

Date: August 31, 2012

From: Center for Consumer Information and Insurance Oversight (CCIIO), Centers for Medicare & Medicaid Services (CMS)

Title: Guidance on 90-Day Waiting Period Limitation under Public Health Service Act § 2708

I. INTRODUCTION

The Departments of Health and Human Services (HHS), Labor and the Treasury (the Departments) are working together to develop coordinated regulations and other administrative guidance to assist stakeholders with implementation of the Patient Protection and Affordable Care Act (Affordable Care Act). This guidance, which is being issued in substantially identical form by the other two Departments, provides temporary guidance regarding the 90-day waiting period limitation in Public Health Service Act (PHS Act) section 2708.¹ The guidance will remain in effect at least through the end of 2014. In addition, the Treasury Department, including the Internal Revenue Service (IRS), is concurrently issuing a notice providing administrative guidance on the shared responsibility of employers under section 4980H of the Internal Revenue Code (Code). See IRS Notice 2012-58. That guidance has been coordinated with the Departments of Labor and HHS and with the guidance contained in this guidance.

II. BACKGROUND

PHS Act section 2708 provides that, for 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 that exceeds 90 days.² PHS Act section 2704(b)(4), ERISA section 701(b)(4), and Code section 9801(b)(4) define a waiting period to be 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, 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.³

¹ 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 (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 2

PHS Act section 2708 does not require the employer to offer coverage to any particular employee or class of employees, including part-time employees. PHS Act section 2708 merely prevents an otherwise eligible employee (or dependent) from having to wait more than 90 days before coverage becomes effective.

The Departments invited comments on the 90-day waiting period limitation, in addition to requesting comments on the employer shared responsibility provisions of Code section 4980H, in IRS Notice 2011-36.⁴ Subsequent guidance outlined various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions.⁵ Specifically, the guidance outlined an approach under which employers would be permitted, under certain circumstances, to use an eligibility condition requiring an employee to complete a specified number of cumulative hours of service in order to be eligible for the coverage under the plan. Comments were invited on this and other aspects of the guidance, including how rules relating to the potential look-back/stability period safe harbor method for determining the full-time status of employees under Code section 4980H should be coordinated

If a group health plan conditions eligibility on an employee regularly working a specified number of hours per period (or working full time), and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours per period (or work full time), the plan may take a reasonable period of time to determine whether the employee meets the plan's eligibility condition, which may include a measurement period that is consistent with the timeframe permitted for such determinations under Code section 4980H.⁶ An employer may use a measurement period that is consistent with section 4980H, whether or not it is an applicable large employer subject to section 4980H. Except where a waiting period that exceeds 90 days is imposed after a measurement period, the time period for determining whether such an 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 ef0(w 0 >>B)2(d)2(t)-2(ps)-1(t

Employer *X* on April 11. Prior to this date, *B* worked part time for *X*. *B* enrolls in the plan and

