

VI. Grandfathered Health Plans

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A. What Is a Grandfathered Health Plan?

Under PPACA,¹ group health plans and health insurance coverage that were in existence on March 23, 2010 are excused from some of the health care reform requirements in the Public Health Service Act (PHSA) and incorporated by reference into ERISA and the Code (referred to in this manual as “PHSA Mandates”).² This rule is referred to as the “grandfather rule,” and the plans and coverage that fall within the rule are referred to as “grandfathered health plans.”

Certain changes in plan terms can, however, cause a plan to lose its grandfathered status. In this Section VI we discuss requirements for grandfathered plans, including what changes may and may not be made to a plan without losing grandfathered status.

Caution: Plan Sponsors Must Plan Ahead for Loss of Grandfathered Status. As discussed in this Section VI, certain PHSA mandates do not apply to grandfathered plans and loss of grandfathered status will make a plan subject to these requirements.* Typically, a plan sponsor will know in advance, based on its design and pricing decisions, when a plan will lose grandfathered status and will make the changes necessary to comply with the requirements that apply to non-grandfathered plans. It will be important for plan sponsors to guard against an unexpected loss of grandfathered status.

* Limited relief is available for plans that lose their grandfathered status and find it difficult to make system changes in time to comply with the additional standards for internal claims and appeals. For more details, see Section XV.

1. General Definition

Group health plans and health insurance coverage that had at least one participant on the day health care reform was enacted (March 23, 2010) are grandfathered health plans.³ To remain grandfathered, the plan or coverage must have continuously covered someone (although not necessarily the same person) since March 23, 2010.⁴ As discussed in subsection D, the regulations impose restrictions on the types of changes a plan may make without jeopardizing its grandfathered status.⁵ Note that the term “grandfathered health plan” includes individual insurance coverage that otherwise meets the criteria.⁶

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010) (HCERA).

² PPACA, Pub. L. No. 111-148, §§ 1251(a) and 10103 (2010), providing that certain existing group health plans are not required to comply with the requirements of Subtitles A and C of Title I of PPACA. Note: HCERA later made grandfathered health plans subject to additional Subtitle A and C requirements. HCERA, Pub. L. No. 111-152, § 2301 (2010). Code § 9815 and ERISA § 715 incorporate the PHSA provisions by reference.

³ PPACA specifically includes group health plans and health insurance coverage in the definition of “grandfathered health plan.” PPACA, Pub. L. No. 111-148, § 1251(e) (2010).

⁴ Treas. Reg. § 54.9815-1251T(a); DOL Reg. § 2590.715-1251(a); HHS Reg. § 147.140(a). These are interim final rules on which plans may rely until final rules are published.

⁵ Treas. Reg. § 54.9815-1251T(g)(1); DOL Reg. § 2590.715-1251(g)(1); HHS Reg. § 147.140(g)(1).

⁶ See Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010). The preamble also notes that new individual policies, by definition, are not grandfathered.

2. Grandfathered Status Applies on a “Benefits Package” Basis

Neither the statute nor the regulations define the term “plan” for purposes of the grandfather rules. However, the regulations state that the grandfather rules apply separately to “each benefit package made available under a group health plan or health insurance coverage.”⁷ This means that a plan may lose its grandfathered status with respect to one of its benefit packages if certain changes are made, but keep its grandfathered status for other benefit packages.⁸ See subsection D for some examples illustrating this rule. While the statute and the grandfathered regulations also do not define a “benefit package,” there is a definition in the HIPAA portability regulations relating to special enrollment rights, which may shed some light on how the agencies would interpret this term for grandfathering purposes. Under those regulations, “any difference in benefits or cost-sharing requirements for different individuals constitutes a different benefit package.”^{8.1} Further guidance would be welcome.

