Benefits Alert

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The Patient Protection and Affordable Care Act: Guidance Issued on Grandfathered Plans

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Employers with "grandfathered plans" may choose not to comply with many of the mandated coverage provisions of the Patient Protection and Affordable Care Act (the "Act"). The Internal Revenue Service, Department of Labor, and Department of Health and Human Services have recently issued interim final regulations providing guidance on this exception from the otherwise mandatory compliance with the reform provisions of the Act applicable to group health plans.

To be a grandfathered plan, an employer's group health plan had to have at least one participant on March 23, 2010. The regulations are effective for plan years beginning on or after September 23, 2010 (that is, January 1, 2011 for a calendar-year plan). Employers will need to evaluate the new guidance to determine the types of changes they will be able to make to their plans without losing the grandfathered plan relief.

Key Grandfathered Provisions and "Benefit Packages"

The principal provisions of the Act that either do not apply to grandfathered plans or else have a delayed effective date for grandfathered plans include:

- first-dollar coverage for certain preventive care;
- no prior authorization for emergency services and no referral requirement for pediatricians or OB/GYNs as primary care physician;
- for plans with dependent coverage, adult children coverage even for those with other coverage (until 2014);
- nondiscrimination rules for fully-insured plans;
- new appeals process and external review requirements (in addition to ERISA claims requirements); and
- several reporting and notice requirements, including detailed quality of care reports.

The regulations clarify that the determination of grandfathered status applies separately to each "benefit package." Although there is no definition of "benefit package," the regulation appears to allow a plan sponsor to maintain the grandfathered status for different plan options. For example, if an employer offers a traditional PPO option and a high deductible option, the grandfathered status could be maintained potentially for one option but not the other.

Adding New Participants

The regulations provide that a plan will not lose its grandfathered status if it enrolls family members of employees covered on March 23, 2010, or enrolls new employees after such date (whether newly hired or newly enrolled). However, the regulations add an important "anti-abuse" provision under which a plan will lose its grandfathered status if it engages in a business transaction (such as a merger or acquisition) for the principal purpose of covering new individuals under the plan. The plan will also lose grandfathered status if it transfers employees from one plan to another in certain circumstances without a "bona fide employment-based reason."

Changing Insurers

The regulations provide (with an exception noted below for collectively bargained plans) that changing the insurance policy, certificate, or contract of insurance under an employer plan will

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cause the insured coverage to lose its grandfathered status. This significant limitation on insured plans may result in many employers retaining the same insurer to avoid loss of the plan's grandfathered status.

Plan Design Changes

Changes in plan design may cause a health plan to lose its grandfathered status. The regulations provide detailed guidance on the kinds of changes to avoid if an employer wants to maintain grandfathered status. These changes include:

- the elimination of all or substantially all benefits to diagnose or treat a particular condition;
- any increase in percentage cost-sharing (*e.g.*, an increase in co-insurance);
- increases in fixed-amount cost-sharing (other than co-payments) of more than 15% above medical inflation;
- increases in fixed-amount co-payments above the greater of a specified dollar amount or 15% above medical inflation;
- decreases in employer contributions of more than a specified percentage; and
- certain changes in annual limits.

On the other hand, the regulations provide that certain changes in plan design will not affect the grandfathered status of a health plan. These include:

- changes in premium amounts;
- changing third-party administrators (for a self-funded plan);
- changes to comply with federal or state laws;
- changes to voluntarily comply with health care reform changes (provided the changes do not violate the limitations described above).

Collectively Bargained Plans

With respect to health plans maintained pursuant to a collective bargaining agreement ratified before March 23, 2010 (the date the Act became effective), the regulations provide that the coverage under such a plan will be treated as grandfathered until the last collective bargaining agreement terminates (regardless of whether there is a change in insurers or one of the other changes that would otherwise eliminate the grandfathered protection). However, this also means that all collectively bargained plans that are grandfathered plans must comply with all the health care reforms that apply to grandfathered plans by the generally applicable effective dates.

This regulatory guidance for collectively bargained plans is a significant change from what might have been expected. The Act suggests that the collectively bargained provision created a general delayed effective date for collectively bargained plans. However, the regulations indicate that there is not a delayed effective date. The Act's grandfathering provision also only refers to insurers, but the regulations clarify that it applies to self-funded plans as well.

Notice and Recordkeeping Requirements

A health plan or insurance coverage may not maintain grandfathered status if it does not provide, in any plan materials describing benefits for participants or beneficiaries, a statement that the plan or coverage is believed to be a grandfathered plan, and contact information for questions or complaints. This required statement must be included in any plan materials describing benefits for participants or beneficiaries (such as the summary plan description for the plan). The regulations include model language that may be used to satisfy this requirement. There is a corresponding recordkeeping requirement as well.

Retiree-Only Plans and Excepted Benefits

The preamble to the regulations states that the existing exception in the Employee Retirement Income Security Act and the Internal Revenue Code for plans with fewer than two employees (including retiree-only plans) was not affected by the Act. It also states that the Act does not affect existing rules on "excepted benefits" (such as stand-alone dental and vision plans and most health FSAs).

The regulations provide much needed clarification about the requirements for grandfathered health plans. Employers who wish to preserve grandfathered status will need to understand these rules and design and administer plans with far less flexibility. To evaluate whether the grandfather plan exception is worth maintaining, each employer will need to carefully weigh the cost of complying with the additional reforms versus the benefit of maintaining the grandfathered plan status.

If you have any questions about the Act, please contact one of the attorneys in the Employee Benefits & Executive Compensation Group at Bradley Arant Boult Cummings LLP.

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