

Issue Brief

Final Rules on Waiting Periods & HIPAA Certificates of Creditable Coverage

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This week, final rules were released regarding the ACA prohibition on waiting periods exceeding 90 calendar days and the retirement of the HIPAA Certificate of Creditable Coverage. The final rules formally adopt the proposed regulations in regard to waiting periods provided in March 2013, and, in a new development, recognize a one-month orientation period to be allowed before the start of the waiting period.

WAITING PERIOD RULES

In general, “a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period...that exceeds 90 days.” This rule applies to all group health plans (large group and small group, fully-insured and self-funded, regardless of grandfathered status) for plan years beginning on or after January 1, 2014 (e.g. if a plan renews 4/1/14, the rule is effective for that plan 4/1/14).

Employers are not required to offer coverage to any particular employee or class of employees. Rather, they cannot impose a wait of more than 90 calendar days before coverage is effective for an otherwise eligible employee or dependent. The final rules clarify that being otherwise eligible means having met the plan’s substantive eligibility conditions (i.e. being in an eligible job classification, achieving job-related licensure requirements, or satisfying a reasonable and bona fide employment-based orientation period).

90-Day Requirement

After the release of the proposed regulations, commenters had requested some flexibility regarding the 90-day limitation to allow for the use of 3 calendar months or eligibility on the 1st of the month following 90 days. However, the final regulations confirm that due to the clear text of the statute, “the waiting period may not extend beyond 90 days and all calendar days are counted beginning on the enrollment date, including weekends and holidays.” If the 91st day is a weekend or holiday, coverage may be made effective earlier than the 91st day, but coverage must be effective no later than the 91st day.

Anyone hired (or newly eligible) prior to the beginning of the 2014 plan year must be credited with any prior waiting period days; and if 90 days has already been incurred before the 2014 plan year renewal, such individual(s) must be allowed to commence coverage on the 1st day of the 2014 plan year. For example, assuming a 1/1/2014 plan year renewal:

- If the eligible employee is hired 12/15/2013 (subject to a pre-ACA waiting period of 1st of the month following 6 months), the employee must be offered coverage no later than 3/15/14 (90 days after date of hire).
- If the employee is hired 9/15/2013 (subject to a 6-month waiting period), the employee must be offered coverage no later than 1/1/2014 (90 days have already occurred upon renewal).

The final rules clarify that an employer may impose a new waiting period upon rehires or employees switching between positions, if reasonable under the circumstances (not just to avoid compliance with the 90-day waiting period). However, “applicable large employers” (generally those with 50 or more full-time equivalents) may be subject to break in service rules requiring that any employers rehired within less than 13 consecutive weeks must be treated as a continuing employee for purposes of the employer shared responsibility rules. Failure by an applicable large employer to reinstate coverage upon re-hire for these “continuing employees” could result in an assessable payment under the 4980(H) rules.

Eligibility Requirements

Eligibility conditions based solely on the lapse of a time period are permissible for no more than 90 calendar days; however, other conditions for eligibility under the terms of a group health plan are generally permissible, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. Following are several specific scenarios that were included in the proposed regulations and have now been formally adopted in the final rules:

- Meeting certain sales goals or earning a certain level of commission, as well as attaining job-related training or licensure, is generally allowed and does not trigger the 90-day waiting period limitation until eligibility is met.
- Requiring a certain number of cumulative hours of service (not to exceed 1200 hours) is allowed, and the 90 days would begin upon the employee's achieving the required cumulative hours of service.
 - Note – this is designed to be a one-time eligibility requirement only and cannot be re-applied to the same individual each year. Also keep in mind that this may violate the employer shared responsibility rules (which require coverage to be offered to full-time employees on the 1st of the fourth month following hire and do not recognize this exception). Therefore, this cumulative service requirement will be used mostly by small groups not subject to the shared responsibility rules, and for use with part-time employees that an employer may optionally choose to cover.
- Variable Hour and Seasonal Employees – if an employer chooses to use the optional look-back measurement method to determine eligibility, the employer may require a 3-12 month initial measurement period consistent with the employer shared responsibility rules under IRS Code section 4980(H). Keep in mind that for new variable hour and seasonal employees, coverage must be offered no later than 13 months from the employee's hire date (plus a fraction of a month if the hire date is not the 1st day of the month). The initial measurement period approach may not be used for full-time employees not meeting the definition of a variable hour or seasonal employee.

The final rules formally adopted the what was previously provided in an FAQ in regard to multiemployer plans that track hours across multiple contributing employers. Such plans, which often allow employees to bank excess hours from one measurement period and apply them to another, or which aggregate hours for one period and permit coverage to extend through the next full period regardless of employment status, are allowed and not seen as violating the waiting period rules.

New “Orientation Period” Permitted

In addition, new rules were added that allow an employer to require employees to satisfy “a reasonable and bona fide employment-based orientation period” prior to the start of the 90 calendar day waiting period. Proposed rules were released providing some limited guidance, but additional rules regarding this “orientation period” are needed to provide further clarification.

The proposed rules allow a maximum of 1 month for an employer to evaluate the employment situation and/or to provide orientation and training prior to the start of the official waiting period (e.g. May 3rd – June 2nd or Oct 1st – Oct 31st). 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 (e.g. Jan 30th – Feb 28th or Aug 31st – Sept 30th). The practical effect of implementing an orientation period would be that some employees’ coverage may not be effective until the 1st of the month following 3 months or 90 days of actual employment (a one-month orientation period plus the full plan waiting period).

CERTIFICATES OF CREDITABLE COVERAGE

Since beginning in 2014 health plan pre-existing condition limitations are generally no longer allowed, the final rules clarify that HIPAA certificates of creditable coverage will no longer be required after December 31, 2014. The effective date recognizes that participants may still need these certificates during 2014 to avoid existing pre-existing condition exclusions under non-calendar plan years.

Summary

For the most part the final regulations are consistent with earlier proposed rules, with the exception of the new proposed orientation period. Employers should carefully review their current eligibility rules to make sure they are in compliance with these rules for their 2014 plan year. And finally, employers will be happy to learn that among all the new things that are required, there is finally one thing that employers no longer have to worry about. After December 2014, employers will no longer have to send HIPAA certificates of creditable coverage.

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