



...From the Employer Perspective

Thursday, July 10, 2014

## Final Regulations on Orientation Period Feature of 90-day Waiting Period Requirements

When [final regulations for the ACA 90-day waiting period](#) limitation were issued last February, the regulating Departments (IRS, HHS and DOL) proposed the concept of including a “reasonable and bona fide employment-based orientation period” before starting a group health plan’s waiting period. [Final regulations regarding this orientation period](#) feature were issued last week and are the subject of this **HCRNews!**

The summary and employer action steps are:

- A reasonable and bona fide orientation period can be included before the waiting period begins.
- The orientation period duration limit is one calendar month less one day, which in effect enables an employer to have an eligible employee work up to 121 calendar days before being covered under the group health plan without violating the waiting period rule.
- However, the employer can be exposed to an employer mandate penalty if a minimum value health plan isn’t offered to an eligible employee by at least the 1<sup>st</sup> day of the 4<sup>th</sup> full calendar month of employment.
- The best way for large employers to avoid this risk of penalty while taking advantage of the orientation and waiting period provisions is to establish a calendar month orientation period and define the waiting period with a coverage effective date of the 1<sup>st</sup> day of the month beginning on or after 60-days from the end of the orientation period.
- The other employer action step should be modifying the group health plan document to describe an orientation period as a “calendar month less one day, which begins on the employee’s start date in a position that is otherwise eligible for the plan and provides a reasonable time period for the employer and employee to evaluate whether the employment situation is mutually satisfactory”.

### Overview of 90-Day Waiting Period Limit Rules

For plan years beginning in 2014, the ACA prohibits group health plans – both grandfathered and non-grandfathered plans – from requiring employees who are *otherwise eligible* to enroll to wait longer than 90 days for coverage to be effective. Being “otherwise eligible” to enroll means having met the plan’s substantive eligibility conditions specified in the plan document (such as being in an eligible job classification or achieving job-related licensure requirements). In other words, coverage must be effective for an employee no later than the 91<sup>st</sup> day after the employee becomes eligible for the group health plan. All calendar days are counted, including weekends and holidays, in determining the 90-day waiting period.

These final rules also introduced proposed regulations allowing plans to use “orientation periods” of up to 1 month as a substantive eligibility condition before starting the 90-day waiting period, as long as it was a “reasonable and bona fide employment-based orientation period”.

### **Final Regulations on Orientation Periods**

The June 23 Final Regulations clarify that orientation periods are “reasonable” and “bona fide” based on all relevant facts and circumstances. The Final Regulations provide little explanation or guidance as to the circumstances under which an orientation period might satisfy these requirements, other than such period is a) expected to give the employer and employee time to evaluate whether the employment situation is mutually satisfactory and b) not a “mere subterfuge for the passage of time”.

The regulations clarify that the 1-month limit on orientation periods is determined by adding one calendar month and subtracting one calendar day, measured from an employee’s start date in an “otherwise eligible” position, as mentioned above. The examples provided are:

- If an eligible employee’s start date is May 3, the last permitted day of the orientation period is June 2 (May 3 to June 3, minus 1 day),
- If an eligible employee’s start date is October 1, the last permitted day of the orientation period is October 31 (October 1 to November 1, minus 1 day), and
- If there is not a corresponding date in the next calendar month, the last permitted day of the orientation period is the last day of the next calendar month, such as
  - If the eligible employee’s start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year), or
  - If the employee’s start date is August 31, the last permitted day of the orientation period is September 30.

So, there’s an opportunity to have a combined orientation plus waiting period of up to 121 calendar days before an eligible employee is covered under the plan, as shown below. However, there’s an important detail involving the employer mandate rules to keep in mind.

## Compliance with the Employer Mandate

These Final Regulations note that compliance with the orientation period and waiting period rules doesn't determine whether an employer has complied with the ACA's employer mandate requirements regarding timeliness of coverage. A large employer subject to the employer mandate may be exposed to tax penalties if it fails to offer affordable minimum value coverage to certain newly-hired full-time employees by the 1<sup>st</sup> day of the 4<sup>th</sup> full calendar month of employment. This means in specific calendar situations the employer would not be able to impose the full 1-month orientation period and the full 90-day waiting period without potential exposure to a penalty under the employer mandate.

For example, if an employee is hired as a full-time employee on January 6, a plan may offer coverage May 1 (the 1<sup>st</sup> day of the 4<sup>th</sup> full month of employment) and comply with all of the orientation period, waiting period and employer mandate coverage provisions. However, if the employer starts coverage May 7, which is the 91<sup>st</sup> day following a 1-month orientation period, the employer would be exposed to a potential penalty under the employer mandate rules because coverage begins after the 1<sup>st</sup> day of the 4<sup>th</sup> full calendar month of employment.

The most effective way to satisfy the employer mandate coverage provision and maximize the allowed orientation and waiting period durations is to have coverage begin on the 1<sup>st</sup> day of the month that begins on or after 60 days from the end of a 1-month orientation period. The following examples show how this suggested coverage provision would work.

EXAMPLE: Full-time employee is hired into an "otherwise eligible" position on July 7. The orientation period is July 7 – August 6. The subsequent 60-day period is August 7 – October 5. The employee's coverage begins on November 1, the 1<sup>st</sup> day of the month beginning on or after the 60<sup>th</sup> day following the orientation period. November 1 is also the 1<sup>st</sup> day of the 4<sup>th</sup> full calendar month of employment, so this satisfies the timing requirements of the employer mandate.



EXAMPLE: Full-time employee is hired into an "otherwise eligible" position on July 3. The orientation period is July 3 – August 2. The subsequent 60-day period is August 3 – October 1. The employee's coverage begins on October 1, the 1<sup>st</sup> day of the month beginning on or after the 60<sup>th</sup> day following the orientation period. In this case, coverage is effective on the 1<sup>st</sup> day of the 3<sup>rd</sup> full calendar month of employment, so this satisfies the timing requirements of the employer mandate.



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

- May 2014: DOL Issues ACA [FAQs Part XIX](#)
- May 2014: Agencies Issue [Bulletin on COBRA Special Enrollment](#) and [Proposed Rules](#)
- May 2014: CMS Issues [FAQ on Transitional Reinsurance Contribution Process](#)
- Jun. 2014: Agencies Issue [Final Rules on Orientation and 90-Day Waiting Periods](#)
- Jun. 2014: IRS Issues [Final Regulations on Small Employer Tax Credit](#)

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