

## Final 90-Day Health Plan Waiting Period Rules Issued

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On June 20, 2014, the Internal Revenue Service, Department of Labor and Department of Health and Human Services (collectively, the "Departments") published [final rules](#) addressing the maximum length of an employment-based orientation period (the "June 2014 Regulations") that would be consistent with the 90-day waiting period limitation under the Affordable Care Act (the "ACA"). The Departments previously published final regulations implementing the ACA's 90-day waiting period restriction on February 24, 2014 (the "February 2014 Final Regulations") and related proposed regulations regarding the permissible orientation period (the "February 2014 Proposed Regulations"). The June 2014 Final Regulations follow the February 2014 Proposed Regulations with few significant changes. Like the February 2014 Proposed Regulations, the June 2014 Final Regulations apply to plan years beginning on or after January 1, 2015. For information about the proposed and final regulations, please see our [May 2013](#) and [March 2014](#) articles.

### 90-Day Waiting Period Limit

The February 2014 Final Regulations define a waiting period as the period that must pass before coverage for an employee who is "otherwise eligible to enroll" in a plan can become effective. Under the ACA and February 2014 Final Regulations, such a waiting period may not exceed 90 days from the date an individual meets the plan's eligibility criteria. Under these rules, an individual is "otherwise eligible to enroll" if that individual has met the plan's substantive eligibility conditions, such as attainment of an eligible job classification (e.g., full-time status); acquiring a job-related license; or "satisfying a reasonable and bona fide employment-based orientation period".

### Employment-based Orientation Period

Under the June 2014 Final Regulations, a plan may require an employee to complete a reasonable and bona fide employment-based orientation period as a condition of eligibility, if the waiting period commences on the first day after the end of the orientation period AND the orientation period is no more than one month. In the preamble, the Departments note that a reasonable and bona fide orientation period allows an employer to start standard orientation and training processes, to determine if a new employee can handle the assigned job duties and challenges, and allows the employer and employee to evaluate whether the employment situation is satisfactory for each party.

The orientation period can begin on any day of a calendar month, but the end of the month is determined by adding one calendar month and subtracting one calendar day. Therefore, if an employee starts work on May 3, the last permitted day of a required orientation period is June 2. If there is no subsequent date in the next calendar month when adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. So, if an 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).

### **New Employer "Pay or Play" Compliance Issues**

In the preamble to the June 2014 Final Regulations, the Departments note that if a large employer (*i.e.*, the employer has 50 or more full-time employees, taking into account full-time equivalents) is subject to both ACA's waiting period rules and the employer shared responsibility requirement of Internal Revenue Code Section 4980H (*i.e.*, the "pay or play provision" of the ACA), it may not be able to impose both a full one-month orientation period and a 90-day waiting period without incurring a penalty under Section 4980H. The June 2014 Final Regulations illustrate how these two sets of rules interact, stating that if a large employer hires a new full-time employee on January 6, then the employer's plan may offer health plan coverage to the employee on May 1 and comply with both the "pay or play" mandate and the waiting period rule. However, if the employee's health coverage doesn't begin until May 6 (*i.e.*, one month plus 90 days after the employee's actual hiring date), the employer may be subject to an assessment under Section 4980H despite complying with the waiting period rules.

### **Next Steps**

To ensure timely compliance, plan sponsors should examine their eligibility criteria to ensure that any waiting period included in plan eligibility requirements meets both the ACA's waiting period rules *and* Section 4980H requirements, if applicable. This may require amending the plan's eligibility provisions, preparing and disseminating any summary of material modifications to affected employees, and verification of administrative procedures with health insurance issuers and third party administrators for self-funded plans, to ensure that plan coverage begins in a timely manner and minimizes any liability under Section 4980H as applicable.

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