



September 30, 2012

Submitted electronically: e-ohpsca-er.ebsa@dol.gov

CC:PA:LPD:PR (Notice 2012-02)
Office of Health Plan Standards and Compliance
Employee Benefits and Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Guidance on 90-Day Waiting Period Limitation (DOL Technical Release 2012-02)

To Whom It May Concern:

The U.S. Chamber of Commerce (the “Chamber”) submits these comments in response to the Department of Labor’s Technical Release 2012-02 (“the Technical Release”),¹ which was released in substantially identical form by the Department of Health and Human Services (“HHS”) and the Department of Treasury (“Treasury”).² The Technical Release provides temporary guidance on what the Departments of Labor, HHS and Treasury (“the Departments”) will consider compliance with the 90-day waiting period limitation under Public Health Service Act §2708, as amended by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as “PPACA”).³ This guidance will remain in effect at least through the end of 2014. It explains what constitutes a “waiting period” and which ones do not violate the 90-day limit. The Technical Release outlines generally permissible eligibility conditions, as well as the proper application of certain eligibility conditions and when waiting periods may be imposed on variable hour employees. The Technical Release coordinates with concurrently issued Treasury Department Notice 2012-58,

¹ DOL Technical Release 2012-02, Guidance on 90-day Waiting Period Limitation Under Public Health Service Act §2708. U.S. Department of Labor, August 31, 2012 (available at: <http://www.dol.gov/ebsa/newsroom/tr12-02.html>.) (hereinafter referred to as the “Technical Release”)

² Notice 2012-59, Guidance on 90-day Waiting period Limitation Under Public Health Service Act §2708. U.S. Department of Labor, issued by the Departments of Labor, Health and Human Services, and the Treasury, August 31, 2012, (available at <http://www.irs.gov/pub/irs-drop/n-12-59.pdf>.)

³ The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010).

which provides guidance on determining full-time employee status for purposes of the shared employer responsibility requirements of section 4980H of the Internal Revenue Code.⁴

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 small businesses, as well as issues facing the business community at large. In addition to representing a cross-section of the American business community in 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.

OVERVIEW

The Chamber and our member companies want quality health care to be readily available at an affordable price, a central goal of PPACA. The Chamber has long advocated for transparent health care price, quality and cost information. The Chamber welcomes the guidance contained in the Technical Release and commends the Departments for their efforts to address the challenges that employers will face during the implementation of the PPACA. Regulations implementing the employer-shared responsibility provisions will be one of the most critical components of health care reform for the employer community. We fully appreciate the Departments' reiteration that a waiting period is the period that must be passed before an *otherwise eligible individual* may be covered for benefits under the terms of the plan, as already specifically defined in the Public Health Service Act and the Internal Revenue Code. It is imperative that employers have flexibility in establishing reasonable eligibility and waiting period requirements. It is fair to prohibit requirements "designed to avoid compliance with the 90-day waiting period limitation,"⁵ as long as what is considered "avoidance" is reasonably narrowly construed.

We appreciate that the Departments' assurances that employers can rely on this temporary guidance through the end of 2014. However, we urge the Departments to formalize the guidance contained in this Technical Release. The temporary guidance must be made permanent through the promulgation of future regulations so that employers can have predictability and certainty as soon as possible for the future.

⁴ Notice 2012-58, Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§ 4980H), The Department of Treasury, August 31, 2012, available at <http://www.irs.gov/pub/irs-drop/n-12-58.pdf>. Hereinafter referred to as "Notice 2012-58")

⁵ Technical Release, page 2.

Additionally, we would urge the Departments to continue to work with the employer community on pragmatic solutions. We implore the Departments to appreciate the difficulty faced by employers struggling to comply with the provisions in the PPACA without complete and final regulatory guidance on these complex requirements.

SPECIFIC RECOMMENDATIONS

Definition of “Waiting Period”

As we emphasized in our previous comments on IRS Notice 2011-36, Request for Comments on Shared Responsibility for Employers regarding Health Coverage,⁶ a “waiting period” should be defined as “the period that must pass before coverage or an employee or dependant who is otherwise eligible to enroll can become effective.” It is critical for employers to be able to establish eligibility requirements.⁷ The Chamber appreciates the clarification that “being eligible for coverage 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).”⁸ Additionally, we appreciate the clarification that it is not considered a violation if an employee takes additional time to elect coverage that would otherwise begin on a date satisfying the 90-day waiting period limitation.

