

REFORM *Update*

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The Department of Labor (DOL), the Department of Health and Human Services (DHHS) and the Internal Revenue Service (IRS) recently released proposed guidance to address the limit on the new hire waiting period. This guidance also amends certain aspects of the Health Insurance Portability and Accountability Act (HIPAA). These amendments make changes to the portability provisions in response to the health care reform requirements taking effect in 2014.

New Hire Waiting Period Limit

Health care reform requires employers to limit their new hire waiting period to 90 days as of the first day of the first plan year beginning on or after January 1, 2014. This limit applies to **all** group health plans. It is **not** delayed for grandfathered plans. The regulations provide some key clarifications:

- The 90-day waiting period applies only to plans that base the waiting period solely on the passage of time. Waiting periods based on other criteria are permitted. The challenges with these waiting periods are discussed below.
- For plans that extend coverage to full-time employees, the waiting period can be no longer than 90 days. It is clear that the first of the month following 90 days is not permitted. Coverage must be offered as of the 91st day. If an employer requires first of the month timing for administrative reasons, then the first of the month following 60 days of employment could be adopted instead.
- The 90 days refers to calendar days, and not to days worked.
- The 90-day limit applies to both eligible employees and eligible dependents. Employers cannot establish a waiting period for dependents that is more than 90 days.
- Employers may have a category of employees that works variable hours. At the time of hire, the employer may not know if these employees will be considered full-time. Therefore, employers are permitted a reasonable amount of time to determine if these specific employees should be considered full-time. The employer must follow the shared responsibility rules discussed in our *Reform Update* at http://www.mcgrawwentworth.com/Reform_Update/2013/Reform_Update_57.pdf. If these variable-hour employees are determined to be full-time, coverage must be offered within 13 months, measured from the first of the month following the employee's date of hire.
- Some plans require an employee to work a specific number of hours in order to become eligible for health plan coverage. As long as the cumulative hours of service do not exceed 1,200, the plan would not be considered designed to avoid compliance. Please note that the regulations do not allow plans to apply cumulative hours of service to the same individual each year.

Plans may have eligibility requirements that tie to the job itself, and not to an interval of time. These conditions are permitted. For example, an employee may be required to meet specific licensing requirements to be eligible for the health plan. Coverage must be offered by the 91st day after

meeting the specific licensing requirement. However, employers should be careful with these requirements. If the employee works full-time (i.e. 30 or more hours per week), the employer may be penalized for failing to offer coverage. It would not matter that the employee does not meet the eligibility requirements for the plan.

The regulations include a number of examples to assist employers in understanding the new hire waiting period limits:

- A group health plan provides coverage for full-time employees. The plan year is January 1 through December 31. Employee A begins work on January 19, 2014. The employer must offer coverage to Employee A by April 19, 2014.
- Employee B is hired full-time to be a graphic artist as of January 30, 2014. ABC Company does not cover graphic artists under their group health plan. On April 11, Employee B is promoted to a marketing specialist. Marketing specialists are eligible for coverage under ABC Company's health plan. The waiting period for Employee B would begin on April 11, 2014. Coverage must be offered by July 10, 2014. Since Employee B works full-time, ABC will be penalized for failing to offer coverage as of May 1, 2014.
- ABC Company offers health coverage to full-time employees working 30 or more hours per week. Employee C is hired as a variable-hour employee, with hours expected to fluctuate between 20 and 45 per week. Employee C's first day of work is October 25, 2014. On the date of hire, it is not known if Employee C will work 30 or more hours per week. ABC Company has an 11-month measurement period, and their administrative period is one month measured from the first of the month following the end of the measurement period. Employee C works full-time during the measurement period, and must therefore be offered coverage by November 1, 2015. This arrangement satisfies the waiting period rules.

The proposed regulations also address how to handle employees that may be in a waiting period at the point the new rules become applicable to the health plan. Once the group health plan is subject to the 90-day limit, a waiting period cannot be applied that exceeds 90 days. For example, ABC Company has a calendar-year plan. Their health plan's new hire waiting period is six months. As of January 1, 2014, ABC Company's new hire waiting period must be amended to 90 days. Employee D was hired on November 15, 2013. On what date must he be offered coverage? Employee D must be offered coverage as of the 91st day measured from November 15, 2013. The logic is that the plan will be amended as of January 1, 2014. The waiting period is measured from the date of hire, even if the date of hire precedes the date the plan is amended.

The regulations note that many insurance carriers rely on employers to report eligibility information, such as the employee's date of hire. These regulations allow insurance carriers to rely on employer-reported data. The carrier will not be held responsible if the 90-day waiting period is exceeded due to incorrect data from the employer.

Stakeholder comments are requested on these proposed rules. Remember, if your plan's waiting period relies on the achievement of a job requirement or cumulative hours of service, and your plan fails to offer coverage to full-time employees and their dependents, you could still be subject to the "play or pay" penalty.

Amendments to HIPAA

Some aspects of the HIPAA portability rules also need to be amended. The HIPAA portability requirements were initially designed to address “job lock.” In the 1990s, most plans included pre-existing condition limitations. Some individuals were unable to change jobs because they could not afford to go without health coverage for their own and their covered dependents’ pre-existing medical conditions. The HIPAA portability rules placed limits on how plans could structure their pre-existing condition limitations. In addition, plans needed to credit time for coverage under the former employer’s plan, as long as certain conditions were met.

As of the first day of the first plan year beginning on or after January 1, 2014, group health plans will no longer be able to include pre-existing condition limitations for any member. As a result, certain changes must be made to the HIPAA portability rules:

- The requirement for health plans to provide HIPAA certificates of creditable coverage will be eliminated after December 31, 2014. These certificates will no longer be needed, because all plans will have removed pre-existing condition limitations by that point.
- A number of examples are provided regarding various aspects of the HIPAA requirements. These examples needed to be updated to reflect the health care reform requirements, specifically the prohibitions on lifetime and annual dollar limits and the extension of dependent child coverage to adult children.

The examples address various issues related to plan design. For example, one example confirms that health plans may assess an annual dollar benefit limit for specific benefits that are not considered essential health benefits.

Concluding Thoughts

Employers need to understand the 90-day waiting period limit for new hires. This latest guidance confirms that the first of the month following 90 days will **not** be permitted. Employers must ensure that their waiting period is amended as of the first day of the first plan year beginning on or after January 1, 2014. If your organization currently has a waiting period exceeding 90 days, please be aware that the reduced waiting period will impact projected costs for 2014.

As of January 1, 2015, employers will no longer be required to send certificates of creditable coverage.

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