ERIC

The ERISA Industry Committee

June 17, 2011

Submitted by e-mail:
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CC:PA:LPD:PR
Room 5203
Internal Revenue Service
P.O. Box 7604
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Washington, DC 20044

Attention: Notice 2011-36 (90-Day Waiting Period Limitation)

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (collectively, the "Departments") for comments regarding the implementation of the 90-day waiting period limitation under the Patient Protection and Affordable Care Act ("ACA"). ERIC has filed a separate letter responding to the request for comments on the employer shared responsibility provisions.

ERIC's Interest in the 90-Day Waiting Period Limitation

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America's largest employers. ERIC's members sponsor some of the largest private group health plans in the country. These plans provide health care to tens of millions of workers and their families.

ERIC's members are committed to, and known for, providing high quality, affordable health care. Employers do not have unlimited resources to spend on health care, however. ACA has imposed a number of expensive new mandates on employer health plans, and has significantly increased the administrative burden and cost of operating these plans. ERIC's members have a vital interest in ensuring that the waiting period limitation does not impose unnecessary administrative burdens on large employers, and does not limit employers' flexibility to design cost-effective health benefits that meet the needs of their work force. ERIC offers a number of recommendations below to help achieve these objectives.

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Comments on the 90-Day Waiting Period Limitation

Applying the Waiting Period Limitation

ACA added section 2708 to the Public Health Service Act (the "PHSA"). Under section 2708, plans and insurers are not permitted to apply a waiting period in excess of 90 days. The same rule is incorporated by reference in the Internal Revenue Code of 1986, as amended (the "Code") and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Plans and insurers that violate section 2708 might be subject to excise taxes and other civil enforcement remedies.

1. A waiting period should not begin until an individual has met all of the plan's eligibility requirements.

The definition of "waiting period" was added to the PHSA, ERISA, and the Code in 1996 as part of the portability provisions under the Health Insurance Portability and Accountability Act ("HIPAA"). The statutes define "waiting period" to mean "with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan." The Departments should make clear that a waiting period does not begin until an individual has satisfied all of the group health plan's eligibility requirements.

The statutory definition does not specify when a "waiting period" begins. The Departments' regulations interpreting the HIPAA provision state that a "waiting period" is the period that must pass before coverage can become effective "for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan."[1] Example 4 in the regulations illustrates this principle in the case of a group health plan that covers only full-time employees, whose coverage becomes effective on the first day of the month after they satisfy the eligibility requirement. In the example, an employee changes from part-time to full-time status on April 11 and becomes covered under the group health plan on May 1. The regulations explain that the period from April 11 through April 30 (after the employee has satisfied the full-time eligibility requirement) is a waiting period; the period before April 11, when the employee worked part time and was not a member of an eligible class of employees, is not a waiting period.

The HIPAA regulations correctly provide that a waiting period does not begin until an individual has satisfied the eligibility requirements to participate in a group health plan. Notice 2011-36 quotes the HIPAA regulations, with emphasis on the statement that a waiting period commences when an individual is *otherwise eligible* to

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[1] Treas. Reg. § 54.9801-3(a)(3)(iii); 29 C.F.R. § 701-3(a)(3)(iii); 45 C.F.R. § 146.111(a)(3)(iii).

enroll in the plan. ERIC urges the Departments to make clear that the same rule will apply for purposes of the 90-day waiting period limitation.

2. When eligibility is determined during a measurement period, the waiting period should begin after the end of the measurement period.

As the Departments recognize, many employers determine an employee's eligibility to participate in a group health plan during a look-back measurement period. When a plan uses a measurement period to determine eligibility, an employee should not be deemed to satisfy the plan's eligibility requirements before the last day of the measurement period.

Notice 2011-36 provides an example of a plan that allows employees to enroll when they have completed an average of 30 hours of service per week during a calendar quarter. At the end of each quarter, the employer determines which employees have satisfied the hours-of-service requirement. If an employee has satisfied the service requirement, the employee is enrolled at the end of a 90-day waiting period that commences after the end of the quarterly measurement period.

ERIC believes that this plan design is consistent with the 90-day waiting period limitation and should be permissible. An example in the HIPAA regulations[2] suggests, however, that the waiting period for this plan would commence at the *beginning* of the quarter in which the employee first satisfies the hours-of-service requirement, with the result that the plan would violate the waiting period limitation. In the example, a group health plan requires employees to complete 250 hours of covered employment in a calendar quarter in order to enroll in the plan on the first day of the next quarter. An employee in the example completes 250 hours of service in the quarter from April 1 through June 30 and enrolls in the plan on July 1. The example states that the period from April 1 through June 30 is a waiting period.

