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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: IS IT WORTH MAINTAINING GRANDFATHERED STATUS UNDER THE NEW HEALTH CARE LAW?

The Patient Protection and Affordable Care Act, as amended ("PPACA"), contains a provision titled "Preservation of Right to Maintain Existing Coverage." This provision, also known as the "Grandfathered Plan Rule," exempts certain preexisting group health plans ("Grandfathered Plans") from complying with certain provisions of PPACA and postpones the effective date for other provisions.

PPACA is silent regarding the changes that group health plan sponsors can make to group health plans while retaining Grandfathered Plan status, leaving that question to be addressed by regulatory guidance. On June 14, 2010, the Departments of Health and Human Services, Treasury, and Labor (the "Departments") issued interim final regulations setting forth the requirements that group health plans must follow to retain Grandfathered Plan status, including provisions addressing how the Grandfathered Plan Rule applies to collectively bargained plans. This *Commentary* will focus on how Grandfathered Plans may maintain their status (apart from the special collective bargaining rules) and the benefits of maintaining that status.[1]

A separate *Jones Day Commentary* dealing with the collective bargaining agreement issues, "Surprise for Employers: No Collective Bargaining Exception Under Health Care Reform," can be found on the Jones Day web site. For a more detailed overview of PPACA, see the Jones Day White Paper, "Impact of Health Care Reform Legislation on Employer-Sponsored Group Health Plans" (April 2010), which is also on the Jones Day web site.

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1 The PPACA changes also apply to health insurance policies issued by insurance companies. Except as expressly noted, the discussion in this *Commentary* about group health plans and the effect of the Grandfathered Plan Rules on those plans applies equally to health insurance policies. Of course, an employer's group health plan may provide coverage through a health insurance policy.

In drafting the regulations, the Departments sought to balance providing adequate flexibility to plan sponsors with the congressional goal of preserving individual rights to remain enrolled in the coverage that was in effect on March 23, 2010. In the Departments' view, allowing plan sponsors complete freedom to change the terms of a Grandfathered Plan would be inconsistent with congressional objectives. Accordingly, the Departments designed the regulations with the intent that only reasonable changes routinely made by plan sponsors would allow the plan to retain its Grandfathered Plan status.

The regulations may make it difficult for many Grandfathered Plans to retain their status over the long term. Rather than preserving perpetual Grandfathered Plan status, the goal of the regulations is to ease transition into the reforms established by PPACA by allowing for gradual implementation of those reforms. In fact, the Departments anticipate that, over time, most Grandfathered Plans will lose their status and eventually be required to adopt all of the changes required under PPACA.[2] In the view of the Departments, the economic impact of the regulations will result in "a one-way sorting process" in which plan sponsors and issuers decide whether and when to relinquish Grandfathered Plan status based on a determination of whether the rules applicable to Grandfathered Plans are more or less favorable (or costly) than those applicable to non-Grandfathered Plans.

The first step in this sorting process is to evaluate the costs and administrative burdens associated with maintaining a Grandfathered Plan. These considerations are discussed in Sections I through III below. These considerations must then be balanced against the cost savings and other business-related benefits that may be gained due to the Grandfathered Plan exemptions under PPACA. These exemptions are discussed in Section IV. Plan sponsors and issuers should also bear in mind the PPACA provisions that apply regardless of whether a plan relinquishes its status as a Grandfathered Plan. These provisions are summarized briefly in Section V.

2 In fact, the Departments' mid-range estimate is that 66 percent of small employer plans and 45 percent of large employer plans will have relinquished Grandfathered Plan status by 2013.

