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## **DEPARTMENT OF THE TREASURY**

### **Internal Revenue Service**

**26 CFR Part 54**

**REG-122706-12**

**RIN 1545-BL97**

## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

**29 CFR Part 2590**

**RIN 1210-AB61**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**45 CFR Part 147**

**[CMS-9952-P2]**

**RIN 0938-AR77**

### **Ninety-Day Waiting Period Limitation**

**AGENCIES:** Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

**ACTION:** Proposed rules.

**SUMMARY:** These proposed regulations 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, as added by

the Patient Protection and Affordable Care Act (Affordable Care Act), as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code.

**DATES:** Written comments on this notice of proposed rulemaking are invited and must be received by [insert date 60 days after publication in the **Federal Register**].

**ADDRESSES:** Written comments may be submitted to the Department of Labor as specified below. Any comment that is submitted will be shared with the other Departments and will also be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

Comments, identified by “Ninety-day waiting period limitation,” may be submitted by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail or Hand Delivery: Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attention: Ninety-day waiting period limitation.

Comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov) and available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Amy Turner or Elizabeth Schumacher, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 317-6846; or Cam Moultrie Clemmons, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (410) 786-1565.

*Customer service information:* Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor’s website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) website ([www.cciio.cms.gov/](http://www.cciio.cms.gov/)) and information on health reform can be found at [www.HealthCare.gov](http://www.HealthCare.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Patient Protection and Affordable Care Act, Pub. L. 111-148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Pub. L. 111-152, was enacted on March 30, 2010. (They are collectively known as the “Affordable Care Act”.) The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The term “group health plan” includes both insured

and self-insured group health plans.<sup>1</sup> 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 (the 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 2728.

PHS Act section 2708, as added by the Affordable Care Act and incorporated into ERISA and the Code, provides that a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in PHS Act section 2704(b)(4)) that exceeds 90 days. 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 implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) portability provisions (2004 HIPAA regulations), the Departments of Labor, Health and Human Services (HHS), and the Treasury (the Departments<sup>2</sup>) 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.<sup>3</sup> PHS Act section 2708 does not require an employer to offer coverage to any particular individual or class of individuals, including part-time employees. PHS Act section 2708 merely prevents an otherwise eligible individual from being required to wait more than 90 days before coverage

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<sup>1</sup> The term “group health plan” is used in title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code, and is distinct from the term “health plan,” as used in other provisions of title I of the Affordable Care Act. The term “health plan” does not include self-insured group health plans.

<sup>2</sup> Note, however, that in the Economic Analysis and Paperwork Burden section of this preamble, in sections under headings listing only two of the three Departments, the term “Departments” generally refers only to the two Departments listed in the heading.

<sup>3</sup> 26 CFR 54.9801-3(a)(3)(iii), 29 CFR 2590.701-3(a)(3)(iii), and 45 CFR 146.111(a)(3)(iii).

becomes effective. PHS Act section 2708 applies to both grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after January 1, 2014.

On February 9, 2012, the Departments issued guidance<sup>4</sup> outlining various approaches under consideration with respect to both the 90-day waiting period limitation and the employer shared responsibility provisions under Code section 4980H (February 2012 guidance) and requested public comment. On August 31, 2012, following their review of the comments on the February 2012 guidance, the Departments provided temporary guidance,<sup>5</sup> to remain in effect at least through the end of 2014, regarding the 90-day waiting period limitation, and described the approach they intended to propose in future rulemaking (August 2012 guidance). After consideration of all of the comments received in response to the February 2012 guidance and August 2012 guidance, the Departments issued proposed regulations on March 21, 2013 (78 FR 17313).

Under the proposed regulations, a group health plan, and a health insurance issuer offering group health insurance coverage may not apply any waiting period that exceeds 90 days. The regulations proposed to define “waiting period” as 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. Being otherwise eligible to enroll in a plan means having met the plan's substantive eligibility conditions (such as being in an eligible job classification or achieving job-related licensure requirements specified in the plan's terms). After consideration of comments on the proposed regulations, the Departments are publishing final regulations elsewhere in this issue of the **Federal Register**. These proposed regulations address orientation

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<sup>4</sup> Department of Labor Technical Release 2012-01, IRS Notice 2012-17, and HHS FAQs issued February 9, 2012.

<sup>5</sup> Department of Labor Technical Release 2012-02, IRS Notice 2012-59, and HHS FAQs issued August 31, 2012.

periods under the 90-day waiting period limitation of PHS Act section 2708 and solicit comment before promulgation of final regulations on this discrete issue.

