

Interim Final Regulations Issued on Grandfathering and Retiree-only Plans under PPACA

Date: June 14, 2010

Summary: Today, the Internal Revenue Service (IRS) and the Departments of Labor (DOL) and Health and Human Services (HHS) officially released interim final rules addressing the grandfathered plan provisions and the status of retiree-only health plans under the Patient Protection and Affordable Care Act (PPACA). Among other things, the regulations, set to be published in the *Federal Register* on Thursday, June 16th, provide guidance and clarification on maintaining (or losing) grandfathered plan status and the applicability of the grandfathering rules to collectively bargained plans. The regulations also confirm that retiree-only plans are exempt from certain PPACA requirements.

Affected Employers: Employers sponsoring group health plans that were in effect on March 23, 2010 (PPACA's enactment date), and employers sponsoring retiree-only group health plans.

Timing: The interim final regulations will be effective on the date published in the Federal Register (expected to be June 16, 2010), and are relevant immediately to employers evaluating the grandfathered status of their group health plans. Generally, the regulations are applicable for plan years beginning on or after September 23, 2010, when many of the market reforms take effect.

Key Implications: Group health plans that were in existence on the March 23, 2010 enactment date of PPACA are grandfathered from (i.e., do not have to comply with) some, but not all, of PPACA's mandates. (Notably, all grandfathered plans must comply with the mandate to cover an employee's adult child to age 26 and the prohibitions regarding lifetime and annual dollar limits, among other provisions.) The regulations provide rules for determining when changes to the terms of an insured or self insured plan will (and will not) cause the plan to lose its grandfathered status. For example, the regulations generally permit plans and insurers to make voluntary changes to increase benefits, to conform to required legal changes, and to adopt other consumer protections in PPACA without jeopardizing grandfathered status. However, a group health plan will cease to be grandfathered if changes are made to the plan that (i) eliminate all or substantially all benefits to diagnose or treat a particular condition, (ii) increase percentage cost-sharing requirements or materially increase fixed-amount cost sharing requirements for participants, or (iii) materially decrease the employer's contribution rate toward any tier of coverage. Details on how these permitted types of changes are measured and calibrated are set out in the regulations. The regulations also interpret the PPACA special exception for insured collectively bargained agreements (CBAs) and the application of the grandfathering provisions generally to all CBAs (insured and self insured).

The regulations also provide that certain retiree-only and HIPAA excepted benefits (such as separate dental and vision plans and health flexible spending arrangements (FSAs)) generally will not have to comply with many of PPACA's coverage mandates. Until these regulations were issued, there was some uncertainty as to whether this long-standing exemption for retiree-only plans from certain federal benefit mandates was applicable to certain PPACA provisions that were incorporated in ERISA and the Internal Revenue Code. The regulations also address this issue for nonfederal governmental plans subject to the Public Health Service Act (PHSA).

General Discussion and Observations: Certain plan changes effective after March 23, 2010 can cause the plan to lose grandfathered status. This includes, for example, plan amendments that:

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- Eliminate all or substantially all benefits to diagnose or treat a particular condition, which includes the elimination of a benefit that is a necessary element to diagnose or treat a particular condition
- Increase a participant's percentage cost-sharing requirement (e.g., increasing coinsurance percentage from 20% to 25%)
- Increase a fixed-amount cost-sharing requirement by more than a threshold amount (i.e., increase deductibles or out-of-pocket limits by more than the rate of medical CPI + 15%, or increase co-payments by the greater of medical CPI + 15% or \$5 adjusted for medical inflation)
- Decrease the employer contribution rate for any tier of coverage by more than 5% (using COBRA rates for purposes of this calculation)
- Implement an overall annual limit on the dollar value of benefits, if the plan did not impose an overall annual or lifetime dollar limit on March 23, 2010, or decrease the dollar value of an annual limit that was in effect on March 23, 2010
- Result in the plan being offered pursuant to a new insurance policy with a new insurance carrier.

Plan changes that are effective after March 23, 2010 do not cause a plan to lose grandfathered status *if* the plan changes were made pursuant to (i) a legally binding contract entered into on or before March 23, 2010, (ii) a filing with a State insurance department made on or before March 23, 2010, or (iii) written plan amendments that were adopted on or before March 23, 2010.

The regulations provide that if the principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered plan, the plan loses grandfathered status. Additional details on the scope of this M&A provision and others are detailed in the regulations.

Also note that to maintain grandfathered status, an employer must include a statement in any plan-related materials distributed to participants that the plan believes it is a grandfathered health plan and providing contact information for questions and complaints; model language for this purpose is included in the regulations.

Additionally, the regulations provide that an insured group health plan maintained pursuant to a CBA ratified before March 23, 2010 is a grandfathered plan at least until the date on which the last of the CBAs relating to the coverage terminates. A self insured group health plan maintained pursuant to a CBA is subject the same grandfathering rules as other non-CBAs group health plans.

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