

Being grandfathered brings certain advantages

Existing health care insurance is exempt from certain procedures under the health care reform law.

By Paul M. Hamburger and James R. Napoli

The Patient Protection and Affordable Care Act, Pub. L. 111-148, as amended by the Health Care and Education Affordability Reconciliation Act of 2010, Pub. L. 111-152 (collectively, ACA) enact a set of mandates that significantly change coverage for virtually all group health plans and insurance policies. At the same time, the ACA allows grandfathered health plans, generally those that existed on March 23, to avoid the application of many, but not all, of the coverage mandates. For example, grandfathered health plans do not have to adopt the new claims appeals procedures set forth under ACA nor do these plans have to comply with ACA's mandate requiring that certain preventative care benefits be provided under group health plans without cost-sharing.

On June 14, the U.S. departments of Labor, Health and Human Services and Treasury released interim final rules (IFRs) defining a grandfathered health plan and explaining how grandfathered plans could lose their grandfathered status. This article summarizes the applicable ACA grandfathering rules.

A grandfathered health plan is simply a group health plan or insurance coverage in which an individual was enrolled on March 23, the ACA's enactment date. 29 C.F.R. 2590.715-1251(a)(1). To remain grandfathered, the plan must continuously enroll someone from March 23 forward. The IFRs clarify that coverage will still be grandfathered even if one or more (or even all) individuals enrolled on March 23 cease to be covered, provided that the plan has continuously covered someone since March 23.

Significantly, the IFRs clarify that the grandfathering rules apply separately to each benefit package made available. Thus, the loss of grandfathering for one benefit package offered under a plan will not cause the entire plan to lose its grandfathered status. However, the IFRs do not explain how to determine exactly what qualifies as a benefit package.

ACA §§ 1251(b) and (c) provide that newly hired employees, new enrollees and their family members can be added to coverage after March 23 without causing the plan to lose its grandfathered status. However, the IFRs add two antiabuse rules designed to prevent employers from taking advantage of this rule to expand grandfathered plan status inappropriately.

ABUSE OF THE RULES

Under the first anti-abuse rule, grandfathered status can be lost if new enrollees are added to the plan through a merger, acquisition or similar business restructuring and the principal purpose of the transaction is to cover new individuals under the grandfathered plan. 29 C.F.R. 2590.715-1251(b)(2). According to the IFRs, this is to prevent grandfather status from being bought and sold as a commodity in commercial transactions. 75 Fed. Reg. at 34541 (June 17, 2010).

Under the second rule, grandfathered status is lost if employees are transferred to a transferee plan from a transferor grandfathered plan; treating the transfer as if it were an amendment of the transferor plan to be like the transferee plan, that deemed amendment would otherwise have caused the transferor plan to lose grandfathered status (for one of the reasons explained below); and there is no bona fide employment-based reason for the transfer. 29 C.F.R. 2590.715-1251(b)(2). A general desire to change plan terms or cost concerns are specifically not bona fide employment-based reasons.

There are seven types of plan changes that could cause a loss of grandfathered status. With respect to insured plans, subject to a special rule for collectively bargained plans discussed below, if an employer or employee organization enters into a new policy, certificate or contract of insurance after March 23, that policy, certificate or contract of insurance is not grandfathered. Therefore, a change of insurer can cause an insured plan to lose grandfathered status. 29 C.F.R. 2590.715-1251(a)(1)(ii).

Whether a plan is insured or self-insured, grandfather status can be lost if any of the following six changes are made (29 C.F.R. 2590.715-1251(g)(1)):

First, the plan sponsor eliminates all or substantially all plan benefits to diagnose or treat a particular condition, including the elimination of benefits for any necessary element to diagnose or treat a condition.

Second, there is any increase, measured from March 23, in a percentage cost-sharing requirement (such as an individual's coinsurance requirement) under the plan.

