Part IV

Department of the Treasury
Internal Revenue Service
26 CFR Part 54

Department of Labor
Employee Benefits Security Administration
29 CFR Part 2590

Department of Health and Human Services
45 CFR Part 147

Ninety-Day Waiting Period Limitation; Proposed Rule
DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 54
[REG–122706–12]
RIN 1545–BL97
DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2590
RIN 1210–AB61
DEPARTMENT OF HEALTH AND HUMAN SERVICES
45 CFR Part 147
[CMS–9952–P2]
RIN 0936–AR77
Ninety-Day Waiting Period Limitation
AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.
ACTION: Proposed rules.
SUMMARY: These proposed regulations would clarify the maximum allowed length of any reasonable and bona fide employment-based orientation period, consistent with the 90-day waiting period limitation set forth in section 2708 of the Public Health Service Act, and added by the Patient Protection and Affordable Care Act (Affordable Care Act), as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code.
DATES: Written comments on this notice of proposed rulemaking are invited and must be received by April 25, 2014.
ADDRESSES: Written comments may be submitted to the Department of Labor as specified below. Any comment that is submitted will be shared with the other Departments and will also be made available to the public. 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 may be posted on the Internet and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.
Comments, identified by “Ninety-day waiting period limitation,” may be submitted by one of the following methods:
Comments received will be posted without change to www.regulations.gov and available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.
FOR FURTHER INFORMATION CONTACT: Amy Turner or Elizabeth Schumacher, Employee Benefits Security Administration, Department of Labor, at (202) 693–8333; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 317–6846; or Cam Moultire Clemmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (410) 786–1565.
Customer service information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (33272) or visit the Department of Labor’s Web site (www.dol.gov/ebsa). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) Web site (www.ccmis.cms.gov/) and information on health reform can be found at www.HealthCare.gov.
SUPPLEMENTARY INFORMATION:
I. Background
The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, was enacted on March 30, 2010. (They are collectively known as the “Affordable Care Act.”) The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term “group health plan” includes both insured and self-insured group health plans. 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 (the 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.
PHS Act section 2708, as added by the Affordable Care Act and incorporated into ERISA and the Code, provides that a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in PHS Act section 2704(b)(4)) that exceeds 90 days. PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period as 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 implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) portability provisions (2004 HIPAA regulations), the Departments of Labor, Health and Human Services (HHS), and the Treasury (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. PHS Act section 2708 does not require an employer to offer coverage to any particular individual or class of individuals, including part-time employees. PHS Act section 2708 merely prevents an otherwise eligible individual from being required to wait more than 90 days before coverage becomes effective. PHS Act section 2708 applies to both grandfathered and non-grandfathered group health plans and group health insurance coverage for

1 The term “group health plan” is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term “health plan,” as used in other provisions of title I of the Affordable Care Act. The term “health plan” does not include self-insured group health plans.
2 Note, however, that in the Economic Analysis and Paperwork Burden section of this preamble, in sections under headings listing only two of the three Departments, the term “Departments” generally refers only to the two Departments listed in the heading.
plan years beginning on or after January 1, 2014.

On February 9, 2012, the Departments issued guidance \(^4\) outlining various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions under Code section 4980H (February 2012 guidance) and requested public comment. On August 31, 2012, following their review of the comments on the February 2012 guidance, the Departments provided temporary guidance,\(^5\) to remain in effect at least through the end of 2014, regarding the 90-day waiting period limitation, and described the approach they intended to propose in future rulemaking (August 2012 guidance). After consideration of all of the comments received in response to the February 2012 guidance and August 2012 guidance, the Departments issued proposed regulations on March 21, 2013 (78 FR 17313).

Under the proposed regulations, a group health plan, and a health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days. The regulations proposed to define “waiting period” as 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. Being otherwise eligible to enroll in a plan 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). After consideration of comments on the proposed regulations, the Departments are publishing final regulations elsewhere in this issue of the Federal Register. These proposed regulations address orientation periods under the 90-day waiting period limitation of PHS Act section 2708 and solicit comment before promulgation of final regulations on this discrete issue.

