

## New Rules on “Grandfathered Plans” May Limit Health Plan Changes

One of most controversial provisions of the new health care reform law is the so-called “grandfathered health plan” rule, which exempts health plans in existence on March 23, 2010 (the date of enactment) from many of the new law’s requirements. The law itself doesn’t state what actions by plan sponsors, if any, might cause a grandfathered plan to lose its protected status.

On June 14, 2010, the three federal agencies primarily responsible for administering the health care reform law issued guidance on the grandfathered health plan exemption. The interim final rule identifies a number of plan changes that will cause a plan’s grandfathered status to terminate, including a simple change of health insurer. Accordingly, the new regulations create challenging issues and decisions for sponsors of health plans that pre-date health care reform.

On a more positive note, the regulations also confirm that retiree-only plans and certain stand-alone dental and vision plans are not subject to the insurance market reforms enacted by health care reform.

---

### The Grandfathered Health Plan Exemption

The Affordable Care Act imposes many new requirements on group health plans; the most important of these are summarized in our previous Alert (see: <http://jaeckle.com/EmployerHealthCareChallenges>.) However, the law includes two important exceptions:

- Health plans in existence on March 23, 2010, the date of the law’s enactment - referred to as “grandfathered health plans” - are exempt from many (though not all) of the new requirements.
- Insured plans maintained pursuant to collective bargaining agreements are also exempt from many of the new requirements until the termination of such agreements.

As we stated in our prior Alert (see link, above), the health care reform law itself does not state what plan amendments or other actions by the sponsor or insurer might cause a grandfathered health plan to lose its protected status. Recognizing the importance of this issue, the three federal agencies primarily responsible for administering the health care reform law<sup>1</sup> issued an interim final rule on June 14, 2010 that addresses these questions.

### Benefits of Grandfathered Health Plan Status

A grandfathered health plan is exempt from many new requirements under health care reform which apply to non-grandfathered plans, including the following:

---

<sup>1</sup> The Internal Revenue Service (IRS), the Department of Health and Human Services (HHS) and the Department of Labor (DOL).

- The requirement that health plans cover certain preventive health services without any cost sharing under new PHSA Section 2713.
- The prohibition on discrimination in favor of highly compensated individuals under new PHSA Section 2716.
- The requirements for appeals procedures under new PHSA Section 2719.
- The new patient protection requirements, including provisions designed to ensure access to obstetric and gynecological care, set forth in PHSA Section 2719A.

In addition, certain provisions of the health care reform law apply differently to grandfathered health plans. For example, the new requirement that dependent coverage be available until age 26 applies, in the case of a grandfathered group health plan, only if the child is not eligible for coverage under an employer plan; this proviso does not apply to non-grandfathered plans.

Accordingly, maintaining grandfathered status is likely to be advantageous to a health plan that was in existence on March 23, 2010; the precise scope of the benefit to the sponsor or issuer would depend on the plan's design before the law was enacted and what design changes are desired after this date.

### **Maintaining Grandfathered Status**

There are three requirements for maintaining a health plan's grandfathered status.

**Keep Same Policy and Insurer:** An insured plan, if not maintained pursuant to a collective bargaining agreement (collectively bargained plans are entitled to special protection; see below), will lose its grandfathered status if the sponsor changes insurers or policies after March 23, 2010. This rule applies separately to each benefit package under the plan.

**Example:** As of March 23, 2010 a health plan (not maintained pursuant to a collective bargaining agreement) offers two insured benefit options, a low deductible option and a high deductible option. Beginning July 1, 2013, the plan replaces the issuer for the low deductible option with a new issuer. The coverage under this option is no longer grandfathered coverage as of July 1, 2013.

**Avoid Disqualifying Changes:** A plan cannot adopt certain plan design changes that, under the interim final rule, are deemed to disqualify it as a grandfathered plan. The rule provides that a health plan, or a specific benefit package under a health plan, not maintained pursuant to a collective bargaining agreement ratified before March 23, 2010 (as to such plans, see below), will forfeit its grandfathered status if the plan sponsor or issuer takes any one or more of the following actions:

- The sponsor or issuer eliminates all or substantially all benefits to diagnose or treat a particular condition.

**Example:** After March 23, 2010 a plan eliminates benefits for counseling, previously used in the treatment of a certain mental health condition. The plan would lose its grandfathered health plan status.

- The sponsor or issuer increases a percentage cost-sharing requirement (such as coinsurance) above the level in effect on March 23, 2010.

Example: After March 23, 2010 a plan increases the co-insurance requirement from 20% to 25% for any category of medical treatments. The plan would lose its grandfathered health plan status.

- The sponsor or issuer increases a deductible, out-of-pocket limit or other fixed-amount cost-sharing requirement (other than a copayment; see below) above the level in effect on March 23, 2010 by more than the medical inflation rate plus 15 percentage points.

Example: After March 23, 2010 a plan increases the deductible for hospital services from \$500 to \$600 (20%). If the medical inflation rate 5% or less measured from March 23, 2010 through the effective date of the increase, so that the 20% increase is more than such rate plus 15 percentage points, the plan would lose its grandfathered health plan status.

