

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act. Many of the provisions of this sweeping health care legislation will take effect in subsequent years. However, some of these health care coverage laws require action as early as October 2010.

In our prior update, we summarized the changes that must be put in place prior to this October 2010 deadline. As noted in that prior update, many health care law changes do not apply to existing health care plans that are deemed to be “grandfathered.”

Recently, the Department of Health and Human Services, Labor, and Treasury issued regulations that outline the circumstances under which group health plans will lose their grandfathered status. Loss of grandfathered status will cause an existing health care plan to face the same compliance burden as a newly created plan. Thus, employers should take great care in examining a proposed change and take into account how the possible loss of grandfathered status could effect the overall operation of the plan.

### **Grandfathered Plans**

Group health plans will lose their grandfathered status if they make any of the following changes:

- ***Changing Insurance Companies.*** If an employer decides to buy insurance from a different insurance company, the new insurance is not a grandfathered plan. This does not apply when employers with self-insured plans switch plan administrators. It also does not apply to plans that are part of a collective bargaining agreement; as long as the collective bargaining agreement is in force, the health plan retains its grandfathered status even if the employers and unions agree to change insurance carriers.
- ***Significantly Cutting or Reducing Benefits.*** A plan will lose its grandfathered status if it no longer covers care for people with certain conditions (for example: diabetes, cystic fibrosis or HIV/AIDS).
- ***Raising Co-Insurance Charges.*** Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered plans cannot increase this percentage.
- ***Significantly Raising Deductibles or Out-Of-Pocket Limits.*** Grandfathered plans can only increase deductibles and out-of-pocket limits up to the “maximum percentage increase.” The “maximum percentage increase” is “medical inflation” (as defined in the Regulations) plus 15%.
- ***Significantly Raising Co-Payment Charges.*** Frequently, plans require patients to pay a fixed-dollar amount for doctor’s office visits and other services. Grandfathered plans will be able to increase those co-pays by no more than the greater of (i) \$5 (adjusted annually for medical inflation), or (ii) the “maximum percentage increase.”
- ***Significantly Lowering Employer Contributions.*** Many employers pay a portion of their employees’ premiums for insurance. Grandfathered plans cannot decrease the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers’ share of premiums from 15% to 25%).

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- ***Adding or Tightening an Annual Limit on What the Plan Pays.*** Some plans cap the amount that they will pay for covered services each year. Grandfathered plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit.

The Regulations provide a “safe harbor” for certain changes. Thus, if a change falls within the safe harbor, the employer may make certain changes to the health plan without the loss of grandfathered status. Under this safe harbor, the following changes are permitted:

- ***Cease Participant Coverage.*** If one or more (or even all) individuals enrolled on March 23, 2010, cease to be covered under a group health plan the plan will nonetheless remain grandfathered; provided the plan has continuously covered at least one person since March 23, 2010 (but not necessarily the same person).
- ***Add New Participants.*** Group health plans may allow new employees or family members to join the grandfathered plan; however, a business transaction (e.g., merger or restructuring) cannot have as its principal purpose the covering of new individuals under an otherwise grandfathered plan.
- ***Reflect Increased Premiums.*** Premium changes are not taken into account when determining whether or not a plan is grandfathered.

### **Obligations Imposed on Plans Claiming Grandfathered Status**

Under these newly issued regulations, a health care plan that is claiming grandfathered status must provide an annual status report to participants to advise them of the grandfathered status of the plan and must maintain specific records regarding such status. A summary of these requirements is as follows:

- ***Provide a Statement to Participants and Beneficiaries.*** The statement, which must be included in any plan materials provided to participants and beneficiaries describing the plan’s benefits, must indicate that the plan believes it is a grandfathered plan. The statement must also provide contact information for questions and complaints. The Regulations contain model language that can be used for these purposes.
- ***Maintain Records.*** The records must document the terms of the grandfathered plan that were in effect on March 23, 2010, and any other documents necessary to verify, explain or clarify the plan’s status as a grandfathered plan. The plan or insurer must make such records available for examination, and must maintain such records (and have them available for examination) for as long as the plan takes the position that it is a grandfathered plan.

## **Proposed Future Handling**

Employers who are contemplating any changes to an existing health care plan must consider the potential consequences that would arise if the changes cause a loss in grandfathered status. These Regulations are the most recent significant guidance pertaining to Health Care Reform. As with all new legislation of this scope, there will be additional guidance issued. The attorneys of Freeborn & Peters LLP will prepare additional updates to keep you informed of new developments. If you have any questions about how the Health Care Reform legislation affects your organization, please contact Edward Hannon, lead Partner of the Tax practice at Freeborn & Peters or Michael Tomasek, lead Partner of Freeborn & Peters' ERISA and Employee Benefits practice.

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