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Submitted Electronically Via Federal Rulemaking Portal: www.regulations.gov

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Ninety-Day Waiting Period Limitation; Proposed Rule

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the Ninety-Day Waiting Period Limitation Proposed Rule ("Proposed Rule") issued by the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury (the "Departments").[1] This Proposed Rule 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 ("PHS Act"), as added by the Patient Protection and Affordable Care Act, as amended and incorporated into the Employee Retirement Income Security Act of 1973 and the Internal Revenue Code ("PPACA").[2] Specifically, the Proposed Rule addresses orientation periods under the 90-day waiting period limitation of PHS Act Section 2708.

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. Therefore, we are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in

[1] Proposed Rule, 79 Fed. Reg. 10320-10325 (February 24, 2014) (to be codified at 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147; and 26 C.F.R. pt. 147 [hereinafter referred to as the "Proposed Rule"] http://www.gpo.gov/fdsys/pkg/FR-2014-02-24/pdf/2014-03811.pdf.

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter referred to as "PPACA"].

terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. These comments have been developed with the input of member companies with an interest in improving the health care system.

GENERAL COMMENTS

In general, the Chamber strongly supports several of the provisions included in the Proposed Rule. We agree with the Proposed Rule's statement that in order for an employee to be "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)."[3] We urge the Departments to retain this "bona fide employment-based orientation period" as proposed in the Final Rule.

We support the concept "the Departments envision" that "during an orientation period, an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin."[4] This language is appropriate and sufficient, providing the necessary flexibility to account for the wide variety of orientation programs that exist in today's workplaces. We recommend that the Final Rule include this language and that no additional language be added on this point to complicate the definition, risk being unnecessarily prescriptive and costly, and likely reduce the usefulness of the provision.

SPECIFIC CLARIFICATION

There are two new relevant and interrelated statutory requirements for employers: (1) applicable large employers must offer minimum essential coverage to all full-time employees (those working 30 or more hours a week averaged over the course of a month) or potentially pay a penalty; and (2) employers cannot impose a waiting period before that health coverage becomes effective of more than 90-days following the day that an employee is first eligible for coverage. We urge the Departments to clarify the interplay between these two requirements in instances where employees are not known to be full-time employees, given the regulatory framework for determining the full–time employee status of variable-hour, part-time, and seasonal employees who are not reasonably expected or hired to work full-time.

The Chamber asks that the Departments clarify that the 90-day waiting period limitation does not require employers to provide minimum essential coverage effective after 90 days of employment to those employees who have not (or have not yet been determined to have) met full-time employee status, should that be an eligibility requirement. In such circumstances, employees who may not yet be eligible for coverage could include employees that are: working less than 6 months per year; seasonal workers; part-time employees or; reasonably expected to be variable

[3] Proposed Rule, 79 Fed. Reg. at 10321.
[4] Proposed Rule, 79 Fed. Reg. at 10321.

hour employees during a stability period following a measurement period when they were determined not to be full-time employees. To harmonize the regulations issued implementing the shared responsibility requirement and those issued to implement the 90-day waiting period

limitation, we urge the Departments to specifically state (perhaps through Frequently Asked Question guidance or in the Final Rule) that an employer is not required to provide minimum essential coverage pursuant to the 90-day waiting period limitation to an employee that has not been determined to be a full-time employee, if full-time employment is an eligibility criteria. Based on prior regulations, it is important to specifically state that if full-time employment (as determined by the methods permitted in regulations implementing section 4980H) is an eligibility criteria, an employer would not be required to provide minimum essential coverage effective pursuant to the 90-day waiting period limitation to non-full-time employees, including a seasonal employee, an employee working less than 6 months per year, a part-time employee or a variable-hour employee.

We believe that the Departments intended to make this clarification based on statements in the Proposed Rule's preamble: "Being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions."[5] This clarification also seems to be intended by section 2590.715-2708(c)(3)(1) in the accompanying Final Rule:

> (i) *Application to variable-hour employees in cases in which a specified number of hours of service per period is a plan eligibility condition.* If a group health plan conditions eligibility on an employee regularly having a specified number of hours of service 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, not to exceed 12 months and beginning on any date between the employee's start date and the first day of the first calendar month following the employee's start date, to determine whether the employee meets the plan's eligibility condition.[6]

It is our understanding that the Departments intend for the 90-day waiting period limitation to apply after eligibility criteria has been met including in instance when eligibility is contingent on full-time employee status, or when an employer reasonably expects an employee to work (or is hired to work) full-time. While we believe that the Departments intend to impose the 90-day waiting period limitation following a determination of eligibility, there have been questions about how this applies in certain circumstances. Therefore, we urge the Departments to clarify that they would not find an employer in violation of the 90-day waiting period limitation if that employer employs an employee for less than 6 months, as a seasonal employee, or as a variable-hour employee during a measurement period in 2014 (or in 2015 for those with 50-100 full-time

[5] Proposed Rule 79 Fed. Reg. at 10321.

[6] Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act Final Rule, 79 Fed. Reg. 10296-10317 (February 24, 2014) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; and 45 C.F.R. pts. 144, 146 and 147 [hereinafter referred to as the "Final Rule"] http://www.gpo.gov/fdsys/pkg/FR-2014-02-24/pdf/2014-03809.pdf.

equivalents) and does not offer effective coverage to such an employee until he or she is determined to be a full-time employee as defined by prior regulations.

CONCLUSION

The Chamber urges the Departments to clarify the issue raised above in the Final Rule to confirm that employers of employees that have not yet been determined to be full-time employees are not required to offer those employees minimum essential coverage after 90-days of employment. We look forward to continuing to work together in the future to reduce unnecessary administrative burdens with the goal of improving efficiencies and reducing costs.

Sincerely,

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