

Re: **Employer Based Health Insurance**
Important Update: Grandfathering of Medical Benefits

With the advent of National Health Insurance Reform, Employers and Employees alike will have decisions to make.

At this time, the Patient Protection and Affordable Care Act requires Employers to decide if they wish to “grandfather” their current health care plan offering(s).

This is a complex topic where the direction one Employer elects may well be different from another similarly situated Employer.

It is for this reason we engaged legal counsel to prepare the attached overview of the “grandfathering” component of Health Care Reform. We encourage you to take a few minutes to review this informative piece.

As you read the attached, you will note that depending on which course of action you select, there are special rules that apply.

If you elect to “grandfather” your medical benefits plan, you must also provide written disclosure to plan participants. The **Model Notice** prepared by the Department of Labor is also attached to this memorandum.

The EBS Foran Group encourages you to contact your EBS Foran/John P. Foran Insurance Agency Account Manager to help you better understand the law and how the grandfathering options impact your Organization specifically.

We would also encourage you to review this matter with your legal counsel.

If your legal counsel is not an expert in the field of Employee Benefits, and in particular the Patient Protection and Affordable Care Act and the topic of grandfathering, we would recommend you consider engaging the author of the attached overview, Attorney Terrence J. Briggs for legal assistance. Mr. Briggs is a partner with the law firm of Bowditch and Dewey, LLP, located in Worcester, Massachusetts. He can be reached via telephone at (508) 926-3466, via e-mail at TBriggs@Bowditch.com.

Health Reform and Your Group Health Insurance Plan

If you like it, you can keep it. Maybe. For now.

By

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The Patient Protection and Affordable Care Act, (“the ACA”), is intended to bring access to affordable health insurance for millions of America's uninsured. The ACA also addresses the content of group health insurance plans by adding a number of plan benefit requirements, some of which apply already, but others of which will become effective over the next few years.

One of the promises that President Obama made in his health reform proposal was that if you liked the insurance you had, you would be able to keep it. **Ultimately, plans that were in existence on March 23, 2010, the date the ACA was enacted, are exempt from some ACA requirements and subject to others only after a delay if they meet certain rules. These plans are called grandfathered plans.**

This article will give you an overview the rules about grandfathering to help you understand the issues so you can decide whether your plan should be grandfathered or not.

If your company's plan is eligible and you want it to remain grandfathered, you forfeit some of your freedom to change its benefit structure and cost-sharing arrangements. You also may not change insurance providers. Instead, you agree that any plan changes will be within prescribed limits. These limits are such that many believe that only a few plans will remain grandfathered after 2014. Most plans will voluntarily give up their grandfathered status because they believe that the benefits of grandfathering will be outweighed by the flexibility to make changes to benefits and better control costs.

In Massachusetts, because we enacted our own health reform in 2007, fully insured plans domiciled in the state already meet many of the ACA requirements. Grandfathering is likely to have only limited value for those plans.

The biggest beneficiaries of grandfathering in Massachusetts are probably going to be self-insured plans. Self funded plans have not had to comply with the requirements of the Massachusetts health insurance reforms applicable to employers and residents, because ERISA, the federal law that governs employee benefit plans, exempts self-insured plans from state regulation.

Let us look at what new ACA requirements do and do not apply to grandfathered plans and what your plan must do (or not do) to remain grandfathered.

New Rules: for Everyone

Even if you have a grandfathered plan, some new ACA requirements will apply:

1. Plan coverage has to be offered to all adult children of employees through age 26, but, until January 1, 2014, this applies only to children who do not have access to another employer-sponsored plan.
2. No lifetime dollar cost benefit caps from now on and only limited annual caps on essential benefits are permitted; annual caps are eliminated after 2014. Essential benefits include ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, prescription drugs, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services and chronic disease management, and pediatric services including oral and vision care. These will be further defined in regulations to be issued.
3. No waiting periods in excess of 90 days after January 1, 2014.
4. No exclusion for pre-existing conditions for enrollees under age 19 and, in 2014, no exclusions for anyone of any age.

