



CLIENT ACTION Bulletin

Employee Benefits

Final and Proposed Rules Issued on the ACA's 90-Day Waiting Period

SUMMARY Group health plans and group health insurance must not impose a waiting period longer than 90 days for employees and their dependents, under a final rule issued by the IRS, the Department of Labor, and the Department of Health and Human Services. The final rule's waiting-period limitation, which is part of the Affordable Care Act (ACA), applies to plan years beginning on or after Jan. 1, 2015. Other provisions of the final rule apply to plan years beginning on or after Apr. 25, 2014, with plan sponsors and insurance issuers deemed in compliance during 2014 if they satisfy the requirements of the March 2013 proposed rule.

The agencies also separately issued a proposed rule on "employment-based orientation periods" to address concerns raised by some employers about the effect of the waiting-period requirement and bona fide orientation periods. Under the proposed rule, an employer's orientation period may be no longer than one month, determined by adding one calendar month and subtracting one day to the waiting period. Employers may rely on the proposed rule for 2014, and a final rule will not be effective prior to 2015.

DISCUSSION 90-Day Waiting-Period Limitation

The final rule generally limits the amount of time an employee (and his or her dependents) must wait to be covered to no more than 90 days once he or she has satisfied the plan's terms for eligibility for coverage. A "waiting period" is defined as the period that must pass before coverage for an individual who is otherwise eligible to enroll under the terms of a group health plan can become effective. Being otherwise eligible means that the employee has met the plan-specified eligibility conditions, such as being in an eligible job classification or obtaining a job-related licensure. If a plan conditions eligibility solely on the lapse of time, it must not require more than 90 days for employees to be covered.

Under the final rule:

- the 90-day waiting period counts all calendar days, including weekends and holidays;
- plans that stipulate a cumulative hours-of-service precondition for eligibility must not require more than 1,200 hours before the 90-day waiting period and must not require employees to meet the threshold more than once;
- a rehired former employee may be treated as newly eligible for coverage and thus may be required to satisfy the waiting-period requirement;
- for variable-hour employees – defined as those who are not hired as "full time" (i.e., working at least 30 hours per week on average) but whose working hours turn out to be full time – an employer may apply a "measurement period" of up to one year before making a determination, and if doing so, coverage must begin no later than 13 months after the employees' start date (or, if the start date is not the beginning of a calendar month, the start of the ensuing calendar month);
- collectively bargained multiemployer plans may continue to apply their "unique operating structures" and eligibility conditions, provided they are not designed to avoid compliance with the 90-day waiting-period limitation;
- a group health insurance issuer may rely upon the plan sponsor-provided information about an employee's eligibility for coverage when administering the waiting-period requirement; and
- the creditable coverage certification requirement under the 1996 Health Insurance Portability and Accountability Act (HIPAA) will be eliminated as of Dec. 31, 2014, given that the ACA prohibits preexisting condition exclusions.

“Orientation” Period

The final rule includes a provision on “bona fide employment-based orientation period.” The preamble notes that some commenters urged that the final rule provide flexibility so that the 90-day waiting period could accommodate common administrative systems that currently extend coverage at the start of a month or to allow for three calendar months. These commenters thus sought the ability to extend the waiting period to more than 90 days. In response, the agencies note that the final rule permits employers to impose a “reasonable and bona fide orientation period” that employees must satisfy before the 90-day waiting period begins. However, the rule does not specify what a reasonable or bona fide orientation period is.

Instead, the agencies separately released a proposed rule relating to employment-based orientation periods under the 90-day waiting-period limitation. The proposed rule, which employers may rely on at least through 2014 and until a final rule applies, would limit a reasonable and bona fide orientation period to no more than one month, determined by adding one calendar month and subtracting one calendar day, measured from an employee’s start date. During this period, “employers and employees could evaluate whether the employment situation was satisfactory for each party and standard orientation and training processes would begin.” Thus, if an employee begins working on May 3 in a position eligible for coverage, he or she would have an orientation period end date of no later than June 2; one beginning on Oct. 1 would have an orientation period ending by Oct. 31. The proposed rule also would set the last day of a calendar month as the maximum orientation period in situations where there is not a corresponding date in the calendar month being added to an employee’s start date. For example, an employee who begins working on Jan. 31 would have an orientation period ending Feb. 28 (or Feb. 29 in leap years).

ACTION Employers that offer group health coverage should review the final and the proposed rules, particularly if employee coverage is dependent upon satisfying a waiting period of nearly 90 days. For sponsors of plans that provide coverage beginning on the first day of a month following a waiting period regardless of the date an employee starts working, the proposed rule might offer the means to accommodate such eligibility requirements. For example, if a plan imposes a 90-day waiting period for an individual hired mid-month, he or she might not be extended coverage until the start of a month following the 90-day period; this longer-than-90-days waiting period would run afoul of the ACA’s waiting-period limitation. By applying an orientation period, an employer may be able to retain its current practice, but to do so will require the plan documents to specify this as part of the eligibility requirement for group health plan coverage. In addition, employers should ensure that appropriate administrative systems are in place to ensure compliance with the proposed rule on the 90-day waiting period, and that employee communications appropriately and accurately reflect the requirements.

For additional information about the agencies’ final and proposed rules on the 90-day waiting period, please contact your Milliman consultant.