

Health Care Reform Management Alert Series



Employment-Based Orientation Period and the 90-Day Waiting Period Limitation

Issue 82

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This is the eighty-second issue in our series of alerts for employers on selected topics in health care reform. (Click [here](#) to access our general summary of health care reform and other issues in this series) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

Recently, the Departments of Treasury, Labor, and Health and Human Services (the “Departments”) jointly issued *final regulations* permitting employers to impose a “reasonable and bona fide employment-based orientation period” of up to one month before the commencement of a waiting period not to exceed 90 days for purposes of the Affordable Care Act.

As described in *Issues 60* and *79*, for plan years beginning on or after January 1, 2014, employees and dependents who are otherwise eligible for coverage under an employer’s group health plan cannot be required to satisfy a waiting period longer than 90 calendar days, including weekends and holidays. In response to the concern that a strict 90-day waiting period (rather than a three calendar month or first of the month following a 90-day waiting period) is more confusing to participants and difficult to administer, the regulations provided an exception that allows employers to require individuals to complete a “reasonable and bona fide employment-based orientation period” as a condition for eligibility.

Importantly, the June 20, 2014 final regulations provide that compliance with the orientation period and the 90-day waiting period limitation is not determinative of compliance with the employer shared responsibility regulations mandating applicable large employers (“ALEs”) to offer affordable health coverage that provides minimum value to newly hired full-time employees (and dependent children) by the first day of the fourth full calendar month of employment or the ALE may incur an assessable payment.

Orientation Period May Not Exceed One Month: A reasonable and bona fide employment-based orientation period may not exceed one month, determined by adding one calendar month and subtracting one calendar day, and measured from the employee’s start date in a position that is otherwise eligible for health coverage.

Employment-based Orientation Period

While the regulations do not specifically define an “orientation period” and further state that orientation periods will not be scrutinized by the Departments, an orientation period appears to be a period during which the employer and employee evaluate whether the employment relationship is satisfactory.

Example: If an employee's start date in an eligible position is May 3rd, the last permitted day of the orientation period is June 2nd (i.e., adding one calendar month to May 3rd would be June 3rd; then one calendar day is subtracted resulting in June 2nd).

Similarly, if an employee's start date in an eligible position is October 1st, the last permitted day of the orientation period is October 31st (i.e., adding one calendar month to October 1st would be November 1st; then one calendar day is subtracted resulting in October 31st).

If there is not a corresponding date in the next calendar month after adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month.

Example: If the employee's start date is January 30th, the last permitted day of the orientation period would be February 28th (February 29th in a leap year).

Coordination with Employer Shared Responsibility Requirements: An ALE that has a one month orientation period is also required to comply with the employer shared responsibility requirements to provide coverage to newly hired full-time employees by the first day of the fourth full calendar month of employment. This means, in some situations, an ALE may not be able to impose the full one-month orientation period and the full 90-day waiting period without becoming subject to an employer shared responsibility penalty.

Example: If the employee's start date in an eligible position is August 31st, the last permitted day of the orientation period would be September 30th. The waiting period would start October 1st, lasting up to December 29th (the 90th day), with coverage commencing no later than December 30th. This commencement date would be after the first day of the fourth calendar month (i.e., December 1st). As a result, an ALE in this situation would need to adjust the coverage commencement date in order to avoid potential penalties under the employer shared responsibility rules.

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