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Interim Final Rules Issued for 'Grandfathered' Health Plans

On June 14, 2010, the Departments of the Treasury, Labor, and Health and Human Services issued interim final regulations implementing rules for group health plans and health insurance coverage in the group and individual markets regarding status of a "grandfathered" health plan under the Patient Protection and Affordable Care Act (PPACA) (P.L. 111- 148), as modified by the Health Care and Reconciliation Act ("Reconciliation Act") (P.L. 111- 152). Comments on these regulations are due 60 days after publication in the Federal Register.

The PPACA and Reconciliation Act establish certain provisions with which both fully insured and self-insured plans offered to active workers must comply. Yet health plans in existence as of March 23, 2010 — the date of enactment of the PPACA — may be considered "grandfathered health plans." A grandfathered plan would only have comply with some of these insurance reform provisions.

For example, by 2014 all plans, including grandfathered plans, must comply with the prohibition on rescissions of coverage (except in the case of fraud or intentional misrepresentation), the elimination of lifetime limits, and the prohibition on restrictive annual limits. Yet, grandfathered plans are exempt from complying with requirements that prohibit cost sharing for certain prevention and wellness services. The interim final rules released today clarify the circumstances under which a health plan or coverage qualifies for grandfather status and what such a plan must do to retain or maintain its status as a grandfathered plan. The interim final rules provide that the standards for retaining grandfathered plan status are applied separately to each benefit package offered under a plan, so that significant changes to one benefit package will not cause a loss of grandfathered status with respect to the entire plan, but only to the benefit package that has been changed.

Certain Changes to Grandfathered Plans Are Permissible

Not all changes to grandfathered plans will result in the loss of grandfathered plan status. The interim final rules state "many plan sponsors and issuers make changes on an annual basis: premiums fluctuate, provider networks and drug formularies change, employer and employee contributions and cost-sharing change, and covered items and services may vary. Without some ability to make some adjustments while retaining grandfather status, [the purposes of the grandfather provision] would be frustrated, because most plans or health insurance coverage would quickly cease to be regarded as the same group health plan or health insurance coverage in existence on March 23, 2010."

The interim final rules would generally permit, for example, plans and issuers to make voluntary changes to increase benefits, to conform to required legal changes, and to adopt voluntarily other consumer protections in PPACA. Yet, if they make

certain changes, like significantly decreasing the benefits covered, materially increasing cost sharing to discourage covered individuals from seeking needed treatment, or substantially increasing the cost of coverage borne by participants, the plan will lose its grandfather status. It is important to note that, for this purpose, a "plan" is not necessarily the entire arrangement with respect to which an employer might file an IRS Form 5000. Rather, each benefit package offered is treated independently; changes to one benefit package that would cause a loss of grandfathered plan status will not automatically affect the status of other benefit packages offered under the same plan. As an example, an employer making significant changes to an HMO option would only jeopardize the grandfathered status of that HMO option under its health plan but not the grandfathered status of a PPO option that the employer also offers but has not changed significantly.

Provisions in Health Care Reform Laws Related to 'Grandfathered' Plans

The PPACA and Reconciliation Act amend Part A of Title XXVII of the Public Health Service Act (42 U.S.C. 300 gg et seq.) to impose several new coverage requirements on health plans. Not all of these requirements apply to grandfathered health plans.

Public Health Service Act	Provision	Effective Date	Application to Grandfathered Plans
Section 2701	Fair health insurance premiums	2014	Not applicable
Section 2702	Guaranteed issue	2014	Not applicable
Section 2703	Guaranteed renewability	2014	Not applicable
Section 2704	No preexisting condition exclusions	2014 For under 19, plan year after 9-23-10	Applicable to grandfathered plans except not applicable to individual health coverage
Section 2705	Prohibit discrimination based on health status	2014	Not applicable
Section 2706	Nondiscrimination in health care	2014	Not applicable
Section 2707	Comprehensive health insurance coverage (small and individual group market)	2014	Not applicable
Section 2708	Prohibition on waiting periods more than 90 days	2014	Applicable
Section 2709	Coverage in clinical trials	2014	Not applicable
Section 2711	No lifetime or annual limits	Plan year after 9-23-10	Lifetime limits: applicable Annual limits: applicable to group plans; not applicable to grandfathered individual plans
Section 2712	Prohibition on rescissions	Plan year after 9-23-10	Applicable
Section 2713	No cost sharing for prevention and wellness benefits	Plan year after 9-23-10	Not applicable
Section 2714	Extension of dependent coverage to age 26	Plan year after 9-23-10 Plan year after 1-1-14	Applicable (with caveat)* Applicable (without caveat)
Section 2715	Uniform explanation and coverage documents	Plan year after 9-23-10	Applicable

