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Proposed Rule to Increase Flexibility for Grandfathered Plans

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The Departments of Labor, Health and Human Services, and the Treasury (collectively, “the Departments”) recently released a notice of proposed rulemaking regarding grandfathered group health plans and grandfathered group health insurance coverage. If finalized, the proposed rule would amend current rules to:

- provide greater flexibility for certain grandfathered group health plans to make changes to fixed-amount cost-sharing requirements without causing a loss of grandfather status.
- ensure that high deductible health plans (“HDHPs”) are able to comply with minimum cost-sharing requirements so enrolled individuals are eligible to contribute to health savings accounts (“HSAs”).

The Departments note that there is no authority for non-grandfathered plans to become grandfathered, and therefore the proposed rule does not provide any opportunity for a plan or coverage that has lost its grandfather status to regain that status.

Background

In general, section 1251 of the Affordable Care Act (“ACA”) provides that certain group health plans and health insurance coverage existing as of March 23, 2010, the date of enactment of the ACA, (referred to collectively in the statute as grandfathered health plans) are not subject to all of the ACA’s mandated provisions. In November 2015, the Departments issued final regulations that identified certain types of changes that, if made to a grandfathered plan or coverage, would result in a loss of grandfather status. These types of changes generally include an increase in fixed-amount cost-sharing above certain thresholds, decrease in employer contributions, and elimination of substantially all benefits to diagnose or treat a condition.

In response to a 2017 Executive Order, the Departments issued a request for information regarding grandfathered group health plans and grandfathered group health insurance coverage (“2019 RFI”). These proposed regulations are based on the feedback received from stakeholders who submitted comments in response to the 2019 RFI.

Proposed Regulations

Alternative Inflation Adjustment

Under the 2015 final regulations, group health plans and group insurance coverage would lose grandfather status if there is any increase in:

- Fixed-amount cost-sharing requirement other than a copayment (e.g., deductible or out-of-pocket limit), determined as of the effective date of the increase, if the total percentage increase in the cost-sharing requirement measured from March 23, 2010 exceeds the “maximum percentage increase.” For this purpose, the “maximum percentage increase” means medical inflation, expressed as a percentage, plus 15%.
- Fixed-amount copayments (when measured from March 23, 2010) above the greater of \$5 plus medical inflation or the “maximum percentage increase.”

The proposed regulations include a revised definition of “maximum percentage increase” to provide an alternative method of measuring “maximum percentage increase” based on the premium adjustment percentage (rather than medical inflation) which is used to calculate other ACA inflation adjusted variables such as the annual employer mandate penalties under IRC Section 4980H and the maximum annual limit on cost-sharing. This alternative standard would not supplant the current standard; rather, it would be available to the extent it yields a greater result than the current standard, and it would apply only with respect to increases in fixed amount cost-sharing requirements that are made effective on or after the effective date of the final rule.

Under the proposed rule, the maximum percentage increase means the greater of:

- medical inflation, expressed as a percentage, plus 15 percentage points; or
- the portion of the premium adjustment percentage, that reflects the relative change between 2013 and the calendar year prior to the effective date of the increase (that is, the premium adjustment percentage minus 1), expressed as a percentage, plus 15 percentage points.

HDHPs

The proposed regulations clarify that grandfathered group health coverage that is an HDHP may increase fixed-amount cost-sharing requirements, such as deductibles, to the extent necessary to maintain their status as an HDHP without losing grandfather status. This change would ensure that participants and beneficiaries enrolled in that coverage remain eligible to contribute to an HSA. The proposed rule notes the annual cost-of-living adjustment to the required minimum deductible for an HDHP has not yet exceeded the maximum percentage increase that would otherwise cause an HDHP to lose grandfather status.

Employer Action

The Departments are issuing the proposed rule with a request for public comment by August 14, 2020. For now, employers with grandfathered group health plans should await release of final regulations and review any changes from the proposed regulations. The amendments to the 2015 final rules that are included in these proposed rules would apply to grandfathered group health plans and grandfathered group health insurance coverage beginning 30 days after the publication of any final rules. The proposed rule should not be relied upon until finalized.