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FINAL RULE CLARIFIES APPLICATION OF 30-DAY MAXIMUM FOR ORIENTATION PERIODS

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Late Friday afternoon, the Departments of Treasury, Labor and Health and Human Services (the “Departments”) issued final regulations (the “Final Rule”) clarifying the interaction between a reasonable and bona fide employment-based orientation period and the 90-day waiting period limitation under the Affordable Care Act (“ACA”).

Background

For plan years beginning on or after January 1, 2014, ACA prohibits a group health plan from applying a waiting period of more than 90 days. Contemporaneous with the February 24, 2014 issuance of final regulations on the 90-day limitation, the Departments issued proposed regulations addressing employee orientation periods. Such proposed regulations provide that conditioning plan eligibility on an employee’s completion of a reasonable and bona fide employment-based orientation period would be permissible if the orientation period does not exceed one month and the maximum 90-day waiting period begins on the first day after the orientation period.

Final Rule

The Final Rule adopts the proposed orientation period rule and offers some additional clarification. Although a plan may impose substantive eligibility criteria (i.e., being in an eligible job classification, achieving job-related licensure requirements specified in the plan, or satisfying a reasonable and bona fide employment-based orientation period) , it may not impose conditions that are mere subterfuges for the passage of time.

Under the Final Rule, the conditioning of plan eligibility on an employee’s completion of a reasonable and bona fide employment orientation period will not be considered to be designed to avoid compliance with the 90-day waiting period limitation; provided the orientation period does not exceed one month (not 30 or 31 days). For this purpose, one month is 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. In the absence of 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. Thus, 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).

After an individual is determined to be otherwise eligible to enroll (i.e., has satisfied the plan's substantive eligibility conditions), the plan cannot apply any waiting period that exceeds 90 days. For purposes of calculating this 90-day period, all calendar days are counted beginning on the *enrollment date*, including weekends and holidays. The *enrollment date* refers to the first day of coverage or, if there is a waiting period, the first day of the waiting period. The Final Rule also notes that a plan that imposes a 90-day waiting period may, for administrative convenience, choose to permit coverage to become effective earlier than the 91st day if the 91st day is a weekend or holiday.

Employer Mandate

Pursuant to Code section 4980H, an applicable large employer must offer full-time employees affordable minimum value coverage by the first day of the fourth full calendar month of employment to avoid the possibility of an assessable penalty tax (the "Employer Mandate"). This requirement must be satisfied separate and apart from compliance with the Final Rule (i.e., the requirements relating to orientation and waiting periods). In other words, compliance with the Final Rule is not determinative of an applicable large employer's compliance with Code section 4980H.

An applicable large employer that has a one-month orientation period may comply with both the 90-day waiting period limitation and the Employer Mandate by offering coverage no later than the first day of the fourth full calendar month of employment. For example, a full-time employee hired on January 6 is offered plan coverage on May 1. However, an applicable large employer will not be able to impose both a full one-month orientation period and a full 90-day waiting period. Thus, if coverage starts on May 6, which is one month plus 90 days after date of hire, the employer may be subject to an assessable payment under Code section 4980H.

The inconsistent coverage obligations under the Final Rule and the Employer Mandate may seem confusing. It may help to bear in mind that some employers will be subject to the Final Rule – but not the Employer Mandate. In that case, the employer would simply comply with the Final Rule. However, an applicable large employer is subject to the Employer Mandate and must comply with its more stringent requirements.

Effective Date

The Final Rule is effective on August 24, 2014 (60 days after publication in the Federal Register) and applies for plan years beginning on or after January 1, 2015. Until then, adherence to the proposed rule will constitute compliance.

MEET THE TEAM



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