

Grandfathered Status: Right or Wrong for Your Plan?

by | David G. Zick





For plan sponsors that have not yet decided whether to try to maintain the grandfathered status of a health plan that existed when health care reform became law, factors such as flexibility to make changes and the repercussions of losing that status need to be weighed carefully.

While our elected officials in Washington and political pundits across the country continue to dissect, debate, define, redefine and modify the interpretations, merits, implications and pitfalls of the new federal health care law passed in early 2010, plan sponsors are facing more immediate challenges.

One of those is deciding whether to maintain the “grandfathered” status of their health care benefits plan. This requires understanding what it takes to keep grandfathered status, and what the plan must do if that status is lost (intentionally or not).

Let’s start with the basics. What exactly is a *grandfathered health plan*? According to the Congressional Research Service, it’s an “existing health plan or health care coverage (including coverage from the individual health care market) in which a person was enrolled on the date of enactment.” As long as a person was enrolled in a health insurance plan on March 23, 2010—the day the president signed the Patient Protection and Affordable Care Act (PPACA)—and that plan is not changed in a way that affects its grandfathered status, that plan is grandfathered.

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Some employers have already opted to make changes knowing that those changes removed their plans from grandfathered status. In some cases, employers made changes that unwittingly caused them to lose that status. More on that later, when we discuss the reasons to either stick with grandfathered status or not, and how to plan for the transition.

It appears many employers will opt out of grandfathered status in the near future. According to Aon Hewitt, a global human resources consulting and outsourcing firm, many U.S. employers initially hoped they could preserve much of their existing group health plans under the new grandfather provision. But when Aon Hewitt surveyed

466 large companies across the country, almost all now believe that won't happen.¹ In fact, 90% of companies in the survey said they anticipate losing grandfathered status by 2014, with the majority expecting to do so in the next two years.

What are the reasons cited by the respondents in the survey? Most companies (72%) expect to lose grandfathered status because of health plan design changes and/or changes to company subsidy levels (39%). Other reasons include consolidation of health plans (16%), changes to insurance carriers (16%) and union negotiations (15%) as additional reasons. Interestingly, 77% said that PPACA guidance on preventive care, which was released early, did

not impact their decision to maintain grandfathered status.

Aon Hewitt also found that 51% of employers with self-funded plans expect to lose grandfathered status in 2011, while another 21% plan to lose status in 2012. The expectations are similar for companies with fully insured medical plans, with the vast majority expecting to lose status in 2011 (46%) or 2012 (18%).

While the grandfathered status scenario can be complicated, the simple view is that employers that decide to keep their plans grandfathered are those that can accept keeping their current health care plans pretty much "as is." With this decision, they are required to make fewer changes to plan



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documents and administrative procedures than plans that lose grandfathered status.

However, if an employer plans on making significant changes, it is important to understand all the consequences of not being grandfathered. If status is lost unwittingly (by taking certain steps such as reducing benefits or significantly raising copayments and/or deductibles), the resulting administrative challenges could be very expensive.

For some, sticking with grandfathered status may seem attractive on the surface; but once the limitations in plan changes are fully understood, that choice loses its luster. For example, if an employer wants to add wellness initiatives with rewards for healthy choices, the employer may find that it isn't possible to do so while maintaining grandfathered status. The employer won't be able to put any "teeth" into the program, and when there is no economic advantage to participate, it has been shown time and time again that there may be little employee participation.

At the same time, the argument to include wellness initiatives is compelling. Some clients that have done so have seen their health care benefit costs increasing far less than the national average—some by less than 3% per year over the past five years. Incentive-based wellness programs have been shown to work. But staying grandfathered can tie the hands of plans that have not yet incorporated wellness initiatives and wish to do so.

Most employers prefer the flexibility of being able to change their benefit plans, and the very limited modifications allowed for grandfathered plans adds an onerous burden.

Plans will lose their grandfathered status if they choose to make significant changes that reduce benefits or increase costs to consumers, among other things.

