiting period for Employee would begin on November 16 and may not exceed 90 days. Coverage for Employee must become effective no later than February 14 of the following year.

Employees with a start date in an otherwise eligible position on the first day of calendar month will use the last day of the calendar month as the last permitted day of the orientation period. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month (i.e., employee's start date in an otherwise eligible position is January 30, the last permitted day of the orientation period will be February 28 or February 29 in a leap year).

Eligibility Based on a Lapse of Time
Eligibility conditions that are based solely on the lapse of a time period are not permissible if the waiting period exceeds 90 days.

Example: A group health plan provides that employees are eligible for coverage after one year of service.

In this example, the plan’s eligibility condition is based solely on the lapse of time and, therefore, is impermissible under this provision because it exceeds 90 days.

Eligibility Based on a Cumulative Hours of Service Requirement
A group health plan or insurer may condition eligibility on an employee’s cumulative hours of service as long as the eligibility condition is not considered to be designed to avoid compliance with the 90 day waiting period limitation. The cumulative hours of service requirement must not exceed 1,200 hours. The plan’s waiting period must begin once the new employee satisfies the plan’s cumulative hours of service requirement and may not exceed 90 days.

Once this eligibility condition is satisfied, an employer may not remove an employee from the plan as long as they remain actively employed.
Part-time, Seasonal and Variable Hour Employees

Plans may take a reasonable period of time to determine whether part-time, seasonal or variable hour employees meet the plan’s eligibility condition, which may include a measurement period of generally no more than 12 months following the employee’s start date. This reasonable period of time to determine a variable hour employee’s eligibility is not designed to avoid compliance with the 90 day waiting period limitation if coverage is made effective no later than 13 months and a partial month (if the employee’s start date is not the first day of a calendar month). See client update Full-Time Employee Determination for details.

NEXT STEPS

Plans that begin coverage after the 91st day of eligibility must take action.

Fully insured plans should work with their carrier while partially self-funded and fully self-funded plans should work with their administrators to amend an excessive waiting period for a health benefit plan by the first day of the 2014 plan year. Summary plan descriptions, wrap documents, employee handbooks and other documents containing waiting period language should be updated.

Employers may consider adding a reasonable and bona fide employment-based orientation period as a condition of eligibility.

HIPAA-excepted benefit plans1 are not required to amend their waiting period, although it may be administratively easier for a plan to have one waiting period for all benefits.

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1 HIPAA excepted benefit plans include, but are not limited to, limited scope dental or vision benefits; coverage for on-site medical clinics; coverage for accident or disability income insurance or any combination thereof; long term care; coverage issued as a supplement to liability insurance; liability insurance, including general liability insurance and automobile liability insurance; workers’ compensation or similar insurance; automobile medical payment insurance; credit-only insurance; health FSA plans that satisfy the maximum benefit condition and availability condition; HRA plans that satisfy the maximum benefit condition; and other similar coverage, specified in regulations, under which benefits for medical care are secondary or incidental to other insurance benefits.

This update is based on the known provisions of the Affordable Care Act. Any inclusion of incorrect data or omission of data is unintentional. This is not to be construed as legal or tax advice.