Health Reform

Regulations Issued on Waiting Period

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For plan years beginning on or after January 1, 2014, a group health plan and an insurance carrier offering group health insurance coverage may not apply any waiting period that exceeds 90 days. This rule applies to both grandfathered and non-grandfathered plans. It should be noted that nothing in the Affordable Care Act requires a group health plan or carrier to have a waiting period. Further, state insurance law may be more restrictive than what the federal law requires (state insurance requirements are generally not applicable to ERISA self-insured plans).

On February 20, 2014, final and additional proposed rules on the waiting period provision were issued. Below you will find notable changes from the previously issued proposed regulations.

Effective Date

The final regulations apply to plan years beginning on or after January 1, 2015. For plan years beginning in 2014, employers may comply with either the previously-issued proposed regulations or the final regulations.

Bona Fide Employment-Based Orientation Period

A waiting period is 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 can become effective. To be otherwise eligible to enroll in a plan means that an individual has met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). So, the maximum 90-day waiting period does not have to begin until the first day after the substantive eligibility conditions are met.

The final regulations indicate that a reasonable and bona fide employment-based orientation period can be a substantive eligibility condition and the proposed rule offers a one-month orientation period. The idea is that, during an orientation period, an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. One month would be determined by 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 in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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. For example, if the 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). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

Rehired Employees/Employees Changing to and from Eligible Job Classifications

The final regulations provide that a former employee who is rehired may be treated as newly eligible for coverage upon rehire and, therefore, a plan may require that individual to meet the plan's eligibility criteria and to satisfy the plan's waiting period anew, if reasonable under the circumstances. For example, the termination and rehire cannot be a subterfuge to avoid compliance with the 90-day waiting period limitation. The same analysis would apply to an individual who moves to a job classification that is ineligible for coverage under the plan but then later moves back to an eligible job classification.

Multiemployer Plans

Multiemployer plans maintained pursuant to collective bargaining agreements have unique operating structures and may include different eligibility conditions based on the participating employer's industry or the employee's occupation. On September 4, 2013, the Departments issued a set of frequently asked questions (FAQs) stating that if a multiemployer plan operating pursuant to an arms-length collective bargaining agreement has an eligibility provision that allows employees to become eligible for coverage by working hours of covered employment across multiple contributing employers (which often aggregates hours by calendar quarter and then permits coverage to extend for the next full calendar quarter, regardless of whether an employee has terminated employment), the Departments would consider that provision designed to accommodate a unique operating structure, (and, therefore, not designed to avoid compliance with the 90-day waiting period limitation).

Employer Action

Eligibility rules should carefully be reviewed for compliance with the 90-day waiting period rules as well as the employer penalty provisions and nondiscrimination rules. While it is permissible under the 90-day waiting period rules for a plan to use substantive eligibility conditions (e.g., job classification) to deny coverage to certain employees, have a waiting period of an additional month during a "bona fide employment-based orientation period," and impose a new waiting period for rehired employees and/or employees changing to and from eligible job classifications, this raises issues for large employers subject to the employer penalty beginning in 2015. These employees may be viewed as continuing employees for purposes of the employer mandate and the imposition of another 90-day waiting period may result in a penalty exposure for the employer as continuing employees generally need to be offered by the first of the month following return to work. In addition, having less generous eligibility rules for lower paid employees or protected classes can also violate various nondiscrimination rules.