

June 1, 2010

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## So Your Plan Is Grandfathered? What Does That Mean?

The recently enacted Affordable Care Act (ACA) (combining the Senate passed Patient Protection and Affordable Care Act and the House passed Health Care and Education Reconciliation Act) designates certain plans as “grandfathered” plans. The grandfathered plan provisions give employers and insurers time to transition to the new requirements.

### What Are Grandfathered Plans?

Simply put, grandfathered plans are group health plans (this term encompasses all employer sponsored plans, both insured and self-funded, except those sponsored by the federal government, multiemployer plans and VEBAs), and health insurance coverage that was in place on March 23, 2010. The ACA also expressly provides that (i) new family members of individuals with such coverage, and (ii) new employees and their families can be enrolled in the plan without undermining the plan’s grandfathered status. The ACA also expressly provides that plans established pursuant to a collective bargaining agreement (CBA) prior to March 23, 2010 are also grandfathered plans, and amending those plans solely to conform to the requirements of the ACA will not jeopardize that status.

### What It Does Not Mean To be A Grandfathered Plan:

Being a grandfathered plan does not mean that the ACA can be ignored. The facts are that (i) some of the ACA requirements do not apply, (ii) some of them apply, but at a later date, and (iii) some of them apply to grandfathered plans in exactly the same manner and time frame as they apply to any other group health plan or health insurer. The road map for grandfathered plans is as follows:

#### 1. Coverage Requirements That Do Not Apply to Grandfathered Plans

- Complying with the rules prohibiting non-discrimination in favor of highly compensated persons for insured benefits (applies only to insurers; self-funded grandfathered plans are currently required to comply);
- Providing certain preventive care treatments and services with no cost-sharing;
- Providing emergency and OB/GYN services without pre-authorization;
- Providing coverage of certain medical expenses in connection with clinical trials;
- Implementing a claims appeal procedure with an external review component;
- Selecting any primary or pediatric care provider;

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- Restricting factors that can be used for underwriting premiums (applies only to insurers);
- Requiring guaranteed availability and renewability (applies only to insurers);
- Prohibiting discrimination with respect to eligibility, or continued eligibility, based on health status (For the most, this provision of the ACA tracks HIPAA's existing nondiscrimination rules based on health-status-related factors, so this compliance exemption may not be particularly meaningful);
- Providing essential benefits coverage package (applies only to insurers);
- Limiting annual cost sharing; and
- Increasing wellness program incentives.

## **2. Coverage Requirements That Do Apply to Grandfathered Plans**

- For employers with over 200 employees, and subject to the Fair Labor Standards Act, offering automatic enrollment with an option to waive coverage (effective for plan years beginning on or after March 23, 2010, but actual effective date may depend on issuance of regulations);
- No annual or lifetime limits on dollar value of benefits (effective for plan years beginning on or after September 23, 2010, but grandfathered plans may allow for restricted annual limits pursuant to regulations to be issued by the Department of Health and Human Services);
- No rescission of coverage other than for fraud or intentional misrepresentation (effective for plan years beginning on or after September 23, 2010);
- Extending coverage to adult children younger than age 26; though, until January 1, 2014, grandfathered plans can limit this coverage to adult children who are not eligible for group health coverage other than that of either parent (effective for plan years beginning on or after September 23, 2010);
- Waiting periods cannot be longer than 90 days (effective for plan years beginning on or after January 1, 2014); and
- No exclusions or limitations on coverage of pre-existing conditions (effective for plan years beginning on or after January 1, 2014).

### **Numerous Unanswered Questions**

Unfortunately, the ACA fails to answer numerous questions about grandfathered plans, including:

- What changes, if any, can plan sponsors make to the coverage provided under its group health plan, and have the plan retain its grandfathered status? Can sponsors of self-funded

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plans implement benefit design changes or offer new benefit options without jeopardizing the plan's grandfathered status? Can sponsors of insured plans change insurers?

- If group health plan sponsors and insurers change coverages to comply with the requirements of the ACA, will the plan lose its grandfathered status? The ACA indicates that, for collectively bargained plans, modifying a plan's terms simply to comply with ACA requirements would not cause the plan to lose its grandfathered status. The regulations regarding coverage of adult children say the same thing regarding these changes. Thus, it may be that all changes intended simply to comply with the ACA may not undermine a plan's grandfathered status, but there remains a need for greater clarification.
- Will insurers offer two varieties of policy – one for grandfathered plans that wish to retain that status, and another for plans that must or want to comply with the full range of ACA requirements? Will insurers treat the small group and large group markets differently in this regard? Insurers may not want to continue grandfathered policies for an extended period of time, but it is not clear if they will be compelled by either the ACA or the market to continue them. This may become more of an issue after January 1, 2014, when the State Insurance Exchanges become operational, and insurers will have to determine what coverages they will be offering outside the Exchanges and how varied these offerings will be. Over time insurers may seek to offer only ACA-compliant policies, which could mean that only self-funded group health plans are likely to retain their grandfathered status over an extended period of time.
- Will collectively bargained plans lose their grandfathered status once the CBA in effect on March 23, 2010 expires, and thus automatically be subject to all the ACA requirements at that time? Or will they become "typical" grandfathered plans after that, subject only to those requirements that apply to such plans?

### Action Steps

Employers need to assess the extent they wish to retain the grandfathered status of their plans, and be aware of guidance that addresses changes that will affect this status. Employers of insured plans should discuss with their insurers exactly how the insurers will be implementing these requirements and on what timetables. Employers with self-funded plans may have more flexibility, but should be cautious about changes in benefit design and should monitor guidance clarifying these issues. If you have any questions about these grandfathered plan rules, or any other of the changes imposed by the ACA, please contact any of the Honigman attorneys listed on this Alert.

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