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Client Alert

GOVERNMENT ISSUES IMPORTANT GUIDANCE ON GRANDFATHERED PLANS UNDER RECENT HEALTH CARE REFORM LEGISLATION

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On June 14, 2010, the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services issued interim final rules for group health plans relating to their status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act (the "Rule"). The Rule describes the requirements for a group health plan or health insurance coverage to retain its "grandfather" status under the Patient Protection and Affordable Care Act. In addition, the preamble to the Rule clarifies that stand-alone retiree plans and plans that provide HIPAA excepted benefits (e.g. dental-only and vision-only plans) are generally not subject to changes required by health care reform.

The Patient Protection and Affordable Care Act (the "Affordable Care Act"), Pub. L. 111-148, was enacted on March 23, 2010. A separate law, the Health Care and Education Reconciliation Act of 2010 (the "Reconciliation Act"), Pub. L. 111-152, was enacted on March 30, 2010. The Affordable Care Act and the Reconciliation Act (collectively, the "Reform Acts") made sweeping changes to the current health care system that will become effective over the next several years.

A key element of the Reform Acts was the provision that allows group health plans in effect on March 23, 2010, to avoid complying with many of the health insurance reforms required by the Reform Acts. These plans are referred to as "Grandfathered Health Plans". However, the Reform Acts failed to address at what point changes to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010 are significant enough to cause the plan or health insurance coverage to cease to be a grandfathered health plan, leaving that question to be addressed by further regulatory guidance. The following is an overview of some of the highlights of the Rule that are of particular importance to employers who sponsor plans that may qualify as Grandfathered Health Plans.

DEFINITION OF A GRANDFATHERED HEALTH PLAN

A Grandfathered Health Plan means a group health plan or group or individual health insurance coverage provided on a self-insured or fully-insured basis in which an individual was enrolled on March 23, 2010, as long as the plan or coverage maintains its protected status by meeting the requirements of the Rule. A group health plan or group health insurance coverage continues (provided it satisfies other requirements in the guidance) to be a Grandfathered Health Plan even if one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan or group health insurance coverage has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person).

Coverage of family members of an individual enrolled in a Grandfathered Health Plan who enroll after March 23, 2010 is also grandfathered. The determination under the Rule is made separately with respect to each separate benefit package made available under a group health plan or health insurance coverage.

If an employer or employee organization enters into a new policy, certificate, or contract of insurance after March 23, 2010 (because, for example, any previous policy, certificate, or contract of insurance is not being renewed), then that policy, certificate, or contract of insurance is not a Grandfathered Health Plan with respect to the individuals in the group health plan. Also, a self-insured collectively bargained plan must comply with the same requirements as any other plan in order to retain its grandfathered status. There is no special protection or delayed effective date for self-insured collectively bargained plans. However, a fully insured collectively bargained plan retains it grandfather status, even if changes are made that would otherwise cause it to lose that status, until the date on which the last of the collective bargaining agreements, which were ratified before March 23, 2010, terminates.

DISCLOSURE AND RECORDKEEPING REQUIREMENT

To maintain status as a Grandfathered Health Plan, a plan must include a statement in plan materials provided to a participant or beneficiary describing the benefits provided under the plan or health insurance coverage, that the plan or coverage believes it is a grandfathered health plan within the meaning of section 1251 of the Patient Protection and Affordable Care Act and must provide contact information for questions and complaints. Model language for such a statement is included in the Rule. In addition, a plan must, for as long as the plan takes the position that it is a grandfathered health plan, maintain records documenting the terms of the plan in connection with the coverage in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its status as a grandfathered health plan; and make such records available for examination upon request.

CHANGES CAUSING CESSATION OF GRANDFATHER STATUS

The following are changes which will cause a Grandfathered Health Plan to lose it protected status:

- Elimination of benefits. The elimination of all or substantially all benefits to diagnose or treat a particular condition.
- Increase in percentage cost-sharing requirement. Any increase, measured from March 23, 2010, in a percentage cost-sharing requirement (such as an individual's coinsurance requirement).
- Increase in a fixed-amount cost-sharing requirement other than a copayment. Any increase in a fixed-amount cost-sharing requirement other than a copayment (for example, a deductible or out-of-pocket limit), determined as of the effective date of the increase, if the total percentage increase in the cost-sharing requirement measured from March 23, 2010 exceeds the maximum percentage increase.

