Compliance Alert

On Monday June 14th the IRS, DOL, and HHS jointly released interim final rules regarding health reform grandfathered plan status. Some of the rules contained in the Affordable Care Act do not apply to grandfathered plans so employers have been waiting to find out what kind of changes can be made to a plan and still retain its grandfathered status. The rules will be published in the Federal Register on June 17th. The rules contain a few surprises and still leave a large question unanswered.

Changes that cause a loss of grandfathered
Most of the changes that will cause a plan to lose its grandfathered status are related to reductions in benefits provided to employees. It seems that the grandfathered plan rules are designed to give employers a reason to keep benefits at or near current levels.

Plan will lose their grandfathered status if they make changes that exceed certain parameters when compared to the plans polices in effect on March 23, 2010. The following changes would cause a plan to lose grandfathered status:

- A significant cut or reduction in benefits for specific conditions. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
- Raising co-insurance that is based on a percentage. Plans cannot raise the % charged for co-insurance (for example raising the hospital co-pay from 20% to 30%).
- Significantly raising deductibles or fixed co-payment charges. Deductibles and fixed-dollar co-payments cannot be raised more than a specified amount. New deductibles and co-payments will be compared to those in effect on March 23, 2010. To retain grandfathered status plans can increase deductibles and co-pays by no more than a fixed percentage or $5 whichever is greater. The allowed percentage increase is calculated by adding medical inflation since March 23, 2010 plus 15%. For example – If the medical inflation rate equals 6% between March 23, 2010 and the date the deductible will be raised, an employer could increase deductibles and co-pays up to 21% and still retain grandfathered status.
- Reducing employer contributions. To retain grandfathered status, plans cannot decrease the percent of premiums the employer pays by more than 5 % (for example an employer would lose grandfathered status if they decrease their own share and increase the workers' share of premium from 15% to 25%).
- Reduce annual limits. To retain their status as grandfathered plans, plans cannot reduce the annual dollar limit in place as of March 23, 2010. Plans that did not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit.
- Change Insurance Companies. In what was a surprise rule for many observers, if an employer changes the insurance company for a fully insured plan, the plan will lose grandfathered status. This rule does not apply to self-funded plans.

Disclosure to Participant
Grandfathered plans must include a disclosure in plan materials that the plan believes that it is a grandfathered plan and therefore is not subject to some of the provisions of the Affordable Care Act. The rules contain model language that can be used for this purpose.

Transition Rules
If employers have already made changes to their plans since March 23, 2010 which will cause the loss of grandfathered status, the rules allow the changes to be rescinded or reduced to a level that maintains grandfathered status on the next plan year beginning after September 23, 2010.

In the preamble to the rules the agencies also state that they will take into account good faith efforts to comply and will not enforce the grandfathered rules for changes that "modestly exceed" changes allowed in the rule. However, no guidance is provided as to what would constitute "modestly exceed"

so this statement is of little value to employers who have already made plan changes this year that exceed what is allowed. Additional guidance is needed before employers can assume any recently enacted changes can be ignored.

So What?

Possibly the most important question employers need to answer is does it even matter if their plan loses grandfathered status? The most significant provisions an employer would need to implement if a plan loses grandfathered status include the following:

- Certain preventive care services will need to be covered with no co-pays or deductibles
- Adult children to age 26 would be eligible for coverage even if they are eligible for other employer sponsored group coverage
- Fully-insured plans would be subject to the Section 105 non-discrimination rules
- Plans would need to comply with new appeals rules
- Certain "patient protection" rules would apply, including a requirement for members to have primary care access to pediatricians and OB/GYNs

When considering the additional requirements that must be met, many employers may simply conclude that it is not worth trying to maintain grandfathered status.