

Extension of Self-Insured Health Plan Nondiscrimination Requirements to NonGrandfathered Insured Plans

Prior to the Patient Protection & Affordable Care Act (PPACA), Internal Revenue Code nondiscrimination rules applied only to self-insured health plans. Thus, over the years, many employers have adopted fully insured plans that provide key employees with more favorable eligibility rules (i.e. coverage immediately available for executives but coverage available for others after 90 days) or that provide key employees with more favorable coverage (i.e. tax free reimbursements for out of pocket medical, dental or vision expenses not covered under the health plans generally available to employees). Similarly key employees upon retirement or pursuant to severance agreements might be eligible for eligibility or benefit provisions more favorable than what is generally available to employees.

Dramatically changing the rules after 30 years, effective for plan years beginning after September 23, 2010, PPACA makes employer group health plans that are fully-insured subject to nondiscrimination rules which generally prohibits discrimination as to eligibility to participate in the plan and benefits provided with respect to 10% shareholders, the five highest paid officers and the highest paid 25% of employees.

Action: Plan design will now have to consider the effects of the Nondiscrimination requirements in determining eligibility to participate and benefits provided under the plan.

"Grandfathered health plans" are exempt from this provision. Generally, PPACA does not apply to health plans that existed on the date of enactment. PPACA provides special rules for these grandfathered health plans exempting them from some of the provisions of PPACA and delaying the effective dates with respect to other provisions of PPACA.

A "grandfathered health plan" is a group health plan in which an individual was enrolled on March 23, 2010, regardless of whether the coverage is renewed after such date. This includes coverage of new employees who enroll after the date of enactment if such enrollment is permitted under the terms of the plan on the date of enactment without causing the plan to lose "grandfathered health plan" status.

Significant issues will arise as to grandfathered discriminatory insured health plans. PPACA does not explicitly prevent plan amendments but PPACA provides no guidance on what plan amendments or other actions may cause a group health plan to lose grandfathered status. Employers urgently need additional guidance to clarify what actions they may take without causing a grandfathered health plan to lose its grandfathered status.

Action: Until such guidance is issued, special caution by employers will be needed to avoid taking actions that may adversely affect the grandfathered status of their plans.