



# Grandfather Plan Provisions in Federal Health Care Reform

(Including Collectively Bargained Plan Impact)

## Client Bulletin Provided by HUB International

**Grandfathered Plans.** A rule in health reform on “grandfathered health plans” would make some provisions of the new law inapplicable to existing plans in place as of the date of enactment. Grandfathered coverage can be renewed, and family members and new employees are allowed to enroll without destroying grandfathered status, for example.

**Caution.** It is not clear what makes a plan lose grandfathered status. If a plan is fully-insured, cooperation by the insurance carrier will be crucial, to prevent changes to the plan that may result in a loss of the status if a plan sponsor attempts to rely on grandfathering to avoid a certain, limited number of new compliance burdens.

**Collective Bargaining and Grandfathered Plans.** A special rule applies if health insurance coverage is maintained due to one (or more) collective bargaining agreements between employee representatives and one (or more) employers. If the agreement was ratified before the date of enactment (March 23, 2010), then portions of two subtitles of the new law do not apply to that plan. (The law allows plan amendments, without destroying grandfathered status, if changes are made solely to conform the plan to the law’s new rules.) Note: One interpretation is that only insured collectively bargained plans are entitled to grandfathering; we need additional guidance on this apparent drafting error.

**Limited Scope of Grandfathering.** Not all provisions of the new law are subject to grandfathering. The “free ride” for grandfathered plans has been cut back along the road to health reform.

Here is a list of the rules for which an employer may claim a **delayed effective date**, with a **permanent delay possible**, if the plan is grandfathered:

- Primary care provider designation
- Access to obstetrical and gynecological care
- Access to pediatric care (allopathic or osteopathic pediatric specialist as child’s primary care provider)
- Nondiscrimination provisions based on hourly/salaried status or other plan distinctions that directly or indirectly create levels of benefits/coverage that vary by compensation level (insured plans)
- Emergency room (no prior authorization/no network benefit differential)
- No cost sharing on minimum preventive benefits
- Extension of dependent coverage to age 26 – but only until plan year beginning on or after January 1, 2014, and only if dependent is directly eligible for employer health coverage
- Appeals process revised
- Renewals guaranteed
- Rating restrictions (age, tobacco, community, etc.)
- Guarantee issue
- Clinical trial coverage
- Potentially some restrictions on deductible and cost sharing maximums

Here is a list of some rules that **do apply** to grandfathered plans, despite attempts to delay compliance for these plans:

- Employer mandate, penalties, automatic enrollment, and vouchers
- Carrier reporting of loss ratios
- Preexisting condition elimination (including for children under 19 years of age)
- Waiting periods over 90 days eliminated
- Lifetime limits eliminated
- Annual limits eliminated (except for plan years beginning prior to 1/1/14, a plan may have annual limits on “essential benefits”)
- No rescission of insurance

- Extension of dependent coverage to age 26 but only if dependent is not eligible to enroll in an eligible employer-sponsored plan
- Early retirement reinsurance program (delay or avoidance not desirable -- actually a benefit to plan sponsor)
- Sixty (60) day advance notice of plan changes
- Four (4) page disclosure / mini summary plan description
- Certain insurance industry or policy changes (minimum loss ratio rules, etc.)
- Cadillac plan excise tax
- Reporting on plan information (care management rules, coverage of persons by month, disclosures regarding essential plan and exchanges, etc.)
- Form W-2 reporting
- Wellness plan design guidelines (not a provision a plan wants to avoid)

**More on Limited Scope of Grandfathering.** The scope of the relief the grandfather rule appears to offer is somewhat illusory, especially in light of “essential” plan mandates and penalties. To get technical, the grandfather rule is limited in scope to two subtitles -- A and C of Title I of the new law, HR 3590. Many new rules fall outside of those provisions:

- One of the most onerous new rules to consider is the requirement that an employer must offer an “essential” health benefit plan, with all the provisions required by the new law, or else pay a fine. The fact an employer offers a grandfathered plan apparently does not make this essential plan requirement or this penalty inapplicable. If the grandfathered plan is not sufficient to satisfy that standard essential plan required by the year 2014 (which it likely will not -- the essential plan may have a lower deductible, mandated preventive care, etc.), the employer will need to offer a qualifying essential plan as well. Otherwise, the penalty applies. Offering a more generous “essential” plan alongside a grandfathered plan may cause adverse selection against the grandfathered plan. While this rule applies to the employer, it is a consideration for collectively bargained plans as well, due to the potential financial impact on the plan. Also, such changes under health care reform may trigger a requirement to hold new bargaining meetings in rare situations.
- The Cadillac plan tax and other revenue / tax provisions apparently will apply to all plans, including grandfathered plans. Under the Cadillac tax rule, health coverage under a certain value is exempt from taxation: under \$10,200 single, and under \$27,500 family. Above those thresholds, starting in 2018, a 40% excise tax will generally apply to the excess benefit.

Special rules provide additional exemptions for plans where the majority of employees covered by the plan (1) are in high risk professions which might include certain government employees – such as police, fire, and EMT workers – and (2) are retirees who are over 55 but not on Medicare. The special rules also apply to retirees from high risk jobs who held those positions for over 20 years.

For persons described in this paragraph, an additional amount of plan coverage is exempt from tax: an additional \$1,650 single, and \$3,450 family. (The higher exempt amounts thus total \$11,850 single and \$30,950 family.) However, many plans with high risk workers or retirees will not satisfy the requirement that the majority of employees or retirees covered by the plan meet these requirements – the law likely means 50% or more by using the word majority.

Participants in multiemployer plans (collective bargaining plans) do get a special break under the excise tax rule: the plans apparently are allowed to provide coverage valued at up to \$27,500 even for a single person without being considered a plan subject to the excise tax, and high risk workers can enjoy up to an additional \$3,450, even for single coverage (provided the majority of plan participants are high risk persons).

- Grandfathering may apply to the new rule on nondiscrimination based on hourly versus salaried status, but the status is difficult to claim and maintain. Note: While grandfathering would seem to provide a potential delay (perhaps permanently) for compliance with this new rule, some insurance carriers are imposing this new rule by refusing to write groups with discriminatory provisions. Carriers do not want to be involved with policies that later may be determined to fall outside of grandfathering. They want to avoid any negative publicity at this time, and do not want to appear as if they are disregarding or skirting the law. As with other grandfathering provisions, the need for carrier cooperation is especially significant with respect to (1) claiming grandfathered status for a plan with such an eligibility distinction and (2) maintaining grandfathered status for the plan.
- Plans are subject to other numerous rules despite coming within the grandfather provision – new rules on reporting to the federal government, for example.

**What Terminates Grandfathered Status?** Plans need additional guidance from the government on what it means to be “grandfathered.” The current definition in the law is circular. As mentioned above, the law says certain changes will not destroy grandfathered status, such as enrollment of new dependents and annual renewals.

That raises the question – will other modifications to the plan cause the plan to lose grandfathered status? Some discussions of Congressional intent during the course of the health reform debate would seem to imply that no plan changes are allowed to a grandfathered plan -- other than the changes specifically allowed by the new law. If the plan is modified to change deductibles and co-pays, for example, or to revise eligibility or covered benefits, will that make the plan lose grandfathered status? The new law does not explain nor define how a plan sponsor must or must not act to maintain a plan as “grandfathered.”

Collectively bargained plans probably enjoy greater stability in plan design, compared to other group health plans. Employers -- and collectively bargained plans -- will need to consider whatever standards the agencies eventually develop on this issue when considering future plan changes

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