



Legal Alert: Anticipated Health Care Reform Grandfathered Plan Regulations Released

6/23/2010

On June 14, 2010, the Departments of Health and Human Services, Labor and Treasury, officially released much-anticipated grandfathered plan regulations under the Patient Protection and Affordable Care Act (the "Act").

The Act mandates benefit structures for most group health plans beginning as early as the first plan year on or after September 23, 2010. However, health plan coverage existing as of March 23, 2010, called "grandfathered health plan" coverage, is exempt from some provisions of the Act for as long as the plan maintains its grandfathered plan status. That sounds simple enough except the Act did not address how a plan could lose its grandfathered plan status or at what point changes in a plan become significant enough to destroy grandfathered status. The regulations issued last week, in the form of an interim final rule, address some of those questions. **Changes in Benefits, Cost-Sharing and Contributions** The regulations specify that any changes in benefits, cost-sharing or contributions listed below will cause a plan (or benefit option) to lose its grandfathered plan status:

- Elimination of benefits to diagnose or treat a particular condition or the elimination of benefits for any necessary element to diagnose or treat a condition;
- Increase in percentage cost-sharing borne by employees by any amount;
- Increase in fixed-amount cost sharing borne by employees, other than co-payments, by greater than the rate of medical inflation plus 15 percentage points (called a "maximum percentage increase");
- Increase in employees' fixed-amount co-payments by the greater of the "maximum percentage increase" or five dollars increased by medical inflation;
- Decrease in employer contributions toward the cost of any tier of coverage (i.e., single, family, etc.) by more than five percentage points;

- Imposition of new or modified annual limits.

Other Events

In addition, these other events can cause a plan to lose its grandfathered plan status:

- For fully insured plans, if an employer or employee organization enters into a new policy, certificate or contract of insurance after March 23, 2010, the new policy, certification or contract of insurance is not a grandfathered health plan.

- If the primary purpose of a merger, acquisition or business restructuring is to cover new individuals under a grandfathered health plan, the plan loses its grandfathered plan status.

- If employees are transferred into a health plan (transferee plan) from another plan existing as of March 23, 2010 (transferor plan), and (i) the transferor plan, if it were amended to be equivalent to the transferee plan, would lose grandfathered plan status as a result of such amendment, and (ii) there is no bona fide employment reason for the transfer, the transferee plan loses grandfathered plan status.

For example: A plan sponsor offers two health plan coverage options, Option A and Option B. The plan sponsor eliminates Option A because of its high cost. All employees participating in Option A are transferred to the remaining coverage, Option B. If the plan sponsor had amended Option A to match Option B, the amendment would have caused Option A to lose grandfathered plan status. Therefore, Option B loses grandfathered plan status as a result of the transfer.

Required Plan Statement

To maintain grandfathered plan status, a plan administrator must include a statement in any materials distributed to plan participants and beneficiaries describing benefits, that the plan is believed to be a grandfathered health plan within the meaning of section 1251 of the Act and must provide contact information for questions and complaints. The regulations provide a model statement. If you wish to receive a copy of the model statement, contact Penny C. Wofford, pwofford@fordharrison.com.

Documentation Requirement

A plan must also maintain records documenting the terms of the plan that were in effect on March 23, 2010, and any other documents necessary to verify, explain or clarify its grandfathered plan status. Such documents could include policies, certificates of insurance, summary plan descriptions (SPDs), premium rate sheets or other documentation of employer and employee contributions to the plan.

Transitional Rules

The interim final rules provide some transitional relief for changes made to a plan before the regulations were issued. If changes were made to a plan

after March 23, 2010, but before issuance of the regulations, pursuant to (1) a legally binding contract entered before March 23, 2010; (2) a filing made before March 23, 2010, with a State insurance department; or written amendments that were adopted before March 23, 2010, such changes are not taken into account in considering whether coverage remains grandfathered.

In addition, for purposes of enforcement, the agencies will take into account good-faith efforts to comply with a reasonable interpretation of the Act and may disregard changes to a plan that only "modestly exceed" those permissible in the interim final rules.

Finally, the regulations allow a grace period for employers to revoke or modify any changes that were adopted prior to the issuance of the interim final rule that would otherwise cause a plan to lose its grandfathered plan status. An employer is permitted to revoke or modify the change effective the first plan year beginning on or after September 23, 2010, to bring the plan's terms within the limits for retaining grandfathered plan status. **More Guidance May Come** The agencies invited comments as to whether the list of changes addressed in the interim final rules should be expanded. For example, the agencies asked for comments as to whether other changes in plan structure, such as a change from fully insured to self-insured status, changes in network providers, changes to prescription drug formulary, etc., should cause a loss in grandfathered plan status. The agencies further stated that they may, as appropriate, issue additional administrative guidance to clarify or interpret the interim final regulations. **Employers' Bottom Line:** Before adopting changes to an existing health plan, employers should consider whether proposed changes could cause a loss of grandfathered plan status and then carefully weigh the benefit of any considered changes with any potential burden of subjecting the plan to non-grandfathered plan compliance obligations under the Act. If you have any questions regarding this Alert, or would like additional details concerning health care reform, you can contact the author of this Alert, [Penny C. Wofford](#), 864-699-1100, pwofford@fordharrison.com, any member of Ford & Harrison's [Employee Benefits](#) practice group or the Ford & Harrison attorney with whom you usually work.