Issue 5

When is a Plan Grandfathered?

This is the fifth issue in our series of alerts for employers on selected topics in health care reform. (Our general summary of health care reform and other issues in this series can be accessed by clicking here.) This series of Health Care Reform Management Alerts is designed to provide a more in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

The Patient Protection and Affordable Care Act (PPACA), as modified by the Health Care and Education Reconciliation Act of 2010 (HCERA) (collectively the "Act") requires all group health plans to comply with certain mandates. This issue focuses on an exemption from complying with certain reforms for plans in existence as of March 23, 2010 (see Appendix A for a full list of these reforms). The Act refers to these plans as "grandfathered plans." Following the Act's passage, plan sponsors had little guidance as to what actions could cause plans to lose grandfathered status. Interim final regulations, published yesterday in the Federal Register, answer some, but not all, of the questions surrounding the concept of "grandfathering." The regulations make clear that many plans should be able to retain grandfathered status in the short-term, but that it may be difficult for plans to retain grandfathered status over a period of many years. These interim final regulations are subject to change, and the final regulations should be released later this year following the close of the comment period.

What is a Grandfathered Plan?

A plan is grandfathered if at least one individual was enrolled on the date of enactment (March 23, 2010). The regulations make clear that a plan will continue to be grandfathered as long as at least one individual remains enrolled in the plan at all times (although it need not be the same individual). Assuming a grandfathered plan makes no impermissible changes (discussed below), it will retain grandfathered status indefinitely. The grandfathering rules apply separately to each benefit option offered within a grandfathered plan. For instance, if a grandfathered plan offers both a low-cost and high-cost option, but the plan sponsor makes impermissible changes to the low-cost option that cause it to lose grandfathered status, the plan may still retain grandfathered status with respect to the high-cost option.

What Happens When a Plan Loses Grandfathered Status?

Plans that lose grandfathered status become subject to all of the reforms of the Act. The regulations do not specify, however, whether such a plan becomes subject to the reforms immediately upon losing grandfathered status or at the beginning of the next plan year.

Changes that Will Result in a Plan Losing Grandfathered Status

The regulations also specify changes that will cause a plan to lose grandfathered status. This list applies to non-collectively bargained plans, as well as self-insured collectively bargained plans. The regulations treat fully-insured collectively bargained plans differently, as discussed below. The changes include:

Change	Explanation
Elimination of Benefits Covered	Grandfathered plans may not eliminate coverage for benefits to diagnose or treat a specific condition. For example, a grandfathered plan that covers cystic fibrosis may not eliminate coverage for that condition (or eliminate benefits for procedures necessary to diagnose that condition).
New Policy, Certificate of Benefits or Contract of Insurance	Grandfathered plans may not enter into a new policy, contract or certificate of insurance. A renewal of an existing policy, contract or certificate will not cost a plan its grandfathered status.
Substantial Increase in Participant Premium Level	Grandfathered plans may not increase the employee-portion or other fixed cost of coverage relative to the premium portion paid by the employer by more than 5%. An increase of the employee-paid percentage for any tier of coverage by more than 5% from the level paid on March 23, 2010, will cause a plan to lose grandfathered status. Employers should determine the cost of coverage using COBRA rates. **NOTE:** Our previous Management Alert on Adult Child Coverage suggested adding tiered coverage to offset increased costs resulting from the extension of coverage to adult children. Under these regulations, plans may risk losing grandfathered status for such a plan change.
Any Increase in Percentage for Cost-Sharing Requirement	Grandfathered plans lose grandfathered status if participants are required to pay a greater percentage of the cost-sharing requirement (such as coinsurance) than the percentage the participants were required to pay as of March 23, 2010.
Certain Increases in Fixed-Amount Cost-Sharing Requirements (other than copayments)	Grandfathered plans may not increase participant fixed-amount contributions for cost-sharing requirements (other than copayments, which are discussed below) in excess of the Maximum Percentage Increase (MPI). MPI is defined as medical inflation (CPI-U) plus 15 percentage points. Increases are measured from the participants' fixed-amount requirement as of March 23, 2010. This formula applies to out-of-pocket limits, deductibles, and other cost-sharing requirements expressed as a dollar amount, other than copayments.

Change	Explanation
Certain Increases in Fixed-Amount Copayments	Grandfathered plans may not increase participant copayments in excess of the greater of **(a)** $5 (indexed to medical inflation), or **(b)** MPI (as defined above). Participant copayments are measured from March 23, 2010.
Adding or Lowering Annual or Lifetime Limits	Grandfathered plans that did not impose annual or lifetime limits as of March 23, 2010, may not add such limits to the dollar value of all benefits. The regulations do not specify whether a plan may impose a limit on the number of visits, or other similar non-monetary limits. Grandfathered plans that, as of March 23, 2010, imposed a lifetime limit but no annual limit may not impose an annual limit *that is lower than the dollar value of the lifetime limit on March 23, 2010.* Grandfathered plans that imposed an annual limit on March 23, 2010, may not decrease the dollar value of the annual limit.

