
Health Care Reform Call: Interim Final Regulations for Grandfathered Plans

American Benefits Council

June 16, 2010

Overview

- Grandfathered Plans – General Rule
- Retiree-Only Plans/Excepted Benefits
- Collectively Bargained Plans
- Documentation
- Adding New Employees
- Changes a Plan Can Make (or Not)
- Transition Rules

ACA Statutory Language

- Health plans grandfathered from certain provisions if it was in effect on date of enactment (3/23/10).
- May add new family members.
- May add new “employees”.
- Statute silent on whether/what changes can be made and still be grandfathered plan.

Insurance Market Reform

Rules That Apply to Both “New” & Grandfathered Plans

- 2011
 - No annual limit or lifetime limits on essential benefits
 - No rescissions (except fraud or misrepresentation)
 - Coverage for adult children up to age 26
 - No pre-existing condition exclusion for enrollees under 19 years old
 - Reporting Medical Loss Ratios
- March 2012
 - Summary of Benefits using HHS uniform definitions
- 2014
 - No pre-existing condition exclusions on any enrollees
 - Waiting periods limited to 90 days
- Other
 - Employer Mandates
 - Cadillac Plan Tax
 - FSA/HSA/HRA Changes

Insurance Market Reform

Additional Rules for Non-Grandfathered Plans

■ 2011

- No cost sharing for immunization or preventive care
- No discrimination in favor of highly compensated individuals (Code sec. 105(h)) applies to insured arrangements
- Must allow individuals to choose pediatrician for child's primary care physician
- Must allow females to choose gynecologist or obstetrician without referral
- Must provide internal appeals and external review process
- Must allow emergency services without preauthorization and treat as in-network

■ 2014

- Rating limitations, guaranteed issue, guaranteed renewability, essential benefits (certain insured plans)
- Cost sharing/deductible limits
- No discrimination against individual participating in clinical trial
- No discrimination on health care providers acting within scope of license
- No discrimination based on health status/allowable wellness reward increased to 30%

General Rule for Grandfathered Plans

Retiree-only Plans/Preemption

Collective-Bargained Plans

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Grandfathered Plan Regulations

- Released 6/14/10 (to be published in Federal Register 6/17/10).
- To be grandfathered, must have enrolled individuals continuously since 3/23/10 (does not have to be same individuals).
- But, any policy, certificate or contract of insurance sold after 3/23/10 will not be grandfathered, even if product offered in the market before 3/23/10.
- Each benefit package considered separately.

Retiree-Only Plans/Excepted Benefits

- Small employer/“retiree-only” exception still applies under ERISA & the Code. Also applies under PHSA through non-enforcement policy.
- So self-funded retiree-only plans may still take advantage of this exception.
- HIPAA excepted benefits are not subject to insurance market reform rules.
- State laws imposing more strict rules not preempted by ACA.

Collectively Bargained Plans

- No delayed effective date for collectively bargained plans in effect on 3/23/10 – ACA provisions that apply to grandfathered plans still apply to collectively bargained plans.
- Insured collectively bargained plan retains grandfather status, even if changes made, until last CBA in effect on 3/23/10 terminates.
- At that time, collectively bargained plan either retains or loses grandfather status, depending on changes made.

Documentation

Adding New Employees

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Documentation

- Plan must state in plan materials whether it “believes” it is grandfathered. Regulations provide model language.
- Plan must maintain records documenting plan in existence as of 3/23/10 in order to verify status as grandfathered.
- Must make records available upon request.

Adding New Employees

- Plan may add new employees (newly hired or newly enrolled) and retain grandfathered status.
- If transfer employees to another plan or plan option,
 - Must be a bona fide employment-based reason for transfer; or
 - “Change” to transferor plan (if made as amendment) must not cause loss of grandfather status.
- Merger generally permitted unless principal purpose is to cover new individuals under grandfathered plan.

Changes Resulting in Loss of Grandfather Status Transition Rules

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Agencies' Approach to Grandfather Rules

“[M]any plan sponsors and issuers make changes on an annual basis: premiums fluctuate, provider networks and drug formularies change, employer and employee contributions and cost-sharing change, and covered items and services may vary. Without some ability to make some adjustments while retaining grandfather status, [the purposes of the grandfather rule] would be frustrated, because most plans or health insurance coverage would quickly cease to be regarded as the same group health plan or health insurance coverage in existence on March 23, 2010”

Preamble to June 14, 2010 IFR

Will Not Lose Grandfather Status If . . .

- Change amount of premiums, as long as employee contributions don't increase by greater than 5%, as adjusted for medical inflation (see later slide for more discussion)
- Change third party administrators (TPAs)
- Change plan to comply with federal or state law
- Voluntary plan changes to comply with ACA

Will Lose Grandfather Status If . . .

