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GUIDANCE ON LOSING HEALTH REFORM GRANDFATHERED STATUS

On June 17, the regulators published extensive guidance on the types of health plan changes that will cause a plan in effect on March 23, 2010 to lose its grandfathered status under the health reform law.

In certain cases, the maintenance of grandfathered status can have significant economic value, and grandfathered plans have a significantly relaxed "glide path" for health reform compliance.

In general, the guidance provides that a grandfathered plan will lose its grandfathered status if any of the following occurs:

1. The plan documents fail to include provisions explaining the plan's grandfathered status. (Model language is provided in the rules.)
2. The plan documents fail to include provisions identifying the party to whom grandfathering questions and "complaints" can be directed. (Again, model language is provided in the rules.)
3. The plan fails to keep records of its grandfathered provisions.
4. The plan fails to make its plan documents and records described above available for inspection by participants and the regulators.
5. The employer engages in a business transaction (a merger, a purchase, a sale, etc.) for the purpose of "buying or selling" the plan's grandfathered status.
6. The employer transfers an employee from one grandfathered plan to another grandfathered plan for purposes of evading the grandfathered provisions affecting the employee in the transferor plan.
7. The plan eliminates or substantially eliminates all benefits necessary to diagnose or treat a particular condition.
8. The plan raises its co-insurance percentage.
9. The plan raises its deductible or out-of-pocket maximum more than the rate of medical inflation plus 15% (measured from March 23, 2010).

10. The plan raises its co-pay more than the greater of: (a) the rate of medical inflation plus 15% (measured from March 23, 2010); or (b) \$5 times the rate of medical inflation (measured from March 23, 2010) plus \$5. [Note that there is significant ambiguity in the language of (b) in the rules.]

11. The employer reduces its contribution toward the total cost of coverage by more than 5%.

12. If the plan had no annual or lifetime limit on March 23, 2010, the plan adds an annual limit.

13. If the plan had a lifetime limit on March 23, 2010, but no annual limit on that date, the plan adds an annual limit less than the lifetime limit on March 23, 2010.

14. If the plan had an annual limit on March 23, 2010, the plan lowers the annual limit.

15. For insured medical coverage, the employer enters into a new insurance contract after March 23, 2010 (rather than renewing an existing contract).

The rules expressly provide that other post-March 23, 2010 changes will not cause a grandfathered plan to lose its grandfathered status (although the regulators request comments on additional types of plan changes that should be added to the list of loss-of-grandfathering changes).

The rules also contain a "grace period" procedure under which certain employers may revoke changes adopted after March 23, 2010 but before June 17, 2010 that caused their plans to lose grandfathered status.

Finally, the rules provide that the regulators may ignore certain "good faith" changes after March 23, 2010 but before June 17, 2010 that "only modestly" exceed the limitations above.

Unfortunately, there are a number of ambiguities and unanswered questions in the rules that will require clarification and that may alter some of the above interpretations.

Naturally, it is very important for employers to: (a) identify their grandfathered plans; (b) determine whether those plans' grandfathered status has significant value; and (c) if desired, take the steps necessary to ensure continued grandfathered status. These new rules add some clarity to that process.