Bloomberg BNA

Daily Labor Report®

HEALTH CARE

You've determined you're a large employer covered by the ACA and examined its requirements and potential penalties, but you're not done yet, attorneys Wendy K. Voss and Jesse L. Noa of Potter Anderson & Corroon LLP say in this BNA Insights article, Part III of a three-part series.

Employers should be aware of the different time limitations for the Waiting Period and Shared Responsibility regulations promulgated under the act and the potential consequences tied to each, the authors write. Now is the time to create a healthy compliance strategy for 2015 and 2016, they advise.

The Affordable Care Act's Rules for Measurement and Waiting Periods: What Is the Difference and What Are the Risks?

BY WENDY K. VOSS AND JESSE L. NOA

On February 12, 2014, the final ''Shared Responsibility'' regulations under the Affordable Care Act (ACA) were released. The Shared Responsibility regulations address the obligations of large employers (90 DLR I-1, 5/9/14) to make health care coverage available to their full-time employees and the penalties possibly applicable (93 DLR I-1, 5/14/14) if they fail to do so.[1] These rules generally allow an employer to avoid any penalty if qualifying coverage is offered to its full-time employees by the end of the third full calendar month after the employees are hired or otherwise establish eligibility. Penalties, if any, are calculated on a month-to-month basis.

On February 20, 2014, the final Waiting Period regulations under the ACA were released. The Waiting Period regulations address the permissible Waiting Periods that may be imposed on otherwise eligible employees who are offered coverage under grandfathered and non-grandfathered group health plans.[2] These rules are applicable to all employers, group health plans, and insurance issuers offering group health insurance. Those

Wendy K. Voss, a partner with Potter Anderson & Corroon LLP in Wilmington, Del., represents management in a wide variety of industries and in locations throughout the United States. She represents clients before the EEOC, NLRB, Delaware Department of Labor, and other state agencies, as well as the Delaware Public Employee Relations Board. Jesse L. Noa is an associate in the firm's Litigation Group. His practice focuses on commercial and employment matters in the state and federal courts of Delaware.

[1] *See* Shared Responsibility For Employers Regarding Health Coverage, 79 Fed. Reg. 8,586, 8,577-601 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54 & 301) (hereafter, ''Shared Responsibility''), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-02-12/pdf/2014-03082.pdf.

[2] The final regulations were released by the three responsible agencies, the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services, on February 20, 2014, and published in the Federal Register on February 24, 2014. *See* Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, 79 Fed. Reg. 10,296 *et seq.* (Feb. 24, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pts. 144, 146 & 147) (hereafter, ''Waiting Periods''), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-02-24/pdf/2014-03809.pdf.

offering coverage with a waiting period in excess of 90 days will be subject to an excise tax, in addition to any ''shared responsibility'' penalties that may apply. Liability under the Waiting Period rule is calculated on a daily basis.[3]

Both the Waiting Period and Shared Responsibility regulations attempt to strike a balance between ensuring that eligible employees have access to health care coverage in a timely fashion and allowing employers the ability to establish reasonable protocols to determine which employee groups must be offered coverage and when. Under certain circumstances, as discussed below, it may be possible to reconcile the differing time limitations for providing coverage that are set forth in the regulations. Regardless, employers should be aware of the potential, and differing, consequences tied to both requirements.

I. Effective Dates for the Application of the Final Rules

The regulations governing employers' ''Shared Responsibility'' were effective upon their publication on February 12, 2014. ''Large employers'' with more than 99 full-time and full-time equivalent employees generally are subject to the rules beginning on January 1, 2015; those with 50 to 99 such employees are subject to the rules beginning on January 1, 2016.

The final regulations governing Waiting Periods were effective on April 25, 2014. The Waiting Period regulations distinguish between plan years that begin prior to January 1, 2015, and those that begin on or after that date. For plan years that begin in 2014, compliance with either the final regulations or the proposed regulations will be acceptable, while the final regulations will govern plan years that begin on or after January 1, 2015.

