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Health Care Reform Management Alert Series

Proposed Guidance Issued on 90-Day Waiting Period

Issue 60

This is the sixtieth 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.

On March 18, 2013, the Departments of Health and Human Services, Labor and Treasury issued *proposed guidance* on the Affordable Care Act's prohibition on waiting periods in excess of 90 days, and amendments to regulations under HIPAA related to Certificates of Creditable Coverage.

The 90-Day Waiting Period

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 (the time that must pass before coverage can become effective) longer than 90 calendar days, including weekends and holidays. Notably, the proposed regulations clarify that there is no *de minimis* exception for the difference between 90 days and 3 months. While coverage will need to be available within 90 days to comply with the rule, the plan will not be penalized if an employee delays his or her election beyond the 90 day waiting period.

[X] Applies to grandfathered plans.

[X] Applies to new health plans and plans that lose grandfathered status.

Other Eligibility Conditions Permitted

Plans can still have other substantive eligibility criteria as long as they are not designed to avoid compliance with the 90-day limit[1]. Also, the 90-day clock does not start ticking at an employee's hire date, but when the employee satisfies those eligibility criteria. For example:

- Coverage can be conditioned on being in a job classification or completing a certain training, and begin within 90 days of satisfying that eligibility requirement.
- Coverage can be conditioned on completing enrollment forms, if the employee has the ability to complete the forms and start coverage within 90 days.

CAUTION: Employers sponsoring group health plans should also be mindful of the rules under the employer mandate. The 90-day limit on waiting periods offers slightly more flexibility than the employer mandate. For instance, if an employer's health plan provides that employees will become eligible for coverage 90 days after obtaining a pilot's license, that requirement would comply with the 90-day limit on waiting periods. But, the same employer could be liable under the employer mandate for failing to provide coverage to a full-time employee within three months of hire date. So, employers sponsoring group health plans or contributing to multiemployer plans should confirm that any plan eligibility criteria aligns with both the employer mandate and the 90-day limit on waiting periods.

[1] Any variations in eligibility criteria also will be subject to nondiscrimination rules.

Plans conditioning eligibility on working full-time (or a certain number of hours in a period) can use a measurement period to determine whether the employee meets the eligibility requirements. *(See Issue 43 for more information about measurement periods for variable hour employees.)* This will not be considered designed to avoid compliance with the 90-day waiting period (unless a waiting period longer than 90 days is imposed in addition to the measurement period) if coverage is effective no more than 13 months from the employee'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.

An eligibility criteria requiring an employee to complete a certain number of hours of service is not considered to be designed to avoid compliance with the 90-day limit if the hours of service requirement does not exceed 1,200 hours.

Certificates of Creditable Coverage

The proposed regulations also amend regulations under the Health Insurance Portability and Accountability Act to remove provisions related to preexisting conditions. Under the Affordable Care Act, plans will not be permitted to impose any preexisting condition exclusions effective for plan years beginning on or after January 1, 2014 (this provision is already in effect for enrollees who are under 19 years of age). *(See Issue 7 for more information regarding preexisting condition exclusions.)* Accordingly, under the proposed regulations, plans will no longer be required to Certificates of Creditable Coverage to offset preexisting condition exclusions beginning on December 31, 2014.

What This Means for Employers

- Plan documentation and enrollment materials will need to be reviewed and amended as needed to ensure that waiting periods do not exceed 90 days.
  - Caution for those plans with a "3 month" waiting period. This will not comply, as the waiting period might exceed calendar 90 days.
- If an employee is in the middle of a waiting period when the regulations become effective (January 1, 2014 for calendar year plans), his or her waiting period may need to be shortened if it would exceed 90 days.
- The process for providing Certificates of Creditable Coverage can be discontinued after the 2014 plan year resulting in some savings of money, time and effort.

Also, follow the Health Care Reform Team on *@SeyfarthEBLaw*

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