VENABLE LLP

employee benefits & executive compensation alert

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Our Employee Benefits and Executive Compensation attorneys have a diversified national practice. We assist clients of all shapes and sizes—businesses in virtually every industry sector, 501(c)(3)s and governmental entities under 414(d)—on compensation and benefit-related issues.

Grandfathered Status For Your Group Health Plans Under Health Care Reform: What is at Stake?

All group health plans that existed on March 23, 2010 were "grandfathered" under the recently enacted health care reform laws.[i] Employers need to understand what grandfathered status means for their group health plans under recently issued regulations and decide whether they want to take the steps necessary to retain that status for their group health plans.[ii]

What does grandfathered status mean?

While the statutory language refers to plans retaining grandfathered status, the regulations clarify that grandfathering occurs on a "benefit package" by "benefit package" basis. If, for example, a medical plan offers both a PPO option and an HMO option, each option must be separately examined.

Grandfathered group health plans do not have to comply with certain requirements under health care reform. While other group health plans will have to comply with the following requirements in 2011, grandfathered plans **will not** have to:

- Provide preventive care without any cost-sharing.
- Implement internal and external review processes.
- Apply nondiscrimination rules to insured plans.
- Provide access to out-of-network emergency care without increased cost-sharing or a pre-authorization requirement.
- Allow participants to designate any available participating primary care provider (or pediatrician for a child) as their primary care provider.
- Allow female participants access to obstetrical and gynecological care without a referral.

A grandfathered group health plan cannot, however, avoid all of the requirements of the health care reform laws. In 2011, all plans (grandfathered or not) **will** have to:

- Provide coverage to children up to age 26 (although until 2014, grandfathered plans may require certification that the adult child is not eligible for coverage through his or her employment).
- Remove lifetime maximums from, and may apply only limited annual maximums to, essential health benefits.
- Limit the reasons it can rescind coverage to fraud, intentional misrepresentation of a material fact, and non-payment of premiums.
- Remove any pre-existing condition limitations on children under the age of 19.
- Report medical loss ratios to HHS if fully insured.
- Eliminate FSA, HRA and HSA reimbursements for over-the-counter drugs without a prescription.
- Report the value of employer-provided health coverage on employees' W-2s.

How is grandfathered status retained?

To retain grandfathered status, a group health plan may not:

- Eliminate all or substantially all benefits for the diagnosis or treatment of a condition.
- Make certain changes to annual limits on benefits.
- Enter into a new policy, certificate, or contract of insurance.
- Increase the co-insurance percentage.
- Increase fixed-amount cost-sharing requirements other than a copayment, such as a deductible or out-of-pocket limit, by more than the medical inflation rate plus 15%.
- Increase copayments by more than $5 (indexed) or medical inflation plus 15%.
- Decrease the employer contribution for coverage by more than 5%.

To retain grandfathered status:

- Materials describing benefits must state that the plan "believes" it is grandfathered.
- Plan terms in effect on March 23, 2010 and any changes to them must be documented, and

this documentation must be available for examination upon request.

What is grandfathered status worth?

Maintaining grandfathered status avoids the need to comply with several health care reform provisions. Certain of those provisions may increase costs once implemented, such as first-dollar preventive care and the new internal and external appeal processes. Others may make employers question the continued viability of affected plans, such as the application of the nondiscrimination rules to executive-only insured plans.

Many health care reform provisions apply even to grandfathered plans. The inability to change group health plan cost-sharing terms while remaining grandfathered will significantly reduce the employers' ability to address the increasing cost of care without absorbing a significant portion of the increased costs.

Given the situation, every employer will have to do a cost-benefit analysis with respect to each benefit package to determine whether to take the steps necessary to retain grandfathered status. The Departments of Treasury, Labor, and Health & Human Services have estimated that as many as 70% of the plans that were grandfathered on March 23, 2010 may lose that status by 2013. Under the circumstances, those estimates may be accurate.

May we help?

We would be happy to answer any questions that you may have regarding grandfathered group health plans, the effect of the health care reform laws on your plans, or any other employee benefit issue.

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[i] The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, will be referred to in this alert as the "health care reform laws."

[ii] Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act were issued on June 17, 2010.

Please contact any of the attorneys in our Employee Benefits & Executive Compensation group if you have any questions regarding this alert.

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