Changes that Plans May Make without Losing Grandfathered Status

The regulations specify several changes that grandfathered plans are permitted to make that will not cause the plan to lose its grandfathered status. These changes include:

Change	Explanation
Add New Enrollees	Grandfathered plans may enroll newly eligible individuals, as well as add family members or other dependents. Grandfathered plans may also enroll employees transferred as a result of a merger or acquisition, as long as there is a bona fide business reason for the transfer.
Increase Benefits	Grandfathered plans are permitted to increase the level of benefits provided to participants. Grandfathered plans may also increase the level of the employer contribution for participant coverage.

Change	Explanation
Changes to Comply with Federal, State or PPACA/HCERA Requirements	Grandfathered plans are permitted (and required) to comply with all legally mandated changes, including those implemented by the Act.
Voluntary Changes to Implement Reforms	Grandfathered plans may voluntarily adopt changes and reforms made by the Act. This includes both early implementation of reforms, as well as adoption of reforms that the plan would not otherwise be required to adopt.
Changes to Third Party Administrator	Grandfathered plans may change third party administrators, as long as the switch does not result in any impermissible change as discussed above.
Renewal of Policy, Contract or Certificate of Insurance	Grandfathered plans may renew insurance policies already in place as of March 23, 2010. On the other hand, if a plan enters into a new contract or changes insurance policies, that plan will no longer be grandfathered.
Changes made to Comply with Contracts Entered into Prior to Enactment	Grandfathered plans may make changes after March 23, 2010, to the extent those changes are required to comply with contracts entered into prior to March 23, 2010. The same rule applies to amendments adopted prior to March 23, 2010 (and implemented after March 23, 2010) and changes to implement a state insurance filing made prior to March 23, 2010.

Record-Keeping and Disclosure Requirement for Grandfathered Plans

Grandfathered plans must preserve records and plan documents necessary to show plan and policy terms as of March 23, 2010. The regulations provide that such documents could include plan documents, health insurance policies, certificates of benefits or contracts of insurance, SPDs, documentation of premiums and documentation of employee contribution rates. These records must be made available upon request by any participant, beneficiary, policy subscriber or state or Federal agency official.

Additionally, grandfathered plans must include a statement in any plan materials describing terms of coverage conveying that the plan is considered to be grandfathered. The statement should provide contact information for questions or complaints. The regulations provide model language that can be used to satisfy this requirement.

Special Grandfathering Rule for Fully-Insured Collectively Bargained Plans

A special rule applies to fully-insured collectively bargained plans only (as opposed to all collectively bargained plans, as many initially assumed). Fully-insured plans are those in which the benefits are paid by an insurance company rather than by the employer.

Fully-insured collectively bargained plans may engage in any of the transactions listed above and still retain grandfathered status, at least until the end of the final collective bargaining agreement ratified before enactment of the Act. At the end of that collective bargaining agreement, the determination of whether the plan remains generally grandfathered will be made by looking to the terms of the plan on the date of expiration of the agreement compared to the terms on March 23, 2010. During that time period, if the plan made any changes listed above (with the exception of entering into a new policy, certificate, or contract of insurance), the plan will lose grandfathered status. If the plan retains grandfathered status following expiration of the final collective bargaining agreement, it will lose its status immediately (as opposed to at the end of the new collective bargaining agreement) upon making any of the changes listed above (including entering into a new policy, certificate or contract of insurance).

Grace Period

Acknowledging the confusion surrounding the concept of "grandfathering," the regulations provide a grace period for changes made between March 23, 2010, and the date the interim final rules were published. To take advantage of the grace period, plans must revoke any impermissible changes prior to the start of the next plan year on or after September 23, 2010. This grace period is only available for changes made following March 23, 2010, that were in good faith compliance with the terms of the Act.

Self-Funded Collectively Bargained Plans Receive No Special Treatment

Many had thought the Act provided all collectively bargained plans (both self-funded and fully-insured) with the ability to make any changes and still retain grandfathered status for the duration of the collective bargaining agreement. The regulations make clear, however, that this special treatment is only afforded to fully-insured (not self-insured) collectively bargained plans. As a result, self-funded collectively bargained plans that make any of the changes discussed above will lose grandfathered status immediately as opposed to at the end of the collective bargaining agreement.

Additional Changes May Later Be Prohibited

The preamble to the regulations indicates that the agencies are considering adding to the list of impermissible changes. Other changes under consideration include:

- Changes to plan structure (i.e., switching from a health reimbursement arrangement to major medical coverage; switching from self-insured to fully-insured);
- Changes in a network plan's provider network;
- Changes to a prescription drug formulary; and
- Other substantial changes to overall benefit design.

The agencies have invited comments on this list. The regulations note, however, that in the event new standards are published that are more restrictive than those included in these interim final rules, they will only apply prospectively. The regulations are not clear as to whether that means another grace period will apply and plans will be required to switch back to the old structure (similar to the grace period described above), or that plans can retain grandfathering without switching back to the prior plan structure.