II. Overview of the Proposed Regulations

A. Orientation Periods

Final regulations published elsewhere in this edition of the Federal Register set forth rules governing the relationship between a plan’s eligibility criteria and the 90-day waiting period limitation. 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 specified in the plan’s terms, or satisfying a reasonable and bona fide employment-based orientation period). Under the final regulations, 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, and all calendar days are counted beginning on the enrollment date, including weekends and holidays.\(^6\)

The final regulations do not specify the facts and circumstances under which an employment-based orientation period would not be considered “reasonable and bona fide.” These proposed regulations would provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. During an orientation period, the Departments envision that an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. Under these proposed regulations, one month would be 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. If a group health plan conditions eligibility on an employee’s having completed a reasonable and bona fide employment-based orientation period, the eligibility condition would not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period did not exceed one month and the maximum 90-day waiting period would begin on the first day after the orientation period.

B. Comment Invitation and Reliance

The Departments invite comments on these proposed regulations. The Departments will consider compliance with these proposed regulations to constitute compliance with PHS Act section 2708 at least through the end of 2014. To the extent final regulations or other guidance with respect to the application of the 90-day waiting period limitation to orientation periods 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.

III. Economic Impact and Paperwork Burden

A. Executive Order 12866 and 13563—Department of Labor and Department of Health and Human Services

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies’ regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, a regulatory action deemed “significant” is subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the
President’s priorities, or the principles set forth in the Executive Order.

These proposed regulations are not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these proposed regulations, and the Departments7 have provided the following assessment of their impact.

1. Summary

As stated earlier in this preamble, these proposed regulations address reasonable and bona fide employment-based orientation periods under the 90-day waiting period limitation of PHS Act section 2708. The Departments have crafted these proposed regulations to secure the protections intended by Congress in an economically efficient manner. The Departments lack sufficient data to quantify the regulations’ economic cost or benefits. The proposed regulations implementing PHS Act section 27088 provided a qualitative discussion of economic impacts of proposed limits on waiting periods and requested detailed comments and data that would allow for quantification of the costs, benefits, and transfers. Comments were received expressing concern about the cost to employers that currently have waiting periods longer than 90 days, and explaining that they would have to change their practices and often have to provide coverage sooner than the 90-day waiting period limitation. No comments provided additional data that would help in estimating the economic impacts of the proposed regulations. The Departments request comments that would allow them to quantify the impacts of these proposed regulations on the discrete issue of orientation periods.

2. Estimated Number of Affected Entities

The Departments estimate that 4.1 million new employees receive group health insurance coverage through private sector employers and 1.0 million new employees receive group health insurance coverage through public sector employers annually.9 The 2013 Kaiser Family Foundation and Health Research and Education Trust Employer Health Benefits Annual Survey (the “2013 Kaiser Survey”) finds that 30 percent of covered workers were subject to waiting periods of three months or more.10 The Departments do not have any data, and therefore invite public comment, on the number of employees subject to orientation periods, as described earlier in this preamble.

2. Benefits

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 specified in the plan’s terms, or satisfying a reasonable and bona fide employment-based orientation period). These proposed regulations would provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. During an orientation period, the Departments envision that an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. If a group health plan conditions eligibility on an employee’s having completed a reasonable and bona fide employment-based orientation period, the eligibility condition would not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period did not exceed one month and the maximum 90-day waiting period would begin on the first day after the orientation period.

3. Costs

These proposed regulations could extend the time between an employee beginning work and obtaining health care coverage relative to the time before the issuance of the final regulations and these proposed regulations. If employees delay health care treatment until the expiration of the orientation period and waiting period, detrimental health effects can result, especially for employees and their dependents requiring higher levels of health care, such as older Americans, pregnant women, young children, and those with chronic conditions. This could lead to lower work productivity and missed school days. Low-wage workers also are vulnerable, because they have less income to spend out-of-pocket to cover medical expenses. The Departments anticipate that these proposed regulations could lead to these effects, although the overall cost may be limited because few employees are likely to be affected and it is anticipated that conditioning eligibility on an employee’s having completed an orientation period will not result in most employees facing a full additional month between being hired and obtaining coverage.

4. Transfers

The possible transfers associated with these proposed regulations would arise from employers beginning to pay their portion of premiums or contributions later than they did before the issuance of the final regulations and these proposed regulations. Recipients of the transfer would be employers who implement an orientation period in addition to the 90-day waiting period, thus delaying having to pay premiums. The source of the transfers would be covered employees who, after these proposed regulations become applicable, will have to wait longer between being employed and obtaining health coverage, during which they may forgo health coverage, purchase COBRA continuation coverage, or obtain an individual health insurance policy—all of which are options that could lead to higher out-of-pocket costs for employees to cover their healthcare expenditures.

