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REFORM Update

Issue Eighty-Five May 2014

May 22, 2014

The Departments of Labor, Treasury and Health and Human Services (the Departments) released final regulations on the new hire waiting period. The final regulations include technical amendments to certain Health Insurance Portability and Accountability Act (HIPAA) requirements. In conjunction with the final regulations, the Departments also released proposed regulations addressing new hire orientation periods.

This *Reform Update* will address:

- Final 90-day waiting period regulations
- Proposed regulations on new hire orientation periods
- Technical amendments to HIPAA

Failure to comply with the waiting period regulations will result in penalties of $100 per participant per day affected by the violation. In general, to avoid the "play or pay" penalties, applicable large employers need to offer coverage to full-time employees as of the first day of the calendar month following three full calendar months of employment.

The waiting period and penalty regulations are separate. Employers must comply with both to avoid penalties.

Final 90-Day Waiting Period Regulations

The proposed regulations for a 90-day waiting period were released last year and addressed in our *Reform Update* at http://www.mcgrawwentworth.com/Reform_Update/2013/Reform_Update_64.pdf.

The final regulations adopted the key provisions of the proposed rules. The rules maintained the definition of a waiting period as the period of time that must pass before coverage will become effective for an individual who is otherwise eligible to enroll under the terms of a group health plan. All calendar days, including weekends and holidays, are counted toward the 90 days.

The final regulations retained the provision that a plan would not violate the waiting period rules if individuals are allowed an extra period of time to enroll. Coverage may be effective upon enrollment. As long as the plan gives the individual the opportunity to enroll for coverage as of the 91st day, it will meet the waiting period requirements. If coverage is delayed because the individual takes additional time to enroll, that would not be a violation of the rules.

The final regulations continue to allow substantive eligibility provisions. Two examples of permissible substantive eligibility conditions, the requirement to hold a particular job classification or achieve job-related licensure requirements, were included in the proposed regulations. **It is important to note that these substantive eligibility provisions are allowed under the waiting period rules, but**

they are not recognized under the penalty rules. If an employer adds a substantive eligibility provision to a waiting period and a full-time employee is not offered coverage as of the first of the month following three full calendar months of employment, then a penalty may be assessed under the "play or pay" rules.

The final regulations include a third example of a substantive eligibility provision. It is a reasonable and bona fide employment-based orientation period. More details on the orientation period were included in the proposed regulations.

The final regulations confirm that an employer could have an initial measurement period of up to 12 months, to determine whether a variable hour employee averages 30 or more hours per week and is thus eligible for coverage. To satisfy the waiting period rules, a variable hour employee must be offered coverage no later than 13 months following the date of hire. The 13-month time period can be measured from the first of the month following the employee's start date.

The final rules will also permit eligibility conditions requiring an employee to complete a cumulative number of service hours. This is allowed, as long as the required hours do not exceed 1,200. The 90 day waiting period would start once the 1,200 cumulative service hours are completed. This is intended to be a one-time requirement; the cumulative hours of service requirement cannot be imposed on an annual basis. In this case, an eligibility provision requiring cumulative hours worked and then a 90 day waiting period once hours worked were completed, would be an issue for the "play or pay" rules.

These rules adopted the provision that insurance carriers can reasonably rely on the eligibility information reported by the employer. The following two requirements must be met:

1. The insurer must require the employer to disclose the conditions of the new hire waiting period imposed by the plan.
2. The insurer can have no specific knowledge of the imposition of a waiting period that would exceed the 90-day limit.

The final regulations clarified how employers should handle rehire situations. Rehired employees can again be subject to the plan's eligibility conditions and waiting period, if the termination and subsequent rehire are not a subterfuge to avoid compliance with the 90-day waiting period limit. Employers will need to be cautious if employees are terminated during the initial waiting period and rehired a short time later. Situations like this could be construed as a way to avoid compliance with the waiting period rules.

Proposed Regulations on New Hire Orientation Periods

The proposed regulations address the employment-based orientation period. This is a period of time in which the employer and employee evaluate whether the employment situation is satisfactory and the standard orientation and training processes begin. The maximum allowed length of an orientation period is one month. The 90-day waiting period would begin after the completion of the orientation period.

The orientation period is measured from the employee's start date. It is determined by adding no more than one calendar month to that date and then subtracting one calendar day. For example, a new employee starts work on February 10. The employer's health plan includes a one-month orientation period, which will run until March 9. After March 9, the employer starts counting days toward the 90-day new hire waiting period. If there is not a corresponding date during the next following month, then the end of the orientation period will be the last day of that month. If an employee started on January 30, the end of the orientation period would be February 28 (or February 29 if it is a leap year).

Few details are provided on the allowance for an orientation period. For example, if an employer does not currently have an orientation period, may one be added in the future? Some attorneys are suggesting that an orientation period be used to allow a plan to effectively have a new hire waiting period that is the first of the month following 90 days. To achieve this result, the plan would have a one-month orientation period and then a new hire waiting period in which coverage becomes effective on the first of the month following 60 days.

Employers will definitely have to administer the orientation period separately from the new hire waiting period. This means they must apply the one-month orientation period and then start counting days toward the waiting period. At this point, it is not clear if this type of arrangement will be allowed for employers that do not currently have an orientation period.

Employers need to be cautious. Adding an orientation period and then a 90-day new hire waiting period would likely cause an issue under the penalty rules.

Technical Amendments to HIPAA

The final regulations also included some technical corrections to HIPAA, including:

- Clarification of situations when an individual enrolls as a special or late enrollee under HIPAA's portability rules. Any period before the late or special enrollment is not considered part of the waiting period.
- Confirmation that HIPAA Certificates of Creditable Coverage will be eliminated effective December 31, 2014. They will not be needed because plans will no longer be able to apply pre-existing condition limitations to essential health benefits.

In addition, a number of examples in the HIPAA portability regulations were updated to reflect changes required by the Affordable Care Act:

- References to annual and lifetime dollar limits were removed.
- More examples of implicit pre-existing condition limitations were added. For example, assume a health plan limits coverage under the plan for fertility treatments. Three treatments per lifetime are covered, and the plan takes into account treatments received prior to an individual's coverage under the plan. This is considered a pre-existing condition limitation. The plan can limit the number of fertility treatments, but may only count the ones received while an individual was covered by that specific plan.

The HIPAA amendments were necessary to reflect various requirements of the Affordable Care Act.

Concluding Thoughts

The proposed waiting period regulations applied to group health plans as of the first day of the first plan year occurring on or after January 1, 2014. These final waiting period regulations are effective as of the first day of the first plan year occurring on or after January 1, 2015.

The final rules retained the provision regarding employees in the new hire waiting period at the time the waiting period is amended. If a plan must reduce the new hire waiting period, then the employer must apply the amended new hire waiting period back to the employee's hire date.

An example will help. ABC Company currently has a six-month new hire waiting period. ABC's plan year runs from July 1 to June 30. ABC hires Paul McCartney on June 1. On July 1, ABC reduces their new hire waiting period to 90 days. Paul's coverage will now be effective 90 days from his June 1 start date. ABC cannot apply the six-month waiting period to Paul, although that was the waiting period in place at the time he was hired. When the plan is amended, the change will apply to hire dates prior to the effective date of the change.

Most employers have made the required changes to their new hire waiting period. Hopefully, the Departments will provide clarification on the orientation period so employers can fully understand their options.

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