II. Shared Responsibility Rule for ''Large Employers''— Permissible Measurement Periods to Establish Full-Time Status

Potential liability under the ACA's Shared Responsibility rules arises only if a ''large employer'' either does not offer coverage to its full-time employees, or the coverage it offers is not ''affordable'' or does not provide ''minimum value.'' Employers are not required by the ACA to provide coverage. Indeed, they may elect instead to pay any applicable penalty. To make an informed and strategic decision and/or to comply with the coverage rules, they first will need to determine which employees qualify as full-time.

a. Methods for Determining an Employee's Full-Time Status

The final Shared Responsibility regulations provide two methods for determining full-time employee status and thus (possible) eligibility for health care coverage: the monthly measurement method and the look-back measurement method. These methods represent a minimum standard for avoiding liability, because employers are always free to offer coverage to additional employees or under other circumstances.

Although an employer generally must use the same measurement method for all employees, it may vary the method used as to the following categories of employees:

- Each group of collectively bargained employees covered by a separate bargaining agreement
- Collectively bargained and not collectively bargained employees
- Salaried and hourly employees
- Employees whose primary places of employment are in different states

The categories listed above are the only categories where variations in the method of determining full-time status are permitted. For example, an employer cannot use the look-back measurement method for variable hour employees and the monthly measurement method for employees with more predictable hours of service. Thus, employers will want to analyze the administrative burdens attached to both methods and, if the employer is seeking to limit its obligations, determine which method might produce the most favorable results.

i. The Monthly Method

When using the monthly method to determine eligibility for coverage, 130 hours of service in a calendar month is deemed the equivalent of an average of 30 hours a week and thus is considered full-time work, regardless of the number of days in the month. An hour of service is defined as each hour for which an employee is paid, including vacation, holiday, illness, disability, or other paid leave of absence. Special equivalency rules apply to non-hourly employees, such as salaried employees.

Employers using the monthly method to establish eligibility for coverage will not be subject to a penalty so long as they make coverage available to qualifying full-time employees before the end of the third full calendar month after the employee first establishes such status. Employers should bear in mind that it is the employee's average hours that establish eligibility.

However, there may be only one such delay in providing coverage during a period of employment for any one employee (and thus only one related exemption from any penalty). Otherwise, for any calendar month in which the employee performs full-time work, the employer also must make full-month, qualifying coverage available or face the possibility of a penalty.

Employers have the option of using a variation on the monthly method—a weekly equivalency rule—whereby full-time status for certain calendar months is based on hours of service over four-week periods (and 120 hours of service) and for others is based on five-week periods (and 150 hours of service).

Generally, the period measured and weeks used must contain either the first day of the month or the last day of the month, but not both. Employers considering using the weekly rule should be aware that it may be used only to determine employee status. The question of whether the employer offered coverage to eligible employees in a particular calendar month, and thus whether any penalty will be due for that month, will continue to be based on the entire calendar month.

Because of the complexities of providing coverage to employees whose monthly hours may fluctuate above and below the 130-hour threshold, employers would be

[3] *See* 42 U.S.C. § 300GG-7 (establishing fines of $100 per employee per day if a waiting period exceeds 90 days).

   ISSN 0418-2693

well advised to limit the use of the monthly method to work forces with stable hours.

ii. The Look-Back Method

Under the ''look-back'' method, employers may select a standard measurement period of at least three and not more than 12 months, and use its employees' work hours during that period to establish eligibility (or lack thereof) for health care coverage, which status then will apply during a subsequent period (referred to as the stability period). For administrative convenience, the employer also may add an administrative period that is no longer than 90 days between the measurement period and the stability period. The addition of an administrative period that is timed to coordinate with the employer's open enrollment period is intended to allow the employer to make eligibility determinations as well as to facilitate the enrollment of eligible employees in coverage.

