May 20, 2013

Via Electronic Submission: http://www.regulations.gov

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

Re: Waiting Periods--comments on NPRM on Section 2708 of the Public Health Service Act

The Society for Human Resource Management (SHRM) is pleased to provide comments in connection with the notice of proposed rulemaking issued by the Departments of Labor, Health & Human Services and Treasury regarding section 2708 of the Public Health Service Act, which was incorporated by reference into ERISA and the Internal Revenue Code under the Patient Protection and Affordable Care Act, as amended (ACA).

Our comments are limited to issues that are of the highest concern to our members, namely that the Departments have interpreted the 90 day limit on waiting periods under Section 2708 too narrowly. The vast majority of our members work within organizations that currently offer coverage to employees starting with the first day of the month following 90 days of employment (or the first day of the third month), or the first payroll period following some waiting period. Thus, many small and medium employer plans would be out of compliance with the approach taken in the proposed regulations that would limit waiting periods to no more than 90 calendar days.
Existing practice reflects a reasonable approach taking into consideration HR and payroll systems, insurance company requirements, and the need for consistent employee communications and a controlled process. Most small and medium size employers simply do not have the staff nor resources to undertake the changes to processes, systems, communications, and other functions that would be needed to switch from current practice to a strict 90 calendar day waiting period at the same time as significant other changes must be implemented to comply with different ACA provisions taking effect in 2014.

Under current and past practice, employers often adopt a “first of the month” following 90 days eligibility rule to coincide with employment probationary periods which are designed to help determine whether the employment relationship works for both the employer and the employee. Decreasing a probationary period to two months (and adopting a waiting period that runs to the first of the month following two months of employment) simply to accommodate an accelerated eligibility for health coverage does not make sense from an overall HR perspective, and further would undermine employer attempts to adopt best practices in human resource management.

Further, a three-month waiting period also helps prevent against adverse selection where an individual accepts a position solely in order to obtain health insurance due to a medical condition which could impose unfair risk on an employer. From an administrative perspective, this eligibility approach allows for a single entry date each month that conforms to insurance carrier requirements, and facilitates efficient payment of premiums and collection of employee contributions. We are concerned that disrupting current practices could actually result in more harm to newly eligible employees as implementation is almost always accompanied by “glitches.”

While we appreciate the significant efforts of the Departments in issuing this guidance, we urge a transition period or enforcement safe harbor for the first plan year of applicability of section 2708. With the many changes facing employers in 2014, transition relief for section 2708 is appropriate and needed.

We do not believe that Congress intended, in adopting Section 2708, to disrupt current practice or to require employers to extend coverage to probationary employees. The Departments have clearly demonstrated flexibility in interpreting provisions of the ACA to accommodate sound practices which do not unduly harm workers. The availability of individual coverage on exchanges suggests that there should be diminished urgency to offering coverage via the workplace. Also, the Treasury Department and IRS have specifically recognized, in the context of rules surrounding employer shared responsibility (Section 4980H of the Code), that granting some leniency to the first of the month following 90 days after an employee has met eligibility requirements makes sense. The Section 2708 regulations should do the same and require plans to comply as of the first day of the month following 90 days.
SHRM appreciates the clarification in the proposed regulations that would allow an employer to impose a cumulative hours of service eligibility requirement of up to 1200 hours (preceding a 90 day waiting period) without violating Section 2708 as well as the ability to integrate the measurement period/stability period safe harbor as an eligibility condition that may be followed by a 90 day waiting period, subject to certain conditions. These reasonable interpretations will assist employers in implementing the ACA without unduly disrupting sound business practices.

Again, SHRM appreciates the opportunity to comment on this NPRM. Please feel free to contact us if you have any questions about our comments.

Respectfully submitted,

Michael P. Aitken  
Vice-President  
Government Affairs