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New Guidance on "Grandfathered Plans"

The Internal Revenue Service, along with the Departments of Labor and Health and Human Services, have issued interim final regulations that address at what point changes to a group health plan in existence on March 23, 2010, are significant enough to cause the plan to cease to be a "grandfathered health plan" for purposes of the Patient Protection and Affordable Care Act (the "Act"). Grandfathered plans are exempt from certain insurance market reform provisions of the Act, including requirements related to preventive care, internal and external review, nondiscrimination based on income, choice of providers, emergency care, clinical trials, cost sharing and deductibles, guaranteed issue/renewal, and rating restrictions. However, grandfathered plans are not exempt from requirements related to annual and lifetime limits, dependent coverage to age 26, rescission, pre-existing condition exclusions, waiting periods, employer mandates, and tax provisions.

The regulations provide that certain changes will not result in a loss of grandfathered status:

- A plan will not lose its status as a grandfathered plan by adding new enrollees.
- Plan changes adopted before March 23, 2010, with an effective date after that date, will not affect the status of a grandfathered plan. If an employer has made changes to a health plan after March 23, 2010, and those changes would cause the plan to cease to be a grandfathered plan, the employer may reverse those changes before the first plan year beginning on or after September 23, 2010 and maintain the plan's status as a grandfathered plan.
- A plan will not lose its status as a grandfathered plan by making changes required to comply with federal or state law.
- A plan will not lose its status as a grandfathered plan by making changes to voluntarily comply with provisions of the Act or to increase benefits.

Collectively bargained health plans that are subject to a collective bargaining agreement in effect on the date the Act was signed are deemed to be grandfathered plans through the end of that agreement and are subject to the health care reform changes that apply to other grandfathered health plans.

Employers need to be aware that the analysis of whether a plan is grandfathered applies separately to each benefit package available under a plan. This means that if one benefit package is modified in a manner that would cause it to lose grandfathered status while others remain unmodified, the modified benefit package option will cease to be grandfathered. Unfortunately, the regulations do not offer guidance as to what constitutes a "benefit package."

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The interim final regulations detail the changes that will cause a health plan to lose its status as a grandfathered plan. The changes that will adversely affect a plan's grandfathered status include: the substantial elimination of benefits; increases in deductibles or out-of-pocket expenses by more than 15% over the medical inflation rate as measured from March 23, 2010; any decrease of more than 5% in the employer's contribution rate for coverage; increases in a copayment for any service by more than the greater of: (1) $5 (adjusted for medical inflation), or (2) medical inflation plus 15%, as measured from March 23, 2010; and changes to lifetime and annual benefit limits that would adversely impact participants.

Any changes that are not specifically prohibited will not affect a plan's grandfathered status. The regulations require that the plan document include a statement that the plan is a grandfathered plan.

Employers and plan sponsors should carefully consider whether (i) plans currently are "grandfathered," (ii) changes previously made or proposed will result in loss of grandfathered status; (iii) changes previously implemented should be reversed to preserve grandfathered status, and (iv) the relief afforded to grandfathered plans is worth the loss of flexibility and control over plan terms.

If you would like Constangy to assist you in the analysis of your health plan, please contact Dana Thrasher (205-226-5464), Bob Ellerbrock (205-226-5462), or Dave Pearson (813-222-1367).