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Frequently Asked Questions about Grandfathered Plans

8-Minute Read

As employers determine their plan designs for the coming year, those with grandfathered status need to decide if maintaining grandfathered status is their best option. The following are some frequently asked questions and answers about grandfathering a group health plan.

Q1: May plans maintain grandfathered status after 2016?

A1: Yes, they may. There is no specific end date for grandfathered status.

Q2: What are the advantages of grandfathered status?

A2: Grandfathered plans are **not** required to meet these Affordable Care Act (ACA) requirements:

- Coverage of preventive care without employee cost-sharing, including contraception for women
- Limitations on out-of-pocket maximums
- Essential health benefits and metal levels (these only apply to insured small group plans)
- Modified community rating (this only applies to insured small group plans)
- Guaranteed issue and renewal (this only applies to insured plans)
- Nondiscrimination rules for fully insured plans (this requirement has been delayed indefinitely)
- Expanded claims and appeal requirements
- Additional patient protections (right to choose a primary care provider designation, OB/GYN access without a referral, and coverage for out-of-network emergency department services)
- Coverage of routine costs associated with clinical trials
- Reporting to the Department of Health and Human Services (HHS) on quality of care (requirement has been delayed indefinitely)

Grandfathered plans are **not** required to comply with the Transparency in Coverage Rules that many group health plans must comply with.

Q3: What ACA requirements apply to grandfathered plans?

A3: Most ACA requirements apply to grandfathered plans. This includes:

- Limits on eligibility waiting periods
- PCORI fee
- Transitional Reinsurance Fee (expired after 2016)
- Summary of Benefits and Coverage
- Notice regarding the exchanges
- No rescissions of coverage except for fraud, misrepresentation, or non-payment
- Lifetime and annual dollar limit prohibitions on essential health benefits
- Dependent child coverage to age 26 (an exception for grandfathered plans when other coverage is available expired at the start of the 2014 plan year)
- Elimination of pre-existing condition limitations
- W-2 reporting of health care coverage costs (this only applies if the employer provided more than 250 W-2s for the prior calendar year)
- Wellness program rules
- Minimum medical loss ratios (this only applies to fully insured plans)
- Employer shared responsibility ("play or pay") requirements (generally started with the 2015 plan year)
- Employer reporting to the IRS on coverage (started in January 2016, based on the 2015 calendar year)
- Excise ("Cadillac") tax on high cost plans (repealed)
- Automatic enrollment (this only will apply to employers with more than 200 full-time employees; this requirement has been delayed indefinitely)

Q4: What must a plan do to maintain grandfathered status?

A4: To maintain grandfathered status, a plan must look at its benefits and contribution levels as of March 23, 2010, and must not:

- Eliminate or substantially eliminate benefits for a particular condition

  For example, if a plan covered counseling and prescription drugs to treat certain mental and nervous disorders and eliminates coverage for counseling, the plan will lose grandfathered status.

- Increase cost-sharing percentages

  For example, if the plan had an 80 percent coinsurance rate in March 2010 and decreases the rate to 70 percent, the plan will lose grandfathered status.

- Increase co-pays by more than the greater of medical inflation plus 15 percentage points, or $5 increased by medical inflation (with medical inflation at approximately 34.28%*)

  For example, if the plan had an office visit copay of $30 in March 2010, it could increase it to $44.78 without losing grandfathered status.

- Beginning June 15, 2021, grandfathered plans must not increase co-pays by more than the greater of: 1) medical inflation, expressed as a percentage, plus 15 percentage points; or 2) the portion of the premium adjustment percentage (adjusted annually), as defined in 45 CFR 156.130(e), that reflects the relative change between 2013 and the calendar year prior to the effective date of the increase (that is, the premium adjustment percentage minus one), expressed as a percentage, plus 15 percentage points; or 3) $5 increased by medical inflation. See our Advisor "Final Rules on Grandfathered Group Health Plan Coverage" for an example.

- Raise fixed amount cost-sharing other than copays by more than medical inflation (with medical inflation at approximately 34.28%*) plus 15 percentage points.

  For example, if the plan had a deductible of $1,000 and an out-of-pocket maximum of $2,500 in March 2010, it could increase the deductible to $1,492.80 and the out-of-pocket limit to $3,732 without losing grandfathered status.

