



THOMPSON COBURN LLP

Health Care Reform: Grandfathered Plan Regulations

Certain group health plans providing coverage on March 23, 2010 (the date health care reform was enacted) are "grandfathered plans," exempt from some, but not all, provisions of the Patient Protection and Affordable Care Act. Regulations issued June 14, 2010 provide guidance on what employers must do to maintain the grandfather status of their plans, including what changes will cause a plan to lose grandfather status. The regulations also address special rules for determining whether collectively bargained plans are grandfathered plans and clarify that plans covering only retirees are not covered by the Act. The new regulations are effective immediately.

Thompson Coburn LLP invites you to attend a presentation by attorneys from our employee benefits practice group on July 20, 2010 from 4:00 to 5:30 p.m. at the Marriott West, where we will address the new grandfathered plan regulations as well as immediate and long-term actions that employers will need to take to comply with the health care reform law. You will also have an opportunity to ask questions about the health care reform law. You will receive an e-mail invitation to this presentation in the next few days.

Determining the Value of Grandfather Status

Employers will need to decide whether the value of maintaining grandfather status for their health plans outweighs the value of making changes to the plans to control costs or achieve other business objectives.

Exemptions for Plan Years Beginning on or after 9/23/2010

Grandfathered plans benefit from a complete exemption from certain requirements and a delayed effective date for certain other requirements. Grandfathered plans are exempt from the following requirements that are otherwise applicable for plan years beginning on or after September 23, 2010:

- The requirement to cover preventive health care on a first dollar basis
- The application of the non-discrimination rules of IRC section 105(h) to fully-insured plans
- The requirement for certain internal and external appeal procedures
- Prohibition on restricting the types of health care providers that may be primary care providers
- Prohibition against requiring prior authorization for emergency services or penalizing a participant from using a non-network provider for such services
- Prohibition against requiring a referral or prior authorization for OB-GYN services

Exemptions for Plan Years Beginning on or after 1/1/2014

Grandfathered plans also benefit from a complete exemption from the following requirements otherwise applicable for plan years beginning on or after January 1, 2014:

- Prohibitions from discriminating against any willing health care provider
- The minimum coverage requirements and limits on cost-sharing
- The requirement to provide coverage for participation in a clinical trial
- The prohibition against establishing eligibility rules based on health status (although grandfathered plans like other plans are already subject to similar prohibitions under HIPAA)

Grandfathered plans must comply with many provisions of the Act. For example, they are subject to the prohibition against imposing lifetime limits on essential health benefits, the prohibition on rescinding coverage for reasons other than fraud, and the prohibition on preexisting-condition exclusions. Grandfathered plans are also subject to the prohibition against placing annual limits on the coverage of essential benefits, although prior to the plan year beginning January 1, 2014 a grandfathered plan may establish a restricted annual limit on essential health benefits pursuant to guidance to be issued by the Secretary of Health and Human Services. Grandfathered plans that offer dependent coverage also must extend coverage to children up to age 26, but prior to the plan year beginning on or after January 1, 2014, grandfathered plans need not provide coverage to an adult child who is eligible for other employer-sponsored coverage. In addition, for plan years beginning on or after January 1, 2014, grandfathered plans cannot provide a waiting period for eligibility in excess of 90 days.

Maintaining Grandfather Status

Disclosure Requirement. To maintain grandfather status, a plan must include a statement in any plan materials provided to a participant describing plan benefits that the plan believes it is a grandfathered plan and must provide contact information for questions and complaints. The regulation provides model language for the disclosure.

Plan documents. To maintain grandfather status, a plan must maintain records documenting the terms of the plan in effect on March 23, 2010 and any other documents necessary to verify its status as a grandfathered health plan. In addition, the plan must make such records available for examination upon request.

