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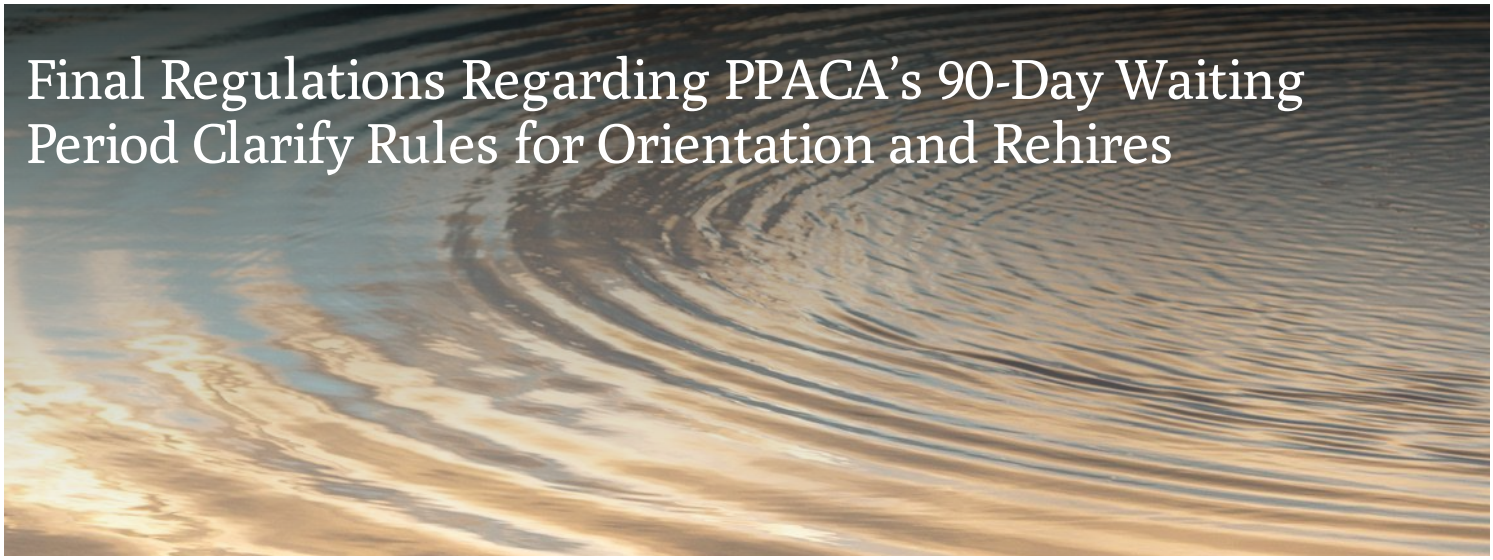

Final Regulations Regarding PPACA's 90-Day Waiting Period Clarify Rules for Orientation and Rehires

FEBRUARY 26, 2014

The Departments of the Treasury, Labor, and Health and Human Services (collectively, the "Departments") have issued final regulations implementing the 90-day waiting period limitation under the Patient Protection and Affordable Care Act. The final regulations largely confirm the guidance in the proposed regulations, and provide some helpful clarifications. The final regulations are effective January 1, 2015. For 2014, plans can comply with either the proposed or final regulations. We recently blasted about the excise taxes associated with a failure to comply with the 90-day requirement.

The regulations confirm that group health plans, both grandfathered and non-grandfathered, cannot apply any eligibility waiting period that exceeds 90 calendar days, including weekends and holidays. A "waiting period" refers to the amount of time that must elapse before an employee or dependent who is otherwise eligible can become covered under a group health plan. An employee or dependent is "otherwise eligible" to enroll in a plan if that person has met the plan's substantive eligibility conditions.

According to the regulations, substantive eligibility conditions include being in an eligible job classification, achieving job-related licensure requirements, or satisfying a reasonable and bona fide employment-based orientation period. The regulations do not specify the maximum length of a bona fide orientation period. However, other proposed regulations provide that such a period can be no more than one calendar month in length. The mere passage of time is not a substantive requirement. In other words, eligibility that is based solely on the passage of time can never be more than 90 days in length (notably, the regulations do not provide any exception for collectively-bargained plans in this regard). If an individual is able to elect coverage that becomes effective within 90 days of eligibility, then the coverage complies with the 90-day limitation, even if the individual does not actually elect the coverage within that time frame.

An important clarification in the final regulations involves rehired employees. A former employee who is rehired by the same employer may be treated as newly eligible for coverage. Therefore, a plan may require that a rehired individual once again meet its eligibility criteria and satisfy its waiting period. The same is true for an individual who changes job classifications, moving between eligible and ineligible classes of employees. Of course, in no event can a termination and rehire (or a change in employment classification, or any eligibility requirement) be a subterfuge to avoid compliance with the 90-day waiting period limitation.

To the extent that a plan imposes a cumulative hours-of-service eligibility requirement, the plan may not require more than 1,200 hours for plan eligibility. The plan's waiting period must begin on the first day after the employee satisfies the hours-of-service requirement, and may not exceed 90 days. Importantly, this is a one-time eligibility requirement only—an individual cannot be required to satisfy the hours-of-service requirement every year.

Finally, the time period for determining whether a variable-hour employee satisfies full-time status (or any other minimum average hours eligibility requirement) will not be considered a subterfuge to avoid compliance with the 90-day limitation, provided that the effective date of the coverage is 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). Of course, if the measurement period for variable-hour employees is shorter, coverage for an employee who satisfies the requirement must be effective no more than 90 days after the end of the measurement period.

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