Departments Propose Keeping Grandfathered Health Plans Alive Longer

Proposed rule would let grandfathered plans increase cost-sharing

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Grandfathered group health plans may be on life support, but federal regulators would like to see them hang on a bit longer.

On June 15, the U.S. Departments of Labor, Health and Human Services, and the Treasury published in the *Federal Register* a proposed rule (https://www.federalregister.gov/documents/2020/07/15/2020-14895/grandfathered-group-health-plans-and-grandfathered-group-health-insurance-coverage) to amend the requirements for grandfathered group health plans, which would help employers to preserve their plans' grandfathered status. The departments are accepting comments on the proposal through Aug. 14, 2020.

Grandfathered plans contain major provisions (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/faqs-grandfathered-plans.aspx) that have gone unchanged since March 23, 2010, the date on which the Affordable Care Act (ACA) became law. They are subject to some of the ACA's requirements, such as the prohibition on the exclusion of participants with pre-existing conditions, but are exempt from many others. Grandfathered plans need not cover preventive care at no cost to employees or impose out-of-pocket spending limits for in-network care, for instance.

To stay grandfathered, these plans cannot significantly raise co-payment charges or deductibles or make other kinds of cost and coverage changes.

Grandfathered plans can be fully insured or self-funded, in either the small-group or large-group market.

Proposed Changes

In February 2019, the departments issued a request for information (RFI) asking employers whether any of the requirements for maintaining grandfathered status created challenges, and how these requirements could be modified to reduce those challenges.

Based on that feedback, the proposed rule would provide greater flexibility for grandfathered group health coverage in two ways:

- **By clarifying that grandfathered group health coverage offered through a high-deductible health plan (HDHP) may increase fixed-amount cost-sharing requirements**—such as co-payments, deductibles and out-of-pocket maximums—to the extent necessary to maintain HDHP status without losing grandfathered status.
  "This change would ensure that participants and beneficiaries enrolled in that coverage remain eligible to contribute to a health savings account," the agencies' announcement stated. HSAs must be linked with health plans that meet HDHP thresholds, adjusted annually by the IRS (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/irs-2021-hsa-contribution-limits.aspx).
- **By providing an alternative method of measuring permitted increases in fixed-amount cost-sharing** that would allow plans to better account for changes in the costs of health coverage over time. The proposed rule would allow plan sponsors to implement fixed-cost cost-sharing increases using either the consumer price index measure of medical inflation under final regulations issued in 2015 (https://www.federalregister.gov/documents/2015/11/18/2015-29294/final-rules-for-grandfathered-plans-preexisting-condition-exclusions-lifetime-and-annual-limits) or the premium-adjustment percentage that the Department of Health and Human

Services publishes in its annual notice of benefit and payment parameters (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/hhs-2021-health-plan-parameters-raise-out-of-pocket-maximums.aspx), whichever is greater. Many believe that the notice is a more appropriate measurement of changes in health care costs over time than medical inflation based on the consumer price index.

These alternatives would apply only to increases occurring after the final rule became effective.

"The fact that a significant number of grandfathered group health plans remain indicates that some employers have found value in preserving grandfathered status," said Jeanne Klinefelter Wilson, acting assistant secretary for the Employee Benefits Security Administration. She called the proposed rule "an important step toward enabling these plans to continue offering affordable coverage while also enhancing their ability to respond to rising health care costs."

Some oppose the proposed changes. "Grandfathered health plans do not have to cover preventive care without cost-sharing," tweeted (https://twitter.com/LouiseNorris/status/1281604012043837440) health care writer Louise Norris when a draft of the proposal was released on June 10. "I often hear from people who wonder why their health plan doesn't cover checkups, vaccines, birth control, etc., at no cost... the answer is because the plan is grandfathered."

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Staying Grandfathered

According to research by the nonprofit Kaiser Family Foundation, 22 percent of U.S. employers providing health benefits offered at least one grandfathered health plan (https://www.kff.org/report-section/ehbs-2019-section-13-grandfathered-health-plans/#:~:text=The%20Affordable%20Care%20Act%20%28ACA%2cwith%20the%20new%20benefit%20and) in 2019. The share of workers covered by grandfathered plans has been falling steadily, however, from 56 percent in 2011 to 13 percent last year.

"Quick action on the part of the [federal] departments might stabilize the number of employer plans that retain grandfathered status (http://locktonbenefitsblog.com/federal-agencies-request-information-regarding-grandfathered-health-plans/)," wrote Jay Kirschbaum, vice president of compliance services at Lockton Benefit Group in Kansas City, Mo., in response to the RFI.

Keeping plans grandfathered isn't easy, he noted, and among employers that desired to keep grandfathered status, "many may have inadvertently lost that status over the years."

Coverage and Costs

"While grandfathered plans provide employers with some flexibility to exclude certain services from coverage, such as any of the essential health benefits (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/aca-coverage-terms.aspx#essential-health-benefits), they have had distinct disadvantages" for employers as well, said Kim Buckey, vice president of client services at Burlington, Mass.-based DirectPath, a benefits education, enrollment and health care transparency firm. For instance, employers have been severely limited in how much they can increase premiums (no more than 5 percent annually) and co-insurance or co-pays (no more than the rate of medical inflation), she explained, "which are all tools employers typically use to keep the coverage they offer affordable."

While the new rule might seem to be allowing grandfathered plans to effectively raise their cost-sharing, Buckey said, "in actuality, the rule merely allows grandfathered plans to continue to meet the definition of high-deductible plans as that threshold changes—which, in turn, will maintain participants' ability to contribute to an HSA. The second part of the rule has a similar effect—merely moving grandfathered plans in lockstep with health care cost inflation to be consistent with other plans."

Nevertheless, Buckey cautioned employers with grandfathered plans that "there may be a negative impact on attracting and retaining talent if the plan has not adopted some of the key provisions of the ACA, such as 100 percent coverage of preventive care. However, some employees may find the trade-off of a lower relative plan premium worth it."

Related SHRM Article:

Is It Time to Let Grandfathered Health Plans Finally Retire? (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/is-it-time-to-retire-grandfathered-health-plans.aspx), *SHRM Online*, March 2019