

Employee Benefits and Executive Compensation Client Alert***Proposed Regulations Issued on PPACA 90-Day Waiting Period***

by S. Tony Ling and Richard J. Zito

On March 18, the Department of Labor (DOL), in conjunction with the Department of Health and Human Services (HHS) and the Department of Treasury, released proposed regulations regarding enrollment timing requirements and limitations imposed by the Patient Protection and Affordable Care Act (PPACA). These proposed regulations adopt substantially similar rules to the temporary guidance contained in IRS Notice 2012-59 and as such, compliance with either these proposed regulations or the guidance in the Notice 2012-59 will constitute good-faith compliance through 2014. This Practice Advisory (i) provides the legislative and regulatory background for the proposed rulemaking; (ii) describes the core 90-day requirement rule and clarifies which plans and employees are subject to it; and (iii) examines the waiting period's applicability to multiemployer plans under the proposed regulations. At a minimum, employers need to recognize that

- any condition of eligibility based solely on a time period elapsing must not exceed 90 days;
- cumulative hours of service requirements that do not exceed 1,200 hours are permissible but might expose plan sponsors to liability under PPACA's "pay-or-play" provisions;
- the complex earnings calculations and "hour-banking" typically found in the multiemployer plan context pose a regulatory challenge that remains unresolved, but the proposed regulations do not exempt multiemployer plans from the 90-day waiting period limitation; and

- HIPAA-excepted plans are exempt from the 90-day limitation.

By adding section 2708 to the Public Health Service Act (PHSA), PPACA prevents an otherwise eligible employee (or that employee's dependent) from having to wait more than 90 days to become effectively covered under the employer's group health insurance plan. We emphasize "otherwise eligible" because it bears reminding that nothing in this section—or in PPACA generally—precludes plan sponsors and insurers from altogether excluding particular employee classes from coverage, provided that those exclusions (i) are not designed as an end-run around the 90-day waiting period prohibition; and (ii) do not run afoul of general tenets of employment law discrimination.

What constitutes a "waiting period" for the purposes of PPACA? And for that matter, what constitutes 90 days? As is often the case, the devil is in the details and, more precisely, the definitions. The proposed regulations incorporate the definition of a "waiting period" found in the Health Insurance Portability and Accountability Act (HIPAA) guidance, which defines it as the amount of time required to pass before coverage for an otherwise eligible employee (or dependent) actually goes into effect. Ninety days is considered to be 90 calendar days beginning with the date of enrollment. This count includes holidays and weekends, with the proviso that if the 91st day is not a business day, the plan may make coverage effective prior to the 91st day.

Eligibility is triggered when the employee satisfies the plan's substantive eligibility conditions, e.g., being a full-time employee. Notably, even eligibility conditions that include a time component, e.g., attaining a certain commission amount within a quarter, are considered by the proposed regulations to be substantive and therefore not designed to avoid the waiting period limitations. This is also true for plans that use a cumulative hours of service requirement to qualify employees for coverage, with three large caveats: (1) the hours of service must not exceed 1,200; (2) the qualification under such a cumulative hour scheme must be a one-time eligibility hurdle, not an annual test; and (3) even if the plan's cumulative hours of service requirement passes muster under the waiting period regulations, it very well might be exposing the plan sponsor to penalties under section 4980H.

What about plans that predicate plan eligibility on a specified number of hours worked per week or pay period? Recognizing that it can be difficult for some employers to anticipate a newly-hired employee's workload, the Department of Treasury, DOL, and HHS have extended the Section 4980H variable-hour employee look-back period rules to this context. In short, those rules provide that any measurement period may last no longer than 12 months, beginning on any date between the employee's start date and the first day of the first calendar month following the start date. If the variable-hour employee contemplated above is determined ultimately to be eligible, the plan will be deemed compliant with the waiting period limitation rules as long as coverage is made effective no later than 13 months¹ from the employee's actual start date.

Consistent with the proposed regulations' overall compatibility with HIPAA, the 90-day waiting period rules do not apply to benefits classified as 'HIPAA-excepted.' These HIPAA-excepted plans include retiree-only plans, most stand-alone dental and vision plans, as well as policies that cover only specified illnesses or conditions.

Additionally, multiemployer plans present some unique questions regarding eligibility determinations. Often these collectively-bargained plans yield eligibility requirements that depend on a worker's earnings and the timing of those earnings. As a general matter, the proposed regulations accept satisfaction of these earnings-based formulas, as well as the use of hour banks, as substantive eligibility provisions that are therefore permissible under PPACA's waiting period rules. DOL, HHS, and Treasury have specifically requested comments on scenarios in which multiemployer plans' eligibility requirements could pose peculiar challenges vis-à-vis these waiting period provisions—and whether they therefore might require additional rulemaking.

Although these regulations will not be effective until January 1, 2014, it is essential that employers conduct a thorough inventory of their benefit plans as soon as possible, identifying those that might be subject to the 90-day waiting period limitation rules. This period before 2014 should also be used to review plan eligibility criteria generally with an eye toward minimizing risk of inadvertent PPACA pay-or-play exposure. It is also a good idea to review participant and prospective-participant communications and policies to ensure internal consistency. By using the remainder of 2013 to administer some 'preventative medicine', plan sponsors can make PPACA compliance less of a headache.

¹ In the event that such employee's start date is not the first day of a calendar month, the timeframe to make coverage effective will be 13 months, plus the number of days between the employee's start date and the first day of the next calendar month.

For further information, please contact:

S. Tony Ling

Partner

Tel: 312 923-2640

Email: tling@jenner.com

Richard J. Zito

Staff Attorney

Tel: 312 840-7848

Email: rzito@jenner.com