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PPACA Nondiscrimination Rule

Could it affect your clients' group health plan coverage?

To assist you in working with your clients, this Briefing provides more information on the nondiscrimination rules and grandfathered plans.

In our renewal notification letters to groups, starting with Oct. 2010 renewals, Rocky Mountain Health Plans (RMHP) will address the nondiscrimination rule and how grandfathered status will effect whether or not a plan is subject to a penalty if it is found to be discriminatory. A sample of the small group renewal notice is [provided here](#).

Nondiscrimination Provision – Background

The PPACA prohibits fully-insured group health plans from discriminating in favor of highly compensated individuals. PPACA states that nondiscrimination rules, similar to those currently in place for self-funded plans, now apply to fully insured plans. **The nondiscrimination rule goes into effect for plan years beginning on or after Oct. 1, 2010.**

As of this writing, clarifying regulations have not been published regarding this provision. The following detail is based on the rules in section 105(h) of the Internal Revenue Code of 1986 which only applies to self-funded plans. There are TWO TESTS an employer must pass in order to be considered a nondiscriminatory plan;

- Eligibility Tests
- Benefit Coverage Tests

Until regulations are issued, it is difficult to determine how the discrimination prohibitions will actually be applied to insured health plans and the details below may change. To follow is what we know today.

As always, if you have any questions, comments or need assistance, please call your Rocky Mountain Health Plans or CNIC Account Executive.

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Eligibility Test:

A group health plan must pass one of the three following coverage tests to be considered nondiscriminatory with respect to eligibility:

- 1) At least 70 percent of all employees (may include retirees) benefit from the plan (i.e., are enrolled in the health plan) or
- 2) At least 70 percent of all employees (may include retirees) are eligible and at least 80 percent of those eligible employees benefit from the plan (are enrolled) or
- 3) The plan benefits a nondiscriminatory classification of employees. Since discrimination is determined on a plan-by-plan basis, it is possible for an employer to have both discriminatory and nondiscriminatory plans.

Certain employees may be excluded from the eligibility tests, including:

- Those who have less than three years of service at the beginning of the plan year;
- Those who are younger than age 25 at the beginning of the plan year;
- Part-time or seasonal employees (defined below);
- Those who are covered under a collective bargaining agreement and;
- Nonresident aliens who receive no income from a U.S. source

Part-time or Seasonal — part-time employees are defined as an employee working less than 35 hours per week. Seasonal employees are defined as an employee whose customary annual employment is less than nine months. These definitions are in section 105(h)(2) of the Internal Revenue Code. However, this could change with regulations for insured plans. For comparison, PPACA defines full-time as an employee whose *hours of service* is on average 30 or more hours per week in any given month in the section referring to *large employers*.

Benefits Test:

The benefits provided under the group plan must not discriminate in favor of highly compensated individuals. Employer groups that offer a richer plan (or provide higher contribution) to management, or exclude classes of individuals from coverage, may be considered as discriminating in favor of highly compensated individuals.

Penalty:

Unlike the tax penalties under the rules that apply to self-funded plans, employers who offer non-grandfathered plans which are considered discriminatory in favor of highly compensated employees may be subject to penalties for violation of the Public Health Service Act.

Maintaining Grandfathered Status

As stated above, a plan can be considered discriminatory and avoid a penalty if it is a grandfathered plan.

Moreover, for plans that maintain grandfathered status beyond 2013, they will not be subject to the following PPACA provisions:

- 1) For small employer groups, their health plan will not be included in the single risk pool (required for plans offered in and out of the Exchange) for rating purposes starting in 2014.

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- 2) The plan will not be required to provide the essential benefits package at one of the four coverage levels (bronze, silver, gold or platinum).
- 3) Grandfathered plans will not be offered in the Exchange.

Is it important for your client to maintain a grandfathered plan?

Keep in mind that prior to 2014,

- Grandfathered status does not have any impact or affect on the rate development process in place today for small or large groups.
- RMHP is adopting all PPACA consumer protections for all group and most individual plans – grandfathered and non-grandfathered.

The grandfathered plan rules described below were published in the Federal Register - Interim Final Rules, released June 17, 2010, by the Department of the Treasury, Department of Labor and Department of Health and Human Services. Comment period is open through Aug. 16, 2010. No timeline has been presented for final regulations which may differ from those in the IFR. [Click here for a link to the Interim Final Rules.](#)

What changes WILL NOT result in a plan losing its Grandfathered status?

