New interim final rules provide employers important guidance on how health plans can lose “grandfathered” status under the landmark federal health care reform law (primarily by cutting benefits or increasing cost-sharing), how and when the law applies to collectively bargained plans (in some cases, there is a delayed effective date) and how the law applies to health plans that cover only retirees (it doesn’t).

Below are the highlights of the eagerly-awaited final interim regulations under the Patient Protection and Affordable Care Act, as modified by the Health Care and Education Reconciliation Act (together, “PPACA”). Issued by the Internal Revenue Service, the Department of Labor (DOL) and the Department of Health and Human Services, the rules are expected to be published in the Federal Register on June 17. Despite the “interim final rules” designation, this guidance is open for public comment and is subject to future modification.

What Is a Grandfathered Plan?

The final rules generally state that grandfathered health plan coverage is coverage provided by a group health plan in which an individual was enrolled on March 23, 2010 (for as long as the plan maintains its grandfathered status under the rules). A group health plan will not lose its grandfathered status due to any or all of its enrollees ceasing to be covered as of March 23, 2010, provided that the plan covers at least one person. In the event that an employer or employee organization enters into a new policy, certificate or contract of insurance after March 23, 2010 (for example, due to a prior insurance policy, certificate or contract not being renewed), the policy, certificate or contract of insurance will not be a grandfathered plan (collectively bargained plans are subject to special rules described below).

Grandfathered plans are subject to certain documentation requirements under the final rules. First, to maintain grandfathered status, plans must include a statement in benefit materials provided to plan participants (i.e., a summary plan description) that the plan believes it is a grandfathered plan under the PPACA. The interim final rules contain model language. Second, plans are required to maintain records documenting the plan terms needed to establish their grandfathered status and make such records available upon the request of a plan participant, beneficiary, or state or federal agency official.

How Could a Plan Lose Grandfathered Status?

Under the interim final rules, there are four cases where a plan change will cause loss of grandfathered status:
Eliminating all or substantially all benefits to diagnose or treat a particular condition – This includes the elimination of benefits for any necessary element to diagnose or treat a condition. For example, if a plan previously (i.e., prior to March 23, 2010) provided benefits for a mental health condition in the form of treatment via counseling and prescription drugs and the plan is amended to eliminate counseling for such condition, the plan will lose its grandfathered status.

Increasing a percentage in a percentage cost-sharing requirement (i.e., coinsurance) – This will be measured against the requirements as of March 23, 2010.

Decreasing an employer or employee organization contribution rate – Specifically, a plan cannot institute a decrease for a tier of coverage for any class of similarly situated individuals of more than five percentage points (compared with rates in effect on March 23, 2010). This would include decreases based on a formula.

Changing annual limits – Specifically, plans cannot make any of the following three changes without losing grandfathered status. A plan that had no annual or lifetime limit on March 23, 2010 may not later impose one. A plan that, on March 23, 2010, had a lifetime limit on benefits but no annual limit may not adopt an overall annual limit if the dollar value is less than the lifetime limit was on March 23, 2010. Finally, a plan cannot decrease an annual limit that was in effect on March 23, 2010.

In two other cases, a change may cause a plan to lose its grandfathered status:

Increasing the fixed-amount cost-sharing requirement other than copays – This would apply, for instance, to a deductible or out-of-pocket limit. Generally, to cause a plan to lose grandfathered status such an increase, measured from March 23, 2010, would have to exceed “medical inflation.” Under the final rules, this is the increase since March 2010 in the overall medical care component of the Consumer Price Index for All Urban Consumers as published by the DOL, expressed as a percentage – plus 15 percentage points.

Increasing a fixed-amount copayment – Generally, to cause a plan to lose grandfathered status such increase, measured from March 23, 2010, would have to exceed either (a) an amount equal to $5 increased by medical inflation or (b) the “maximum percentage increase” determined based on the percentage of the total increase in the copayment.

The preamble to the interim final rules specifically states that changes other than those described above will not cause a plan or coverage to cease to be a grandfathered plan. Such changes would include changes to premiums, changes to comply with federal or state legal requirements, changes to voluntarily comply with the PPACA and changes in third-party administrators (assuming such changes do not exceed the standards as described above).

