



BURNING BENEFITS NEWS

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IN THIS ISSUE:

REGULATIONS ISSUED REGARDING GRANDFATHERED HEALTHCARE PLANS

On June 14, 2010, regulations were issued addressing grandfathered healthcare plans under the Patient Protection and Affordable Care Act, as amended ("PPACA"). "Grandfathered" plans (generally those in effect on March 23, 2010) are exempt from some but not all of the PPACA requirements. We list below the rules which grandfathered plans escape.

So that your plans might retain grandfathered status, we warned in our Burning Benefits News ("BBN") of April 21, 2010 that you should make no plan changes pending guidance on grandfathering. We now have that guidance.

The Benefits of Grandfathered Status: Grandfathered plans are not subject to the following PPACA requirements:

- Preventive care services covered at 100%
- Insured plans may not discriminate in favor of highly compensated employees (uninsured plans were previously subject to this rule.)
- No preauthorization or referral may be required for OB/GYN, pediatrician or ER services.
- An expanded appeals process is required, including an outside fiduciary.
- Certain mandated coverage's apply.
- Out of pocket maximums apply.

If one or more of your plans (or parts of plans) lose grandfathered status, the world will not end. The plan will simply become subject to the above rules, which it would otherwise escape. As you'll see below, maintaining grandfathered status requires that the plan be maintained essentially as it was on March 23, 2010. This includes limits on certain cost increases to participants. Thus, there will be a trade-off between maintaining grandfathered status, and freely changing plan design.

The remainder of this BBN will describe how to retain grandfathered status.

Retiree-only plans aren't even subject to PPACA: First of all, the preamble to these regulations clarifies that PPACA does not apply to group health plans with two or fewer current active employees. This means that retiree-only plans are not subject to PPACA at all. However, retiree-only plans may require amendments at this time for a number of non-PPACA developments which have been the subject of previous BBN's. In view of significant potential penalties, you should confirm compliance.

Grandfathered Plans: The bulk of the regulations deal with grandfathered plans and preserving or destroying grandfathered status.

Changes that are not ok: Grandfathered status will be lost if any of the following occur with respect to the grandfathered plan after March 23, 2010:

1. Elimination of all or substantially all benefits to diagnose or treat a particular condition.
2. Any increase in employee co-insurance percentages. Example: changing the employee's cost of a hospital visit from 20% to 25%.
3. Increases in fixed-amount deductible or out-of-pocket limits that exceed medical inflation plus 15 percentage points.
4. Increases in co-pays that exceed the greater of (1) \$5 plus medical inflation, or (2) medical inflation plus 15 percentage points.
5. Employer contributions toward overall cost of coverage are reduced by more than 5%.
6. Certain changes in annual limits.
7. Enter into a new policy, certificate, or contract of insurance after March 23, 2010.

Changes that are ok: Changes other than those described above will not cause a plan to lose its grandfathered status. Examples of changes that don't affect grandfathered status include changes to premiums, changes to comply with legal requirements, changes to voluntarily comply with PPACA, and changing third party administrators.

Claiming grandfathered status: If a plan is relying on its grandfathered status as of March 23, 2010, it must notify employees that it is considering itself a grandfathered plan. The new regulations have model language that can be used to notify employees of the plan's grandfathered status. Also, records must be kept documenting the plan terms that were in existence on March 23, 2010.

Special rules for collectively bargained plans: The regulations also address collectively bargained plans and somewhat surprisingly, limit the special collectively-bargained rules to only **insured plans, not self-insured plans**. We find this result surprising, but it is technically what the statute says.

Also somewhat surprisingly, the collectively bargained plan must be amended before the end of the current collective bargaining agreement to comply with the consumer protections that other grandfathered plans must meet (no lifetime limits, restricted annual limits, no preexisting conditions for children under 19, no rescissions, and coverage for adult dependent children.) Usual collective bargaining treatment would completely exempt plans from new laws until the current collective bargaining agreement expires.

The beneficial treatment extended to **insured** collectively bargained plans is that, during the term of the CBA in place on March 23, 2010 (the "PPACA-date CBA"), the insured healthcare plan may be changed in ways that would otherwise destroy "usual" grandfathered status (see "Changes that are not ok" above). Also, for "usual" grandfathering, the plan's terms will be based on the plan as configured on the last day of the PPACA-date CBA. For example, assume an employer maintains a healthcare plan pursuant to a PPACA-date CBA, and changes insurers during the term of the PPACA-date CBA. Normally, changing insurers would terminate grandfathered status. However, an insured PPACA-date CBA healthcare plan will maintain grandfathered status until at least the expiration of the CBA if changing insurers is the only change. If, however, the insured PPACA-date CBA healthcare plan not only changed insurers, but also permanently eliminated treatment for a particular condition, grandfathered status would be destroyed after the expiration of the PPACA-date CBA. It is not clear whether the PPACA-date CBA healthcare plan could restore the eliminated treatment prior to the expiration of the CBA to preserve grandfathered status.

Summary: Overall, the interim final regulations are designed to take into account reasonable changes routinely made by group health plans or insurers without destroying grandfathered status. The regulations generally permit plans and issuers to make voluntary changes to increase benefits, to conform to required legal changes, and to adopt voluntarily other consumer protections in PPACA.

Suggested actions:

1. Weigh the benefits of grandfathered status against the restrictions.
2. Take the necessary actions if you intend to "grandfather" certain plans.
3. Amend even grandfathered plans to meet applicable PPACA requirements.
4. Adopt required changes to collectively bargained plans.
5. If you have made changes after March 23, 2010 that would otherwise destroy grandfathering, you may be able to retain grandfathered status by reversing the change before plan year-end.

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