

Interim Final Rules Released on Group Health Plan Grandfather Status Under Healthcare Reform Law

June 21, 2010

On June 14, federal agencies responsible for Healthcare Reform regulations issued interim final rules addressing grandfathering of health plans (the Rules) under the Patient Protection and Affordable Care Act of 2010 (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010 (the Reconciliation Act) (collectively, the Healthcare Reform Law).

The Rules clarify when a group health plan will be deemed to be a grandfathered plan, the administrative steps necessary to maintain its status as a grandfathered plan, and what changes to a plan will result in the loss of grandfathered status.

The concept of grandfathering under PPACA stems from President Obama's statements during the Healthcare Reform debate that "If you like your plan, you can keep it." However, the permanency of grandfathering is indicated in the statement in the preamble to the Rules that grandfathering is a "glide path toward a competitive, patient-centered market of the future."

In addition to the planned obsolescence built into the grandfathering Rules, the term itself is a bit of a misnomer because, due to the Reconciliation Act changes to PPACA, there are a number of individual and group market reforms that are applicable to grandfathered plans (including the revolutionary application of PPACA to collectively bargained plans).

The Rules were published in the *Federal Register* on June 17, 2010 as the "Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Plan under the Patient Protection and Affordable Care Act" and are effective immediately. The comment period on the Rules ends August 16, 2010. The Tri-Agency Group (the IRS, the Department of Labor, and the Department of Health and Human Services) that published the Rules will release additional nonregulatory administrative guidance as they deem necessary to clarify or interpret the Rules.

Background

Under the Healthcare Reform Law, health plans that were in existence on March 23, 2010 (the date of enactment of PPACA) are considered grandfathered and do not have to comply with certain new individual and group market reforms in the law.

Regardless of grandfathering status, insurers and group health plans must modify coverage to comply with several new individual and group market mandates, including widely discussed changes such as the end of annual or lifetime limits and the extension of coverage to adult children up to age 26.¹ These changes take effect the first plan year beginning on or after September 23, 2010 (January 1, 2011 for a calendar-year plan). The Healthcare Reform Law, however, exempts grandfathered plans from complying with the following near-term reforms:

- No cost-sharing requirements for preventive care
- Nondiscrimination testing of fully insured plans
- Patient protections in choosing certain specialty doctors
- Internal appeals and an external review procedure
- Emergency services without preauthorization treated as in-network benefits

In addition, grandfathered plans will be exempt from several other reforms that would otherwise take effect in 2014, including minimum essential benefit requirements and the prohibition on discrimination against individuals participating in clinical trials.

While the Reconciliation Act narrowed the original scope of grandfather treatment under PPACA, many plans will still seek the shelter of grandfathering treatment and strive in future years to limit plan changes in order to retain grandfathered status. For example, grandfathered insured plans are exempt from the new nondiscrimination testing requirement. If such plans cover a possibly discriminatory group of highly compensated employees, it will be critical for such plans to establish and maintain grandfathered status.

Establishing Grandfathered Status

The Rules clarify which plans will initially qualify as grandfathered plans: in short, a group health plan or group health insurance coverage with at least one individual enrolled in coverage on March 23, 2010 and that continuously covers at least one person thereafter will be a grandfathered plan. Further, after March 23, 2010, a plan will retain grandfathered status even though the plan takes the following actions:

- Enrolls new hires, newly eligible employees, and family members of each
- Transfers participants from one plan or plan option to another—but, subject to anti-abuse rules, only if:
 - The plan sponsor has a bona fide employment-based reason to transfer participants, or
 - In the context of a business merger or acquisition, the principal purpose of the business restructuring is not to move participants into a grandfathered plan

Collectively Bargained Plans

Unlike prior legislative changes, and after much speculation regarding the intent of the Healthcare Reform Law, the Rules subject grandfathered collectively bargained plans to the same mandates, and at