Public Health Service Act	Provision	Effective Date	Application to Grandfathered Plans
Section 2716	Prohibition on discrimination in favor of highly compensated individuals	Plan year after 9-23-10	Not applicable
Section 2717	Ensuring quality of care	Plan year after 9-23-10** (will be done in 2012)	Not applicable
Section 2718	Application of MLR (fully-insured products only)	Plan year after 9-23-10	Applicable to insured grandfathered plans
Section 2719	Appeals process	Plan year after 9-23-10	Not applicable

***CAVEAT**: *For plan years before 1/1/2014, applicable if the adult child is not eligible for other employer sponsored health plan coverage. If eligible under employer sponsored plans of both parents, neither parent's plan may exclude the adult child for coverage.*

Assertion of Grandfather Status

Any health plan seeking to maintain grandfather status must include a statement, in any plan materials provided to participants or beneficiaries describing the benefits provided under the plan or health insurance issuer, that the plan believes it is a grandfathered plan within the meaning of PPACA. The interim final rules provide model language to satisfy this disclosure requirement. In addition, the plan must also maintain records documenting the terms of the plan or health insurance coverage that were in effect on March 23, 2010, along with any other materials necessary to verify, demonstrate, or clarify the plan's status as a grandfathered health plan.

Impact of Adding New Employees

A plan may add new employees without affecting the plan's grandfathered status. Yet, if a principal purpose of a merger, acquisition or similar business restructuring is to cover new individuals under a grandfathered health plan or coverage, the plan or coverage ceases to be a grandfathered health plan.

Application of Rules to a Collective Bargaining Agreement

A collectively bargained health care coverage (note this does not refer to or include group health plans) retains grandfathered plan status at least until the date on which the last collective bargaining agreement relating to the health care coverage (that was in effect on March 23, 2010) terminates. Collectively bargained plans (both insured and self-insured) that are grandfathered plans are subject to the same requirements as other grandfathered plans; they are not provided with a delayed effective date for Public Health Service Act provisions with which other grandfathered plans must comply. At the end of the term of the collectively bargained plans or coverage, only those insured plans (not self-insured) may maintain grandfather status.

Elimination of Benefits for Diagnosis and Treatment of Particular Conditions

The elimination of all, or substantially all, benefits to diagnose or treat a particular condition will cause a plan to cease to be a grandfathered health plan. The elimination of 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.

Changing Insurers

If an employer offering a fully insured plan changes insurers, the affected benefit package loses grandfathered plan status. This change will eliminate the grandfathered status of the plan, even if employee premiums, copays, coinsurance, deductibles, and other coverage components remain exactly the same (or within the range of changes that are permissible within an existing contract).

Changes to Cost-Sharing Requirements

The rules limit the extent to which plans and issuers can increase the fixed-amount and the percentage cost-sharing requirements that are imposed with respect to individuals when receiving items and services and maintain grandfather status.

- For fixed-amount cost-sharing requirements other than copayments (i.e., a $500 deductible or $2,500 out-of-pocket limit), a plan will lose its grandfather status if it increases, since March 23, 2010, the fixed-amount cost-sharing requirement by a total percentage that is greater than the maximum percentage increase (medical inflation — from March 23, 2010 — plus 15 percentage points).
- For fixed-amount copayments, a plan will lose its grandfathered plan status if there is an increase since March 23, 2010, in the copayment that exceeds the greater of (A) the maximum percentage increase or (B) five dollars increased by medical inflation.

Changes to Contribution Rates

A plan may retain its grandfather status if the employer maintains its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals. A plan loses its grandfather status if the employer or employee organization decreases its contribution rate to any tier of coverage for a class of similarly situated individuals by more than five percent below the contribution rate on March 23, 2010. The rules use the COBRA standard for calculating the cost of coverage.

Grace Period

The rules provide employers and issuers with a grace period to revoke or modify changes adopted prior to the date the regulations were made publicly available, if those changes might cause the plan or health insurance coverage to cease to be a grandfathered health plan. Grandfather status will be preserved if the changes are revoked and the plan or health insurance coverage is modified, as of the first day of the first play or policy year beginning on or after September 23, 2010.

Good Faith Compliance

For purposes of enforcement, the Departments will consider good faith efforts to comply with a reasonable interpretation of the statutory requirements. The Departments may disregard changes to a plan made before the publication of the grandfathered regulations provided these plan changes “only modestly exceed” permitted changes under the grandfathered regulations.

Comments

The Departments specifically invite comments on whether the following changes should result in cessation of grandfather status: (1) changes to plan structure (switching from a health reimbursement arrangement to major medical coverage, or from an insured product to a self-insured product); (2) changes in a network plan's provider network and what magnitude of changes would have to be made; (3) changes to a prescription drug formulary; and (4) changes to overall benefit design. In addition, the Departments invite comment on whether the rules' parameters with respect to benefits, cost sharing and employer contributions should be reconsidered in light of changes that health care reform brings to the marketplace.

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