

2,080 hours (although for this purpose not more than 40 hours per week may be used); and

(iv) Adding the quotient determined under paragraph (e)(3)(iii) of this section to the number determined under paragraph (e)(3)(i).

(4) *Rounding.* For purposes of paragraph (e)(3)(iv) of this section, all fractions are disregarded. For instance, a figure of 50.9 is deemed to be 50.

(5) *Employers not in existence in the preceding year.* In the case of an employer that was in existence for less than the entire preceding calendar year (including an employer that was not in existence at all), a determination of the average number of employees that the employer employs is based on the average number of employees that it is reasonably expected the employer will employ on business days in the current calendar year.

(6) *Scope of the term "employer".* For purposes of this paragraph (e), employer includes any predecessor of the employer. In addition, all persons treated as a single employer under section 414(b), (c), (m), or (o) of the Internal Revenue Code are treated as one employer.

(7) *Special rule for multiemployer plans.* (i) With respect to the application of a rule in this part to a multiemployer plan (as defined in section 3(37) of ERISA), each employer with at least one employee participating in the plan is considered to employ the same average number of employees. That number is the highest number that results by applying the rules of paragraphs (e)(1) through (6) of this section separately to each of the employers.

(ii) The rules of this paragraph (e)(7) are illustrated by the following example:

Example. (i) *Facts.* Twenty five employers have at least one employee who participates in Multiemployer Plan *M*. Among these 25 employers, Employer *K* has 51 employees, determined under the rules of paragraphs (e)(1) through (6) of this section. Each of the other 24 employers has fewer than 50 employees.

(ii) *Conclusion.* With respect to the application of a rule in this part to *M*, each of the 25 employers is considered to employ 51 employees.

Dated: November 24, 2004.

Mark B. McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 2, 2004.

Tommy G. Thompson,

Secretary, Department of Health and Human Services.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

45 CFR Part 146

RIN 0938-AL64

Request for Information on Benefit-Specific Waiting Periods Under HIPAA Titles I & IV

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: Request for information.

SUMMARY: The Departments invite comments about benefit-specific waiting periods. This solicitation is to ensure that the public can provide input into any criteria used to determine whether a benefit-specific waiting period utilized by a group health plan or issuer is a preexisting condition exclusion under HIPAA. The Departments are requesting this information to help decide whether to issue any guidance on this question, and the content of any such guidance.

DATES: The Departments request that comments be submitted on or before March 30, 2005.

ADDRESSES: Written comments should be submitted with a signed original and three copies (except for electronic submissions) to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments.

Comments to the IRS can be addressed to: CC:PA:LPD:PR (REG-130370-04), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

In the alternative, comments may be hand-delivered between the hours of 8 a.m. and 5 p.m. to: CC:PA:LPD:PR (REG-130370-04), Courier's Desk, Internal Revenue Service, 1111

Constitution Avenue, NW., Washington DC 20224.

Alternatively, comments may be transmitted electronically via the IRS Internet site at: www.irs.gov/regs.

Comments to the Department of Labor can be addressed to: U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room C-5331, Washington, DC 20210, *Attention:* Benefit-Specific Waiting Period Comments.

Alternatively, comments may be hand-delivered between the hours of 9 a.m. and 5 p.m. to the same address. Comments may also be transmitted to the Department of Labor by e-mail to: E-OHPSCA.EBSA@dol.gov.

Comments to HHS can be submitted as described below:

In commenting, please refer to file code CMS 2150-NC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of three ways (no duplicates, please):

Electronically. You may submit electronic comments to <http://www.cms.hhs.gov/regulations/ecomments> (attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word).

By mail. You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2150-NC, P.O. Box 8017, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786-7195 in advance to schedule your arrival with one of our staff members. Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201; or 7500 Security Boulevard, Baltimore, MD 21244-1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and

retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW., Washington, DC from 9 a.m. to 4 p.m.

All submissions to the Department of Labor will be open to public inspection and copying in the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC from 8:30 a.m. to 4:30 p.m.

All submissions timely submitted to HHS will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters for the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786-7195.

FOR FURTHER INFORMATION CONTACT:

Dave Mlawsky, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at 1-877-267-2323 ext. 61565; Amy Turner, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335; or Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at (202) 622-6080.

SUPPLEMENTARY INFORMATION:

Customer Service Information

To assist consumers and the regulated community, the Departments have issued questions and answers concerning HIPAA. Individuals interested in obtaining copies of Department of Labor publications concerning changes in health care law may call a toll free number, 1-866-444-EBSA (3272), or access the publications on-line at www.dol.gov/ebsa, the Department of Labor's Web site. These regulations as well as other information on the new health care laws are also available on the Department of Labor's interactive Web pages, *Health Elaws*. In addition, CMS's publication entitled "Protecting Your Health Insurance Coverage" is available by calling 1-800-633-4227 or on the Department of Health and Human Services' Web site (www.cms.hhs.gov/hipaa1), which includes the interactive Web pages, HIPAA Online. Copies of the HIPAA regulations, as well as notices and press

releases related to HIPAA and other health care laws, are also available at the above-referenced Web sites.