I. WHAT IS A GRANDFATHERED PLAN?

Under PPACA and the interim regulations, a group health plan or insurance coverage (both referred to in this *Commentary* as a "plan" for ease of reference) is a "Grandfathered Plan" if it was in existence on March 23, 2010 and has continuously covered someone (not necessarily the same person) since that time. Grandfathered Plan status extends to individuals who were enrolled in the plan on March 23, 2010, and to new enrollees, which may include family members of current enrollees as well as newly eligible employees and their family members. The determination of Grandfathered Plan status is made separately with respect to each "benefit package" made available under a plan, although the term "benefit package" is not defined in the regulations.

In order to maintain status as a Grandfathered Plan, the following conditions must be satisfied:

- The plan must include in plan materials provided to participants or beneficiaries (*e.g.*, summary plan descriptions or certificates of coverage) a description of the benefits provided under the plan, a statement that the plan believes it is a Grandfathered Plan, and contact information for questions and complaints. The regulations contain model language to be used for this purpose.
- The plan must maintain records documenting the terms of the plan that were in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its status as a Grandfathered Plan. These documents may include, for example, past and current plan documents, insurance policies, contracts or certificates, summary plan descriptions, and documentation regarding premiums or coverage costs and required participant contribution rates. The plan must maintain these records and make them available for examination by a participant or regulating agency for as long as the plan takes the position that it is a Grandfathered Plan.
- The terms of coverage under the plan may be modified only within the parameters described in Section II below, and may not be manipulated in violation of the "anti-abuse" rules described in Section III below.

II. HOW CHANGES TO A PLAN AFFECT GRANDFATHERED PLAN STATUS

A. Changes that Will Cause a Grandfathered Plan to Lose Its Status. A Grandfathered Plan will lose its grandfathered status if it makes any of the following changes relative to its terms in effect on March 23, 2010:

- **Significantly Cut or Reduce Benefits**. A plan will cease to be a Grandfathered Plan if it eliminates all or substantially all of the benefits to diagnose or treat a condition, or any necessary element to diagnose or treat a condition. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis, or HIV/AIDS, it would cease to be a Grandfathered Plan. Similarly, if the plan provides benefits for a mental health condition, the treatment for which is a combination of counseling and prescription drugs, the plan could not eliminate counseling benefits without losing Grandfathered Plan status.
- **Raise Percentage of Coinsurance**. Generally, a plan's coinsurance provisions require a patient to pay a fixed percentage of a charge for health services or benefits (for example, 20 percent of a hospital bill). Any increase in this percentage from its level on March 23, 2010 will cause a plan to lose its Grandfathered Plan status.
- **Significantly Raise Cost-Sharing Amounts Other than Copayments (*e.g.*, Deductibles and Out-of-Pocket Limits)**. A plan will cease to be a Grandfathered Plan if it increases the cost-sharing amount required as of March 23, 2010 by a percentage greater than medical inflation (measured from March 23, 2010) plus 15 percentage points. For example, assume a Grandfathered Plan had an individual deductible of $250 on March 23, 2010, but is subsequently amended to increase that deductible to $375. This increase, expressed as a percentage, is 50 percent ($375 - $250 = $125; $125/$250 = .5 = 50%). Assuming that medical inflation since March 2010 is 25 percent, the maximum percentage increase permitted is 40 percent (25% + 15%). Because the 50 percent change is greater than the 40 percent permitted, this change would cause the plan to lose its Grandfathered Plan status.
- **Significantly Raise Copayment Amounts**. A plan will cease to be a Grandfathered Plan if it increases the copayments in effect on March 23, 2010 by more than the greater of: (i) $5 (adjusted annually for medical inflation) or (ii) a percentage equal to medical inflation (measured from March 23, 2010) plus 15 percentage points.
- **Significantly Lower Employer Contributions**. Many employers or employee organizations pay a portion of participants' premiums for coverage. The employer's or employee organization's contribution rate may be based on the cost of coverage or on a formula (*e.g.*, calculated on the basis of hours worked or production levels). A Grandfathered Plan will lose its status if the employer or employee organization decreases its contribution rate toward the cost of any tier of coverage for any class of similarly situated individuals by more than 5 percentage points.[3] For example, if an employer pays 50 percent of the premiums for coverage for all participants under a Grandfathered Plan, that plan would lose its status if the employer decreased its share of the premiums to 40 percent. The result is the same whether or not some or all of the employee contributions are paid on a pre-tax basis through a cafeteria plan.
- **Add or Reduce an Annual Limit on What the Plan Pays**. Some plans impose an annual dollar limit on the amount that they will pay for covered services. A plan will cease to be a Grandfathered Plan if it lowers the annual dollar limit in existence on March 23, 2010, or adds an annual dollar limit if it had neither an annual dollar limit nor a lifetime limit in place on March 23, 2010. In addition, if the plan has a lifetime limit but not an annual dollar limit in place on March 23, 2010, it cannot add an annual dollar limit that is less than the lifetime limit on that date.
- **Change Insurance Companies**. If an employer or employee organization enters into a new policy, certificate, or contract of insurance (for example, because it wants to change insurance carriers) after March 23, 2010, then that new policy, certificate, or contract of insurance is *not* a Grandfathered Plan. In addition, any polices sold

