

HEALTH REFORM IMPACT

What you need to know NOW

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Protecting Your Plan's Grandfathered Status Under Health Reform

June 17, 2010

As enacted this spring, the health reform law provided for special treatment of plans that existed on March 23, 2010. These "grandfathered" plans are subject to many of the law's substantive provisions¹ but exempt from others, including the requirement to provide preventive care services (immunizations, cancer screening, etc.) without cost-sharing, new rules requiring external review of denied benefit claims, and new limits on maximum deductibles and out-of-pocket amounts applicable to non-preventive care.

Despite the law's broad definition of grandfathered plans (i.e., any plan existing on March 23, 2010), federal regulations released earlier this week will require plan sponsors to take certain actions to preserve their plans' grandfathered status going forward. The regulations also prohibit certain changes as a condition of continued grandfathered status. And because some of the limits on allowed changes are tied to financial parameters that narrow over time, maintaining grandfathered status will generally become more difficult with each passing year. By some estimates, half of all employer plans could lose (or voluntarily abandon) their protected status by 2013.²

What Not to Do

Under the new regulations, the following actions will result in forfeiture of a plan's grandfathered status:

- Changing insurers (for insured plans)
- Eliminating all or substantially all benefits for a particular condition (e.g., diabetes, cystic fibrosis), including items necessary to diagnose or treat the condition

¹ For a discussion of the applicable provisions, please see our alert entitled ["Existing Health Plans – Changes Requiring Attention This Year."](#)

² Special rules apply to collectively bargained plans that are fully insured. In general, these plans remain grandfathered until expiration of the last collective bargaining agreement that was in effect on March 23, 2010.

- Any increase in a percentage cost-sharing feature over the March 23, 2010 level (e.g., raising a coinsurance requirement for inpatient surgery)
- Increasing deductibles, out-of-pocket limits, or other fixed-dollar cost-sharing features (other than copayments) in excess of medical inflation³ plus 15 percentage points (i.e., the “maximum percentage increase”)
- Increasing fixed-dollar copayments over the greater of the maximum percentage increase or \$5 increased by medical inflation
- Decreasing the employer’s contribution rate by 5% or more⁴
- Limiting annual benefits (if the plan contained no annual or lifetime limits on March 23, 2010)
- Decreasing annual benefit limits
- Adding an annual benefit limit less than the lifetime limit (if plan contained a lifetime benefit but no annual benefit on March 23, 2010)
- Transferring or limiting employees to a less generous benefit option than was available March 23, 2010, unless due to bona fide employment reasons (other than cost). For example, if a group health plan offered two benefit packages on March 23, 2010 and subsequently eliminated one option, the exemption would be spoiled by transferring affected employees to the remaining option, unless a bona fide employment reason applied (e.g., closure of the manufacturing plant whose employees were exclusively eligible for the discontinued option).

What To Do

Besides forbidding the above actions, the regulations require certain affirmative measures by employers who wish to preserve their plans’ grandfathered status. First, summary plan descriptions (SPDs) and other materials describing plan benefits must state the intended status (the regulations contain model language for this purpose). Plans must also maintain records of the terms of coverage as in effect on March 23, 2010, and records for any subsequent periods that grandfathered status is intended. Required documentation includes records of old plan documents, insurance policies, SPDs, deductible amounts, and other details of coverage.

What is Allowed

The following actions will not spoil a plan’s grandfathered status (provided they do not include a prohibited change):

- Changing a self-insured plan’s third party administrator
- Adjusting employee premiums (unless accompanied by reduction in employer contributions of 5% or more)
- Changes to comply with federal or state laws (including voluntary compliance with any provision of health reform legislation)

³ Measured by increases in medical CPI from March 23, 2010. The regulations include complex formulas and examples showing how to calculate the maximum percentage increase for a plan year.

⁴ The “contribution rate” is the employer contribution (on March 23, 2010) measured as a percentage of total costs of coverage. Costs of coverage are determined under COBRA.

Allowing enrollment of employees who were employed on March 23, 2010, but not then enrolled, will not cause loss of grandfathered status (nor will enrollment of persons first employed after March 23, 2010), provided the enrollment is consistent with plan terms. Allowing persons previously enrolled in one benefit option to enroll in another option also will not jeopardize grandfathered status, provided the second benefit option was available on March 23, 2010.

Open Issues

The new rules are “interim final” regulations with a public comment period of 60 days, meaning IRS, DOL, and HHS may review comments submitted and make any changes deemed necessary. In the meantime, the above rules are final and binding. The federal agencies have specifically requested public comment on whether the following should affect grandfathered status:

- Changes to plan structure (e.g., change from insured plan to a self-insured plan⁵ or from health reimbursement arrangement to major medical coverage)
- Changes to the plan’s prescription drug formulary
- Changes to a plan’s provider network

Although guidance may be issued on these items at a later date, the changes will not necessarily cause a plan to forfeit its grandfathered status. Nevertheless, employers should exercise caution when considering any of these changes.

While the new regulations provide much-needed detail, plan sponsors will want to consider whether preserving their plans’ grandfathered status is worth forfeiting the associated flexibility in plan design. Sponsors that have amended their plans in a way that jeopardizes desired grandfather status are permitted to revoke the amendment prior to the first plan year beginning on or after September 23, 2010, in which case the amendment will be disregarded.

If you have questions regarding the information in this client alert, or with respect to other provisions of the health reform legislation as it relates to your employee benefits plans, please contact any of the attorneys in our Employee Benefits Practice Group listed below.

Also, please [click here](#) to visit our special Web page for Health Reform IMPACT.

⁵ Changing from self-insured coverage to insured coverage after March 23, 2010 would spoil grandfathered status.

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