COMPLIANCE INSIGHTS

Grandfathered Health Plans

June 2021

Overview

Group health plans in existence when the Affordable Care Act (ACA) was enacted (March 23, 2010) had the option to maintain "grandfathered" status and avoid certain ACA market reforms and coverage mandates. To remain grandfathered, a plan cannot make certain changes to costs or coverage (discussed below) measured from March 23, 2010. Grandfathered status applies separately to each benefit option offered under a group health plan. For example, an employer may have one benefit option that is grandfathered and another that is not. Once grandfathered status is lost it cannot be recovered. Although there are not many remaining grandfathered plans, the significance of maintaining grandfathered status and plan changes that will cause a loss of grandfathered status are discussed below.

Significance of Grandfathered Plan Status

As noted above, grandfathered plans avoid certain ACA provisions. The chart below addresses the more significant ACA group health plan market reforms and coverage mandates and whether they apply to grandfathered group health plans or are avoided by maintaining grandfathered status.

ACA Market Reform/Mandate	Applicable to Grandfathered Plans
Guaranteed issue and renewal rules (insured plans)	No
Provider non-discrimination rules	No
Coverage for certain clinical trials	No
Preventive care coverage mandate (no cost sharing)	No
Enhanced claims and appeals rules (including external review)	No
Out-of-pocket limits on Essential Health Benefits	No
Insured plan non-discrimination rules (delayed indefinitely)	No
Patient protections (e.g., any available PCP, access to OB&N without referral and pediatrician as PCP)	Yes, effective 2022
No pre-existing condition exclusions	Yes
No excessive waiting periods (90-day rule)	Yes
No lifetime or annual limits on EHBs	Yes
Coverage of dependent children to age 26	Yes
Provide Summary of Benefits and Coverage (SBC)	Yes

Common employer questions on the costs and benefits of maintaining grandfathered status relate to insured plan non-discrimination rules, the enhanced claims appeal process, clinical trials, and the preventive care coverage mandate. As noted above the insured plan non-discrimination provisions were delayed indefinitely in 2010 so should not drive most decisions about maintaining grandfathered status.

Although grandfathered plans also avoid the ACA's enhanced claims and appeals and external review process, which is fairly cumbersome, this process is generally managed by carriers, and for self-funded plans is outsourced to TPAs. Therefore, it is not likely to directly impact employers other than possibly creating some additional expense for any outsourced services.

Grandfathered plans avoid some expenses in connection with participation in clinical trials. Clinical trials usually do not charge for participation in the trial itself, but non-grandfathered health plans must cover any medical complications that result from that participation (for example, if a cancer patient undergoing a clinical trial develops an infection, the non-grandfathered health plan must cover treatment for that infection).

First dollar coverage of preventive care is also required for non-grandfathered plans. This has resulted in negligible cost increases for most plans, and many plans choose to design their coverage this way to encourage preventive care and ultimately lower claims costs. Religious employers have objected to the preventive care coverage mandate requiring coverage of contraceptive services, but there is a religious employer exemption that was subsequently expanded to include an accommodation process for nonprofit employers that do not qualify for the religious exemption but have religious objections to contraceptives.

Changes that Cause Loss of Grandfathered Status

The biggest drawback to maintaining grandfathered status is that grandfathered plans lose a significant amount of flexibility to make plan design and cost-sharing changes. Plan changes (measured from March 23, 2010) that cause a plan to lose its grandfathered status include:

- The elimination of all or substantially all benefits to diagnose or treat a particular condition
- Any increase in percentage cost-sharing (coinsurance)
- An increase in fixed-amount cost-sharing such as a deductible or out-of-pocket limit of more than 15% above medical inflation
- An increase to a co-payments of more than 15% above medical inflation OR $5 increased by medical inflation
- A decrease to employer cost sharing by more than 5% below the contribution rate on March 23, 2010
- A new or reduced lifetime or annual limit (no longer applicable to GHPs)

Note that any change tied to medical inflation will involve complex mathematical calculations. These calculations are further complicated by recent regulations (December 2020) that include a revised definition of maximum percentage increase that allows plans to use the premium adjustment percentage, rather than medical inflation, as the inflation adjustment standard for fixed amount cost-sharing increases made on or after June 15, 2021. This alternative method is intended to allow plans and issuers more flexibility and to better account for changes in the costs of health coverage over time.