3 In the case of a contribution rate based on the cost of coverage, the employer's or employee organization's contribution rate is determined as a percentage of the total cost of coverage, which is determined in the same manner that the "applicable premium" is calculated for COBRA coverage.

in the group and individual health insurance markets to new entities or individuals after March 23, 2010 will *not* be Grandfathered Plans even if those products were offered in the group or individual market before March 23, 2010. These rules do not apply to the renewal of an existing policy, certificate, or contract, or to changes in third-party administrators for self-insured group health plans.

B. Changes that Do Not Affect Grandfathered Plan Status. A Grandfathered Plan will not lose its grandfathered status if it makes any of the following changes:

1. **Generally Permissible Changes.** Changes other than those described in Section II.A. above will not cause a plan to lose its Grandfathered Plan status. Thus, for example, a Grandfathered Plan will not lose its status due to changes to premiums or total coverage costs, changes to comply with federal or state legal requirements, changes to voluntarily comply with PPACA, and changes to third-party administrators, provided those changes are made without violating the rules described in Section II.A. above.
2. **Certain Changes Adopted Prior to March 23, 2010 or Prior to the Adoption of the Grandfathered Plan Regulations.** Changes are considered part of the terms of a Grandfathered Plan in effect on March 23, 2010 (and, thus, do not adversely affect its status) even though they take effect after March 23, 2010, if they are made pursuant to: (i) a legally binding contract entered into on or before that date; (ii) a filing with a state insurance department made on or before that date; or (iii) plan amendments that were adopted on or before that date.

In addition, the Departments state in the preamble to the regulations that, for the purposes of enforcement, they will take into account good-faith efforts to comply with a reasonable interpretation of PPACA and may disregard plan changes that only modestly exceed those described in Section II.A. above and that are adopted before June 14, 2010.

Finally, the regulations provide a grace period to revoke or modify changes adopted prior to June 14, 2010, if those changes might otherwise cause a Grandfathered Plan to lose its status. Changes made after March 23, 2010, but before June 14, 2010, will not cause a Grandfathered Plan to lose its status if (i) the changes are revoked or modified effective as of the first day of the first plan year (or policy year in the individual market) beginning on or after September 23, 2010 (*i.e.*, January 1, 2011, for calendar year plans), and (ii) the terms of the plan on that date, as modified, would not cause the plan to lose its Grandfathered Plan status under the rules described in Section II.A. above. For this purpose, changes will be considered to have been made prior to June 14, 2010 if they are (i) effective before June 14, 2010 or (ii) are effective on or after June 14, 2010, pursuant to (a) a legally binding contract entered into before that date, (b) a filing with a state insurance department before that date, or (c) written plan amendments adopted before that date.