Employer Action Plan

- Determine whether your plan would be considered grandfathered as of March 23, 2010.
- Determine whether you have made any changes since March 23, 2010, that could affect your grandfathered status.
- Run a cost analysis to determine the difference in compliance costs for grandfathered plans versus non-grandfathered plans.
- All plans sponsors should prepare to comply with the reforms described in the chart in Appendix A entitled *Reforms Extended to Grandfathered Plans through the Reconciliation Bill.* These reforms apply for plan years beginning on or after September 23, 2010, to all plans, **regardless of whether the plan is collectively bargained, grandfathered, fully-insured or self-insured.** This may mean sponsors of collectively bargained plans will need to reopen union negotiations.
- For plan sponsors choosing to retain grandfathered status, revise plan and participant communication materials to include the required grandfathering language.
- For plan sponsors choosing to retain grandfathered status, maintain plan and policy documentation to evidence the terms of the plan as of March 23, 2010.
- For plan sponsors intending to make changes discussed in the *Additional Changes May Later Be Prohibited* section, consider making those changes sooner rather than later (although it is not clear whether you may be required to reverse those changes if they are later deemed prohibited).
- For sponsors of self-insured plans maintained pursuant to a collective bargaining agreement, negotiate flexibility into the agreement to comply with the terms of the Act.

For further details, or if you have any questions regarding the grandfathering requirements, contact your Seyfarth Shaw LLP attorney or any Employee Benefit attorney listed on the website at www.seyfarth.com/employeebenefits, or send your questions to HealthReform@seyfarth.com.

APPENDIX A

Grandfathered Plans Are Not Required to Comply with Certain Provisions of the Act

Grandfathered plans are not required to comply with certain provisions of the Act as long as they retain grandfathered status. These provisions include:

Provision	Details
Required Coverage for Certain Clinical Trials	Group health plans must provide participants with coverage for approved clinical trials for certain life-threatening diseases.
First Dollar Coverage for Preventive Care	Group health plans may not impose any cost-sharing or copayments for preventive services.
Prohibition Against Discrimination in Favor of Highly Compensated Employees	Previously, self-insured plans were prohibited from discriminating in favor of highly compensated employees, but no such prohibition existed for fully-insured plans. The Act extends this prohibition to fully-insured plans.
Quality Reporting Requirements	Group health plans are required to submit information regarding whether the plan has implemented activities to protect patients, prevent hospital readmissions and generally improve health outcomes.
Revised Appeals Process	Group health plans are required to implement effective internal and external appeals processes.
Patient Protections	Group health plans are required to allow participants to choose their provider among all available providers in the networks. Group health plans must cover emergency services without preauthorization. Group health plans must allow women to access OB/GYN services without a referral.
Transparency Disclosures	Group health plans are required to provide information regarding claims payment practices, financial disclosures, enrollment data, information on cost-sharing for out-of-network coverage and data on ratings practices.
Coverage for Adult Children with Other Employment-Based Coverage Available	Group health plans are required to make available coverage for adult children up to age 26, regardless of whether the adult child has other employment-based coverage available.

Reforms Extended to Grandfathered Plans through the Reconciliation Bill

HCERA, more commonly known as the Reconciliation Bill, created some confusion regarding the effective dates for certain provisions of the Act. This is because HCERA required grandfathered plans to comply with certain provisions that did not apply to those plans under PPACA. The regulations make clear that all group health plans will be required to comply with these provisions (listed below) on the effective date provided in the legislation. *There is no delayed effective date for collectively bargained plans, regardless of whether the plan is self-insured or fully-insured.*

It is important to note that these are not the only provisions that grandfathered plans are required to implement. Grandfathered plans were never exempt from certain reforms. Also, grandfathered plans must still comply with the employer "pay or play" requirements and many of the tax reforms (including the "Cadillac Tax"). The provisions that were previously delayed but that now apply to all grandfathered plans include:

Provision	Details
Ban on Lifetime and Annual Limits	Starting with plan years beginning on and after September 23, 2010, group health plans are prohibited from placing lifetime limits on essential health benefits. Group health plans may only place reasonable annual limits on essential health benefits until January 1, 2014, at which time group health plans must eliminate all annual limits.
Prohibition on Rescissions	Starting with plan years beginning on and after September 23, 2010, group health plans may not rescind coverage after enrolling a participant, except in the event of fraud or other limited circumstances.
Ban on Preexisting Condition Exclusions	Starting with plan years beginning on and after September 23, 2010, group health plans may not impose preexisting condition exclusions for children under age 19. Starting January 1, 2014, plans may not impose preexisting condition exclusions for any group health plans.
Required Adult Child Coverage	Starting with plan years beginning on and after September 23, 2010, group health plans that provide dependent coverage are required to extend coverage to adult children up to age 26 with no conditions on dependency. **NOTE: Grandfathered plans may still exclude coverage for adult children with other employment-based coverage available until January 1, 2014.**
Prohibition on Excessive Waiting Periods	Starting January 1, 2014, group health plans may not impose a waiting period in excess of 90 days prior to enrolling eligible individuals.