The Departments believe that under these proposed regulations only a small number of employers would further delay offering coverage to their employees because a relatively small fraction of workers have an orientation period in addition to a waiting periods that runs for 90 days.

B. Regulatory Flexibility Act—Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) applies to most Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include
small businesses, organizations and
governmental jurisdictions.

For purposes of analysis under the
RFA, the Departments propose to
continue to consider a small entity to be
an employee benefit plan with fewer
than 100 participants. The basis of this
definition is found in section 104(a)(3)
of ERISA, which permits the Secretary
of Labor to prescribe simplified annual
reports for welfare benefit plans that
cover fewer than 100 participants.13
Further, while some large employers
may have small plans, in general, small
employers maintain most small plans.
Thus, the Departments believe that
assessing the impact of these proposed
regulations on small plans is an
appropriate substitute for evaluating the
effect on small entities.

The definition of small entity
considered appropriate for this purpose
differs, however, from a definition of
small business that is based on size
standards promulgated by the Small
Business Administration (SBA) (13 CFR
121.207). Pursuant to the Small Business
Act (15 U.S.C. 631 et seq.), the
Departments therefore request
comments on the appropriateness of the
size standard used in evaluating the
impact of these proposed regulations on
small entities.

The Departments carefully considered
the likely impact of the rule on small
entities in connection with their
assessment under Executive Order
12866. The Departments lack data to
focus only on the impacts on small
business. However, the Departments
believe that the proposed regulations
include flexibility that would minimize
the transfers in health insurance
premiums that would occur due to the
orientation period.

The Departments hereby certify that
these proposed regulations will not have
a significant economic impact on a
substantial number of small entities.
Consistent with the policy of the RFA,
the Departments encourage the public to
submit comments that would allow the
Departments to assess the impacts
specifically on small plans or suggest
alternative rules that accomplish the
stated purpose of PHS Act section 2708
and minimize the impact on small
entities.

C. Special Analyses—Department of the
Treasury

For purposes of the Department of the
Treasury, it has been determined that
this proposed rule is not a significant
regulatory action as defined in
Executive Order 12866, as
supplemented by Executive Order
13563. Therefore, a regulatory
assessment is not required. It has also
been determined that section 553(b) of
the Administrative Procedure Act (5
U.S.C. chapter 5) does not apply to these
proposed regulations, and, because
these proposed regulations do not
impose a collection of information
requirement on small entities, a
regulatory flexibility analysis under the
Regulatory Flexibility Act (5 U.S.C.
chapter 6) is not required. Pursuant to
Code section 7805(f), this proposed rule
has been submitted to the Small
Business Administration for comment
on its impact on small business.

D. Congressional Review Act

These proposed regulations are
subject to the Congressional Review Act
provisions of the Small Business
Regulatory Enforcement Fairness Act of
1996 (5 U.S.C. 801 et seq.) and, if
finalized, will be transmitted to the
Congress and the Comptroller General
for review.

E. Unfunded Mandates Reform Act

For purposes of the Unfunded
Mandates Reform Act of 1995 (Pub. L.
104–4), as well as Executive Order
12875, these proposed regulations do
not include any Federal mandate that
may result in expenditures by State,
local, or tribal governments, or by the
private sector, of $100 million or more
adjusted for inflation.

F. Federalism Statement—Department
of Labor and Department of Health
and Human Services

Executive Order 13132 outlines
fundamental principles of federalism,
and requires the adherence to specific
criteria by Federal agencies in the
process of their formulation and
implementation of policies that have
“substantial direct effects” on the
States, the relationship between the
national government and States, or on
the distribution of power and
responsibilities among the various
levels of government. Federal agencies
promulgating regulations that have
these federalism implications must
consult with State and local officials,
and describe the extent of their
consultation and the nature of the
concerns of State and local officials in
the preamble to the regulation.

