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Health Care Reform Has Arrived: “Grandfathered Plans”

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Understanding and interpreting the new sweeping healthcare reform changes is now a top priority for all employers. To help clients work through the myriad of issues and changes, the Proskauer Health Care Reform Task Force is publishing a series of targeted client alerts that will focus on key compliance requirements. This client alert focuses on the “grandfathering” provisions enacted as part of the Patient Protection and Affordable Care Act (H.R. 3590) (the “Reform Act”) as amended by the Health Care & Education Affordability Reconciliation Act of 2010 (H.R. 4872) (the “Reconciliation Act”).

The grandfathering relief allows certain plans in effect on the date of enactment to avoid the application of many of the new rules. Nevertheless, there are some healthcare reform provisions that do apply to grandfathered plans. Therefore, it is important not only to understand what makes a plan “grandfathered,” but also to distinguish between those provisions that are or are not applicable to grandfathered plans.

Grandfathered Plans Defined

A “grandfathered health plan” is any group health plan or individual coverage that was in effect on March 23, 2010, the date of the new law’s enactment. Even if an individual may reenroll in a grandfathered health plan or new employees (and their families) may be added to the plan after March 23, 2010, that does not destroy the plan’s grandfathered status. Likewise, an individual who was covered by a grandfathered health plan may add his or dependents to the plan after March 23, 2010 without negating the plan’s grandfathered status as long as the plan allowed for dependent/family coverage on March 23, 2010. At this point, it is not clear whether any significant modifications of coverage under a plan design will alter its grandfathered status.

Separately, collectively bargained multi-employer and single employer plans in effect on March 23, 2010 are not subject to the Reform Act rules (as amended by the Reconciliation Act) until the date on which the last of the collective bargaining agreements relating to the coverage terminates. At that time, a collectively bargained plan is then subject to healthcare reform rules and, assuming it remains grandfathered (based on the rules then in effect), it would have to comply with the requirements for grandfathered plans. The Reform Act specifically provides, however, that a collectively bargained plan is permitted to be amended early for some or all of the Reform Act's rules. This voluntary amendment will not be treated as a termination of the collective bargaining agreement which might otherwise subject the plan to an earlier Reform Act compliance deadline.

Provisions Applicable to Non-Collectively Bargained Grandfathered Plan

Although grandfathered plans are generally able to avoid the application of many of the new law's requirements, some key health coverage access and reform provisions will still apply to grandfathered health plans. In reviewing these rules, it is important to focus on the specific effective dates. Some are effective with the first plan year that begins on or after September 23, 2010 (*e.g.*, six months after enactment of the Reform Act). That means January 1, 2011 for calendar year plan years. Other provisions are effective for plan years beginning on or after January 1, 2014.

Provisions generally effective January 1, 2011 for calendar year grandfathered plans (technically effective for plan years beginning on or after September 23, 2010)

- Pre-existing Conditions. Elimination of pre-existing condition exclusions from group health plans for children under the age 19.
- Dependent Coverage (for plan years beginning on or after the date that is 6 months after enactment and before January 1, 2014). Requirement that group health plans provide coverage for adult dependent children up to age 26 only if the child is not eligible to enroll in other employer provided coverage (other than in a grandfathered plan).

- Rescissions. Elimination of coverage rescissions. Rescission refers to the practice of canceling coverage after someone has submitted medical claims. Rescission would still be permitted if an individual committed fraud or made an intentional misrepresentation of a material fact.
- Coverage Limits. Requirement that group health plans eliminate lifetime maximum limits on coverage of essential benefits and the elimination of certain annual limits. It should be noted, that group health plans will continue to be able to place limits on the amount covered for certain medical procedures.

Provisions generally effective January 1, 2014 for calendar year grandfathered plans

- Dependent Coverage. Requirement that group health plans provide coverage for adult dependent children up to age 26.
- Excessive Waiting Periods. Elimination of enrollment waiting periods in excess of 90 days.
- Pre-existing Conditions. Elimination of pre-existing condition exclusions entirely.
- Coverage Limits. Elimination of annual limits on benefits.

Provisions Not Applicable to Grandfathered Plans.

Although the Reconciliation Act subjects grandfathered health plans to various Reform Act requirements, there are still some key requirements that continue not to apply to grandfathered health plans. Some of the key provisions are:

- Section 105(h). The application of Internal Revenue Code Section 105(h) to insured group health plans.
- Claims Appeals. The new rules for processing claims appeals do not apply to grandfathered health plans.
- The requirement that women be permitted to select an OB-GYN of their choice. The physician would still have to abide by certain plan rules.
- Preventative Care. The requirement that certain preventative care benefits be provided under group health plans.

Of course there are many other provisions that would not apply to grandfathered plans and this list is not meant to be exhaustive. Rather, this *Client Alert* is meant to summarize and highlight some of the more common and/or high interest provisions of health care reform as applied to grandfathered health plans. We will provide more in-depth analysis of some of the issues highlighted above in future *Client Alerts* and will continue to update our clients on new developments in this rapidly changing area of the law. In the meantime, please feel free to contact your Proskauer attorney or any member of our Health Care Reform Task Force should you have questions regarding health care reform.

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