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The Departments of Labor, Treasury and Health and Human Services issued proposed regulations that implement the 90-day waiting period limitation under the Affordable Care Act. This guidance mostly follows the earlier guidance issued on the 90-day waiting period and also includes changes to existing HIPAA portability regulations. Highlights from the proposed regulations are discussed below.

The Rule

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 nongrandfathered plans. 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.

Timing

Many plans have waiting periods that end the first day of the month following 90 days. The proposed regulations clarify that this will not be permissible; plans will need to be amended to comply with the requirements. When counting the 90 days, all calendar days are counted beginning on the first day of

the waiting period, including weekends and holidays. If the 91st day falls on a weekend or holiday, the plan or carrier may choose to permit coverage to be effective earlier than the 91st day, for administrative convenience, but the effective date of coverage may not be later than the 91st day.

For individuals who are in a waiting period for coverage before the effective date of these regulations, beginning on the first day the requirement applies, the waiting period can no longer apply to the individual if it would exceed 90 days with respect to that individual. For example, if an employee begins work as a full-time employee on October 1, 2013 and prior to January 1, 2014 the plan provides full-time employees are eligible for coverage after a 6-month waiting period, the employee must be given the opportunity to elect coverage that begins no later than January 1, 2014 (which is 93 days after the employee's start date) because otherwise, on January 1, 2014, the plan would be applying a waiting period that exceeds 90 days. The plan would not be required to make coverage effective prior to January 1, 2014.

Eligibility and the Waiting Period

Being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (for example, being in an eligible job classification or achieving job-related

licensure requirements specified in the plan's terms). The 90-day waiting period limitation generally does not require the plan sponsor to offer coverage to any particular employee or class of employees, including, for example, part-time employees. Instead, the proposed regulations prohibit requiring otherwise eligible participants and beneficiaries to wait more than 90 days before coverage is effective. Eligibility conditions that are based solely on the lapse of a time period are permissible as long as they do not exceed 90 days. Other eligibility provisions are permissible as long as they are not designed to avoid compliance with the 90-day limitation.

Variable Hour Employees and Cumulative Hours-of-Service Requirements

The proposed regulations set forth an approach when applying waiting periods to variable-hour employees in cases in which a specified number of hours of service per period (such as 30 hours per week or 250 hours per quarter) is a plan eligibility condition. This rule is similar to the safe harbor available to large employers to determine full-time employee status of newly hired variable-hour employees. It appears that any employer (including small employers not subject to the penalty requirements) may use this approach for compliance with the 90-day waiting period rules.

Under this approach, if a group health plan conditions eligibility on an employee regularly having a specified number of hours of service per period (or working full-time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period of no more than 12 months that begins on any date between the employee's start date and the first day of the first calendar month following the employee's start date. The time for determining whether a variable-hour employee meets the plan's hours of service per period eligibility condition will not be considered as designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective no later 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. The employer cannot impose an additional 90-day waiting period in addition to the time spent in the measurement period.

The proposed regulations provide that if a group health plan or carrier conditions eligibility on any employee (part-time or full-time) having completed a number of cumulative hours of



service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the cumulative hours-of-service requirement does not exceed 1,200 hours. The plan's waiting period must begin once the new employee satisfies the plan's cumulative hours-of-service requirements and may not exceed 90 days. This provision is designed to be a one-time eligibility requirement only.

Multiemployer Plans

The Departments recognize that multiemployer plans maintained pursuant to collective bargaining agreements have unique operating structures and may include different eligibility conditions based on the participating employer's industry or the employee's occupation. The proposed regulations provide that the proposed rules provide flexibility to both multiemployer and single-employer health plans to meet their needs in defining eligibility criteria, while also ensuring that employees are protected from excessive waiting periods. The Departments are looking for comments on this issue.

Carrier Responsibility

The 90-day waiting period limitation applies to both group health plans (including the plan sponsor) and to carriers. The proposed regulations clarify that to the extent coverage under a plan is insured by a carrier, the carrier is permitted to rely on the eligibility information reported to it by the employer and will not be considered to violate the 90-day waiting period requirement with respect to its administration of any waiting period, if the following conditions are satisfied:

- the carrier requires the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered under the terms of the employer's plan (and requires the plan sponsor to update this representation with any changes), and
- the carrier has no specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period.

Changes to HIPAA Regulations

The Affordable Care Act made changes to existing HIPAA portability regulations, including permitted pre-existing condition exclusions and annual and lifetime dollar limits on essential benefits. The proposed regulations amend existing rules to:

- remove provisions superseded by the prohibition on pre-existing condition exclusions including eliminating the requirement to provide certificates of creditable coverage as of December 31, 2014; and
- amend certain examples contained in the regulations to conform to the changes under the ACA, including the prohibition on lifetime and annual dollar limitations and coverage for children up to age 26.

Effective Date

These proposed regulations may be relied upon at least through the end of 2014. If any more restrictive guidance on the 90-day waiting period limitation is issued, such guidance would not be effective prior to January 1, 2015.

Required Action

Employers should review existing waiting periods to determine compliance for the first plan year that begins on or after January 1, 2014. Large employers subject to an assessable payment (the employer penalty) will need to pay special attention to these waiting period rules. While the waiting period applies based on the first plan year that begins in 2014, complications may arise for a large employer with a non-calendar year plan and a waiting period longer than 90 days, if that employer does not qualify for transition relief (which delays the application of the employer penalty to the first fiscal plan year that begins in 2014). Large employers in this situation may wish to shorten the waiting period to 90 days or less, effective no later than January 1, 2014, since employer penalty assessments could apply as of that date.