

CLIENT UPDATE

WHO'S YOUR GRANDDADDY? IS YOUR MEDICAL PLAN REALLY EXEMPT FROM HEALTHCARE REFORM?

NEW YORK

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Now that the Supreme Court has upheld the Patient Protection and Affordable Care Act of 2010 (the "ACA"), many employers are scrambling to ensure that their medical plans comply or will be ready to comply with the law as the various provisions of ACA become effective. Several of those provisions (such as rules prohibiting insured plans from discriminating in favor of highly compensated employees, rules limiting cost sharing with employees, and rules requiring external appeals review) do not apply to so-called "grandfathered" plans.

Yet, while employers may only now be coming to grips with the ACA's requirements, the guidance defining a "grandfathered" plan was issued years ago, and the memos and alerts that were written on the subject have no doubt been relegated to some long forgotten folder. As a result, some employers may believe that any plan that was in effect when the ACA was enacted (although they may not remember that date, which was March 23, 2010) is a grandfathered plan. Those employers would be wrong, and they risk violating the ACA with respect to plans that they thought were, but in fact are not, grandfathered plans.

As you prepare for this upcoming healthcare plan enrollment period, consider this Client Update a refresher course to help you determine whether your health care plans are "grandfathered" and understand which provisions of the ACA do and do not apply to your grandfathered plans.

IS YOUR HEALTHCARE PLAN GRANDFATHERED?

In general, a health plan that existed on March 23, 2010 is grandfathered so long as:

- **Continuous Participation.** There continues to be *someone* – which could include an existing employee participant, one or more of the employee’s dependents or a new participant – enrolled in the plan.
- **No Material Modifications.** The plan is not “materially modified.”
 - The grandfathering rules allow *routine changes* provided the changes do not significantly cut benefits or increase out-of-pocket spending for consumers. Examples of permitted changes include adding new benefits, increasing premiums to keep pace with medical inflation, increasing deductibles within limits, enrolling new employees and family members, voluntarily adopting consumer protections under the ACA, making changes to comply with State or Federal laws, and changing insurance providers.
 - However, a plan will lose its grandfathered status if the changes (a) significantly reduce benefits (such as eliminating the benefits for cystic fibrosis, even though the change affects few, if any participants); (b) increase the rate of co-insurance charges (for example, from 20% to 30%); (c) increase, since March 23, 2010, co-pays by more than \$5, adjusted annually for medical inflation, or by more than the rate of medical inflation plus 15 percent (that is, if medical inflation is 10%, the co-pay may not be increased by more than 25%); (d) increase deductibles and out-of-pocket expense limits by more than the rate of medical inflation plus 15 percent; (e) decrease the percent of premium the employer pays by more than 5 percent of the employer’s contribution rate on March 23, 2010; or (f) impose certain new or modified annual limits.
 - Changes that are made to the plan pursuant to a legally binding commitment prior to March 23, 2010 are considered to be “in effect” as of March 23, 2010.
- **Recordkeeping.** The employer keeps records of the terms of the grandfathered plans, and any other documents (such as insurance policies, summary plan descriptions, and documentation of employee contribution rates) that may be needed “to verify, explain, or classify its status as a grandfathered health plan.” These records must be available for examination by participants, beneficiaries and State or Federal agency officials to enable them to verify the grandfathered status of the plan.
- **Employee Notification.** The employer notifies participants of the plan’s grandfathered status. The notification consists of a statement, provided in the materials describing

the benefits of the plan, that the plan is a grandfathered health plan within the meaning of section 1251 of the ACA and contact information for questions and complaints. The Department of Labor has provided model language for the notice which may be found at <http://www.dol.gov/ebsa/grandfatherregmodelnotice.doc>.

These rules apply separately to each benefit package offered by a plan. Therefore, a plan that has more than one benefit package may have both grandfathered and non-grandfathered packages.

While beyond the scope of this Client Update, it should be noted that there are special rules for insured plans that are subject to collectively bargained agreements.

WHICH RULES APPLY TO YOUR GRANDFATHERED PLAN?

A grandfathered plan does not have to follow all of the new rules established under the ACA, including rules requiring coverage of preventative services without any cost sharing, the new external appeals process standards, the prohibition against insured plans from discriminating in favor of highly-compensated individuals, and certain patient protections (such as choice of provider and no pre-authorization required for emergency services). Many employers will find these to be welcome exemptions.

However, employers should bear in mind that some of the new rules *do* apply even to grandfathered plans. These include the following requirements:

- Employers must provide participants with a Summary of Benefits and Coverage;
- A grandfathered plan must extend dependent coverage to adult children up to age 26;
- A grandfathered plan is prohibited from imposing pre-existing condition limitations and rescissions of coverage;
- The waiting period before an employee may participate in a grandfathered is limited to a maximum of 90 days; and
- Lifetime limits on coverage and annual limits on coverage must be eliminated beginning in 2014 (prior to 2014, plans may have certain restricted annual limits).

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Please do not hesitate to contact us if you have any questions.

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