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New Grandfathered Health Plan Rules

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When the Patient Protection and Affordable Care Act of 2010 (PPACA) was passed, it implemented many rules that affected new health plans, but exempted plans that were in existence and had at least one participant on the date of enactment (March 23, 2010)—otherwise known as "grandfathered" health plans—from some of these new rules. Health plans established after that date were considered nongrandfathered, but the Act did leave to regulators the task of defining when an existing health plan could lose its grandfathered status.

Now, under new interim final regulations issued by the Departments of Labor, Treasury, and Health and Human Services in June, the protections afforded by the PPACA to grandfathered health plans may be very short-lived, as the regulations outline any number of changes to a grandfathered plan that will cause it to lose its status and become nongrandfathered.

Nongrandfathered Plans

For most employers, there are seven significant items in the PPACA that are required of nongrandfathered plans that are not for grandfathered plans.

- Nongrandfathered plans will have minimum plan design requirements, such as a maximum $2,000 individual and $4,000 family deductible, unless the employer implements a personal care account program such as a Health Reimbursement Arrangement (HRA) or Health Savings Account (HSA) plan with employer contributions to "buy down" an even higher deductible to those levels.

- Nongrandfathered plans must implement an external claims appeal process. While all plans governed by ERISA (as well as most plans that are not subject to ERISA) do have a claims appeal process, most are performed either by an insurance carrier or a third-party administrator internally.

- All nongrandfathered health plans are required to provide certain preventive benefits with no cost-sharing of any kind (except for out-of-network charges). This rule precludes all deductibles, co-pays, and coinsurance charges.

- Nongrandfathered plans are prohibited from requiring any form of pre-authorization for emergency department services.

- Nongrandfathered plans are required to have similar plan designs for in-network and out-of-network emergency department services. Thus, a nongrandfathered plan could not have additional deductibles, co-pays, or coinsurance for an out-of-network emergency room visit as for an in-network visit.

- For plans that require the designation of a primary care physician, nongrandfathered health plans are required to allow such a primary care designation for pediatricians for children and OB/GYNs for women.

- Lastly, all insured nongrandfathered health plans will be subject to similar nondiscrimination rules as are self-funded plans today. These include provisions prohibiting discrimination in favor of "highly compensated individuals" regarding eligibility, benefits, and contributions.

Changes that Do Not Cause a Loss of Grandfathered Status

Within the PPACA, certain events are deemed not to cause an otherwise grandfathered health plan to lose its status. These items include:

- Re-enrollment of formerly covered individuals or family members.

- The enrollment of newly-eligible individuals and family members.

- The addition of dependents and other eligibles (such as adult children under the age of 26) to the grandfathered health plan.

Thus, for example, an employee and his or her family members could change from one grandfathered health plan to another grandfathered plan of the same employer without causing either plan to lose its grandfathered status. Further, an employee who had previously opted-out of health coverage could later join the plan and add their family members again without causing the loss of grandfathered status to the plan.

Grandfathered Health Plan Documentation and Notice Requirements

Any grandfathered health plan must perform certain notice and documentation processes in order to maintain the plan's status. First, the plan must maintain records of the plan's design (preferably through actual plan documents or insurance contracts) as it existed on March 23, 2010, the grandfathered date, for as long as the plan wishes to maintain its grandfathered status. These records are required to be made available to plan participants, beneficiaries, and state and federal officials upon request. Next, any plan materials provided to a participant or beneficiary describing the benefits provided under a plan must include a statement that the plan believes it is a grandfathered health plan. The plan must also provide contact information for any questions or complaints in any such materials. Thus, all Summary Plan Descriptions (SPDs), Summaries of Material Modifications (SMMs), and even any HR employee manuals must contain such a disclosure.

What Causes a Grandfathered Health Plan to Lose Its Status?

Under the Interim Final Regulations, grandfathered health plans lose their status by doing any of the following:

- Changing insurance carriers (but not third-party administrators), except for collectively bargained plans during the term of the bargaining agreement that was in effect on March 23, 2010. Note that if an employer only changed insurance carriers of one of its grandfathered health plans but not the carrier of any other plan, it would not jeopardize the grandfathered status of the other non-changed health plans.

