



AMERICAN BENEFITS

COUNCIL

April 25, 2014

Submitted electronically via <http://www.regulations.gov>

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
ATTN: Ninety-Day Waiting Period Limitation

RE: 90-Day Waiting Period Limitation

Sir or Madam:

I write on behalf of the American Benefits Council (“Council”) to provide comments on the proposed rules (“Proposed Rules”) issued with respect to the ninety-day waiting period limitation under Section 2708 of the Public Health Service Act (“PHSA”), as added by the Patient Protection and Affordable Care Act, as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code. The Proposed Rules were published in the Federal Register on February 24, 2014, by the Departments of Labor, Health and Human Services, and the Treasury (collectively, the “Departments”).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

PHSA Section 2708 provides that, in 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 (as defined in PHSA Section 2704(b)(4))

that exceeds 90 days. Final regulations (“Final Rules”) concurrently issued with the Proposed Rules provide that after an individual is determined to be otherwise eligible for coverage under the terms of the plan, any waiting period may not extend beyond 90 days. Specifically, the final regulations provide that being otherwise eligible to enroll in a plan “means having met the plan’s substantive eligibility conditions (such as, for example, being in an eligible job classification, achieving job-related licensure requirements as specified in the plan’s terms or satisfying a reasonable and bona fide employment-based orientation period).”

In prior comments,¹ the Council requested that the 90-day waiting period limitation be construed to permit a waiting period of three calendar months, given that the great majority of employers carry out enrollment activities as of the first day of a month, rather than in terms of the lapse of a certain number of days. By requiring that the waiting period not exceed 90 days, administration is made more complicated and employers that hire new employees mid-month are practically afforded less than 90 days to make coverage available. This is because such employers would need to offer coverage as of the first day of the *third* full month following the start of employment which could be well in advance of the 90th day following the start of employment.

Although the Final Rules concurrently issued with the Proposed Rules do not permit a waiting period limitation of three full calendar months, the Final Rules and the related Proposed Rules expressly provide that satisfaction of a reasonable and bona fide employment-based orientation period may be used as a condition of eligibility under the plan.

The Council supports ability of employers to utilize a reasonable and bona fide employment-based orientation period as a plan’s substantive eligibility condition as provided in the Final Rules and related Proposed Rules. Employers that choose to use such an orientation period should find it helpful in enabling them to better coordinate their plan eligibility rules to line up with their obligations, if any, to offer qualifying coverage under Code Section 4980H.

The Council appreciates the opportunity to provide the following specific comments with regard to the proposed reasonable and bona fide employment-based orientation period.

¹ See Council Letter dated May 20, 2013, available at http://www.americanbenefitscouncil.org/documents2013/hcr_90day_comments052013.pdf.

DURATION AND DESIGN OF ORIENTATION PERIOD

The Proposed Rules provide that a reasonable and bona fide employment-based orientation period may not exceed one month, and the maximum 90-day waiting period would begin on the first day after the orientation period. We believe up to one month is appropriate for the duration of an orientation period. We also support the proposal that a determination of whether an orientation period is “reasonable” and “bona fide” be made on a facts-and-circumstances basis, as this provides needed flexibility to employers to tailor the orientation period to the needs of their employees and business practices. We encourage the Departments to retain both the one-month limitation and the flexibility in design of the orientation period in final rulemaking.

RELIANCE ON PROPOSED RULES

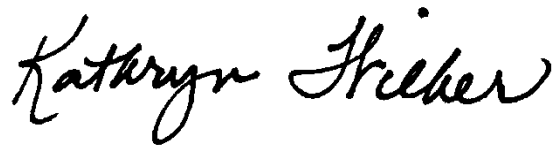
The Proposed Rules provide that the Departments will consider compliance with the proposed regulations to constitute compliance with PHSA Section 2708 at least through the end of 2014, and to the extent final regulations or other guidance is more restrictive on plans and issuers, the final regulations or other guidance will not be effective prior to January 1, 2015, and will provide plans and issuers a reasonable time period to comply.

The Council supports the ability of employers to rely on the Proposed Rules as this will enable employers to implement a reasonable and bona fide employment-based orientation period as a condition of eligibility without waiting for the finalization of the rules surrounding orientation periods.

* * *

Thank you for considering these comments submitted in response to the Proposed Rules issued with respect to the 90-day waiting period. If you have any questions or would like to discuss these comments further, please contact me at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Kathryn Wilber
Senior Counsel, Health Policy