

Grandfathered Health Plan Regulations Released

One of the most common questions we have received since the enactment of Health Care Reform is “What changes can I make to my plan without losing grandfathered status?” It has been frustrating to have to tell you that the only thing we know for sure is that a grandfathered plan is a plan that was in existence on March 23, 2010. We now have some additional answers for you. Earlier this week, the IRS, HHS, and DOL jointly issued interim final regulations that address the changes that will cause a grandfathered plan to forfeit their grandfathered status.

Eligibility Requirements

Whether a plan is a grandfathered plan is determined separately for each plan made available by the employer or insurer. Subject to special rules for collectively bargained plans, health insurance products sold to new entities or individuals after the grandfather date will not be grandfathered, even if those products were offered in the market before March 23, 2010.

A plan does not cease to be grandfathered plan merely because one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan has continuously covered someone since March 23, 2010. Further, an employee can switch from one grandfathered plan offered by the employer to another grandfathered plan offered by the employer without causing either plan to lose grandfathered status.

Grandfathered plans may permit newly hired or newly enrolled employees and their families to enroll in the plan after March 23, 2010 without jeopardizing the plan’s grandfathered status. In addition, an employee who had previously declined coverage prior to March 23, 2010 can enroll himself or herself and eligible family members in a grandfathered health plan after such date. The regulations have an anti-abuse provision, which states that if the purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered health plan, the plan ceases to be a grandfathered plan.

Changes That Will Cause a Plan to Lose Grandfathered Status

The preamble to the regulations state that the regulations are designed to take into account reasonable changes routinely made by plans or issuers without the plan losing its grandfathered status. Generally, the regulations permit plans and issuers to make voluntary changes to increase benefits, to conform to required legal changes, and to adopt voluntarily other consumer protections of Health Care Reform. In contrast, changes that significantly decrease the benefits covered, materially increase cost sharing by participants, or substantially increase the cost borne by participants will generally cause a plan to lose its grandfathered status.

More specifically, the regulations provide that certain changes that will cause a plan to lose its grandfathered status. These changes include:

- Changing Insurance Carriers – A fully-insured plan will lose its grandfathered status if it changes insurance carriers. A plan will not lose its grandfathered status if it changes third-party administrators.
- Decreasing Premium Contributions – A plan will lose its grandfathered status if the employer decreases its contribution towards the cost of any tier of coverage (e.g., single, family, etc.) by more than 5% of its contribution rate in effect on March 23, 2010. The total cost of coverage is to be determined in the same manner as the COBRA premium for the plan.
- Reducing/Eliminating Benefit Option – A plan will lose its grandfathered status if it eliminates all or substantially all benefits relating to the diagnosis or treatment of a particular condition.
- Increasing Coinsurance – Any increase in an individual’s percentage coinsurance requirements (e.g., increasing from 10% to 20% coinsurance) will cause a plan to lose grandfathered status.
- Increasing Copayments – A plan will cease to be a grandfathered plan if there is an increase since March 23, 2010 in any copayment that exceeds the greater of (i) a percentage equal to medical inflation (as defined in the regulations) plus 15 percentage points, or (ii) \$5 (increased by medical inflation).
- Increasing Other Fixed Cost-Sharing – A plan ceases to be a grandfathered plan if there is an increase since March 23, 2010 in a fixed-amount cost sharing (e.g., a deductible) that is greater than the rate of medical inflation plus 15 percentage points.
- Changing/Implementing Lifetime or Annual Benefit Limits – A plan will cease to be a grandfathered plan if it makes certain changes to lifetime or annual benefit limits, including imposing an overall annual or lifetime limit when it did not previously have one and decreasing any annual limits below what they were on March 23, 2010.

Disclosure and Documentation Requirements

In order to maintain grandfathered health plan status, the plan or issuer must maintain records documenting the plan or policy terms in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify the plan’s status as a grandfathered health plan. The records must be kept for as long as the plan takes the position that it remains grandfathered. The records must be made available to participants, beneficiaries, individual policy holders, or state or federal agencies upon request. 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 plan, along with the contact information for questions and complaints. The regulations contain a model statement that will satisfy this disclosure requirement.

Effective Date and Transition Guidance

The regulations are effective immediately. They provide some relief for plans that have made changes after March 23, 2010. Any changes made during this time period will be considered part of the terms of the plan on March 23, 2010 even though they were not effective at that time, if: (i) changes were pursuant to a legally binding contract entered into on or before March 23, 2010, (ii) changes were made pursuant to a filing on or before March 23, 2010 with a State insurance department, or (iii) changes were pursuant to written amendments to a plan that were adopted on or before March 23, 2010.

Additionally, the regulations provide that employers and issuers who modified plans in a way that would cause the plan to cease to be a grandfathered plan after March 23, 2010 and prior to June 14, 2010 will not lose grandfathered plan status if the changes are modified or revoked. An employer or insurer has until the first day of the plan year beginning on or after September 23, 2010 to modify or revoke any changes to its plan that would otherwise cause the plan to lose grandfathered status.

Collectively Bargained Plans

A fully-insured plan maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010 is a grandfathered plan at least until the date on which the last agreement relating to the coverage that was in effect on March 23, 2010 terminates. Self-insured plans maintained pursuant to a collective bargaining agreement are not eligible for this collectively bargained exception. After the date on which the last of the collective bargaining agreements terminates, the determination of whether health insurance coverage maintained pursuant to a collective bargaining agreement is a grandfathered plan is made under the general rules on maintenance of grandfather status. This determination is made by comparing the terms of the plan on the date of determination, with the terms that were in effect on March 23, 2010. The regulations state that a change in issuers during the period of the agreement, by itself, would not cause the plan to cease to be a grandfathered health plan at the termination of the agreement.

What Does it Mean to be a Grandfathered Plan

Grandfathered plans are still required to comply with many of the provisions of Health Care Reform. However, there are some benefits to being a grandfathered plan. For example, grandfathered plans are deemed to be minimum essential coverage for purposes of the employer pay or play mandates that become effective in 2014. Also, grandfathered plans are exempt from some (but not all) of the insurance mandates that are effective for the first plan year beginning on or after September 23, 2010. Some of the provisions to which grandfathered plans are exempt include: (i) the nondiscrimination rules that apply to fully-insured plans; (ii) the requirements regarding coverage of preventive health care; (iii) the requirement for a new appeals process; (iv) the requirements regarding access to primary care providers and OB-GYNs; and (v) the requirements regarding access to and cost-sharing for emergency services. Also, while grandfathered plans must generally comply with the dependent age 26 mandate, they do not have to provide coverage to any dependent child that has other employer-sponsored coverage available until January 1, 2014.