



## Implementing the Affordable Care Act Countdown to 2014



### The 90-Day Waiting Period Limitation

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Section 2708 of the Affordable Care Act (ACA) provides that group health insurers and group health plans may not impose a waiting period on participants if the waiting period is more than 90 days. The Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services have issued temporary guidance to assist both grandfathered and non-grandfathered plans in complying with this standard. Because the guidance issued by the three agencies is substantially identical, this article references only the IRS guidance, published as IRS Notice 2012-59.

The ACA adopts the definition of “waiting period” stated at 42 U.S.C. § 2704(b)(4)). Under existing law, which was not changed by the ACA, the term waiting period means “the period that must pass ... before the individual [who is a potential participant or beneficiary] is eligible to be covered for benefits under the terms of the plan.” Under IRS Notice 2012-59, insurers and employers are advised that the IRS will consider a waiting period to be the time period that must pass before coverage for an employee who is otherwise eligible to enroll under the terms of the plan can become effective.

Under the IRS guidance, the 90-day waiting period limitation applies only if the individual meets applicable eligibility criteria for the plan coverage. For example, if the plan is open to only employees in specified job classifications, then the individual must first be employed in an eligible job classification before the 90-day waiting period limitation is applicable. However, IRS Notice 2012-59 makes clear that a plan’s substantive eligibility conditions may not be a pretext for avoiding compliance with the 90-day waiting period limitation.

Additionally, IRS Notice 2012-59 provides that if the plan permits an employee to select coverage within the 90-day period, compliance with the 90-day waiting period limitation will be considered satisfied, even if coverage does not commence within the 90-day period because of the employee’s timing

in electing coverage. For example, if the employee is hired on January 10, but does not return the necessary enrollment forms until the 89<sup>th</sup> day, a plan’s 90-day waiting period should be viewed as compliant, even if the plan provides that coverage commences on the first day of the month after the employee enrolls in the plan.

The application of the waiting period limitation can be complicated with respect to employees who work variable hours, if the plan has an eligibility criteria requiring the employee must work a specified number of hours of service to qualify for coverage. Under IRS guidance (see IRS Notice 2012-58), plans may use a reasonable measurement period (up to 12 months) to determine whether a variable-hour employee is a full-time employee. After the measurement period, if it is determined that the variable-work employee is a full-time employee, the IRS will not consider the plan as designed to avoid the waiting period limitation if coverage can become effective within the 90 days after the measurement period is concluded.

While IRS Notice 2012-59 provides several fact scenarios with compliance guidance based upon the facts presented, the Notice does not address all of the variances that plans may encounter. Plans should seek assistance from qualified counsel to help assure their compliance with the 90-day waiting period limitation with respect to their specific workforce issues.

The 90-day waiting period limitation is effective for plan years beginning on or after January 1, 2014. Plans may rely upon the guidance provided in IRS Notice 2012-59 through at least 2014.

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Linda Kaiser Conley at [lconley@cozen.com](mailto:lconley@cozen.com) or 215.665.2099.*