

Bad Things Can Happen When Employers Waive Benefit Waiting Periods

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An integral part of any group health insurance plan is the waiting period. The waiting period is the period of time that must pass before coverage can begin for an employee or dependent who is otherwise eligible to enroll in the plan. As a general rule, employers are free to impose any waiting period requirement they want as long as it is applied consistently and it doesn't violate other applicable laws (*e.g.*, the prohibition against discrimination).

Although the federal government doesn't prescribe waiting period requirements, the federal law known as the Employee Retirement Income Security Act ("ERISA") is very clear that plan administrators (*i.e.*, employers) must administer their health insurance program consistently and in accordance with the specific plan terms, including waiting period requirements. These laws apply to all insurance programs, fully-insured and self-funded alike, and inasmuch as they are federal laws, they preempt contrary state laws.

Notwithstanding the general law against the subjective administration of health insurance benefits, many employers still arbitrarily administer their waiting periods by imposing them on some employees and waiving them for others. This is inconsistent with ERISA's objectivity requirement and it places the employer at serious risk of liability, including the possibility that other employees could demand equal preferential treatment thus invalidating the waiting period altogether.

If a company is dissatisfied with its waiting period, it is free to change it. While this is the preferred way to deal with waiting period issues, many employers are unwilling to modify their waiting period for all plan participants so they continue waiving their waiting period requirements on a case-by-case basis. Because an employer's decision to waive a waiting period undermines the integrity of the employer's plan (and may constitute a violation of the employer's fiduciary obligation under federal law), I strongly recommend against it. At a bare minimum, employers should consult with competent legal counsel before going down the dangerous road of waiting period waivers. Nonetheless, if after such consultation, the employer still desires to waive the waiting period, here are just a few issues that must be considered:

1. Waiving a waiting period for some employees and not others can expose the employer to civil liability (and in some cases, criminal liability and penalties). Additionally, such action can expose the involved individuals to personal liability for losses caused to the plan.
2. Arbitrary administration of benefit waiting periods can invalidate the waiting period altogether or expose the employer to claims for health benefits that would otherwise be unavailable to the employee and his or her dependents.
3. Arbitrary administration of waiting periods can result in employers extending benefits to ineligible employees and their dependents. In the event of a claim

for benefits when the employer has extended eligibility to an ineligible participant, an insurer most often will refuse to recognize such an informal plan modification and deny the claim. This could leave the employer financially responsible to pay the claims which could be hundreds of thousands of dollars.

4. Inconsistent benefits administration hurts employee morale and can support claims of employee discrimination

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