

Impact of Healthcare Reform on Labor Relations

Kenneth A. Jenero
Partner

Holland & Knight LLP

131 S. Dearborn Street, 30th Floor

Chicago, Illinois 60603

Tel: 312-715-5790

Fax: 312-578-6666

kenneth.jenero@hklaw.com

Impact on Collectively Bargained Plans

- Need to understand rules applicable to “grandfathered plans”
- Collectively bargained plans generally are treated as “grandfathered plans”
- Special rule for insured collectively bargained plans
 - No loss of grandfathered status at least until the last of the collective bargaining agreements including the plan terminates

Impact on Collectively Bargained Plans

- A grandfathered plan is a group health plan that was in effect on March 23, 2010
- Certain mandates and requirements will not apply to a grandfathered plan
- Others will have a delayed effective date

Provisions That Do Not Apply to Grandfathered Plans

- Extension of rules prohibiting discrimination in favor of highly compensated employees to fully-insured plans
- Extension of the rules prohibiting discrimination on the basis of health status-related factors to fully-insured plans
- Prohibition against group health plans imposing annual cost-sharing rules different from those imposed for "essential health benefits" arrangements

Provisions That Do Not Apply to Grandfathered Plans

- Required coverage for certain preventive medicine services (including immunizations and screenings for infants, children, adolescents) with no cost-sharing
- Rule requiring equal cost-sharing for emergency services regardless of whether the services are in-network or out-of-network
- Rule providing that group health plans covering emergency services must cover such services without the need for prior authorization

Provisions That Do Not Apply to Grandfathered Plans

- Rule providing that group health plans requiring participants to designate a primary care provider must allow the participants to choose any provider in the plan's network
- Rule prohibiting group health plans from requiring authorization or referral before a female participant may seek obstetrical or gynecologic care from a professional specializing in such care

Provisions That Do Not Apply to Grandfathered Plans

- Requirement that all group health plans implement an "effective appeals process" and "external review process" for coverage determinations and claims
- For plan years before January 1, 2014, grandfathered plans do not need to extend coverage to adult dependents (i.e., children up to age 26) who are eligible to enroll in another health plan sponsored by the adult dependent's employer

Basic Conditions for Maintaining Grandfathered Status

- Plan must include in plan materials:
 - Description of benefits provided under the plan
 - Statement that the plan believes it is a grandfathered plan
 - Contact information for questions and complaints
- Plan must maintain records documenting the terms of the plan that were in effect on March 23, 2010
- Plan may be modified only within parameters prescribed in the regulations

What Will Cause a Loss of Grandfathered Status

- Elimination of all or substantially all of the benefits to diagnose or treat a condition, or any necessary element to diagnose or treat a particular condition
- Any increase in a participant's co-insurance percentage for health insurance or benefits
- An increase in the dollar amount of participants' deductibles or out-of-pocket limits, if the increase exceeds the medical inflation rate plus 15%

What Will Cause a Loss of Grandfathered Status

- An increase in the dollar amount of a co-payment, if the increase exceeds the greater of \$5.00, as adjusted annually for medical inflation, or the medical inflation rate plus 15%
- A decrease in the percentage the employer pays of the cost of any tier of coverage by more than 5%

What Will Cause a Loss of Grandfathered Status

- Imposition of a new annual dollar limit on the amount the plan will pay for covered services
- Imposition of annual limits that are lower than a former lifetime dollar limit
- For insured plans, entering into a new policy, certificate or contract of insurance

What Will Cause a Loss of Grandfathered Status

- Impermissible changes made prior to June 14, 2010 will not result in loss of grandfathered status if:
 - They are revoked or modified as of the first day of the first plan year on or after September 23, 2010, and
 - The plan, as modified, otherwise complies with the requirements for maintaining grandfathered status as of such date

What Will Not Cause a Loss of Grandfathered Status

- Changes in the dollar amount of deductibles, out-of-pocket limits or co-payments that are smaller than those that will trigger a loss of grandfathered status per the regulations
- Changes to comply with the Health Care Reform Act or other federal or state legal requirements
- Normal enrollment of employees and family members who were not enrolled on March 23, 2010

What Will Not Cause a Loss of Grandfathered Status

- Employees' normal election changes
- For insured plans, renewing the current carrier
- For self-insured plans, changing third party administrators

