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# Health Care Reform: How Long Will Our Group Health Plan Remain "Grandfathered"?

*In March, President Obama signed the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA), enacting comprehensive health care reform (in combination, referred to as the Act). This e-alert is another in a series related to the legislation and addresses the scope of PPACA's "grandfathered" status for group health plans.*

On June 17, 2010, the Internal Revenue Service (IRS), the Department of Labor (DOL) and the Department of Health and Human Services (HHS) jointly issued regulations that further define the scope of a "grandfathered" group health plan, including a list of actions that will cause a plan to lose its "grandfathered" status.

## Definition of "Grandfathered"

"Grandfathered" health plan coverage means coverage provided by a group health plan or a health insurance issuer, in which an individual was enrolled on March 23, 2010 and which maintains grandfathered status according to these rules. Under the Act, a "group health plan" generally excludes "HIPAA-excepted" benefits. This means that the health care reform plan design mandates do not apply to such "HIPAA-excepted" benefits as limited scope dental and vision programs and most health flexible spending accounts. The preamble to the regulations provides clarification that retiree-only group health plans may be among the "HIPAA-excepted" benefits that are exempt from the plan design mandates.

The regulations clarify that the grandfathering rules apply separately to each benefit package made available under a group health plan or health insurance coverage. Example: Jones Company offers a group health plan with an HMO option and a POS option, which are both "grandfathered" health plan coverages. In general, if Jones Company makes changes only to the POS option, and those changes cause the POS option to lose its grandfathered status, it will not affect the grandfathered status of the HMO option.

## Collectively Bargained Plans

Historically, when new benefits legislation was passed, collectively bargained

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plans received the benefit of a general delayed effective date for compliance with new requirements. Collectively bargained plan sponsors then viewed themselves as "grandfathered" out of compliance with the new legislation until the delayed effective date. However, the Act uses the term "grandfathered" in a different and very specific manner. For purposes of health care reform, being a "grandfathered" plan does not mean that the plan has a general delayed effective date for compliance. Rather, being grandfathered means that the plan only has to comply with some health care reform mandates, but not others.

All grandfathered plans (collectively bargained or not) are subject to certain health care reform mandates on the same date that those requirements would apply to non-grandfathered plans. Some of those mandates become effective as of the first plan year beginning on or after September 23, 2010; others become effective as of the first plan year beginning on or after January 1, 2014.

Self-funded collectively bargained plans are immediately subject to the same rules for maintaining grandfathered status as non-collectively bargained plans; they remain grandfathered until they take an action that causes the plan to lose its grandfathered status as outlined by the regulations. On the date that the self-funded collectively bargained plan loses its grandfathered status, it then has to comply with the additional mandates that apply to non-grandfathered plans at that time.

Insured collectively bargained plans are grandfathered at least until the date on which the last CBA governing the plan that was in effect on March 23, 2010 expires. Thereafter, the determination of whether an insured collectively bargained plan is grandfathered is made based on the same criteria imposed by the grandfathering regulations on all other plans, comparing the terms of the Plan as of March 23, 2010 with the terms of the plan on the CBA expiration date (and thereafter).

## Disclosure and Recordkeeping for Grandfathered Plans

Grandfathered plans must include a statement claiming grandfathered status, plus contact information for questions and complaints in "plan materials" that describe benefits. A model notice is included in the regulations. The regulations do not provide a specific effective date for this statement/notice. In the absence of specific guidance, it may be desirable to include such a statement/notice in any

plan materials describing benefits that are disseminated after the issuance of the regulations, but certainly no later than the first day of the plan year beginning on or after September 23, 2010. Grandfathered plans must maintain records documenting their status, which they must make available for examination.

## Adding New Employees and Dependents

Generally speaking, the enrollment of new employees and dependents will not cause a group health plan to lose its grandfathered status. A plan in effect on March 23, 2010 will be grandfathered as to new employees (whether newly enrolled or newly hired) who enroll after March 23, 2010. It will also be grandfathered as to an employee's new family members (whether newly enrolled or newly acquired) who are enrolled after March 23, 2010.

The regulations contain anti-abuse provisions to prevent "grandfathered" status from being a saleable commodity in commercial transactions, and to prevent employers from trying to circumvent the rules by reorganizing employees and plan options. Transferring employees from a non-grandfathered plan to a grandfathered plan without an independent business reason for doing so will generally cause the grandfathered plan to lose its status.

