

AGENCIES ISSUE JOINT REGULATIONS TO IMPLEMENT GRANDFATHERED PLAN RULES; PROVIDE IMPORTANT CLARIFICATIONS REGARDING OTHER EXCEPTIONS

[Interim Final Rules Relating to Status as a Grandfathered Health Plan Under PPACA, 26 CFR Parts 54 and 602; 29 CFR Part 2590; 45 CFR Part 147, 75 Fed. Reg. 34537 (June 17, 2010)]

Regulations: <http://edocket.access.gpo.gov/2010/pdf/2010-14488.pdf>

Fact Sheet:

http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html

FAQs: <http://healthreform.gov/about/grandfathering.html>

News Release: <http://www.hhs.gov/news/press/2010pres/06/20100614e.html>

The IRS, DOL, and HHS have jointly issued interim final regulations addressing the grandfathered plan rule, which excuses compliance with certain health care reforms for group health plans and health insurance coverage that had at least one participant on March 23, 2010. The regulations are effective for plan years beginning on or after September 23, 2010. The preamble to the regulations also contains other important clarifications (including guidance on retiree-only plans and excepted benefits):

==> What Reforms Are Subject to the Grandfathered Plan Rule? Under the statute, grandfathered health plans are excused from some but not all of the reforms added to the Public Health Service Act (PHSA) (and incorporated by reference into ERISA and the Code). The regulations list the applicable reforms by PHSA section number and also clarify that the determination of grandfathered status applies on a "benefit package" basis. [EBIA Comment: We think employers will welcome the latter clarification since applying the rules on a benefit package basis will tend to preserve grandfathered plan status for some components of bundled plans. Unfortunately, no definition of "benefit package" is provided.]

==> Adding New Family Members and New Employees. Reflecting the express terms of the statute, the regulations provide that a plan may, without losing grandfathered status (1) enroll family members of employees covered on March 23, 2010, and (2) enroll new employees (whether newly hired or newly enrolled). However, the regulations add an "anti-abuse" rule: A plan will lose grandfathered status if it engages in a business transaction (e.g., a merger) for the principle purpose of covering new individuals under a grandfathered plan, or if it transfers employees from one plan to another in certain circumstances without a "bona fide employment-based reason."

==> Changing Insurers Under an Employer Plan. Subject to the special rule discussed below for collectively bargained plans, changing the insurance contract or policy under an employer plan will cause the insurance coverage to lose its grandfathered status. [EBIA Comment: In practice, it appears that this rule will prevent insurers from marketing to new customers policies that do not comply with all the PHSA reforms; the rule may also encourage employers to retain existing policies for the lower premium rates and other advantages that may be associated with grandfathered health coverage.]

==> Changes to Benefits, Cost-Sharing, Employer Contributions, and Annual Limits. The regulations contain detailed rules (subject to mathematical formulas in certain cases) for determining whether particular changes will cause a loss of grandfathered status. These changes include (1) elimination of all or

substantially all benefits to diagnose or treat a particular condition; (2) any increase in percentage cost-sharing (e.g., an increase in co-insurance); (3) increases in fixed-amount cost-sharing (other than co-payments) of more than 15% above medical inflation; (4) increases in fixed-amount co-payments above the greater of a specified dollar amount or 15% above medical inflation; (5) decreases in employer contributions of more than a specified percentage; and (6) certain changes in annual limits. This part of the regulations contains a series of examples that illustrate some of the necessary calculations, provides certain transition rules for changes that were already adopted but were not yet effective on March 23, 2010, and includes a good faith enforcement policy for changes that "modestly" exceed permitted levels. [EBIA Comment: Examples of permitted changes include changes in premium amounts, changing TPAs, and changes to comply with federal or state laws or to voluntarily comply with health care reform changes (provided the changes don't violate the limitations described above).]

==> Clarification Regarding Collectively Bargained Plans. The regulations provide that, in the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010, the coverage will be treated as grandfathered until the last collective bargaining agreement terminates (i.e., regardless of whether there is a change in insurers or one of the other changes that would otherwise destroy grandfathered status). As explained in the preamble, this also means that collectively bargained plans (both insured and self-insured) that are grandfathered plans must comply--by the generally applicable effective dates--with all the health care reforms that apply to grandfathered plans. [EBIA Comment: The collectively bargained provision in the statute has been the subject of much debate regarding whether it created a general delayed effective date (or just extended grandfathered status) and whether it applied to self-funded plans. Both of these questions are discussed at length in the preamble and answered in the regulations with a narrow interpretation that may surprise some practitioners.]

==> Notice and Recordkeeping Requirements. To maintain grandfather status, a plan or coverage must provide, in any plan materials describing benefits for participants or beneficiaries, (1) a statement that the plan or coverage is believed to be a grandfathered plan, and (2) contact information for questions or complaints. Model language is provided for this purpose. In addition, for as long as grandfathered status is claimed, the plan or coverage must retain and make available for examination specified records relating to that status. [EBIA Comment: Further guidance would be welcome on how this notice requirement is expected to work with the new four-page summary of benefits requirement also imposed under health care reform.]

==> Clarifications Regarding Retiree-Only Plans and Excepted Benefits. The preamble contains a helpful description of the reforms added to Title XXVII, Part A of the Public Health Service Act (PHSA), and incorporated by reference into ERISA and the Code. The regulators state that the existing exception in ERISA and the Code for plans with less than 2 employees (including retiree-only plans) was not affected by the new law. They also state that the new law did not affect existing rules on "excepted benefits" (including, among others, stand-alone dental and vision plans and most health FSAs). As a result, none of the health care reform mandates in ERISA and the Code apply to retiree-only plans or excepted benefits. With respect to the PHSA, the preamble states that issuers and nonfederal governmental plans should not be treated any differently for enforcement purposes and that, therefore, HHS will not use its resources to enforce either the existing requirements of HIPAA or the health care reforms (in

PHSA Title XXVII, Part A) against retiree-only plans or excepted benefits offered by nonfederal governmental plans. [EBIA Comment: This part of the preamble provides valuable clarification on these additional issues that have been under debate. With respect to the PHSA, the nonenforcement policy should provide some comfort to plans and insurers, although it should be noted that, although persuasive, it might not be viewed as binding by all courts.]

EBIA Comment: While complicated and detailed, these rules provide much-needed clarification about the requirements for grandfathered health plans. Employers who wish to preserve grandfathered status will need to carefully understand and apply these rules, and will be forced to design and administer plans with less flexibility than previously enjoyed. In order to evaluate whether the grandfather rule is worth the trouble, each employer will need to carefully weigh the cost of complying with the additional reforms from which the rule provides protection. Comments on the regulations are requested by August 16, 2010, in particular, regarding the model notice language, recordkeeping requirements, and whether any additional changes should be treated as affecting grandfathered status. (However, any new standards added in response to comments would apply prospectively only.) For more information, see EBIA's upcoming new Checkpoint title "Health Care Reform for Employers and Advisors," which will be available July 1, 2010. To sign up for a free trial, visit <http://ria.thomsonreuters.com/EStore/detail.aspx?ID=EHCQ&site=EBIAWeekly>.

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