

Grandfathered Health Plans



GENERAL RULES

2.1 TIMETABLE

Virtually all health plans in force on March 23, 2010 are de facto grandfathered plan initially, but the plan sponsor now has to formally declare its intent to make the grandfathered election and then let plan members know of that election.

2.2 WHICH PLANS

This applies to group health plans of all sizes, fully insured or self-funded, but not dental or vision plans. It is not clear how certain “executive” health plans will be affected.

2.3 ADVANTAGES

Grandfathered plans can avoid discrimination testing that is otherwise be required and some other of the law’s provisions.

2.4 DISADVANTAGES

It will be hard for employers to maintain and explain such plans, and will the health plans be able to administer such grandfathered plans?

An Important Decision for Health Plan Sponsors:

“To Grandfather or Not to Grandfather —That is the Question.”

Hamlet never had to deal with Health Care Reform issues. One of the important questions that health plan sponsors need to decide is whether they are going to attempt to maintain a “grandfathered” status with their health plans. When the Obama Administration promised voters that they would be able to keep their health plan if they liked it, their way of offering that option was to allow plans in existence on the day the health bill was enacted (March 23, 2010) to be grandfathered, which allowed such plans to avoid some—but not all—of the healthcare reform changes.

Is it worth it to try to maintain a grandfathered status? “Ay, there’s the rub.”

Which Plans?

Virtually all health plans start out as grandfathered plans, but the employer|plan sponsor needs to make an affirmative declaration now that the Interim Final

Regulations have been published. This does not apply to dental or vision plans. It is not clear whether executive benefit health plans (such as Exec-U-Care) will be allowed grandfathered status.

Advantages

The biggest advantage is probably the ability to avoid having to run discrimination tests on fully insured plans. Another advantage is the ability to avoid certain plan benefit mandates that can add to the cost of coverage, but it is not clear that the health plans will offer non-grandfathered coverage at a lower rate.

Disadvantages

Such plans will be difficult to keep their grandfathered status (see the later rules), the employees may not understand why their plan does not have what they mistakenly think the law requires, and it is not clear if the health plans will even offer rate differentials for grandfathered plans.

Grandfathered Plans:

Grandfathered plans are able to avoid the following requirements that would otherwise apply:

- The requirement to offer preventive health benefits without cost sharing
- Coverage of adult children eligible for other employer-sponsored coverage
- Annual reports on health care quality and care coordination
- Prohibition against discrimination as to coverage, eligibility or contributions
- New internal and external review and appeals procedures
- Choice of participating specialists as PCPs
- No prior approval for or higher out-of-network cost sharing for emergencies
- No denials of pre-existing conditions for children (primarily applies to individual plans)

Grandfathered plans are also exempt from the following requirements that would otherwise apply in 2014:

- Restriction of annual limits (individual coverage only)
- Plain language disclosure of data on health plans
- Review of premium increases
- Modified community rating
- Restrictions on annual out-of-pocket limits
- Cover clinical trials
- Guaranteed access/renewability rules

On June 2010, the federal government released “Interim Final Rules” relating to how a grandfathered plan is defined and how it is established and maintained. Specifically, compared to their policies in effect on March 23, 2010, grandfathered plans:

- ❑ **Cannot Significantly Cut or Reduce Benefits.** For example, if a plan eliminates all or substantially all benefits to diagnose or treat a particular condition such as diabetes, cystic fibrosis or HIV/AIDS.
- ❑ **Cannot Raise Co-Insurance Charges.** Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- ❑ **Cannot Significantly Raise Co-Payment Charges.** Frequently, plans require patients to pay a fixed-dollar amount for doctor’s office visits and other services. Compared with the copayments in effect on March 23, 2010, grandfathered plans will be able to increase those co-pays by no more than the greater of \$5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a plan raises its copayment from \$30 to \$50 over the next 2 years, it will lose its grandfathered status. Medical inflation is defined as the medical component of CPI-U.
- ❑ **Cannot Significantly Raise Deductibles.** Many plans require patients to pay the first bills they receive each year (for example, the first \$500, \$1,000, or \$1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-to-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a \$1,000 annual deductible, this would mean if they had a hike of \$190 or \$200 from 2010 to 2011, their plan could then increase the deductible again by another \$50 the following year.
- ❑ **Cannot Significantly Lower Employer Contributions.** Most employers pay a portion of their employees’ premium for insurance and this is usually deducted from their paychecks. Grandfathered plans cannot decrease the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers’ share of premium from 15% to 25%).
- ❑ **Cannot Add or Tighten an Annual Limit on What the Insurer Pays.** Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as

grandfathered plans, plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit (which is more protective of high-cost enrollees).