In the Departments’ view, these
proposed regulations have federalism
implications, because they have direct
effects on the States, the relationship
between the national government and
States, or on the distribution of power
and responsibilities among various
levels of government. In general,
through section 514, ERISA supersedes
State laws to the extent that they relate
to any covered employee benefit plan,
and preserves State laws that regulate
insurance, banking, or securities. While
ERISA prohibits States from regulating a
plan as an insurance or investment
company or bank, the preemption
provisions of ERISA section 731 and
PHS Act section 2724 (implemented in
29 CFR 2590.731(a) and 45 CFR
146.143(a)) apply so that the HIPAA
requirements (including those of the
Affordable Care Act) are not to be
“construed to supersede any provision
of State law which establishes,
implements, or continues in effect any
standard or requirement solely relating
to health insurance issuers in
connection with group health insurance
coverage except to the extent that such
standard or requirement prevents the
application of a requirement” of a
federal standard. The conference report
accompanying HIPAA indicates that
this is intended to be the “narrowest”
preemption of State laws. (See House
Conf. Rep. No. 104–736, at 205,
reprinted in 1996 U.S. Code Cong. &
Admin. News 2018.)

States may continue to apply State
law requirements except to the extent
that such requirements prevent the
application of the Affordable Care Act
requirements that are the subject of this
rulemaking. State insurance laws that
are more consumer protective than the
Federal requirements are unlikely to
“prevent the application of” the
Affordable Care Act, and therefore are
unlikely to be preempted. Accordingly,
States have significant latitude to
impose requirements on health
insurance issuers that are more
restrictive than the Federal law.

Guidance conveying this
interpretation was published in the
Federal Register on April 8, 1997 (62 FR
16904), and December 30, 2004 (69 FR
78720), and these proposed regulations
would clarify and implement the
statute’s minimum standards and would
not significantly reduce the discretion
given the States by the statute.

In compliance with the requirement
of Executive Order 13132 that agencies
examine closely any policies that may
have federalism implications or limit
the policy making discretion of the
States, the Departments have engaged in
efforts to consult with and work

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13 Under ERISA section 104(a)(2), the Secretary
may also provide exemptions or simplified
reporting and disclosure requirements for pension
plans. Pursuant to the authority of ERISA section
104(a)(3), the Department of Labor has previously
issued at 29 CFR 2520.104–20, 2520.104–21,
2520.104–41, 2520.104–46, and 2520.104b–10
certain simplified reporting provisions and limited
exemptions from reporting and disclosure
requirements for small plans, including unfunded
or insured welfare plans, that cover fewer than 100
participants and satisfy certain other requirements.
cooperatively with affected State and local officials, including attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

Throughout the process of developing these proposed regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States’ interests in regulating health insurance issuers, and Congress’ intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments’ view that they have complied with the requirements of Executive Order 13132.

IV. Statutory Authority

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed to be adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 124 Stat. 1029; Secretary of Labor’s Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are proposed to be adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

List of Subjects
26 CFR Part 54
Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590
Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147
Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

John Dalrymple,
Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Signed this 12th day of February, 2014.

Phyllis C. Borzi,
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.


Marilyn Tavenner,
Administrator, Centers for Medicare & Medicaid Services.


Kathleen Sebelius,
Secretary, Department of Health and Human Services.

Department of the Treasury
Internal Revenue Service

Accordingly, 26 CFR Part 54, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the Federal Register, is proposed to be further amended as follows:

PART 54—PENSION EXCISE TAXES

§ 54.9815–2708 Prohibition on waiting periods that exceed 90 days.

(a) * * * * *

(b) * * * * *

(c) * * * * *

(iii) Limitation on orientation periods.

To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month 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.

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. If the orientation period was more than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.

* * * * *

3. The authority citation for Part 2590 continues to read as follows:


The Department of Labor proposes to further amend 29 CFR part 2590, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the Federal Register, as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS
orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

Department of Health and Human Services

45 CFR Subtitle A

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to further amend 45 CFR part 147, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the Federal Register, as set forth below:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

5. The authority citation for part 147 continues to read as follows:

Authority: Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92).

6. Section 147.116 is amended by—

A. Adding paragraph (c)(3)(iii); and

B. Adding Example 11 in paragraph (f).

The additions read as follows:

§ 147.116 Prohibition on waiting periods that exceed 90 days.

* * * * *

(c) * * * *(iii) Limitation on orientation periods.

To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is considered to be a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month 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.

(f) * * * *

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, one month 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.