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DOL, Treasury, and HHS Issue Additional FAQs (Part VI) on Grandfathered Health Plans under PPACA

The DOL, Treasury, and HHS have released Part VI of their FAQs providing sub-regulatory guidance on PPACA's provisions. Part VI addresses grandfathered health plans.

Background

The Patient Protection and Affordable Care Act was enacted on March 23, 2010 and amended on March 30, 2010 by the Health Care and Education Reconciliation Act of 2010 (collectively, PPACA). PPACA includes provisions that exempt health coverage in existence on March 23, 2010 (grandfathered health plans) from certain of the insurance market reform requirements. The Departments of Health and Human Services (HHS), Labor (DOL), and the Treasury (collectively, the Departments) issued [interim final regulations](#) on June 17, 2010 (that provide guidance regarding grandfathered health plans (see our June 23, 2010 [For Your Information](#)).

Since then, the Departments have issued a series of Frequently Asked Questions (FAQs) that are intended to address issues that plan sponsors have raised as they attempt to implement PPACA. The Departments posted on the DOL website FAQs Part I on September 20, 2010 (see our September 22, 2010 [For Your Information](#)); FAQs Part II on October 8, 2010 and Part III on October 12, 2010 (see our October 18, 2010 [For Your Information](#) covering both Parts II and III); FAQs Part IV on October 29, 2010 (see our November 2, 2010 [For Your Information](#)); and FAQs Part V on December 22, 2010 (see our January 25, 2011 [For Your Information](#)).

FAQs Part VI

On April 1, 2011, the Departments issued [Part VI of the FAQs](#). Part VI answers six questions about grandfathered plans.

Question 1 – Scope of Anti-Abuse Rule

Generally, under the interim final regulations, a change of benefits in a plan for a group of employees will cause the plan to lose its grandfathered status if the new benefits are sufficiently different from the old benefits. As long as the transfer is not abusive, a similar rule does not apply when an employer transfers employees from one grandfathered plan to another grandfathered plan. A transfer is not abusive if it is made for a “bona-fide employment-based reason.”

In response to questions as to what a bona-fide employment-based reason would be, Part VI provides a list of circumstances, but the Departments emphasize that the list is not intended to be exhaustive. The listed reasons are the following:

- The issuer of a benefit package is exiting the market;
- The issuer of a benefit package no longer offers the product to the employer;
- Low or declining participation makes it impractical to offer the package;
- The package is eliminated from a multiemployer plan pursuant to a collective bargaining agreement; and
- The package is eliminated for any reason, but multiple alternative benefit packages covering a significant portion of other employees remain available to the employees being transferred.

BUCK COMMENT. *The last reason is very open-ended and arguably provides considerable flexibility to eliminate benefit packages. The guidance also should eliminate many of the concerns of employers involved in mergers and acquisitions that want to terminate the seller's plans and move the employees into the less-rich plans of the buyer.*

Question 2 – Classification of Drugs

There was a concern under the interim final regulations that the reclassification of a drug from one cost category to a more expensive one might result in the loss of grandfathered status. Part VI addresses the situation where a plan has one cost structure for drugs that have generic alternatives and a different cost structure for those that do not. FAQ 2 provides that if a drug is reclassified to a more expensive category solely because a generic alternative becomes available, the increased cost is not considered an increase in plan costs for purposes of determining whether the grandfathered plan rules are satisfied.

BUCK COMMENT. *The distinction here appears to be that the change in cost occurred automatically under the terms of the plan and not because of actions of the employer.*

Question 3 – Value-Based Insurance Design (VBID)

Under PPACA, non-grandfathered plans are required to provide coverage for recommended preventive services such as colorectal cancer preventive services without cost sharing. FAQ 3 provides that grandfathered status is not lost if a plan that originally did not require a co-payment for preventive services in either an in-network ambulatory surgery center or an in-network outpatient hospital setting now wants to impose a \$250 co-payment for the hospital situation as long as there is a waiver of the co-payment for patients who have medical reasons why they must have the procedure in a hospital setting.

BUCK COMMENT. *The Departments recognize that employers are interested in maintaining grandfathered status while at the same time implementing VBID and wellness programs. The Departments are seeking further information on VBID and wellness programs and will be issuing further guidance.*

Questions 4 and 5 – Timing of Loss of Grandfathered Status

FAQs 4 and 5 make clear that it is the date a plan amendment is effective that matters for loss of grandfathered status, even if that is mid-plan year. The date the amendment is adopted is irrelevant.

Question 6 – Contributions Based on a Formula

Under the interim final regulations, a plan generally will lose grandfathered status if the employer's contribution rate towards the cost of coverage is reduced by more than 5% over the cost as of March 23, 2010. In this FAQ, the employer's contribution level is based on a formula, and the formula does not change even though each year the employer's percentage of the total cost of coverage will decrease. Even if the formula-based decrease is more than 5%, the decrease does not cause the plan to lose grandfathered status.

BUCK COMMENT. *The distinction here, as in earlier FAQs, appears to be that the employer is not exercising any discretion.*

Conclusion

Grandfathered plan issues have raised some of the biggest concerns during the implementation of PPACA. Since the general standards of the interim final regulations were issued, the Departments have received numerous questions about specific fact situations. The Departments have tried to answer the questions in a consistent manner in the FAQs. Part VI is the latest set of specific questions. Further FAQs on grandfathered plans are likely in the future.

Buck's consultants are available to help you understand the grandfathered plan rules and the PPACA implications of losing or keeping grandfathered status.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.