  Beginning June 15, 2021, grandfathered plans must not increase fixed amount cost-sharing other than copays by more than the greater of: 1) medical inflation, expressed as a percentage, plus 15 percentage points; or 2) the portion of the premium adjustment percentage (adjusted annually), as defined in 45 CFR 156.130(e), that reflects the relative change between 2013 and the calendar year prior to the effective date of the increase (that is, the premium adjustment percentage minus one), expressed as a percentage, plus 15 percentage points. See our Advisor "Final Rules on Grandfathered Group Health Plan Coverage" for an example.

- Lower the employer contribution rate by more than 5 percent for any group of covered persons

  For example, if the employer contributed 80 percent of the cost of employee-only coverage and 60 percent of the cost of family coverage in March 2010, if the employer keeps its contribution percentage for employee-only coverage at 80 percent but reduces its contribution for family coverage to 50 percent, the plan will lose grandfathered status.

- Add or reduce an annual limit

  For example, a plan that had no limit on MRIs in March 2010 could not impose a $10,000 per year maximum on MRIs without losing grandfathered status.

* Medical inflation is measured by the increase since March 2010 in the overall medical care component of the Consumer Price Index for All Urban Consumers (CPI-U). For purposes of this Advisor, we are using the medical inflation rate from March 2010 to November 2020.

The plan also must:

- Maintain records of its plan design and contribution levels as of March 23, 2010, and any changes since that date.
- Include a notice about the plan's grandfathered status in significant participant communications, such as enrollment materials and summary plan descriptions. (The notice does not need to be included with the Summary of Benefits and Coverage (SBC) or explanation of benefits (EOB).) The Department of Labor (DOL) provides a model notice.

Q5: How are changes measured?

A5: Changes are measured cumulatively since March 2010. So, for example, if an employer contributed 70 percent of the cost in March 2010, and reduced its share to 68 percent in January 2012, it could again reduce its share, to 65 percent, in January 2020 without losing grandfathered status.

Or, if the deductible was $500 in March 2010 and it was increased to $550 in September 2011, it could be increased to $696.40 in December 2020 without losing grandfathered status.

Q6: May a grandfathered health savings account (HSA) eligible high deductible health plan (HDHP) make cost-sharing changes due to IRS increases to the cost-of-living adjusted required minimum annual deductible and annual limit on out-of-pocket expenses for HSA-eligible HDHPs?

A6: Yes. Grandfathered group health plans and grandfathered group health insurance coverage that are HSA-eligible high deductible health plans (HDHPs) may make changes to fixed-amount cost-sharing requirements without losing grandfathered status, but only to the extent that those changes are necessary to comply with the cost-of-living adjusted required minimum annual deductible and annual limit on out-of-pocket expenses for HSA-eligible HDHPs.

Q7: Will violating just one of the requirements forfeit grandfathered status?

A7: Yes.

Q8: What changes may a plan make and keep grandfathered status?

A8: A plan will not lose grandfathered status if it:

- Changes insurers (on or after November 15, 2010) or third party administrators, as long as benefits do not change
- Moves between self-funded and insured status, as long as benefits don't change
- Makes changes required by law
- Increases benefits
- Makes any change other than a prohibited change (for example, a change to eligibility rules is probably allowed)
- Moves drugs to a different copay tier because the drugs have become generic
- Changes networks
- Passes along premium increases (as long as the increase is essentially shared pro rata)
- Adds new employees or family members to the plan
- See Q6 above for changes that may be made to an HSA eligible HDHP

Q9: If an employer offers several plan options, can it keep grandfathered status for some plans even if it has lost it for others?

A9: Yes, it can. So, for instance, an employer could have a grandfathered PPO option and a non-grandfathered HMO option.

Q10: Can an employer add tiers without losing grandfathered status?

A10: Yes, it can, as long as it maintains its contribution level for all tiers at the required level. For example, if the employer offered a two-tier plan and paid 90 percent of the cost of employee-only coverage and 75 percent of the cost of family coverage in March 2010, it could move to four tiers in January 2020 without losing grandfathered status as long as it paid at least 85 percent of the cost of employee-only coverage and at least 70 percent of the cost of employee plus spouse, employee plus children and family coverage.

