



AMERICAN BENEFITS

COUNCIL

October 1, 2012

Submitted electronically via e-ohpsca-er.ebsa@dol.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

Re: Notice 2012-59 (Guidance on 90-Day Waiting Period Under Public Health Service Act Section 2708)

Sir or Madam:

We write on behalf of the American Benefits Council (“Council”) to provide comment in connection with Notice 2012-59 (“Notice”), which was published in substantially identical form by the Departments of Labor, Health and Human Services and the Treasury (the “Departments”) and provides temporary guidance regarding the 90-day waiting period limitation in Public Health Service Act (“PHS Act”) section 2708.

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. Please note, our comments are organized based on the headings that appear in section III of the Notice.

WAITING PERIOD DEFINED

The Notice provides in pertinent part that eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days and that 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. The Council strongly encourages the Departments to provide that the 90-day waiting period limitation will be considered satisfied if coverage is made effective no later than 90 days from the employee's start date, plus if the 90th day is not the first day of the calendar month, the time remaining until the first day of the next calendar month.

As we noted in our comment letter dated April 6, 2012 concerning the frequently asked questions for employer regarding automatic enrollment, employer shared responsibility, and waiting periods, the vast 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. Therefore, by requiring that the waiting period not exceed 90 days, employers who hire new employees mid-month would practically be afforded less than 90 days to make coverage available. This is because employers would effectively 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. Thus, as noted above, the Council strongly urges the Departments to provide that the 90-day waiting period limitation will be considered satisfied if coverage is made effective no later than 90 days from the employee's start date, plus if the 90th day is not the first day of the calendar month, the time remaining until the first day of the next calendar month. Given the very common employer practice of enrolling employees in coverage as of the first day of a month, we believe such a rule would better recognize Congress' intent to provide employers a full 90 day period to make coverage available. Additionally, such a rule would ease many of the administrative burdens associated with implementing a shorter waiting period.

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

Under the Notice, a group health plan that conditions eligibility on an employee regularly working a specified number of hours per period (or working full time) may take a reasonable period of time to determine whether a newly-hired employee meets the plan's eligibility condition if it cannot be determined that the employee is reasonably expected to regularly work the applicable number of hours per period (or work full time). This reasonable period of time may include a measurement period that is consistent with the timeframe permitted for such determinations under section 4980H of the Internal Revenue Code of 1986, as amended (the "Code"). As is noted in footnote 6 of the Notice, IRS Notice 2012-58 provides a safe harbor method under which

employers may use a measurement period of up to 12 months. The Notice further provides that, except where a waiting period that exceeds 90 days is imposed after a measurement period, the time period for determining whether a newly-hired variable hour 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 (the "New Employee Rule").

The Council encourages the Departments to extend the New Employee Rule by one month. We understand that the Departments desire to limit the period of time during which a new employee may not be covered by an employer's plan, but we believe that using a 14-month period instead of the 13-month period currently provided in the Notice would serve the interests of both employers and employees. Many employers likely will adopt a 12 month measurement period for ease of administration and, if the 13-month period contemplated by the Notice is used, these employers would have a very short window following the end of the measurement period during which to accomplish the administrative steps necessary to enroll employees in the plan. Providing employers a 14-month period 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) would allow for longer and more robust enrollment periods during which employees who are determined to qualify for an employer's plan can elect appropriate coverage.

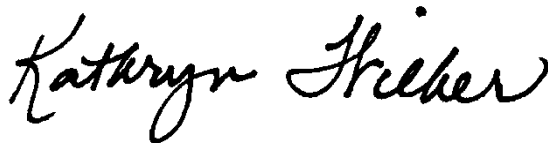
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We appreciate the opportunity to provide comments regarding the temporary guidance concerning the 90-day waiting period limitation in section 2708 of the PHS Act. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



Paul W. Dennett
Senior Vice President,
Health Care Reform



Kathryn Wilber
Senior Counsel,
Health Policy