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Nothing in the Affordable Care Act (“ACA”) requires a group health plan or insurance carrier to have a waiting period. However, the ACA provides that, for plan years beginning on or after January 1, 2014, a group health plan and a health insurance carrier offering group health insurance coverage may not apply any waiting period that exceeds 90 days. This rule applies to both grandfathered and non-grandfathered plans.

On February 20, 2014, final and additional proposed rules were issued. These rules introduced the concept of a one-month orientation period prior to the commencement of a waiting period of up to 90 days. On June 20, 2014, final regulations were issued that adopted the proposed regulations without change. The final regulations apply to plan years beginning on or after January 1, 2015. For plan years beginning in 2014, employers may comply with either the previously-issued proposed regulations or the final regulations. Below you will find a brief summary of the pertinent provisions of the regulations.

The Final Regulations

A waiting period is the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective. To be otherwise eligible to enroll in a plan means that an individual has met the plan’s substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan’s terms). So, the maximum 90-day waiting period does not have to begin until the first day after the substantive eligibility conditions are met.

Previously-issued final regulations indicated that a reasonable and bona fide employment-based orientation period can be a substantive eligibility condition. The proposed regulations suggested a one-month orientation period. The idea is that, during an orientation period, an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. This final rule confirms that, to ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid

compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month 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. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

What does this mean for Large Employers?

The preamble to the final regulations notes that compliance with waiting period rules does not necessarily insulate a large employer from a penalty exposure under the employer mandate. A large employer may be subject to an assessable 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. A large employer plan may not be able to impose the full one-month orientation period and the full 90-day waiting period without potentially becoming subject to the employer penalty. For example, if an employee is hired as a full-time employee on January 6, a plan may offer coverage May 1 and comply with both provisions. However, if the employer is a large employer and starts coverage May 6, which is one month plus 90 days after date of hire, the employer may be subject to an assessable payment under the employer penalty.

Employers should carefully review eligibility rules for compliance with the 90-day waiting period rules, employer penalty provisions and nondiscrimination rules.