- Increase in a fixed-amount copayment. Any increase in a fixed-amount copayment, determined as of the effective date of the increase, if the total increase in the copayment measured from March 23, 2010 exceeds the greater of:
    - An amount equal to $5 increased by medical inflation, (that is, $5 times medical inflation, plus $5), or
    - The maximum percentage increase, (that is, medical inflation, expressed as a percentage, plus 15 percentage points) determined by expressing the total increase in the copayment as a percentage.
- Decrease in contribution rate by employers and employee organizations—
    - Contribution rate based on cost of coverage. A decrease by the employer or employee organization of its contribution rate based on cost of coverage towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points below the contribution rate for the coverage period that includes March 23, 2010.
    - Contribution rate based on a formula. A decrease by the employer or employee organization of its contribution rate based on a formula (such as hours worked) towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percent below the contribution rate for the coverage period that includes March 23, 2010.
- Changes in annual limits—
    - Addition of an overall annual or lifetime limit on the dollar value of all benefits to a plan that did not impose such a limit on March 23, 2010.
    - For a plan that imposed a lifetime limit but not an annual limit on the dollar value of benefits on March 23, 2010, adoption of an overall annual limit at a dollar value that is lower than the dollar value of the lifetime limit on March 23, 2010.
    - For a plan that imposed an annual limit on the dollar value of benefits on March 23, 2010, adoption of a lower annual limit than the dollar value of the limit on March 23, 2010 (regardless of whether the plan imposed an overall lifetime limit on March 23, 2010).

ADDING NEW EMPLOYEES THROUGH HIRING, MERGERS AND ACQUISITIONS

- New employees (whether newly hired or just newly enrolled) and their families who enroll in a Grandfathered Health Plan after March 23, 2010 do not affect the grandfathered status of the plan.
- If the principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a Grandfathered Health Plan, the plan ceases to be a Grandfathered Health Plan.
- A group health plan (including a benefit package under a group health plan) ceases to be a Grandfathered Health Plan if –
    - Employees are transferred into the plan (the transferee plan) from a plan under which the employees were covered on March 23, 2010 (the transferor plan);
    - The terms of the transferee plan are compared with those of the transferor plan (as in effect on March 23, 2010) and the transferee plan is treated as if it were an amendment of the transferor plan; and

- There is no bona fide employment-based reason to transfer the employees into the transferee plan. For this purpose, changing the terms or cost of coverage is not a bona fide employment-based reason.

TRANSITION RULES

If a group health plan or health insurance issuer makes the following changes to the terms of the plan, the changes are considered part of the terms of the plan on March 23, 2010, even though they were not effective at that time, and such changes do not cause a plan to cease to be a Grandfathered Health Plan:

- Changes effective after March 23, 2010 pursuant to a legally binding contract entered into on or before March 23, 2010.
- Changes effective after March 23, 2010, pursuant to a filing on or before March 23, 2010, with a State insurance department.
- Changes effective after March 23, 2010 pursuant to written amendments to a plan that were adopted on or before March 23, 2010.

In addition, if a group health plan or health insurance issuer makes changes to the terms of a plan and the changes were adopted prior to issuance of this interim final rule, the changes will not cause the plan to cease to be a Grandfathered Health Plan if the changes are revoked or modified effective as of the first day of the first plan year (in the individual market, policy year) beginning on or after September 23, 2010, and the terms of the plan on that date, as modified, would not cause the plan to cease to be a Grandfathered Health Plan under the Rule. The three exceptions above apply when determining the date of adoption of a change.

GUIDANCE CONCERNING STAND-ALONE RETIREE PLANS

Due to a technical glitch in the drafting of the new law, there has been concern that stand-alone retiree plans and HIPAA excepted benefits (e.g. dental-only and vision-only plans) would be covered by HIPAA and the Reform Acts. The preamble to the new Rule clarifies that such plans remain exempt from HIPAA and the Reform Acts. Also, the government stated its intent to not use its resources to enforce HIPAA requirements or requirements of the Reform Acts with respect to State and local retiree-only plans and excepted benefit plans.

ISSUE NOT RESOLVED

An issue of some importance is not addressed in the new Rule. Section 2712 of the Affordable Care Act places a prohibition on rescissions of health insurance coverage (except where the covered individual has admitted fraud or makes and intentional misrepresentation). Some have read this provision to prevent termination of a plan after the effective date (January 1, 2011 for calendar year plans). This issue is not addressed in the regulations but remains a concern.

LOOKING FORWARD

While the guidance provided by the Rule regarding Grandfathered Health Plans is helpful, it is now apparent that many plans likely will lose their grandfathered status due to normal plan design changes over time. Plans that wish to retain their protected status will have to carefully consider whether any changes to the plan will cause a loss of status, and whether the loss of status is worth making the change.

Contact Information: If you have questions regarding the effect of the Rule and health care reform on your health plan, please contact Diane J. Fuchs or Elisa A. Cawood, the principal authors of the alert. You may also contact the Womble Carlyle attorney with whom you usually work, or one of our Employee Benefits attorneys.