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# Waiting Period Rules

## How HHS and DOL rules interact with the ACA shared responsibility rules

The Departments of Treasury, Labor (DOL) and Health and Human Services (HHS) issued final rules earlier this year, 79 Fed. Reg. 10296 (February 24, 2014), regarding health plan waiting periods. The Patient Protection and Affordable Care Act (ACA) requires that, for plan years on or after January 1 of this year, no group health plan or group health insurance issuer may impose a waiting period that exceeds 90 days after an employee is otherwise eligible for coverage. The rules do not require coverage be offered to any particular individual or class of individuals.

To ensure that eligibility conditions based solely on the passage of time are not used to evade the waiting period limit, the regulations say such conditions also cannot exceed 90 days. Additionally, requiring employees to complete a certain number of hours before becoming eligible for coverage is generally allowed as long as the requirement is capped at 1,200 hours. The regulations also address situations in which it cannot be determined that a new employee will be working full-time.

Below we address questions concerning the waiting period requirements and, in particular, how these rules interact with the ACA shared responsibility rules under Internal Revenue Code (IRC) Section 4980H, effective for most plans January 1, 2015.

### What waiting period are plans permitted to impose?

Under the ACA, a group health plan may not impose a waiting period of more than 90 days. The final regulations define a "waiting period" as the length of time that must pass before coverage for an individual who is otherwise eligible to enroll under the terms of the group health plan can become effective. The rules clarify that 90 days means calendar days, including weekends and holidays.

### To which plans does this rule apply?

The rule applies to group health plans that are subject to the other insurance market reform rules under the ACA, including Employee Retirement Income Security Act (ERISA) group health plans, health insurance issuers, governmental health plans and church health plans. The rule does not apply to benefits that are considered "excepted benefits" under the Health Insurance Portability and Accountability Act (HIPAA), such as standalone dental and vision coverage, Employee Assistance Programs (EAPs), supplemental coverage or disease-only policies that meet the HIPAA-excepted benefits requirements.

# The waiting period rules and 4980H rules marry up in a number of ways—plans should pay attention to both sets of rules.

## When does the waiting period start?

The 90-day waiting period must start when an individual has met the plan's substantive eligibility conditions, such as being in an eligible job classification or obtaining a required license, as long as the eligibility condition is not designed to avoid compliance with the 90-day rule. In addition, a plan may require that an employee complete a minimum amount of cumulative hours of service in order to be eligible, as long as the number of hours does not exceed 1,200. The rules provide that other eligibility conditions "based solely on the lapse of time" are permissible only if they are no more than 90 days.

## What is the new orientation period that is permitted?

The agencies also issued a new proposed rule that would allow a new "orientation period" on top of the 90-day waiting period: 79 Fed. Reg. 10320 (February 24, 2014). The orientation period is limited to one month, which is determined by adding one calendar month and subtracting a day. For example, if an employee is hired May 3, the orientation period would end June 2 and the waiting period would begin June 3. Plans are permitted to rely on the proposed rule until final rules are issued, at least through this year.

## How do the waiting period rules interact with 4980H/ shared responsibility?

The waiting period rules and 4980H rules marry up in a number of ways—plans should pay attention to both sets of rules.

- **When coverage starts: full-time employees.** Under the 4980H rules, plans must provide coverage to full-time employees no later than the first day of the fourth month following date of hire. Depending on the hire date, this has meant that plans sometimes had more than 90 days before coverage had to start. For example, if someone's hire date was March 2, coverage under 4980H did not have to start until July 1—the first day of the fourth month. This was more than 90 days, so plans not providing coverage until the date required under 4980H could violate the waiting-period rule. The new orientation period bridges this gap, allowing plans to be able to take advantage of the full period allowed by 4980H.
- **When coverage starts: variable-hour employees.** For plans that are not able to predict an employee's hours to know if he will be full-time, the 4980H rules provide a "look-back method" to measure hours. The final waiting-period regulations provide a similar rule, allowing plans to count hours, as long as coverage ultimately is provided no later than 13 months from the employee's start date—or the beginning of the next month if this is mid-month. This time period lines up with the 4980H requirement as to when coverage must begin.

## What if an employee is terminated and rehired?

The final waiting period rules provide that a plan may treat an employee who terminates and is rehired as a newly eligible employee. Plans can require the employee to meet the waiting period anew "if reasonable under the circumstances." If an employer routinely terminates and rehires employees, this practice may violate the anti-abuse rule, but if an employee is legitimately terminated and rehired, plans should be able to impose a new waiting period. Note that the 4980H rules have their own restrictions related to rehires—generally, if employees are rehired less than 13 weeks after termination, 4980H rules require the plan to reinstate them into their same coverage. So plans will need to consider both sets of rules.

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*These Q-and-A's first appeared on plansponsor.com in June. As health care law is evolving rapidly, there may have been further developments since the initial publication.*