III. ANTI-ABUSE RULES

The regulations describe two circumstances in which a plan may lose Grandfathered Plan status even if the plan is not amended or modified. First, if a plan sponsor engages in a merger, acquisition, or similar business restructuring with the principal purpose of covering new individuals under the Grandfathered Plan, the plan loses its Grandfathered Plan status. This rule was intended to prevent Grandfathered Plan status from being bought and sold as a commodity in commercial transactions.

Second, a plan sponsor or issuer may not circumvent the rules limiting the changes that can be made to a Grandfathered Plan by transferring employees among plans. Specifically, if one or more employees who were covered under a plan on March 23, 2010 (the "transferor plan") are transferred to another Grandfathered Plan (the "transferee plan"), that transferee plan will lose its Grandfathered Plan status if (i) amending the transferor plan to include the terms of the transferee plan would have caused the transferor plan to lose its Grandfathered Plan status, and (ii) there was no bona fide employment-based reason for the transfer. This rule prevents plan sponsors and issuers from attempting to retain Grandfathered Plan status by indirectly making changes that could not be made directly.

IV. WHAT ARE THE BENEFITS OF GRANDFATHERED STATUS?

A. Exemption from Near-Term Benefits. Whether Grandfathered Plan status is worth maintaining, at least in the short term, is dependent in part on the benefit derived from being exempt from the following requirements in PPACA that would otherwise apply for plan years beginning on and after September 23, 2010 (except as otherwise indicated below):

- **No Cost Sharing for Certain Preventive Services.** PPACA requires non-Grandfathered Plans to provide coverage for certain preventive care items and services without imposing any cost-sharing requirements on the individual. *Many Grandfathered Plans may already offer complete coverage for the listed preventive care services and will receive little benefit due to exemption from this provision.*
- **"Transparency" in Coverage.** PPACA requires non-Grandfathered Plans to submit certain information about their coverage and cost-sharing requirements to the Secretary of Health and Human Services ("HHS") and the state insurance commissioners and to make the information available to plan participants and the public. *Although many Grandfathered Plans already maintain the information required by the disclosures, employers and plans may experience some financial benefit from avoiding the costs of reporting.*
- **Reporting Requirements.** HHS must develop reporting requirements by March 2012 for non-Grandfathered Plans regarding benefits and health care provider reimbursement structures. Plans will be required to submit a report annually to the Secretary and plan participants on whether the plan's benefits and coverage satisfy these requirements. *Grandfathered Plans will benefit from their status by avoiding the reporting costs under this provision.*
- **New Benefit Claim Dispute Resolution Rules.** PPACA requires non-Grandfathered Plans to implement an internal appeals process as well as an external review process. However, many group health plans are already required to establish and maintain reasonable internal claims appeal procedures under ERISA, and approximately 90 percent of the states currently mandate an external review process for state-regulated insurance. *Grandfathered Plans that are self-insured are likely to benefit most due to exemption from this requirement.*
- **Limitations on Prior Authorization Requirements, Primary Care Provider Designation Restrictions, and Restrictions for Emergency Services Coverage**. PPACA requires that: (i) if a non-Grandfathered Plan requires individuals to designate a participating primary care provider, the individual must be able to select any participating primary care provider (including a pediatrician) who is accepting patients; (ii) if a non-Grandfathered Plan covers emergency room services, it must cover such services without requiring any prior authorization (regardless of whether the health care provider is in-network), and the cost-sharing requirement for an out-of-network emergency room visit must be the same as if the provider were in-network; and (iii) non-Grandfathered Plans that provide coverage for obstetric and gynecologic care and require participants to designate a primary care provider may not require a prior authorization or a referral for the coverage of services from an obstetrician/gynecologist. *Many Grandfathered Plans currently require a participant to pay a greater percentage of the costs when seeking out-of-network emergency services and should therefore experience some cost savings due to exemption from this provision.*
- **Prohibition against Discrimination in Favor of Highly Compensated Individuals in Insured Health Plans.** PPACA prohibits non-Grandfathered Plans, other than self-insured plans, from discriminating in favor of highly compensated individuals for both eligibility to participate in the plan and benefits provided thereunder. *Because existing nondiscrimination requirements under the Internal Revenue Code ("IRC") did not apply to fully insured plans prior to the enactment of PPACA, such plans could provide more generous health insurance benefits to highly compensated individuals. Employers with Grandfathered Plans that are fully insured may continue to use those plans to provide more generous benefits to attract and retain key executives.*
- **Extension of Certain Dependent Coverage to Age 26 before 2014.** PPACA requires plans that offer coverage of dependent children to extend the availability of such coverage for adult children until the child reaches 26 years

