

## Final Regulations on Orientation Periods Released

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On June 20, the Federal regulatory agencies in charge of health care reform guidance (the **Departments of Labor, Treasury, and Health and Human Services**) released **final regulations** (“Final Regulations”) clarifying the relationship between a **group health plan’s eligibility criteria** and the **Affordable Care Act’s** (ACA) 90-day limit on **waiting periods**. Specifically, the Final Regulations (published in the June 25 Federal Register) address an employer’s ability to require new employees to satisfy a “reasonable and bona fide employment-based orientation period” before starting a group health plan’s waiting period.

The Final Regulations on orientation periods are effective for plan years beginning in 2015. (For the remainder of 2014, employers may rely on the proposed regulations on orientation periods that were released in February 2014 and which are substantively identical to the Final Regulations.)

### 90-Day Limit on Waiting Periods

Starting with plan years beginning in 2014, the ACA prohibits group health plans from requiring otherwise eligible employees to wait longer than 90 days for coverage to be effective once an employee is eligible to enroll under the terms of the plan. Being “otherwise eligible” to enroll 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). Thus, under the waiting period rules, once an individual is determined to be otherwise eligible for coverage under a group health plan’s terms, any waiting period for coverage may not extend beyond 90 days. All calendar days are counted, including weekends and holidays. In other words, coverage must be effective no later than the start of the 91st day after the employee becomes eligible.

Final regulations on the 90-day waiting period limit were issued February 24, 2014. At the same time, the Federal agencies issued proposed regulations that allowed plans to use “orientation periods” of up to one month in addition to a 90-day waiting period as long as the period was a reasonable and bona fide employment-based orientation period.

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## **Final Regulations Orientation Periods**

The most recent Final Regulations clarify that orientation periods are “reasonable” and “bona fide” based on all relevant facts and circumstances. The Final Regulations provide little explanation or guidance as to the circumstances under which an orientation period might satisfy these requirements; however, they clarify that the one month limit on orientation periods 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. Similarly, 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. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the 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). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

## **Compliance with the Employer Mandate**

The Final Regulations note that compliance with the orientation period and waiting period rules is not determinative of whether an employer has complied with the ACA's “pay-or-play” employer mandate. An employer subject to the mandate may be exposed to tax penalties if it fails to offer affordable minimum value coverage to certain newly-hired full-time employees by the first day of the fourth full calendar month of employment.

For example, an employer that has a one-month orientation period may comply with both the waiting period rules and the employer mandate by offering coverage no later than the first day of the fourth full calendar month of employment. However, the employer would not be able to impose the full one-month orientation period and the full 90-day waiting period without potential exposure to a penalty under the employer mandate. For example, if an employee is hired as a full-time employee on January 6, a plan may offer coverage May 1 (first day of the fourth full month of employment) and comply with both the orientation period and waiting period provisions. However, if the employer starts coverage May 6, which is one month plus 90 days after date of hire, the employer may be exposed to a penalty under the employer mandate.

## **Employer Action Steps**

Now that the 90-day waiting period regulations are finalized in full, employers should review the terms of their group health plans and work with qualified ERISA counsel to ensure that any orientation period is reasonable, bona fide and employment-based, and not merely a subterfuge for the passage of time. In addition, employers should consider application of the pay-or-play mandate when structuring eligibility and waiting periods to ensure that coverage is offered to new full-time employees no later than the first day of the fourth full calendar month of employment.

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