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Healthcare Reform Regulations Issued Addressing Grandfathered Plans

On June 17, 2010, the Departments of Health and Human Services (HHS), Labor and Treasury released final interim regulations for determining whether an employer-sponsored health plan will be grandfathered under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (together referred to as the Affordable Care Act (ACA)). ACA represents comprehensive health care reform legislation that significantly impacts employer sponsored health plans, both fully insured and self-insured plans. Attached is a summary of those reforms that are effective before 2014.

Grandfathered plans will be relieved of certain ACA compliance obligations. To be grandfathered, a plan must have had at least one individual enrolled in coverage on March 23, 2010, and the plan must have continuously covered at least one person since March 23, 2010 (even if not the same individual(s)). ACA specifically provides that a plan will not lose its grandfather status when newly eligible employees and employees' family members become covered under the plan on or after March 23, 2010. A special grandfather rule (discussed below) applies to fully insured plans maintained pursuant to one or more collective bargaining agreements ratified on or before March 23, 2010.

The interim final regulations outline the actions that will cause loss of grandfather status, provide transition and anti-abuse rules, and clarify the plans and benefits that are not subject to ACA. Grandfather status is a choice that plans subject to the ACA must consider by weighing the costs of compliance under ACA as a non-grandfathered plan against the lost opportunity costs associated with retaining grandfather status.

ACA Provisions Applicable ONLY to Non-Grandfathered Plans:

No employee cost-sharing for certain preventive care and certain immunizations

Disclosure of certain plan information to HHS, the applicable state insurance commissioner and the public

The nondiscrimination rules that were previously applicable only to self-insured health plans are extended to non-grandfathered fully insured health plans

Annual reporting to HHS and to enrollees regarding benefits under the plan that improve health and wellness and health promotion activities

A pediatrician may be designated a primary care provider for a child and no authorization or referral may be required for participating OB-GYNs

Emergency services must be covered without prior authorization and treated as in-network coverage

The ability not to offer coverage to adult children (up to age 26) if they are eligible for other employer-sponsored coverage is lost. This is lost effective for the first plan year beginning on or after January 1, 2014, even for grandfather plans.

An internal and external review process must be established and continued coverage must be provided pending the outcome of appeals

Coverage for routine clinical trials must be provided

Changes Causing Loss of Grandfather Status

Grandfather status and the loss of grandfather status are determined on a per benefit option basis for a plan. For example, a PPO option offered under a plan may lose grandfather status, but a high deductible option offered under the same plan may not. The interim final regulations specify that the following actions will result in loss of grandfather status:

Changing Insurance Carriers or Entering into New Contracts - changing the insurer of fully insured coverage will trigger the loss of grandfather status even without changes in plan design. In addition, entering into a new contract (even with the same insurer) instead of merely renewing a contract will cause the loss of grandfather status. For example, if a plan adds a high deductible option as part of a contract renewal, the new high deductible option will not be grandfathered, but the existing options under the plan will. A plan may also lose grandfather status if it changes from being self-funded to fully insured, or vice versa.

Eliminating Coverage of a Benefit - the elimination of substantially all benefits of the coverage that was in place on March 23, 2010, for a condition or substantial elimination of any element necessary to treat a condition. For example, eliminating coverage of counseling for mental illness treatment or any coverage related to a particular condition, such as AIDS.

Increase in Co-Insurance - any increase in the coinsurance percentage in effect on March 23, 2010.

Increasing Fixed Cost-Sharing Amounts - an increase in a fixed cost-sharing amount that exceeds the amount in effect on March 23, 2010, by medical inflation plus 15% (or the greater of \$5 or 15% for a copay).

Decreasing the Rate of Employer Contributions - a decrease in the rate of employer contributions of more than 5%. If employer contributions are based on a formula, grandfather status is lost if employer contributions for any tier of coverage decrease by more than 5% for similarly situated individuals. If the plan is self-insured, the employer's contributions are equal to total plan costs minus employee contributions.

New Maximum Limits on Benefits - imposing a new annual or lifetime maximum on an option after March 23, 2010. ACA prohibits annual or lifetime maximums on essential benefits for plan years beginning on and after September 23, 2010 (January 1, 2011, for calendar year plans). In addition, a plan that imposed a lifetime limit on March 23, 2010, but not an annual limit, will lose grandfather status if it later adopts an annual limit that is less than the lifetime limit that was in place on March 23, 2010. Finally, a plan will lose grandfather status if it decreases an annual limit that was in place on March 23, 2010.

