

Federal Agencies Issue Interim Final Rules for Grandfathered Health Plans

The U.S. Departments of Treasury, Labor, and Health and Human Services have issued interim final rules for group health plans and health insurance coverage on grandfathered health plan status under the Patient Protection and Affordable Care Act. These eagerly anticipated rules provide important guidance for employers as they make decisions about their health plans and benefits for their upcoming plan years.

Under the Act, health plans in which employees and individuals were enrolled on March 23, 2010 are exempt from certain of the Act's patient protection and insurance reform requirements if they retain their status as grandfathered health plans. Questions have loomed about what changes, if any, an employer could make to its plans without the plans losing that status. Acknowledging that employers and insurers have to make changes to keep pace with increases in health care costs, the rules allow plans to make "reasonable changes routinely made" to benefits and to add certain individuals without losing their grandfathered status. However, health plans that significantly cut benefits, increase out-of-pocket costs for employees, or try to circumvent the rules will lose their grandfathered status and be subject to the full scope of the Act's mandates.

The rules also clarify when union plans can retain their grandfathered status, even after the collective bargaining agreement that was ratified before March 23, 2010 terminates. They also describe the disclosures a plan must make to plan participants regarding its grandfathered status and the steps employers must avoid when transferring employees from one plan to another. Finally, the rules provide transitional relief for coverage changes made prior to March 23, 2010 or made after March 23, 2010 and adopted before the issuance of the rules.

Changes Allowed

An employer can allow employees' family members not enrolled on March 23, 2010 to join a plan or insurance coverage without jeopardizing its grandfathered status. Furthermore, the rules clarify that not only can new employees enroll in a plan or coverage that was in place on March 23, 2010, but also current employees who newly enroll in such a plan or coverage can do so without jeopardizing its grandfathered status. Finally, a plan or coverage does not lose its grandfathered status if any of the individuals enrolled on March 23, 2010 drop coverage so long as the plan or coverage has continuously covered at least one person since that date.

Presumably, any changes to a plan not specifically prohibited by the rules, *e.g.*, the enhancement of an existing benefit, will not cause the plan to lose its grandfathered status.

Changes Not Allowed

A group health plan or health insurance coverage ceases to be a grandfathered health plan if it makes any of these changes:

- Eliminates all, or substantially all, benefits to diagnose or treat a particular condition, including the elimination of any element necessary to diagnose or treat a condition;
- Increases any percentage cost-sharing requirement, *e.g.*, coinsurance, under the plan;
- Increases any fixed-amount cost-sharing requirement other than a copayment, *e.g.*, a deductible or out-of-pocket maximum, since March 23, 2010 in excess of the percentage of medical inflation (as defined under the rules) plus 15%;
- Increases copayments since March 23, 2010 in excess of the greater of (a) \$5 times annual medical inflation plus \$5, or (b) the increase in medical inflation plus 15%;
- Decreases the employer contribution rate, based either on the cost of coverage or on a formula (both defined under the rules), toward the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate that was in effect on March 23, 2010;
- Decreases an annual limit on the dollar value of all benefits that existed on March 23, 2010 or adds such annual limit unless the added annual limit is replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit it is replacing; or
- Changes insurance carriers or offers a new policy after March 23, 2010, except that changes to a self-insured employer's third party administrator or switches in insurers under a collective bargaining agreement ratified before March 23, 2010 will not jeopardize a plan's grandfathered status. This may result in an employer's group health plan containing both grandfathered and non-grandfathered benefit options.

Collective Bargaining Agreements

The rules clarify that any coverage changes made to health insurance coverage (as opposed to self-insured group health plans) offered under a collective bargaining agreement ratified before March 23, 2010 that are made solely to conform to any requirements of the Act (*e.g.*, enrolling adult children up to age 26) will not be treated as a termination of that collective bargaining agreement and, therefore, will not result in the loss of grandfathered status for the insurance coverage offered pursuant to that agreement. Once these collective bargaining agreements terminate, the coverage offered under a newly ratified agreement can continue to enjoy grandfathered plan status if the health insurance coverage does not make any of the prohibited changes described above. Note that switching insurers for health insurance coverage (again, as opposed to self-insured group health plans) offered under a collective bargaining agreement ratified before March 23, 2010 will not, in and of itself, result in the loss of grandfathered status for that coverage, and retaining that new insurer upon termination of the collective bargaining agreement and under a newly ratified agreement will also not jeopardize the coverage's grandfathered status. If, however, the insurer changes after termination of the agreement and under the newly ratified agreement, the coverage will lose its grandfathered plan status.

Disclosure of Grandfathered Plan Status

In order to maintain its status as a grandfathered health plan, the plan or insurance policy must include a statement in any plan materials furnished to a participant or beneficiary that describes the benefits provided under the plan, explaining that the plan believes it is a grandfathered health plan within the meaning of section

1251 of the Act. The statement must also provide contact information for any questions or complaints. The rules provide model language that can be used to satisfy both of these disclosure requirements.

For so long as a plan takes the position that it is grandfathered, it must maintain records documenting the terms of the plan or health insurance policy in effect on March 23, 2010 and any other documents necessary to verify, explain, or clarify its status as a grandfathered health plan. Examples of documents that would satisfy this obligation include current and intervening plan documents, summary plan descriptions, and communications about employee contribution rates. The plan must also make such records available for examination upon request.

Anti-abuse Rules

Attempts to circumvent the rules are not treated lightly. The rules underscore that if the principal purpose of a merger, acquisition or similar business reorganization is to cover new individuals under a grandfathered health plan, then the plan loses its grandfathered status. These anti-abuse rules may also apply where employees are transferred from one plan to another other than in connection with a business reorganization. The rules give some examples that make clear that if there is no *bona fide* employment-based reason to transfer employees from a plan in which they were enrolled on March 23, 2010 into a new plan, then the new plan will lose its grandfathered status. Changing the terms or cost of coverage does not qualify as a *bona fide* employment-based reason under the rules.

Transitional Rules

If your plan made changes prior to March 23, 2010 that were effective after that date and such changes were made or adopted prior to that date pursuant to a legally binding contract, a filing with a state insurance department, or a written plan amendment, then the changes are considered part of the terms of the plan or policy on March 23, 2010 and they will not cause the plan to lose its grandfathered status.

If your plan made changes after March 23, 2010 that were adopted prior to the publication of the rules, the changes will not cause the plan or policy to lose grandfathered status so long as (a) you revoke or modify the changes as of the first day of the plan year beginning on or after September 23, 2010, and (b) the terms of the plan or health insurance coverage on that date, as modified, would not cause the plan or the insurance coverage to lose its grandfathered status under the rules.

More to Come

The agencies will be accepting comments on these rules for the next 60 days and may make prospective changes based on input received. They have also signaled the possibility that further guidance may be forthcoming.

If you have any questions about the new rules or wish to discuss changes to your group health plan, please contact your Ropes & Gray advisor or a member of our [Employee Benefits](#) practice or Benefits Consulting Group. You may also find copies of the rules and additional guidance issued by the agencies under the Employer portal on the Ropes & Gray [Health Reform Resource Center website](#).

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