New Rules: but not for Grandfather

So long as you meet the grandfathering rules, your plan is exempted from the following ACA requirements:

1. The application of the nondiscrimination rules of Internal Revenue Code Section 105(h) to fully-insured plans. Comment: this is not an issue for most plans and, in Massachusetts; insured plans are already prohibited from discriminating in setting the employer's share of premium payments.
2. The provision of "essential benefit" without cost-sharing to pay for those benefits.
3. The creation an external review procedure for claims and appeals.
4. The provision of certain preventive services and emergency services without prior authorization.
5. Permitting a participant to choose a pediatrician as a primary care physician.
6. Permitting women to have direct access to an obstetrician or gynecologist.
7. Including coverage for treatment that is part of a clinical trial.

Grandfather: you must do these things

There are three requirements that must be obeyed in order to be and remain a grandfathered plan:

1. Your plan must have been in existence since March 23, 2010 and have continued to cover at least one participant—who need not be the same participant.
2. Information materials that you provide to participants must disclose that the plan is grandfathered and must give contact information for participants who have questions and complaints. There is a model notice that plan sponsors may use.

3. The plan or plan sponsor must maintain records that will show that the plan originally met and still meets the grandfathering criteria—this would include plan documents, benefit and cost-sharing structures, and eligibility rules. These records must be available for inspection by participants and regulators.

Grandfather: you may not do these things

Your plan will lose its grandfather status if you make any of a number of changes to your benefit structure or cost-sharing arrangements. It is important to remember that the baseline for these changes is fixed at March 23, 2010—so you have to look back to your plan on that date to see whether a change you want to make will cost you grandfathering.

Your plan will lose its grandfathered status if you do any of the following:

1. Do not renew existing contracts under fully-insured arrangements and provide coverage through a new insurer.
2. Eliminate benefits for the diagnosis or treatment of a particular condition (e.g., cystic fibrosis) or eliminate benefits for any necessary element to diagnose or treat a condition (e.g., eliminate counseling but continue drug therapy for the treatment of a mental disease or disorder).
3. Increase a percentage cost-sharing requirement (such as coinsurance) above the level it was on March 23, 2010 (for example, increasing the percentage the employee pays for out-patient surgery from 25% to 30%).
4. Increase any fixed-amount cost-sharing, other than co-payments (such as deductibles or out-of-pocket limits), measured from March 23, 2010, by more than the total of medical inflation plus 15 percent.
5. Increase any co-payments, measured from March 23, 2010, by an amount that exceeds the greater of (1) the total of medical inflation and 15 percent or (2) \$5 plus medical inflation.
6. Decrease the employer's rate of contribution toward the premium cost for any level of coverage offered by more than five percent (5%) below the rate contributed on March 23, 2010. (Premiums can increase, but the percentage paid by the employer cannot decline more than 5%.)

Summary

This is a brief overview of a complicated subject. That being said, your plan advisors can probably best advise you as to whether your plan will benefit from being grandfathered. And, there is a particular wrinkle if you are a fully-insured plan. Several health insurers—Blue Cross and Blue Shield of Massachusetts, Tufts Health Plan—have said that they will not be grandfathering certain of their smaller fully-insured plans. Other insurers have announced that they are considering what to do. You should check with your insurer to see what its policy is.

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To maintain status as a grandfathered health plan, a plan or health insurance coverage must include a statement, in any 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.

The following model language can be used to satisfy this disclosure requirement:

This [group health plan or health insurance issuer] believes this [plan or coverage] is a “grandfathered health plan” under the Patient Protection and Affordable Care Act (the Affordable Care Act). As permitted by the Affordable Care Act, a grandfathered health plan can preserve certain basic health coverage that was already in effect when that law was enacted. Being a grandfathered health plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans, for example, the requirement for the provision of preventive health services without any cost sharing. However, grandfathered health plans must comply with certain other consumer protections in the Affordable Care Act, for example, the elimination of lifetime limits on benefits.

Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information]. [For ERISA plans, insert: You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or www.dol.gov/ebsa/healthreform. This website has a table summarizing which protections do and do not apply to grandfathered health plans.] [For individual market policies and nonfederal governmental plans, insert: You may also contact the U.S. Department of Health and Human Services at www.healthreform.gov]