December 27, 2013

Prohibition on Excessive Waiting Periods Begins 2014

Group health plans are prohibited from imposing excessive waiting periods on an otherwise eligible employee (or dependent) under healthcare reform beginning with the first plan year on or after January 1, 2014. For plans subject to ERISA, the effective date of this provision will be consistent with the ERISA plan year. Group health plans not subject to ERISA will generally have to comply with this provision at the medical plan annual renewal/enrollment date, i.e., the first day of the new benefit year beginning on or after January 1, 2014.

All group health plans are subject to this prohibition, regardless of size or grandfathered status, and the rules apply to both full-time and part-time employees and their dependents. The excessive waiting period prohibition does not require group health plans to offer coverage to a certain class of employees, but if health coverage is offered, the waiting period for such coverage has to meet the requirements of this provision to avoid non-compliance. The rule generally requires that health plans not impose a waiting period of more than 90 days. The guidance defines a waiting period as a "a period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective." Being "otherwise eligible to enroll under the terms of the group health plan" generally means an individual has satisfied the waiting period based on a lapse of time, which can not be more than 90 days, or has met the plan's substantive eligibility conditions. Both types of eligibility waiting periods are discussed in more detail below. While the 90-day maximum waiting period provision applies to health coverage, HIPAA-excepted benefits like stand-alone vision, dental or health FSAs that meet specific conditions are not subject to this rule.

The proposed regulations are detailed and provide numerous examples for how the prohibition on excessive waiting periods apply. This Update is intended to provide plan sponsors with a general understanding of how the prohibition applies. Examples have been taken from the proposed regulations to illustrate the applicability of the rule.

Waiting Period Based on a Lapse of Time

For waiting periods based solely on a lapse of time, the waiting period can not be more than 90 days for employees otherwise eligible for coverage. Employers implementing or maintaining waiting periods compliant with this rule should be aware that:

- Every calendar day is counted toward the 90 day maximum waiting period, including weekend days and holidays. If the 91st day falls on a weekend or holiday, the plan may permit coverage to be effective earlier than the 91st day, but not later.

- Three months is not the same as 90 days and three month waiting periods based solely on a lapse of time will violate this rule if the three months equate to longer than 90 days.
- The waiting period rule applies to both the employee and eligible dependent so it is not permissible to impose a longer waiting period for spouses and dependent children if such waiting period exceeds 90 days.
- If an otherwise eligible employee is within a waiting period and has already waited 90 days as of the effective date of the provision, the waiting period no longer applies to this individual and health coverage for this individual must begin immediately.

Example: A group health plan provides that full-time employees are eligible for coverage under the plan. Employee A begins employment as a full-time employee on January 19.
Conclusion: In this Example, any waiting period for A would begin on January 19 and may not exceed 90 days. Coverage under the plan must become effective no later than April 19 (assuming February lasts 28 days).

Example: A group health plan provides that employees are eligible for coverage after one year of service.
Conclusion: In this Example, the plan's eligibility condition is based solely on the lapse of time and, therefore, is impermissible because it exceeds 90 days.

Waiting Periods Based on Substantive Eligibility Requirements

Eligibility based on a substantive eligibility requirement are permissible under the rules and will not violate the prohibition on excessive waiting periods so long as the waiting period was not put in place to avoid compliance with the 90 day rule. The proposed regulations provide examples of substantive waiting periods, which include:

- *Benefit eligibility contingent on a certain job classification* – the waiting period may begin after the employee obtains the job classification.

Example: A group health plan provides that only employees with job title M are eligible for coverage under the plan. Employee B begins employment in job title L on January 30.
Conclusion: In this Example, B is not eligible for coverage under the plan, and the period while B is working in job title L (and therefore not in an eligible class of employees) is not considered part of a waiting period.

Example: Same facts as in Example above, except that B transfers to a new position with job title M on April 11.
Conclusion: In this Example, B becomes eligible for coverage on April 11, but for the waiting period. Any waiting period for B begins on April 11 and may not exceed 90 days. Coverage under the plan must become effective no later than July 10.

- *Benefit eligibility based on acquiring a license* - waiting period may begin after the employee has acquired the necessary license.

Example: A group health plan provides that only employees who have completed specified training and achieved specified certifications are eligible for coverage under the plan. Employee C is hired on May 3 and meets the plan's eligibility criteria on September 22.
Conclusion: In this Example, C becomes eligible for coverage on September 22, but for the waiting period. Any waiting period for C would begin on September 22 and may not exceed 90 days. Coverage under the plan must become effective no later than December 21.

