



Determining, Establishing and Maintaining Grandfathered Status Under Federal Health Reform

Client Bulletin Provided by HUB International

June 18, 2010

Overview of “Grandfathered” Status

Federal health reform allows certain plans in existence on March 23, 2010 to remain unaffected by a limited number of health care reform provisions. On June 17, 2010, three federal agencies jointly issued interim final regulations on grandfathered plans and provided specific guidance on:

- Maintaining grandfathered status through disclosure obligations
- Required record keeping
- Transition provisions allowing grandfathering for plans that may have made disqualifying changes

The regulations generally are effective immediately.

HUB's Client Bulletin *Grandfather Plan Provisions in Federal Health Care Reform* dated May 5, 2010, describes the general rules on grandfathered plans as known prior to the release of these regulations. That Bulletin explains the rule, its scope, and the limited information on plan changes known at that time. When referring to it for background information, remember the regulations clarify and even supersede some of the initial interpretations.

The grandfather rules apply separately with respect to each benefit package made available under the group health plan. A group health plan does not lose grandfathered status even if there is complete turnover in the covered population; the plan simply needs to have covered at least one person since March 23.

Collectively Bargained Plans. When health insurance coverage is maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010, the coverage will be grandfathered at least until the date on which the last agreement relating to that coverage terminates. The regulations add a couple of new twists for these plans:

- The special grandfathering rules are applicable only to insured collectively bargained plans. (Self-funded collectively bargained plans may be grandfathered under the regular rules.)
- Grandfathered status is maintained for these plans solely on the basis of the collectively bargained status; these plans are not subject to the regular rules on maintenance of grandfather status regarding impermissible plan changes. For example, a collectively bargained plan that claims grandfathered status may change insurance carriers (a change which would eliminate grandfathered status for any other group health plan).

- While a collective bargaining agreement is in place, this plan may do the following (without regard the new guidelines described later in “Changes to Benefit Design Potentially Causing Loss of Grandfather Status”):
 - Eliminate benefits
 - Increase percentage cost sharing requirements
 - Increase fixed amount cost-sharing (for co-payments as well as other forms of cost-sharing such as deductibles, out-of-pocket amounts, etc.)
 - Increase the amount employees must pay (whether based on the cost of coverage or a formula)
 - Change annual limits
 - Change carriers

- After the last collective bargaining agreement expires, the insured plan is subject to the same grandfathering rules as other group health plans (and as would apply to any self-funded collectively bargained plan). Interestingly, the fact that a plan has changed carriers between March 23, 2010 and the date of expiration of the agreement does not cause the plan to lose grandfathered status. However, the plan cannot remain grandfathered if the plan has made any of the following changes unless the regularly-applicable guidelines are met when comparing the plan as of March 23, 2010 with the then-current plan:
 - Elimination of benefits
 - Increases to percentage cost sharing requirements
 - Increases to fixed amount cost-sharing (for co-payments as well as other forms of cost-sharing such as deductibles, out-of-pocket amounts, etc.)
 - Increases to the amount employees must pay (whether based on the cost of coverage or a formula)
 - Changes to annual limits

A plan amendment may be necessary to bring the plan within the usual guidelines.

The scope of the grandfathering rule is identical for collectively bargained plans.

These new rules seem to change prior interpretations based only on the statute. Now, as a collective bargaining agreement expires, the plan apparently may be revised to capture changes required by the new agreement. Compared to a regular plan, a collectively bargained plan has much greater leeway to make changes while it is grandfathered. We will continue to follow this issue for additional guidance from the federal agencies.

Maintaining Grandfathered Status

Disclosure of Status. A group health plan maintains its grandfathered status by making a disclosure in any and all plan materials describing the benefits to participants and beneficiaries. The statement must provide that the health plan believes it is a grandfathered plan within the meaning of Section 1251 of the Affordable Care Act, as well as contact information for questions and complaints.

Plan sponsors should use model language provided by the agencies to satisfy this requirement. The agencies may change the model language later, based on input from the benefits community, but for now a group health plan should use the model language as follows:

This group health plan believes this [plan or coverage] 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 or policy] 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 address and phone number as contact information]. [For ERISA plans, 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.]

Maintenance of Records. A plan sponsor wishing to retain grandfathered status must maintain records documenting the terms of the plan that were in effect on March 23, 2010, and all other documents necessary to verify, explain, or clarify its status as a grandfathered health plan. These documents include (but are not limited to):

- The plan document or policy in effect on March 23, 2010, and any later documents, up to the current document or policy in place
- Health insurance policies, contracts, or certificates of insurance
- Summary plan descriptions (SPDs)
- Documentation of premiums or the cost of coverage
- Documentation of required employee contribution rates

The plan sponsor must make these records available for examination, meaning the federal agencies may request these items in the event grandfathered status is audited. (State agency officials and individuals may examine the records as well.) Keeping these materials in a separate file or binder, labeled as retained only for this purpose, is strongly encouraged. The preamble (explanation) to the new regulations indicates the plan should keep these records for as long as the plan takes the position it is a grandfathered plan. However, we suggest retaining these records for at least seven years after the end of each plan year in which it was grandfathered, which corresponds with the ERISA recording keeping

requirements. If records were to be unavailable immediately after grandfathered status were to end, the lack of records might appear suspicious if compliance with certain health reform provisions were audited.

