

## Health Care Reform Law: Agencies Explain "Grandfathering"

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June 24, 2010

The Departments of Labor, Treasury and Health and Human Services have jointly issued interim regulations on the grandfathering provisions under the Patient Protection and Affordable Care Act of 2010 (PPACA) as amended by the Health Care and Education Reconciliation Act of 2010 (HCERA) (together, "Health Care Reform Law").

The regulations illuminate the agencies' interpretations, thus far, on the Health Care Reform Law's grandfathering provisions. The provisions added to the excise tax rules by these interim regulations are set to expire June 14, 2013, but are expected to be replaced before that date.

Some of the agencies' interpretations surprised unions and employers, as well as commentators and practitioners, as they appear to advance a policy agenda beyond what actually is provided in the Health Care Reform Law.

### What is grandfathered health plan coverage?

Group health plans and health insurance coverage in effect on March 23, 2010, may be "grandfathered" from certain Health Care Reform Law requirements. See our article, [Health Care Reform Law: "Immediate" Concerns for Employers and Their Group Health Plans](#).

### From which provisions of the new law is a grandfathered plan exempt?

Exempted provisions include those requiring coverage for clinical trials and preventive health services, prohibiting discriminating in favor of highly compensated employees, and affording certain new appeals, reporting and disclosure requirements. (The U.S. Department of Labor has published a table showing how the relevant provisions of the Health Care Reform law apply to grandfathered plans at <http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf>.)

### What provisions of the new law apply to a grandfathered plan?

Even a grandfathered plan (effective as of the first day of the plan year beginning on or after September 23, 2010) must provide extended dependent coverage to children up to age 26, refrain from rescinding coverage, eliminate lifetime dollar value limits on essential benefits and pre-existing condition exclusions for children under age 19, and restrict annual limits on essential benefits in accordance with regulations (yet to be issued). Additionally, in the next couple of years, a grandfathered plan must provide uniform explanations of coverage, eliminate entirely annual limits on essential benefits and pre-existing condition exclusions, and eliminate waiting periods in excess of 90 days. The DOL's table (<http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf>) also lists the provisions that apply to grandfathered plans.

### Does a grandfathered plan exempt the employer from the new law's employer "pay or play" penalty?

No, a grandfathered plan does not exempt the employer from the employer "pay or play" penalty. The employer would be subject to the pay-or-play penalty provisions of the Health Care Reform Law effective as of 2014.

### What changes will cause a grandfathered plan to lose its grandfathered status?

The new regulations contain plan changes that will cause a plan to lose its grandfathered status. Initially, the regulations reiterate the Health Care Reform Law's provision that a grandfathered plan will not lose its grandfathered status by adding family members of already-covered participants or by adding new employees.

However, changing insurance carriers will cause a plan to lose grandfathered status. Also, the regulations add "anti-abuse" rules to prevent corporate re-organizations and plan mergers from being

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used to make plan changes without losing grandfathered status.

Finally, an otherwise grandfathered plan loses its grandfathered status if, compared to the plan in effect as of March 23, 2010:

- benefits are eliminated;
- any cost-sharing percentage is increased;
- a fixed cost-sharing amount (like a deductible or maximum out-of-pocket limit), other than a fixed co-payment, is increased by more than the “medical inflation” rate plus 15%;
- a fixed cost-sharing co-payment amount is increased by more than \$5 plus medical inflation or by more than the medical inflation rate plus 15%, if greater;
- the employer contribution amount is decreased by more than 5%; or
- **an annual limit provision is added (or an existing annual limit threshold is decreased).**

#### What else must a grandfathered health plan do to retain its status?

In order to maintain grandfathered status, the regulations require a plan to be maintained in writing (reflecting terms in effect on March 23, 2010, and available for agency examination) and to disclose in plan materials that “it believes it is a grandfathered plan.” (The regulations provide model language for this purpose. See the “Model Notice” on the DOL’s website, <http://www.dol.gov/ebsa/healthreform>.) The notice must be included in “any plan materials provided to a participant or beneficiary describing the benefits provided under the plan.”

#### Are there any special rules for collectively bargained plans?

Yes. A special rule is applicable to insured plans maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010. These plans have additional grandfathering protection until the last such collective bargaining agreement expires. However, one surprise for many such plans is the agencies’ pronouncement that even these plans are subject to certain “consumer protection” mandates that apply to all other plans. These include the requirement to cover dependents to age 26, the prohibitions against lifetime limits and coverage rescissions, and the restrictions on pre-existing condition exclusions and annual limits that go into effect as of the first day of the plan year beginning on or after September 23, 2010.

#### What about a plan that covers only retirees?

A plan covering only retirees is not subject to the coverage mandates and prohibitions under the Health Care Reform Law.

#### What if a plan does not comply with a change required by the new law?

The basic penalty for failure to comply, for example, with the mandates and prohibitions that go into effect for plan years beginning on or after September 23, 2010, is a non-deductible excise tax of \$100 per failure per affected individual per day. Generally, this penalty is capped at \$500,000 per year for a single employer plan and the amount may be reduced for timely corrections and for failures that are due to reasonable cause and not willful neglect.

#### Is there a transition period for complying?

Yes. Under special transition rules, if an employer: (a) made changes to its plan after March 23, 2010, pursuant to a contract entered into before that date, or (b) adopted amendments prior to March 23, 2010, that were effective after that date, the changes may be considered part of the plan’s terms as of March 23, 2010. Other changes made after March 23, 2010, and adopted before June 14, 2010, if revoked before the first day of the plan year beginning on or after September 23, 2010, will not cause the plan to lose grandfathered status.

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Although the interim regulations were issued without the usual full rulemaking notice-and-comment period (giving the public an opportunity to comment beforehand), the agencies now invite public comment on whether additional plan changes should result in loss of grandfather status and other grandfathering-related issues.

The Employee Benefits group of Jackson Lewis LLP is providing substantive advice on these interim final regulations. In addition, the Government Relations group of Jackson Lewis LLP regularly assists employers and associations in submitting regulatory comments as well as facilitating other efforts to influence regulations and legislation.

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