## II. Overview of the Proposed Regulations

### A. Orientation periods

Final regulations published elsewhere in this edition of the **Federal Register** set forth rules governing the relationship between a plan's eligibility criteria and the 90-day waiting period limitation. Specifically, the final regulations provide that being 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). Under the final regulations, after an individual is determined to be otherwise eligible for coverage under the terms of the plan, any waiting period may not extend beyond 90 days, and all calendar days are counted beginning on the enrollment date, including weekends and holidays.<sup>6</sup>

The final regulations do not specify the facts and circumstances under which an employment-based orientation period would not be considered "reasonable and bona fide." These proposed regulations would provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. During an orientation period, the Departments envision that an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. Under these proposed regulations, one month would be determined by

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<sup>6</sup> The final regulations also note that a plan or issuer that imposes a 90-day waiting period may, for administrative convenience, choose to permit coverage to become effective earlier than the 91<sup>st</sup> day if the 91<sup>st</sup> day is a weekend or holiday.

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. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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 January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30. If a group health plan conditions eligibility on an employee's having completed a reasonable and bona fide employment-based orientation period, the eligibility condition would not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period did not exceed one month and the maximum 90-day waiting period would begin on the first day after the orientation period.

#### B. Comment invitation and reliance

The Departments invite comments on these proposed regulations. The Departments will consider compliance with these proposed regulations to constitute compliance with PHS Act section 2708 at least through the end of 2014. To the extent final regulations or other guidance with respect to the application of the 90-day waiting period limitation to orientation periods is more restrictive on plans and issuers, the final regulations or other guidance will not be effective prior to January 1, 2015, and will provide plans and issuers a reasonable time period to comply.

### **III. Economic Impact and Paperwork Burden**

#### A. Executive Order 12866 and 13563 – Department of Labor and Department of Health and Human Services

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, a regulatory action deemed "significant" is subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

These proposed regulations are not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, OMB has determined that the actions are significant within the meaning of section 3(f)(4) of the Executive Order. Therefore, OMB has reviewed these proposed regulations, and the Departments<sup>7</sup> have provided the following assessment of their impact.

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<sup>7</sup> In section III of this preamble, some subsections have a heading listing one or two of the three Departments. In those subsections, the term "Departments" generally refers only to the Departments listed in the heading.

## 1. Summary

As stated earlier in this preamble, these proposed regulations address reasonable and bona fide employment-based orientation periods under the 90-day waiting period limitation of PHS Act section 2708. The Departments have crafted these proposed regulations to secure the protections intended by Congress in an economically efficient manner. The Departments lack sufficient data to quantify the regulations' economic cost or benefits. The proposed regulations implementing PHS Act section 2708<sup>8</sup> provided a qualitative discussion of economic impacts of proposed limits on waiting periods and requested detailed comments and data that would allow for quantification of the costs, benefits, and transfers. Comments were received expressing concern about the cost to employers that currently have waiting periods longer than 90 days, and explaining that they would have to change their practices and often have to provide coverage sooner than the 90-day waiting period limitation. No comments provided additional data that would help in estimating the economic impacts of the proposed regulations. The Departments request comments that would allow them to quantify the impacts of these proposed regulations on the discrete issue of orientation periods.

## 2. Estimated Number of Affected Entities

The Departments estimate that 4.1 million new employees receive group health insurance coverage through private sector employers and 1.0 million new employees receive group health insurance coverage through public sector employers annually.<sup>9</sup> The 2013 Kaiser Family Foundation and Health Research and Education Trust Employer Health Benefits Annual Survey (the "2013 Kaiser Survey") finds that 30 percent of covered workers were subject to waiting

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<sup>8</sup> 78 FR 17313 (March 21, 2013).

<sup>9</sup> This estimate is based upon internal Department of Labor calculations derived from the 2009 Medical Expenditure Panel Survey.

periods of three months or more.<sup>10</sup> The Departments do not have any data, and therefore invite public comment, on the number of employees subject to orientation periods, as described earlier in this preamble.

## 2. Benefits

The final regulations provide that being 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). These proposed regulations would provide that one month is the maximum allowed length of any reasonable and bona fide employment-based orientation period. During an orientation period, the Departments envision that an employer and employee could evaluate whether the employment situation was satisfactory for each party, and standard orientation and training processes would begin. If a group health plan conditions eligibility on an employee's having completed a reasonable and bona fide employment-based orientation period, the eligibility condition would not be considered to be designed to avoid compliance with the 90-day waiting period limitation if the orientation period did not exceed one month and the maximum 90-day waiting period would begin on the first day after the orientation period.

