Grandfathered Health Plan Regulations

Melissa B. Kurtzman

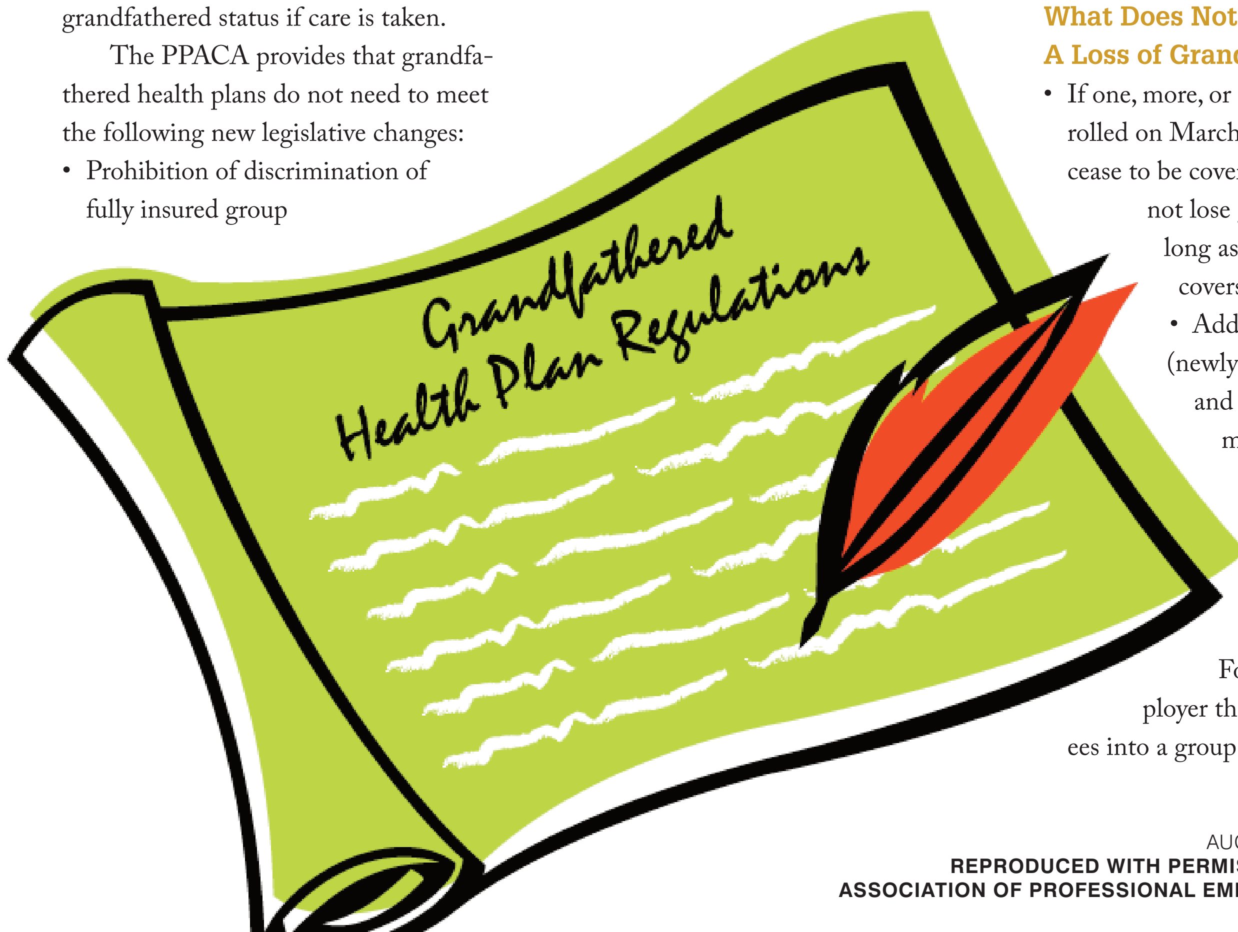
On June 14, 2010, the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury issued final interim regulations for health plans in place on or before March 23, 2010 (grandfathered health plans). The guidance provides rules about what is a "significant change" to a plan in operation and form.