The stability period corresponding to a standard measurement period must be the same length as the measurement period, but, in any event, no less than six months. Regardless of hours worked during the stability period, an employee who establishes full-time status during the measurement period will continue to retain that status and the right to coverage. Conversely, an employee who fails to qualify as full-time during the measurement period will not qualify for coverage during the corresponding stability period, even if his or her hours increase to full-time.

In the case of new hires who are not seasonal or variable hour employees, the employer's reasonable expectations at the time of hire will govern the employee's initial status. In other words, employers must classify new employees as full-time when it reasonably is expected that is the case, and as part-time when that reasonably is expected. Employers then can confirm (or change) the status of ongoing employees using the look-back method's standard measurement period.

In making their initial determinations, employers should take into consideration circumstances such as whether comparable employees in similar positions are working full time, if the job posting stated or communicated that the position was full-time as defined by the regulations, and whether the new hire is replacing another employee who was full-time.

b. Special Rules for New Variable Hour, Seasonal, and Part-Time Employees.

It may be unclear at times whether newly hired employees will meet the requirements to be classified as full-time due to the potential for varying schedules or assignments. For such variable hour employees and part-time employees, covered large employers using the look-back method may use an initial measurement period of three to 12 months to determine whether the employees should be classified as full-time employees.

The same is true for new seasonal employees, even if the seasonal employees reasonably may be expected to work full time. If it is determined at the end of the initial measurement period that any of the employees was employed an average of 30 hours per week or more, then those employees will be classified as full-time employees and must be provided the option of coverage during a designated stability period.

The initial measurement period need not consist of calendar months. In contrast, the initial stability period for such employees must consist of calendar months. The employer may determine the date on which the initial measurement period begins, which may be as late as the first day of the first calendar month after the employee's start date. If the employer elects to use the payroll period method for tracking the employee's hours, it also has the option to begin the measurement period on the first day of the first full payroll period after the employee's start date. However, the payroll period method is available only for payrolls that are one week, two weeks, or semimonthly in duration.

Again, the stability period following an initial measurement period must be at least as long as the measurement period, but cannot be less than six months, and must begin immediately after the initial measurement period (and any related administrative period). If the employer elects to use an administrative period, the combined length of the initial measurement period (which in any event cannot exceed 12 months) and the related administrative period (which cannot exceed 90 days) cannot extend beyond the last day of the first calendar month beginning after the employee's anniversary date. In short, the total period before an eligible variable hour, seasonal, or part-time employee is offered coverage cannot exceed 13 full calendar months.

If the employer has opted to use the look-back method of determining eligibility for its ongoing employees, the status of variable hour employees must be measured during both the employer's initial measurement period and its standard measurement period. Coverage obligations will be triggered if the employee establishes full-time status during either of these periods. In the event the employee establishes eligibility during the initial measurement period and the initial stability period does not extend through the beginning of the next standard stability period, the employer nonetheless must provide coverage to the employee until the beginning of the next standard stability period.

c. Special Rules for Breaks in Service and Rehired Employees.

Whether the employer uses the look-back method or the monthly method to determine full-time status, an employee must be treated as a continuing employee, rather than a new hire, unless the employee has had a period of at least 13 weeks (26 weeks for an employee of an educational organization) in which no hours of service were credited to the employee. In addition, at the employer's option, an employee may be treated as a new hire if she or he has no hours of service during a period that is at least four consecutive weeks and longer than the employee's immediately preceding period of employment. Notably, unpaid time due to FMLA leave, military leave, and jury duty need not be counted when determining hours of service for this purpose.

III. The 90-Day Waiting Period Rule Applicable to All Group Plans

Notably, the Waiting Period rules do not require an employer or plan to offer coverage to any particular individuals or class of individuals and impose no penalties if an employer chooses not to offer coverage. To the extent an employer opts to provide health care coverage to certain of its employees, however, failure to abide by the Waiting Period rules generally will result in an excise tax of $100 per day per failure, which must be selfreported to IRS. The 90-day Waiting Period limitation is effective for plan years beginning on or after January 1, 2015.

a. Reasonable Eligibility Criteria May Extend the Wait for Coverage.

