

HEALTHCARE REFORM: GRANDFATHERED STATUS AND HOW TO MAINTAIN IT

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The Patient Protection and Affordable Care Act of 2010 was enacted with the goal of ensuring access to affordable essential healthcare coverage and improving the quality of coverage available. The new law impacts employer-sponsored group healthcare programs and decisions made by employers now will affect their future obligations under the Act. The Act does not require employers to terminate coverage existing on March 23, 2010 to replace it with new coverage which complies with all provisions of the Act. Existing plans are exempted or “grandfathered” from a number of the new requirements. One of the first key decisions facing employers is determining whether maintaining the grandfathered status of their existing plan is important.

Provisions Which Do Not Apply To Grandfathered Plans

A grandfathered plan is any group healthcare plan, whether insured or self-funded, in which an individual was enrolled on March 23, 2010, the effective date of the Act. Going forward, the new law will apply to all group healthcare plans and health insurance coverage implemented after that date. However, grandfathered plans are exempt from the following requirements in the new law which may make maintaining a plan’s grandfathered status desirable.

- All insured nongrandfathered plans will be subject to the nondiscrimination rules already required in self-funded plans which prohibit discrimination in favor of “highly compensated individuals” regarding eligibility, benefits and contributions.
- All nongrandfathered plans must provide certain preventative coverage with no cost-sharing (except for out-of-network charges).
- Nongrandfathered plans may not require preauthorization for emergency department services or have different plan designs for

in-network and out-of-network emergency department services.

- Nongrandfathered plans will have minimum plan design requirements and will not be able to have deductibles in excess of \$2,000 for individual and \$4,000 for family coverage unless the employer provides an HRA or HSA plan with employer contributions to “buy down” a deductible to those levels.
- Nongrandfathered plans must provide an external appeals process.
- If the plan requires the designation of a primary care physician, a nongrandfathered plan must allow a pediatrician to be designated for a child and an OB/GYN to be designated for a woman.
- Nongrandfathered plans may not discriminate against individuals in approved clinical trials.
- Nongrandfathered plans are subject to the automatic enrollment rules.

While maintaining grandfathered status lessens a plan’s immediate obligations under the new law, it will not excuse compliance with other requirements which are applicable to all plans.

Maintaining The Plan’s Grandfathered Status

Once the employer determines that it is desirable to maintain the grandfathered status of the plan, it is important to understand what changes to the plan will result in a loss of grandfathered status. On June 14, 2010, the U.S. Departments of the Treasury, Labor, and Health and Human Services released interim final regulations providing guidance on maintaining grandfathered status. The following events will not cause an otherwise grandfathered health plan to lose its status:

Continued on the next page...

- Re-enrollment of formerly covered individuals or family members
- The enrollment of newly eligible individuals and family members
- The addition of dependents and other eligible individuals (such as adult children under the age of 26) to the grandfathered health plan

These exceptions allow employees who had not had health insurance coverage through their employer to later join the plan and add their family members without causing the plan to lose its grandfathered status.

The key to maintaining grandfathered status is maintaining the status quo with respect to the existing plan. The following changes will result in the loss of grandfathered status:

- Eliminating all or substantially all benefits to diagnose or treat a particular condition. The elimination of benefits for any necessary element to diagnose or treat a condition is considered the elimination of all or substantially all benefits to diagnose or treat a particular condition.
- Any increase in a percentage cost sharing requirement such as a co-insurance.
- With respect to fixed amount cost sharing requirements other than co-payments, any increase in a fixed amount cost sharing requirement that is greater than the maximum percentage increase defined as medical inflation (from March 23, 2010) plus 15 percentage points.
- For fixed amount co-payments, any increase in the co-payment that exceeds the greater of (a) the maximum percentage increase, or (b) \$5.00 increased by medical inflation.
- If the contribution rate is based on the cost of coverage, decreasing the employer's contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points below the contribution rate on March 23, 2010.
- If the contribution rate is based on a formula, such as hours worked, decreasing the employer's contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate on March 23, 2010.
- Adding a new overall annual or lifetime limit on the dollar value of benefits.
- Adopting an overall annual limit at a dollar value that is lower than the dollar value of the lifetime limit on March 23, 2010, if on March 23, 2010 the plan imposed an overall lifetime limit on the dollar value

of all benefits, but no overall annual limit on the dollar value of all benefits.

- Decreasing the dollar value of the annual limit (regardless of whether the plan or health insurance coverage also imposed an overall lifetime limit on March 23, 2010 on the dollar value of all benefits) if the plan imposed an overall annual limit on the dollar value of all benefits on March 23, 2010.
- Transferring a new group of employees into the plan if the main purpose is to take advantage of the plan's grandfathered status.

If changes that would cause the plan to lose its grandfathered status were adopted prior to the release of the final interim regulations on June 14, 2010, the regulations provide a grace period within which to revoke or modify those changes. Under the rule, grandfathered status is preserved, the changes are revoked, and the plan or health insurance coverage is modified, effective as of the first day of the first plan year beginning on or after September 23, 2010.

Administrative Requirements For Grandfathered Plans

The interim final regulations impose certain notice and record retention requirements on plan sponsors to maintain grandfathered status. Any plan communications and materials provided to participants or beneficiaries describing the benefits provided under the plan must include a statement that the plan is grandfathered along with contact information for questions and complaints. The regulations include a model notice. The plan sponsor must also maintain records verifying the plan's grandfathered status and documenting the terms of the plan in effect on March 23, 2010. These records must be maintained for as long as the plan intends to maintain its grandfathered status and must be made available to plan participants, beneficiaries and state and federal officials upon request.

Conclusion

With these items in mind, employers should review their current plan documents to decide whether grandfathered status is beneficial. If the plan is already in compliance with the new provisions in the Act, forfeiting grandfathered status may not be an issue if you are seeking more flexibility in your plan design. In addition, given the relief provided employers by the interim final regulations, if the goal is to maintain grandfathered status, the employer should determine if any changes which were made prior to June 17, 2010 would be permissible under the regulations. If the changes would cause the plan to lose its grandfathered status, the employer should consider rescinding the changes before the end of the 2010 plan year in order to regain grandfathered status. As future changes to the plan are considered, the employer should take into account the impact of the changes on the plan's grandfathered status.