

QUESTIONS AND ANSWERS TO VARIOUS HEALTH REFORM IMPLEMENTATION ISSUES

AUGUST, 2010

Q1. For a fully insured client, are the notices sent by insurer or the covered entity (employer)?

To maintain status as a grandfathered health plan, a plan or health insurance coverage must include a statement in any plan materials provided to a participant or beneficiary describing the benefits provided under the plan or health insurance coverage that the plan or coverage believes that it is a grandfathered plan. §54.9815-1251T(a)(2)(i). The regulations are not clear as to what entity must send the notices; however, since the notice must be included in any materials that are being sent to participants in the plan or those covered by health insurance. The interim final rules regarding the new claims procedures makes it clear that if either the plan or the issuer complies with the new claims procedure rules, both the plan and the issuer will be deemed to have complied. §54.9815-2719T(b)(2). We understand that this concept will be applied to the notice requirement for grandfathered plan status. Therefore, as long as the grandfathered plan status notice is included in any materials sent to participants, both the plan and the issuer will be considered to have met this compliance burden.

Q2. Regarding new nondiscrimination test requirements for fully insured plans (IRC Sec. 105(h)), will it still be possible to offer your salaried employees one level of benefits and offer all other classes something different? Under the same scenario, if there are employee contributions, could an employer charge differently for different classes? Also, does grandfathering affect this? Meaning a group who is grandfathered can do, but those who aren't can't?

There are different nondiscrimination rules depending on whether the benefits are being provided on an insured basis or they are self-funded.

The nondiscrimination rules for self-funded arrangements are under section 105(h) of the Internal Revenue Code. These nondiscrimination rules for self-funded arrangements apply regardless of whether a plan is grandfathered from PPACA. Under section 105(h), there must be no discrimination in favor of highly compensated employees with regard to eligibility to participate in the self-funded health and no discrimination with regard to benefits subject to reimbursement. The employer contribution toward coverage would be considered a benefit and if the employer is providing better benefits to higher compensated employees, the arrangement would be considered discriminatory under section 105(h). Of course, the plan could be subdivided into two separate plans based on the level employee contributions; however, each part of the plan must meet the nondiscrimination rule regarding eligibility -- which may be difficult. Further, self-funded plans that discriminated against highly compensated employees with regard to eligibility and/or benefits would not be considered discriminatory under section 105(h).

Nondiscrimination rules for insured plans were added as part of PPACA . New §2716(a) of the Public Health Service Act. Grandfathered plans will not be subject to these rules, so that grandfathered insured plans can discriminate with regard to eligibility and/or benefits in favor of highly compensated employees. Regulations setting out how these nondiscrimination rules will operate have not been issued yet, but these nondiscrimination rules are to be similar to the nondiscrimination rules under section 105(h) of the Code. Consequently, it is likely that an arrangement that offered better benefits to highly compensated employees or charged highly compensated employees lower premiums than for employees that are not highly compensated will be considered discriminatory when regulations are issued.

Q3. I have a client who was fully insured and changed to self-funding with the same carrier and same benefits. The only thing that changed is the contract moving from the fully insured platform to the self-funded. Will they lose their Grandfathered status? Their renewal date was 7/1/2010 which is when the changes were effective. Aetna is the carrier - final documents have not been issued yet but open enrollment occurred in the month of April. They have 546 employees.

This issue was not addressed in the interim regulations regarding grandfathered status and so it is still an open question. The regulatory agencies asked for comments on whether a change from insured to self-insured product would be cause the loss of grandfathered status.

Q4. Does the new law address whether or not Indian Health Plans are subject to any or all provisions?

The Indian Health Care Improvement Act (the "IHCA") was included as part of PPACA. §10221 of PPACA. The IHCA contains many provisions dealing with health care provided by the Indian Health Service. PPACA did not change the current law regarding whether health coverage provided by an Indian tribe was considered to be coverage from a government entity. PPACA, however, did provide that certain Indian health care benefits provided to members of a tribe would not be included in the tribal member's income. New §139D of the Internal Revenue Code.

Q5. Do ancillary product changes affect "grandfathering"?

Grandfathering status is lost if there is an elimination of all or substantially all benefits to diagnose or treat a particular condition. §54.9815-1251T(g)(1)(i). An ancillary product, such as life insurance or accidental death and dismemberment, is not a benefit to diagnose or treat a particular condition. Therefore changing one of those type benefits would not result in loss of grandfather status.

Q6. On grandfathering and employer premium contributions: if the dollar amount changed enough to increase the employee contribution more than 5% even though their percentage of contribution stayed the same, is there a loss of grandfathering?

A plan would lose grandfathered status if there is a decrease in the contribution rate by the employer. §54.9815-1251T (g)(1)(v). In this instance there is no change in the contribution rate; therefore the plan would maintain its grandfathered status – even though the dollar amount that the employee has to contribute has increased.

Q7. GRANDFATHERING: We have a self funded client who currently covers transplants under their self funded plan. They have decided to carve out the transplants from the self funded plan, and buy a stand alone fully insured transplant benefit. Will this in and of itself cause them to lose grandfathered status?

A plan would lose grandfathered status if benefits were eliminated. §54.9815-1251T (g)(1)(i). In this instance, they are continuing to provide the transplant benefits, however, those benefits will be provided through a new insurance policy. Therefore no benefits have been eliminated which would trigger the loss of grandfather status.

Q8. NONDISCRIMINATION TESTING: Will Long Term Care insurance policies be affected by the new nondiscrimination requirements?

Possibly, YES, some LTC contracts could be affected by existing and the new nondiscrimination requirements, according to Frank Palmieri, CPA, JD, LL.M (Taxation), partner with the law firm of Palmieri & Eisenberg.

In a recent article for Employee Benefit News (<http://ebn.benefitnews.com/news/employers-face-penalties-with-new-nondiscrimination-rules-2683785-1.html>), he writes that it is not uncommon for C Corporations to purchase LTC policies for senior executives when they are close to retirement. Providing a LTC policy is a tax-free benefit to an executive and a corporation receives a deduction for the payment of an LTC policy.

However, a LTC policy is considered a health plan. Accordingly, providing a fully insured LTC policy for only one senior executive will once again result in discrimination and the excise tax will be imposed on the employer.

Assuming the LTC policy requires payments for a 10-year period in order to purchase benefits, it would appear that the policy would be discriminatory for a 10-year period, resulting in significant excise taxes to an employer.

Employers must become familiar with the health care legislation and drill down on specific issues, such as the extension of Section 105(h), part-time employees and other issues relevant to each employer. By considering each component of the laws as it applies to an employer, business decisions may be made and penalties minimized.