For the Waiting Period rules to apply, an employee or dependent must be ''otherwise eligible.'' Under the final regulations, ''otherwise eligible'' means the individual can meet the plan's substantive eligibility conditions, provided that those conditions are not based solely on the passage of time or created as a ploy to evade the 90-day rule. Generally, any other conditions that are reasonable under the circumstances are permissible. Because the ultimate application of this ''reasonableness'' standard currently is unclear, employers must be prepared to make a showing of some reasonable purpose.

In the proposed rules, examples of reasonable eligibility requirements included cumulative hours of service, and sales or commission goals.[4] Under the final rules, completion of a bona fide orientation period (not to exceed one month, per additional guidance, discussed below) is listed as a permissible eligibility criterion, as is satisfaction of a cumulative hours of service requirement. The latter generally will be permitted if the hours required do not exceed 1,200 hours within a year. (An employer that imposes a cumulative hours of service requirement would need to provide coverage to an employee by the 90th day after the employee reaches 1,200 hours to remain in compliance with the regulations.) Similarly, an employer may impose a requirement that an employee average 30 hours of service per week during a 40-week period, so long as it provides coverage by the 90th day thereafter to eligible employees.

b. Initial Measurement Periods for Variable Hour Employees May Extend the Wait for Coverage.

The advent of the Waiting Period limitation generated concern among employers regarding the treatment of employees whose hours fluctuate throughout the year. This situation typically arises when employers are unable to determine whether the employee is or will be a full-time employee due to the uncertainty in schedules.

To address this issue, the final regulations provide that employers may use a measurement period of up to 12 months for employees who do not qualify as full-time employees at the outset of their employment. During the measurement period, the Waiting Period rule will not be triggered. More specifically, delaying the availability of coverage during the initial measurement period will not violate the rules so long as coverage is made effective no later than 13 months from the employee's start date or, if the employee's start date is not the first day of a calendar month, the first day of the next calendar month. The regulations provide that any measurement period extending beyond 12 months will be deemed to have the purpose of avoiding the Waiting Period.

c. Special Rules for Rehired Employees.

The final Waiting Period regulations have diverged from the proposed regulations and the Shared Responsibility rules in regard to rehired employees. Rather than looking to the time frame of when the employee left or how long the employee was without hours of service, the final Waiting Period regulations simply classify all rehired employees as ''newly hired'' for the purpose of the Waiting Period. This is true regardless of how long the rehired employee has been away from the job.

In any case, however, employers cannot act so as to avoid the Waiting Period. For example, it would be a violation of the regulations for an employer to terminate and then rehire an employee merely to restart the clock on the Waiting Period. The test for determining whether the termination and rehire were legitimate or a ploy is whether the decision was reasonable under the circumstances. More guidance would be preferable regarding what the agencies will consider ''reasonable'' in this context. Regardless, employers should document the termination and rehiring processes and be prepared to present rational and reasonable bases for these decisions in order to avoid potential liability under the regulations.

d. Special Rules for Multiemployer Plans.

Concerns were expressed by employers and employees prior to the finalization of the rules regarding the Waiting Period's effect on multiemployer plans, specifically those governed by collective bargaining agreements that were in effect prior to the time the final regulations were issued and that continued in effect beyond the date the regulations were issued. To address these concerns, the final regulations present an example that provides that multiemployer plans operating pursuant to an arms-length CBA will not violate the regulations if their eligibility criteria are not designed to evade the Waiting Period.

Specifically, the example states that a multiemployer plan that aggregates hours in a calendar quarter and then, if enough hours are earned, provides coverage beginning on the next day of the calendar quarter will be in compliance because it is designed to accommodate a unique operating structure, and not to avoid compliance with the Waiting Period. Essentially, the example provides that eligibility criteria crafted to fit the needs of complex and unique operating structures, such as those typically found in CBAs, will not be considered to violate the rules, provided that those criteria are not mere artifices intended to circumvent compliance with the Waiting Period.

e. Safe Harbor for Health Insurance Issuers.

