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Proposed Guidance Issued on 90-day Waiting Period Limit

March, 2013

For plan years beginning on or after Jan. 1, 2014, the Affordable Care Act (ACA) prohibits group health plans and group health insurance issuers from applying any waiting period that exceeds 90 days. ACA's 90-day waiting period limit applies to both non-grandfathered and grandfathered group health plans and health insurance coverage.

ACA's 90-day waiting period limit does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees. It only prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage under a group health plan becomes effective.

On March 21, 2013, the Departments of Labor, Health and Human Services and the Treasury (Departments) issued a proposed rule on ACA's 90-day waiting period limit. The proposed rule would apply to plan years beginning on or after Jan. 1, 2014.

Although the rule is not in final form, the Departments will consider compliance with the proposed rule as compliance with ACA's 90-day waiting period limit at least through the end of 2014. To the extent a final rule or other guidance is more restrictive on plans and issuers than the proposed rule, the final rule or other guidance will not be effective prior to Jan. 1, 2015.

This Legislative Brief summarizes ACA's 90-day waiting period limit and the guidance provided in the proposed rule. It also discusses how the waiting period limit relates to ACA's shared responsibility provisions that will apply to large employers beginning in 2014.

Waiting Period

A waiting period is the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll in the plan becomes effective. If an individual enrolls as a late enrollee or special enrollee, any period before the individual's late or special enrollment is not a waiting period.

An employee or dependent is eligible for coverage when he or she has met 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.

Also, if a plan allows an employee to elect coverage that would begin on a date that does not exceed the 90-day waiting period limit, ACA's 90-day waiting period limit is considered satisfied. Thus, a plan or issuer does not violate ACA merely because employees take additional time to elect coverage.

The following examples help explain these rules:

Example 1

Facts - A group health plan provides that full-time employees are eligible for coverage under the plan. Employee A begins employment as a full-time employee on Jan. 19.

Conclusion - Any waiting period for A would begin on Jan. 19 and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example 2

Facts – A group health plan provides that only employees with job title M are eligible for coverage under the plan. Employee B begins employment in job title L on Jan. 30.

Conclusion – B is not eligible for coverage under the plan, and the period while B is working in job title L and therefore not in an eligible class of employees is not part of a waiting period under the proposed rule.

Example 3

Facts – Same facts as Example 2, except that B transfers to a new position with job title M on April 11.

Conclusion – B becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for B begins on April 11 and may not exceed 90 days. Coverage under the plan must become effective no later than July 10.

Example 4

Facts – A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee C is hired on May 3 and meets the plan's eligibility criteria on Sept. 22.

Conclusion – C becomes eligible for coverage on Sept. 22, but for the waiting period. Any waiting period for C would begin on Sept. 22 and may not exceed 90 days. Coverage under the plan must become effective no later than Dec. 21.

Example 5

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

Conclusion – The plan’s eligibility condition is based solely on the lapse of time and, therefore, is impermissible under the proposed rule because it exceeds 90 days.

Example 6

Facts – Employer W’s group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the applicable enrollment forms. Enrollment forms are distributed on an employee’s start date and may be completed within 90 days. Employee D is hired and starts on Oct. 31, which is the first day of a pay period. D completes the enrollment forms and submits them on the 90th day after D’s start date. Coverage is made effective 7 days later, which is the first day of the next pay period.

Conclusion – Under the terms of W’s plan, coverage may become effective as early as Oct. 31, depending on when D completes the applicable enrollment forms. Under the terms of the plan, when coverage becomes effective is dependent solely on the length of time taken by D to complete the enrollment materials. Therefore, under the terms of the plan, D may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, and the plan complies with the proposed rule.

Other Conditions For Eligibility

Under ACA, eligibility conditions that are based solely on the lapse of time are permissible for no more than 90 days. Other conditions for eligibility are permissible under ACA, as long as they are not designed to avoid compliance with the 90-day waiting period limit.

Variable Hour Employees

A special rule applies if a group health plan conditions eligibility on an employee regularly working a specified number of hours per pay period (or working full time), and it cannot be determined that a newly hired employee is reasonably expected to regularly work that number of hours per period (or work full time). In this type of situation, the plan may take a **reasonable period of time** to determine whether the employee meets the plan’s eligibility condition. This may include a measurement period of not more than 12 months that begins on any date between the employee’s start date and the first day of the first calendar month following the employee’s start date.

The time period for determining whether a variable hour employee meets the plan’s eligibility condition will comply with ACA’s 90-day waiting period limit if coverage is made effective no later than 13 months from the employee’s start date, except where a waiting period that exceeds 90 days is imposed after the measurement period. If an employee’s start date is not the first of the month, the time period can also include the time remaining until the first day of the next calendar month.

