

Final Regulations Allow One-Month Orientation Period before 90-Day Waiting Period

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Final waiting period [regulations](#) issued June 20, 2014 by the DOL, IRS and HHS confirm that **employers can require new employees to complete a one-month “orientation period” before the eligibility waiting period begins for the employer’s group health plan.** The final regulations adopt without substantive changes the provisions in proposed regulations that were issued February 24, 2014. The final regulations also clarify the interplay between the 90-day waiting period provision and the employer shared responsibility provisions (which provide for an offer of coverage by the first day of the fourth month of employment).

Four Highlights of the Final Regulations

1- Maximum One Month Orientation Period: One month is determined by adding one calendar month and subtracting one calendar day, measured from an employee’s start date in a position that is otherwise eligible for coverage. For example, if an employee’s start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2.

2- No Particular Training Required during Orientation Period: The preamble to the final regulations says “the Departments do not intend to call into question the reasonableness of short, bona fide orientation periods.” However, it also notes that, during an orientation period, “the Departments envision that an employer and employee will evaluate whether the employment situation is satisfactory for each party, and standard orientation and training processes will begin.”

3- Interplay with Employer Shared Responsibility: The “orientation-period-plus-90-day-waiting-period” rule in these final regulations is different from the “first-day-of-the-fourth-month” rule under employer shared responsibility. The preamble notes that an “applicable large employer” (ALE) that complies with these final regulations on orientation periods and waiting period could nonetheless be subject to a penalty under IRC section 4980H if it fails to offer affordable minimum value coverage to newly-hired full-time employees by the first day of the fourth calendar month of employment. See Examples 2, 3 & 4 below.

4- Effective Date: The final regulations apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2015. Prior to that time, compliance with the proposed regulations will be considered compliance. Thus, through the end of the 2014 plan year, employers can comply with the proposed regulations, which are basically the same as the final regulations.

Background on Waiting Periods

The Affordable Care Act and the final regulations prohibit a group health plan or a health insurance issuer offering group health insurance coverage from applying a waiting period that exceeds 90 days. The regulations define “waiting period” as the period that must pass before coverage can become effective for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan. Being “otherwise eligible

to enroll” in a plan means having met the plan's “substantive eligibility conditions,” such as being in an eligible job classification, achieving job-related licensure requirements specified in the plan's terms, or satisfying a reasonable and bona fide employment-based orientation period. This third example was added by the *proposed* regulations that were issued in February 2014. The proposed regulations also limited the maximum orientation period to one month, to ensure that employers do not add an orientation period “as a subterfuge for the passage of time” or designed to avoid compliance with the 90-day limit on waiting periods.

Examples of Allowable Orientation Periods and Waiting Periods

The final regulations include several examples of allowable orientation periods and of how to calculate the combined orientation period and 90-day waiting period. As noted above, the one-month orientation period is determined by adding one calendar month and subtracting one calendar day, measured from an employee’s start date in an otherwise eligible position. If there is not a corresponding date in the next calendar month, the last permitted day of the orientation period is the last day of the next calendar month. (The following examples combine several different examples in the final regulations so are not numbered the same as the examples in the final regulations.)

Example 1: If an employee’s start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. The waiting period must start June 3, and the 90th day would be August 31. Coverage must start no later than September 1. This also meets the employer shared responsibility requirements because the first day of the fourth calendar month would be September 1.

Example 2: If an employee’s start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. The waiting period must start November 1, and the 90th day would be January 29. Coverage must start no later than January 30. This does not meet the employer shared responsibility requirements because the first day of the fourth calendar month would be January 1. Thus, a large employer could be subject to penalties under IRC 4980H if it did not offer coverage until January 30.

Example 3: 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). The waiting period must start March 1, and the 90th day would be May 29. Coverage must start no later than May 30. This does not meet the employer shared responsibility requirements because the first day of the fourth calendar month would be May 1. Thus, a large employer could be subject to penalties under IRC 4980H if it did not offer coverage until May 30.

Example 4: If the employee’s start date is August 31, the last permitted day of the orientation period is September 30. The waiting period must start October 1, and the 90th day would be December 29. Coverage must start no later than December 30. This does not meet the employer shared responsibility requirements because the first day of the fourth calendar month would be December 1. Thus, a large employer could be subject to penalties under IRC 4980H if it did not offer coverage until December 30.

Next Steps for Employers

- Employers who want to take advantage of the final rule and start their 90-day waiting period immediately after the last day of the orientation period must amend their plan documents, summary plan descriptions (SPDs), employee handbooks and other employee communications to specify the classification of employees who will not be eligible for coverage until they have satisfied both the orientation period and the waiting period.

- For ease of administration, employers may want to offer coverage as of the first of the month after 60 days, after the end of the orientation period, so that all employees start coverage the first day of a month. Employers with insured plans should check with their carriers as to whether coverage *must* be offered as of the first day of a month, or can be offered as of the 91st day. Employers with self-funded plans have discretion whether to use the 91st day or the first of each month. Of course, employers can always apply a waiting period shorter than 90 days, such as first of the month after date of hire, or first of the month after 30 days.
- "Applicable large employers" must determine whether they will meet the employer shared responsibility "offer of coverage" requirements (70% in 2015 and 95% thereafter) if they require all full-time employees to satisfy both the orientation period and a 90-day waiting period before being offered coverage. As some of the examples above illustrate, compliance with the "orientation-plus-waiting-period" limits often is not compliance with employer shared responsibility. Employers who will not meet the 70% or 95% test may wish to offer coverage to all full-time employees by the first day of the fourth month, or by the first of the month after 60 days following the end of the orientation period.
- Small employers only have to comply with the waiting period and orientation period limits. For 2015, "small" employers with fewer than 100 full-time employees or full-time equivalents are not subject to penalties under employer shared responsibility. After 2015, "small" employers are defined as those with fewer than 50 full-time employees and full-time equivalents.
- Although the final regulations do not *require* any particular training during the one-month orientation period, we recommend that employers document some training or orientation processes that occur during the orientation period, so it is clear it is a bona fide orientation period and was not added as a subterfuge to extend the 90-day limit on waiting periods.