Will Grandfathered Plans be Rescued?

Thursday, March 21, 2019

Introduction

On February 25, 2019 the Department of Labor, Department of Health and Human Services, Treasury Department and the Internal Revenue Service (the “Departments”) published a request for information (the “ROI”) on grandfathered plans, signaling that a relaxation of the grandfathering rules may be forthcoming. This post gives a brief history of grandfathered plans and describes the information requested in the ROI (for which responses are due March 27, 2019).

History of Grandfathered Plans

The Affordable Care Act (ACA) created a large array of new rules for health plans. By now, many of these rules, such as the required coverage of children up to age 26 and the prohibition of pre-existing condition limitations, are familiar to most Americans.

The ACA also provided that certain plans, known as “grandfathered plans,” would be exempt from some of these rules so long as the plans continued to maintain “grandfathered” status. Most notably, grandfathered plans are not required to cover dollar-one preventive services (including a broad range of contraceptive services).

However, in order to maintain grandfathered status, plans are required to meet a number of standards, set out in regulations issued on November 18, 2015. The regulations lay out the types of design and cost changes that will result in the loss of grandfathered status, including:

- Elimination of all or substantially all benefits to diagnose or treat a particular condition;
- An increase in a percentage cost-sharing requirement after March 23, 2010;
- An increase since March 23, 2010 in a fixed-amount cost-sharing requirement (other than a copayment) in excess of the maximum percentage increase (medical inflation plus 15%);
- An increase since March 23, 2010 in a copayment that exceeds the greater of the maximum percentage increase (medical inflation plus 15%) or five dollars increased by medical inflation;
- A decrease in the employer’s contribution rate towards the cost of any tier of coverage for any class of similarly situated individuals by more than 5% below the contribution rate on March 23, 2010; and/or
- Certain changes to a plan’s lifetime and annual limits in effect on March 23, 2010.

In addition to the prohibition on these changes, the grandfathered plan must have continuously provided coverage for someone (not necessarily the same person, but at all times at least one person) since March 23, 2010. A grandfathered plan must include a statement of grandfathered status in any statement of benefits provided under the plan. Anti-abuse rules prevent the use of business transactions and employee transfers in order to circumvent the grandfathering rules.

Once grandfathered status is relinquished, it cannot be restored, and since the enactment of the ACA, the prevalence of grandfathered plans appears to have declined precipitously. In its 2018 Employer Health Benefits Survey, the Kaiser Family Foundation estimated that:
The percentage of employers who offer grandfathered plans has declined from 72% in 2011 to 20% in 2018; and

The percentage of American workers with employer-sponsored coverage enrolled in a grandfathered plan has declined from 56% in 2011 to 16% in 2018.

**The ROI Requests Responses by March 27, 2019**

The stated purpose of the ROI published on February 25, 2019 is “to gather input from the public in order to better understand the challenges that group health plans and group health insurance issuers face in avoiding a loss of grandfathered status and to determine whether there are opportunities for the Departments to assist such plans and issuers, consistent with the law, in preserving the grandfathered status of group health plans and group health insurance coverage in ways that would benefit employers, employee organizations, plan participants and beneficiaries, and other stakeholders.” The Departments also note that the ROI is issued pursuant to [Executive Order 13765 issued January 20, 2017](https://www.whitehouse.gov/presidential-actions/executive-order-13765-minimizing-economic-burden-patient-protection-affordable-care-act-pending-repeal/) (“Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal”), which generally directs the Departments to take actions to lessen the impact and burden of the ACA.

The Departments request responses to the following questions by March 27, 2019:

- What actions could the Departments take, consistent with the law, to assist group health plan sponsors and group health insurance issuers preserve the grandfathered status of a group health plan or coverage?
- What challenges do group health plan sponsors and group health insurance issuers face regarding retaining the grandfathered status of a plan or coverage? Does any particular requirement(s) for maintaining grandfathered status create more challenges than others, and if so, how could the requirement(s) be modified to reduce such challenges?
- For group health plan sponsors and group health insurance issuers that have chosen to preserve grandfathered status of their plans or coverage, what are the primary reasons for doing so? If grandfathered status is preserved so that particular ACA requirements will not apply to the plan, please specify the particular ACA requirements not included in the grandfathered plan and explain any related concerns.
- What are the reasons why participants and beneficiaries have remained enrolled in grandfathered group health plans if alternatives are available?
- What are the costs, benefits, and other factors considered by plan sponsors and health insurance issuers when considering whether to retain grandfathered status of their plans or coverage?
- Is preserving grandfathered status important to group health plan participants and beneficiaries? If so, which participants and beneficiaries benefit the most and which, if any, are affected detrimentally by the employer offering grandfathered group health plan coverage?
- What is the typical change in benefits, employer contributions or employee organization contributions, and cost-sharing requirements that causes a grandfathered group health plan or grandfathered group health insurance coverage to lose its grandfathered status?
- What are the reasons why participants and beneficiaries have remained enrolled in grandfathered group health plans if alternatives are available?
- Do the grandfathered health plan disclosure requirements in the November 2015 final rules provide adequate, useful, and timely information to plan participants and regarding grandfathered status? If not, how could the disclosure be improved?
- Other than the Kaiser Family Foundation's “Employer Health Benefits Annual Survey,” and the MEPS-IC survey, what data resources are available to help the Departments better understand how many group health plans and group health insurance policies are considered grandfathered and how many participants and beneficiaries are enrolled in such plans and coverage?
- What are the characteristics (for example, plan size, geographic areas, or industries) of grandfathered group health plans and the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage? Do grandfathered group health plans or the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage share common characteristics?
- Do group health plan sponsors and group health insurance issuers that have chosen to retain grandfathered status for certain plans, benefit packages, or policies also offer other plans, benefit packages, or policies that are not grandfathered? If so, why?
- What are the typical differences in benefits, cost-sharing, and premiums (including employer contributions, employee organization contributions, and employee contributions) associated with grandfathered group health plans and grandfathered group health insurance coverage compared to non-grandfathered group health plans?
- How many group health plan sponsors and group health insurance issuers are considering making changes to their plans or coverage over the next few years that are likely to cause loss of grandfathered status under the November 2015 final rules? How many individuals would be affected?
- What impact do grandfathered group health plans and grandfathered group health insurance coverage have on the individual and small group market risk pools?
Where is This Headed?

In the ROI, the Departments reiterate that there is no authority for non-grandfathered plans to become grandfathered; put another way, if a plan lost grandfathering status (or never had it), it’s unlikely that the Departments will issue rules which allow grandfathered status to be conferred or restored. What is clear, however, is that the Departments are looking for ways to relax the grandfathering requirements and breathe new life into existing grandfathered plans. Plans that were thinking of relinquishing grandfather status may want to try to hang on a little bit longer.

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