

## HHS/DOL/IRS Release Interim Final Regulations for Grandfathered Plans Under Health Care Reform Law

The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act (together, the "Health Care Reform Law") provide exemptions from certain mandated coverages and other new statutory requirements for group health plans and health insurance coverages in effect as of March 23, 2010, the date of enactment of the Health Care Reform Law. These arrangements are generally labeled grandfathered plans. Until the three governing federal agencies released their interim final regulations for grandfathered plans, it also appeared that significantly broader exemptions were available to collectively bargained grandfathered plans (more about that later).

A few days before the interim final regulations were released, an earlier draft was posted on the OMB web site, which included interpretations of the exemptions for grandfathered plans that were surprisingly narrow. This prompted immediate and critical commentary. The Administration responded by removing the draft from the OMB web site, explaining that substantial modifications were likely before official release of the guidance. But the interim final regulations were officially released just a few days later with few, if any, material changes.

Bottom line: the interim final regulations are more restrictive than anticipated. Employers will need to decide whether the advantages of grandfathered status (i.e., the exemption from certain coverage mandates and other statutory requirements) outweigh the cost of the limitations on plan design charges. We can assist with this analysis.

Here are some of the key points.

- The preamble to the regulations confirms that the Health Care Reform Law mandates do not apply to plans covering fewer than 2 participants who are current employees (e.g., retiree-only plans) or to HIPAA excepted benefits (e.g., dental-only and vision-only plans, health care flexible spending accounts, Medigap policies and AD&D coverage). The actual statutory language of the Health Care Reform Law does not appear to preserve this exception for plans maintained by non-federal governmental employers, but HHS confirms in the preamble to the regulations that it will make no effort to enforce new statutory mandates or other requirements against such plans.
- Group health plans and health insurance coverage will not lose their grandfathered status if some or all of the individuals enrolled on March 23, 2010 cease to be covered, so long as the plan or health insurance coverage has continuously covered someone since March 23, 2010.
- The requirements for maintaining grandfathered status are applied separately to each benefit package made available under a group health plan or health insurance coverage.
- Grandfathered status will be lost if an employer switches insurance carriers or otherwise enters into a new policy, certificate or contract of insurance after March 23, 2010 for a grandfathered plan.
- A grandfathered plan must include a statement, in any materials provided to participants or beneficiaries describing benefits, that the plan believes it is a grandfathered health plan, and must provide contact information for questions and complaints. The regulations include model language.
- A grandfathered plan must maintain records documenting the terms of the plan or health insurance coverage that were in effect on March 23, 2010, for as long as the plan or health insurance issuer takes the position that the plan or health insurance coverage is a grandfathered plan. These records must be

available for inspection by a participant, beneficiary or governmental regulatory agency.

- Grandfathered status will not be lost if family members of an individual who is enrolled as of March 23, 2010 are enrolled after that date.
- Grandfathered status will not be lost if new employees (whether newly hired or newly enrolled) and their families are enrolled after March 23, 2010.
- If employees covered by a grandfathered plan are transferred to another grandfathered plan, and amending the transferor plan to provide the coverage available under the transferee plan would cause the transferor plan to lose grandfathered status (see below), the transferee plan will lose grandfathered status if there is no bona fide employment-based reason to transfer the employees to the transferee plan.
- If the principal purpose of a corporate transaction is to cover new individuals under a grandfathered plan, the plan will lose its grandfathered status.
- The special grandfathering rules for collectively bargained plans are not so special. They only apply to insured collectively bargained plans, not to self-insured plans. Self-insured collectively bargained plans are treated like any other grandfathered plans.
- Even insured collectively bargained plans have limited advantages. Those plans will not lose grandfathered status until the last collective bargaining agreement in effect on March 23, 2010 terminates. So during the term of the collective bargaining agreement, an insured collectively bargained plan can change insurance carriers, or increase participant financial responsibilities in ways that would otherwise cause loss of grandfathered status, without losing grandfathering. But after termination of the last collective bargaining agreement, any change of insurance carriers will cause loss of grandfathered status, and levels of participant financial responsibility at that time will be compared with pre-March 23, 2010 levels, which could result in immediate loss of grandfathered status.
- In addition, insured collectively bargained plans do not enjoy deferred effective dates for coverage mandates that otherwise apply to grandfathered plans. HHS/DOL/IRS appear to have reached this conclusion by rejecting relatively unambiguous legislative language, and elevating general statutory language over specific statutory language, in contravention to the principles of statutory interpretation taught to any first year law student.
- A grandfathered plan will lose its grandfathered status if:
  - it eliminates all or substantially all benefits to diagnose or treat a particular condition. This will occur if any necessary element to diagnose or treat a condition is eliminated. An example illustrates the loss of grandfathered status where a plan providing benefits for a particular mental health condition, the treatment for which is a combination of counseling and prescription drugs, eliminates the counseling benefits.
  - the plan adopts any increase to participants in a percentage cost-sharing requirement, such as co-insurance.
  - the plan increases to participants a fixed-amount cost-sharing requirement, other than co-payments, by more than medical inflation (as defined in the regulations) plus 15 percentage points.
  - the plan increases fixed-amount co-payments to participants by more than the greater of (i) medical inflation plus 15 percentage points or (ii) \$5 increased by medical inflation.
  - the employer decreases its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points below the contribution rate in effect on March 23, 2010. In the case of a contribution rate based on a formula, such as hours worked or tons of coal mined, grandfathered status is lost if the employer decreases its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the rate in effect on March 23, 2010.
  - The plan imposes new annual limits or reduces existing annual limits on benefits below prescribed standards.
- The regulations provide relatively generous transition rules for amendments to group health plans or health

insurance coverages that were adopted, but not effective, either before March 23, 2010, the date of enactment of the Health Care Reform Law, or June 14, 2010, the official release of the interim final regulations.

If you have questions or would like additional information relating to the rules for grandfathered plans under the Health Care Reform Law, please feel free to contact Brian Dougherty at (215) 587-5919 or [bdougherty@postschell.com](mailto:bdougherty@postschell.com).

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