FINAL 90-DAY WAITING-PERIOD REGULATIONS RELEASED

On February 24, 2014, the U.S. Departments of Labor, Treasury, and Health and Human Services (Departments) published final regulations pertaining to the Affordable Care Act (ACA) prohibition against a waiting period exceeding 90 days for group health plan coverage. These final regulations apply to group health plans and group health insurance issuers for plan years beginning on or after January 1, 2015. Per the preamble to the final regulations: “For plan years beginning in 2014, the Departments will consider compliance with either the proposed regulations [released on March 21, 2013] or the final regulations to constitute compliance.”

Also, in the same edition of the Federal Register, proposed regulations were released addressing the maximum allowed length of any reasonable and bona fide employment-based orientation period that would not violate the 90-day waiting period limitation.

Background
Under the ACA, effective for plan years beginning on or after January 1, 2014, group health plans and insurers offering group health insurance coverage are prohibited from applying a waiting period that exceeds 90 days. A waiting period is defined as 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. Grandfathered health plans must also comply with the waiting-period requirements.

Final Regulations
The final regulations adopt many provisions of the March 21, 2013 proposed regulations and provide clarifications, modifications, and new provisions. Following are a few of the most significant highlights of the final regulations.

Prohibition on Waiting Periods That Exceed 90 Days
The final regulations provide that group health plans and health insurance issuers offering group health insurance coverage may not impose a waiting period that exceeds 90 days. The Departments also note in the preamble that “nothing in these final regulations requires a plan or issuer to have any waiting period, or prevents a plan or issuer from having a waiting period that is shorter than 90 days.”

Waiting Period
Consistent with the proposed regulations, the final regulations define a waiting period “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.” In addition, consistent with previous guidance, the final regulations stipulate that if an individual enrolls as a late enrollee or special enrollee, any period before the late or special enrollment is not a waiting period.

Cumulative-Hours-of-Service Requirements
The final regulations provide that if a group health plan or group health insurance issuer conditions eligibility on the completion of a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation, if the cumulative hours-of-service requirement does not exceed 1,200 hours.

Relation to a Plan’s Eligibility Criteria
The final regulations clarify that “being otherwise” eligible to enroll under the terms of a group health plan means having met the plan’s eligibility requirements – for example, working in an eligible job classification, achieving job-related licensure requirements or satisfying a reasonable bona fide employment-based orientation period. In addition, the preamble to the final regulations notes that the waiting-period limitation does not require a plan sponsor to offer coverage to any particular individual or class of individuals such as part-time employees. Rather, it “prohibits requiring otherwise eligible individuals to wait more than 90 days before coverage is effective.”

Variable-Hour Employees
Where a group health plan conditions eligibility on an employee regularly having a set number of hours per period (or working full-time) and the plan cannot determine that a newly hired employee is reasonably expected to work the required hours, the plan may take a reasonable period of time – not to exceed 12 months and beginning on any date between the employee’s start date and the first day of the calendar month following the employee’s start date – to determine whether the employee meets the plan’s eligibility condition. The time period for determining whether such an employee meets the plan’s eligibility requirements will not be considered in violation of the 90-day waiting period mandate, if (i) coverage is made effective no later than 13 months from the employee’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 (ii) a waiting period that exceeds 90 days is not imposed in addition to a measurement period.

Counting Days for the 90-Day Waiting Period
All calendar days, including weekends and holidays, are counted in applying the 90-day waiting period rule as measured from the “enrollment date.” Enrollment date means the first day of coverage or, if there is a waiting period, the first day of the waiting period.

Former Employee Rehired
The final regulations include a new provision under which a former employee who is rehired may be treated as newly eligible for coverage upon rehire. Consequently a plan or issuer may require the rehired employee to meet the plan’s eligibility requirements once again, “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).” Furthermore, the preamble notes that 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 a job classification that is eligible for coverage.

HIPAA Certificates of Creditable Coverage (CCC)
The final regulations clarify and confirm that individuals who lose coverage under a plan must be provided a HIPAA CCC through December 30, 2014, and that the elimination of the required HIPAA CCC will apply beginning December 31, 2014. The preamble to the final regulations notes that the prohibition on pre-existing conditions for adults is applicable to plan years beginning on or after January 1, 2014, and that if a plan has a plan year beginning on December 31, 2013, the plan could impose a pre-existing condition exclusion, and an individual could need a HIPAA CCC through December 30, 2014.

Proposed Regulations
As noted previously, the Departments also released proposed regulations addressing the maximum allowed length of any reasonable and bona fide employment-based orientation period that must be satisfied before an individual would be considered to have met the plan’s substantive eligibility conditions. While the final regulations do not specify the facts and circumstances under which an employment-based orientation period would not be considered “reasonable and bona fide,” the proposed regulations provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. 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.

Adherence to the proposed regulations will be considered compliance with the 90-day waiting period provision of the ACA, at least through the end of 2014. If more restrictive final regulations are released regarding the application of the 90-day waiting period with respect to an orientation period, such regulations will not be effective prior to January 1, 2015.

For a copy of the final and proposed regulations published on February 24, 2014, please click on the links provided below.

Final Regulations

Proposed Regulations