3. Grandfathered Status Is Lost on Date Prohibited Changes Are Effective

As discussed further in subsection D, certain changes to plan terms can cause a plan to lose its grandfathered status. Regulators have clarified that the status is lost on the date any such amendment becomes effective, rather than the date the amendment is adopted (i.e., if an amendment is effective midyear, there is a midyear loss of grandfathered status; if the amendment is effective at the beginning of the next year, the status is lost for that next plan year).⁹

Example: Plan Amendment Adopted Midyear but Effective for Next Plan Year.

On July 1, 2011, a calendar-year plan adopts an amendment that will cause it to lose grandfathered status. The change becomes effective for the plan year beginning on January 1, 2012. When does the plan lose grandfathered status?

The plan will lose its grandfathered status when the amendment becomes effective, regardless of when the amendment is adopted. Therefore, this plan would cease to be a grandfathered health plan on January 1, 2012.*

* See FAQs About the Affordable Care Act Implementation Part VI, Q/A-4, available at <http://www.dol.gov/ebsa/faqs/faq-aca6.html> (as visited Oct. 14, 2011).

4. Special Grandfathered Plan Status for Insured Plans Under Collective Bargaining Agreements

The regulations provide that, in the case of “health insurance coverage” maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010, the coverage will be treated as grandfathered until the last collective bargaining agreement terminates, regardless of whether there is a change that would otherwise destroy grandfathered status.¹⁰

Caution: Special Collectively Bargained Plan Rule Is for Insured Plans Only.

The regulations and preamble make it clear that the special rule for collectively bargained plans is limited to insured arrangements. Thus, self-funded collectively bargained plans will be treated the same as non-bargained plans and will need to comply with the grandfathering rules, including the new mandates and the limitations on plan changes, even before the relevant collective bargaining agreement expires.*

* See Treas. Reg. § 54.9815-1251T(f)(1); DOL Reg. § 2590.715-1251(f)(1); HHS Reg. § 147.140(f)(1); Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010).

What If an Insured Plan Has Both Collectively Bargained and Non-Bargained Groups.

It is not clear whether the regulators would consider a plan that has both insured collectively bargained groups and non-bargained groups as one plan or separate plans—thus, an insured collectively bargained group within a plan that also has a non-bargained group may not be able to take advantage of the special rule.

⁷ Treas. Reg. § 54.9815-1251T(a)(1)(i); DOL Reg. § 2590.715-1251(a)(1)(i); HHS Reg. § 147.140(a)(1)(i).

⁸ See FAQs About the Affordable Care Act Implementation Part II, Q/A-2, available at <http://www.dol.gov/ebsa/faqs/faq-aca2.html> (as visited Oct. 14, 2011).

^{8.1} Treas. Reg. § 54.9801-6(d)(2); DOL Reg. § 2590.701-6(d)(2); HHS Reg. § 146.117(d)(2).

⁹ See FAQs About the Affordable Care Act Implementation Part VI, Q/A-4 and -5, available at <http://www.dol.gov/ebsa/faqs/faq-aca6.html> (as visited Oct. 14, 2011).

¹⁰ Treas. Reg. § 54.9815-1251T(f)(1); DOL Reg. § 2590.715-1251(f)(1); HHS Reg. § 147.140(f)(1).

The special collectively bargained plan rule does not provide a delayed effective date for collectively bargained plans. Instead, it simply provides an extension of time during which such plans are treated as grandfathered plans. Although the grandfather rule allows collectively bargained plans to maintain grandfathered plan status during the period of the bargained agreement, it does not excuse them from complying with the rules otherwise applicable to grandfathered health plans. Therefore, collectively bargained plans (both insured and self-insured) that are grandfathered plans must comply—by the generally applicable effective dates—with all the health care reforms that apply to grandfathered plans.¹¹ For a list of mandates that apply to grandfathered plans, see the chart in subsection B.2.

Once the collective bargaining agreement expires, the plan may or may not be a grandfathered health plan. Such status will be determined under the otherwise applicable rules, by comparing the plan in existence at the end of the collective bargaining period with the plan in existence on March 23, 2010.¹² If the plan has made changes that, absent the special collectively bargained rule, would take it out of grandfathered status, then the plan is not a grandfathered plan once the collective bargaining agreement expires.