Effect of Certain Actions on Grandfathered Status

New Enrollees. New employees (and their family members) may enroll in a grandfathered plan, whether newly hired or simply newly enrolled, without affecting its grandfathered status. This provision confirms as expected that an employee who previously declined coverage may enroll at annual enrollment.

New Family Members. If family members of a person enrolled in a grandfathered plan enroll in the plan after March 23, 2010, the plan remains grandfathered even as to those new enrollees.

Mergers, Acquisitions, and Business Reorganizations. If the principal purpose of a merger or acquisition, or similar business restructuring is to cover new individuals under a grandfathered plan, the plan will cease to be a grandfathered plan. The goal of this rule is to prevent grandfathered status from being bought and sold as a commodity in commercial transactions. Practice pointer – when a corporate transaction involves additional employees being added to a grandfathered plan, be sure to document why the corporate transaction is occurring and why the grandfathered plan was selected as the plan to remain in place, both for legitimate business reasons other than the grandfathered status of the plan.

Participant Transfers Between Grandfathered Plans. A plan sponsor is not permitted to transfer employees from one grandfathered plan to another separate grandfathered plan. If a plan sponsor does so without a bona fide employment based reason, the plan to which they are transferred (and possibly the other plan) will lose grandfathered status. (Changing the terms or cost of coverage is not a bona fide reason permitting a transfer.) This rule is designed to prevent efforts to retain grandfathered status by indirectly making changes that would result in the loss of grandfathered status if the changes were made directly to the plan in which these persons originally participate.

New Insurance Policies. If any new policy, certificate, or contract of insurance is entered into after March 23, 2010, that program is not a grandfathered plan. Likewise, if a new employer decides to offer a plan, then any policy, certificate, or contract will not be grandfathered – the new employer cannot simply attempt to sign up for a policy the carrier has offered to another employer on a grandfathered basis or for other policies that were offered prior to March 23, 2010.

Changes to Benefit Design Potentially Causing Loss of Grandfather Status. A plan sponsor can only make changes to certain aspects of plan design if the changes are made within specific parameters designed to reduce cost shifting to covered persons. These rules determine when changes to a plan cause it to cease to be grandfathered:

- **Benefit Elimination.** A grandfathered plan cannot eliminate all or substantially all benefits to diagnose or treat a particular condition. (For example, elimination of all benefits for cystic fibrosis would cause a plan to lose grandfathered status.) Elimination

of benefits for any necessary element to diagnose or treat a condition is considered the elimination of all or substantially all benefits to diagnose or treat a particular condition. For example, if the treatment for a particular mental health condition is a combination of medication and counseling, and the plan eliminates benefits for counseling, the plan has eliminated substantially all benefits for that condition and loses grandfather status.

- **Co-payments.** A plan can alter co-payments only if the increase does not exceed the greater of (1) medical inflation plus 15%, or (2) \$5 increased by medical inflation.
- **Deductibles, Out-of-Pocket Amounts, Etc.** A plan can alter fixed cost sharing amounts other than co-payments (such as deductibles and out-of-pocket limits) only if the increase expressed as a percentage does not exceed medical inflation plus 15%.
- **Coinsurance.** A grandfathered plan cannot alter coinsurance cost-sharing rules; coinsurance already automatically adjusts for inflation. For example, a plan may require a participant to pay 20% of inpatient surgery costs. Increasing that amount to 30% is not permitted.
- **Contributions Toward Coverage Cost.** Employer contributions cannot be reduced, increasing employee premium amounts or coverage costs, except within limited guidelines. For plans where contributions are calculated based on the cost of the coverage, as is typical, the employer cannot decrease its contribution rate toward the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate in effect March 23, 2010. The COBRA rate will be used to determine the respective percentages contributed by the employer and an employee. If the contribution rate is based on a formula (such as hours worked or tons of coal mined), the plan sponsor cannot reduce its contribution rate toward any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate on March 23, 2010.
- **New or Modified Annual Limits.** The regulations address three different situations involving overall annual limits on plan benefits. An “overall annual limit” is a specific dollar limit that caps all of the benefits a participant may receive during a particular year at a certain amount (such as \$25,000); the limit applies to all benefits received, not just to certain treatments or services and not just to certain conditions. Most plans do not have and would not impose such an annual limits on benefits. However, if a plan would revise or impose such a limit, the following rules apply:
 - A plan with no overall annual limit or no lifetime limit on benefits on March 23, 2010 will lose grandfathered status if it imposes an overall annual limit on the dollar value of plan benefits.
 - A plan that imposed an overall lifetime limit on all benefits on March 23, 2010, but no overall annual limit on that date, cannot impose an overall annual limit that is lower than the lifetime limit as of March 23, 2010.
 - A plan with an overall annual limit on the dollar value of all benefits as of March 23, 2010 will lose grandfathered status if it decreases the annual limit. (Whether a

lifetime limit was or is in place is not relevant.)
 “Medical inflation” for these purposes is defined by reference to the overall medical care component of the Consumer Price Index for All Urban Consumers, unadjusted (CPI), published by the Department of Labor.