How, specifically, can a plan lose grandfathered status? The basic guidelines say employers cannot:

- Significantly cut or reduce benefits—for example, if a plan sponsor decides to no longer care for people with diabetes, cystic fibrosis or HIV/AIDS
- Raise coinsurance charges. For example, a 20% hospital coinsurance charge cannot be increased.
- Significantly raise copayment charges. Grandfathered plans will be able to increase copays by no more than \$5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15%. For ex-

takeaways >>

- Maintaining grandfathered status might be a burden for employers that prefer flexibility in making changes to a health plan.
- Nongrandfathered plans must pass nondiscrimination tests, a potentially expensive result of losing grandfathered status.
- When a plan is no longer grandfathered, members gain new benefits such as recommended preventive services with no cost sharing.
- A plan sponsor that chooses to stay grandfathered should look at consequences of making any changes, so that grandfathered status isn't lost accidentally.

ample, if a plan raises the doctor office visit copay from \$30 to \$50 over the next two years, it will lose grandfathered status.

- Significantly raise deductibles. To remain grandfathered, a plan can raise the deductible by only a percentage equal to medical inflation plus 15%.
- Significantly lower employer contributions. Employers cannot decrease the percentage of premiums they pay by more than 5%.
- Add or lower an annual limit on what the insurer pays
- Transfer employees to another plan or plan option without a bona fide employment-based reason for the transfer.

Note: Although initially precluded, as of November 15, 2010 employers with group health plans can change health plan carriers provided the new plan does not violate any of the other rules for maintaining grandfathered status.

Grandfathered health plans may make routine and certain minor changes to their policies and still maintain their status. Routine changes include cost adjustments to keep pace with medical inflation, adding new benefits, making modest adjustments to existing benefits, voluntarily adopting new consumer protections under the new law, or making changes that comply with state or other federal laws. Premium changes are not taken into account when determining whether or not a plan is grandfathered, although employee contributions are.

On the plus side, some of the benefits/advantages of remaining grandfathered include:

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by Brian M. Pinheiro, Jean C. Hemphill, Clifford J. Schoner and Jonathan M. Calpas.
Aspen Publishers. 2010.

For more details, visit www.ifebp.org/books.asp?8860.

- Plans are not required to provide specified preventive health services.
- Cost sharing may continue to be applied to preventive services.
- Plans are exempt from cost-sharing limits (until effective in 2014).
- Plans are exempt from the requirement providing coverage of routine patient cost for clinical trials of life-threatening diseases (also starting in 2014).
- Additional “administrative” advantages include:
 - Plans are not required to create a new external claims appeal process.
 - Fully insured plans are not subject to IRS 105(h) nondiscrimination rules.

Among other potentially expensive consequences in losing grandfathered status, nongrandfathered plans must pass the nondiscrimination tests under Code Section 105(h) for plan years beginning after September 23, 2010, including eligibility and benefits tests. Both tests were designed to prohibit discrimination in favor of highly compensated individuals (HCIs).

To satisfy the eligibility criteria, a nongrandfathered plan must benefit one of the following:

- 70% or more of all nonexcludable employees
- 80% or more of all employees who are eligible to benefit, if 70% or more of all nonexcludable employees are eligible to participate under the plan, or
- Employees qualifying under a classification that does not discriminate in favor of HCIs (the nondiscriminatory classification test).

Under the benefits test, the benefits provided to HCIs under the plan must be provided to all other participants. Required contributions should be identical for each benefit level. The maximum benefit level that can be elected cannot be based on percentage of compensation, age or years of service. The type of benefits that are reimbursable must be identical for all participants. The health plan must not have different waiting periods.

New administrative burdens such as the nondiscriminatory rules are far easier to deal with given proper preparedness (and not in a rush because of lost grandfathered status).