- Adding new family members to a grandfathered plan
- Adding new employees to a grandfathered plan
- Employees voluntarily making a plan change to a different plan that was in place on March 23, 2010. (Applies to employers offering more than one plan design, as long as all plans had at least one person enrolled in the plan on March 23, 2010)
- Amendments required to conform to legal requirements/changes (Federal & State mandates)
- **Voluntary adoption of PPACA consumer protections***
- Plan design changes by the health plan to increase benefits, including addition of ancillary coverage by employer
- Changing existing plan Deductible and/or OOP Max amounts by less than the sum of medical inflation, as defined by statute (4 percent in 2010) plus 15 percent.
- Changing existing plan copayments by an amount that is less than:
 - The sum of medical inflation plus 15 percent OR
 - \$5 increased by medical inflation
- For self-funded plans, changing TPAs

*RMHP will be adopting all PPACA consumer protection mandates to all grandfathered and non-grandfathered plans, effective October 1. This includes large and small group plans and individual plans. Large employers can chose to wait until their anniversary for mandated changes.

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What actions cause a plan to lose its Grandfathered status?

- Increasing Member coinsurance at any level (example: change from 20 percent to 30 percent)
- Changing existing plan Deductible and/or OOP Max amounts by more than the sum of medical inflation plus 15 percent.
- Changing existing plan copayments by an amount that exceeds the greater of:
 - The sum of medical inflation plus 15 percent OR
 - \$5 increased by medical inflation
- Decreasing existing plan coverage, including elimination of benefits to treat a specific condition – this may include ancillary plans, such as dental, vision, or chiropractic coverage offered by employer, but does not include the elimination of a life or disability group policy
- **Employer actions, including:**
 - Any merger, acquisition or similar business restructuring for the primary purpose of covering new individuals under a grandfathered plan
 - Decreasing employer contribution toward any tier of coverage for any class of similarly situated individuals by more than 5 percent of the current contribution rate
 - Eliminating a plan option, causing employees to transfer to another plan. This includes a plan change at renewal or elimination of a plan when multiple plans are available and there is no bona fide employment-based reason to transfer employees. *A bona fide employment-based reason would include a group health plan with different plans based on location. If one location closes and employees are moved to another plan, this employer action would not cause the loss of grandfathered status.*
 - Changing fully-insured group or individual health plan carriers

Grace Period to Revoke or Modify Plan:

If changes were made that caused a plan to lose its grandfathered status prior to June 14, 2010, the plan can revoke or modify the changes back to the plan in place on March 23, 2010, effective on their next anniversary to reinstate grandfathered status. In other words, employer groups that made changes in April, May or June 2010, that caused their plan to lose grandfathered status, can modify the plan or revoke their actions back to their original state as of March 23, 2010 at their next renewal in 2011.

Steps to avoid a Discrimination Penalty

There are two ways to avoid a penalty under the discrimination rule of PPACA.

- Maintain grandfathered status. If an employer made a plan change in April, May or June, 2010, the employer has until their next renewal to revoke the change or;
- If the plan currently fails the eligibility and/or benefit tests and is not grandfathered, the employer can bring the plan into compliance with nondiscrimination criteria without incurring penalties. This approach only applies to RMHP plans with renewal dates of September 2010, or before. Employers with renewal dates after Oct. 1, 2010, may incur a penalty for every day they are not in compliance.

Conclusion

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Whether it is valuable for an employer to maintain grandfathered status for purposes of the nondiscrimination rules is a decision each employer must make in consultation with their broker, tax advisor or legal counsel. While maintaining grandfathered status has some benefits once the Exchange is established, it may negatively affect the employer's ability to control benefit costs. For example, maintaining grandfathered status would prohibit an employer from switching to a lower-priced plan with higher levels of cost sharing. Special consideration should be given to employers with management-only carve outs or plans that currently can not pass the nondiscrimination rules related to eligibility and benefit tests.

Since final regulations related to the grandfathered provision and nondiscrimination rules have not been released, some of the provisions discussed above may change. We will keep you informed of any changes related to these two provisions and how they affect each other.