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted on August 21, 1996 (Pub. L. 104-191). HIPAA amended the Internal Revenue Code of 1986 (Code), the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act (PHS Act) to provide for, among other things, improved portability and continuity of health coverage in the group and the individual insurance markets, including group health plan coverage provided in connection with employment. Health coverage is regulated in part by the federal government, through the Code, ERISA, the PHS Act and other federal provisions, and in part by the states.

The portability, access, and renewability provisions of HIPAA are set forth in Subtitle K of the Code, Part 7 of Subtitle B of Title I of ERISA, and Title XXVII of the PHS Act (referred to below as the HIPAA portability provisions). The HIPAA portability provisions are designed to improve the availability and portability of health insurance coverage by limiting exclusions for preexisting conditions and providing credit for prior coverage, guaranteeing availability of health coverage for small employers, prohibiting discrimination against employees and dependents based on health status, and guaranteeing renewability of health insurance coverage for employers and individuals. The HIPAA portability provisions also include rules that guarantee access to individual health coverage for certain people who lose their group coverage. These provisions also set forth other requirements imposed on health insurance issuers.

The Departments issued interim regulations published in the **Federal Register** on April 8, 1997 to carry out these provisions. Today, elsewhere in this issue of the **Federal Register**, the Departments are publishing final regulations governing the HIPAA portability requirements. Also being published is a set of proposed regulations addressing additional and discrete issues with an invitation for comments.

Included in today's final regulations is an example illustrating that a plan providing first-day coverage for other medical/surgical benefits but imposing a waiting period on benefits for pregnancy is imposing a preexisting condition exclusion. Because HIPAA prohibits imposing a preexisting condition

exclusion on pregnancy benefits, the final regulations clarify that this plan provision is impermissible. Several comments (including those of several state insurance commissioners' offices) have asked the Departments to clarify that a preexisting condition exclusion would also include any benefit-specific waiting period or other temporary exclusion of specific benefits. Essentially, these comments argue that some plans and issuers use benefit-specific waiting periods that are, in effect, preexisting condition exclusions that do not comply with HIPAA's statutory limits. The rationale for this argument is that these exclusion periods are likely to affect principally individuals who had a condition before the first day of any coverage under the plan or health insurance coverage. In addition, other comments suggest that these exclusions violate HIPAA's nondiscrimination provisions. Nonetheless, the comments do not suggest that it would be impermissible to impose a waiting period for all benefits available under the plan or to impose permanent exclusions on specific benefits (that is, these types of exclusions would not be considered a preexisting condition exclusion nor would they be considered discrimination based on health status).

Comments

The Departments welcome further comments on this issue of benefit-specific waiting periods. In particular, the Departments are interested in comments reflecting the experience of group health plans, health insurance issuers, states, individuals, and other interested parties with waiting periods on specific benefits such as tonsillectomies, hernia repairs, and organ transplants. Rules under consideration might also affect plans that cover only emergency services for an initial period; comments on these types of provisions are also welcome. One possible standard for determining whether a benefit-specific waiting period is operating as a preexisting condition exclusion is whether the waiting period is likely to affect principally individuals who had a condition before the first day of any coverage under the plan or health insurance coverage. Several factors affect the application of such a standard to a particular plan's waiting period, including the relevant population considered to determine whether the impact is likely to affect principally individuals who had a condition before the first day of coverage, the condition to which a plan's waiting period is applied, and the length of a plan's

waiting period (because, generally, as the waiting period becomes longer, a greater number of individuals affected will not have had the condition before enrolling). The Departments welcome comments on this standard and these factors, and also invite suggestions for alternative standards.

In order to quantify the costs and benefits associated with an interpretation that certain benefit-specific waiting periods function as preexisting condition exclusions, the Departments are interested also in comments, studies, surveys, or reports on the prevalence of such exclusions in group health coverage and individual health insurance coverage, what types of conditions or treatments are subject to benefit-specific waiting periods, the duration of such periods, and alternative cost-control mechanisms that may be available.

Signed at Washington, DC, this 8th day of December, 2004.

Nancy J. Marks,

*Associate Chief Counsel/Division Counsel,
Tax Exempt and Government Entities,
Internal Revenue Service, Department of the
Treasury.*

Signed at Washington, DC, this 9th day of December, 2004.

William F. Sweetnam, Jr.,

*Benefits Tax Counsel, Department of the
Treasury.*

Signed at Washington, DC, this 1st day of December, 2004.

Ann L. Combs,

*Assistant Secretary, Employee Benefits
Security Administration, U.S. Department of
Labor.*

Dated: November 24, 2004.

Mark B. McClellan,

*Administrator, Centers for Medicare &
Medicaid Services.*

Dated: December 2, 2004.

Tommy G. Thompson,

*Secretary, Department of Health and Human
Services.*

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