Congress to Repeal Health Care Reform

By David McFarlane

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Get real. With a Presidential veto and a two-third legislative vote override. Right. How about withholding of funds by Congress? Oh please. Let's move on to dealing with this titanic change (titanic might be a poor word choice) and the manner in which the nation must revamp in order to deal with health care reform. So, here's what you need to know to get started.

The new legislation basically divides plans into grandfathered and non-grandfathered health plans. If a plan is grandfathered, it gets a reprieve from certain health care reforms until the beginning of 2014. So, what exactly is a "grandfathered" health plan? Long-awaited guidance (which is a bit of a misnomer, because it actually raises more questions than it answers) defining what is a "grandfathered health plan" under health care reform was recently issued in the form of Interim Final Rules by the U.S. Departments of the Treasury, Labor, and Health and Human Services.

A grandfathered health plan is one in which coverage provided on a fully-insured or a self-insured basis and which was in existence on March 23, 2010 (the date of health care reform enactment (the "grandfather date")). Grandfathered health plan coverage includes coverage of an individual or an individual and the individual's family members enrolled in the group health plan or health insurance coverage on the grandfather date. The plan keeps its grandfathered status as long as the plan or coverage has continuously covered someone since the grandfather date. Newly hired or newly enrolled employees and their families to enroll in the plan after the grandfather date without jeopardizing the plan's status.

The grandfathering rules are applied separately to each benefit package made available under a group health plan or health insurance coverage. Subject to special rules for collectively bargained plans, health insurance products sold to new entities or individuals after the grandfather date will not be grandfathered, even if those products were offered in the group or individual market before the grandfather date. Therefore, insurers wishing to maintain grandfathered products will have to keep existing policies (and renewals of such policies) separate from newly-sold policies, which will not be eligible for grandfathered health plan protection. In addition, if a certificate of insurance is not renewed, and a new contract is entered into, then the new contract is not grandfathered.

In order to maintain grandfathered health plan status, the group health plan or group health insurance coverage must maintain records documenting the plan or policy terms in effect on the grandfather date, and any other documents necessary to verify, explain, or clarify the plan's status as grandfathered health plan coverage. These records must be made available to participants, beneficiaries, individual policy holders, or state or federal agencies upon request. The records must be kept for as long as the plan or health insurance coverage takes the position that the coverage remains grandfathered. Any plan materials provided to a participant or beneficiary describing the benefits provided under a plan or health insurance coverage must include a statement that the plan or coverage believes it is a grandfathered health plan. The plan or coverage must also provide contact information for questions and complaints in any such materials. A model statement that will satisfy this disclosure requirement is included in the guidance.

Here are the types of changes that will cause a group health plan to lose grandfathered status: Entering into a new policy, certificate, or contract of insurance with the plan's insurance issuer. Changing the insurance issuer of a group health plan (except with respect to collectively bargained plans during the term of any existing agreement). Changing the plan to eliminate all or substantially all benefits to diagnose or treat a particular condition, or to eliminate benefits for any necessary element to diagnose or treat a condition. Increasing any percentage cost-sharing requirement (e.g., coinsurance). Increasing a fixed-amount cost-sharing requirement, other than a copayment (e.g., a deductible or out-of-pocket limit), if the total percentage increase in the cost-sharing requirement exceeds the "maximum percentage increase" (the increase in the overall medical care component of the CPI-U plus 15 percentage points). Changes to wellness programs if they significantly reduce benefits or increase participant costs. For example, if a plan sponsor previously imposed a 10 percent surcharge on group health

plan premiums for smokers, and increases the surcharge to 20 percent, the change would be considered a significant increase in participant costs and the plan would lose its grandfathered status.

Other changes include increasing a fixed-amount copayment, if the total increase in the copayment exceeds the greater of: 5 percent increased by medical inflations measured from the grandfather date, or a total percentage measured from the grandfather date that is more than the sum of medical inflation plus 15 percentage points. Decreasing the employer or employee organization's contribution rate toward the cost of any tier of coverage for any class of similarly situated individuals by more than five percentage points. Decreasing or imposing a new annual limit on the dollar value of benefits (however, plans with an existing lifetime limit are permitted to adopt an overall annual limit at a dollar value that is lower than the dollar value of the plan's lifetime limit, subject to agency guidance regarding restrictions on annual limits).

In addition, the Interim Final Rules contain anti-abuse rules with regard to certain mergers, acquisitions and plan transfers that do not have a bona fide employment-based reason in order to attempt to maintain grandfathered status.

The following changes will not cause a plan to lose grandfathered status: Changes effective after the grandfather date pursuant to a legally binding contract entered into on or before the grandfather date, pursuant to a filing on or before the grandfather date with a state insurance department, or pursuant to written amendments to a plan that were adopted on or before the grandfather date. Changes adopted prior to the date the Interim Final Rules were released that would otherwise cause the plan or coverage to lose grandfathered health plan status, if such changes are revoked or modified effective as of the first day of the first plan year on or after September 23, 2010. Voluntary changes to increase benefits, to conform to required legal changes (including health care reform mandates), and to voluntarily adopt health care reform requirements. Increasing a fixed-amount copayment, as long as the total increase in the copayment is less than 5 percent increased by medical inflation measured from the grandfather date, or a total percentage measured from the grandfather date that is more than the sum of medical inflation plus 15 percentage points. And increasing a fixed-amount cost-sharing requirement other than a copayment (e.g., a deductible or out-of-pocket limit), as long as the total percentage increases in the cost-sharing requirement is less than the maximum percentage increase (the increase in the overall medical care component of the CPI-U plus 15 percentage points).

Employers should review their current benefit plan offerings to determine first, whether they have a grandfathered plan and second, whether the benefits of maintaining a grandfathered plan outweigh the restrictions on plan design and cost-sharing changes imposed by these Interim Final Rules. Employers who decide to retain the grandfathered status of their group health plan should carefully document the plan or policy terms in effect on the grandfather date and include the model grandfather statement in plan materials distributed to participants and beneficiaries.

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