



Health Care Reform

LEGISLATIVE BRIEF

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Temporary Guidance Issued on 90-day Waiting Period Limit

For plan years beginning on or after **Jan. 1, 2014**, the Affordable Care Act (ACA) prohibits group health plans and group health insurance issuers from applying any waiting period that exceeds **90 days**. ACA's 90-day waiting period requirement does not require an employer to offer coverage to any particular employee or class of employees, including part-time employees. It only prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage under a group health plan becomes effective.

In 2011, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) invited comments on ACA's 90-day waiting period limit. The Departments are working to develop regulations that address the 90-day waiting period requirement.

On Aug. 31, 2012, the IRS issued [Notice 2012-59](#) in conjunction with the DOL and HHS to provide temporary guidance on the 90-day waiting period limit. The temporary guidance will remain in effect **at least through the end of 2014**. According to Notice 2012-59, if more guidance is issued on the 90-day waiting period limit for periods after 2014, plans and issuers will be given adequate time to comply with any additional or modified requirements.

WAITING PERIOD

A group health plan or issuer may not impose a waiting period that exceeds 90 days. A waiting period is the period of time that must pass before coverage for an employee or dependent who is otherwise eligible to enroll in the plan becomes effective. An employee or dependent is eligible for coverage when he or she has met the plan's eligibility conditions, such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms.

Under ACA, eligibility conditions that are based solely on the lapse of time are permissible for no more than 90 days. Other conditions for eligibility are permissible under ACA, as long as they are not designed to avoid compliance with the 90-day waiting period limit.

Also, if a plan allows an employee to elect coverage that would begin on a date that does not exceed the 90-day waiting period limit, ACA's 90-day waiting period limit is considered satisfied. Thus, a plan or issuer does not violate ACA merely because employees take additional time to elect coverage.

The following examples from Notice 2012-59 illustrate how these rules work:

Example 1

Facts: A group health plan provides for coverage to begin on the first day of the first payroll period on or after the date an employee is hired and completes the plan's enrollment forms. Enrollment forms are distributed on an employee's start date. Employee A is hired and starts on Oct. 31, which is the first day of the payroll period. On Nov. 2, A completes and files all of the plan's necessary enrollment forms. A's coverage under the plan becomes effective on Nov. 14, which is the first day of the first payroll period after A completes the enrollment forms.

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Conclusion: In this example, under the plan's terms, coverage may become effective as early as Oct. 31, depending on when A completes the plan's enrollment forms. Under the terms of the plan, when coverage becomes effective is dependent solely on the length of time taken by A to complete the enrollment materials. Thus, the plan complies with ACA's 90-day waiting period limit because, under the terms of the plan, A may elect coverage that would begin on a date that does not exceed the 90-day waiting period limit.

Example 2

Facts: A group health plan limits eligibility for coverage to full-time employees. Coverage becomes effective on the first day of the calendar month following the date the employee becomes eligible. Employee B begins working full time for the employer on April 11. Prior to this date, B worked part time for the employer. B enrolls in the plan and coverage is effective May 1.

Conclusion: In this example, the period from April 11 through April 30 is a waiting period. The period while B was working part time is not part of the waiting period because B was not in a class of employees eligible for coverage under the terms of the plan while working part time. Full-time versus part-time status is a bona fide employment-based condition that is not considered to be designed to avoid compliance with the 90-day waiting period limit.

VARIABLE HOUR EMPLOYEES

A special rule applies if a group health plan conditions eligibility on an employee regularly working a specified number of hours per pay period (or working full time), and it cannot be determined that a newly hired employee is reasonably expected to regularly work that number of hours per period (or work full time). In this type of situation, the plan may take a **reasonable period of time** to determine whether the employee meets the plan's eligibility condition. This may include a measurement period that is consistent with the time frame permitted for making this same determination under ACA's shared employer responsibility provisions.

Under ACA's shared employer responsibility rules, employers have the option of using a safe harbor look-back measurement period of up to 12 months to determine whether certain types of new employees are full-time employees, without being subject to a penalty under ACA's shared responsibility provisions for that period with respect to those employees. An employer may use this measurement period for purposes of complying with ACA's 90-day waiting period limit for variable hour employees, even if it is not a "large employer" subject to ACA's shared responsibility provisions.

