



eActionAlert

When Does a Health & Welfare Plan Lose its “Grandfathered” Status?

June 22, 2010

Our **eActionAlert** dated March 30, 2010 was devoted to a discussion of the “grandfather” provisions of the Health Care Reform legislation. In that publication we cautioned readers as follows:

“It is not clear to us at what point making design changes to a plan could cause that plan to no longer be the “same plan” and therefore lose its ‘grandfathered’ status. We urge employers to exercise caution before making design changes and to consult with their advisors first.”

This issue has now been clarified by the U.S. Department of HHS, Labor and Treasury who issued interim and final regulations for group health plans and health insurance coverage relating to status as a grandfathered health plan under the Patient Protection and Affordable Care Act (P.L. 111-148). The regulations, which also call for comment, were published in the June 17 Federal Register and are synthesized here for easy reading.

GRANDFATHERING REGULATION HIGHLIGHTS

- In ANY materials provided to participants and beneficiaries they must be notified about the plan’s grandfathered status. (See attached Model Notice.)
- Must maintain records documenting the terms of the plan on March 23, 2010 and other documents sufficient to prove its grandfathered status.
- A Plan ceases to be a grandfathered plan if:
 1. A new policy of insurance (or certificate) is entered into which is not a renewal;

2. Any merger or reorganization occurs which is designed for the principal purpose of covering new individuals under a grandfathered plan;
3. All or substantially all benefits for any particular medical condition are eliminated;
4. Co-insurance percentages are increased;
5. Fixed amount cost sharing is increased (other than copayments) by more than the rate of medical cost inflation* plus 15%;
6. Copayments are increased by more than the greater of (a) the rate of medical cost inflation plus 15% or (b) \$5 increased by medical inflation*;
7. The employer contribution rate is decreased by more than 5% for any tier of coverage (cost determined a la COBRA);
8. Where employee contributions are based on hours worked or units produced, the employer contribution rate is decreased by 5%;
9. Annual or lifetime limits are imposed where the plan previously did not have one;
10. An annual limit is imposed that is lower than its previous lifetime limit;
11. An annual limit is lowered; and
12. Employees are moved to a grandfathered plan with lesser benefits.

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- There is a grace period which extends to the first day of the plan year beginning on or after September 23, 2010 to revoke any changes that would cause the loss of grandfathered status. (Seems to require only prospective correction).

* Medical inflation is determined cumulatively from March 23, 2010 as measured by the Medical Care Component Price Index for All Urban Consumers.

MODEL NOTICE

This [group health plan or health insurance issuer] believes this [plan or coverage] is a “grandfathered health plan” under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was already in effect when that law was enacted. Being a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information].

[For ERISA plans, insert: You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.] [For individual market policies and nonfederal governmental plans, insert: You may also contact the U.S. Department of Health and Human Services at www.healthreform.gov.]

What Happens if Grandfathered Status is Lost?

If grandfathered-plan status is lost, the following additional requirements will become applicable to the plan for the first plan year beginning after September 22, 2010 (or in which grandfathered status is lost, if later):

- Annual limits must be eliminated then instead of 2014 plan year;
- Plans with dependent coverage must allow adult children to be covered to 26th birthday without regard to whether coverage is available under another plan;
- New claims procedures and notice rules will apply;
- Free preventive care must be provided;
- If the plan is insured, it may not discriminate in favor of higher compensated employees.

NOTE: Failure to comply with these requirements can result in civil penalties of up to \$100 **per participant, per day** as long as the Plan is out of compliance. Also note that additional financial consequences may apply.

These interim final regulations are now in a 60-day comment period. The final version could, therefore, differ significantly. In the meantime, employers should be very cautious about making such changes as are described in the proposal.

As we have in the past, we will continue to monitor Health Care Reform developments and report them to you as soon as practicable.

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