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March 27, 2013

Proposed Rule on 90-Day Waiting Period

On Monday, March 18, 2013, the Internal Revenue Service, Department of Labor and Department of Health and Human Services (collectively, “Departments”) proposed a rule to implement the 90-day waiting period limitation in the Health Care Reform Act (“HCRA”). The proposed rule does not deviate drastically from guidance issued in 2012.

Waiting Period Defined. The HCRA prohibits insured and self-insured group health plans from imposing a waiting period that exceeds 90 days before coverage can begin for an otherwise eligible person. The proposed rule provides that “waiting period” has the same meaning as in the 2004 Health Information Portability and Accountability Act (“HIPAA”) regulations - the period of time 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. If an employee enrolls as either a late enrollee or a special enrollee, any period before such late or special enrollment is not a waiting period.

Rule. The rule states that where employee eligibility is conditioned solely on the lapse of time, such condition cannot exceed 90 days. Thus, if an employee can elect coverage that becomes effective on a date that does not exceed the 90-day waiting period limitation, the coverage complies with the waiting period rules, and the plan will not be in violation merely because individuals choose to elect coverage beyond the end of the 90-day waiting period.

The rule also clarifies that the 90-day limitation counts all calendar days starting with the first day of the waiting period, including weekends and holidays. This is an absolute requirement – the period cannot be extended past 90 days because the 90th day falls on a weekend or holiday, and 90 days is not synonymous with three months (*i.e.*, an employee must be offered coverage by the 91st day of becoming eligible for coverage and not the first day of the fourth month following eligibility for coverage).

Permissible Eligibility Criteria. The proposed rule does not prohibit non-time based conditions of coverage, as long as they are not designed to avoid compliance with the 90-day waiting period requirement. Other eligibility criteria, such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan’s terms, is permissible. Plans can also still impose cumulative service

requirements – that is, a group health plan can condition eligibility on an employee's having completed a number of cumulative hours of service as long as the service requirement does not exceed 1,200 hours. The running of the 90-day waiting period would not begin until the employee becomes eligible under the plan's terms.

Certificates of Creditable Coverage. Under HIPAA, rules relating to preexisting conditions require plans and issuers to issue certificates of creditable coverage. Because the HCRA prohibits preexisting condition exclusions beginning in 2014, the HIPAA rules pertaining to certificates of creditable coverage have been eliminated by the proposed rule. However, the elimination is not effective until December 31, 2014 so that individuals needing to offset a preexisting condition exclusion under a plan that operates on a non-calendar year basis would still have access to proof of coverage.

Contact Information. For more information from Mazursky Constantine, please contact Amy Heppner (404.888.8825), Kelly Meyers (404.888.8838) or Carl Lammers (404.888.8872). For more information from VCG Consultants, please contact Leslie Schneider (770.863.3617)

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