These same rules also allow grandfathered group health plans to make changes to satisfy minimum cost-sharing requirements for high-deductible health plans (HDHPs) associated with Health Savings Accounts (HSAs) without having to relinquish grandfathered status but only to the extent those changes are necessary to maintain their status as a qualified HDHP. These statutory HDHP cost-sharing requirements include a minimum annual deductible and maximum out-of-pocket limit as updated each year. Although this has not been an issue historically, this guidance ensures

grandfathered HDHP plans will not lose their status if they increase fixed-amount cost-sharing requirements to meet a future adjusted minimum annual deductible.

With respect to the elimination of all or substantially all benefits to diagnose or treat a particular condition, the elimination of any element necessary to diagnose or treat the condition is considered elimination of all or substantially all of the benefits for that condition. Whether or not a plan has eliminated substantially all benefits to diagnose or treat a particular condition must be determined based on all the facts and circumstances, taking into account the items and services provided for a particular condition under the plan on March 23, 2010, as compared to the benefits offered at the time the plan or coverage makes the benefit change effective. Formulary changes are particularly problematic in that it is not clear whether certain changes in formularies cause loss of grandfathered status. For example, if before March 23, 2010, a plan covered a specific brand-name drug effective for a particular condition but then switches to a different PBM and that drug is no longer covered, whether grandfathered status is lost may depend on whether other drugs are available that treat the same medical condition as effectively at the same/similar cost so that there has not been an elimination of all or substantially all benefits to treat that condition and the cost change rules have not been triggered.

Lastly, under anti-abuse rules a benefit option will lose grandfathered status if an employer requires employees to transfer to that grandfathered plan or terminates a non-grandfathered plan to require an election change without a bona fide employment purpose (e.g., dropping one of two benefit options solely for cost reasons is impermissible but an option could be dropped due to declining enrollment etc.). Also, if the principal purpose of a merger, acquisition, or business restructuring is to acquire or cover new individuals under a grandfathered plan, the plan ceases to be a grandfathered.

Plan design, funding, or other changes that are not listed above will not cause a loss of grandfathered status. Such changes include, but are not limited to, entering into a new contract, certificate or policy of insurance, changing plan funding, changing Stop-loss coverage, eliminating coverage for a segment of the workforce, or adding benefit packages or options.

Disclosure and Recordkeeping Requirements

To maintain grandfathered status, a plan must document its terms as of March 23, 2010 and track any plan changes to show that those changes did not compromise grandfathered status. This documentation, plus any additional information needed to verify, explain, or clarify grandfathered health plan status, must be retained for so long as the plan takes the position that it is grandfathered. These records must be made available for examination upon request.

Grandfathered plans are also subject to additional disclosure requirements. Grandfathered plans must provide a statement that the plan or coverage is believed to be a grandfathered plan and contact information for questions or complaints in any plan materials describing benefits for participants or beneficiaries. The Department of Labor has provided a model notice for this purpose. This notice should be included annually in open enrollment materials, in enrollment materials for new hires/new enrollees, and in summary plan descriptions (SPDs). It is not necessary for a grandfathered plan to provide a disclosure statement with every communication (e.g., an explanation of benefits) to participants and beneficiaries.

Conclusion

Although maintaining grandfathered status does have some benefits, there are significant drawbacks as well. Employers should carefully consider their long-term benefit strategy and costs when making a

decision about whether to maintain grandfathered status. For additional support, please contact your Alliant team member.