## Plan Funding and Administration Changes

A plan may or may not lose its grandfathered status by making certain funding or administrative changes. For example, an increase in insurance premiums will not cause an insured plan to lose its grandfathered status. On the other hand, if the plan enters into a new contract of insurance, rather than renewing an existing contract, it will lose grandfathered status with respect to the new contract. (However, an insured collectively bargained plan will not lose its grandfathered status merely because it changes carriers or contracts before the last collective bargaining agreement in effect on March 23, 2010 expires.)

In contrast, a self-funded plan will not lose its grandfathered status merely by changing third party administrators.

## Plan Design Changes

The regulations contain a list of "bright line" changes that will cause the loss of grandfathered status. A plan will lose its grandfathered status if:

1. **Reduction in Benefits**. It eliminates all or substantially all benefits to diagnose or treat a particular condition;
2. **Increased Coinsurance**. It increases a percentage cost-sharing requirement (such as coinsurance) above the level at which it was on March 23, 2010;
3. **Increased Fixed-Amount Cost-Sharing**. It increases fixed-amount cost-sharing requirements other than copayments, such as a $500 deductible or a $2,500 out-of-pocket limit, by a total percentage that is more than the sum of medical inflation measured from March 23, 2010 and 15 percentage points;
4. **Increased Copayments**. It increases copayments by an amount that exceeds the greater of: a total percentage that is more than the sum of medical inflation measured from March 23, 2010 plus 15 percentage points, or $5 increased by medical inflation measured from March 23, 2010;
5. **Employer Contributions**. The employer or employee organization decreases its contribution rate by more than five percentage points below the contribution rate on March 23, 2010; or
6. **Annual Limits**. A plan will lose its grandfathered status if:
    1. On March 23, 2010, it did not impose an overall annual or lifetime limit on the dollar value of all benefits, and it now imposes an overall annual limit on the dollar value of benefits;
    2. On March 23, 2010, it imposed an overall lifetime limit on the dollar value of all benefits but no overall annual limit on the dollar value of all benefits and it now adopts an overall annual limit at a dollar value that is lower than the dollar value of the lifetime limit on March 23, 2010; or
    3. On March 23, 2010, it imposed an overall annual limit on the dollar value of all benefits, and it now decreases the dollar value of the annual limit (regardless of whether the plan also imposes an overall lifetime limit on the dollar value of all benefits).
    Reinhart Comment: As an example of subparagraph (b) above, Smith Company's Group Health Plan is grandfathered, and currently has a $1 million overall lifetime maximum benefit. The plan has to remove this limit as of its new plan year beginning on January 1, 2011 to comply with the Act. Smith Company replaces this lifetime limit with an overall annual $1 million maximum, effective January 1, 2011. According to the new regulations, this change will not cause the plan to lose its grandfathered status. However, this change may not necessarily satisfy the requirements for "restricted annual limits" in

the recently published regulations. Please see our forthcoming e-alert on this topic.

## Transitional Rules

The regulations also contain some rules to provide relief to plans that adopted changes prior to the issuance of regulations that would now cause the plans to lose grandfathered status.

These are as follows:

1. A plan will not lose its grandfathered status with respect to changes made after March 23, 2010 pursuant to:
    1. a legally binding contract entered into on or before March 23, 2010;
    2. a state insurance filing made on or before March 23, 2010; or
    3. written amendments adopted on or before March 23, 2010.
2. A plan will not lose its grandfathered status with respect to changes made after March 23, 2010 and prior to the issuance of regulations if the changes are revoked or modified effective as of the first day of the first plan year beginning on or after September 23, 2010, and the terms of the plan on that date would not otherwise cause the plan to lose its grandfathered status.

## Open Questions

The agencies requested comments on whether the following actions should cause a plan to lose its grandfathered status:

1. Changing from fully-insured to self-funded status.
2. Changes in the composition of a provider network.
3. Changes in a prescription drug formulary.

In requesting these comments, the agencies indicated that if they issue more guidance with additional rules regarding actions that will cause plans to lose grandfathered status, such rules would apply prospectively only. Hopefully, this also means that plans making such changes in advance of new guidance will also receive transition relief.

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