of age, even if the child is married. For plan years beginning prior to January 1, 2014, Grandfathered Plans do not need to provide this coverage to an adult child if the child is eligible to enroll in an eligible employer-sponsored plan other than a parent's plan. *Grandfathered Plans may experience some cost savings due to this temporary exemption, but they likely will bear some higher costs related to covering adult children who are too sick or disabled to obtain their own employment-based coverage or are between jobs.*

B. Exemption from Far-Term Benefits. Grandfathered Plans that maintain their status over a longer period may also benefit due to exemption from the following provisions of PPACA, which would otherwise be effective for plan years beginning on and after January 1, 2014:

- **Prohibition on Discrimination in Premiums; Guaranteed Availability and Renewability of Insurance.** Health insurance issuers offering health insurance coverage in the small group market will be prohibited from varying premium rates based on any factors other than rating areas, whether coverage is individual or family, and, with certain limitations, based on age and tobacco use. The prohibition will apply to all coverage offered by issuers in the large group market as well if such issuers are authorized to offer coverage through the new health insurance exchanges that are supposed to be available for coverage on January 1, 2014. In addition, health insurance issuers offering coverage in a group market are required to accept every employer that applies for such coverage and guarantee renewability of such coverage. *The impact on premium rates may influence a plan sponsor's decisions about whether to renew grandfathered insurance coverage or to enter a new policy or contract.*
- **Prohibition against Discrimination Based on "Health Status" Factors and Exception for Wellness Programs.** PPACA provides that non-Grandfathered Plans may not establish rules for eligibility or coverage based on an individual's or dependent's health status. PPACA created an exception from this requirement for employer-sponsored wellness programs. However, employer-sponsored wellness programs, particularly those that condition rewards on the employee's satisfying a standard related to any health status factor, must comply with several specific requirements under PPACA (including, among others, a limit on the reward for participation in the program of 30 percent of the cost of the coverage in which the employee is enrolled). *Although Grandfathered Plans are exempt from complying with this provision, they are not exempt from complying with existing nondiscrimination rules that are virtually identical (with the exception that the reward for wellness programs under existing law may not exceed 20 percent of the cost of coverage). Therefore, Grandfathered Plans may receive little benefit from this exemption.*
- **Non-Discrimination against Health Care Providers.** PPACA prohibits non-Grandfathered Plans from discriminating against health care providers who are acting within the scope of their state license or certification but who may have been traditionally excluded from participation in the plan, such as alternative medicine practitioners, acupuncturists, and chiropractors. *Whether there is any benefit from this provision may be dependent on potential usage and costs associated with nontraditional practitioners.*
- **Non-Discrimination against Individuals.** Non-Grandfathered Plans must comply with newly added Section 18C of the Fair Labor Standards Act, a provision that protects employees who receive premium assistance tax credits or report violations of PPACA. *There likely is little practical benefit from this exemption due to the fact that employers also must comply with this non-discrimination provision.*
- **Cost-Sharing Limitations for All Group Health Plans.** PPACA requires group health plans to comply with the same annual cost-sharing limits as "essential health coverage" offered through the newly created state exchanges. Beginning in 2014, annual out-of-pocket costs (including deductibles) cannot exceed the limit applicable to a high-deductible health plan under IRC Section 223(c)(2)(A)(ii) (currently, $5,950 for self-only coverage and $11,900 for family coverage), and annual deductibles may not exceed $2,000 for self-only coverage or $4,000 for family coverage.[4] Beginning in 2015, both the annual limitations may be indexed for the increase in the per capita cost of health insurance in the United States relative to

4 Note that a Grandfathered Plan that is individual insurance coverage is exempt from the prohibition on annual dollar limitations.