## 3. Costs

These proposed regulations could extend the time between an employee beginning work and obtaining health care coverage relative to the time before the issuance of the final regulations and these proposed regulations. If employees delay health care treatment until the expiration of the orientation period and waiting period, detrimental health effects can result, especially for

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<sup>10</sup> See e.g., Kaiser Family Foundation and Health Research and Education Trust, *Employer Health Benefits 2013 Annual Survey* (2013) available at <http://ehbs.kff.org/pdf/2013/8345.pdf>

employees and their dependents requiring higher levels of health care, such as older Americans, pregnant women, young children, and those with chronic conditions. This could lead to lower work productivity and missed school days. Low-wage workers also are vulnerable, because they have less income to spend out-of-pocket to cover medical expenses. The Departments anticipate that these proposed regulations could lead to these effects, although the overall cost may be limited because few employees are likely to be affected and it is anticipated that conditioning eligibility on an employee's having completed an orientation period will not result in most employees facing a full additional month between being hired and obtaining coverage.

#### 4. Transfers

The possible transfers associated with these proposed regulations would arise from employers beginning to pay their portion of premiums or contributions later than they did before the issuance of the final regulations and these proposed regulations. Recipients of the transfer would be employers who implement an orientation period in addition to the 90-day waiting period, thus delaying having to pay premiums. The source of the transfers would be covered employees who, after these proposed regulations become applicable, will have to wait longer between being employed and obtaining health coverage, during which they must forgo health coverage, purchase COBRA continuation coverage, or obtain an individual health insurance policy – all of which are options that could lead to higher out-of-pocket costs for employees to cover their healthcare expenditures.

The Departments believe that under these proposed regulations only a small number of employers would further delay offering coverage to their employees because a relatively small fraction of workers have an orientation period in addition to a waiting periods that runs for 90 days.

B. Regulatory Flexibility Act – Department of Labor and Department of Health and Human Services

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) applies to most Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.). Unless an agency certifies that such a rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of analysis under the RFA, the Departments propose to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(3) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for welfare benefit plans that cover fewer than 100 participants.<sup>11</sup>

Further, while some large employers may have small plans, in general, small employers maintain most small plans. Thus, the Departments believe that assessing the impact of these proposed regulations on small plans is an appropriate substitute for evaluating the effect on small entities.

The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small

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<sup>11</sup> Under ERISA section 104(a)(2), the Secretary may also provide exemptions or simplified reporting and disclosure requirements for pension plans. Pursuant to the authority of ERISA section 104(a)(3), the Department of Labor has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). The Departments therefore request comments on the appropriateness of the size standard used in evaluating the impact of these proposed regulations on small entities.

The Departments carefully considered the likely impact of the rule on small entities in connection with their assessment under Executive Order 12866. The Departments lack data to focus only on the impacts on small business. However, the Departments believe that the proposed regulations include flexibility that would minimize the transfers in health insurance premiums that would occur due to the orientation period.

The Departments hereby certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Consistent with the policy of the RFA, the Departments encourage the public to submit comments that would allow the Departments to assess the impacts specifically on small plans or suggest alternative rules that accomplish the stated purpose of PHS Act section 2708 and minimize the impact on small entities.

#### C. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury, it has been determined that this proposed rule is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these proposed regulations, and, because these proposed regulations do not impose a collection of information requirement on small entities, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to Code section

7805(f), this proposed rule has been submitted to the Small Business Administration for comment on its impact on small business.

D. Congressional Review Act

These proposed regulations are subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

E. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, these proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector, of \$100 million or more adjusted for inflation.

F. Federalism Statement--Department of Labor and Department of Health and Human Services

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the regulation.

In the Departments' view, these proposed regulations have federalism implications, because they have direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among various levels of

government. In general, through section 514, ERISA supersedes State laws to the extent that they relate to any covered employee benefit plan, and preserves State laws that regulate insurance, banking, or securities. While ERISA prohibits States from regulating a plan as an insurance or investment company or bank, the preemption provisions of ERISA section 731 and PHS Act section 2724 (implemented in 29 CFR 2590.731(a) and 45 CFR 146.143(a)) apply so that the HIPAA requirements (including those of the Affordable Care Act) are not to be “construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement” of a federal standard. The conference report accompanying HIPAA indicates that this is intended to be the “narrowest” preemption of State laws. (See House Conf. Rep. No. 104-736, at 205, reprinted in 1996 U.S. Code Cong. & Admin. News 2018.)

States may continue to apply State law requirements except to the extent that such requirements prevent the application of the Affordable Care Act requirements that are the subject of this rulemaking. State insurance laws that are more consumer protective than the Federal requirements are unlikely to “prevent the application of” the Affordable Care Act, and therefore are unlikely to be preempted. Accordingly, States have significant latitude to impose requirements on health insurance issuers that are more restrictive than the Federal law.

