



## Health Care Reform Update: Week of February 24

### *Final Regulations on PPACA 90-Day Waiting Period Provisions*

On February 20, 2014, the Departments of Treasury, Labor and Health and Human Services issued [final regulations](#) implementing the 90-day waiting period provisions under the Patient Protection and Affordable Care Act (PPACA). These regulations adopt virtually all of the rules addressed in the proposed regulations that the federal agencies released on March 21, 2013, as well as implement some new changes. The following briefly highlights that new guidance.

#### Background

Under the proposed regulations, a group health plan cannot apply a waiting period that exceeds 90 days. A waiting period is the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll in the plan can become effective. Being otherwise eligible to enroll in a plan means having met the plan's eligibility conditions.

#### Finalization of Previously Proposed Rules

The final regulations preserve the rules that were addressed in the proposed regulations, as summarized below:

- Individuals who are otherwise eligible cannot be required to wait more than 90 days before their health coverage becomes effective. All calendar days are counted beginning on the enrollment date, including weekends and holidays.

Note: despite requests by commentators, the limitation on the waiting period remains at 90 days, not 3 months.

- Health coverage eligibility conditions based solely on the lapse of a time period are permissible for no more than 90 days.
- For an individual who enrolls as a late enrollee or special enrollee, the period before the late or special enrollment is not a waiting period.
- If a plan conditions eligibility on an employee working full-time or a specified number of hours of service per period, and the plan cannot determine that a newly-hired employee is reasonably expected to regularly work full-time or that number of hours per period (often referred to as a "variable-hour employee"), the plan can use a measurement period to determine if the employee meets the plan's eligibility condition. That measurement period must:



- Not exceed 12 months;
  - Begin on any date between the employee's start date and the first day of the first calendar month following the employee's start date; and
  - If the employee is determined to be eligible during the measurement period, the employee's coverage is effective no later than 13 months from the employee's start date, plus the time remaining until the first day of the next calendar month (if the employee's start date is not the first day of a calendar month).
- If a plan conditions eligibility on completion of a number of cumulative hours of service, the hours-of-service requirement cannot exceed 1,200 hours.
    - The waiting period must start the first day after the employee satisfies the plan's hours-of-service requirement and cannot exceed 90 days.
    - The hours-of-service requirement can be used only once; it cannot be reapplied to the same individual each year.

The final regulations continue to indicate that the 90-day waiting period limitation does not require a plan or plan sponsor to offer coverage to any particular individual or class of individuals, including, for example, part-time employees.

### Introduction of New Rules

In addition, the final regulations provide the following new guidance:

- Application of Waiting Period Rule to Rehires

If an employee terminates employment and is then rehired by the same employer, the plan may require the former employee to meet the plan's eligibility criteria and satisfy the plan's waiting period again, if that is reasonable under the circumstances. As an example of what is not reasonable, the regulations state that a termination and rehire cannot be a subterfuge to avoid compliance with the 90-day waiting period.

This rule also applies when an employee moves from a job that has health coverage to a job that is ineligible for coverage, and then later moves back to an eligible job classification.

- Eligibility Condition Based on an Orientation Period

The final regulations also introduced a new element that an employer can use in complying with the 90-day waiting period requirement—the "orientation period." An employer who establishes an orientation period at the beginning of a new employee's employment can delay the start of the waiting period until after the orientation period is completed, provided that the orientation period



does not exceed one month. Additional information regarding the orientation period is provided below.

Under the 90-day waiting period proposed regulations, a plan can establish substantive eligibility conditions that an employee must meet before being eligible to enroll and starting the waiting period of up to 90 days. Those proposed regulations included two “safe harbor” examples of such substantive eligibility conditions—being in an eligible classification and achieving job-related licensure requirements. The final regulations added a third example of a “safe harbor” substantive eligibility condition—satisfying a “reasonable and bona fide employment-based orientation period.”

Although the final regulations do not specify the circumstances in which the duration of an orientation period is considered “reasonable and bona fide,” the federal agencies also issued [proposed regulations](#) on February 20, 2014 addressing how this permissible substantive eligibility condition applies. Those proposed regulations describe the orientation period as a period during which the employer and employee can evaluate whether the employment situation is satisfactory for each party, and standard orientation and training processes can begin.

The maximum allowed length of a “reasonable and bona fide employment-based orientation period” is one month. That month is applied in the following manner:

- Add one calendar month (using the length of the month containing the employee’s start date) after the employee’s start date, and then subtract one calendar day, provided the orientation period ends on or before the end of the next calendar month. For example, if the employee’s start date is May 3, the orientation period must end on June 2. An employee whose start date is October 1 must have an orientation period ending on October 31.
- If after adding a calendar month the orientation date does not end in the next calendar month following the month of the employee’s start date, the last day of the orientation period must be the last day of the next calendar month. For example, if the employee’s start date is January 30, the orientation period must end on February 28 (or February 29 in a leap year), not March 1. An employee whose start date is August 31 must have an orientation period ending on September 30, not October 1.

When a group health plan conditions eligibility on an employee completing an orientation period that meets these criteria, the maximum 90-day waiting period can begin on the first day after the orientation period ends.

#### Effective Date



While the 90-day waiting period requirement became effective as of the first plan year beginning 1/1/2014, the final 90-day waiting period regulations are effective as of the first plan year beginning on or after 1/1/2015. Prior to that date group health plans can continue to rely on the proposed 90-day waiting period regulations. The proposed orientation period regulations are open for comment and most likely will not become final and effective prior to 1/1/2015 and possibly later.

Willis' National Legal & Research Group will continue to review and provide timely updates on these and other related changes in Health Care Reform that affect employers.

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