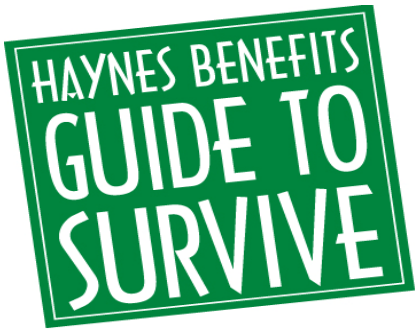

. . . Health Care Reform 2010

Week 3: Grandfathered Plans

Our third alert will discuss the rules relating to grandfathered plans in the Patient Protection and Affordable Care Act (the "Act"). As indicated in our prior alerts, the grandfathered plan rules follow through on President Obama's often repeated promise "if you like your coverage you can keep it". The grandfathered plan rules provide an exception to many of the Act's mandates, but not all of them.

> *The concept of grandfathered plans may be the most important rule facing plan sponsors right now, and has led to the most questions that we have received on the Act since its passage. If plan sponsors change their plans in a manner that causes the loss of grandfathered status, those plans will be subject to all the increased mandates under the Act discussed in our prior alerts.*

This alert will define "grandfathered plan," describe the mandates in the Act that apply to grandfathered plans, describe some of the mandates in the Act that do not apply to grandfathered plans; and describe the delayed effective date that applies to health insurance coverage that is subject to a collective bargaining agreement.

> *These email alerts provide a summary of the Act and our comments, which are in italics.*

Grandfathered plan definition. The Act defines "grandfathered health plan" to mean any group health plan or health insurance coverage in which an individual was enrolled and that was in effect on the date of the enactment of the Act (March 23, 2010). The Act clearly provides that the enrollment of new employees, and new family members of individuals enrolled on the date of enactment, will not cause the plan to lose its grandfathered status.

> *We do not know what kind of changes to a fully insured or self funded plan will cause it to lose its grandfathered status. For example, what plan amendments relating to eligibility or benefits can be made without risking loss of grandfathered plan status?*
>
> *Similarly, can a plan change its financial arrangement without risk of loss of grandfathered status? For example, some plans might wish to change from fully insured to self funded status in order to avoid some of the specific insurer mandates, but it is unclear whether such a change endangers grandfathered status.*

The special rule for collectively bargained plans provides some insight with respect to whether plan amendments to comply with the Act will affect a plan's grandfathered status.

Specific rule for plans subject to collective bargaining agreements. The Act provides that health insurance coverage that was subject to one or more collective bargaining agreements ratified before the enactment of the Act is not subject to the Act's market reforms until the last collective bargaining agreement terminates. Any coverage amendment made pursuant to a collective bargaining agreement to conform the health plan's coverage to any of the market reform provisions in the Act will not be treated as a termination of the collective bargaining agreement.

This rule raises more questions than it answers. The rule specifically refers to health insurance coverage, but we cannot discern any reason why this provision should not be equally applicable to group health plans subject to a collective bargaining agreement. This confusion may be another example of misuse of terminology in the Act.

That being said, the rule does provide support for the position that the "best practice" until guidance is provided may be to limit changes in grandfathered plans to plan amendments required under the Act. Hopefully, we will receive guidance before these amendments are necessary. It is unclear whether amendments to insured plans required by state law will likewise not risk loss of grandfathered status.

Changes required for grandfathered plans. Grandfathered plans must be amended to comply with the following mandates under the Act, generally by the plan year beginning after September 23, 2010 (January 1, 2011 for calendar year plans):

- Pre-existing condition exclusions for children under the age of 19;
- Lifetime and some annual limits;
- Rescissions;
- Coverage of adult children to age 26;
- Uniform explanations and standardized definitions; and
- Cost reporting and rebates for insured plans.

We provided a summary of these rules in our week 1 alert, available at: http://haynesbenefits.com/admin/uploads/Week%201%20%20Market%20and%20Access_Revised.pdf.

Grandfathered plans also must be amended to comply with the following mandates under the Act, by the plan year beginning on or after January 1, 2014:

- Pre-existing condition exclusions for all covered individuals;
- Some annual limits; and
- Waiting periods in excess of 90 days.

We provided a summary of these rules in our week 2 alert, available at: http://haynesbenefits.com/admin/uploads/Week%202%20Health%20Insurance%20Market%20Reforms.pdf

Other changes not required for grandfathered plans. The other rules discussed in our prior alerts will not apply to grandfathered plans. Changes not required include preventive health services, emergency services, choice of provider, pediatric care, obstetrical/gynecological care, and the new appeals process.

We provided a complete list and summary of these rules in our week 1 and 2 alerts.

Update on adult children to age 26. Some insurers have expressed an interest in providing adult child coverage immediately, retroactive to March 30, 2010, rather than waiting until the effective date under the Act.

Why? To provide continued coverage for full-time students graduating in May or June, 2010, who would lose full-time student status and dependent coverage under their parent's employer provided coverage, but could be entitled to have their health coverage reinstated later in 2010 or in 2011.

In response to this interest by some insurers, IRS Notice 2010-38 provides guidance with respect to pre-tax coverage for eligible adult children in 2010 (which may be retroactive to March 30, 2010). The notice clarifies that, while adult child coverage is only required for insured or self insurance coverage purposes until the attainment of age 26, tax excluded coverage may be provided until the end of the calendar year in which the adult child attains age 27. The notice also addresses the timing of amendments to group health plans, related cafeteria plans, health flexible spending account plans, health reimbursement arrangements, voluntary employee beneficiary associations, retiree health accounts and payroll tax withholding. In order to provide this coverage on a pre-tax basis, amendments to group health plans, cafeteria plans and other related documents must be adopted in 2010.

Our next email alert will discuss the new exchange rules which become effective in 2014.

May 12, 2010