- Creating a new insurance contract with an existing carrier.

- Changing the plan to eliminate all or substantially all benefits to diagnose or treat a particular condition, or to eliminate benefits for any necessary element to diagnose or treat a condition.

- Increasing any percentage cost-sharing requirement (*e.g.*, coinsurance). For example, changing a coinsurance amount from 20 percent to 25 percent would automatically cause the plan to lose grandfathered status.

- Increasing a fixed-amount cost-sharing requirement,

other than a copayment (*e.g.*, a deductible or out-of-pocket limit), if the total percentage increase in the cost-sharing requirement exceeds the "maximum percentage increase" (the increase in the overall medical care component of the Consumer Price Index for All Urban Consumers [CPI-U] plus 15 percentage points). For example, if an employer increased the plan's deductible from $250 to $500, this would cause the plan to lose grandfathered status since the 100 percent increase in the deductible is greater than current medical inflation plus 15 percentage points.

- Increasing a fixed-amount copayment, if the total increase in the copayment exceeds the greater of: $5 increased by medical inflation as measured from the grandfathered date, or a total percentage measured from the grandfathered date that is more than the sum of medical inflation plus 15 percentage points. For example, increasing a fixed presricption co-pay amount from $20 to $30 would cause the plan to lose its grandfathered status, since it is more than a $5 increase and, as a 50 percent increase, is more than the sum of medical inflation plus 15 percent.

- Decreasing the employer's contribution rate toward the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points. The contribution rate means the amount of contributions made by an employer compared to the total cost of coverage, expressed as a percentage. The cost of coverage is determined in the same way the premium is calculated for COBRA continuation coverage purposes. For example, if an employer was currently subsidizing 80 percent of employee-only health coverage and 50 percent of family coverage, and then decided to decrease its subsidy to 70 percent for employee-only coverage and leave family coverage at 50 percent, the plan would lose its grandfathered status since the drop in the employer contribution rate for employee-only coverage was more than 5 percentage points. Note too that the measurement date of this decrease is not year-to-year,

but rather always measured from the contribution rate in place on the grandfathered date (March 23, 2010).

- Decreasing or imposing a new annual limit on the dollar value of benefits. However, plans with an existing lifetime limit are permitted to adopt an overall annual limit at a dollar value that is lower than the dollar value of the plan's lifetime limit, subject to restrictions on annual limits.

- In addition, the Interim Final Rules contain anti-abuse rules with regard to certain mergers, acquisitions and plan transfers that do not have a bona fide employment-based reason in order to attempt to maintain grandfathered status.

In an interesting note in the Preamble to the interim final regulations, any plan design change made in good faith between March 23, 2010 and June 17, 2010 (the publication date of the interim final regulations), that "only modestly exceed the permitted changes" outlined above will not cause a grandfathered plan to lose its status.

Special Grandfather Rules for Collectively Bargained Plans

While there are no special rules for self-funded collectively bargained plans, insured plans subject to collective bargaining that were ratified before March 23, 2010 and which contained good-faith bargaining over health plan benefits do have some special grandfather rules.

As an exception to normal grandfathering rules, changing the insurance issuer during the period of a collective bargaining agreement will not cause the health plan to lose grandfathered status. After the termination date of the bargaining agreement, the coverage is treated as a grandfathered health plan until it loses grandfathered status under one of the situations described above. The determination of grandfathered status is made by considering changes to the terms of the plan since the grandfather date. Therefore, changes made during the period of a collective bargaining agreement could cause the plan to lose grandfathered status immediately upon the termination date of the collective bargaining agreement.

Summary

All employers should review their plan designs that were in place on March 23, 2010 and the new requirements to maintain grandfathered plan status. Upon such detailed review, some em-

ployers may decide to try to maintain grandfathered status while others may choose to forgo such status due to plan cost or design issues.

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