ACAP Guide to Guaranteed Issue and Special Enrollment Periods

Introduction

The Patient Protection and Affordable Care Act (ACA) established a market-wide policy of guaranteed availability, requiring "each health insurance issuer that offers health insurance coverage in the individual or group market in a state [to] accept every employer and individual in the state that applies for such coverage."[1] In 2014, The Center for Consumer Information and Insurance Oversight (CCIIO) issued guidance interpreting guaranteed availability to mean that all qualified health plans (QHPs) offered through health insurance Marketplaces must also be available to individuals seeking to purchase these plans in the broader market, called "off-Marketplace."[2] This interpretation requires QHP issuers to understand any differences between Marketplace and off-Marketplace rules.

Though guaranteed availability ensures individuals' eligibility for health insurance coverage, it does not mean that they may enroll year-round. The ACA establishes enrollment periods at specific times during the year, or following certain "life events." The ACA sets an annual open enrollment period (specific dates vary by year); CCIIO has ruled that open enrollment periods be the same both on- and off-Marketplace.[3]

The ACA also establishes a number of "special enrollment periods" (SEPs) which enable individuals to enroll in the Marketplaces outside of open enrollment under certain circumstances. However, it did not specify special enrollment periods for plans operating off-Marketplace. Because insurance markets are governed largely by states, there was potential for on-Marketplace SEPs to differ from those available off-Marketplace. While many organizations have created resources and toolkits to help individuals and insurers understand the triggering events that create special enrollment periods for consumers interested in Marketplace health plans, specific information regarding SEPs in the off-Marketplace individual market is sparse.

The research informing this brief establishes considerable overlap between SEPs for on-Marketplace QHPs and off-Marketplace individual insurance coverage. This brief will

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201 (2010)

[2] *Exchange and Insurance Market Standards for 2015 and Beyond; Final Rule* clarified a requirement that all products sold on the Marketplaces be sold off the Marketplaces as well. Section 147.104a states that "Section 2702 of the PHS Act generally requires a health insurance issuer that offers health insurance coverage in the individual or group market in a state to offer coverage to and accept every individual or employer in the state that applies for coverage." Footnote 14 to this paragraph states that "Although the Affordable Care Act creates a limited exception to the guaranteed availability requirements for qualified individuals purchasing coverage through an Exchange, *if an individual declines or is ineligible to enroll through an Exchange and seeks enrollment directly with the issuer, issuers of coverage subject to the guaranteed availability requirements of section 2702 of the PHS Act must accept every individual in the State that applies for such coverage unless an exception applies*." [Emphasis added.].

[3] Department of Health and Human Services. "Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015." 11 March 2014. https://www.federalregister.gov/articles/2014/03/11/2014-05052/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2015#h-87

identify which SEPs are shared both on- and off-Marketplace and also highlight a select few that apply exclusively to on-Marketplace QHP coverage.

Common Special Enrollment Periods for Individual Health Insurance

Qualifies as Special Enrollment Period BOTH On- and Off-Marketplace
• Getting married • Having a baby (Note that becoming pregnant does not trigger a special enrollment period) • Adopting a child or placing a child for adoption of foster care • Losing job-based coverage for any reason, including resigning, getting laid off, or getting fired • Losing coverage through a divorce • COBRA coverage ending (but not cancelling it yourself before it expires) • Aging off a parent's plan when you turn 26 • Losing eligibility for Medicaid or the Children's Health Insurance Program (CHIP) • Permanently moving outside your plan's coverage area • Leaving incarceration • For people already enrolled in Marketplace coverage: Having a change in income or household status that affects eligibility for premium tax credits or cost-sharing reductions
Qualifies as Special Enrollment Period On-Marketplace, But Not Off-Marketplace (Absent State Law to the Contrary)
• Gaining Citizenship or lawful Presence • Gaining or continuing status as a member of an Indian tribe or an Alaska Native shareholder.[4] • "Tax Season" SEP for individuals who pay a tax penalty for non-coverage in 2014 and want to purchase coverage for 2015 by April 30, 2015. • Consumers who are "in line" to purchase coverage, meaning that they attempted to buy coverage before the Open Enrollment Deadline but were unable to complete the process. An SEP was granted in 2014 and 2015 but guidance has not been released regarding "in-line" SEPs for future years.

