



Healthcare Re-FORUM

Healthcare Re-Forum : 2010 Issue No. 27

How Do Collective Bargaining Agreements Impact Grandfathered Status?

Grandfathered health plans were originally introduced with the passage of the Patient Protection and Affordable Care Act (PPACA) on March 23, 2010. The section of the legislation pertaining to grandfathering attempts to allow plans that were in existence as of March 23, 2010, to retain much of their existing plan structure if they follow a specific set of rules. The rules for grandfathered health plans were defined in Interim Final Regulations (IFR) issued June 17, 2010, by the U.S. Departments of Health and Human Services (HHS), Labor and the Treasury (the Departments). A grandfathered health plan may be provided on a fully insured or self-insured basis.



Previous issues of *Healthcare Re-Forum* (*Should My Plan Stay Grandfathered?* and *Maintaining Grandfathered Plan Status*) have described both the rules grandfathered plans must follow, as well as the exemptions they are allowed by various mandates.

One of the questions that has frequently arisen is: "How does collective bargaining impact a plan's grandfathered status?" The IFR provides most of the answers to this question.

Fully Insured Collectively Bargained Plans (Limited Relief)

Fully insured plans subject to collective bargaining agreements (CBA) in effect March 23, 2010, may:

- Maintain their grandfathered health plan coverage by delaying implementation of non-grandfathered benefits (if such status is lost) until the expiration of the current CBA
- Change insurance carriers during the term of the current CBA without adversely affecting grandfathered status (provided that no changes have been made that would independently affect grandfathered status, such as changes to cost and coverage terms)

If any changes are made that would otherwise cause the plan to lose its grandfathered status (other than a change in carriers) prior to the termination of the last CBA, non-grandfathered status must be implemented once the last provision of the CBA terminates.

If the plan is a fully insured multi-employer plan in which other employers also participate, the plan can delay implementation of non-grandfathered status (if such status is lost) until the last of all the CBAs relating to that plan terminates. Once the last CBA relating to the plan terminates, the plan sponsors must confirm if any changes have been made to the plan that would cause the loss of grandfathered status under the PPACA by comparing all of the changes made to the plan after March 23, 2010, to the terms of the plan as they existed on March 23, 2010.

An example of a common question about the impact of CBAs on grandfathered status is: "Would a fully insured, collectively bargained plan that has a CBA that was ratified February 1, 2010, and expires February 1, 2014, be able to switch carriers without losing its grandfathered status?" The answer is yes, the plan could switch carriers prior to the expiration of the last provision of the CBA and still maintain its grandfathered status. **However, the guidance of legal counsel should always be obtained on these matters.**

[over]



Self-Insured Grandfathered Health Plans

Self-insured grandfathered plans subject to CBAs are treated like other grandfathered plans and do not have the special status afforded to fully insured grandfathered plans subject to CBAs.

The grandfathering rules apply on a plan-by-plan basis (i.e., if an employer has one or more plans subject to a CBA and one or more plans not subject to a CBA, the appropriate rules are applied to each plan to determine its grandfathered status independently of any other plans).

Affordable Care Act Amendments to Opt-Out Provisions (Applies Regardless of Grandfathered Status)

Prior to the passage of the PPACA, sponsors of self-insured, non-federal governmental group health plans were permitted to exempt their plans from six requirements of the Public Health Service Act (PHSA). On September 21, 2010, Steve Larsen, Director of HHS' Office of Oversight, issued a memorandum clarifying that with the enactment of the PPACA, these plans have been restricted to opting out of just three PHSA provisions, as demonstrated in the chart below:

PHSA Requirement	Allowed to Exempt Plans?	
	Under PHSA	Under PPACA
Limits on Pre-existing Condition Exclusions	Yes	No
Requirements for Special Enrollment Periods	Yes	No
Prohibition Against Discrimination Based on Health Status	Yes	No
Benefits for Newborns and Mothers	Yes	Yes
Parity in Mental Health and Substance Use Disorder Benefits	Yes	Yes
Coverage for Reconstructive Surgery Following Mastectomies	Yes	Yes

With respect to the opt-out elections, HHS has issued a transitional period and will not take any enforcement actions for plan years that begin before April 1, 2011, to allow plans the opportunity to comply with the changes in the PHSA provision exemptions.

While the restrictions on opting out apply whether or not a plan is grandfathered, it is important to note that if a self-insured, non-federal governmental plan is operating under a CBA ratified prior to March 23, 2010, the plan may still be exempted from all six mandates until the first plan year following the plan year in which the last provision of the CBA has expired.

Plans With Both Union and Non-Union Employees

No formal guidance pertaining to grandfathering was issued regarding whether a plan is classified as collectively bargained if there are both union and non-union employees participating in a single plan. However, the IRS has issued guidance through other federal laws that affect collectively bargained plans. A plan is considered to be collectively bargained if at least 25 percent of the employees participating in the plan are union-represented. If less than 25 percent of the employees in the plan are union-represented, the plan will operate under the rules for non-collectively bargained plans.

Future Topics:

- Another Look at High Risk Pools
- Overview of the American Health Benefit Exchanges
- Co-ops and Multi-State Plans