¹ See Morgan Lewis's April 14, 2010 LawFlash, "Immediate Healthcare Reform Law Issues for Group Health Plans Come Into Sharper Focus," available at http://www.morganlewis.com/pubs/WashGRPP_GroupHealthPlans_LF_14apr10.pdf. See also Morgan Lewis's May 14, 2010 LawFlash, "Dual Guidance Addresses Many Age 26 Adult Child Issues," available at http://www.morganlewis.com/pubs/WashGRPP_AdultChildIssues_LF_14may10.pdf.

the same time, as grandfathered plans that are not subject to collective bargaining. This means that grandfathered collectively bargained plans can postpone the application of the near-term and subsequent reforms outlined above. However, all collectively bargained plans must comply with the other individual and group market PPACA mandates, such as covering adult children up to age 26 or ending annual and lifetime limits, on the first day of the first plan year occurring on or after September 23, 2010.

This represents a sharp contrast to the historic treatment of collectively bargained plans, where all legislative changes are typically postponed until the first day of the plan year following the end of the last-expiring current collective bargaining agreement. It is likely plans or collective bargaining parties will be required to address the additional costs of these changes during the term of current collective bargaining agreements.

Maintaining a Grandfathered Plan: Required Notice

In order to maintain grandfathered status, a plan sponsor must include a statement in all materials describing plan benefits stating that the sponsor believes the plan is a grandfathered plan. This disclosure also must contain instructions on how to request additional information or file a complaint about the plan. The disclosure must include contact information for both the plan sponsor and the Department of Labor. The Rules contain suggested model language and the preamble allows that the agencies may expand the scope of the required statement.

In what might initially seem like a benign requirement, the Rules also require plan sponsors to maintain records documenting plan terms as of March 23, 2010 and any other documents required to verify grandfathered status. However, these records must be made available for inspection upon request by representatives of state or federal agencies or plan participants.

Loss of Grandfathered Status

If a grandfathered plan changes its terms in a way outlined below, grandfathered status will be lost and it will immediately become subject to all of the PPACA individual and group market reforms. Plan sponsors will need to balance the benefit of grandfathered status against other business and financial objectives on an ongoing basis, and consider the point at which maintaining such status is no longer feasible.

Changes resulting in the loss of grandfathered status include:

- Negotiation of a new policy, certificate, or contract of insurance after March 23, 2010 (other than a renewal of a policy that existed before March 23, 2010)
- Elimination of a particular benefit or necessary element to treat a condition
- Any increase in coinsurance from the level set at March 23, 2010
- A cumulative increase in deductible or out-of-pocket maximum by more than the rate of medical inflation +15%, measured from March 23, 2010
- A cumulative increase in copayment by more than either of the following:
 - (1) \$5 increased by medical inflation
 - (2) The rate of medical inflation +15%, measured from March 23, 2010
- A cumulative decrease in employer contribution for any tier of coverage by more than 5% below the contribution rate in effect on March 23, 2010

- Application of a new annual limit if none was in effect on March 23, 2010, or decreasing the annual limit in effect on March 23, 2010 (annual limit may not be less than the lifetime limit in effect on March 23, 2010)

The preamble to the Rules outlines examples of changes to a group health plan that will **not** cause the plan to forfeit its grandfathered status. These changes include:

- Changes to comply with federal or state laws (within the rule limits established above)
- Changes to increase benefits
- Changes to a plan's third-party administrator

The Rules also clarify that changes to one benefit package will not affect the grandfathered status of another benefit package. In the context of the Rules, the term "benefit package" means different benefits under one plan (for example, different medical options under one welfare benefit plan).

Another exception to the loss of grandfathered status rule applies to fully insured collectively bargained health plans. If a fully insured collectively bargained plan makes a change that would otherwise cause it to lose grandfathered status, the loss of such status is delayed until the expiration of the current collective bargaining contract (note that this loss is not delayed until the start of the following plan year). Additionally, the rules clarify that a fully insured collectively bargained plan can always change its insurer before the end of the current collective bargaining contract, and that such change will never result in a loss of grandfathered status.

