DEPARTMENT OF HEALTH & HUMAN SERVICES Washington, DC 20201

Date: August 31, 2012

From: Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS)

Title: Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708

I. INTRODUCTION

The Departments of Health and Human Services (HHS), Labor and the Treasury (the Departments) are working together to develop coordinated regulations and other administrative guidance to assist stakeholders with implementation of the Patient Protection and Affordable Care Act (Affordable Care Act). This guidance, which is being issued in substantially identical form by the other two Departments, provides temporary guidance regarding the 90-day waiting period limitation in Public Health Service Act (PHS Act) section 2708.[1] The guidance will remain in effect at least through the end of 2014. In addition, the Treasury Department, including the Internal Revenue Service (IRS), is concurrently issuing a notice providing administrative guidance on the shared responsibility of employers under section 4980H of the Internal Revenue Code (Code). See IRS Notice 2012-58. That guidance has been coordinated with the Departments of Labor and HHS and with the guidance contained in this guidance.

II. BACKGROUND

PHS Act section 2708 provides that, for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period that exceeds 90 days.[2] PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be the period that must pass with respect to an individual before the individual is eligible to be covered for benefits under the terms of the plan. In 2004 regulations, the Departments defined a waiting period to mean 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.[3]

[1] The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans and health insurance issuers providing health insurance coverage in connection with group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728. Accordingly, PHS Act section 2708 is subject to shared interpretive jurisdiction by the Departments.

[2] PHS Act section 2708 applies to both grandfathered and non-grandfathered plans. See section 1251(a)(4)(A)(i) of the Affordable Care Act.

[3] 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), 45 CFR 146.111(a)(3)(iii).

PHS Act section 2708 does not require the employer to offer coverage to any particular employee or class of employees, including part-time employees. PHS Act section 2708 merely prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage becomes effective.

The Departments invited comments on the 90-day waiting period limitation, in addition to requesting comments on the employer shared responsibility provisions of Code section 4980H, in IRS Notice 2011-36.[4] Subsequent guidance outlined various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions.[5] Specifically, the guidance outlined an approach under which employers would be permitted, under certain circumstances, to use an eligibility condition requiring an employee to complete a specified number of cumulative hours of service in order to be eligible for the coverage under the plan. Comments were invited on this and other aspects of the guidance, including how rules relating to the potential look-back/stability period safe harbor method for determining the full-time status of employees under Code section 4980H should be coordinated with the 90-day waiting period limitation of PHS Act section 2708.

III. GUIDANCE

This section provides temporary guidance on what the Departments will consider as compliance with PHS Act section 2708, and this guidance will remain in effect at least through the end of 2014. Regulations or other guidance on these issues applicable for periods after 2014 will provide adequate time to comply with any additional or modified requirements.

A. WAITING PERIOD DEFINED

A group health plan and a health insurance issuer offering group coverage may not use 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 under the terms of the plan can become effective. For this purpose, being eligible for coverage means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms).

Consistent with PHS Act section 2708, eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days. Other conditions for eligibility under the terms of a group health plan are generally permissible under PHS Act section 2708, unless the condition is designed to avoid compliance with the 90-day waiting period limitation. Furthermore, if, under the terms of a plan, an employee may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, the 90-day waiting period limitation is considered satisfied. Accordingly, a plan or issuer will not be considered to have violated PHS Act section 2708 merely because employees take additional time to elect coverage.

B. APPLICATION TO VARIABLE HOUR EMPLOYEES WHERE A SPECIFIED NUMBER OF HOURS OF SERVICE PER PERIOD IS A PLAN ELIGIBILITY CONDITION

[4] See www.irs.gov/file_source/pub/irs-drop/n-11-36.pdf.

[5] Department of Labor Technical Release 2012-01, IRS Notice 2012-17, and HHS FAQs issued February 9, 2012.

If a group health plan conditions eligibility on an employee regularly working a specified number of hours per 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), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period that is consistent with the timeframe permitted for such determinations under Code section 4980H.[6] An employer may use a measurement period that is consistent with section 4980H, whether or not it is an applicable large employer subject to section 4980H. Except where a waiting period that exceeds 90 days is imposed after a measurement period, the time period for determining whether such an employee meets the plan's eligibility condition will not be considered to be designed to avoid compliance with the 90-day waiting period limitation if coverage is made effective 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.

