

How the ACA Rules For Eligibility Affect Multi-Employer Plans

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**Presented by:
Daniel F. Murphy, Jr.
PUTNEY, TWOMBLY, HALL & HIRSON LLP
521 Fifth Avenue
New York, NY 10175
(212) 682-0020
dmurphy@putneylaw.com**

ACA 90-Day Waiting Period Limitation

- “A group health plan and a health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in section 300gg–3 (b)(4) of this title) that exceeds **90 days**.”
 - 42 U.S.C. § 300gg-7
- The term “**waiting period**” means, with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan.
 - 42 U.S.C. § 300gg-3(b)(4)

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- The 90-day waiting period limitation applies to all grandfathered and non-grandfathered group health plans and group health insurance coverage for plan years beginning on or after **January 1, 2014**.

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- On March 21, 2013, the Department of the Treasury, the Department of Labor and the Department of Health and Human Services jointly issued proposed rules on the “Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act.”
 - 26 CFR Part 54; 29 CFR Part 2590; 45 Parts 144, 146 and 147

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- The 90-day waiting period limitation prohibits eligibility conditions that are based solely on the lapse of a time period that are more than 90 days.
 - Note: certain permissible eligibility conditions such as whether an employee has a specified number of hours of service per period (*e.g.*, 30 hours) for part-time classification necessarily require the passage of time in order to determine whether the substantive eligibility condition has been met. Such conditions are not based solely on the lapse of a time period.
- Other eligibility conditions are generally permissible, unless the condition is designed to avoid compliance with the 90-day waiting period limitation.

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- Examples of permissible eligibility conditions:
 - Being in an certain job classification
 - Part-time vs. Full-time
 - Security Officer vs. Security Supervisor
 - Achieving job-related licensure requirements
 - Meeting sales goals
 - Exceeding a commission threshold
 - Buy-in provisions, hours banks

 - *Cumulative hours of service?*
 - *Probationary period?*

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- Cumulative Service Requirements:
 - If eligibility is conditioned on an employee's having completed a number of cumulative hours of service, the eligibility condition is not considered to be designed to avoid compliance with the 90-day waiting period limitation if the requirement does not exceed 1,200 hours.
 - If a plan has a 1,200 hour cumulative service requirement, the plan must offer coverage by the 91st day after the employee satisfies the 1,200 hour requirement.

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- Probationary Period:
 - Is a contractually fixed probationary period (*e.g.*, 6 months, 9 months etc.) a substantive requirement other than the mere passage of time?
 - The proposed rules and guidance issued to date do not specifically address this issue
 - The more the probationary period is simply just a period of time the more likely it will violate the 90-day limitation. However, the more the probationary period is used to evaluate employees for permanent/regular employment the more likely it will be viewed as a condition that is not based solely on the passage of time and, thus, permissible.

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- Recommendations:
 - Employers with Collective Bargaining Agreements that have waiting periods that violate the 90-day rule should negotiate compliance with the rule.
 - For example, negotiate to keep the longer waiting period but add the following language: “three (3) months or such shorter period as may be required by law.”

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- Recommendations:
 - There may be a disconnect between the group of individuals to whom the plan will be obligated to offer coverage and the group of individuals for whom an employer is required to make contributions to the fund under the terms of a Collective Bargaining Agreement. The fund trustees must take steps to ensure that these groups are coextensive because they as the plan sponsor are obligated to comply with the 90-day requirement.
 - For example, amend the trust agreement to require employers to make contributions for any individuals for whom the plan is obligated to offer coverage notwithstanding any contrary Collective Bargaining Agreement provision