The final Waiting Period regulations provide a safe harbor that allows health insurance issuers to rely on the eligibility information submitted to them by employers if two conditions are satisfied. First, health insurance issuers must require the plan sponsor to make a representation regarding the terms of any eligibility conditions or waiting periods imposed by the plan sponsor before an individual is eligible to become covered. Second, the health insurance issuer must not have any

[4] The proposed regulations noted that eligibility criteria requiring employees to meet certain sales goals or obtain certain levels of commissions would be viewed as ''substantive eligibility provisions'' and, therefore, would not trigger the Waiting Period rule. *See* 78 Fed. Reg. 17,313, 17,316 (Mar. 21, 2013). The final Waiting Period regulations are silent on the issue of sales goals and commissions, but the general guidance remains the same: provisions that are not based solely on the lapse of time generally will be deemed appropriate if such provisions are not ploys to avoid the Waiting Period. *See* Waiting Periods at 10,306, 311 & 316.

   ISSN 0418-2693

specific knowledge of the imposition of a waiting period that would exceed the permitted 90-day period. If these requirements are met, the insurance issuer will not violate the regulations if health care coverage is not offered to an eligible employee within the Waiting Period.

IV. Proposed Rules to Clarify the Final Waiting Period Regulations

In addition to the final Waiting Period regulations, newly proposed regulations were released on February 24, 2014, that provide additional guidance on what will be considered the ''maximum allowed length of any reasonable and bona fide employment-based orientation period.''[5] The agencies stated their position that the orientation period should be used by both the employer and the employee to evaluate whether the employment situation was satisfactory. Ultimately, the aim of the proposed regulation is to prevent employers from trying to avoid the Waiting Period under the guise of a bona fide orientation period.

To achieve this aim, the proposed regulations would limit the orientation period to one month, after which the Waiting Period would begin. To calculate the one-month period, employers add ''one calendar month and [subtract] one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage.'' (79 Fed. Reg. at 10,324).

The proposed regulations provide an example explaining that the last permitted day of an orientation period would be on the second of June if the employee was otherwise eligible on the third of May. If there is no date equivalent to the employee's start date in the next month, then the appropriate end of the orientation period would be the last day of that month. For example, if an employee's start date is January 31, the orientation period would end on February 28 or 29, as the case may be.

The practical effect of the proposed regulations would be to extend the permissible wait for coverage to up to 120 days where employers have established a reasonable and bona fide orientation period.

V. What Employers Should Do Now

The main thrust of the final regulations is to ensure that employers do not delay or circumvent coverage for eligible employees. While the rules give some objective guidance, as is the case with full-time and variable hour employees, uncertainty remains in other areas, such as the proper application of orientation periods. Ultimately, employers should document their good faith and reasonable efforts to remain in compliance with the regulations. This will ensure that employees' rights are protected and that employers are prepared to address properly any agency inquiries or investigations.

Employer actions should include review of the waiting periods and eligibility criteria in their insurance policies. After such review, they should make any needed adjustments to ensure that the plans are in compliance with the proposed or final regulations, as may be applicable. Further, employers that wish to use the look-back measurement period should consider the design of their measurement periods, administrative periods, and stability periods for ongoing employees, and be prepared to assess the eligibility of their variable hour employees.

Employers also would be well advised to review and revise their plan documents, summary plan descriptions, employee handbooks, and other relevant materials as necessary to avoid any discrepancies between documents and any conflict between the administration of their plans and the governing plan documents. Finally, employers should document their decisions and the resulting policies and procedures regarding eligibility, measurement periods, and waiting periods.

---

[5] *See* Ninety-Day Waiting Period Limitation, 79 Fed. Reg. 10,320 *et seq.* (proposed Feb. 24, 2014) (setting forth proposal for ''bona fide orientation periods'' lasting no longer than one month), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-02-24/pdf/2014-03811.pdf.