



NEW REGULATIONS DEFINE “GRANDFATHERED STATUS”

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On June 14, 2010 the United States Health & Human Services, Department of Labor and Department of Treasury issued interim rules further defining “grandfathered status” for purposes of the Patient Protection & Affordable Care Act (the “Act”). These rules are important because several of the new health care reform provisions in the Act are not applicable to “grandfathered plans.” The Act defines a grandfathered plan as simply a plan that was in place on March 23, 2010; however, it was silent on what changes a plan could make and still retain its grandfathered status. The new rules released Monday give us initial guidance on this issue. Below is a summary of the new rules and how we anticipate they will impact employer-sponsored group health plans. Note, the impact of the new rules on individual plans is beyond the scope of this summary.

1. What Actions Jeopardize My Grandfathered Status?

Changing Carriers. Subject to an exception for fully-insured collectively bargained plans, employers who change carriers lose their grandfathered status. The new rules provide that any new policy, certificate or contract of insurance entered into after March 23, 2010 is not a grandfathered plan.

Decreasing Employer Contributions By More than 5%. An employer who decreases the percentage it is paying toward any tier of coverage under a benefit package by more than 5% loses the grandfathered status. It appears, however, that the grandfathered status is lost for the specific benefit package as the regulations provide that the grandfathered status rules apply separately to each benefit package made available under the group health plan. Note, if you decrease any tier of coverage (single, family, employee plus spouse, etc) within a benefit package by more than 5% the entire benefit package loses its grandfathered status.

Certain Plan Design Changes. Every year employers consider a number of plan design changes. Many of these will now implicate the grandfathered status of the employer’s plan. The following design changes will result in a loss of the plan’s grandfathered status:

- Eliminating all or substantially all benefits to diagnose or treat particular conditions. For example, eliminating infertility benefits.
- Making any increase (measured from 3/23/10) to a percentage cost-sharing requirement such as co-insurance. For example, raising co-insurance from 20% to 30%.
- Increasing a fixed-amount cost-sharing requirement other than a co-payment, such as a deductible or out of pocket maximum, by more than a "maximum percentage increase" which is defined by the regulations as medical inflation plus 15 percentage points.
- Increasing a fixed amount co-payment by more than the greater of (a) the "maximum percentage increase" or (b) \$5.00 times medical inflation plus \$5.00.
- Adding an annual limit that is lower than the lifetime limit in place as of March 23, 2010, adding an annual limit if you have no annual or lifetime limits currently in place, or lowering the amount of an existing annual limit in place on March 23, 2010.

2. What Changes Will Not Jeopardize My Grandfathered Status.

Under the interim rules, the following changes can be made without jeopardizing the grandfathered status.

Adding New Benefits or Participants. Plans can elect to add new benefits without jeopardizing their grandfathered status. Additionally, plans can add new participants, such as new employees, employees at open enrollment and family members without losing their grandfathered status.

Premium Increases. Any increases in the premium imposed by the self-insured plan or the insurance carrier for fully-insured plans will also not jeopardize the plan's grandfathered status, provided the employer contribution is not decreased by more than 5 percentage points.

Changing Plan Administrators. Under the current rules, self-insured plans may change plan administrators without losing their grandfathered status.

Complying with State & Federal Laws. Any changes you make in response to State or Federal requirements or to voluntarily comply with the health care reform legislation will not jeopardize your grandfathered status.

Employers who are currently implementing design changes to comply with the Mental Health Parity & Addiction Equity Act ("MHPAEA") will not jeopardize their grandfathered status by making these changes. However, employers who seek a cost exemption under the MHPAEA in subsequent plan years or who have non-federal

government health plans and later opt out of the MHPAEA may lose their grandfathered status if they later try and decrease their mental health coverage.

The rules prohibit actions that are attempts to circumvent the rules or could turn a plan's grandfathered status into a commodity. Therefore, employers considering creative ways to avoid losing their grandfathered status while still making some of the prohibited design changes noted above should consult their benefits advisors before implementing these measures.

3. What Impact Does Dropping or Adding a Benefit Option Have?

The new rules state that they apply separately to each "benefit package." That would seem to indicate that if you eliminated a benefit package, it wouldn't necessarily jeopardize the grandfathered status of the other benefit packages you offer. However, the rules also state that if you do not have a bona fide employment reason for eliminating a benefit option and you eliminate that option and move those employees to another benefit option, you jeopardize the grandfathered status of the benefit option those employees were moved to. We believe additional clarification is needed to address this issue.

