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Bona Fide Orientation Periods and the ACA

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Orientation Periods

Orientation periods are a familiar tool for employers hiring new employees. Employers use a period of time at the beginning stages of a newly-hired employee's employment to assess the employee's fit into their business and to ensure that the employee is properly trained and oriented to the business' needs and goals. The orientation period also allows new employees to learn about their new employer, their employer's expectations, and the duties involved in their new role. In the normal course, employees are ineligible for fringe benefits like health insurance and retirement compensation until after satisfactory completion of the orientation period.

New ACA Final Regulations

The implementation of the Affordable Care Act (ACA) has significantly altered the landscape of employment and employee benefits, and new final regulations promulgated by the federal government continue that trend. On June 20, 2014, the Departments of the Treasury, Labor, and Health and Human Services jointly issued final regulations regarding the meaning of a "bona fide orientation period" as that term relates to the 90-day limitation on waiting periods for health insurance coverage imposed by the ACA.

Under the ACA, a group health plan (meaning both insured and self-insured plans) offering group health insurance coverage may not impose any waiting period that exceeds 90 days. A "waiting period" is 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. The regulations define being "otherwise eligible" as having met the plan's substantive eligibility conditions, such as 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." This means that a group health plan must offer health insurance to an employee no later than 90 days after they become substantively eligible for coverage. The 90-day period includes all weekends and holidays.

The newly-published final regulations explain that if a group health plan uses a "bona fide orientation period" as a substantive eligibility requirement, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period does not exceed one month and the maximum 90-day waiting period begins on the first day after the orientation period.

The Departments included bona fide orientation periods as a possible substantive eligibility requirement because they recognize the reasonableness of using short periods of time to assess the employment relationship and provide orientation and training prior to an employee becoming eligible for benefits. However, the Departments also recognized that orientation periods extending too long could be used to abuse and avoid the 90-day limitation period. Thus, bona fide orientation periods may only last a maximum of one month. 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. 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 August 31st, the last permitted day of the orientation period is September 30th.

Compliance with Other ACA Provisions

Importantly, compliance with the regulations proscribing the 90-day limitation period does not ensure compliance with other provisions of the ACA. Most relevantly, applicable large employers (those with 50+ full-time and full-time equivalent employees) remain liable for a penalty under the ACA for failing to offer affordable minimum-value health insurance coverage to newly-hired full-time employees by the first day of the fourth full calendar month of employment. This means that applicable large employers may not be able to use a full month-long bona fide orientation period without incurring penalties for failing to offer coverage. To use an example from the preamble to the regulations, if an employee is hired as a full-time employee on January 6th, a plan may offer coverage May 1st and comply with both provisions (May 1st is the first day of the fourth full calendar month of employment). However, if the employer waits until May 6th to begin coverage, which represents one month of a bona fide orientation period plus 90 days after the date of hire, the employer may be liable for a penalty under the ACA.

Other Implications for Employers

The 90-day limitation and the bona fide orientation period regulations directly apply to group health plans, but they also implicate the actions of employers, as employers dictate many of the eligibility requirements for their health insurance plans. Thus, employers must be aware of these rules and adapt their eligibility requirements accordingly. Each new employee should have their own eligibility timeline based on these new limitations.

Notably, the definition of bona fide orientation period is only a limitation on eligibility for health insurance. Employers can continue to impose orientation periods of any length of time for any reason other than an offer of health insurance coverage.

Conclusion

Employers must remain aware of the ACA's constantly changing provisions and of how those changes affect their business. **For additional information on these or any other issues regarding the ACA or employment, please any of the Knox attorneys at 120 West Tenth Street, Erie, PA 16501 and by phone at 814-459-2800.**

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