

## HEALTH CARE REFORM UPDATE

# The Grandfathering Dilemma



The Patient Protection and Affordable Care Act, as amended by The Health Care and Education Affordability Reconciliation Act of 2010, raises many questions. The most pressing question employers have is: “Should I keep my grandfathered plan?” It’s not an easy question to answer since the underlying question of “What *is* a grandfathered plan?” has yet to be defined by government agencies. Employer answers will surface gradually as formal guidance and/or regulations are released by the Department of Health and Human Services. In the interim, a few of the interpretations are noted below. We can say with confidence that you’ll want to understand the insurance reforms that apply to *all* plans, even grandfathered plans. And, you’ll want to weigh the pros and cons of “keeping your plan” with your Advisor.

### What is a grandfathered plan?

A grandfathered health plan is any group health plan or individual plan that was in effect on March 23, 2010, the date of the new law’s enactment. The grandfathering provision under health care reform allows certain plans in effect on the date of enactment to avoid the application of several reform rules. The concept of grandfathering is permitting an old rule to continue when a new rule will apply to future situations. It has yet to be determined what changes if any would result in a plan losing its grandfather status. The law permits individuals to maintain current coverage and allows enrollment changes. Current enrollees in grandfathered health plans are allowed to re-enroll in that plan, even if renewal occurs after March 23, 2010. Family members are allowed to enroll in the grandfathered plan if such enrollment is permitted under the terms of the plan in effect on March 23, 2010. New employees and their family members may enroll in a grandfathered plan.

### What is a non-grandfathered plan?

A non-grandfathered plan is any *new* plan implemented after March 23, 2010 and plans losing grandfather status.

### What coverage changes result in a loss of grandfather status?

It’s unclear at this time whether changes to covered benefits, cost-sharing requirements, actuarial value, or other plan features would be allowed under a grandfathered plan. Also, the law does not address instances where there are changes to the insurance carrier offering the plan. It is not clear whether organizational changes would change grandfathered plans into new plans (e.g., new corporate owner). There are numerous interpretations of the law being discussed between employers, advisors, and attorneys. This is the question we all seek an answer to immediately. In the interim, employers must grapple with the pros and cons of keeping their grandfathered plan with the information they have today. Certainly, employers with attractive premium savings on the table have more to consider before changing their plan.

## What reform provisions are not applicable to grandfathered plans?

Although the Reconciliation Act subjects grandfathered health plans to various reform requirements, there are still some *key* provisions that do not apply to grandfathered health plans. Some employers may perceive this as being advantageous if they can quantify potential savings. *Key provisions that don't apply to grandfathered plans include:*

- New non-discrimination testing and administration for fully insured group health plans as regulated by Internal Revenue Code Section 105(h)
- 100% employer coverage for preventive care benefits
- Restriction on employee out-of-pocket limits
- In-network coverage requirement for emergency services regardless of provider
- Right to designate any in-network provider as a primary care physician
- Right to self-refer to a OB/GYN provider
- New claim appeal process
- Coverage for clinical trials
- Certain quality information reporting to HHS is not required

## What insurance reforms apply to all plans, even those that are grandfathered?

Even though grandfathered health plans are exempt from the vast majority of the new insurance reforms, they are subject to a handful of requirements with different effective dates. The most prevalent become effective for plan years beginning on or after September 23, 2010 (six months after the law's enactment date). The following—while not exhaustive—lists the most common provisions impacting employers:

- No lifetime limits on essential health benefits
- Waiting periods for new hires cannot exceed 90 days
- No unreasonable annual limits on essential health benefits
- No pre-existing condition exclusions for children under 19 years of age and for all participants in 2014
- Prohibition on rescission of coverage except for intentional misrepresentation or fraud
- Coverage of dependent children to age 26
  - For grandfathered plans until 2014, this would only apply to those dependents that do not have another source of employer-sponsored health insurance

## What should employers consider when making a plan change?

Each employer should consider the pros and cons of making a plan design change with the information at hand. We know that a grandfathered plan is exempt from several health reform provisions that can increase insurer costs. Employers should consider the savings vs. cost potential when keeping or implementing a new plan. The direct and indirect result of new administration should also be considered. Employers should understand that grandfathered plans and plans meeting the minimum essential benefits requirement will be the only plans permitted in the market as of 2014. The exact definition of “essential benefits” has yet to be defined in detail, but will include hospitalization, prescriptions, preventive care, and other “essential” benefits. Certainly, an employer’s risk tolerance and financial situation will play a primary role in the decision to either keep a grandfathered plan or have it fall under all reform requirements. Conservative employers may opt to keep their plans until further guidance is released. Less conservative employers or those seeking immediate financial relief may opt for new plans. Certainly, all employers will need to continue attracting and retaining talented employees. The question remains on how benefits and compensation will play into the mix.

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