Changes to the Plan. The regulation lists certain plan changes that would cause a plan to lose grandfather status. Subject to special rules discussed below relating to certain collectively bargained plans, changes that would cause a loss of status include:

- Changing the insurance issuer of a group health plan or entering into a new contract of insurance with the plan's existing issuer. (A self-insured plan may change administrators with no loss of status.)
- The elimination of substantially all benefits to diagnose or treat a particular condition, e.g. the elimination of coverage for HIV/AIDS, cystic fibrosis, or morbid obesity
- Any increase from the March 23, 2010 level in a percentage cost-sharing requirement, such as a coinsurance requirement
- The addition of an annual limit to a plan that previously had no annual or lifetime

limit or the decrease of an annual limit in a plan

- For a plan with a lifetime but no annual limit, the addition of an annual limit that is less than the lifetime limit in effect on March 23, 2010
- Any increase in a fixed-amount cost-sharing requirement, other than a copayment (e.g. a deductible or out-of-pocket limit) if the percentage increase measured from March 23, 2010 exceeds the rate of medical inflation (defined by reference to the medical care component of the Consumer Price Index) plus 15 percentage points
- Any increase in a fixed amount copayment if the total increase from the March 23, 2010 level exceeds the greater of \$5 increased by medical inflation or a percentage equal to medical inflation plus 15 percent
- A decrease in the employer's contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percent

It is not clear whether an employer who adds tiers of coverage, but keeps the contribution percentage towards each tier the same, would cause a plan to lose grandfather status. Employers considering moving from an "Employee plus family" tier to a charge for each individual covered (perhaps in response to the requirement to cover children to age 26) may want to await further guidance if they determine that maintaining grandfather status is more important than the resulting cost savings.

New employees (both new hires and new enrollees) may enroll in a plan without causing it to lose grandfather status.

Benefit Options. Under the regulation, grandfather status is determined separately for each benefit option under a health plan. Status can be lost for one benefit option under a plan, but maintained for another. If a benefit option is eliminated from a plan and employees are transferred to another option, the option to which the employees are transferred will be treated as an amendment to the eliminated option. Grandfather status will be lost for the option to which employees are transferred if the amendment would have caused the loss of grandfather status to the first plan. There is an exception: if there is a bona fide employment-based reason to transfer the employees into the other option, grandfather status will not be lost. Reducing the cost of coverage is not a "bona fide employment-based reason."

Permissible plan changes. Plan changes that are effective after March 23, 2010 will not cause a plan to lose grandfather status if made pursuant to a contract entered into on or before March 23, 2010 or pursuant to written amendments to a plan adopted on or before March 23, 2010. Changes adopted prior to release of the regulation that would otherwise cause a plan to lose grandfather status will not result in a loss of status if they are revoked in a timely manner. Changes made to comply with law and changes to increase benefits will not cause a plan to lose grandfather status. The regulation also states that for purposes of enforcement, the regulators will take into account good-faith efforts to comply with the Act prior to the issuance of the regulations and may disregard changes to plans that only modestly exceed the changes described.

Collectively Bargained Plans

The regulations confirm a significant distinction between insured and self-insured collectively-bargained plans. An insured collectively-bargained plan will maintain its grandfathered plan status at least until the date on which the last of the collective

bargaining agreements relating to the coverage that was in effect on March 23, 2010 terminates. After that, whether or not the plan is a grandfathered plan is determined under the rules applicable to non-collectively bargained plans, comparing the coverage to the coverage in effect on March 23, 2010. This rule does not apply, however, to self-insured plans maintained pursuant to a collective bargaining agreement. The regulations also clarify that there is no delayed effective date for collectively bargained plans - insured or not - for provisions of the law that are applicable to grandfathered plans. Collectively bargained plans must comply with these provisions, including the applicable restrictions on lifetime and annual limits, the prohibition on rescinding coverage for reasons other than fraud, and the prohibition against preexisting-condition exclusions. They must also cover children to age 26, although for plan years before January 1, 2014 they need not cover adult children who have other employer-sponsored coverage available to them. These changes may need to be implemented before an existing bargaining agreement expires.

Retiree Only Plans

The new regulation clarifies that group health plans that cover only retirees and no current employees are not subject to the Act. It does not appear that an amendment to a plan to clarify that retirees and employees are in separate plans would cause a plan to lose grandfather status.

Our Attorneys

If you have further questions regarding grandfathered plan regulations you may contact one of our Employee Benefits attorneys listed below:

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