Grandfathering

Qualification

What qualifies as a grandfathered plan?

- A “Grandfathered Health Plan” is defined as a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010, regardless of whether the individual later renews coverage. Grandfathered plans are required to meet some, but not all, of the reforms contained in the Patient Protection and Affordable Care Act.

- The Act allows for family members to be added to a current plan and for new employees (including new enrollees subject to certain anti-abuse rules) to be enrolled in a grandfathered plan.

- Beyond this, interim regulations detail what it means to be grandfathered and what benefit changes grandfathered plans can make and still retain their grandfathered status.

Application of rules to grandfathered plans

Which health care reform provisions apply to grandfathered plans?

- Grandfathered plans will be required to meet some, but not all of the reforms.

Must grandfathered plans provide internal/external reviews under the Act?

- Grandfathered plans are not required to comply with the Act’s internal and external review mandate — although plans may voluntarily comply without losing grandfathered status.

Disqualification

What disqualifies a grandfathered plan?

Can you conform benefits to reflect new state and federal laws without loss of grandfathered status?

Generally, a plan will lose grandfathered status if any of the following changes are made after March 23, 2010.* These rules apply separately to each “benefit package” offered by an employer:

1. A significant cut or reduction in benefits by eliminating all or substantially all of the benefits to diagnose or treat a condition, or any necessary element to diagnose or treat a condition.
2. Raising coinsurance charges
3. Significantly raising fixed cost-sharing (i.e., deductibles and out-of-pocket limits) by more than medical inflation (as measured from March 23, 2010) plus 15 percentage points
4. Significantly raising copayment charges by more than the greater of: (i) medical inflation (as measured from March 23, 2010) plus 15 percentage points or (ii) $5 (adjusted for medical inflation)
5. Significantly lowering the rate of employer contributions by 5 percentage points for any coverage tier
6. Adding or tightening an annual limit (with one exception)
7. Reclassifying employees so that the reclassified employees are eligible for a different plan (even if it’s a grandfathered plan), without a bona fide employment reason
8. Failing to continuously maintain at least one covered individual (not necessarily the same individual)

HHS may issue additional guidance on what other changes may defeat grandfathered status in the future.

Note: To maintain grandfathered status, a notice must be placed in plan materials provided to a participant or beneficiary explaining the grandfathered status of the plan or coverage.

*The interim regulations provide a mechanism to undo certain changes that would otherwise defeat grandfathered status effective as of the next plan year on or after September 23, 2010. In addition, certain changes made by an insurer under a filing made prior to March 23, 2010 with the applicable department of insurance may not defeat grandfathered status. Please see the next section below for more information.
Collectively bargained plans

How are collectively bargained plans treated under the grandfathering rules?

- For collectively bargained grandfathered plans, many of the requirements of the Act will continue to apply including: the dependent to age 26 requirement, the elimination of lifetime maximums, and the restriction on annual dollar limits, etc. All grandfathered collectively bargained plans, self-insured and fully insured, are subject to the benefit mandates that apply to grandfathered plans.**

How extensive is grandfathering for insured collectively bargained plans?

- Insured health insurance coverage that is maintained pursuant to one or more collectively bargained agreements that were ratified before March 23, 2010 may switch insurance carriers without defeating their grandfathered status during the term of the collectively bargained agreement. In addition, until the date on which the last agreement relating to the coverage that was in effect on March 23, 2010 terminates, it appears that a collectively bargained insured plan (but apparently not a self-funded one) may make changes to the group insurance coverage that would otherwise defeat grandfathered status, such as increasing coinsurance levels.

- After the last collectively bargained agreement, in place as of March 23, 2010 terminates, the rules that apply for all other grandfathered plans regarding how plans maintain or lose grandfathered status will then apply. According to the rule, the collectively bargained plan should compare the terms of the health insurance coverage after the date the last collective bargaining agreement terminates with the terms of the health insurance coverage that were in effect on March 23, 2010 to determine if the coverage is still grandfathered.

- There are still unanswered questions on how collectively bargained grandfathered plans will be defined and treated. We expect that there will be future guidance on this issue and must emphasize that Aetna does not provide legal or compliance advice and we are providing our general and initial view of this new legislation. We may update this view in the future to reflect guidance we receive from HHS and other regulatory authorities. In the end, you will need to work with your own professional advisors to determine whether your plan is entitled to grandfathering protections, to what extent you intend to apply those protections and for how long.

How extensive is grandfathering for self-funded collectively bargained plans?

- Self-funded collectively bargained plans do not have a special status. They are treated like any other grandfathered health plan.**

Maintaining grandfathered status

How does a plan maintain grandfathered status?

The regulations also provide guidance on changes which are generally acceptable and will not normally affect a plan’s grandfathered status as long as the other invalidating changes are not made. Generally, if any of the changes listed below were made to a plan after March 23, 2010, they will not, by themselves, cause a plan to lose grandfathered status:

1. Changes to third-party administrators or insurers in the group market
2. Changing premiums
3. Changes to comply with state or federal law, including voluntary changes to implement PPACA
4. Agreeing to binding renewals before March 23, 2010, effective on or after March 23, 2010
5. Allowing new employees or new enrollees who are not new employees and their dependents to enroll (subject to certain anti-abuse rules)
6. Allowing new dependents of current subscribers to enroll.

In general, routine changes in provider networks and drug formularies should not defeat grandfathered status.

**By a memo dated September 21, 2010, HHS clarified that certain grandfathered, self-funded, non-federal governmental plans maintained under a collectively bargained agreement are not subject to PPACA’s prohibitions on preexisting conditions, special enrollment period restrictions, and prohibitions against discrimination based on health status if they have already opted out of those requirements until the commencement of the first plan year following the expiration of the last planned year governed by the collective bargaining agreement. See www.hhs.gov/ociio/regulations/opt_out_memo.pdf
Other

Can you change provider networks or make a change to a prescription drug formulary?

- In general, routine changes in provider networks and drug formularies should not defeat grandfathered status.

Does adding new enrollees to a grandfathered plan due to a merger or acquisition defeat grandfathered status?

- If the principal purpose of a merger, acquisition or similar business restructuring is to cover new individuals under a grandfathered health plan, the plan ceases to be a grandfathered health plan. The rules contain helpful examples that plan sponsors should review with their counsel if undergoing a merger or acquisition.

Is grandfathered business in the same pool as non-grandfathered business?

- The law is not clear if grandfathered business will be in the same pool as non-grandfathered business. Further regulation will be needed to answer this.

How many employers will maintain grandfathered health plans in the future?

- The answer to this question is not known. Every year, however, employers, individuals and insurers make decisions about changes to the health care coverage they offer, buy or underwrite.

Often changes are made to deal with the increased cost of coverage, most of which is due to the high demand for medical care and the increasing sophistication and cost of medical technology. Coverage for small employers undergoes the most change. In fact, the government estimates that up to 80 percent of small employer plans could lose grandfathered status by 2013. Up to 64 percent of large group plans could lose grandfathered status by then as well. (See the low, medium and high estimates for plans maintaining grandfathered status in 26 CFR Parts 54 and 602 citing, Kaiser/RHET Employer Survey, 2008-2009.)

What happens if an “executive” health plan loses grandfathered status?

- So-called insured “executive plans” that were allowed to be discriminatory in favor of highly compensated employees before health care reform may become subject to the non-discrimination rules in Internal Revenue Code section 105(h) that applied to self-funded plans before PPACA. Because the employer penalties for violating these non-discrimination rules as to insured plans are quite significant, we urge our customers to seek advice from tax counsel with expertise in this area if they think their plans may be discriminatory.

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