Background

The Patient Protection and Affordable Care Act (PPACA) provides many exceptions to the new health care law for grandfathered health plans. The guidance released is not specific to plans maintained by PEOs. However, I believe PEO-sponsored welfare plans can be maintained in grandfathered status if care is taken.

The PPACA provides that grandfathered health plans do not need to meet the following new legislative changes:

- Prohibition of discrimination of fully insured group health plans in favor of highly compensated individuals.
- Prohibition of discrimination by health plans against health care providers and PPACA provisions on discrimination. Note, however, that Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination provisions remain effective for grandfathered health plans.
- Grandfathered plans must include all adult children beginning in 2014—prior to 2014, grandfathered health plans only need to include adult children up to age 26 if they are not eligible for another employer's plan.
- Preventive care and immunizations without cost sharing.
- New appeals process.
- Emergency services without prior authorization and in-network requirement.
- Prohibitions on referrals to OB-GYNs and pediatricians and expansion of primary care doctors.
- Reporting of wellness initiatives and health care quality in 2012.
- Including cost-sharing limits and out-of-pocket and deductible expenses beginning in 2014.
- Including routine costs of patients who are part of clinical trials beginning in 2014.



What Does Not Cause A Loss of Grandfathered Status

- If one, more, or even all individuals enrolled on March 23, 2010, cease to be covered, the plan does not lose grandfathered status as long as the plan continuously covers someone.
- Adding new employees (newly hired or newly enrolled) and their families (subject to merger, acquisition, or business restructuring anti-abuse rules).

The anti-abuse rules could impact PEO-sponsored plans. For example, any employer that transfers its employees into a group health plan sponsored

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by the PEO without bona-fide employment-based reasons may cause a loss of grandfathering status. Likewise a PEO that advertises a benefit of its services as access to a grandfathered plan may fall within the anti-abuse rules.

- Changing third-party administrators will not cause the plan to lose grandfathered status.
- Changing the plan to comply with federal or state law will not cause the plan to lose grandfathered status.
- Making a voluntary change to comply with the PPACA will not cause the plan to lose grandfathered status.

Different Benefit Packages/New Policies and Insurers

The grandfather rules apply separately to each benefit package made available under a group health plan. However, moving employees from one plan to another could jeopardize both plans. Moreover, if an employer enters into a new policy, certificate, or contract of insurance (collectively, "policy") (e.g., any previous policy, certificate, or contract of insurance is not being renewed), then that policy is not a grandfathered health plan.

Disclosure and Record Retention Requirements

A plan must include a statement (a model is provided in regulations) in any plan materials provided to participants or beneficiaries describing the benefits provided under the plan and that the plan believes it is grandfathered and provides contact information for questions and complaints. The model language has the following required language: "Being a grandfathered plan means that your plan does 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…" Many employers may get a lot of questions from employees about what consumer protections are not provided.

The plan must also maintain records documenting the terms of the plan that were in effect on March 23, 2010. This should not be difficult to accomplish due to the record retention requirements already in existence under the Employee Retirement Income Security Act (ERISA).

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Collectively Bargained Plans, not so Grandfathered

In the case of health coverage maintained pursuant to one or more collective bargaining agreements (CBAs) ratified before March 23, 2010, the coverage is a grandfathered health plan at least until the date on which the last agreement relating to the coverage that was in effect on March 23, 2010, terminates. Thus, before the last of the CBAs terminates, any health insurance coverage provided pursuant to the CBA is a grandfathered health plan, even if there is a change in issuers during the period of the CBA. This does not apply to self-insured plans, according to the draft regulations. This means that during the term of the CBA (last to expire), the union plan can change carriers, etc., without losing grandfathered status. At the end of the CBA, the terms of the plan will be compared to the terms in effect on March 23, 2010, to see if the plan is still grandfathered. Between now and the end of the CBA, the union plan is grandfathered, which means that those insurance market reforms applicable to grandfathered plans in 2011 are applicable to union plans as well.