Collectively Bargained Plans

Collectively bargained plans that are fully-insured (as opposed to self-insured) are subject to special timing rules in that coverage maintained pursuant to one or more collective bargaining agreements (CBAs) that were ratified before March 23, 2010 is grandfathered at least until the date on which the last of those CBAs terminates. After such date, the determination of whether the plan is a grandfathered plan is based on the standard rules of determining grandfathered status as discussed above by comparing plan terms when the last CBA expires against the terms in effect on March 23, 2010.
For example, if a CBA, which provides for certain health coverage, was in effect on March 23, 2010 and such CBA does not expire until December 31, 2011, entering into a new group health insurance policy for the January 1, 2011 plan year will not result in the loss of grandfathered status since the CBA has not terminated. Further, if the coverage is renewed under a new CBA effective January 1, 2012 and the only changes since March 23, 2010 are those that would not have caused the plan to have lost grandfathered status, the plan will continue to be a grandfathered plan.

Retiree-Only Coverage

Due to the manner in which the PPACA amended the Internal Revenue Code and the Employee Retirement Income Security Act, there were questions as to how the PPACA affects retiree-only health plans. Significantly, the preamble to the final rules specifically states that the PPACA rules do not apply to retiree-only plans.

Enrollment After March 23, 2010

The final rules clarify that enrollment of individuals after March 23, 2010 in certain situations will not result in loss of grandfathered status. First, with respect to an individual enrolled in a group health plan on March 23, 2010, grandfathered plan coverage will include coverage of such individual’s family members if they are enrolled in the group health plan after March 23, 2010. Second, a grandfathered group health plan will retain its grandfathered plan status if it allows new employees and their families to enroll in the plan after March 23, 2010.

Anti-Abuse Rules

There are two anti-abuse rules that may affect a group health plan’s grandfathered status. First, in the mergers and acquisitions context, if the principal purpose of such a transaction is to cover individuals under a grandfathered plan, the plan ceases to be a grandfathered plan.

Second, if (1) employees are transferred into a plan from another plan under which the employees were covered on March 23, 2010, and (2) when comparing the two plans and treating the old plan as if it were amended so that it had the same provisions found in the new plan, the old would have lost its grandfathered status, and (3) there was no bona fide employment-based reason to transfer the employees, then the plan will lose its grandfathered status.

PPACA Provisions Not Applicable to Grandfathered Plans

The benefit of grandfathered plan status is the exemption from a number of PPACA requirements. These exceptions include the following:

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<th>Provisions Not Applicable to Grandfathered Plans</th>
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Insured plans prohibited from discriminating in favor of highly-compensated individuals based on income. PHSA §2716
Quality of care and provider reimbursement structure reporting. PHSA §2717
Appeals and external review procedures. PHSA §2719
Providing participants with certain protections related to choice of providers and emergency services. PHSA §2719A

PPACA Provisions Applicable to All Grandfathered Plans

Notwithstanding the various PPACA provisions that are not applicable to grandfathered plans, there are certain PPACA provisions that apply to group health plans irrespective of whether the plan is a grandfathered plan or not. PPACA provisions that apply to all group health plans, for plan years beginning after September 23, 2010, unless noted otherwise, include:

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<td>Prohibitions on excessive waiting periods (noting that this provision applies to grandfathered plans for plan years beginning January 1, 2014).</td>
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<td>No lifetime or annual limits.</td>
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<td>Prohibitions on rescissions.</td>
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<td>Extension of dependent coverage until age 26 (noting that grandfathered group health plans have a special rule in that for plan years beginning before January 1, 2014, if a dependent is eligible for other employer-sponsored group health coverage then he/she may be excluded from the grandfathered plan).</td>
<td>PHSA §2714</td>
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<td>Development and utilization of uniform explanation of coverage documents and standardized definitions.</td>
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Transition Rules

Understanding potential issues relating to maintaining grandfathered plan status due the March 23, 2010 determination date, the final rules provide a couple of transition rules allowing plan sponsors to make certain changes to preserve a plan’s grandfathered status.

First, certain changes (1) made on or before March 23, 2010 that are effective after March 23, 2010 or (2) that were adopted after March 23, 2010, but were effective prior to March 23, 2010, will be deemed to have been part of the terms of the plan on March 23, 2010.

Second, the final rules provide a grace period to revoke or modify changes where the changes would cause the plan to lose grandfathered plan status. If such revocation/modification is made to the plan effective as of the first day of the plan...
year beginning on or after September 23, 2010 (i.e., January 1, 2011 for a calendar plan year), such plan will retain its grandfathered status.

Conclusion

The new interim final rules provide some clarity when it comes to what changes a group health plan sponsor may make and retain its grandfathered status. Ultimately, plan sponsors will need to weigh the value of maintaining the grandfathered status of its group health plan versus the costs of doing so.