B. What Is the Significance of Grandfathered Plan Status?

1. Grandfathered Plans Are Excused From Some, but Not All, PHS A Mandates

Grandfathered health plans are excused from some but not all of the reforms added to the PHS A (and incorporated by reference into ERISA and the Code).¹³ However, as discussed in subsection B.2, grandfathered health plans must comply with some of the PHS A reforms. They also must continue to comply with other federal laws, such as ERISA and the Code.¹⁴

Caution! Grandfathered Plans Are Excused From Certain PHS A Mandate Rules Only. Just because a grandfathered plan is excused from some of the PHS A mandates does not mean it is exempt from all aspects of health care reform or other laws. In addition to the PHS A mandates discussed in subsection B.2, grandfathered health plans must comply with other health care reform mandates such as automatic enrollment, the employer “play or pay” penalty, new notice requirements, the “Cadillac” plan excise tax, and new tax requirements related to HSAs, HRAs, and FSAs. They must also comply with other previously existing laws such as ERISA, HIPAA portability, HIPAA Privacy & Security, GINA, the Mental Health Parity Act, and the Newborns and Mothers Health Protection Act.* See other Sections of this manual for discussions of health reform requirements beyond the PHS A mandates. See EBIA’s other manuals for coverage of these other laws.

* See Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010).

The following chart shows the PHS A mandates that do not apply to grandfathered plans and where they are discussed in this manual.

PHSA Provision	Description	Where Discussed
§ 2701	Fair health insurance premiums	Section XIV.E
§ 2702	Guaranteed availability	Section XIV.B
§ 2703	Guaranteed renewability	Section XIV.B
§ 2705	Nondiscrimination based on health status	Section XIII.C

¹¹ Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010).

¹² Treas. Reg. § 54.9815-1251T(f)(1); DOL Reg. § 2590.715-1251(f)(1); HHS Reg. § 147.140(f)(1).

¹³ PPACA, Pub. L. No. 111-148, §§ 1251(a) and 10103 (2010), providing that certain existing group health plans are not required to comply with the requirements of Subtitles A and C of Title I of PPACA. Note: HCERA later made grandfathered health plans subject to additional Subtitle A and C requirements. HCERA, Pub. L. No. 111-152, § 2301 (2010). Specifically, grandfathered health plans are excused from compliance with PHS A §§ 2701, 2702, 2703, 2705, 2706, 2707, 2709, 2713, 2715A, 2716, 2717, 2719, and 2719A. See Treas. Reg. § 54.9815-1251T(c)(1); DOL Reg. § 2590.715-1251(c)(1); HHS Reg. § 147.140(c)(1).

¹⁴ Treas. Reg. § 54.9815-1251T(c)(2); DOL Reg. § 2590.715-1251(c)(2); HHS Reg. § 147.140(c)(2).

PHSA Provision	Description	Where Discussed
§ 2706	Nondiscrimination against health care providers	Section XIII.D
§ 2707	Comprehensive health insurance coverage	Section XIV.F
§ 2709	Coverage for clinical trials	Section XII.D
§ 2713	Coverage of preventive health services	Section XII.C
§ 2715A	Transparency in coverage	Section XXXVI.F
§ 2716	Nondiscrimination for insured plans	Section XIII.B
§ 2717	Quality of care reporting	Section XXXVI.G
§ 2719	Appeals process	Section XV
§ 2719A	Patient protections	Section XII.B

2. What PHSA Mandates Apply to Grandfathered Health Plans?

Although grandfathered health plans are excused from many of the health care reform mandates in the PHSA, they are not excused from all of them. In fact, some of the more significant and costly mandates such as the age 26 requirement, limitation on waiting periods, and prohibition on annual and lifetime caps apply to grandfathered plans. Here is a table showing which PHSA provisions apply to grandfathered health plans and where they are discussed in this manual.¹⁵

