



Health Reform Regulations on Preexisting Condition Exclusions

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On June 28, 2010, the Departments of Labor, Treasury (IRS), and Health and Human Services jointly published interim final regulations on preexisting condition exclusions. The regulations also addressed several other issues regarding health reform (to be addressed in separate Hub Client Bulletins). In this Bulletin, we explain the impact of preexisting condition exclusions and provide some action items for employers.

Background -- Currently, preexisting conditions can affect individuals covered by group health plans, as well as the plans themselves. Carriers may deny certain people coverage, increase the premiums for the group contract, or decline to write the group, subject to applicable state law. Plans, including larger self-funded plans, may examine large claims, investigate whether those claims relate to a preexisting condition, and deny coverage after-the-fact on that basis. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) attempted to mitigate the impact of these plan provisions by providing credit for prior creditable coverage, thus reducing or eliminating the exclusion period, but the law did not protect everyone fully.

Effective Dates

The preexisting condition exclusion rule is generally effective for plan years starting on or after January 1, 2014. That means for a January 1 plan year, the rule is effective on January 1, 2014, and for a May 1 plan year, the rule is effective May 1, 2014, for example. Until the health reform rules become fully effective in 2014, the preexisting condition exclusion rules of HIPAA will continue to apply.

Young people benefit from the rule sooner. For enrollees under 19 years of age, no preexisting condition provision may apply effective for plan years starting on or after October 1, 2010. For a January 1 plan year, the rule on children under age 19 will be effective January 1, 2011, and for a July 1 plan year, the rule will be effective July 1, 2011, for example.

The health reform rules on grandfathering do not allow a grandfathered group health plan to avoid compliance with these new rules. (Interestingly, an individual policy that is grandfathered may avoid compliance with this rule.)

Preexisting Condition Exclusions

Health reform prohibits a group health plan from imposing any preexisting condition exclusion, starting in 2014 for most people and sooner for people under age 19. Plans can no longer deny enrollment/plan coverage or deny benefits based on preexisting condition exclusions.

The definition of "preexisting condition" is broader than in the past to prevent plans from denying any person coverage under the plan due to such a condition. A "preexisting condition exclusion" is a plan provision that limits benefits or excludes benefits or plan

coverage based on the fact a condition was present before the effective date of coverage. The rule applies whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that date. The definition encompasses conditions relating to a person's prior health status as may be identified by pre-enrollment questionnaires, physical examinations, or review of medical records from the period prior to enrollment. This new definition closely follows the HIPAA definition.

Certain rules in plans and in current law are unaffected. For example, a group health plan may still impose an exclusion that applies regardless of when the condition arose relative to the effective date of the coverage. A plan may state no benefits are payable for surgeries relating to muscle-nerve connectivity, for example. (Other requirements of federal law may prohibit such exclusions, however, such as the Americans with Disabilities Act.)

Specific examples in the new regulations make the following points:

- A plan cannot exclude coverage for a condition caused by an injury based on the fact the injury occurred prior to the effective date of coverage under the policy.
- A plan cannot deny an individual's application for coverage because a pre-enrollment physical reveals the person has type 2 diabetes. (As a result of this rule, health insurance carriers will not require pre-enrollment physicals after the law takes effect.)

People Under Age 19

The scope of the age 19 rule is broader than expected initially. The word Congress uses in the provision is "enrollee," rather than "child" or "dependent." As a result, the federal interpretation is no preexisting condition rules can apply to anyone under age 19, including a young employee, spouse, domestic partner, or other person who is otherwise eligible for the plan and who is enrolled in coverage.

A group health plan will be able to exclude people under age 19 only until their next plan year starting on or after October 1, 2010. (The law refers to plan years beginning on or after September 23, 2010, but that translates into October 1 and following plan years; plan years generally start the first of a month.) An example in the regulations illustrates the effective date and the application of the new rule to people under age 19:

Facts. Individual F commences employment and enrolls F and F's 16-year-old child in the group health plan maintained by F's employer, with a first day of coverage of October 15, 2010. F's child had a significant break in coverage because of a lapse of more than 63 days without creditable coverage immediately prior to enrolling in the plan. F's child was treated for asthma within the six-month period prior to the enrollment date and the plan imposes a 12-month preexisting condition exclusion for coverage of asthma. The next plan year begins on January 1, 2011.

Conclusion. In this Example, the plan year beginning January 1, 2011 is the first plan year of the group health plan beginning on or after September 23, 2010. Thus, beginning on January 1, 2011, because the child is under 19 years of age, the plan cannot impose a preexisting condition exclusion with respect to the child's asthma regardless of the fact that the preexisting condition exclusion was imposed by the plan before the applicability date of this provision.

The conclusion would be the same if the person under age 19 had been the employee (F) himself or any other person enrolled in the plan, such as a spouse or domestic partner.

Impact on Plans and Action Items

In general, the preexisting condition exclusion rules may not affect certain larger employer group health plans. In those plans, both full-insured and self-funded, often all people have been allowed to enroll in coverage regardless of medical conditions – past or present. Some other plan sponsors eliminated preexisting condition exclusion clauses after HIPAA reduced their effectiveness and increased administrative obligations. Even for those plans with preexisting condition rules, the exclusions traditionally have been applied only to larger claims over a certain dollar threshold. (Once the claims threshold was met, an investigation would occur.)

Smaller plans and their participants will realize greater access to coverage. Underwriting and denials at the application stage will be eliminated. Greater access comes at a price; carriers are expected to increase the rates charged to smaller employers (and individuals) as a result of this rule. State and federal oversight will constrain cost increases somewhat, but the change will increase premiums. A carrier likely will spread this expense over its entire market segment.

The preexisting condition exclusion rule will have the greatest impact on:

- Employers that have retained preexisting condition exclusion rules, especially those that have enforced it diligently as to incurred claims.
- Employers with fully-insured plans where the carrier has been permitted to deny eligibility and benefits to people with preexisting conditions.

Any plan with no exclusions for preexisting conditions may wish to assert that any renewal increase (supposedly justified by this health reform rule) should be inapplicable to their specific insurance contract.

A group health plan sponsor should examine its written plan provisions very closely – especially its limitations and exclusions – to be certain it eliminates any impermissible provisions lurking in plan details.

Finally, any size plan with preexisting condition exclusions should consider the impact of eliminating that exclusion for children under age 19. Initially, one may expect a negligible financial impact from the elimination of the preexisting condition exclusions for people under age 19. These people are assumed to be healthier on average than the general population. However, group health plans may experience some adverse selection at annual enrollment when unhealthy children who have not had private insurance coverage are added to plan coverages.