Permissible Changes

The preamble to the interim final regulations specifies that the following actions, by themselves, will not result in the loss of grandfather status:

Policy Premium Increases – although an employer is not permitted to decrease the rate of employer contributions by more than 5%.

Changes to Comply with Law – however changes that decrease benefits will result in loss of grandfather status (e.g., eliminating all mental health and substance abuse benefits to avoid complying with the Mental Health Parity and Addiction Equity Act).

Compliance with Non-Mandatory Reforms and Increases in Benefits – such as amending a plan prior to 2014 to provide for coverage to dependent and non-dependent adult children up to age 26, even if the child is eligible for other employer sponsored coverage.

A Self-Insured Plan Changing Third Party Administrators or Stop-Loss Carriers – however, a fully insured plan is not permitted to change insurance carriers.

Required Communication and Document Retention for Maintaining Grandfather Status

Sponsors of plans or benefit options that are grandfathered must include in employee communications (e.g. summary plan descriptions) a statement that the plan or benefit option is grandfathered. The statement must also include contact information for questions and complaints and must be added to plan materials before the first day of the plan year in which the plan seeks grandfather status. The interim final regulations provide model language for sponsors to use, which may be updated in future regulations. In addition, a plan wishing to maintain grandfather status must retain, and make available for inspection, plan records proving the plan's provisions in effect on March 23, 2010, and any plan documents necessary to verify, explain or clarify the plan's status as a grandfathered plan.

Transition and Anti-Abuse Rules

Changes to a contract or plan made prior to March 23, 2010, but effective after March 23, 2010, do not cause loss of grandfather status. Changes made after March 23, 2010, but before the issuance of the interim final regulations, do not cause the loss of grandfather status if the changes are revoked or modified on or before the first plan year beginning on or after September 23, 2010 (January 1, 2011, for calendar year plans).

The preamble to the interim final regulations also states that plan changes made after March 23, 2010, but before issuance of the interim final regulations, will not cause a plan to lose grandfather status if such changes represent a “good-faith effort to comply with a reasonable interpretation of [ACA]” and “only modestly exceed” the rules set forth in the interim final regulations.

If participants covered under a plan or benefit option are transferred to another plan or benefit option for cost, plan design, or non-bona fide employment-based reasons, both plans lose grandfather status if the plan from which they are transferred would have lost grandfather status if it were amended to have the terms of the plan to which they are transferred. In addition, if the principal purpose of a

merger or other corporate transaction is to cause participants to be covered under a grandfathered plan or option, the plan that provides coverage for those participants loses grandfather status.

Plans and Benefits that are Exempt from Compliance with ACA

The preamble to the interim final regulations confirms that the following plans and benefits are exempt from compliance with all provisions of ACA (whether applicable to all plans or only to non-grandfathered plans):

Dental-only and vision-only plans

Most health flexible spending arrangements

Separate insurance coverage for critical illness or accidents

Separate retiree-only plans

Medigap policies

Accidental death and dismemberment coverage

Special Rule for Collectively-Bargained, Fully Insured Plans

In addition to the general grandfather rule, ACA provides that health insurance coverage maintained pursuant to one or more collective bargaining agreements (“CBA”) ratified before March 23, 2010, is deemed to be grandfathered until the last CBA relating to the coverage terminates. The interim final regulations clarify that this rule applies only to insured plans pursuant to a CBA and not to self-funded plans. Fully-insured coverage maintained pursuant to a CBA ratified before March 23, 2010, will lose grandfather status if changes are made to coverage between March 23, 2010, and the date the CBA expires that would cause loss of grandfathered status for a plan that is not maintained pursuant to a CBA. However, the grandfather status will not be lost until the last CBA relating to such coverage terminates. In addition, grandfathered collectively bargained plans must comply with all reforms that apply to grandfathered non-collectively bargained plans at the same time as such reforms are applicable to other grandfathered plans.

Comment Period

The interim final regulations are not conclusive, and may change. In addition to comments on the rules set forth in the interim final regulations, the agencies have specifically asked commentators for input regarding whether changes to plan structure (e.g., changing from fully-insured to self-insured), changes to provider networks or drug formulary, or other changes should cause a plan to lose grandfather status. Employers wishing to submit comments to the agencies may do so no later than 60 days after publication (August 16, 2010).

What This Means To You

Employers with plans in existence on March 23, 2010, must determine whether or not to maintain grandfather status. Therefore, the potential cost savings from the plan changes foregone in the interest of maintaining grandfather status must be weighed against the costs of complying with the ACA provisions applicable to non-grandfathered plans.

Contact Info

If you have any questions about this or any other employee benefits and executive compensation matter, please contact your Husch Blackwell Sanders attorney.

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