If this rule is applied for purposes of the 90-day limitation on waiting periods, no plan will be able to use a look-back measurement period longer than 90 days. Any plan that uses a 90-day measurement period will have to determine on the last day of the measurement period which employees satisfied the eligibility requirement, and will have to enroll those employees in the health plan the following day. These restrictions will make the look-back measurement period unworkable. The measurement period must be long enough to allow employers to determine the average hours of service for an employee whose work schedule is variable. As Notice 2011-36 recognizes in connection with the shared responsibility provisions, employers often will need a measurement period lasting up to twelve months in order to determine the

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[2] Treas. Reg. § 54.9801-3(a)(3)(iv), Ex. 5; 29 C.F.R. § 701-3(a)(3)(iv), Ex. 5; 45 C.F.R. § 146.111(a)(3)(iv), Ex. 5.

average hours of service for employees whose work schedules vary with seasonal changes in the employer's business. As we explained in a separate comment letter addressing the shared responsibility provisions, a large employer with a diverse work force needs an extended period of time after the end of the measurement period to evaluate employees' service records and to enroll employees who have satisfied the eligibility requirement. The rules interpreting the 90-day waiting period limitation should preserve this important flexibility.

An employee clearly will not have satisfied a service-based eligibility requirement on the first day of the measurement period, since the employee must complete the necessary service *during* the measurement period in order to become eligible to participate in the plan. Accordingly, there is no justification for treating the first day of the measurement period as the beginning of the waiting period. It is not practicable for an employer to determine at what point during the measurement period an employee completes the necessary service: the purpose of the measurement period is to allow the employer to measure employees' service retrospectively rather than to track their hours of service in real time.

We urge the Departments to provide that an employee's satisfaction of the plan's eligibility requirement will not need to be determined before the last day of the measurement period, so that the 90-day waiting period will commence on the first day following the end of the measurement period. We also ask the Departments to make clear (consistent with the shared responsibility proposal for determining full-time status) that the measurement period may last up to twelve months.

3. A new eligibility period should start if an employee ceases to be eligible during the waiting period.

Many group health plans require that an employee continue to satisfy the plan's eligibility requirements throughout the waiting period in order to enroll in the plan. For example, suppose that a group health plan covers only full-time employees, whose coverage becomes effective after a 90-day waiting period. An individual who is hired as a full-time employee on March 2 immediately satisfies the plan's eligibility requirement and is eligible for coverage effective June 1. If the employee changes to part-time status in May, however, the employee will no longer be eligible to enroll in the plan. If the employee again becomes a full-time employee the following year, the employee will have to satisfy another 90-day waiting period before the employee's coverage becomes effective.

ERIC believes that this plan design is consistent with the principle that the waiting period limitation does not change a plan's eligibility requirements. If an employee does not satisfy the eligibility requirements at the end of the waiting period, the plan is not required to cover the employee. Nothing in the statute requires an employer to aggregate partial waiting periods for an employee who satisfies the plan's eligibility conditions initially, but who does not satisfy the conditions at the end of the waiting period. Accordingly, the Departments should permit a plan to terminate an

employee's eligibility if the employee does not continue to satisfy the eligibility conditions throughout the waiting period, and to apply a new 90-day waiting period if the employee satisfies the plan's eligibility conditions again at a later date.

4. Employers should be permitted to define the waiting period as three calendar months.

Most group health plans define periods of coverage on the basis of calendar months. When an employee becomes eligible to participate in the plan, the employee's coverage is effective on the first day of a calendar month following the end of the plan's waiting period. This structure allows employers and third-party administrators to administer premiums, employee contributions, and benefit payments uniformly for all participants, rather than attempt to keep track of different coverage periods for each participant based on his or her initial eligibility date. The shared responsibility provisions recognize that a month is a standard unit of group health plan coverage: both the individual penalty and the employer penalties for failing to maintain minimum coverage are assessed month-by-month.

In order to preserve employers' ability to administer their group health plans on a monthly basis, the Departments should allow employers to define a permissible waiting period as a period of three full calendar months after the employee satisfies the plan's eligibility requirements. For example, if an employee satisfies the plan's eligibility requirements on June 30, the plan should not be deemed to violate the 90-day waiting period limitation if the employee's coverage becomes effective on October 1, even though October 1 is 93 days after the employee's eligibility date.

5. The 90-day waiting period limitation should not apply to late enrollees.

In order to prevent adverse selection, group health plans often require an employee to enroll in the plan when he or she first becomes eligible. If an employee fails to enroll at the first opportunity, the employee must wait until the plan's next open enrollment period in order to enroll. For example, an employee who was first eligible for coverage under a calendar year plan on February 1 and failed to enroll might be required to wait eleven months, until the following January 1, in order to enroll. The Departments should make clear that the 90-day waiting period limitation does not apply to late enrollees.

The Departments' HIPAA regulations provide that "[i]f an employee or dependent enrolls as a late enrollee or special enrollee, any period before such late or special enrollment is not a waiting period."[3] The Departments should apply the same rule to the 90-day waiting period limitation.

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[3] Treas. Reg. § 54.9801-3(a)(3)(iii); 29 C.F.R. § 701-3(a)(3)(iii); 45 C.F.R. § 146.111(a)(3)(iii).

