

March 28, 2013

Federal Agencies Propose Rule on 90-Day Waiting Periods and Elimination of HIPAA Certificate Requirement

Executive Summary

- IRS has issued proposed regulations on the maximum 90-day waiting period that will apply to plan years beginning in 2014.
- Waiting periods cannot exceed 90 calendar days, including weekends and holidays.
- Plans may continue to apply substantive criteria that delay eligibility, provided the criteria are not based on the mere passage of time.
- Agencies have proposed elimination of the HIPAA creditable coverage certificate requirement beginning in 2015.
- IRS has revised its transition rule on the impact of multiemployer plan contributions on an employers' "play or pay" obligation.

The federal agencies responsible for implementing the health reform law have issued proposed regulations on the requirement that a health plan's waiting period not exceed 90 days. The regulations would apply to both grandfathered and non-grandfathered health plans for the first plan year beginning in 2014. The proposed rules mirror preliminary guidance issued by the agencies last summer (see our [Alert](#) dated September 10, 2012).

In tandem with the proposed rules, the agencies propose to eliminate the requirement that health plans issue HIPAA creditable coverage certificates beginning in 2015. The agencies also broadened the transition relief that exempts employers from potential "play or pay" penalties with respect to full-time employees on whose behalf the employer contributes to a multiemployer (Taft-Hartley) plan.

What's a "Waiting Period?"

A waiting period is the length of time an individual must wait, after becoming eligible for coverage, before coverage becomes effective. Nothing about the health reform law's waiting period rule requires an employer to offer coverage; the waiting period rule applies only where an employer offers a health plan. And the 90-day clock begins to run only with respect to those individuals who qualify for coverage under the eligibility criteria set forth in the plan, and timely enroll for the coverage.

Criteria that Can--and Cannot--Delay Eligibility for Coverage

The proposed regulations make clear that eligibility conditions based solely on the passage of time may not exceed 90 calendar days, including weekends and holidays. There is no accommodation under the guidance for waiting periods that provide for coverage to begin, say, on the first day of the month following 90 days of eligibility, or after "three months" of employment. Plans cannot extend the effective date of coverage beyond the 91st day.

Lockton Comment: The limitation on eligibility conditions based on the passage of time means that, as a general rule, a plan offering coverage to full-time employees may not say to a new full-time employee, "You become eligible after six months, and then you have a 90-day waiting period." Such an employee's coverage would impermissibly be conditioned on the mere passage of six months, plus the additional 90 days. Instead, coverage would have to begin on the employee's 91st day of employment, assuming the employee timely enrolled for the coverage.

Conditioning Eligibility on Substantive Criteria

Under the proposed regulations, plans would be allowed to continue to condition eligibility--and therefore delay the start of the 90-day maximum waiting period--on an employee's satisfaction of *substantive conditions* as opposed to the mere passage of time. For example, a plan may require employees to complete training certifications or attain sales goals in order to become eligible for coverage, and may impose a waiting period of up to 90 days following the date the employee satisfies the eligibility criteria.

Conditioning Eligibility on Hours of Service Over Time

Some plans require an employee to work a given number of hours over a period of time (i.e., 250 hours over a quarter, or 500 hours over six months, etc.) in order to become eligible for coverage. Such eligibility rules involve both substantive eligibility criteria *and* the passage of time. These sorts of eligibility rules add wrinkles to the 90-day maximum waiting period concept.

Where an employer conditions eligibility for a variable hour employee on working a certain number of hours over a given period (e.g., regularly average 30 hours or more per week), the proposed regulations would allow the employer to use the same sort of "measurement period" concept that larger employers use for determining full-time status of variable hour employees under the "play or pay" mandate (see our [Alert](#) dated January 21, 2013).

The employer may impose up to a 90-day waiting period after the variable hour employee demonstrates his or her eligibility (based on hours worked during the measurement period, which cannot exceed 12 months). But in no event may coverage be delayed more than 13 months after the employee's start date, plus the handful of days between the start date and the first day of the next month, if the start date is not the first of a month.

Lockton Comment: Thus, a plan might require a variable hour employee to average 30 hours per week over a 12-month measurement period, in order to become eligible for coverage. Assume an employee commences employment on June 10, 2014, and averages 30 hours per week over a 12-month measurement period beginning July 1, 2014. The proposed regulations would require the employee's coverage to begin August 1, 2015.

Conditioning Eligibility on Accumulation of Hours of Service

Some plans, rather than conditioning eligibility on a given number of hours of service over a period of time, condition eligibility on accumulating a given number of hours of service, no matter how long (or short) it takes. For example, a plan might provide that an employee becomes eligible after accumulating 1,000 hours of service. Such a cumulative service requirement remains permissible under the proposed regulations, but may not be greater than 1,200 hours of service, and may be imposed only once with respect to the same employee. A waiting period of up to 90 days may be imposed after the employee satisfies the cumulative hours of service requirement.

Individual's Duty to Timely Enroll

If an employee could gain coverage within a 90-day waiting period if he or she were to timely submit an application, the fact that the employee's coverage is delayed beyond a 90-day waiting period because the employee failed to timely submit the application does not mean the employer violates the waiting period rule.

What Happens to Employees in Waiting Periods When the Rules Apply?