- *Benefit eligibility based on a cumulative service requirement* - waiting period may being after the cumulative service requirement has been satisfied. For eligibility based on cumulative service requirements, the cumulative hour requirement may not be more than 1200 hours to be compliant with the 90-day maximum waiting period rule. This provision must be designed as a one-time eligibility requirement only; the proposed rules do not permit, for example, re-application of such a requirement to the same individual each year.

Example: Employee F begins working 25 hours per week for Employer Z on January 6 and is considered a part-time employee for purposes of Z's group health plan. Z sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. F satisfies the plan's cumulative hours of service condition on December 15.
Conclusion: In this Example, the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, coverage for F under the plan must begin no later than the 91st day after F completes 1,200 hours. (If the plan's cumulative hours-of-service requirement was more than 1,200 hours, the requirement would be considered to be designed to avoid compliance with the 90-day waiting period limitation.)

Special Rules for Variable Hour Employees

Under the proposed rules, if eligibility is based on a number of service hour requirements, and it can not be determined at the time of hire that the employee will meet the eligibility definition, the plan may adopt a reasonable period to measure the employee's hours to determine whether the employee meets the plan eligibility definition. This measuring period may not be more than 12 months and must begin on a date between the employee's start date and the first of the month following the employees start date. If the employee is determined to be eligible for coverage during the measurement period, coverage must start no more than 13 months from the employee's start date.

Example: Under Employer Y's group health plan, only employees who are full-time (defined under the plan as regularly averaging 30 hours of service per week) are eligible for coverage. Employee E begins employment for Employer Y on November 26 of Year 1. E's hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and E's availability. Therefore, it cannot be determined at E's start date that E is reasonably expected to work full-time. Under the terms of the plan, variable-hour employees, such as E, are eligible to enroll in the plan if they are determined to be a full-time employee after a measurement period of 12 months that begins on the employee's start date. Coverage is made effective no later than the first day of the first calendar month after the applicable enrollment forms are received. E's 12-month measurement period ends November 25 of Year 2. E is determined to be a full-time employee and is notified of E's plan eligibility. If E then elects coverage, E's first day of coverage will be January 1 of Year 3.
Conclusion: In this Example, the measurement period is permissible because it is not considered to be designed to avoid compliance with the 90-day waiting period limitation. The plan may use a reasonable period of time to determine whether a variable-hour employee is a full-time employee, provided the period of time is no longer than 12 months and begins on a date between the employee's start date and the first day of the next calendar month, provided coverage is made effective no later than 13 months from E's start date (plus if the employee's start date is not the first day of a calendar month, the time remaining until the first day of the next calendar month) and provided that, in addition to the measurement period, no more than 90 days elapse prior to the

employee's eligibility for coverage.

Buy-In of Hours and Multiemployer Plans

Where a plan requires employees to work a certain number of hours during a specified measurement period in order to be eligible for coverage, the rules allow for the plan to permit employees with insufficient hours to purchase, or "buy-in," the additional hours they need to meet the threshold. The rules also note that "hour banks," a common feature of multiemployer plans, function as buy-in provisions and are permissible. Acknowledging the unique nature of multiemployer plans, the agencies are soliciting additional comments on the application of the proposed rules to multiemployer plans and whether any additional examples or provisions are needed.

Other Considerations

Other factors may need to be considered as employers review current waiting period provisions and/or make changes to existing rules in light of the prohibition on excessive waiting periods.

- An employee's failure to elect benefits within the 90-day period does not cause the employer to be non-compliant with the 90-day maximum waiting period rule.
- State law may call for shorter waiting periods. For example, in California, there is a 60 day waiting period law for health benefits that will still apply after 2014.
- Employers subject to the employer-shared responsibility mandate ("play or pay") will have to comply with the 90-day waiting period rule in 2014 (assuming the employer offers health coverage), but will also have to comply with "play or pay" rules to avoid tax penalties beginning in 2015. Compliance with the 90-day waiting period rule in itself does not mean compliance with "play or pay." Employers subject to both provisions will have to examine their plans closely for compliance under both provisions. For example, while an employer may condition benefit eligibility on the attainment of a license (which may be compliant under the 90-day waiting period rules), during the period of time the employee takes to acquire that license, the employer may by liable for a "play or pay" penalty for such employee if the employee is full-time (as defined under health reform) and the employee receives a premium subsidy to receive coverage under the Marketplace while ineligible for the employer's health plan.
- The Department of Labor noted in an FAQ that final regulations on the prohibition of excessive waiting periods are forthcoming but proposed rules may be relied on from January 1, 2014 until the end of 2014. The guidance indicates that if the final rules are more restrictive than the proposed rules, that final rules will be effective after January 1, 2015.

Plan sponsors with waiting periods need to confirm that their plans are in compliance with these rules. Should you have any questions regarding the prohibition on excessive waiting periods, please contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online Resource Center.