

BENEFITS & COMPENSATION

>> ALERT

HOW CAN EMPLOYERS KEEP THEIR HEALTH PLANS GRANDFATHERED UNDER HEALTH CARE REFORM? ANSWER: WITH GREAT DIFFICULTY

On June 17, 2010, the Departments of Treasury, Labor and Health and Human Services published interim final rules addressing how employer-sponsored group health plans can maintain their status as “grandfathered health plans” under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act (collectively, the Act).

BACKGROUND

Massive changes to U.S. health care coverage laws were enacted under the Act in late March. The Act will affect employers over time, with a significant set of changes becoming effective for plan years beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans). “Grandfathered health plans” are plans that were in existence on March 23, 2010 and are subject only to certain provisions of the Act. Maintaining grandfather status is important to some employers because it means the employer’s plan will be exempt from some of the Act’s potentially expensive and administratively burdensome requirements. However, the Act does not address at what point changes to a health plan are significant enough to cause the plan to cease to be a grandfathered health plan. These regulations fill that gap.

BENEFITS OF HAVING A GRANDFATHERED HEALTH PLAN

Grandfathered health plans do not need to comply with a number of the

Act’s requirements, including:

- 1) new nondiscrimination requirements applicable to insured health plans;
- 2) new claims processes, requiring an external review of health plan claims, and
- 3) new requirements that preventive health services be covered without any cost sharing.

These provisions are applicable for plan years beginning on or after September 23, 2010, unless the health plan is grandfathered. On the other hand, grandfathered health plans must still comply with a subset of the Act’s health reform provisions (e.g., elimination of lifetime limits and many other changes).

CHANGES CAUSING CESSATION OF GRANDFATHER STATUS

The regulations address the following situations in which a plan ceases to be grandfathered:

- >> **Percentage cost-sharing (co-insurance) changes.** Any increase in a percentage cost-sharing requirement (e.g., moving from a requirement that the

THE BOTTOM LINE

The new regulations will require employers to make a choice between maintaining a grandfathered health plan or making desired changes to its plan. Employers should review the new regulations with counsel and weigh the costs and benefits of grandfathering before making any health plan changes. Employers should stay tuned for further health care reform guidance.

employee pay 20% cost-sharing to a requirement that the employee pay 30% of inpatient surgery cost) causes a plan to cease to be a grandfathered health plan.

>> **Fixed amount cost-sharing (other than copayments) changes.**

For fixed-amount cost-sharing requirements other than copayments (e.g., deductible or out-of-pocket limit), a plan ceases to be a grandfathered health plan if there

>> *continues on next page*

is an increase, since March 23, 2010, that is greater than the “maximum percentage increase” (generally, medical inflation (from March 23, 2010) plus 15 percentage points).

>> **Co-payment changes.** For fixed-amount copayments, a plan ceases to be a grandfathered health plan if there is an increase since March 23, 2010 in the copayment that exceeds the greater of (A) the maximum percentage increase described above or (B) five dollars increased by medical inflation.

>> **Employer contribution changes.** With respect to employer contributions, (A) if the contribution rate is based on the cost of coverage, a group health plan ceases to be a grandfathered health plan if the employer decreases its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than five percentage points below the contribution rate on March 23, 2010 and (B) if the contribution rate is based on a formula, such as hours worked, a group health plan ceases to be a grandfathered health plan if the employer decreases its contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate on March 23, 2010.

>> **Elimination of benefits.** The elimination of all or substantially all

benefits to diagnose or treat a particular condition causes a plan to cease to be a grandfathered health plan. Moreover, the 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 (e.g., if a plan that provides benefits for a particular mental health condition, the treatment for which is a combination of counseling and prescription drugs, subsequently eliminates benefits for counseling, the plan is treated as having eliminated all or substantially all benefits for that mental health condition).

>> **New limits.** Imposition of a new or modified annual limit by a plan, will cause a loss of grandfathering in many situations.

DISCLOSURE REQUIREMENTS

The regulations address the following disclosure requirements:

Statement in all plan materials. Plan materials provided to participants must include a statement that the plan believes that it is a grandfathered health plan; and provide contact information for questions and complaints. Model language is provided in the regulations.

Records. A plan must maintain records documenting the terms of the plan that were in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its status as a

grandfathered health plan. In addition, the plan must make such records available for examination (e.g., by a participant, beneficiary, individual policy subscriber, or state or federal agency official). The plan must maintain such records and make them available for examination for as long as the plan takes the position that the plan is a grandfathered health plan.

OTHER GUIDANCE

The regulations provide special rules for plans that cover union employees and also clarify that some of the Act's requirements do not apply to certain retiree medical plans and certain dental and vision plans.

FOR MORE INFORMATION

Mark E. Bokert, Partner/Chair
212.468.4969
mbokert@dglaw.com

Alan Hahn, Partner
212.468.4832
ahahn@dglaw.com

A. Derek Nelson, Counsel
212.468.4887
anelson@dglaw.com

or the D&G attorney with whom you have regular contact.

DAVIS & GILBERT LLP

T: 212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

© 2010 Davis & Gilbert LLP