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## Grandfathered Health Plan Regulations Issued

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As mentioned in our *Health Law Vantage Point* titled "The New Health Care Reform Law: A Client Overview" and located at [http://www.gklaw.com/news.cfm?action=pub\\_detail&publication\\_id=967](http://www.gklaw.com/news.cfm?action=pub_detail&publication_id=967), a "grandfathered" health plan is exempt from many of the requirements of the Patient Protection and Affordable Care Act ("PPACA") that was passed in March 2010. For example, under the PPACA, a grandfathered plan is exempt from the following:

- Nondiscrimination testing rules under the Internal Revenue Code which are intended to prevent an insured plan from discriminating in favor of "highly compensated individuals" as to eligibility to participate and benefits available under the plan. (These rules already apply to self-insured plans, but will also apply to nongrandfathered insured plans under the PPACA.)
- Rules that require a plan to provide first dollar coverage for certain preventive services (e.g., mammograms, immunizations).
- Enhanced claim and appeal procedures and requirements that coverage be continued during the appeals process.
- Rules that require coverage for certain treatments associated with clinical trials.
- Limits on "out of pocket" expenses that generally will go into effect in 2014.

Initially, little was known about which plans could qualify as grandfathered. The PPACA provided that a grandfathered plan had to have at least one participant as of March 23, 2010 and could allow certain new employees and family members to enroll after that date. However, the PPACA generally did not provide any information as to what types of plan changes could be made without causing a loss of grandfathered status.

The Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service recently released much-anticipated guidance (the "Regulations") which alleviates much of the uncertainty that surrounded grandfathered plan status. For example, the Regulations provide detailed explanations of the changes that will cause a plan to lose grandfathered status. Additionally, the Regulations indicate grandfathered status is determined with respect to each separate benefit option which was in existence on March 23, 2010. For example, if an employer offers a self-insured option and an insured option, grandfathered status must be determined separately with respect to those two options.

### What Changes To A Plan Will Cause The Loss of Grandfathered Status?

The Regulations provide a list of changes that will trigger the loss of grandfathered status. Generally, these changes include:

- Any elimination of all or substantially all benefits to diagnose or treat a particular condition (including any necessary element to diagnose or treat a condition);
- Entering into a new policy or insurance contract after March 23, 2010 (excluding the renewal of an existing policy or contract);
- Any increase in coinsurance above the March 23, 2010 level;
- An increase in the deductible or out-of-pocket maximum by more than medical inflation plus 15%, as measured from March 23, 2010;
- An increase in any copayment in effect as of March 23, 2010 by more than the greater of \$5 (as adjusted for medical inflation) or medical inflation plus 15%;
- A decrease in the employer contribution for any tier of coverage (e.g., self or family) by more than 5 percentage points below the March 23, 2010 level; or
- Imposing or decreasing certain annual limits.

### What Changes May Be Made To A Benefit Option Without Losing Grandfathered Status?

The Regulations discuss certain changes that will not trigger the loss of grandfathered status. Generally, if a benefit option has continuously covered someone since March 23, 2010 (even if not the same individual), then grandfathered status can be preserved if the following changes are made:

- Amending the benefit option to comply with federal or state law;

The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

- Switching third-party administrators (assuming that no other changes are made that would cause a loss of grandfathered status);
- Enrolling newly hired or existing employees, including family members;
- Increasing benefits; or
- Early adoption of requirements under the PPACA.

### What Are the Special Rules For Insured Benefit Options Maintained Pursuant To A Collective Bargaining Agreement?

The Regulations state that an insured benefit option which is maintained pursuant to at least one collective bargaining agreement that was ratified prior to March 23, 2010 has grandfathered status at least until the date on which the last collective bargaining agreement related to the benefit option terminates. Once that collective bargaining agreement terminates, then the determination of grandfathered status generally is made under the benefit option design rules discussed above by comparing the coverage in effect at that time to the coverage as of March 23, 2010. However, with respect to PPACA requirements that do apply to grandfathered benefit options, there is no delayed effective date for collectively bargained benefit options.

### Is There Transitional Relief For Changes That Have Already Been Made?

Yes, the Regulations provide for certain transitional relief. For example, if a benefit option made changes after March 23, 2010, but prior to June 14, 2010 (*i.e.*, the issuance of the Regulations), then the benefit option will not lose grandfathered status if those changes are revoked or modified effective no later than the first day of the first plan year beginning on or after September 23, 2010. Similarly, there is a "good faith" compliance period for any benefit option that made certain changes between March 23, 2010 and June 14, 2010 which otherwise were not permitted but were modest in nature (*e.g.*, increasing the deductible by 16% instead of the 15% limit).

### What Administrative Steps Must Be Taken To Maintain Grandfathered Status?

To maintain grandfathered status, a plan sponsor must maintain records that document the benefit option's terms which were in effect as of March 23, 2010, and any other documents necessary to verify, explain, or clarify its grandfathered status. These records must be made available upon request to participants, beneficiaries, and applicable governmental agencies.

Additionally, the benefit option must include a statement that it believes it is grandfathered in all materials which describe benefits (*i.e.*, a summary plan description, benefits summary, enrollment guide, etc.). Contact information for the plan and the Department of Labor (in the case of an ERISA plan) or the Department of Health and Human Services (for a plan not subject to ERISA) must be included. The Regulations provide a model statement that can be used to satisfy these requirements.

### What Requirements Apply to Grandfathered Benefit Options?

It is important to note that grandfathered benefit options generally will be subject to the following PPACA requirements (among others):

- The prohibition on lifetime and certain annual limits, preexisting condition exclusions, and waiting periods longer than 90 days.
- The requirement that a benefit option which provides coverage for dependents must make that coverage available for adult children up to age 26.
- Automatic enrollment rules for certain large employers.
- The requirement to provide a uniform explanation of coverage to participants no later than March 23, 2012.
- The requirement to notify participants at least 60 days in advance of material changes regarding the benefit options.

There are still many open questions related to grandfathered status, and further guidance may be issued. Godfrey & Kahn will monitor this situation and provide updates when appropriate. If you have any questions or need assistance, please contact any member of Godfrey & Kahn's Employee Benefits Team.

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