PHSA Provision	Description	Application to Grandfathered Health Plans	Where Discussed
§ 2704	PCE prohibition	Applies to grandfathered group health plans and group health insurance coverage; not grandfathered individual coverage.	Section X.B
§ 2708	Excessive waiting periods	Applies.	Section X.C
§ 2711	Annual/lifetime limits	Lifetime limits: Applies. Annual limits: Applies to grandfathered group health plans and group health insurance coverage; not grandfathered individual coverage.	Section IX.A
§ 2712	Rescission prohibition	Applies.	Section X.D
§ 2714	Dependent coverage for children under age 26	Applies, but for group health plans and coverage for years prior to 2014, coverage need not be provided if child is eligible for other employer-sponsored coverage.	Section XI
§ 2715	Four-page summary of benefits and coverage	Applies.	Section XVI
§ 2718	Bringing down the cost of coverage (reporting and rebates)	Applies to insured grandfathered health plans.	Section XIV.G

¹⁵ See Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010).

Decision Whether to Preserve Grandfathered Status. Each employer/plan sponsor will need to carefully evaluate its own situation to determine the relative cost versus the benefit of preserving grandfathered status. In cases where external forces already restrict changes that can be made to coverage or contributions (e.g., collective bargaining agreements), the decision to retain grandfathered status may not be too difficult. In the vast majority of cases, the relative cost increases of compliance with each of the PHSA mandates that grandfathered plans are excused from will need to be evaluated. For example, an employer that already provides a robust preventive care program will see much less of a cost increase from the preventive care mandates than an employer that provides little or no preventive care coverage. Once this cost benefit analysis is done, it will need to be reevaluated each year as future plan design decisions are considered. According to the preamble, ultimately, these decisions will involve a comparison by the plan sponsor of the long-run value of grandfather status to the short-run need of that plan sponsor to adjust plan structure for controlling costs or achieving other business objectives.*

* Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010). The agencies' mid-range estimate is that 66% of small employer plans and 45% of large employer plans will relinquish their grandfather status by the end of 2013. However, with the amendment to the regulations permitting a group health plans to enter into a new insurance contract or policy without loss of grandfather status, the agencies have revised the estimate slightly upward. Preamble to the Amendment to the Grandfathered Health Plan Regulations, 75 Fed. Reg. 70114, 70118 (Nov. 17, 2010).

C. Who May Participate in a Grandfathered Health Plan?

PPACA explicitly provides that individuals who are enrolled on the date of enactment (March 23, 2010) may remain enrolled in grandfathered health plans.¹⁶

1. New Enrollees

An individual who was enrolled in a grandfathered health plan on March 23, 2010 may enroll his or her family members in the grandfathered health plan after March 23, 2010.¹⁷ In addition, new employees (and their families) may enroll in a grandfathered health plan, including newly hired employees and newly enrolled existing employees.¹⁸ Existing employees not otherwise covered in a grandfathered plan option may move into that option (e.g., at open enrollment) without jeopardizing the grandfathered status of that option.¹⁹

2. Mergers & Acquisitions

A plan will lose grandfathered status if it engages in a business transaction (e.g., a merger, acquisition, or other restructuring) for the principal purpose of covering new individuals under a grandfathered health plan.²⁰

¹⁶ “Nothing in [PPACA] shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of enactment of this Act.” PPACA, Pub. L. No. 111-148, § 1251(a)(1) (2010).

¹⁷ PPACA, Pub. L. No. 111-148, § 1251(b) (2010); Treas. Reg. § 54.9815-1251T(a)(4); DOL Reg. § 2590.715-1251(a)(4); HHS Reg. § 147.140(a)(4).

¹⁸ PPACA, Pub. L. No. 111-148, § 1251(c) (2010); Treas. Reg. § 54.9815-1251T(b)(1); DOL Reg. § 2590.715-1251(b)(1); HHS Reg. § 147.140(b)(1).

¹⁹ Treas. Reg. § 54.9815-1251T(b)(3), Example 1; DOL Reg. § 2590.715-1251(b)(3), Example 1; HHS Reg. § 147.140(b)(3), Example 1.