Plan Design Issues – No Guidance Provided. The agencies did not provide guidance on the following plan design changes (but has asked for input):

- Changes to plan structure such as switching from a health reimbursement arrangement to major medical coverage, or from an insured product to a self-funded platform
- Changes in network plan’s provider network, including what level of change is allowed – perhaps based on a network disruption analysis
- Change to a prescription drug formulary, including what level of change is allowed
- Any other substantial change to overall plan design

Lack of guidance on these issues may leave plan sponsors feeling uncertain about making plan changes, despite the agencies’ assertions other changes are allowed. (See the next paragraph.) The agencies are promising similar transition rules as described later in this Bulletin, in the event they do issue specific guidance on these and other plan changes, to allow employers who made changes to remain grandfathered. Please note any changes that fall outside or specific guidelines must reflect a good faith interpretation of the regulations.

Permissible Changes. In addition to the permitted changes described above, other coverage or benefit changes will not cause a plan to lose grandfathered status. Examples include changing third party administrators, changes to premiums, changes to comply with state or federal requirements, and changes required by other applicable provisions of health reform law. All changes cannot violate the above standards for changes to benefit design in this section.

Transitional Rules

Plan Changes Initiated Prior to March 23, 2010, but Effective Afterward

The regulations provide a special transitional rule for a plan that made changes after March 23, 2010 because of certain circumstances set in motion prior to that date. For the following situations, the changes are treated as if they were already in effect on March 23, 2010, and will not hurt grandfathered status:

- If a plan made changes after March 23, 2010 pursuant to a legally binding contract signed prior to that date
- If a plan made changes to the terms of health insurance coverage pursuant to a filing before March 23, 2010 with a state insurance department
- If a plan made changes pursuant to written plan amendments adopted prior to March 23, 2010, to be effective after that date

In other words, the changes are not taken into account, because they are treated as if they were already effective.

Good Faith Compliance Period

If a plan has made changes after March 23, 2010 which were adopted before June 17, 2010 (the date these regulations were published), the agency may disregard those changes if the changes to the plan only “modestly exceed” those changes to plan design which the regulations allow. (See the section above titled “Changes to Benefit Design Potentially Causing Loss of Grandfather Status.”) The agency will take into account good faith efforts to reasonably comply with a reasonable interpretation of the law as passed by Congress. The regulations do not provide additional guidance on what “modestly exceeds” means and on what actions might step over the line of good faith interpretations of the law. (Any plan sponsor not comfortable with whether their plan meets this vague standard should consider modifying or revoking changes as described in the following section on “Grace Period to Modify or Revoke Any Changes.”)

Changes are considered to have been adopted prior to June 17, 2010 as follows:

- If the changes are effective before that date, or
- If the changes are effective on or after that date pursuant to:
 - A legally binding contract entered into before that date,
 - A filing with a state insurance department, or
 - A written amendment adopted before that date.

Grace Period to Modify or Revoke Any Changes

A plan can revoke or modify any changes made prior to June 17, 2010 (the date the regulations were published) that would otherwise cause the plan to lose grandfathered status. Grandfathered status is preserved if the changes are revoked, and the plan or health coverage is modified, effective as of the first day of the first plan or policy year beginning on or after October 1, 2010. Plan sponsors will be adopting such changes in connection with a new policy or plan year, so separate carrier approval likely will not be required. The change must bring the terms within the limits for retaining grandfathered status in these new regulations.

Changes are considered to have been adopted prior to June 17, 2010 as follows:

- If the changes are effective before that date, or
- If the changes are effective on or after that date pursuant to:
 - A legally binding contract entered into before that date,
 - A filing with a state insurance department, or
 - A written amendment adopted before that date.

Conclusion

The new rules provide some important guidance on plan design changes, but do not resolve all uncertainties. The guidelines on permissible plan revisions will not be as flexible

as some plan sponsors would like. Some plan sponsors who might have changed one or two aspects of cost sharing may find themselves making changes to most if not all areas. The federal government acknowledges the likelihood of plans foregoing and dropping grandfathered status; in fact, the agencies make specific predictions along those lines. As they state, “These interim final regulations will likely influence plan sponsors’ decisions to relinquish grandfather status.” At least the transition rules will provide some relief for plan sponsors that made changes after March 23, 2010 by allowing them to retain grandfathered status so long as they revoke or revise impermissible changes. Finally, an overarching consideration in evaluating the choice to remain grandfathered is whether the limited scope of the grandfathering rules makes such a choice appropriate for the specific plan in question.

© 2010 Hub International All Rights Reserved

This discussion is informational in nature and is not (and should not be construed as) a legal opinion or legal advice. We would be happy to discuss any information above with you or your attorney.

Published June 18, 2010