Employers who want to add a benefit option, such as a high deductible health plan, should also look for further guidance. The new rules do not specifically address this issue but as mentioned above state that the rules apply separately to each benefit package. That seems to mean that the new benefit option will be considered a non-grandfathered plan but the other benefit options in place on March 23, 2010 will continue to be considered grandfathered plans.

4. What Happens If I Made Design Changes After March 23, 2010 Because of An Upcoming Renewal Date or Plan Year?

Any employer with a plan year that starts between April 1 and August 1 has either already made changes to their plans or is currently considering changes for the upcoming plan year. For example, an employer with a plan year starting July 1 typically decides what plan changes they will make by June 1 so they can communicate those changes to their employees.

Employers who made plan changes after March 23, 2010 can avoid losing their plans' grandfathered status if they revoke those changes effective the first day of the plan year beginning on or after September 23, 2010. For example, a school district whose plan year starts July 1 and who made design changes for the July 1, 2010 plan year which jeopardize their grandfathered status can avoid losing their grandfathered status if they revoke these design changes for the plan year starting July 1, 2011.

The rules also provide for transitional assistance to plans that made changes after March 23, 2010 pursuant to a legally binding contract or policy entered into prior to March 23, 2010. For example, if your plan year started April 1, 2010 and you entered

into a new contract with the carrier on March 22, 2010, the plan that is in effect on April 1, 2010 becomes the standard by which any changes are measured.

5. What If the Coverage is Maintained Pursuant to a Collective Bargaining Agreement?

Plans maintained pursuant to a collective bargaining agreement have special rules IF they are fully-insured. Employers first need to determine whether their plan is maintained pursuant to a collective bargaining agreement that was ratified before March 23, 2010. If it is and their plan is fully-insured the plan will continue to maintain its grandfathered status until the date on which the last of the collective bargaining agreements relating to the coverage terminates.

6. What is the Importance of Grandfathered Status?

Some of the health care reform legislation's provisions do not apply to grandfathered plans, including:

- Covering specified preventative care services with no cost-sharing;
- Providing participants with the choice of primary care physician and direct access of children to pediatricians and women to obstetricians or gynecologists;
- Providing a new claims and appeals process that includes external review;
- Covering emergency services without regard to prior authorization or whether the emergency services provider is in or out of network;
- Requiring coverage of essential health benefits;
- Cost-sharing limits;
- Prohibiting the denial of routine patient costs in connection with a clinical trial for the treatment of cancer or other life-threatening disease/condition (note, fully-insured plans in Iowa have a new State mandate that also requires this);
- "Highly-compensated employee" non-discrimination rules (self-insured plans already have to comply with these).

The importance of a plan maintaining its grandfathered status will vary depending on the employer and the type of plan they have. Many plans may already be complying with several of the above provisions. For some employers, it will be more important to the employer to have the flexibility to make plan changes than to lose grandfathered status. Additionally, for fully-insured plans, we don't yet know what the cost difference will be of non-grandfathered plans and whether the non-grandfathered status of a plan will result in premium increases or what those premium increases will be. Prior to their renewal date or next plan year, an employer should discuss these issues with their benefits advisors to determine what plan changes make the most sense for its specific situation.

7. Are There Other Requirements Relating to Grandfathered Status?

Grandfathered plans are required to notify participants that they are grandfathered plans in enrollment materials, summary plan descriptions and other plan documents. The interim rules provide for a model notice that can be used for this purpose.

The rules also require that plan sponsors of grandfathered plans maintain documentation substantiating their grandfathered status, including documents that verify, explain or clarify a plan's status as a grandfathered plan. According to the rules, these documents include plan documents, health insurance policies, certificates or contracts of insurance, summary plan descriptions, descriptions of premiums or the cost of coverage and documentation of required employee contribution rates.

8. What Does It Mean That These Are “Interim” Final Rules?

Because of the importance of the definition of “grandfathered status” it was necessary for HHS, DOL and Treasury to issue final rules without the typical review and comment period. It is possible that these rules could change after comments are submitted and reviewed by the Departments. Until then, however, group health plans are subject to these rules and should start complying with them.

For more information about this and other health care reform issues, please contact Susan Freed or your Davis Brown attorney.

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