Cumulative Service Requirement

Under the proposed rule, if a group health plan or issuer conditions eligibility on any employee’s (part-time or full-time) having completed a number of cumulative hours of service, the eligibility

condition does not violate ACA's 90-day limit on waiting periods if the cumulative hours-of-service requirement does not exceed **1,200 hours**.

The proposed rule provides that 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. Also, this provision is designed to be a one-time eligibility requirement. The proposed rule does not permit a plan or issuer to reapply the hours-of-service requirement to the same individual each year.

Example 7

Facts – Under Employer Y's group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee E begins employment for Employer Y on Nov. 26 of Year 1. E's hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and E's availability. Therefore, it cannot be determined at E's start date that E is reasonably expected to work full-time.

Under the terms of the plan, variable-hour employees, such as E, are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. E's 12-month measurement period ends Nov. 25 of Year 2. E is determined to be a full-time employee and is notified of E's plan eligibility. If E then elects coverage, E's first day of coverage will be Jan. 1 of Year 3.

Conclusion – The measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limitation. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided the period of time is no longer than 12 months and begins on a date between the employee's start date and the first day of the next calendar month, provided coverage is made effective no later than 13 months from E's start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month) and provided that, in addition to the measurement period, no more than 90 days elapse prior to the employee's eligibility for coverage.

Example 8

Facts – Employee F begins working 25 hours per week for Employer Z on Jan. 6 and is considered a part-time employee for purposes of Z's group health plan. Z sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. F satisfies the plan's cumulative hours of service condition on Dec. 15.

Conclusion – The cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for F under the plan must begin no later than the 91st day after F completes 1,200 hours. (If the plan's cumulative hours-of-service requirement was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

Counting Days

The proposed rule clarifies the method for counting days when applying a 90-day waiting period. Due to ACA's wording, the proposed rule provides that the waiting period may not extend beyond 90 days and all calendar days must be counted beginning on the enrollment date, including weekends and holidays. For a plan with a waiting period, the enrollment date is the first day of the waiting period.

If a plan or issuer imposes a 90-day waiting period and the 91st day is a weekend or holiday, the plan or issuer may choose to make coverage effective earlier than the 91st day for administrative convenience. Similarly, plans and issuers that do not want to start coverage in the middle of a month (or pay period) may choose to make coverage effective earlier than the 91st day for administrative convenience. For example, a plan may impose a waiting period of 60 days plus a fraction of a month (or pay period) until the first day of the next month (or pay period).

However, a plan or issuer may not make the effective date of coverage later than the 91st day. Thus, for example, under the proposed rule, a plan or issuer generally cannot wait until the first of month after the 90-day waiting period ends to make coverage effective.

Individuals In a Waiting Period Prior To Effective Date

ACA's 90-day waiting period limit is effective for plan years beginning on or after Jan. 1, 2014. With respect to individuals who are in a waiting period for coverage when this ACA requirement becomes effective, the waiting period can no longer apply to the individual if it would exceed 90 days.

The following example helps clarify this rule:

Example 9

Facts – A group health plan is a calendar year plan. Prior to Jan. 1, 2014, the plan provides that full-time employees are eligible for coverage after a six-month waiting period. Employee A begins work as a full-time employee on Oct. 1, 2013.

Conclusion – The first day of A's waiting period is Oct. 1, 2013 because that is the first day A is otherwise eligible to enroll under the plan's substantive eligibility provisions, but for the waiting period. Beginning Jan. 1, 2014, the plan may not apply a waiting period that exceeds 90 days. Accordingly, A must be given the opportunity to elect coverage that begins no later than Jan. 1, 2014 (which is 93 days after A's start date) because otherwise, on Jan. 1, 2014, the plan would be applying a waiting period that exceeds 90 days. The plan is not required to make coverage effective before Jan. 1, 2014 under the proposed rule.

Employer Shared Responsibility Penalty

Under ACA's "pay or play" requirements large employers that do not offer health coverage to their full-time employees or that offer health coverage to their full-time employees that is either unaffordable or does not provide minimum value may be subject to a penalty. This penalty is also called a "shared responsibility payment" under ACA.

On Jan. 2, 2013, the Internal Revenue Service (IRS) issued proposed regulations that address ACA's shared responsibility provisions. Under these rules, if an employee is reasonably expected at his or her start date to work full time, an employer that sponsors a group health plan and offers coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment will not be subject to a shared responsibility penalty under ACA for not offering coverage during the initial three months.

However, if a large employer subject to ACA's shared responsibility penalty denies coverage to a full-time employee based on a substantive eligibility condition, such as being in an eligible job classification, the employer may be subject to a penalty under ACA.

Also, although a cumulative hours-of-service requirement up to 1,200 hours may be permissible under ACA's 90-day limit on waiting periods, denying coverage to full-time employees while they accumulate the necessary number of hours of service may trigger an employer penalty for large employers.

Source: Departments of Labor, Health and Human Services and the Treasury

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Illinois (847) 457-3000

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