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HEALTH LAW ALERT
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Waiting Periods Limited to 90 Days

Certificate of Credible Coverage Distribution Requirement Ends This Year

Today, the Departments of Health and Human Services, Labor, and the Treasury (the Agencies) formally published final rules implementing the Affordable Care Act's prohibition on waiting periods in excess of 90 days for group plan coverage. While health plans must comply with the waiting period standards for plan years beginning on or after January 1, 2015, the Agencies emphasize that compliance with the statutory provision was effective on January 1, 2014 and that health plans should rely on guidance the Agencies previously issued on the subject. That guidance generally is consistent with the final rules.

The Agencies acknowledge that an insurer is not typically in a position to determine whether an individual has been subject to a waiting period of more than 90 days. An insurer is therefore "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] requirements," provided that the insurer meets certain conditions. (See box on next page for more details.)

The final rules are published at 79 *Federal Register* 10295 (click here). Click here (or see the "Resources" page at tbixbylaw.com) for my compilation of Selected Federal Health Insurance Provisions incorporating the final rules (*see* Volume I under first bullet under "Compiled Rules").

Waiting Period Final Rules

Under the final rules, an insured or self-funded group health plan may not impose a waiting period that lasts more than 90 days on an individual who is otherwise eligible to enroll in coverage. Although the restriction applies to any eligibility condition that is based solely "on the lapse of time," other conditions for eligibility are permissible, provided that they are not a subterfuge for avoiding the 90-day limitation. Thus, for example, a group health plan may require employees to "complete specified training and achieve[] specified certifications" before becoming eligible for coverage. Because this limitation is not based on a lapse of time, the plan may indefinitely withhold any offer of coverage to an individual who has not completed the training or achieved the certifications, notwithstanding the 90-day waiting period limitation.

On the other hand, a group health plan may no longer offer coverage only to employees who have completed (for example) one year of service: this eligibility condition would be based solely on lapse of time and would therefore violate the 90-day limitation. The final rules do allow employers to limit eligibility based on "cumulative hours-of-service" requirements, provided that the does not exceed 1,200 hours of service. The Agencies distinguish this from the one-year-of-service limitation because the requirement relates to more than the lapse of time—it relates to the number of hours of work performed for the employer. Thus, an employer who imposes a 1,200 hour cumulative service requirement must allow an individual to elect coverage within 90 days of the date on which the individual completes 1,200 hours of service.

The final rules also specify how employers may treat "variable hour employees"—employees who have variable work hours such that an employer cannot determine whether they will qualify for health plan coverage.

Guidance for Waiting Periods in 2014

The Agencies published guidance for compliance with the Affordable Care Act's 90-day waiting period limitation in 2012. The Agencies assert that health plans must comply with this guidance for purposes of applying waiting periods for group plans with plan years beginning during calendar year 2014. Click here for a copy of the primary guidance. Click here for a copy of additional guidance (see top of page 3 and Q/A 7 on page 7-8).

Insurer Compliance: Obtain Employer Representation

An insurer generally receives eligibility information from employers (or other plan sponsors) and has no way to determine whether a waiting period has been imposed (or how long a waiting period may be imposed) prior to receiving eligibility information about an individual.

The final rules allow an insurer to comply with the requirements of the 90-day waiting period limitation by requiring an employer (or other plan sponsor) "to make a representation regarding the terms of any eligibility conditions or waiting periods imposed . . . before an individual is eligible to become covered under the terms of the plan."

The insurer must also require the employer (or other plan sponsor) to update this representation upon making any changes and must not have specific knowledge that a longer waiting period has been imposed.

An insurer should therefore consider how to best obtain such representations from its accounts (*e.g.*, by revising its account agreements) and implement a system to obtain them prior to January 1, 2015.

Certificates of Creditable Coverage

The final rules eliminate the requirement that health plans issue certificates of credible coverage when individuals disenroll from a plan. The Agencies explain that, beginning on January 1, 2015, the creditable coverage certificates will be unnecessary due to the Affordable Care Act's prohibition on pre-existing condition exclusions. The requirement remains in effect through 2014 due to the (somewhat unlikely) possibility that an individual would need to prove s/he had credible coverage to enroll in a plan not yet subject to the prohibition on preexisting condition exclusions because it had a plan year beginning prior to January 1, 2014.

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