What Cannot be Changed to Maintain Grandfathered Status

- Any elimination of all or substantially all benefits to diagnose or treat a particular condition will cause the loss of grandfathered status. For example, if a plan eliminates all benefits for cystic fibrosis, diabetes, or HIV/AIDS, the plan will lose grandfathered status. If a plan provides benefits for a particular mental health condition, the treatment for which is a combination of counseling and prescription drugs, and the plan eliminates counseling, the plan will lose grandfathered status.
- Increasing the fixed amount and the percentage cost-sharing requirements that are charged can, but does not automatically, cause the plan to lose grand-

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fathered status (i.e., 20 percent of a hospital bill).

- An increase in annual dollar limits in place as of March 23, 2010. Plans that do not have an annual dollar limit cannot add a limit unless the new limit is replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit.
- Any increase in a percentage cost-sharing requirement will cause the loss of grandfathered status.

According to HHS, DOL, and Treasury, cost-sharing requirements shifting the burden of the costs to those in need of the specific medical services in a manner that may cause a change in the use of the services significantly changes the plan. The regulations, however, do provide some flexibility in their adjustments and provide different standards with respect to co-insurance and fixed amount cost sharing. According to HHS, DOL, and Treasury, co-insurance automatically rises with medical inflation. Therefore, changing the level of co-insurance (e.g., moving from patient paying 20 percent to 30 percent of inpatient surgery costs) significantly after the level of benefits provided is prohibited. However, fixed-amount cost sharing (co-pays and deductibles) does not take into account a co-pay increase from $35 to $40 for outpatient doctor visits and may be reasonable to keep up with rising costs. Raising co-pays from $30 to $50 over a two-year period, however, will result in the loss of grandfathering.

- There cannot be an increase in fixed amount cost sharing (e.g., $500 deductible or $2,500 out-of-pocket limit) that is more than "the maximum percentage increase."
- The maximum percentage increase is medical inflation (from March 23, 2010, plus 15 percentage points). Medical inflation is defined by looking to the medical care component of the Consumer Price Index for all Urban Consumers, unadjusted (CPI-U). In recent years, medical costs have risen an average of 4 to 5%, thus this new formula would permit deductibles to increase by 19 to 20% in 2010 and 2011, or by 23 to 25% between 2010 and 2012.
- A plan will cease to be grandfathered if there is an increase, since March 23, 2010, in the co-pay that exceeds the greater of: the maximum percentage increase (described above); or $5.00 (as increased by medical inflation). These formulas assist zero or very low-level copayments for many plans.
- A plan loses grandfathered status, however, if the employer decreases its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points below the contribution rate on March 23, 2010. A contribution rate is the amount of contributions made by an employer compared to the total cost of coverage, expressed as a percentage. For self-insured plans, contributions by an employer are reduced by employee contributions paid towards the total cost of coverage.

What is Unclear

We do not know the extent any changes can be made to the plan's structure (i.e., changing from a health reimbursement account to major medical or from self-insured to insured) without impacting the grandfathered status.

We are also awaiting more guidance on changing prescription drug formulary, changing related provider network, or changing plan eligibility.

Transition Rules

The PPACA provides transition rules for any plans that cease being grandfathered due to changes made after March 23, 2010, and before the regulations are issued to the public, if the changes are revoked and the coverage is modified, retroactively.

PEO Impact

Arguably, bringing new employers into a group health plan should only impact that employer's employees rather than the entire group health plan, depending on the benefit plan structure. It remains to be seen whether substantial movement of workers to PEOs based in total or in part on a desire to participate in a grandfathered plan would be deemed to constitute "a business restructuring" subject to the anti-abuse provisions. PEOs should review the structures of all group health plans and determine whether it is cost effective to maintain grandfathered plans for their current worksite employers. The greatest downside of losing grandfathered status is the loss of nondiscrimination relief for insured health plans. Any changes and additions to PEO plans must be reviewed carefully to see what, if any, negative effect it would have on the worksite employer.

Melissa B. Kurtzman, is a shareholder in the Philadelphia, Pennsylvania, office of Littler Mendelson, PC.

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