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## ***New Regulations Provide Guidance on Loss of Grandfathered Plan Status***

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) states that coverage provided through a group health plan or health insurance issuer that was in effect on March 23, 2010 will be “grandfathered” and will only have to comply with a sub-set of the new requirements.

Our prior [\*So Your Plan Is Grandfathered? What Does That Mean?\*](#) Health Care Reform Alert explained which requirements of the ACA grandfathered plans need to comply with, and on what time lines. On Monday, June 15, 2010, the Departments of Labor, Health and Human Services and Treasury issued “interim final regulations” that addressed what changes may cause a grandfathered plan to lose that status. These regulations are generally effective as of June 14, 2010.

### **Maintaining Grandfathered Status**

The grandfathered rules apply separately to each benefit package made available under a plan or health insurance policy. Plans or coverage in place on March 23, 2010 will continue to be grandfathered plans provided that the plan or policy continues to cover at least one person continuously (even if not necessarily the same person). Thus, new employees and new dependents can be covered without jeopardizing the plan’s grandfathered status. In addition, to maintain grandfathered status:

- Any plan materials that describe the benefits provided and that are distributed to participants or beneficiaries must contain a statement that says: (1) that the plan sponsor or insurer believes that the plan or policy is a grandfathered arrangement within the meaning of the ACA, and (2) provides contact information for questions and complaints about that issue. Model language for this purpose is included in the regulations.
- For as long a period as it seeks to maintain grandfathered status, the plan or insurer must (1) maintain records documenting the terms of the plan or coverage in effect on March 23, 2010, (2) maintain any other documents needed to explain, verify or clarify its ongoing “grandfathered” status, and (3) make such records open to inspection upon request.

### **Do’s and Don’ts Regarding Grandfathered Status**

Any group or individual contract or policy of insurance bought or sold after March 23, 2010, will not be (or be part of) a grandfathered health plan.

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The following will cause a plan or coverage to lose grandfathered status:

- The elimination of all, or substantially all, benefits to diagnose or treat a particular condition
- Any increase in a percentage cost-sharing requirement (e.g., an individual's percentage coinsurance payment) measured from March 23, 2010 (e.g., if the employee's share of the cost not subject to the deductible goes from 20% to 25%)
- An increase in a fixed amount cost-sharing requirement (e.g., a deductible or out-of-pocket limit) other than co-payments, if the total increase in the percentage of cost-sharing, measured from March 23, 2010, is greater than the rate of medical inflation plus 15%. "Medical inflation" and the method for determining the "increase in the overall medical care component" are defined in the regulations.
- Any fixed-amount copayment increase that, measured from March 23, 2010, exceeds the greater of (i) an amount equal to \$5 adjusted for medical inflation, plus \$5, or (ii) the percentage increase in medical inflation plus 15%
- Any decrease in the rate of the employer's or employee organization's contribution rate towards the cost of any tier of coverage, based on the cost of coverage as determined under COBRA, by more than 5% below the contribution rate in effect for the period that includes March 23, 2010
- If the plan or policy had no annual or lifetime limit on the dollar value of benefits on March 23, 2010, and imposes an annual limit
- If the plan or policy had an overall lifetime limit, but no annual limit, on March 23, 2010, and the plan adopts, or the policy adds, an annual limit with a dollar value below the lifetime dollar limit on March 23, 2010
- If the plan or policy had an annual limit on March 23, 2010, and decreases it

In addition, there are two anti-abuse rules:

- If the principal purpose of a merger, acquisition or similar business restructuring is to cover new individuals under a grandfathered health plan, then that plan will lose its grandfathered status.
- If employees are transferred from a plan that was in effect on March 23, 2010, into a different plan, and if treating that plan as an amendment to the transferor plan would cause a loss of the original plan's grandfathered status, and there was no bona fide employment-based reason for the transfer, then the transfer will cause a loss of grandfathered status. For this purpose, changing the terms or cost of coverage is not a *bona fide* employment-based reason.

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**Special Rule for Collectively Bargained Plans**

Grandfathered status extends to collectively bargained health insurance coverage during the period of the collective bargaining cycle that was entered into just prior to March 23, 2010, even if there is a change in the insurance coverage or the insurer after that date, but before the end of the bargaining cycle. After the expiration of the collective bargaining cycle that began prior to March 23, 2010, the arrangement will simply be treated as a standard grandfathered plan. Self-funded collectively bargained plans are treated as grandfathered plans at least until the end of the bargaining cycle based on an agreement that was ratified prior to March 23, 2010. In both cases, any changes made solely to comply with the ACA will not cause a loss of grandfathered status.

**Transition Rules**

If a plan or insurance issuer adopts changes before March 23, 2010, pursuant to a legally binding contract, a filing with a state insurance department or written plan amendments, and the changes were to be effective after March 23, 2010, such changes shall be considered part of the terms of the plan or policy in effect on March 23, 2010.

If a plan or policy is changed after March 23, 2010, but before June 14, 2010, the changes will not cause the plan or policy to lose its grandfathered status, if they are revoked or modified to be effective as of the first day of the first plan year beginning on or after September 23, 2010.

**Action Steps**

Employers should assess the extent they wish to retain the grandfathered status of their plans. To retain this status, they must be aware of any changes to their plans that will cause them to lose this status. Employers of insured plans should discuss with their insurers whether the insurers will be implementing any changes that might threaten the grandfathered status of the coverage. Employers with self-funded plans may have more flexibility, but should be cautious about changes in benefit design and cost-sharing features of their plans. All employers should monitor any future guidance clarifying these requirements.

If you have any questions about these grandfathered plan rules and how they impact your group health plan, or any of the other changes imposed by the ACA, please contact any of the Honigman attorneys listed on this Alert.

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