



February 25, 2014

## 90-Day Waiting Period Final and Proposed Regulations Issued

Last week the Departments of Health and Human Services, Labor, and Treasury (“The Departments”) issued two regulations regarding the 90-day waiting period limitation for health plan coverage – a [final version of the originally proposed waiting period regulations](#) and a [newly proposed regulation](#) that addresses rules on orientation periods as they relate to the waiting period.

### Final Regulations – 90-Day Waiting Period Limitation

The 90-day waiting period limitation provision of the Affordable Care Act (ACA) provides that, in plan years beginning on or after Jan. 1, 2014, group health plans and insurers may not apply an eligibility waiting period greater than 90 days. A waiting period is the period of time that must pass before coverage for an otherwise eligible employee or dependent can become effective.

The final regulations substantially mirror the originally proposed regulations, with two notable additions regarding “reasonable and bona fide employment-related orientation periods” and employees who are terminated and later rehired. The final regulations confirm the following:

- The regulation does not require an employer to offer coverage to any particular individual or class of individual (including, for example, full-time or part-time). It merely prevents an otherwise eligible individual from having to wait more than 90 days for coverage.
- An employee is “eligible for coverage” when the employee has “met the plan’s substantive eligibility conditions (such as being in an eligible job classification, achieving job-related licensure requirements specified in the plan’s terms, or satisfying a reasonable and bona fide employment-based orientation period).”
- Other eligibility conditions that are not based solely on the lapse of a time period are permissible, provided they are not designed to avoid compliance with the 90-day limit. (If a plan conditions eligibility on the completion of a number of cumulative hours of service, the condition is not considered designed to avoid compliance if the cumulative hours-of-service requirement does not exceed a one-time requirement of 1,200 hours.)
- If an individual is eligible to begin coverage by the 91<sup>st</sup> day but takes additional time beyond the 90-day limit to elect coverage, the plan will not be considered to be in violation of the 90-day limit.

- If an individual enrolls as a late enrollee or special enrollee, any period before the late or special enrollment is not a waiting period.
- All calendar days count toward the 90-day limitation, including weekends and holidays. Plans may choose to offer coverage effective prior to the 91<sup>st</sup> day for ease of administration around weekends, holidays or payroll periods. Offering coverage effective later than the 91<sup>st</sup> day (e.g., the 1<sup>st</sup> day of the month or the 1<sup>st</sup> day of the payroll period following the 90-day waiting period) would not be compliant with the waiting period limitation.
- If an employee is terminated from employment and later rehired, a plan may require the individual to satisfy the plan's waiting period again, if reasonable under the circumstances (i.e., not subterfuge to avoid compliance with the 90-day waiting period limitation). The same applies to an individual who moves between job classifications that is or is not eligible for coverage.
- With regard to variable hour employees, the time period for determining whether a variable hour employee meets the plan's hours of service per period eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the period of time before coverage is made effective lasts no longer than the last day of the month beginning on or after an employee's 1-year anniversary (totaling, at most, 13 months and a fraction of a month).

### **Newly Proposed Regulations – Orientation Periods**

While the final regulations add reference to a “reasonable and bona fide employment-based orientation period”, the final regulations do not specify the facts and circumstances under which an orientation period would not be considered “reasonable and bona fide.” The proposed regulations are intended to add clarity around that issue to ensure that employment-based orientation periods are not used to avoid compliance with the 90-day waiting period limitation.

The proposed regulations provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period that would enable an employer and employee to evaluate whether the employment situation was satisfactory for each party and to begin orientation and training. The maximum 90-day waiting period would begin on the first day after the orientation period. Therefore, it appears these proposed regulations enable an employer to have a total period of up to 121 days (depending on the number of days in the orientation month) before coverage must be effective.

For the purpose of an orientation period, one month is defined as adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. For example, if an employee's start date is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date is October 1, the last permitted day of the orientation is October 31.

## **HIPAA Certificates of Coverage**

The final regulations also addressed the impact of the prohibition on pre-existing condition limitations on the issuance of HIPAA Certificates of Creditable Coverage. Because the prohibition on pre-existing condition limitations is effective for plans as of the first day of the 2014 plan year rather than the first day of 2014, individuals may have a need for HIPAA Certificates in 2014. Therefore, plans are required to continue to issue HIPAA Certificates until Dec. 31, 2014.

## **Effective Date**

The guidance indicates that the final regulations apply to group health plans and insurers for plan years beginning on or after Jan. 1, 2015. For plan years beginning in 2014, the Departments will consider compliance with either the previously issued proposed regulations or the new final regulations to constitute compliance with the 90-day waiting period limitation. The newly issued proposed regulations may be relied upon at least through the end of 2014.

## **PPACA REGULATIONS & GUIDANCE ISSUED IN THE LAST 3 MONTHS**

- Dec. 2013: [HHS Issues Interim Final Rule Extending Exchange Enrollment Deadline for 1/1/13 Coverage](#)
- Dec. 2013: [Agencies Issue Proposed Regulations on Excepted Benefits](#)
- Jan. 2014: [Departments Issue FAQs on Preventive Services, Cost-Sharing Limits, Expatriate Plans, Wellness Programs, Fixed Indemnity Insurance and MHPAEA](#)
- Jan. 2014: [IRS Issues Proposed Regulations on Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals](#)
- Feb. 2014: [IRS Issues Final Regulations on Shared Responsibility for Employers](#)
- Feb. 2014: Agencies Issue [Final Regulations](#) and [Additional Proposed Regulations](#) on 90-Day Waiting Period

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