



Employee Benefits Law Action Memo

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Electronic Dispatch

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REGULATIONS ISSUED REGARDING “GRANDFATHERED PLAN” STATUS UNDER HEALTH CARE REFORM LAW

During the debate on health care reform, proponents of the legislation stressed that employees who were happy with the health benefits currently provided by their employers would be able to keep them. To this end, the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (“PPACA”), provides that group health plans existing as of March 23, 2010 (the date that PPACA was enacted) are not subject to certain provisions of PPACA. PPACA referred to such plans as “grandfathered plans,” and directed that regulations be issued to define what constitutes a grandfathered plan and what changes to such a plan might result in the loss of grandfathered plan status. On June 14, 2010, the Department of the Treasury, the Department of Labor and the Department of Health and Human Services jointly issued interim final regulations regarding grandfathered plan status. The regulations are available at <http://edocket.access.gpo.gov/2010/pdf/2010-14488.pdf>. The regulations further define what a grandfathered plan is and what changes to a plan will result in the loss of grandfathered plan status. The regulations are effective for plan years beginning on or after September 23, 2010.

Significance of Grandfathered Plan Status

A grandfathered plan is not subject to a number of the provisions of PPACA, including the preventative care mandate, certain nondiscrimination requirements, mandatory internal and external appeals rules, and restrictions on pre-authorizations for OB/GYN, pediatric and emergency care services. However, grandfathered plans are subject to many of the most significant PPACA requirements, including the tax penalties on employers for failing to provide affordable health coverage, restrictions on annual and lifetime limits, adult children coverage to age 26, limits on waiting periods, and the prohibition on pre-existing condition exclusions.

Definition of Grandfathered Plan

Under PPACA and the regulations, a grand-fathered plan is coverage provided under a group health plan in which an individual was enrolled on March 23, 2010. The regulations make clear that the grandfathered plan rules apply separately to each benefit package made available under a group health plan. Thus, if an employer’s group health plan offers three different coverage options (e.g., an HMO, a PPO and a high deductible health plan), the grandfathered plan rules would apply separately to each coverage option. The loss of grandfathered plan status for one of the options would not affect the grandfathered plan status of the other two options, even though all three options are components of the same group health plan.

Changes that Will Not Result in Loss of Grandfathered Plan Status

The regulations and its preamble list a number of changes that will not affect a plan’s grandfathered status. Most importantly, the enrollment of new employees or new beneficiaries in a plan after March 23, 2010 will not affect a plan’s grandfathered status. However, the regulations include anti-abuse rules designed to prevent employers from circumventing the grandfathered plan rules by transferring employees from one plan to another without a bona fide business reason or through a merger, acquisition or similar business transaction (if the principal purpose of the transaction is to cover new employees under a grandfathered plan).

An increase in the premium for a coverage option does not result in the loss of grandfathered plan status, although a decrease in the share of such premium paid by the employer may (see below). In addition, changes made to a plan to comply with Federal or State legal requirements, voluntary changes to comply with the provisions of PPACA, and a change in third party administrators for a self-funded plan generally would not result in the loss of grandfathered plan status.

Changes that Will Result in Loss of Grandfathered Plan Status

The changes listed below will result in an immediate loss of grandfathered plan status. Once grandfathered plan status is lost, it cannot be regained.

- *New Policy or Contract of Insurance* – Grandfathered plan status will be lost if the employer enters into a new policy or contract of insurance after March 23, 2010. However, the renewal of an existing policy or contract will not result in the loss of grandfathered plan status.



- *Elimination of Benefits* – The elimination of all or substantially all benefits to diagnose or treat a particular condition will result in loss of grandfathered plan status. For example, a plan that eliminates benefits for cystic fibrosis would no longer be a grandfathered plan, even if the change affects relatively few individuals.
- *Increase in Co-insurance* – Any increase in a co-insurance requirement (measured from March 23, 2010) will result in loss of grandfathered plan status.
- *Increase in Deductible or Out-of-Pocket Limit* – An increase in a deductible or out-of-pocket limit will result in the loss of grandfathered plan status, if the total percentage increase (measured from March 23, 2010) exceeds a “maximum percentage increase” (essentially, the medical inflation rate determined under the regulation, plus 15%).
- *Increase in Co-payments* – An increase in a co-payment amount will result in the loss of grandfathered plan status, if the increase (measured from March 23, 2010) exceeds the greater of \$5 (increased by medical inflation) or the maximum percentage increase (as defined above).
- *Decrease in Employer Contribution Rate* – A decrease in the employer’s contribution rate (based upon cost of coverage) for any tier of coverage for any class of similarly situated individuals by more than five percentage points below the contribution rate for the coverage period that includes March 23, 2010 will result in the loss of grandfathered plan status. Essentially, this means that, to maintain grandfathered plan status, an employer must continue to pay the same percentage (subject to the five percentage point allowance) of the total cost of coverage that it was paying on March 23, 2010.
- *Change in Annual Limits* – The imposition of a new annual limit or a reduction of an existing annual limit will result in the loss of grandfathered plan status.

Notice Requirements

In order to maintain its grandfathered plan status, a group health plan must disclose to participants and beneficiaries that it is being treated as a grandfathered plan. An appropriate notice must be included in any plan materials provided to participants and beneficiaries describing the benefits provided under the plan (e.g., summary plan descriptions, benefit booklets, and open enrollment materials). The regulations provide model language which, if included in the appropriate documents, will be deemed to satisfy the notice requirement.

Recommended Actions

Employers should keep the grandfathered plan rules in mind when considering any changes to their group health plans. While PPACA and the regulations allow certain changes to be made without loss of grandfathered plan status, many changes (particularly changes to a plan’s cost sharing provisions) may result in the loss of grandfathered plan status and the application of all of PPACA’s requirements. Employers will need to weigh the benefits of maintaining grandfathered plan status against the need or desirability of plan changes that may jeopardize such status. For many employers, the loss of grandfathered plan status may be inevitable. In fact, the Federal government estimates that, by 2013, only 55 percent of all large employer plans and 34 percent of all small employer plans will remain grandfathered.

If you have any questions about this memorandum, please contact Aaron M. Pierce in our Syracuse office (315-218-8635, apierce@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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