

PUBLICATION

Interim Final Rules Issued for Grandfathered Health Plans Under PPACA

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On June 17, the Departments of Treasury, Labor, and Health and Human Services issued interim final rules for health plans relating to status as grandfathered health plans under the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (PPACA). These rules are intended to clarify section 1251 of PPACA entitled "Preservation of Right to Maintain Existing Coverage," which provides that individuals will not be required to terminate coverage under an individual or group plan in which he or she was enrolled on March 23, 2010. The regulation expands on that definition and sets forth rules for retaining grandfathered status. Below is a summary of certain PPACA provisions affecting grandfathered plans and the requirements to retain grandfathered status.

Health Care Reform Provisions Affecting Grandfathered Plans

While grandfathered plans are exempt from many of the reforms mandated by PPACA, they still must comply with the following provisions:

- Prohibition against waiting periods in excess of 90 days;
- Prohibition on lifetime limits;
- Ban on rescissions
- Coverage of adult children to age 26 (unless the child has other coverage through the child's employer);
- Coverage disclosure and transparency requirements; and
- Requirement for plans to pay out a minimum of 80 or 85 percent of premiums to cover health care claims or quality improvement activities.

Furthermore, grandfathered group plans must comply with provisions relating to annual limits and prohibitions on pre-existing condition exclusions for children under age 19.

However, grandfathered plans are exempt from a number of significant reforms. Most notably, grandfathered plans do not have to provide the essential health benefits package or first-dollar coverage for preventive care.

Definition and Requirements of Grandfathered Plans

A grandfathered group health plan must have existed on March 23, 2010, must continue to exist within the limits set forth in the regulations, and must continuously cover at least one person (whether or not that person was covered on March 23, 2010). Furthermore, a grandfathered plan must provide notice to covered persons describing benefits and indicate that it believes it has grandfathered status. The regulation provides a model notice. Additionally, the plan must maintain and make available for examination upon request records documenting the terms of the plan in connection with the coverage in effect on March 23, 2010.

Changes That Result in Loss of Grandfathered Status

If an employer or employee organization enters into a new policy, certificate, or insurance contract, the plan is not grandfathered even if the new policy provides cheaper and better coverage in every respect. Thus, for

example, except under very limited circumstances described below, a new policy purchased after March 23, 2010 cannot be a grandfathered plan. However, a change in third-party administrators for a self-funded health plan will not result in a loss of grandfathered status.

Additionally, a merger, acquisition, or similar business restructuring made solely for the purpose of covering new individuals in a grandfathered plan will result in a loss of grandfathered status.

Each coverage package is treated as a separate plan. If there are three coverage options and only the policy for option "A" is changed, then only option A loses grandfathered status. However, if coverage for a subset within a package (e.g., family level coverage within the PPO package) loses grandfathered status, then the whole (PPO) package loses grandfathered status.

Anti-abuse rules are included for transfers of people into a grandfathered plan. If employees are transferred from a grandfathered plan into another plan that treats "the transferee plan as if it were an amendment of the transferor plan," and there is no "bona-fide employment-based reason to transfer the employees into the transferee plan" the plan loses its grandfathered status.

A grandfathered plan will lose its grandfathered status if it makes significant changes in plan benefits to disadvantage participants. The following changes will result in a loss of grandfathered status:

- Elimination of substantially all benefits to diagnose or treat any condition (or any element of diagnosis or treatment);
- Increase in cost sharing percentage after March 23, 2010 (e.g., increase in the participant's co-insurance percentage);
- Any increase in a fixed dollar cost, other than a co-pay, such as a higher deductible or out-of-pocket limit, but only if the increase is higher than a specified medical inflation index plus 15%, measured from March 23, 2010;
- Any increase in a fixed dollar co-pay, if the increase is more than the greater of (i) \$5 adjusted for a defined "medical inflation" index plus \$5, or (ii) a formula "maximum percentage increase" as compared to the original co-payment, in either case measured from March 23, 2010;
- Decrease of employer contribution, whether based on the cost of coverage (employer contribution/total cost of coverage) or on a formula (such as hours worked or production levels). Grandfathered status is lost if the contribution rate for any tier of coverage is decreased by more than 5% from March 23, 2010 levels; or
- Changes in benefit limits. If the plan adds an annual or lifetime limit when there had not been one, grandfathered status is lost. A plan with only a lifetime limit on March 23, 2010 but no annual limit loses grandfathered status if a new annual limit is lower than the lifetime limit in effect on March 23. If the plan had an annual limit on March 23, 2010, grandfathered status is lost if that limit is lowered.

Changes That Do Not Result in Losing Grandfathered Status

New participants (new hires or just newly enrolled) and family members can join a grandfathered plan, without the plan losing its grandfathered status.

In some cases, employers made good faith changes between March 23, 2010 and the issuance of regulations on June 14, 2010, not expecting those changes to result in a loss of grandfathered status. In this scenario, employers may revoke or modify the changes in order to retain grandfathered status.

Additionally, the regulations address the situation where an insurance issuer or health plan made changes to the terms of the plan prior to March 23, 2010, but those changes do not go into effect until after March 23,

2010. In this instance, these terms become part of the plan and the plan does not lose its grandfathered status if:

- The changes were made pursuant to a legally binding contract;
- The changes were pursuant to a filing with a state insurance department; or
- The changes were made pursuant to written amendments to a plan.

Definitions, examples, and rules of application are provided in the full interim rules. This client alert is intended to be just a brief overview of the regulations relating to grandfathered health plans; all plans are different, and administrators are encouraged to contact their Baker Donelson attorney or any of the attorneys in Baker Donelson's Health Care Reform Group with questions.