- Cannot Change Insurance Companies.** If an employer decides to buy insurance for its workers from a different insurance company, this new insurer will not be considered a grandfathered plan, even if the benefits from the new insurance company are the same as the replaced plan and or the plan costs less to the employer and employees.

This does not apply when employers that provide their own (self-funded) insurance to their workers switch plan administrators. Plans provided under collective bargaining agreements get a special pass from this provision.

Causes for revoking a plan's grandfathered status include:

- If the plan forces consumers to switch to another grandfathered plan that, compared to the current plan, has less benefits or higher cost sharing as a means of avoiding new consumer protections; or
- If the plan is bought by or merges with another plan simply to avoid complying with the law.

Specifically Permitted Changes:

Certain changes will not cause a plan or coverage to cease to be a grandfathered health plan. For example:

- Changes to premiums
- Changes to comply with Federal or State legal requirements
- Changes to voluntarily comply with provisions of the ACA (provided these changes are made without exceeding the standards required)
- Changing third party administrators
- Changes made pursuant to a good faith effort to comply prior to the date proposed regulations were issued.

New Notice Requirements for Any Grandfathered Plan:

The new regulation also adds the following requirements in order to maintain grandfathered status:

- Requires a plan to disclose to consumers every time it distributes materials whether the plan believes that it is a grandfathered plan within the meaning of section 1251 of the Affordable Care Act and therefore is not subject to some of the additional consumer protections of the Affordable Care Act. This allows consumers to understand the benefits of staying in a grandfathered plan or switching to a new plan. The plan must also provide contact information for enrollees to have their questions and complaints addressed;
- A plan must also maintain records documenting the terms of the plan that were in effect on 3/23/2010 and any other documents necessary to verify, its status as a grandfathered health plan. This could include:
 - certificates or contracts of insurance
 - documentation of premiums
 - documentation of required employee contribution rates

Is it worth it?

That is not an easily answered question. Here are a series of questions that we still have or issues to be considered:

- Will the health plans treat grandfathered plans differently for rating purposes?
- How is a plan sponsor supposed to handle a situation where one of the plan options is no longer grandfathered but the rest are (or vice versa)? [Note: *it appears that grandfathering is looked at for each plan offered, so some might be grandfathered while others are not.*]
- Employees hear or read of provisions in the law that they presume will apply to them. How does the plan sponsor explain how its plan does not have to comply with that law?
- Does the plan sponsor have plans that favor highly compensated employees (in benefits or contributions), where being able to avoid running discrimination tests for fully insured plans will be beneficial?
- The new rules do not give a lot of latitude for making benefits and contribution changes in the future to maintain the grandfathered status (see the rules given earlier). **And they do not allow grandfathered plans to change health insurance companies.** Are those constraints considered realistic going forward?
- Will the plan sponsor commit to explaining the distinction to employees on how a grandfathered plan compares to a non-grandfathered plan? See the Model Notice below:

Model Notice For Plan Sponsors to Complete and Provide to Covered Members:

“This [*group health plan or health insurance issuer*] believes this [*plan or coverage*] is a “grandfathered health plan” under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was already in effect when that law was enacted. Being a grandfathered health plan means that your [*plan or policy*] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [*insert contact information*].

[***For ERISA plans, insert:*** You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.]

[***For individual market policies and nonfederal governmental plans, insert:*** You may also contact the U.S. Department of Health and Human Services at www.healthreform.gov.]”

Note: the above generally applies to health plans outside of a collective bargaining agreement. Contact us if you have questions on health benefits under a collective bargaining agreement.

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