

Final regulations permit one-month orientation period

The Departments recently issued final regulations on the maximum length of an employment-based orientation period for purposes of the ACA's 90-day waiting period limit. Specifically, the final regulations permit an orientation period of no longer than one month, and measure that month by adding one calendar month and subtracting one calendar day from an employee's start date. Additionally, the Departments clarified that compliance with the orientation period rules does not guarantee compliance with the employer shared responsibility requirement. The rules apply to plan years beginning on January 1, 2015. Plan sponsors should review their employee orientation periods in light of these final regulations.

Background

For plan years beginning on or after January 1, 2014, the Affordable Care Act (ACA) prohibits group health plans and health insurers from imposing a waiting period that exceeds 90 days on individuals who are otherwise eligible for coverage. This 90-day waiting period limitation does not apply to HIPAA-excepted benefits, which include certain health FSAs and stand-alone dental or vision plans. The waiting period limitation also does not apply to retiree-only plans.

On February 20, 2014, the Departments of Treasury, Labor, and Health & Human Services (Departments) issued final regulations addressing a variety of issues relating to the 90-day waiting period limit. These regulations defined the term "waiting period" as the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of the group health plan becomes effective, and specified that coverage must be available by the 91st day following eligibility. They also explained that being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions, such as serving in an eligible job classification, achieving job-related licensure requirements specified in the plan's terms, and satisfying a "reasonable and bona fide" orientation period. See our [April 2, 2014 For Your Information](#) for detailed information about these final regulations.



At the same time, the Departments issued separate [proposed regulations](#) addressing a "reasonable and bona fide orientation period" as a substantive eligibility requirement that could delay coverage entitlement beyond 90 days, and asked for comments on this specific issue. These proposed regulations suggested a one-month maximum allowable orientation period, but sought comments on this proposal.

One-month orientation period is a permissible substantive eligibility condition

In the [final regulations](#), which incorporate the proposed regulations without any substantive changes, the Departments acknowledge that orientation periods are commonplace and permissible so long as they serve a legitimate purpose and are not used to violate the spirit of the 90-day maximum waiting period limitation. The Departments envision that a short orientation period allows the employer and employee to evaluate whether the employment situation is satisfactory to each party and begin standard orientation and training processes.

Specifically, the final regulations provide for a one-month period as the maximum length of an employment-based orientation period that serves as a substantive condition for plan eligibility. For an orientation period lasting longer than one month, the clock on the 90-day waiting period limit begins to tick after one month of the orientation period has passed. That is to say, a one-month period can count as a permissible orientation period, but any additional time will count toward the 90 day waiting period limit.

Under the final regulations, the one-month maximum orientation period begins on an employee's start date in a position that is otherwise eligible for coverage and runs for one calendar month, subtracting one calendar day.

For example, if an employee starts in an otherwise eligible position on May 3, the last permitted day of the orientation period is June 2, and the 90-day waiting period starts on June 3.

If an employee's start date is October 1, the last permitted day of the orientation period is October 31, and the 90-day waiting period starts on November 1.

If an employee's start date is January 30, the last permitted date of the orientation period is February 28 (or February 29 in a leap year), and the 90-day waiting period starts on March 1.

Shared responsibility requirements apply independent of orientation and waiting period limitations

In response to comments, the Departments clarified the interaction between the 90-day waiting period limit and the employer shared responsibility requirements.

Separate compliance issues

Employers must analyze compliance with both the (1) 90-day waiting period limitation, and (2) employer shared responsibility requirements. These are separate compliance issues, even though there are points of intersection.

eligible individuals (which can include part-time employees).

Under the ACA's employer shared responsibility requirements, large employers that do not provide health coverage to full-time employees and their dependents could be subject to assessable payments. See our [April 17, 2014 FYI](#) In-depth for a detailed analysis of the final regulations governing the employer shared responsibility requirements. Generally, under these regulations, for new employees, an employer must offer coverage to eligible employees no later than the first day of the fourth full calendar month of employment. This requirement is substantively distinct from the 90-day waiting period limit, which does not require an employer to offer coverage to any individual or class of individuals, but rather prohibits an employer from imposing a waiting period of more than 90 days before coverage begins for otherwise

Given these differences, compliance with the orientation period rules does not guarantee compliance with the employer shared responsibility requirements. Specifically, a permissible orientation period could extend an employee's eligibility for coverage beyond the first day of the fourth month because waiting periods can begin and end in the middle of a calendar month (whereas coverage for purposes of the employer shared responsibility requirements must begin on the first day of the fourth full calendar month of employment). For example, if an employee is hired as a full-time employee of an applicable large employer on January 6 and starts coverage on May 6 (one month plus 90 days after hire), the employer may be subject to an assessable payment.

Buck comment. Given this possibility, applicable large employers wishing to impose an orientation period as a substantive condition of plan eligibility should consider the timing of the employer shared responsibility requirements in determining plan waiting period rules if they want to avoid assessable payments. A plan that imposes a one-month orientation period in conjunction with a waiting period can avoid an assessable payment by ending the waiting period on the first day of the fourth full calendar month of employment. For example, if an employee is hired as a full time employee on January 6 with an orientation period that lasts until February 5, the plan should offer coverage by May 1 to satisfy both the waiting period limitation and the employer shared responsibility requirement.

Effective date

The final regulations on orientation periods apply to plan years beginning on January 1, 2015. Until then, the Departments will consider compliance with the proposed regulations on the orientation period as compliance with the 90-day waiting period rules.

In closing

Plan sponsors should review their current orientation period practices to ensure compliance with these final regulations as well as coordination with the shared responsibility requirements.

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