Coordination with Employer Shared Responsibility

ACA added section 4980H to the Code. Under section 4980H, large employers are subject to one of two penalties if any full-time employee is certified to receive a premium tax credit or cost-sharing reduction through a state exchange:

- Section 4980H(a) Liability: If a large employer fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, the employer must pay an excise tax equal to 1/12 of $2,000 per month times the number of its full-time employees in excess of 30, regardless of whether the employees receive a premium tax credit or cost-sharing reduction through a state exchange.

- Section 4980H(b) Liability: If a large employer offers minimum essential coverage, but the coverage is not affordable or not sufficiently valuable, the employer must pay an excise tax equal to 1/12 of $3,000 per month times the number of its full-time employees who receive a premium tax credit or cost-sharing reduction. This excise tax is capped so that it does not exceed the section 4980H(a) liability that would have applied if the employer did not offer coverage.

ERIC urges the Departments and the Internal Revenue Service to coordinate the shared responsibility rules under section 4980H with the 90-day waiting period limitation.

6. The shared responsibility penalties under section 4980H should not apply during a waiting period.

PHSA section 2708 permits an employer to apply a waiting period to employees and their dependents that does not exceed 90 days, thus allowing a waiting period of at least two full calendar months. If the employer could be liable for substantial penalties under section 4980H(a) for failing to offer minimum essential coverage to a full-time employee during this waiting period, PHSA section 2708 would be transformed from a limitation on waiting periods to a prohibition on waiting periods. The Departments should clarify that a waiting period permitted under ACA will not trigger liability under section 4980H.

ACA recognizes that employer group health plans should be permitted to impose waiting periods lasting up to 90 days. Waiting periods are important for a variety of administrative reasons: for example, they give employers time to identify and enroll individuals who are eligible for group health coverage, and they permit employers to avoid the expense of enrolling employees who are terminated after a brief probationary period of employment. If the Departments impose section 4980H(a) liability on an employer that fails to offer minimum essential coverage to a full-time employee during a waiting period, the Departments will unfairly penalize employers for using an important, well accepted, and reasonable administrative practice that ACA was designed to preserve.

The shared responsibility provisions for individuals appear to recognize that the penalty for failing to maintain minimum essential coverage should not apply during a waiting period up to 90 days. Under section 5000A(e)(4), an individual is exempt from the shared responsibility penalty for failing to maintain minimum essential coverage during a continuous period of less than three months. The shared responsibility provisions for individuals and employers are intended, and should be interpreted, to operate in a coordinated way. Accordingly, the Departments should provide a parallel exception under section 4980H, which will exempt employers from the shared responsibility penalty during a period of up to three calendar months after an individual first becomes a full-time employee.

7. The waiting period limitation should be coordinated with an administrative interval following a measurement period.

Section 4980H penalizes employers for failing to offer affordable coverage to their full-time employees. In Notice 2011-36, the Treasury Department and Internal Revenue Service suggested that the shared responsibility provisions might include a special rule for determining which workers are full-time employees. Under the special rule, an employer would determine an employee's average hours of service during a look-back measurement period lasting up to twelve months, and would treat the employee's full-time or part-time status as continuing for a stability period following the end of the measurement period. The Treasury Department and Internal Revenue Service also suggested that employers might be given the option of including an administrative interval between the end of a measurement period and the beginning of a stability period, so that the employers will have time to identify full-time employees and enroll the employees in group health coverage. The notice suggests an interval lasting up to one month.

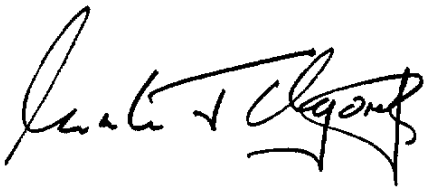
As ERIC explained in its separate comment letter addressing the shared responsibility provisions, an administrative interval is crucial to make the measurement and stability period concept workable. Large employers will need an administrative interval lasting at least four months, so that they can coordinate the measurement period with a group health plan's open enrollment period and treat the plan year as the stability period. ERIC urges the Departments to make clear that an employer will not have section 4980H liability for any employee during a measurement period in which the employee's status as a full-time employee is being determined. If an employee who is determined to be full-time employee is eligible to enroll in the group health plan after the end of the measurement period, section 4980H liability also should not apply during an administrative interval lasting up to four months between the end of the measurement period and the beginning of the stability period.

In comment 4, above, ERIC urged the Departments to allow employers to define a permissible waiting period as a period up to three full calendar months after the employee first becomes eligible to participate in a group health plan. This rule is important in part so that employers can coordinate the measurement and stability

periods under the shared responsibility provisions with the 90-day waiting period limitation. Under ERIC's proposed rule, if an employer uses a measurement period that ends (for example) on September 1, the group health plan will satisfy the 90-day waiting period limitation if it treats the period from the end of the measurement period through the end of December as the waiting period. This rule will give the employer time to analyze the results of the measurement period and identify eligible full-time employees during September, and it will allow the full-time employees to enroll in the group health plan during the regular open enrollment period beginning in early October.

ERIC appreciates the opportunity to provide comments on Notice 2011-36 and the 90-day waiting period limitation. If the Departments have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,



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