Also, when a plan loses grandfathered status, members in those plans will gain additional new benefits, including coverage of recommended prevention services with no cost sharing and patient protections such as guaranteed access to obstetrician-gynecologists and pediatricians. Other such member benefits and nongrandfathered processes include:

- Establish internal and external claims appeals processes for appeals of benefit determinations and claims, allow participants to present evidence and testimony in appeal, provide notice to employees and allow participants to continue coverage during disputes.
- Report to Health and Human Services (HHS), state commissioner and make available to the public, financial data, claims payments and policies, claims denials, enrollment and disenrollment data, rating practices, cost sharing and payments for out-of-network coverage, and other information required by HHS
- Report annually to HHS and enrollees regarding plan features that improve health outcomes, reduce hospital readmissions, improve patient safety and reduce medical errors, and implement wellness activities. HHS will make reports public.
- Cover clinical trials and routine expenses for clinical trials for cancer and other life-threatening diseases and cannot discriminate against individuals for participating in the trial
- Cost sharing, including deductibles, coinsurance, copayments or similar charges, cannot exceed

the out-of-pocket maximum for high-deductible health plans in 2014, indexed thereafter.

Finally, even if a plan maintains grandfathered status, there are changes the plan sponsor must make beginning on or after January 1, 2014 if the plan doesn't already incorporate them, including:

- No lifetime limits on coverage of essential health benefits for all plans
- No annual limits on certain types of benefits
- No preexisting conditions exclusions for children under the age of 19 (and for all participants in 2014)
- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their application
- Extension of parents' coverage to young adults under the age of 26 (for those unable to obtain employer-paid coverage)
- No prior authorization requirement for emergency services, or higher cost sharing for out-of-network emergency services.

So, what should an organization do? For one, it should prepare for the next plan year as it has done in the past, but pay very close attention to the mandatory and nonmandatory provisions of the grandfathered status guidelines.

Some employers may decide to keep grandfathered status for one or more of their health care plans (for employers with multiple plans, the option applies to each plan), other employers may decide that the grandfathered status advantages are relatively minimal compared to the limitations placed on an employer's ability to make changes.

Most of our clients maintained grandfathered status in 2010, mainly because there were so many uncertainties and so much unknown about the new law. Even where these are specific regulations and requirements, there was little or no guidance on specific steps required for nongrandfathered plans.


Now, with economics the driving factor, employers are reviewing their options and evaluating changes (such as wellness initiatives, benefit changes and employee contributions) and many will decide that 2011 is the year to move from grandfathered status and implement those changes. The economic incentive is there to do it.

As noted, maintaining grandfathered status might not hurt a plan sponsor. A viable, incentive-based wellness program may already be in place, for example, and the sponsor may find there is no compelling business reason to make changes

that lose grandfathered status. In that case, staying grandfathered for the current time may be in the sponsor's favor.

But if a plan sponsor chooses to stay grandfathered, it should carefully examine the consequences of any changes it wants to make, so that the plan doesn't accidentally lose status.

Employers that initially believe it's critical to maintain grandfathered status may, upon closer review, decide that is not the case. Trying to maintain grandfathered status at any cost may be shortsighted, in fact. As the limitations of grandfathered status are becoming clearer, HR and benefits executives who do a cost/benefit analysis may well decide that keeping grandfathered status is not the best strategy.

Health care reform and the political opinion swirling around it have resulted in a moving target. It's a constantly evolving situation, so today's decision may need to be reexamined tomorrow. As of this writing, HHS and DOL were developing structure to all the reforms signed into law a year ago, and are expected to release clarifications over the next several months. Choosing to shed a plan's grandfathered status may be the right choice to give a benefits plan the cost-cutting boost it needs. Or, on the flip side, it may make sense to sit tight and see what happens. 

Endnote

1. Aon Hewitt. *Employer Reaction to Health Care Reform: Grandfathered Status Survey*. 2010. Available at www.hewittassociates.com/_MetaBasicCMAssetCache/_Assets/Articles/2010/ER_Reaction_HC_Grandfathered.pdf.

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