Third, a fixed-amount cost-sharing requirement other than a co-payment (for example, a deductible or out-of-pocket limit) is increased by more than the rate of medical inflation plus 15 percentage points.

Fourth, a fixed-amount co-payment is increased and the total increase in the co-payment measured from March 23 exceeds the greater of: \$5 increased by the rate of medical inflation, or the rate of medical inflation plus 15 percentage points.

Fifth, the employer (or employee-organization) contribution rate toward the cost of any tier of coverage for any class of similarly situated individuals decreases by more than a specified amount, depending on how the contribution rate is determined.

Sixth, the plan is amended to add or decrease annual benefit limits under various scenarios.

Under the IFRs, all of the ACA coverage mandates that apply to grandfathered noncollectively bargained plans (like coverage for dependent children to age 26 or the prohibitions on annual or lifetime limits) apply at the same time and in the same way to all grandfathered collectively bargained plans. 29 C.F.R. 2590.715-1251(f). There is no delayed effective date under ACA for collectively bargained health plans.

Nevertheless, there are two special rules that apply to insured collectively bargained plans. First, even if an insured collectively bargained plan is amended in a way that would otherwise cause it to lose grandfathered status, the plan will keep its grandfathered status until termination of the last collective-bargaining agreement in effect on March 23 related to the plan.

Second, if an insured collectively bargained plan changes insurers before termination of the last collective-bargaining agreement in effect on March 23 related to the plan, that change, alone, will never cause a loss of grandfathered status. However, a change in insurer after the termination of that last collective-bargaining agreement will cause a loss of grandfathered status.

TRANSITION RULES

Recognizing that some plans made modifications either before or after March 23 and before the grandfathering guidance was issued, the IFRs include special transition rules. A plan modification adopted before March 23 will not cause a loss of grandfathered status, even if the change is effective after March 23, as long as it is implemented under written contract or plan amendment. Similarly, changes made based on a filing with a state insurance department filed on or before March 23 will not alter grandfathered plan status. 29 C.F.R. 2590.715-1251(g)(2).

Separately, a plan may revoke any change made after March 23, but before June 14 (when the IFRs became publicly available), as long as the revocation is made before the first day of the plan year beginning on or after Sept. 23 (i.e., Jan. 1, 2011, for calendar-year plans). Of course, the plan terms as so modified cannot otherwise cause the plan to lose grandfathered status.

A final transition rule, found in the regulatory preamble, indicates that, for enforcement purposes, the agencies will consider good-faith efforts taken prior to June 14, 2010, to comply with the statutory ACA rules and grandfather status and may disregard changes "that only modestly exceed" the changes otherwise stated in the IFRs. 75 Fed. Reg., at 34544 (June 17, 2010). It is not exactly clear what it means for the agencies to take these efforts into account and how one determines whether a change only modestly exceeds those in the IFRs. Therefore, employers need to consider whether it is advisable to rely on this general statement.

As a condition to continued grandfathered status, the IFRs require that any plan materials provided to a participant or beneficiary must contain a statement that the plan believes itself to be a grandfathered health

plan. 29 C.F.R. 2590.715-1251(a)(2). The statement must include contact information for questions or complaints regarding the plan's grandfathered status. *Id.*

The IFRs include model language that is reflected in a separate Department of Labor [model notice](#).

Finally, plan sponsors must maintain records documenting the plan or insurance coverage terms in effect on March 23. They also must keep any other documents necessary to verify, explain or clarify grandfathered status. 29 C.F.R. 2590.715-1251(a)(3). These records must be made available for examination upon request by a government agency. Participants, beneficiaries or individual policy subscribers are able to inspect these documents to verify grandfathered status. Records must be maintained and available for examination for as long as the plan or insurer considers the plan or coverage grandfathered.

As this summary shows, there are a myriad of rules affecting grandfathering treatment under the ACA. There are many nuances and open issues that are not within the purview of this article. A close reading of the IFRs and related guidance is necessary before making any decisions regarding a plan's grandfathered status.

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