



New Employer Medical Plan Nondiscrimination Requirements – “Grandfathered” Plans

Introduction

As reported in our March 2010 Client Alert, many of the new health care law requirements will go into effect for an existing medical plan as of its first plan year beginning on or after September 23, 2010 – January 1, 2011 for a calendar year plan. However, medical plans in existence on March 23, 2010, the date of enactment for the new requirements, are “grandfathered” for purposes of certain of the new requirements, with the result that certain of the new requirements will not apply to existing plans. The new nondiscrimination requirements for fully-insured medical plans are covered by the grandfathered plan exception.

New Nondiscrimination Requirements Inapplicable to Grandfathered Plans

As reported in our March 2010 Client Alert, effective immediately for new plans or, for existing plans, as of the first plan year beginning on or after September 23, 2010, fully-insured medical plans (as has been the case for self-insured medical plans) will become subject to requirements prohibiting discrimination in favor of highly compensated employees. Failure to satisfy these new nondiscrimination requirements will result in an employer excise tax equal to \$100 per day per affected participant, with a maximum excise tax for unintentional failures of \$500,000 per tax year (the IRS will also have the discretion to waive all or part of the tax where the failure is due to reasonable cause and not willful neglect). However, grandfathered plans are excluded from these new nondiscrimination

requirements. Guidance is expected, perhaps as early as this Summer, as to the specifics of grandfathering and the possible loss of grandfathered status. It is clear, however, that adding additional family members and new hires to a grandfathered plan will not result in loss of grandfathered plan status.

Timing

For any medical plan in existence on March 23, 2010 which does not have an October 1, November 1 or December 1 plan year (e.g., a calendar year plan), the applicability of the new nondiscrimination requirements and the grandfathering/loss of grandfathering specifics will not be effective until 2011. In light of current regulatory efforts to issue guidance very soon, the best course of action for the sponsor of a potentially grandfathered plan is to protect its grandfathered status by making no or as few changes as possible to the plan until the anticipated guidance is issued, hopefully well in advance of 2011.

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