Transitional Rules

Transitional rules address the application of grandfathered status to:

- Changes made after March 23, 2010 but related to terms agreed to before March 23, 2010
- Good-faith efforts to comply that were adopted before June 14, 2010 that only modestly exceed the rule requirements
- A grace period applicable to changes that would result in loss of grandfathered status made before June 14, 2010, that are revoked before the start of the first PPACA-covered plan year

Retiree-Only Plans

The Rules also state that retiree-only plans and HIPAA excepted benefits (such as stand-alone dental or vision coverage) are not subject to any of the PPACA individual or group market reforms and are not treated as grandfathered plans.

Plan Sponsor Actions

Plan sponsors should consider whether the complications and limitations associated with transitional grandfathered status are appropriate and consistent with their long-term benefits delivery strategy. If grandfathered status is desired, plan sponsors should document the terms of the plan as of March 23, 2010, update materials describing plan benefits, and describe the plan to participants as a grandfathered plan. In addition, plan sponsors will have to pay careful attention to the range of actions associated with retaining grandfather status in future years.

For more information, or if you have questions regarding the issues discussed in this LawFlash, please contact **Andy R. Anderson** (312.324.1177; aanderson@morganlewis.com), **Kimberly Boggs** (312.324.1758; kboggs@morganlewis.com), or any of the following key members of our cross-practice Healthcare Reform Law resource team:

FDA & Healthcare Practice

Joyce A. Cowan	Washington, D.C.	202.739.5373	jcowan@morganlewis.com
Kathleen M. Sanzo	Washington, D.C.	202.739.5209	ksanzo@morganlewis.com

Employee Benefits & Executive Compensation Practice

Andy R. Anderson	Chicago	312.324.1177	aanderson@morganlewis.com
Steven D. Spencer	Philadelphia	215.963.5714	sspencer@morganlewis.com

Antitrust Practice

Thomas J. Lang	Washington, D.C.	202.739.5609	tlang@morganlewis.com
Scott A. Stempel	Washington, D.C.	202.739.5211	sstempel@morganlewis.com

Business & Finance Practice –

Mergers & Acquisitions, Securities, Emerging Business & Technology

Marlee S. Myers	Pittsburgh	412.560.3310	msmyers@morganlewis.com
Scott D. Karchmer	San Francisco	415.442.1091	skarchmer@morganlewis.com
Randall B. Sunberg	Princeton	609.919.6606	rsunberg@morganlewis.com

Business & Finance Practice –

Insurance Regulation

David L. Harbaugh	Philadelphia	215.963.5751	धारबाugh@morganlewis.com
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Labor & Employment Practice

Joseph J. Costello	Philadelphia	215.963.5295	jcostello@morganlewis.com
John F. Ring	Washington, D.C.	202.739.5096	jring@morganlewis.com

Life Sciences Practice

Stephen Paul Mahinka	Washington, D.C.	202.739.5205	smahinka@morganlewis.com
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Litigation Practice –

Commercial & Products Liability

Kathleen M. Waters	Los Angeles	213.612.7375	kwaters@morganlewis.com
John P. Lavelle, Jr.	Philadelphia	215.963.4824	jlavelle@morganlewis.com
Coleen M. Meehan	Philadelphia	215.963.5892	cmeehan@morganlewis.com
Brian W. Shaffer	Philadelphia	215.963.5103	bshaffer@morganlewis.com

Litigation Practice –

Corporate Investigations & White Collar Practice

Lisa C. Dykstra	Philadelphia	215.963.5699	ldykstra@morganlewis.com
Jack C. Dodds	Philadelphia	215.963.4942	jdodds@morganlewis.com
Eric W. Sitarchuk	Philadelphia	215.963.5840	esitarchuk@morganlewis.com

Tax Controversy & Consulting Practice

Gary B. Wilcox	Washington, D.C.	202.739.5509	gwilcox@morganlewis.com
Barton W. Bassett	Palo Alto	650.843.7567	bbassett@morganlewis.com

Washington Government Relations & Public Policy Practice

Fred F. Fielding	Washington, D.C.	202.739.5560	ffielding@morganlewis.com
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