

Grandfathering Under The Affordable Care Act:

What changes would cause your health plan to lose grandfathered status?

For more information regarding this or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys Labor and Employment Group by calling 614.464.6400.

The long-awaited grandfathering regulations under the Patient Protection and Affordable Care Act (ACA) have been published. Grandfathered status is significant because some of the 2011 and 2014 ACA mandates do not apply to grandfathered plans. Mandates that do not apply to grandfathered plans include: first dollar coverage of preventive services; application of nondiscrimination rules to insured plans; external appeal rights; no preauthorization for OB/GYN care; cost-sharing limited to out-of-pocket maximum for HSA-compatible high deductible health plans (2014); deductibles limited to \$2,000 for individual coverage and \$4,000 for family coverage (2014); and coverage of clinical trial expenses related to cancer and other life-threatening diseases (2014).

Any health plan in existence on March 23, 2010 (the date ACA was enacted) is initially grandfathered. However, certain changes to your health plan will cause your plan to lose grandfathered status.

Changes that would cause your plan to lose grandfathered status:

- Elimination of coverage for any necessary element to diagnose or treat a particular condition.
- Any increase in participants' coinsurance percentage from the percentage in effect on March 23, 2010.
- An increase in the dollar amount of participants' deductibles or out-of-pocket limits in effect on March 23, 2010, if the increase exceeds medical inflation plus 15%.

- An increase in the dollar amount of a copay over the amount in effect on March 23, 2010 if the increase exceeds the greater of (a) \$5.00, as adjusted annually for medical inflation; or (b) medical inflation plus 15%.
- A decrease in the percentage your company pays of the cost of any tier of coverage (e.g., single, single plus one or family) by more than 5% below the contribution rate in effect on March 23, 2010, calculated as $[(\text{COBRA rate} - \text{employee premium}) / \text{COBRA rate}]$.
- Imposition of a new or reduced global annual dollar limit on benefits, except if the global annual dollar limit is not less than a former lifetime dollar limit. (As an aside, the government said to expect guidance "soon" on the prohibition on lifetime dollar limits and some annual dollar limits.)
- If your plan is insured, changing insurance carriers.

Changes that would not cause a plan to lose grandfathered status:

- Smaller changes in the dollar amount of deductibles, out-of-pocket limits or copays.
- Changes to comply with ACA or other federal or state legal requirements.
- Normal enrollment of employees and family members who were not enrolled on March 23, 2010 and employees' normal election changes.
- If your plan is insured, renewing with your current carrier.
- If your plan is self-insured, changing third-party administrators.

Benefit options: If your plan has more than one benefit option (e.g., a high option and a low option), the grandfathered status of each option is analyzed separately.

Good news for retiree-only plans:

The preamble to the regulations confirms that a retiree-only plan continues to be exempt from most HIPAA portability requirements and, now, ACA mandates. There had been some doubt about this result due to ACA's elimination of the exemption for plans covering fewer than two active employees from the Public Health Service Act.

Mostly bad news for collectively bargained plans:

- If your collectively bargained plan is self-insured, you get no extension of the ACA effective dates and you get no special protection from loss of grandfathered status. Your self-insured collectively bargained plan is treated the same as a non-bargained plan.
- If your collectively bargained plan is insured, you still don't get an extension of the ACA effective dates but you are protected from loss of grandfathered status until the date on which the last of the collective bargaining agreements relating to the coverage that was in effect on March 23, 2010 terminates.

New disclosure requirement: All plan materials describing a grandfathered plan need to include the following statement:

This group health plan believes this plan is a "grandfathered health plan" under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was

already in effect when that law was enacted. Being a grandfathered health plan means that your plan may 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. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information]. [For plans subject to ERISA, insert: You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.] [For nonfederal governmental plans, insert: You may also contact the U.S. Department of Health and Human Services at www.healthreform.gov.]

Records retention: You will need to maintain records to document the plan terms (including contribution rates) as of March 23, 2010 and for all periods during which your plan is grandfathered, and to make these records available upon request.

Update on the COBRA subsidy: As of June 16, 2010, Congress has not acted to extend eligibility for the COBRA premium subsidy past May 31, 2010.

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