Guidance conveying this interpretation was published in the **Federal Register** on April 8, 1997 (62 FR 16904), and December 30, 2004 (69 FR 78720), and these proposed regulations would clarify and implement the statute’s minimum standards and would not significantly reduce the discretion given the States by the statute.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected State and local officials, including attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

Throughout the process of developing these proposed regulations, to the extent feasible within the specific preemption provisions of HIPAA as it applies to the Affordable Care Act, the Departments have attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide uniform minimum protections to consumers in every State. By doing so, it is the Departments' view that they have complied with the requirements of Executive Order 13132.

#### **IV. Statutory Authority**

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed to be adopted pursuant to the authority contained in 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are proposed to be adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended.

**List of Subjects**

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

John Dalrymple  
Deputy Commissioner for Services and Enforcement,  
Internal Revenue Service.

Signed this 12th day of February, 2014.

Phyllis C. Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
Department of Labor

Dated: February 11, 2014

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**Marilyn Tavenner,**

Administrator,

Centers for Medicare & Medicaid Services.

Dated: February 14, 2014

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**Kathleen Sebelius,**

Secretary,

Department of Health and Human Services.

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

Accordingly, 26 CFR Part 54, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the **Federal Register**, is proposed to be further amended as follows:

**PART 54 – PENSION EXCISE TAXES**

Paragraph 1. The authority citation for Part 54 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805. \* \* \*

Section 54.9815–2708 is also issued under 26 U.S.C. 9833.

\* \* \* \* \*

Par. 2. Section 54.9815–2708 is amended by adding paragraph (c)(3)(iii) and a new Example 11 in paragraph (f) to read as follows:

**§ 54.9815-2708 Prohibition on waiting periods that exceed 90 days.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(iii) Limitation on orientation periods. To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, 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. For example, if an employee’s start date in an otherwise eligible position is May 3, the

last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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 January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

\* \* \* \* \*

(f) \* \* \*

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be considered a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

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**DEPARTMENT OF LABOR**

Employee Benefits Security Administration

29 CFR Chapter XXV

For the reasons stated in the preamble, the Department of Labor proposes to further amend 29 CFR part 2590, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the **Federal Register**, as follows:

**PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS**

3. The authority citation for Part 2590 continues to read as follows:

**Authority:** 29 U.S.C. 1027, 1059, 1135, 1161-1168, 1169, 1181-1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L.104-191, 110 Stat. 1936; sec. 401(b), Pub. L. 105-200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Pub. L. 110-343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111-148, 124 Stat. 119, as amended by Pub. L. 111-152, 124 Stat. 1029; Secretary of Labor’s Order 3-2010, 75 FR 55354 (September 10, 2010).

4. Section 2590.715-2708 is amended by adding paragraph (c)(3)(iii) and a new Example 11 in paragraph (f) to read as follows:

**§ 2590.715-2708 Prohibition on waiting periods that exceed 90 days.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(iii) Limitation on orientation periods. To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting

period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, 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. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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 January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

\* \* \* \* \*

(f) \* \* \*

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be considered a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

45 CFR Subtitle A

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to further amend 45 CFR part 147, as amended by the final rule titled, Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act, published elsewhere in this issue of the **Federal Register**, as set forth below:

**PART 147 – HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS**

5. The authority citation for part 147 continues to read as follows:

**Authority:** Secs. 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92).

6. Section 147.116 is amended by—

- A. Adding paragraph (c)(3)(iii); and
- B. Adding Example 11 in paragraph (f).

The additions read as follows:

**§147.116 Prohibition on waiting periods that exceed 90 days.**

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(iii) Limitation on orientation periods. To ensure that an orientation period is not used as a subterfuge for the passage of time, or designed to avoid compliance with the 90-day waiting period limitation, an orientation period is permitted only if it does not exceed one month. For this purpose, 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. For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. Similarly, if an employee's start date in an otherwise eligible position is October 1, the last permitted day of the orientation period is October 31. 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 January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year). Similarly, if the employee's start date is August 31, the last permitted day of the orientation period is September 30.

\* \* \* \* \*

(f) \* \* \*

Example 11. (i) Facts. Employee H begins working full time for Employer Z on October 16. Z sponsors a group health plan, under which full time employees are eligible for coverage after they have successfully completed a one-month orientation period. H completes the orientation period on November 15.

(ii) Conclusion. In this Example 11, the orientation period is not considered a subterfuge for the passage of time and is not considered to be designed to avoid compliance with the 90-day waiting period limitation. Accordingly, plan coverage for H must begin no later than February 14, which is the 91st day after H completes the orientation period. (If the orientation period was more than one month, it would be considered to be considered a subterfuge for the passage of time and designed to avoid compliance with the 90-day waiting period limitation. Accordingly it would violate the rules of this section.)

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