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August 2010

An Employee Benefits Update: Losing Grandfathered Status – Should You Care?

The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (collectively, the Act), has significantly changed the landscape for providing health care coverage to employees. Although the mandates created under the Act are generally applicable to all group health plans, there are certain compliance exemptions for "grandfathered plans." As a result, the initial reaction of employers was to take all steps necessary to establish and maintain grandfathered status. However, now that interim final regulations have been issued regarding grandfathered status (http://www.dol.gov/federalregister/HtmlDisplay.aspx?DocId=23967&AgencyId=8&DocumentType=2) and most employers are in the midst of their annual insurance renewal process, employers are now stepping back and re-evaluating the actual benefits of maintaining such status. *Many employers are actually finding the costs of maintaining a grandfathered plan are more significant than the long-term impact of "losing" grandfather status in the process. The focus of this e-Alert is to identify the advantages and disadvantages of preserving grandfathered status.*

What Is a Grandfathered Plan?

For purposes of this discussion, a "grandfathered" health plan is any group health plan that was in effect on the date of the enactment of the Act (i.e., March 23, 2010). Under the interim final rules, a grandfathered "plan" is determined on a benefit program basis (e.g., if the employer maintains both an HMO and PPO plan design, each of these benefit programs is a separate "plan" for these purposes), and a benefit program that existed on March 23, 2010 will retain its grandfathered status unless and until an "impermissible" change is made to that benefit program on any date thereafter that otherwise causes it to lose grandfathered status. As such, if an employer maintained a health plan for its employees on March 23, 2010, under which employees could choose a PPO or HMO option, each option must be separately analyzed to determine whether grandfathering status is lost as a result of an impermissible change made to either or both programs on any date thereafter. It is also important to note that grandfathering does not apply to plans with less than two covered employees, retiree only plans, and certain limited scope dental and vision plans.

What Is the Significance of Maintaining Grandfathered Plan Status?

Although other cost issues may change the result from a practical perspective, from a legal perspective, while every group health plan may be impacted in some way based on health care reform, maintaining a grandfathered plan does at least initially require less compliance responsibility than a non-grandfathered plan. More specifically, effective as of the first plan year renewal date on or after September 23, 2010 (so for plans that are maintained on a "calendar year" basis, the required effective date is January 1, 2011), the Act requires that all grandfathered plans be amended and operated in a manner that, among other things:

- Eliminates lifetime limits on coverage for "essential health benefits" (still undefined), though the interim regulations allow for usage of annual limits of up to approved amounts
- Prevents usage of pre-existing condition limitations for children under age 19
- Adult children (even non-dependent children) can stay on parents' employer group coverage until age 26 (unless other group coverage is available)
- Removes non-cancellable insurance provisions for circumstances other than due to fraud or misrepresentation of coverage eligibility

Note too that the rules require that participants be provided notice of the grandfather plan's status and what that means from an individual's perspective (model language is provided in the regulations). Although for most employer plans, these mandates are not a significant projected cost to the annual renewal, they are obligations for coverage nonetheless and thus plan documents must be revised accordingly. However, the loss of grandfather status imposes even greater compliance responsibilities as further explained below.

What Is An "Impermissible" Change That Would Cause a Grandfathered Plan To Lose Status?

Pursuant to the interim regulations, facts and circumstances can cause a group health plan to lose its grandfathered status, but certain changes will necessarily result in the loss of grandfathered status:

- Entering into a new policy, certificate, or contract of insurance (at least for that new program)
- Eliminating coverage or substantially eliminating coverage for benefits to diagnose or treat a specific medical condition (though the list of "specific medical conditions" remains undefined)
- Increases in any of the following:
    - Co-insurance percentages
    - Employee contributions by more than 5% per year beyond what the employer contributes
    - Co-payment increases of the greater of (i) $5 per visit/usage (subject to annual cost of living) or (ii) medical inflation (under parameters set forth in the regulations) plus 15 percent
    - Deductible and/or out-of-pocket limit increases of at least 15 percent plus medical inflation
- Adding or reducing annual limits to less than $750,000 for 2011

Notwithstanding the above, there are certain changes that may be made to a plan after the March 23, 2010 enactment date that will not affect grandfathered status. For example, a self-insured plan may change its third party administrator or be amended to comply with state or federal law and remain grandfathered. Also, a fully-insured collectively bargained plan will maintain its grandfathered status even if one or more of the above-listed changes occurs (with the exception of entering into a new policy, certificate or contract of insurance) until the end of the collective bargaining agreement that was ratified prior to March 23, 2010 expires.

Our Plan or Option Lost Its Grandfathered Status … Now What?

If a group health plan or program loses its grandfathered status, the Act imposes additional compliance mandates that become effective as of the first Plan Year beginning on or after September 23, 2010, which generally include the following:

- Certain preventive care services must be covered at 100 percent with no cost sharing or co-payments on an in-network basis
- Coverage for adult children under age 26 cannot exclude coverage for a child who has other employment–based coverage
- Emergency room coverage must be the same for in and out-of-network claims without preauthorization
- Implementation of new internal appeals process with an external review option
- Patient protections such as increased access to providers and pediatricians, access to OB-GYN without referral
- Implementation of quality reporting to Health and Human Services
- Application of nondiscrimination requirements to fully-insured plans or components. Note that this will be a significant issue if a higher level of benefits or a lower co-insurance rate is provided to executives or other highly compensated employees
- Required coverage for approved clinical trials for certain life-threatening diseases
- Transparency information disclosures regarding claims payment practices, financial disclosures, and enrollment data

While this list of additional mandates is extensive, in reality many group health plans already provide coverage that is equal to or better than the non-grandfathered plan mandates. Moreover, given the very restrictive limits imposed on plan design or cost sharing arrangements to maintain a grandfathered plan status, the benefit of making certain plan changes, both from a cost and administrative perspective, may outweigh the costs of losing grandfathered status as a result.

Planning Points and Considerations

Employers should determine whether their plans (including each separate benefit package under a plan) would be considered grandfathered, and identify any anticipated changes that may affect grandfathered status. Employers should conduct a cost analysis to determine whether the cost to maintain grandfathered status outweighs the benefits of making one or more of the changes that will result in the loss of such status. Employers providing enhanced benefits to executives or other highly compensated employees will need to address how the plan will need to be restructured to comply with nondiscrimination rules if grandfathered status is lost. Consideration will also need to be given to how to compensate executives and other highly compensated employees for the loss of the enhanced coverage. If an employer intends to preserve grandfathered status, then participant communications (including applicable updates to summary plan description information) should be revised to include required grandfathering notice provisions. Furthermore, such employers should implement a process to maintain and document evidence that it complied with the grandfathering requirements.

For further guidance on the ***Patient Protection and Affordable Care Act****,*
as amended by the ***Health Care and Education Reconciliation Act*** *rules, please contact:*

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