LOEB & LOEB LLP

Employment and Labor Law

ALERT

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LOEB & LOEB adds Knowledge.

"Grandfathered Health Plan" Exception

Introduction

As reported in our recent Client Alert, medical plans in existence on March 23, 2010 may be entitled to "grandfathering" relief from many of the new healthcare law requirements which would otherwise go into effect for the first plan year beginning after enactment (i.e., January 1, 2011 for a calendar year plan). These requirements include free coverage for preventive care, guaranteed renewability of coverage and the extension of the existing nondiscrimination rules for self-insured plans to fully-insured plans. Interim final regulations were issued on June 14, 2010 by the U.S. Departments of Health and Human Services, Labor and Treasury, which detail the grandfathering exception and the actions which can result in the loss of its applicability.

Loss of "Grandfathered Health Plan" Status

Generally, a grandfathered health plan under which (A) benefits in effect as of March 23, 2010 are continued, and (B) the participant share of costs/expenses (i.e., deductibles and co-payments) as of March 23, 2010 remain unchanged, will retain its "grandfathered health plan" status.

The following is a list of the changes by the plan sponsor or issuer that would result in the loss by a plan of its otherwise grandfathered status:

- Elimination of all or substantially all benefits for diagnosis or treatment of a particular condition (where the diagnosis or treatment involves multiple necessary elements (e.g., counseling and prescription drugs for a particular mental health condition), the elimination of one or more (e.g., the counseling portion) is treated as the elimination of all or substantially all for this purpose);
- Increase of deductible or co-payment by more than the rate of medical inflation (based upon the overall medical care component of the Consumer Price Index for All Urban Consumers, unadjusted, published by the U.S. Department of Labor) plus 15 percentage points (any increase to the participant's contribution if based on a percentage of the costs/expenses);
- Reduction of employer or employee organization contribution to extent employer's/employee organization's share of the total costs of coverage declines by more than 5 percentage points; or
- Reduction or new imposition of an annual dollar limitation on covered services.

If the employer or employee organization enters into a new policy, certificate or contract of insurance after March 23, 2010 (e.g., upon non-renewal of the existing one), then that policy, certificate or contract of insurance will no longer be grandfathered.

Note that other changes (e.g., benefit improvements) can be made without loss of "grandfathered health plan" status. The addition of new employees (newly-hired or not) and their families will not alter a grandfathered

health plan's status as such; however, special anti-abuse rules apply to (i) corporate transactions/restructurings the principal purpose of which is to cover new individuals under a grandfathered health plan, and (ii) the transfer of employees from one grandfathered health plan to another which provides lesser benefits/greater employee costs/expenses.

Administrative Requirements

Disclosure Requirements – To maintain its status as a grandfathered health plan, the plan must include a statement in the materials provided to plan participants/beneficiaries (1) describing the benefits provided, (2) advising that the plan is intended to be a grandfathered health plan within the meaning of Section 1251 of the Patient Protection and Affordable Care Act and (3) providing contact information for questions and complaints. The interim final regulations provide model language for purposes of these disclosure requirements.

Records Maintenance – Records documenting the terms of the plan coverage in effect on March 23, 2010, and any other documents needed to verify, explain or clarify the plan's grandfathered status must be maintained and made available for inspection/examination by participants, beneficiaries and State/Federal agency officials for such period as the plan is intended to be grandfathered.

Transition Rules

If changes are made to a plan or by an issuer after March 23, 2010 pursuant to (a) a legally binding contract entered into prior to that date, (b) a filing prior to that date with a State insurance department or (c) written plan amendments adopted prior to that date, those changes will be considered part of the plan terms as of March 23, 2010. In addition, a grace period is provided, whereby grandfathered health plan status is preserved if changes which would result in the loss of grandfathering are revoked/coverage is modified, effective as of the first day of the first plan/policy year beginning on or after September 23, 2010 (i.e., January 1, 2011 for a calendar year plan/policy).

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