Option for Additional State Special Enrollment Periods

The SEPs described in this brief reflect those that have been defined by federal regulations for both state-based Marketplaces (SBM) and federally-facilitated Marketplaces (FFM), but in final rules on SEPs, the Department of Health and Human Services wrote that, "states may create special enrollment periods or limited open enrollment periods in addition to

[4] For Marketplace plans, "members of federally recognized Indian tribes and Alaska native shareholders can sign up for or change plans once per month throughout the year," according to healthcare.gov

those established by this final rule."[5] State Departments of Insurance may also have defined SEPs for insurance markets before the ACA was enacted, or for off-Marketplace insurance. The SEPs described below offer a baseline, but insurers should check state laws and regulations to determine whether additional SEPs are offered in their particular states**.**

<u>SEPs Available On- and Off-Marketplace</u>

Rules governing enrollment periods for the entire health insurance market — both Marketplace and non-Marketplace plans — can be found at §147.104. In that section, the law states that SEPs must be granted for "qualifying events as defined under section 603 of the Employee Retirement Income Security Act (ERISA) of 1974, as amended. These special enrollment periods are in addition to any other special enrollment periods that are required under federal and state law."[6]

The section of ERISA in question highlights the circumstances in which an individual would be eligible to purchase COBRA continuation coverage – death of employee, termination or reduction of working hours, divorce or legal separation, eligibility for Social Security benefits, dependent child ceasing to be a dependent child under plan requirements, or declaration of personal bankruptcy.[7] In other words, if an event could trigger COBRA continuation coverage eligibility, it could also trigger a special enrollment period in the individual market.

The original language used in the law, paired with subsequent HHS regulations, has also produced SEPs for Marketplace plans that fall into three main categories: Life Changes, Loss of Coverage and Complex Cases.

Life Changes: Major life changes may prompt a special enrollment period in which an individual would have a time window to enroll in coverage after the life-changing event. For life-changing events that can be anticipated ahead of time, consumers can contact their Marketplace in the months prior to the triggering event to select a new plan and avoid any gap in coverage

- **Change in household size:** This category includes individuals who got married, had a child, got divorced and lost their insurance, adopted a child or had a child placed in their care for foster care, had a death in the household, or had a dependent age out of coverage by turning 26.
- **Change in address:** This category includes individuals who moved outside of the coverage area for their health plan.
- **Change in eligibility status**: This category includes individuals who experienced a change in their income that affected their eligibility for financial assistance or a change in income that altered the amount of financial assistance owed to them.

[5] Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review; Final Rule. 78 Fed. Register 13406, 13417-13418 (February 27, 2013) https://www.federalregister.gov/articles/2013/02/27/2013-04335/patient-protection-and-affordable-care-act-health-insurance-market-rules-rate-review
[6] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 147.104 (2010)
[7] Public Law 93-206 [As Amended Through P.L. 113-97, Enacted April 7, 2014]. http://legcounsel.house.gov/Comps/ERISA_CMD.pdf

Loss of Coverage: Certain individuals who lose their existing health coverage will also qualify for a special enrollment period.

- **QHP decertification:** If an individual is enrolled in a QHP that is decertified, the individual will have the opportunity to enroll in a different plan.
- **Loss of minimum essential coverage:** Under 26 U.S. Code § 5000A, "minimum essential coverage" is defined as coverage through government sponsored programs, employer-sponsored plans, plans in the individual market, grandfathered health plans and other coverage, such as recognized state health benefits risk pools. This category could include individuals who have lost their eligibility for Medicaid, employer coverage, CHIP or COBRA. For instance, an individual who is enrolled in Medicaid may take on a new job that results in an income level too high for Medicaid coverage. This person would then be given an SEP to enroll in a QHP.[8] This category does not include individuals who lost their coverage after failing to pay premiums on a timely basis, including COBRA premiums.

Complex Cases: There are several other, less-common scenarios in which an individual may be eligible for an SEP. An HHS memo[9] from March 2014 describes some of these situations:

- **Exceptional circumstances:** "A consumer faces exceptional circumstances as determined by CMS, such as a natural disaster, medical emergency, and planned system outages that occur on or around plan selection deadlines." A July 2015 memo from CMS confirmed that victims of domestic abuse and spousal abandonment will be granted a special enrollment period under the exceptional circumstances clause.[10]
- **Misinformation, misrepresentation or inaction:** "Misconduct by individuals or entities providing formal enrollment assistance (like an insurance company, Navigator, certified application counselor, Call Center Representative, or agent or broker) resulted in one of the following:
    - A failure to enroll the consumer in a plan
    - Consumers being enrolled in the wrong plan against their wish
    - The consumer did not receive advanced premium tax credits or cost-sharing reductions for which they were eligible."

[8]In DHHS' 2015 Notice of Benefit and Payment Parameters (BPP rule) for 2016 Final Rule, an SEP was created for individuals in non-Medicaid expansion states with income below 100 percent of the federal poverty level that have a change in income or household size that brings then above the FPL. Prior to the creation of this SEP, these individuals would have been forced to wait until the next open enrollment period to purchase a Marketplace plan.