The proposed regulations apply a special rule to individuals who are in a waiting period on the first day of the 2014 plan year (the date the new rules apply). The waiting period can be no longer than 90 days, with coverage effective no earlier than with the first day of the 2014 plan year. For example, an employee who is hired on October 1, 2013, into a class of employees eligible for coverage must be offered coverage under a calendar year plan on January 1, 2014 (93 days after the employee's start date).

Interplay Between the 90-Day Waiting Period Rule, and the "Play or Pay" Mandate

It's easy to become confused at the intersection of the 90-day waiting period rule and health reform's "play or pay" mandate. Neither literally requires an employer to offer health coverage; if a large employer fails to offer coverage, it risks penalties under the play or pay mandate alone.

If the employer offers a health plan, the plan is subject to the 90-day waiting period rule, but only with respect to employees *the plan* treats as eligible. The employer *might* also become subject to play or pay penalties, depending on to whom the plan's coverage is offered, when it is offered, how good it is, and how much employees must pay for it.

Lockton Comment: Under the 90-day waiting period rule, an employer *could* have a plan that offers coverage, for example, only to full-time employees (defined in the plan as employees regularly working at least 40 hours per week) and variable hour employees who average at least 36 hours a week over a 12-month measurement period.

The waiting period rule would have to satisfy the regulations; that is, coverage for regular, full-time employees would have to begin on the 91st date of employment in that class, and coverage for the variable hour employees who average at least 36 hours per week over the 12-month measurement period would have to begin no later than 13 months after the start date, plus the handful of days between the start date and the first day of the next month, if the start date is not the first of a month.

Of course, under the play or pay mandate, the employer might risk penalties under such an eligibility scheme. For example, the employer might have employees who average 30-35 hours per week over the measurement period, and don't receive an offer of coverage. These employees are considered "full-time" under the play or pay mandate, and the employer risks penalties for not offering them coverage shortly after their measurement periods end.

Also, the employer might have an employee who *regularly* works 35 hours per week (i.e., the employee's hours are not variable), and is not eligible for coverage under the plan. But the employee is considered "full-time" under the play or pay mandate on his or her date of hire, and would have to be offered coverage by the end of the third full calendar month of employment, or the employer would risk penalties.

Lockton Comment: Generally, the play or pay mandate requires larger employers to offer coverage to employees averaging at least 30 hours per week, or risk penalties. To avoid potential penalties, the employer must offer coverage to non-variable hour, full-time employees by the end of the third full calendar month of employment. Most large employers will offer coverage to these employees, to satisfy the play or pay mandate.

As a practical matter, however, these employers will not be able to wait through the first three full calendar months of the employee's employment before commencing coverage. Because the employer will treat these employees as eligible under the employer's health plan, coverage will have to begin by the employee's 91st day in the eligible class of employees, in order for the health plan to satisfy the 90-day waiting period rule.

Goodbye HIPAA Certificates (But Not Quite Yet)

Since the late 1990s, federal law has required that health plans issue HIPAA certificates of creditable coverage when an enrollee's coverage ends. The certificate allows the person to demonstrate coverage in order to wear away any preexisting condition exclusion under new coverage.

Because plans can no longer deny coverage because of preexisting conditions in 2014, the agencies have proposed elimination of the HIPAA certificate requirement beginning in 2015.

We don't expect any opposition to this proposal and expect the rule to be finalized late this year.

Clarification of Impact of Multiemployer Plan Contributions on Employers' Play or Pay Obligation

The proposed play or pay regulations issued late last year provided transition relief for employers who contribute to multiemployer plans. Employers had hoped for a broad exemption from the play or pay mandate with respect to their collective bargaining unit employees whose health coverage was provided through a multiemployer program. Instead, among other rules, the transition relief required the employer make a contribution toward multiemployer plan coverage (that satisfies the play or pay mandate's "minimum value" and "affordability" requirements) for *each* of its full-time employees covered under the bargaining agreement. See our [Alert](#) dated January 4, 2013.

Lockton Comment: In short, the transition relief allows the employer to take credit, against its play or pay obligation, for the coverage supplied to its bargaining unit employees by the multiemployer plan, but only if the employer made contributions to the plan on behalf of each full-time bargaining unit employee.

IRS has issued a new, relaxed transition rule that applies if:

- The employer is required by a collective bargaining agreement to make contributions to the multiemployer plan with respect to *some or all of its employees* who satisfy the plan's eligibility conditions,
- The plan offers coverage that satisfies the "minimum value" (i.e., 60 percent actuarial value) and affordability requirements, and
- The plan offers coverage to the employees' children to age 26.

Mark Holloway, J.D.
Health Reform Advisory Practice

Not Legal Advice: Nothing in this Alert should be construed as legal advice. Lockton may not be considered your legal counsel and communications with Lockton's Compliance Services group are not privileged under the attorney-client privilege.

Circular 230 Disclosure: To comply with regulations issued by the IRS concerning the provision of written advice regarding issues that concern or relate to federal tax liability, we are required to provide to you the following disclosure: Unless otherwise expressly reflected herein, any advice contained in this document (or any attachment to this document) that concerns federal tax issues is not written, offered or intended to be used, and cannot be used, by anyone for the purpose of avoiding federal tax penalties that may be imposed by the IRS.