

June 27, 2014

Final Waiting Period Rules

The agencies have released [final rules](#) clarifying that one-month is the maximum allowed length of any “reasonable and bona fide employment-based orientation period” as it relates to the waiting period limit under the Affordable Care Act (ACA). The ACA limits waiting periods for group health plans to 90 days. However, eligibility conditions, including employment-based orientation periods, can still be used. The final rules on orientation periods also clarify that the waiting period requirement is independent of the employer “pay or play” requirement, which imposes its own time limits and penalties. Under the pay or play rules, an employer must cover a newly hired full-time employee by the first day of the fourth full calendar month of employment.

Waiting Period Limitation

Effective for plan years beginning on or after January 1, 2014, the ACA prohibits waiting periods that exceed 90 days in length. A waiting period is the period of time that must pass before coverage can become effective for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan. Under the final waiting period rules, being “otherwise eligible to enroll” in a plan means having met the plan’s substantive eligibility conditions. The ACA’s limitation on waiting applies regardless of grandfathered status and to both self-insured and insured plans. The rules do not require coverage be offered to any particular individual or class of individuals (including, for example, part-time employees). The penalty for violating the 90-day waiting period rule is \$100 per employee per day of violation.

Substantive Eligibility Conditions

Plans can require that a new employee meet substantive eligibility conditions to be “otherwise eligible to enroll” first, before applying the 90-day waiting period. These permissible eligibility conditions include being in an eligible job classification, achieving job-related licensure requirements specified in the plan’s terms, meeting certain sales goals, earning a certain level of commission, satisfying a “reasonable and bona fide employment-based orientation period,” completing a certain number of hours (not more than 1,200) on a one-time basis, or working a specified number of hours per period or working full-time. See our [Update](#) for more information on the waiting period rules and the permissible eligibility conditions.

Orientation Periods

Plans can require that a new employee first satisfy a one-month orientation period (as a substantive eligibility condition) to be “otherwise eligible to enroll,” before applying the 90-day waiting period. During a reasonable and bona fide employment-based orientation period, an employer and employee can evaluate whether the employment situation is satisfactory for each

party, and standard orientation and training processes begin. The final rules confirm that one month is the maximum allowed length of any such orientation period. So if a group health plan conditions eligibility on an employee having completed a reasonable and bona fide employment-based orientation period, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period does not exceed one month and the maximum 90-day waiting period begins on the first day after the orientation period.

The one-month orientation period is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example:

- Pat's start date in an otherwise eligible position is May 3. The last permitted day of the orientation period is June 2.
- Pat's start date in an otherwise eligible position is October 1. The last permitted day of the orientation period is October 31.
- Pat's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year).
- Pat's start date is August 31, the last permitted day of the orientation period is September 30.

The agencies provided the following example of how the one-month orientation period works with the 90-day limitation. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full-time employees are eligible for coverage after they have successfully completed a bona fide one-month orientation period. H completes the orientation period on November 15. In this example, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. If the orientation period was longer than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly, it would violate the waiting period regulations.

Pay or Play Rules

Compliance with these final waiting period and orientation rules does not constitute compliance with the ACA's employer shared responsibility "pay or play" provisions, under which an applicable large employer (ALE) may be subject to a penalty payment if it fails to offer affordable minimum value coverage to certain newly-hired full-time employees by the first day of the fourth full calendar month of employment and at least one of the employees receives a premium subsidy for exchange coverage. For example, an ALE that has a one-month orientation period may comply with both the waiting period and pay or play rules by offering coverage no later than the first day of the fourth full calendar month of employment. However, an ALE may not be able to impose the full one-month orientation period and the full 90-day waiting period without potentially becoming subject to a pay or play penalty payment. For example, consider an ALE who hires a full-time employee on January 6:

- If the plan offers coverage starting May 1 (the first day of the fourth full calendar month of employment), it will comply with both the waiting period provision and the pay or play provision.

- If the plan offers coverage starting May 6 (one orientation period month plus 90 days), it would comply with the waiting period provision but not the pay or play “first day of the fourth full calendar month” provision. In this case, the ALE could be subject to a pay or play penalty payment for any newly-hired full-time employees who go to the exchange and get a subsidy and who do not have an offer of affordable minimum value coverage by the first day of the fourth full calendar month of employment.
- If a plan has a one-time eligibility requirement where employees must complete a certain number of cumulative hours before becoming eligible (can't exceed 1,200 hours), and the plan's waiting period (not more than 90 days) begins on the first day after the employee satisfies the plan's cumulative hours-of-service requirement, it would comply with the waiting period provision but not the pay or play provision.

Note too that compliance with the waiting period rules but non-compliance with the pay or play rules could also occur if a plan imposes other substantive eligibility conditions that require full-time employees wait more than 90 days for health coverage, such as requiring the obtainment of a job related license or meeting a certain sales goal as a condition of health coverage eligibility.

Special rules apply for variable hour employees. If a plan conditions eligibility on working a specified number of hours per period or working full-time, the plan can take a reasonable period of time to determine whether the employee meets that condition. This period can include a measurement period consistent with the timeframes for determining full-time status under the employer pay-or-play mandate rules. However, coverage must be effective no later than 13 months from the employee's start date, plus any time remaining until the first day of the next calendar month (if the start date is not the first day of the calendar month). Applying this rule for variable hour employees would comply with the waiting period provision and the pay or play provision.

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](#).



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