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Grandfathered Health Plans: How to Keep (or Lose) Your Grandfathered Status

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"Grandfathered" health care plans are exempt from several onerous requirements imposed by the health care reform legislation. Unfortunately, recently imposed regulations make it more difficult for employers to maintain their plans' grandfathered status. Under the current regulatory scheme, more and more plans will lose their grandfathered status and become subject to all of the requirements that are imposed on non-grandfathered plans. In 2011, 71% to 87% of large employer plans (i.e., those with 100 or more workers) are expected to qualify for grandfathered status, but by 2013, only 36% to 66% of those plans are expected to retain it. For small employer plans, only 20% to 51% are expected to retain their grandfathered status by 2013.

What is a "Grandfathered" Health Plan?

A grandfathered health plan is defined as "a group health plan or group or individual health insurance coverage . . . with respect to individuals enrolled on March 23, 2010." The term "group health plan" includes insured and self-insured plans, so

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either type of plan can have grandfathered status. The interim regulations provide that a plan will not lose its grandfathered status simply because one or more individuals cease to have coverage, so long as coverage has been provided to someone continuously since March 23, 2010.

What Are the Advantages of a Grandfathered Health Plan?

Grandfathered health plans are exempt from a number of requirements of the health care reform legislation, including the following:

1. ***Preventative health care requirements:*** Plans without grandfathered status must provide free coverage for specified preventative care services (e.g. immunizations, screenings);

2. ***Primary care designations:*** If a non-grandfathered plan provides for designation of a participating primary care provider, participants must be given the right to choose that provider;

3. ***Clinical trials:*** A non-grandfathered plan cannot deny participation in an approved clinical trial or deny coverage of routine costs associated with the clinical trial;

4. ***Mandatory appeal process:*** Non-grandfathered plans must maintain an internal and external appeal process, and permit enrollees to review their files. Coverage must continue pending the outcome of the appeals process;

5. ***Premium increase reviews:*** Non-grandfathered fully insured plans are subject to an annual review to determine if there have been unreasonable increases in premiums for health insurance coverage;

6. ***Plan quality reporting obligation:*** Non-grandfathered plans also are subject to an annual reporting requirement purportedly designed to help improve health outcomes, insure effective case management, and provide proof of implementation of wellness and health promotion activities;

7. ***Emergency services***: Employers with non-grandfathered plans that provide any benefits for services in an emergency department of a hospital must cover those services without a prior authorization requirement and without a cost-sharing requirement that different between in-network and out-of-network services;

8. ***Annual limitation on cost sharing:*** The sum of the annual deductible and other annual out-of-pocket expenses required to be paid for non-grandfathered plans cannot exceed $5,000 for self-only coverage and $10,000 for family coverage. Non-grandfathered plans offered in the small group market (i.e., less than 100 employees), cannot have deductibles exceed $2,000 for self-only coverage and $4,000 for family coverage; and

9. ***Essential health benefits and community ratings:*** New plans offered in the small group market (i.e., less than 100 employees) and individual plans must offer certain minimal health benefits as established by the Secretary of Health and Human Services. Also, for such plans, rating shall be determined by each state, and premium rates can only vary based on certain factors listed in the legislation.

How Can a Plan Lose Its Grandfathered Status?

One way to lose grandfathered status is to acquire a plan for the purpose of adding new individuals to the grandfathered plan. For example, Company A – a company without a grandfathered health plan – could buy Company B for the sole purpose of falling under Company B's grandfathered health plan. Under the good faith rule described in the regulations, if the "principal purpose" of a merger or acquisition is merely to cover new individuals under a grandfathered health plan, that plan will lose its grandfathered status.

A change in the scope of benefits beyond a certain limit also will cause the loss of a plan's grandfathered status. Grandfathered status will be lost if the plan eliminates "all or substantially all" of the benefits that are necessary to diagnose or treat a particular condition. For example, a plan will lose its grandfathered status if it decides it will no longer provide benefits for the treatment of HIV/AIDS.

Any increase in a percentage cost-sharing requirement, such as co-insurance, also will result in the loss of grandfathered status. An increase in a deductible or out-of-pocket limit that is equal to or greater than medical inflation plus 15 percentage points also will lead to loss of grandfathered status. Similarly, co-payments cannot be increased by more than the greater of either of the following: (1) $5.00 (to be adjusted annually for medical inflation); or (2) medical inflation plus 15 percentage points, with the co-payment expressed as a percentage.

A decrease in employer contributions also can lead to loss of grandfathered status. If an employer decreases its contribution by more than five percentage points below the contribution rate that was in effect on March 23, 2010, the plan will lose its grandfathered status.

Changes with regard to annual limits on coverage also will lead to loss of grandfathered status. If a plan did not have an annual limit as of March 23, 2010, but thereafter imposes one, then that plan will lose its grandfathered status. Similarly, a plan loses its grandfathered status if it decreases the annual limit by any amount from what was established as of March 23, 2010.

Lastly, if an employer or employee organization enters into a new insurance policy after March 23, 2010, that new policy is not a grandfathered health plan. However, this provision does not apply to self-insured plans that switch third party administrators.

Special Considerations for Employers Subject to Collective Bargaining Agreements

A fully insured plan that was maintained pursuant to a collective bargaining agreement that was ratified before March 23, 2010, will retain its grandfathered status until the end of the term of the collective bargaining agreement, even if changes to benefits occur while the collective bargaining agreement is in effect (e.g., an increase in co-payments). After the end of the term of the collective bargaining agreement, the terms of the plan will be compared to the terms that were in effect on March 23, 2010, and if a change triggers loss of status, then the plan will no longer be grandfathered after the date of the termination of the collective bargaining agreement.

Self-insured plans, however, are treated entirely different from fully insured plans in the context of collective bargaining agreements. The statutory language regarding grandfathered status does not refer to "group health plans." Instead, the language only applies to "health insurance coverage," which does not include self-insured plans. Therefore, a self-insured plan that was maintained pursuant to a collective bargaining agreement that was ratified before March 23, 2010, will not retain its grandfathered status if a triggering change is made while the collective bargaining agreement is in effect. Instead, loss of status will occur on the date of the change.

What Are the Disclosure and Reporting Obligations to Retain Grandfathered Status?

To maintain grandfathered status, the plan must provide a disclosure to participants that includes:

1. a description of the benefits of the plan;
2. a statement that the plan believes it is a grandfathered plan; and
3. contact information where questions can be addressed.

Additionally, a plan is required to retain records proving its grandfathered status for as long as it takes the position that it is a grandfathered plan. Accordingly, retention of records showing the plan as it existed on March 23, 2010, and any subsequent changes, is essential to maintain grandfathered status.

Conclusion

There are many benefits of retaining a plan's grandfathered status in light of the numerousrequirements imposed by the health care reform legislation. Employers must proceed cautiously when making any changes to their grandfathered plans and diligently insure that all disclosure and reporting requirements are met. If you are interested in how to best approach the preservation of your plan's grandfathered status, please contact us for a more detailed discussion.

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