Q11: Can an employer add a wellness program without losing grandfathered status?

A11: An employer can add a wellness program without losing grandfathered status, but needs to take care to make sure it maintains contributions and benefits at the needed levels. (Wellness plans do not have special rules that would give them extra latitude.)

Q12: Can an employer impose a spousal surcharge or carve-out without losing grandfathered status?

A12: An employer can impose a spousal surcharge without losing grandfathered status, but it must keep its contribution for spousal coverage within five percent of its contribution rate for spousal coverage in March 2010, even for spouses who must pay the surcharge.

It appears that spouses with other coverage may be completely excluded without jeopardizing grandfathered status.

Q13: If an employer loses grandfathered status, can it get it back?

A13: With the exception of a transition period in 2010, a plan that loses grandfathered status, even inadvertently, cannot get it back. This seems to include losing status because the required notice was not provided.

Q14: What happens if a plan loses grandfathered status?

A14: The plan must comply with all the requirements that apply to non-grandfathered plans as of the effective date of the change that caused the loss of status. So, for example, if the plan is amended to increase the coinsurance level effective January 1, 2015, but the amendment isn't signed until February 6, 2015, grandfathered status is lost as of January 1, 2015.

Q15: Are there special rules for bargained plans?

A15: A fully-insured plan maintained under one or more collective bargaining agreements ratified before March 23, 2010, may remain a grandfathered plan at least until the date on which the last agreement relating to the coverage that was in effect on March 23, 2010, terminates. (Self-insured plans maintained under a collective bargaining agreement are not eligible for this collectively bargained exception.) After the date on which the last of the collective bargaining agreements terminates, the usual rules for maintaining grandfather status apply – the current terms of the plan are compared to the terms that were in effect on March 23, 2010.

Q16: Should a plan keep grandfathered status for 2021?

A16: Whether to keep grandfathered status for 2021 is the plan sponsor's decision. Typically, the employers most interested in maintaining grandfathered status are those that:

- Want to retain an out-of-pocket limit above the limit ($8,550 single and $17,100 family for 2021)
- Have religious objections to covering contraception
- Have carve-out plans for executives
- Are in the small group market and wish to avoid the insurance market changes (essential health benefits, cost-sharing limits, metal levels and modified community rating)

Q17: What are the main provisions of the final rule issued in 2015 that affect grandfathered plans?

A17: On November 18, 2015, federal agencies issued a final rule on grandfathered health plans. The final rule went into effect on January 1, 2017; at that time, all of the prior interim rules were superseded. The final rule noted that various transitional rules are now void, such as the allowance of grandfathered health plans to exclude children under age 26 who were eligible for other group health plan coverage, and rules that provided a special enrollment period for children under age 26 who had been excluded from coverage.

The final rule reaffirmed that grandfathered status applies separately with respect to each benefit package. For example, a group health plan with a preferred provider organization (PPO) plan, a point of service (POS) arrangement, and a health maintenance organization (HMO) option would each carry grandfathered status (or not) separately. Requirements for grandfathered status notification remain the same; plans must include a statement that the plan or health insurance coverage believes it is a grandfathered health plan in any summary of benefits provided under the plan. The model disclosure notice remains the same.

Grandfathered plans have been governed by anti-abuse rules to prevent plans from maintaining grandfathered status when employees transferred into the plan are from a transferee plan that would have caused the transferor plan to lose grandfathered status if its terms were adopted. There is an exception for bona fide reasons for employee transfers, such as a plan being eliminated by the carrier.

The final rule noted that a plan that eliminated substantially all benefits needed to diagnose a condition would cause a plan to lose its grandfathered status, but purposefully declined to provide a bright line rule to interpret the requirement. Excessive increases to a single or limited number of copayments would cause a plan to lose grandfathered status, even if the remaining copayments remained the same.

Plans that add additional tiers (such as individual plus one, individual plus two) will not lose grandfathered status if the contribution rate for the new tiers is not below the previous non-self-only tier by more than five percent. Employers with grandfathered health plans that offer wellness programs should take great caution if the wellness program imposes penalties for failing to meet standards, this could put the plan's grandfathered status at risk. Finally, grandfathered health plans may move brand-name versions of drugs that become generic to a higher cost-sharing tier.

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