[9] "Guidance for Issuers on Special Enrollment Periods for Complex Cases in the Federally-facilitated Marketplace after the Initial Open Enrollment Period." CMS. 26 March 2014. https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/complex-cases-SEP-3-26-2014.pdf

[10] "Updated Guidance on Victims of Domestic Abuse and Spousal Abandonment." CMS. 27 July 2015. https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Updated-Guidance-on-Victims-of-Domestic-Abuse-and-Spousal-Abandonment_7.pdf

- **Enrollment error:** "Consumers enrolled through the Marketplace, but the insurance company didn't get their information due to technical issues." In 2015, this included auto re-enrollment issues, in which consumers were auto-re-enrolled into the incorrect plan.[11]
- **Immigration status system error:** "An error in the processing of applications submitted by immigrants caused the consumer to get an incorrect eligibility result when they tried to apply for coverage."

On-Marketplace Special Enrollment Periods

The SEPs described above are applicable to all individual insurance coverage, which includes on-Marketplace and off-Marketplace plans. But how, if at all, do SEPs differ for individuals seeking to purchase coverage on- or off-Marketplace?

This question came up during HHS' period of public comment on the draft rules and regulations governing special enrollment periods. There are more SEPs that apply on-Marketplace than off-Marketplace for individual coverage. With the exception of three specific triggering events, HHS stated that "limited open enrollment periods are the same inside and outside the Exchange in the individual and the small group market."[12] The three highlighted exceptions, which detail SEPs exclusively available on-Marketplace, are:

1) "An individual, who was not previously a citizen, national, or lawfully present individual gains such status." A special enrollment period prompted by a change in immigration status is unique to on-Marketplace plans, because it is related to specific Exchange eligibility criteria.
2) "An Indian, as defined by section 4 of the Indian Health Care Improvement Act, may enroll in a QHP or change from one QHP to another one time per month." The special rule for federally recognized tribes and Alaska natives applies only to individuals seeking a Marketplace plan, because it is related to specific Exchange eligibility criteria. Members of either group have no limited enrollment period and can change QHP plans as often as once a month.
3) "A qualified individual or enrollee demonstrates to the Exchange, in accordance with guidelines issued by HHS, that the individual meets other exceptional circumstances as the Exchange may provide."

Since the final rule quoted above was released, CMS has also enacted SEPs in the face of unexpected obstacles or faulty technology. In 2014 and 2015, CCIIO created an SEP for individuals who tried to enroll during the open enrollment period but were unable to complete the application process by the deadline. Last year, an SEP was created for these "in line" individuals to complete their applications within 15 days of the close of the open enrollment

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[11] "Fact Sheet: Helping Consumers Enroll in Special Enrollment Periods Arising from Auto Re-enrollment: Issues during the 2015 Open Enrollment Period." CMS. https://marketplace.cms.gov/technical-assistance-resources/bulletin-sep-for-auto-reenrollment.pdf

[12] "Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, Final Rule." HHS. 27 February 2013. https://www.federalregister.gov/articles/2013/02/27/2013-04335/patient-protection-and-affordable-care-act-health-insurance-market-rules-rate-review

period. This year, the SEP was only available for seven days after the close of open enrollment.[13]

In February 2015, CMS announced an SEP for eligible consumers to enrollment between March 15 and April 30. This SEP is available to individuals and families who were not covered in 2014 and, "were unaware or didn't understand the implications of this new requirement to enroll in 2015 health insurance coverage."[14] This SEP will likely only be available in 2015, as it is the first year that financial penalties are assessed for non-coverage, but it demonstrates CMS' willingness to create new SEPs as needed. Both the "in-line" SEP and tax season SEP are intended to help consumers in the early years of the ACA as they become more accustomed to open enrollment period timelines and new tax penalty implications of non-coverage.

Both the in-line SEP and the tax season SEP fall under the "exceptional circumstances" provision and are therefore exclusively available to on-Marketplace plans.

Conclusion

For issuers participating in Marketplaces, understanding the variety of ways that potential enrollees gain eligibility for an SEP is critical to meeting enrollment goals. Though measuring total SEP eligibility is difficult, the Urban Institute estimates that as many as 6.7 million people were likely eligible for an SEP at some point in 2014, with younger populations being more likely to qualify.[15] The vast majority of SEPs are available for subsidized coverage on-Marketplace and unsubsidized off-Marketplace coverage. A select few enrollment periods — those applicable to members of federally recognized Indian tribes, individuals who experience a change in citizenship status or income and those subject to exceptional circumstances like the in-line consumers and those who had not known about the tax penalty — only exist for consumers shopping for on-Marketplace plans.

[13] "Guidance for Issuers on People "In Line" for the Federally-facilitated Marketplace at the end of the Initial Open Enrollment Period." CMS. 26 March 2014. http://www.cms.gov/cciio/Resources/Regulations-and-Guidance/Downloads/in-line-SEP-3-26-2014.pdf

[14] "CMS Announces Special Enrollment Period for Tax Season." CMS. 20 February 2015. http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-02-20.html

[15] "Special Enrollment Periods in 2014: A study of Select States" Urban Institute. February 2015. http://www.urban.org/UploadedPDF/2000122-Special-Enrollment-Periods-in-2014.pdf