- The sponsor or issuer increases a copayment above the level in effect on March 23, 2010 by an amount that exceeds the greater of (1) the medical inflation rate plus 15 percentage points, or (2) \$5.00 increased by the medical inflation rate measured from March 23, 2010.

Example: After March 23, 2010 a plan increases the prescription drug copayment from \$10.00 to \$17.00 (the increase is \$7.00, or 70%). The medical inflation rate from March 23, 2010 through the effective date of this change is 15%. Since the \$7.00 increase is greater than \$5.75 (\$5.00 increased by the 15% medical inflation rate) *and* greater than 30% (the medical inflation rate plus 15 percentage points), this change would cause the plan to lose its grandfathered status.

- The plan sponsor (employer or employee organization) decreases its contribution rate for any coverage tier by more than five percentage points below the rate in effect on March 23, 2010.

Example: As of March 23, 2010 the employer contributes 80% of the total cost of employee-only coverage and 60% of the total cost of family coverage for family. Subsequently, the employer reduces the contribution to 50% for family coverage, but retains the 80% contribution rate for employee-only coverage. The plan would cease to be a grandfathered health plan, because the 10 percentage point decrease in the contribution for family coverage is exceeds 5 percentage point maximum.

- The plan imposes a new annual or lifetime limit on the dollar value of benefits, or increases a lifetime limit (if there is no annual limit); increases an annual limit (if there is no lifetime limit), above the level in effect on March 23, 2010.

Plan changes that would not affect grandfathered status include: increasing the premium, changing the third party administrator, changing the basic plan design (insured to self-insured, for example), and changing a provider network or a prescription drug formulary.

**Comply With Notice and Records Requirements:** Finally, the plan must comply with certain notice and record-keeping requirements. In particular, the plan must include, in any materials provided to participants or beneficiaries describing plan benefits, a statement to the effect that the plan believes that it is a grandfathered health plan under the Affordable Care Act, and contact information for questions and complaints. In addition, the plan must maintain records documenting the terms of the plan that were in effect on March 23, 2010, and any other documents necessary to verify its status as a grandfathered health plan.

### **Plans Maintained Pursuant To Collective Bargaining Agreements**

An insured<sup>2</sup> health plan maintained pursuant to one or more collective bargaining agreements is entitled to special grandfather protection. Such a plan will not lose its grandfathered status earlier than the date on which the last of such agreements relating to coverage in effect on March 23, 2010 terminates. Until the collective bargaining agreement terminates, such a plan remains a grandfathered health plan even if, for example, the sponsor enters into a new insurance policy or adopts a disqualifying plan amendment of the type described above. Once the agreement terminates, whether or not the plan remains grandfathered is determined under the disqualifying change rules summarized above, by comparing the plan terms after the termination date with the terms in effect on March 23, 2010.

**Example:** A group health plan maintained pursuant to a collective bargaining agreement that runs through December 31, 2011 provides coverage through an insurance policy. The plan enters into a new group policy with a different issuer for the plan year starting on January 1, 2011. This new policy is renewed under a new collective bargaining agreement effective as of January 1, 2012, without any disqualifying changes in plan design. The plan continues as a grandfathered health plan after January 1, 2012.

### **Retiree-Only, Dental and Vision Plans**

Prior to health care reform, retiree-only health plans<sup>3</sup> and plans that provide only what are defined as "excepted benefits" – including stand-alone dental and vision plans – were exempted from health plan requirements under the Internal Revenue Code, ERISA and the PHSA that were added by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Affordable Care Act also amended the PHSA, and it was not completely clear that the HIPAA exemption for retiree-only and "excepted benefits" plans continued. The preamble to the new regulations confirms that it does, so that retiree plans, and stand-alone dental or vision plans, are not subject to the new health insurance market reform rules enacted by the new law.

---

<sup>2</sup> The preamble to the new regulations specifies that the special grandfather rules for collectively bargained plans applies only to insured health plans; self-insured plans are not covered.

<sup>3</sup> Specifically, plans with fewer than two participants who are current employees.

## What Health Plan Sponsor Should Do

Each group health plan sponsor should

- determine whether the plan is a grandfathered health plan under the health care reform law,
- if the plan is grandfathered:
  - consider what plan design changes are necessary or appropriate, in light of health care reform or otherwise,
  - determine whether any such design changes would terminate the plan's grandfathered status, and
  - analyze the costs and benefits of adopting these design changes and of deferring or modifying them so as to preserve grandfathered status.

If you have any questions about grandfathered health plan issues or any other aspect of health care reform, please contact Robert W. Patterson at 716.843.3910 or [rpatterson@jaeckle.com](mailto:rpatterson@jaeckle.com), or Michele O. Heffernan at 716.843.3850 or [mheffernan@jaeckle.com](mailto:mheffernan@jaeckle.com).

This Jaeckle Alert, prepared by the attorneys at Jaeckle Fleischmann & Mugal, LLP, is intended for general information purposes only and should not be considered legal advice or an opinion on specific facts. For more information on these issues, contact one of the attorneys listed above or your existing Firm contact. Prior results do not guarantee a similar outcome. The invitation to contact is not a solicitation for legal work in any jurisdiction in which the contacted attorney is not admitted to practice. Any attorney/client relationship must be confirmed in writing.  
© 2010. All Rights Reserved.