

**FEDERAL HEALTHCARE REFORM:
PATIENT PROTECTION AND AFFORDABLE CARE ACT
90-DAY WAITING PERIOD LIMITATION**



This summary provides an overview of the 90-day waiting period limitation contained in the Patient Protection and Affordable Care Act (“ACA”), guidance and proposed regulations issued by the Department of Health and Human Services (“HHS”), the Internal Revenue Service (“IRS”), and the Department of Labor (“DOL”) (collectively, the “Departments”).

Summary: For plan years beginning on or after January 1, 2014, group health plans and health insurance issuers may not delay enrollment of an otherwise eligible individual in health coverage for more than 90 days. (ACA § 1201 adding § 2708 to the Public Health Service Act (“PHSA”); 45 C.F.R. § 147.116 (proposed); 26 C.F.R. § 54.9815-2708 (proposed); 29 C.F.R. § 2590.715-2708 (proposed)¹)

Scope: The waiting period limitation applies to both grandfathered and non-grandfathered group health plans, whether fully insured or self-insured, and health insurance issuers (in the individual and group markets), for plan years beginning on or after January 1, 2014.

Definitions: “Waiting period” is the period of time that must pass before coverage for an individual (an employee or their dependent in the case of a group health plan) who is otherwise eligible to enroll under the terms of a group health plan will become effective. (45 C.F.R. § 147.116 (proposed). *See* 26 C.F.R. 54.9801-3(a)(3)(iii), 29 C.F.R. 2590.701-3(a)(3)(iii), and 45 C.F.R. 146.111(a)(3)(iii)) Any period before a special enrollment is not a waiting period. (45 C.F.R. § 147.116(b) (proposed))

Prohibition: Generally, a group health plan, and a health insurance issuer, must not apply a waiting period that exceeds 90 days before coverage for an otherwise eligible individual takes effect. Being otherwise eligible to enroll means having met all substantive eligibility conditions (such as being in eligible job classification or meeting compensation requirements). These substantive conditions on eligibility are allowed, unless they are designed to avoid compliance with the 90-day waiting period limitation.

It is enough that the plan or health insurance issuer allows an eligible individual to choose coverage that would begin within the 90-day waiting period. If an eligible individual takes additional time (beyond the end of the 90-day waiting period) to elect coverage, the group health plan or issuer would not be in violation of this rule. An issuer can rely on a representation made by the group health plan regarding eligibility and the length of the waiting period so long as the group health plan is required to periodically update the representation and the issuer does not have actual knowledge of a waiting period violation.

The 90-day waiting period limitation does not require that coverage be offered to any particular employee or class of employees (including, for example, part-time employees).

Certain special rules may apply for group health plans:

- **Variable-Hour Employees**

The proposed regulations provide that a group health plan or issuer may take a reasonable period of time to determine whether the employee is eligible under the plan. This rule is specific to “variable-hour employees,” which is undefined by the proposed regulation, but generally means an employee who cannot reasonably be expected to meet eligibility requirements at the outset of employment (e.g., may not have a regular schedule).

In such situations, a 12-month measurement period beginning on any date between the employee’s start date and the first day of the first calendar month following the employee’s start date can be used to calculate whether the employee meets the plan’s eligibility requirements. When using this measurement period, the employee’s coverage must be made effective no later than 13 months from the employee’s start date; provided that if the employee’s start date is not the first day of a calendar month, coverage may be effective the first day of the next calendar month. (45 C.F.R. § 147.116(c)(3)(i) (proposed))

¹ Because the three proposed regulations are identical, this fact sheet will cite only to the HHS regulation at 45 C.F.R. § 147.116.

- **Hours-of-Service Requirements**

Conditioning eligibility on the employee's completion of certain hours of service is allowed so long as the cumulative requirement does not exceed 1,200 hours. (45 C.F.R. § 147.116(c)(3)(ii) (proposed)). Group health plans can impose a waiting period after a certain number of hours are worked, so long as the waiting period begins as soon as the hours-of-service requirement is met, but once the waiting period begins it cannot exceed 90 days. This rule is designed to be a one-time eligibility requirement only; applying a service-hour requirement to the same individual each year is not allowed under the proposed regulations. The proposed regulations also clarify that plan procedures permitting self-payment (or buy-in) to satisfy any otherwise permissible hours-of-service requirement are allowed.

- **Multi-Employer Plans**

Eligibility provisions frequently used by multi-employer plans, such as compensation-based requirements, are substantive eligibility provisions not designed to avoid compliance with the 90-day waiting period limitation. Therefore, the regulations permit use of these provisions, along with hours-banking policies that allow employees to transfer hours from one period to another to avoid lapses in coverage.

Counting Method:

In counting the days of a waiting period, all calendar days (including weekends and holidays) are included. (45 C.F.R. § 147.116(d) (proposed)) This counting method reflects the clear intent of the ACA that a waiting period may not exceed 90 days. Accordingly, the proposed regulations state that if a plan requires a 90-day waiting period, and the 91st day falls on a weekend or holiday, the plan or issuer can make coverage effective *earlier* than the 91st day, but cannot wait until *after* the 91st day. Similarly, a plan that requires a 90-day waiting period with coverage effective the first day of the month after the 90-day waiting period is not allowed under the proposed regulations.

Temporary Guidance for 2014:

On August 31, 2012, HHS, IRS, and DOL issued temporary guidance regarding the waiting period limitation, to remain in effect at least through the end of 2014. *See* DOL Technical Release 2012-02, IRS Notice 2012-59, and HHS FAQs issued August 31, 2012 ("August 2012 guidance"). The Departments state that the proposed regulations are consistent with and no more restrictive than the August 2012 guidance, but to the extent final regulations or other guidance with respect to the 90-day waiting period limitation is more restrictive on plans and issuers than the proposed regulations, the final regulations or other guidance will not be effective prior to January 1, 2015.

Rhode Island Application:

Rhode Island law already restricts health insurance carrier imposed waiting periods to no longer than 60 days in the small group market. (R.I. Gen. Laws § 27-50-7(d)(2)(iv)). Because the ACA is meant to provide a basic level of consumer protections, and to allow states to enforce laws that constitute greater consumer protections, the 60-day waiting period restriction under Rhode Island law continues to apply in the small group market (those groups with 50 or fewer eligible employees). For the individual and large group markets, the federal 90-day waiting period restriction applies.

What is BCBSRI doing?

As of July 2013, BCBSRI intends to continue with the standard waiting period whereby coverage is effective on the first of the month following the date of hire, unless otherwise agreed to by BCBSRI and the employer. As part of the 2014 renewal process, BCBSRI will work with employers whose current waiting period may exceed 90 days to ensure that it is decreased to comply with this regulation.

References:

PPACA: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3590enr.txt.pdf
Reconciliation: <http://www.dol.gov/ebsa/pdf/tr12-02.pdf>; <http://www.irs.gov/pub/irs-drop/n-12-59.pdf>;
August 2012 Guidance: <http://www.dol.gov/ebsa/pdf/tr12-02.pdf>; <http://www.irs.gov/pub/irs-drop/n-12-59.pdf>;
<http://cciio.cms.gov/resources/files/Files2/2708-guidance-8-31-2012.pdf>;
Proposed Regulation: <http://www.gpo.gov/fdsys/pkg/FR-2013-03-21/pdf/2013-06454.pdf>

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