²⁰ Treas. Reg. § 54.9815-1251T(b)(2)(i); DOL Reg. § 2590.715-1251(b)(2)(i); HHS Reg. § 147.140(b)(2)(i). According to the Preamble, this rule is intended to “prevent grandfather status from being bought and sold as a commodity in commercial transactions.” Preamble to Grandfathered Health Plan Regulations, 75 Fed. Reg. 34537 (June 17, 2010).

Example: Acquisition for Purposes of Attaining Grandfathered Plan. BigCo has a very expensive PPO plan arrangement. Innovations, Inc., a diversified company in an entirely different line of business, has a much less costly high deductible consumer-directed health plan arrangement. BigCo acquires Innovations, terminates all of its employees, and ceases its business operations. However, BigCo continues the Innovations health plan and moves all of the BigCo employees under the former Innovations plan arrangement. The Innovations health plan would cease to be a grandfathered plan if the principal purpose in the acquisition was to cover BigCo employees under the Innovations plan.

3. *Transferees From Another Plan May Cause Loss of Grandfathered Status*

A plan will lose its grandfathered status if a plan transfers employees to another plan in a circumstance where the transfer, if treated like a plan amendment to the transferor plan, would cause that plan to lose its grandfathered status, unless there is a bona fide employment-based reason for the transfer.²¹ However, employees may voluntarily change from one grandfathered health plan to another without endangering the grandfathered status of either plan.²²

Example: Employees Voluntarily Switch to Another Benefit Package. A group health plan offers two benefit packages, Options F and G. During open enrollment, some of the employees move from Option F to Option G.

This change does not endanger the grandfathered status of Option G, since it was a voluntary change by the employee.*

* Treas. Reg. § 54.9815-1251T(b)(3), Example 1; DOL Reg. § 2590.715-1251(b)(3), Example 1; HHS Reg. § 147.140(b)(3), Example 1.

What is a bona fide employment-based reason for this purpose? The regulations specifically note that changing terms or cost of coverage is not a bona fide employment-based reason.²³ Similarly, dropping one of two benefit options solely for cost reasons is impermissible, although dropping a benefit option following a plant closure may be permissible.²⁴

Example: Employer Eliminates High-Cost Option. A group health plan offers two benefit packages, a more generous PPO and a less generous HMO. The plan eliminates the PPO due to its high cost and transfers the employees to the HMO. (If the employer had amended the PPO to match the terms of the HMO, the PPO would have lost its grandfathered status.)

Since the plan did not have a bona fide employment-based reason for this transfer and since the PPO would have lost its grandfathered status if instead its terms had been modified to match the terms of the HMO, the HMO will lose its grandfathered status. This loss of grandfathered status applies to all enrollees in the HMO, including those in the plan before the employees were transferred from the PPO.*

* See Treas. Reg. § 54.9815-1251T(b)(3), Example 2; DOL Reg. § 2590.715-1251(b)(3), Example 2; HHS Reg. § 147.140(b)(3), Example 2.

²¹ Treas. Reg. § 54.9815-1251T(b)(2)(ii); DOL Reg. § 2590.715-1251(b)(2)(ii); HHS Reg. § 147.140(b)(2)(ii).

²² Under the rule discussed in subsection C.1, employees may newly enroll in a grandfathered health plan without endangering its grandfathered status. See Treas. Reg. § 54.9815-1251T(b)(3), Example 1; DOL Reg. § 2590.715-1251(b)(3), Example 1; HHS Reg. § 147.140(b)(3), Example 1.

²³ Treas. Reg. § 54.9815-1251T(b)(2)(ii)(C); DOL Reg. § 2590.715-1251(b)(2)(ii)(C); HHS Reg. § 147.140(b)(2)(ii)(C).

²⁴ See Treas. Reg. § 54.9815-1251T(b)(3), Examples 2 and 3; DOL Reg. § 2590.715-1251(b)(3), Examples 2 and 3; HHS Reg. § 147.140(b)(3), Examples 2 and 3.