

REFORM *Update*

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The Department of Treasury, Labor, and Health and Human Services (the Departments) recently released final regulations relating to the employment-orientation period. The Affordable Care Act (ACA) limits the new hire waiting period for employer group health plans to not more than 90 days. This provision affected group health plans as of the first day of the plan year on or after January 1, 2014.

The Departments released final regulations in February on the waiting period rules. These were addressed in our *Reform Update* at http://www.mcgrawwentworth.com/Reform_Update/2014/Reform_Update_85.pdf. Along with the final regulations, the Departments released proposed regulations on the permissibility of orientation periods. These latest regulations finalize the rules relating to orientation periods. The regulations define an orientation period as a time period used by the employer and employee to determine if the employment situation is satisfactory. It would include the standard orientation and training processes for new hires. These final rules impact plans as of the first day of their first plan year in 2015. Until that date, employers can rely on the proposed regulations.

It is important to remember that the waiting period rules and the employer mandate rules are separate regulations, governing separate parts of the ACA. Each regulation looks at new hire waiting periods differently. Both have different potential consequences for failing to comply. The final waiting period regulations provide more detail on the interplay between the waiting period rules and the employer mandate requirements.

A waiting period is defined as the period of time that must pass before coverage for an otherwise eligible employee or dependent becomes effective. Group health plans may apply up to a maximum 90-day waiting period from the date an individual would otherwise be eligible to enroll for coverage. For most employers, new hires are eligible for coverage on the first day of work. Other plans may have conditions that must be satisfied prior to eligibility, deemed “substantive eligibility conditions” that do not necessarily tie to the passage of time. The waiting period final regulations specify three permitted types of substantive eligibility conditions:

1. Being in an eligible job classification
2. Meeting a job-related licensure requirement; or
3. The completion of a bona-fide employment based orientation period

Although an employer may implement a substantive eligibility condition before the 90-day waiting period begins, the employer may suffer a penalty under the employer mandate rules if the employee averages 30 or more hours of service a week (i.e. full-time employee). In order to avoid employer mandate penalties, employers must offer coverage to full-time new hires as of the first day of the first month following 3 full calendar months of employment. For example, an employer may require an employee secure an insurance license to be eligible under the health plan. Once the license is obtained and the employee is eligible for benefits, a new hire 90-day waiting period is applied. If a new full-time employee obtains the license in 3 months, the 90-day waiting period would start at that point. The employee would not have effective coverage until six months after his/her start date. Although this may be permitted under the waiting period rules, this employer may be subject to a penalty under the employer mandate rules depending on their

circumstances. If the employee is working full-time, the employee must be offered affordable, minimum value coverage as of the first day of the first month following 3 full calendar months of employment to avoid the employer mandate penalty.

The final regulations clarified the rules surrounding the orientation period. An employer may only use an orientation period if it is being used for “a reasonable bona fide” business purpose. The reasonableness will be determined by the facts and circumstances of the situation.

The orientation period is a time period used by the employer and employee to determine if the employment situation is satisfactory. The orientation period can be no longer than one month. It is measured by adding one calendar month to the employee’s start date and then subtracting one calendar day. The orientation period would occur separately and prior to any new hire waiting period. If there is no corresponding date in the next calendar month after adding one month, then the last permitted day of that orientation period is the last day of the next calendar month.

Several examples of measuring the orientation period were provided:

- Employee’s start date is May 3rd. The last permitted day of the orientation period is June 2nd.
- Employee’s start date is October 1st. The last permitted day of the orientation is October 31st.
- Employee’s start date is January 30th. The last permitted day of the orientation is February 28th (or the 29th in a leap year).

If an employer decides to add an orientation period of one month, they should be mindful of the new hire waiting period that immediately follows the orientation period. If the plan applies a one month orientation period, the plan will likely be compliant with the ACA’s new hire waiting period rules. However, if the orientation period is as long as one month, and then an employee is thereafter subjected to a maximum 90-day waiting period, they could end up making coverage effective later than the first day of the first month following 3 full calendar months of employment.

The final rules make clear a health plan cannot implement a substantive eligibility provision period that is simply a subterfuge to avoid the maximum 90-day waiting period limitation. Employers should exercise caution if they are planning to use the orientation period as a subterfuge to the maximum 90-day waiting period rule, or if they implement the orientation period for a non-bona fide business reason. The final regulations did not comment on whether an employer who has historically not included an orientation period could add one going forward. The final rules did note that orientation periods are fairly common.

Employers that intend to use an orientation period combined with a new hire waiting period must amend their plan documents to accurately reflect these separate time periods. They also need to make sure they are administering the orientation period properly. Simply counting 30 days from the start date will not be construed as administering the orientation period properly. The employer must add one month to the start date and subtract one calendar day.

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