Keeping in Line

PPACA coverage mandates penalties and eligibility waiting periods

What are the penalties for violating the PPACA waiting period limitation and the other PPACA coverage mandates?

The Patient Protection and Affordable Care Act (PPACA) requires that group health plans modify their coverage to comply with the mandates set forth in Subtitle A and Subtitle C of Title I of the Act. These provisions generally amend the Public Health Services Act (PHSA) and are incorporated by reference into § 715 of the Employee Retirement Income Security Act of 1974 (ERISA) and § 9815 of the Internal Revenue Code of 1986 (the Code). Among other things, group health plans are required to extend coverage to adult children until the age of 26 (PHSA § 2714), must eliminate certain annual limits and all lifetime maximum limits on coverage of essential benefits (PHSA § 2711), and, beginning in 2014, will be prohibited from establishing waiting periods that exceed 90 days (PHSA § 2708).

By adding these coverage mandates to the PHSA, ERISA and Code, Congress effectively allocated enforcement authority for PPACA's insurance market reforms and coverage mandates between the Department of Health and Human Services (HHS), Department of Labor (DoL), and the Internal Revenue Service (IRS). In addition, participants have a private right of action to enforce PPACA. More specifically, the PPACA coverage mandates are enforceable as follows:

Code/IRS: The IRS has the authority to assess excise taxes upon group health plans that do not comply with the coverage mandates. For group health plans, the penalty tax on a noncomplying plan sponsor is $100 per day of noncompliance per affected individual, and the violations must be self-reported to the IRS on IRS Form 8928. The tax may be higher where violations occurred or continued during a period under IRS examination or where the violations are more than "de minimis." The tax does not apply where the failure was based on reasonable cause and not to willful neglect and the failure is corrected within 30 days after the person knew or should have known that the failure existed. Even if not corrected, if the failure was due to reasonable cause and not willful neglect, the tax imposed may not exceed the lesser of 10% of the amount paid to provide medical care during the taxable year or $500,000. In the case of a multiemployer plan, the tax is levied upon the plan itself. There is an exception for small employers with between 2 and 50 employees.

ERISA/DoL: DoL may enforce the coverage mandates against group health plans by bringing a civil action to enjoin a noncompliant act or practice or for appropriate equitable relief under Part 7 of ERISA. ERISA also provides a private cause of action by which participants, beneficiaries and fiduciaries may sue plan fiduciaries to enforce Part 7 of ERISA (into which the PPACA reforms are incorporated by reference).

PHSA: There may be civil money penalties of $100 per day per individual discriminated against for each day the plan does not comply with the coverage mandate (capped at 10% of the aggregate amount paid or incurred by the employer during the preceding taxable year for the group health plan or $500,000, whichever is less). This penalty appears to be limited in this context to nonfederal governmental group health plans.

Does the PPACA regulate eligibility periods imposed by individual companies for new hires to wait before they can participate in a company-sponsored health plan?

Section 2708 of the Public Health Service Act (PHSA), as added by PPACA, prohibits group health plans and health insurance issuers offering group health insurance coverage from applying any waiting period that exceeds 90 days, effective beginning in 2014. It is not yet clear how this restriction will apply with respect to eligibility period requirements imposed on newly hired employees, but pre-PPACA guidance under the HIPAA rules and a recent IRS Notice suggest that future guidance could allow the continued use of certain eligibility period requirements.

Section 2704(b)(4) of the PHSA (and identical definitions in the Code and ERISA) defines the term "waiting period" to mean "with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan." Joint final regulations issued by the Departments of Treasury, Labor, and Health and Human Services (the "Agencies") under the HIPAA rules define the term "waiting period" as "the period that must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective."

The Agencies have not yet issued guidance regarding the PPACA waiting period limitation, but IRS Notice 2011-36 asks for comments on which employees are subject to the limitation, when a waiting period may apply consistent with the PPACA limitation, and how the 90-day limit should be calculated. It also requests comments on the application of the waiting period limitation to common employer eligibility and enrollment practices and the interaction between the waiting period limitation and PPACA employer mandate requirements. With respect to newly hired employees, it requests comments on the following scenarios: Employees becoming eligible to enroll in the employer's plan after completing a service-based "probationary" period of three to six months; part-time employees who are offered coverage, but only after having worked for a period longer than 90 days; and employees becoming eligible to enroll when they are determined to have worked an average of a certain number of hours during a look-back period, with a 90-day waiting period being applied beginning once the employee is determined to be eligible to enroll. —*PS*

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