We concur as well with the Department’s determination in Example 4 that a cumulative hours of service condition for part time employees is permissible. This will encourage employers to provide coverage for part-time employees, although they are not required to do so by PPACA’s employer shared responsibility provisions.

Variable Hour Employees and Plan Eligibility Conditions

As articulated in our previous IRS Notice 2011-36 comments, the Chamber commends the Departments for its efforts to provide employers flexibility and predictability as they struggle to comply with the PPACA. The compliance challenge is particularly difficult for employers with variable hour employees. We appreciate the Departments’ acknowledgement of this challenge and their pragmatic approach.⁹

We particularly support the Departments’ guidance on the application of the 90-day waiting period limitation to variable-hour employees. The guidance explains that “the plan may take a reasonable period of time to determine whether the employee meets the plan’s eligibility condition, which may include a measurement period that is consistent with the time frame permitted for such determinations under Code section 4980H.”¹⁰

⁶ Internal Revenue Bulletin, Bulletin No. 2011-21, May 23, 2011, Part III. Administrative, Procedural and Miscellaneous, Notice 2011-36, 792-798. (Available at: <http://www.irs.gov/pub/irs-irbs/irb11-21.pdf>)

⁷ Chamber comments on IRS Notice 2011-36, available at http://www.uschamber.com/sites/default/files/comments/USCCcomments_2011-36_IRS.pdf.

⁸ Technical Release, page 2.

⁹ Id.

¹⁰ Notice, page 3.

In future guidance, several clarifications would make compliance with the shared employer responsibility provisions and the 90-day waiting period limitation more straightforward for employers. We ask for clarification on the following four points:

1. Employers should be permitted to use either an up to three-calendar month waiting period or an up to 90-day waiting period.
2. The Departments should allow employers to commence coverage on a standardized period basis (e.g., beginning of the month) following the expiration of the 90-day waiting period.
3. Employers should be permitted to use different eligibility requirements for different categories of employees, as they may do with the length of the measurement and stability periods. The Departments must clarify that such differentiation will not be considered to be discriminating in favor of highly paid employees.
4. The Departments should prescribe a similar monthly equivalent to simplify the 1,200 hour provision for part time employees.

First, while a reference is made in Notice 2012-58¹¹, there is no mention in the Technical Release that the Departments intend to allow the 90-day waiting period limitation to be interpreted as three calendar months. The Notice on the Determination of Full time Employees states:

If an employee is reasonably expected at his or her start date to work full-time, an employer that sponsors a group health plan that offers coverage to the employee at or before the conclusion of the employee's initial three calendar months of employment will not be subject to the employer responsibility payment under §4980H by reason of its failure to offer coverage to the employee for up to the initial three calendar months of employment. For rules on compliance with the 90-day waiting period limitation under PHS Act §2708, see the guidance cited at footnote 1.

Secondly, since insurance typically starts on the first of the month and often on the first day of a new pay period, the Departments should allow employers to start coverage with the first standard period following the 90-day period (either the first of following month or the first pay period following the 90-day period). Without this provision, the 90-day limitation is effectively a 60-day waiting period.

Thirdly, just as the Departments recognize the importance of permitting employers to offer different measurement and stability periods for different categories of workers, the Departments should also permit employers to vary eligibility requirements for different categories of workers.

Finally, it is unclear in the examples set forth how the "1,200 hours of service rule" works and where that number came from. It would appear that this reflects the average hours worked by part time employees assuming that part time employees work on average 50 weeks per year for

¹¹ Notice, pages 2, 8.

24 hours per week. Just as the Departments have suggested in Notice 2012-58 that three months may be used interchangeably to comply with the 90-day period, we ask that employers be permitted to similarly equate this 1,200 hours of service period for part time employees to 12 months.

CONCLUSION

We appreciate the opportunity to provide comments on this Technical Release and urge the Departments to continue to work carefully, pragmatically, and cooperatively with the numerous stakeholders. The Chamber looks forward to continuing to work together with the Departments in the future.

Sincerely,



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