Consequences of Loss of Grandfathered Status

- Plan immediately will become subject to all of the Act's mandates
- Employer (or in the case of a multi-employer plan, the plan) will be subject to excise taxes
 - \$100 per day for each affected individual up to the date of correction

Grandfathered Status for Collectively Bargained Plans

- Regulations did not provide answers that unionized employers had hoped for
- Collectively bargaining plans ratified before March 23, 2010 are grandfathered plans that generally are subject to the rules applicable to other grandfathered plans
- There is no delayed effective date different from that applicable to other grandfathered plans

Grandfathered Status for Collectively Bargained Plans

- Collectively bargained plans that are self-insured receive no special protection from loss of grandfathered status; they are treated as non-collectively bargained plans for purposes of the grandfathered plan rules
- Regulations provide limited relief for insured single-employer and multi-employer collectively bargained plans

Rules for Grandfathered Insured Collectively Bargained Plans

- Insured collectively bargained plan will not lose its grandfathered status until the termination of the last collective bargaining agreement relating to the coverage
- Insured collectively bargained plan will not lose grandfathered status during the term of the current collective bargaining agreement, even if otherwise impermissible changes are made to the plan

Rules for Grandfathered Insured Collectively Bargained Plans

- No "free pass" for any cost and coverage changes made during the term of the collective bargaining agreement
- Potential loss of grandfathered status is merely delayed until the termination of the last collective bargaining agreement relating to the coverage

Rules for Grandfathered Insured Collectively Bargained Plans

- After the termination of the collective bargaining agreement, changes made to the plan after March 23, 2010 will be compared to the terms of the plan as they existed on March 23, 2010 to determine if the insured plan retains grandfathered plan status
- Plan that retains post-termination grandfathered status will lose its status immediately upon making any of the impermissible changes

Rules for Grandfathered Insured Collectively Bargained Plans

- Any change in insurance issuers during the term of the current collective bargaining agreement, by itself, will not affect grandfathered plan status
- Any change to a new group insurance policy after the expiration of the current collective bargaining agreement will result in loss of grandfathered plan status

Collective Bargaining and Labor Relations Strategies

- Determine status of group health plans
 - Insured vs. self-insured
 - Grandfathered status
- Determine timing of the applicable health reform mandates
- Determine which of the applicable mandates will require plan changes

Collective Bargaining and Labor Relations Strategies

- Determine cost of applicable mandates and required plan changes
- Evaluate importance of maintaining grandfathered status
 - Costs and administrative burdens associated with maintaining a grandfathered plan
 - Cost-savings and other business-related benefits that may be gained due to the grandfathered plan exemptions

Collective Bargaining and Labor Relations Strategies

- Ensure that structural changes to the plan are consistent with the desired objective regarding grandfathered plan status
- Document the plan or policy terms on the grandfather date
- Determine if collective bargaining agreements permit mid-term changes to address additional costs caused by the mandates

Collective Bargaining and Labor Relations Strategies

- Healthcare/economic reopener clauses
- Management rights clauses
- Reserved rights to modify terms of benefit plans
- Adopt longer-term strategies, assess trade-offs and anticipate health care rules

Collective Bargaining and Labor Relations Strategies

- Develop specific strategy for addressing 2014 minimum essential coverage requirements and related insurance market reforms
 - Develop and offer compliant plans to avoid penalties
 - Negotiate out of contractually required health coverage (or unilaterally cease providing insurance after bargaining to impasse) and pay “pay or play” penalty

Collective Bargaining and Labor Relations Strategies

- Provide unaffordable or inadequately subsidized health coverage and pay “pay and play” penalty
- Build maximum flexibility into collective bargaining agreement to respond to unknowns
 - Shorter duration contracts
 - Health care/economic reopener provisions

Collective Bargaining and Labor Relations Strategies

- Provision stating that unionized employees will receive the same benefits as those in effect for other employees
- Create environment of transparency regarding the financial impact of healthcare reform
- Consider using alternative bargaining model: "interest-based" versus "rights based" bargaining

Collective Bargaining and Labor Relations Strategies

- Ensure satisfaction of contractual obligations and statutory bargaining obligations