The time period for determining whether a variable hour employee meets the plan's eligibility condition will comply with ACA's 90-day waiting period limit if coverage is made effective no later than 13 months from the employee's start date, except where a waiting period that exceeds 90 days is imposed after the measurement period. If an employee's start date is not the first of the month, the time period can also include the time remaining until the first day of the next calendar month.

Notice 2012-59 provides the following examples for the special rule for variable hour employees:

Example 3

Facts – Under an employer's group health plan, only employees who work full time (defined under the plan as regularly working 30 hours per week) are eligible for coverage. Employee C begins work for the employer on Nov. 26 of Year 1. C's hours are reasonably expected to vary, with an opportunity to work between 20 and 45 hours per week, depending on shift availability and C's availability. Thus, it cannot be determined at C's start date that C is reasonably expected to work full time.

Under the terms of the plan, variable hour employees, such as C, are eligible to enroll in the plan if they are determined to be full time after a measurement period of 12 months. Coverage is made effective no later than the

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first day of the first calendar month after the applicable enrollment forms are received. C's 12-month measurement period ends Nov. 25 of Year 2. C is determined to be full time and is notified of C's plan eligibility. If C then elects coverage, C's first day of coverage will be Jan. 1 of Year 3.

Conclusion – In this example, the measurement period is not considered to be designed to avoid compliance with the 90-day waiting period limit (and is, thus, permissible) because the plan may use a reasonable period of time to determine whether a variable hour employee is a full-time employee if the period of time is consistent with the timeframe permitted for this determination under ACA's employer shared responsibility provisions. In this circumstance, the time period for determining whether an employee is full time will not be considered to avoid the 90-day waiting period limit if coverage can become effective no later than 13 months from C's start date, plus the time remaining until the first day of the next calendar month.

Example 4

Facts – Employee D begins working 25 hours per week for the employer on Jan. 3 and is considered a part-time employee for purposes of the employer's group health plan. The employer sponsors a group health plan that provides coverage to part-time employees after they have completed a cumulative 1,200 hours of service. D satisfies the plan's cumulative hours of service condition on Dec. 15.

Conclusion – In this example, the cumulative hours of service condition with respect to part-time employees is not considered to be designed to avoid compliance with the 90-day waiting period limit. Accordingly, coverage for D under the plan must begin no later than the 91st day after D works 1,200 hours. However, if the plan's cumulative hours of service requirement was more than 1,200 hours, the Departments would consider the requirement to be designed to avoid compliance with the 90-day waiting period limit.

ELIGIBILITY FOR PREMIUM ASSISTANCE

ACA created premium tax credits and cost sharing reductions to help eligible individuals and families purchase health insurance through an Affordable Insurance Exchange (Exchange). By reducing a taxpayer's out-of-pocket premium costs, the assistance is designed to make coverage through an Exchange more affordable. The Exchanges are scheduled to become operational in 2014, with enrollment beginning Oct. 1, 2013.

To receive the premium assistance a taxpayer must enroll in one or more qualified health plans through an Exchange and must meet certain eligibility criteria. For example, one criterion is that the taxpayer cannot be eligible for minimum essential coverage. "Minimum essential coverage" includes coverage under a government-sponsored health program, such as the Medicare or Medicaid programs or employer-sponsored minimum essential coverage.

Notice 2012-59 provides that an employee (or related individual) is not eligible for minimum essential coverage under the plan, and may be eligible for a premium tax credit or cost-sharing reduction, during any period when coverage is not offered. This includes any measurement period or administrative period prior to when coverage takes effect. Thus, all employees, whether full time, part time or variable, who are not offered the opportunity to enroll in health coverage by their employer will be eligible to receive premium tax credits and cost-sharing reductions for Exchange coverage if they meet other conditions for receipt of the assistance.

EMPLOYER SHARED RESPONSIBILITY PENALTY

Under ACA's "pay or play" requirements large employers that do not offer health coverage to their full-time employees or that offer health coverage to their full-time employees that is either unaffordable or does not provide minimum value may be subject to a penalty. This penalty is also called a "shared responsibility payment" under ACA.

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On Aug. 31, 2012, the IRS issued [Notice 2012-58](#), which describes safe harbor methods and rules that employers may use to determine their liability under ACA's shared responsibility rules at least through the end of 2014. Under these rules, if an employee is reasonably expected at his or her start date to work full time, an employer that sponsors a group health plan and offers coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment will not be subject to a shared responsibility penalty under ACA for not offering coverage during the initial three months.

Source: Departments of Labor, Health and Human Services and the Treasury

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