- Obtain new policy, certificate or contract of insurance
 - E.g., if a policy, certificate, or contract of insurance is not renewed

- Eliminate benefits for particular condition
 - Includes the elimination of necessary element to diagnose or treat a condition

 - **Example:** Plan provides mental health benefits, which include both counseling and Rx benefits. The plan eliminates the benefits for counseling, but not Rx benefits. Under the IFR, the plan has eliminated an element of coverage that is necessary to treat a condition, i.e., mental health illness. Thus, plan loses grandfather status

- Add or decrease overall annual dollar limit

Will Lose Grandfather Status If . . .

- Increase of coinsurance percentage to any extent (e.g., 1%)
 - Unlike above, where some increase is permitted under the IFR because the amount of cost-sharing is otherwise a fixed dollar amount, the agencies felt that no safe harbor percentage increase was necessary here because a coinsurance percentage automatically increases with medical inflation
 - **Example:** On March 23, 2010, a grandfather health plan has a coinsurance requirement of 20% for inpatient surgery. The plan is subsequently amended to increase the coinsurance requirement to 25%. The increase in the coinsurance requirement from 20% to 25% causes the plan to cease to be a grandfather health plan

Will Lose Grandfather Status If . . .

- Increase Deductible or Out-of-Pocket Max by more than 15%*
 - **Example:** On March 23, 2010, a grandfathered health plan has a deductible of \$1,000 per covered individual. The plan is subsequently amended to increase the deductible to \$1,200. This represents a 20% increase in the plan deductible. Medical inflation for the period from March 23, 2010 until the date of the amendment is 22.69%. Thus, the permissible maximum increase is 37.69% (22.69% + 15%). Because 20% does not exceed 37.69%, the change in the deductible does not cause the plan to cease to be a grandfathered health plan.

* Adjusted for medical inflation

Will Lose Grandfather Status If . . .

- Increase copay by more than greater of: (1) \$5*; or (2) 15%*
 - **Example:** On March 23, 2010, a grandfather health plan has a copayment requirement of \$30 per office visit for specialists. The plan is subsequently amended to increase the copayment requirement to \$40, which represents a 33.33% increase. Medical inflation in the period from March 23, 2010 until the date of the amendment is 22.69%. Thus, the permissible maximum increase is 37.69% (22.69% + 15%). Because 33.33% does not exceed 37.69%, the change in the copayment requirement does not cause the plan to lose grandfather plan status.

But what happens if plan, one year later, increases the copay from \$40 to \$45? Assume medical inflation from March 23, 2010 to the date of the second copay increase is 25.27%. The maximum permissible increase from March 23, 2010 is 25.27% + 15% = 40.27%. Since the overall increase from the original copay of \$30 to \$45 is a 50% increase, and this exceeds the maximum increase limit of 40.27%, the plan would lose its grandfather status as of the date of the second amendment.

* Adjusted for medical inflation

Will Lose Grandfather Status If . . .

- Decrease employer contribution rate by more than 5%
 - Measured based on each “tier” of coverage (e.g., self-only, family)
 - Determine contribution rate based on COBRA valuation, if self-insured
- **Example regarding cost of coverage:** On March 23, 2010, a self-insured group health plan provides two tiers of coverage – self-only and family. The employer contributes 80% of the total cost of coverage for self-only and 60% of the total cost of coverage for family. Subsequently, the employer reduces the contribution to 50% for family coverage, but keeps the same contribution rate for self-only coverage. The decrease of 10 percentage points for family coverage in the contribution rate based on cost of coverage causes the plan to cease to be a grandfather health plan. The fact that the contribution rate for self-only coverage remains the same does not change the result.

Unclear Whether Lose Grandfathered Status If . . .

- Make changes to a plan's structure
 - (such as switching from a health reimbursement arrangement to major medical coverage or from an insured product to a self-insured product)
- Alter the related provider network
- Change to a prescription drug formulary



Given lack of certainty regarding above and lack of express regulatory safe harbor, plan sponsors and issuers are perhaps well advised to assume the above would invalidate grandfather plan status

Transition Rules

- Certain changes adopted prior to 3/23/10 are not counted, even if effective after 3/23/10
 - Changes made pursuant to written contract or plan amendment entered into on or before March 23, 2010
 - Changes made pursuant to a filing with a State insurance department that was filed on or before March 23, 2010
 - Changes made pursuant to written plan amendment adopted on or before March 23, 2010

Transition Rules

- Grace period for revocations
 - If amended plan after 3/23/10 but prior to issuance of the IFR, then a sponsor has may revoke any such amendments prior to the beginning of plan year commencing on or after 9/23/10

- Good faith compliance
 - Agencies to take into account good faith efforts to comply where plans already have made changes that “only modestly exceed” permitted changes