IV. EXAMPLES

Examples set forth below illustrate how the "designed to avoid compliance with the 90-day waiting period limitation" standard applies to various plan eligibility conditions at least through the end of 2014. Comments are invited on additional examples (if any) that would be helpful to include in future regulations or other guidance.

Example 1. (i) Facts. Employer *W*'s 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 applicable enrollment forms. Enrollment forms are distributed on an employee's start date. Employee *A* is hired and starts on October 31, which is the first day of the payroll period. On November 2, *A* completes and files all the forms necessary to enroll in the plan. *A*'s coverage under the plan becomes effective on November 14, which is the first day of the first payroll period after *A* completes the enrollment forms.

(ii) Conclusion. In this Example 1, under the terms of *W*'s plan, coverage may become effective as early as October 31, depending on when *A* completes the applicable 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. Therefore, 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 limitation, and the plan complies with PHS Act section 2708.

Example 2. (i) Facts. Employer *X*'s 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

[6] IRS Notice 2012-58 provides guidance regarding the measurement period that may be used under Code section 4980H. That guidance provides a safe harbor method under which an applicable large employer may use a measurement period of up to 12 months to determine whether certain types of new employees are full-time employees, without being subject to an assessable payment under Code section 4980H for that period with respect to such employees.

Employer *X* on April 11. Prior to this date, *B* worked part time for *X*. *B* enrolls in the plan and coverage is effective May 1.

(ii) Conclusion. In this Example 2, 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, and 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 limitation.

Example 3. (i) Facts. Under Employer *Y*'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 Employer *Y* on November 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. Therefore, 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 first day of the first calendar month after the applicable enrollment forms are received. *C*'s 12-month measurement period ends November 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 January 1 of Year 3.

(ii) Conclusion. In this Example 3, the measurement period is not considered to be designed to avoid compliance with the 90-day waiting period limitation (and is, therefore, permissible) because the plan may use a reasonable period of time to determine whether a variable-hour employee is full time under PHS Act section 2708 if the period of time is consistent with the timeframe permitted for such determinations under Code section 4980H. In such circumstances, the time period for determining whether an employee is full time will not be considered to avoid the 90-day waiting period limitation 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. (i) Facts. Employee *D* begins working 25 hours per week for Employer *Z* on January 3 and is considered a part-time employee for purposes of *Z*'s group health plans. *Z* 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 December 15.

(ii) Conclusion. In this Example 4, 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 limitation. Accordingly, coverage for *D* under the plan must begin no later than the 91st day after *D* works 1,200 hours. (If the plan's cumulative hours of service requirement were more than 1,200 hours, the Departments would consider the requirement to be designed to avoid compliance with the 90-day waiting period limitation.)

V. RELIANCE

Employers, plans and issuers may rely on the compliance guidance in this notice at least through the end of 2014. An employee or related individual is not eligible for minimum essential coverage under the plan (and therefore may be eligible for a premium tax credit or cost-sharing reduction) during any period when coverage is not offered, including 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 insurance 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 these credits.

VI. REQUEST FOR COMMENTS

Comments are requested by September 30, 2012. *Warning*: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the Internet as received, and can be retrieved by most Internet search engines. Comments may be submitted anonymously. Comments will be shared among the Departments.

Comments may be sent electronically to: e-ohpsca-er.ebsa@dol.gov. Alternatively, comments may be sent via mail or hand delivery to: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

VII. FOR FURTHER INFORMATION

The Departments have coordinated on the guidance and other information contained in this guidance and are publishing substantively identical issuances. Questions concerning the information contained herein may be directed to the Internal Revenue Service at 202-622-6080; the Department of Labor's Office of Health Plan Standards and Compliance Assistance at 202-693-8335; or the Department of HHS at 410-786-1565 or phig@cms.hhs.gov. Additional information for employers regarding the Affordable Care Act is available at www.healthcare.gov and www.dol.gov/ebsa/healthreform.