2013. *Group health plans that have deductibles or cost-sharing requirements higher than PPACA's limitations may financially benefit from their Grandfathered Plan status by avoiding the higher coverage costs associated with lower cost-sharing levels.*

- **Essential Health Benefits Coverage in Small Employer Insured Plans**. Insurance issuers that offer health insurance in the "small group market" (*i.e.*, for employers that employed an average of no more than 100 employees on business days during the prior calendar year) must ensure that such coverage includes the essential health benefits package required for "qualified health plans" under the exchanges. *Small employers that have limited resources and flexibility in structuring group health coverage often provide limited coverage options through insured products. Such employers would be able to continue their limited coverage as long as the coverage retains its Grandfathered Plan status (provided the insurance issuer is willing to continue offering the policy).*
- **Coverage for Approved Clinical Trials.** Non-Grandfathered Plans may not deny individuals with life-threatening diseases participation in approved clinical trials or discriminate against participants who enroll in clinical trials and may not deny, limit, or impose additional conditions on the coverage of routine patient costs for trial study participants. PPACA does not preempt any state law that requires state-regulated health plans (*i.e.*, fully insured plans) to cover participation in clinical trials. Approximately half of the states currently have laws requiring coverage of certain health care costs for participants in clinical trials. *Although many Grandfathered Plans may already cover routine patient costs for trial study participants, those that do not and which are not otherwise subject to the state insurance law mandates may experience cost savings.*

V. PPACA RULES THAT DO APPLY TO GRANDFATHERED PLANS

Whether or not plans retain their Grandfathered Plan status, they will be subject to many PPACA mandates.

A. Near-Term Mandates. Many of the PPACA mandates will apply as early as the first plan year beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans).

- **No Preexisting Condition Exclusion for Children under the Age of 19**. A plan (other than grandfathered individual health insurance coverage) is prohibited from imposing preexisting conditions exclusions on children under the age of 19 .
- **Lifetime and Annual Limits on Dollar Value of Benefits**. A plan may not impose lifetime limits or annual limits on the dollar value of essential health benefits,[5] provided that, for plan years beginning prior to January 1, 2014, a plan may establish a "restricted annual limit" on the dollar value of essential health benefits as determined by HHS.
- **No Rescission of Coverage.** A plan or coverage may not rescind coverage for an enrollee other than for fraud or intentional misrepresentation.
- **Extension of Coverage for Adult Children.** A plan must extend coverage for an adult child until the child attains age 26, provided that, until January 1, 2014, a Grandfathered Plan does not need to provide this coverage if the child is eligible to enroll in an employer-sponsored plan other than a parent's plan.
- **Bringing Down the Cost of Coverage**. Insurance issuers will be required to report the ratio of their premium revenues to claim reimbursements and other non-claims costs and provide rebates to the insured if that ratio falls below a certain threshold percentage.

B. Far-Term Mandates. Several PPACA requirements will become applicable to Grandfathered Plans (except for, in some instances, individual insurance coverage) in later plan years, including the following:

- **No Preexisting Condition Exclusion Irrespective of Age.** The prohibition on preexisting condition exclusion limitations will apply to plans (other than grandfathered individual insurance coverage) regardless of the enrollee's age for plan years beginning on or after January 1, 2014.

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5 Note that a Grandfathered Plan that is individual insurance coverage is exempt from the prohibition on annual dollar limits.

- **Prohibition on Excessive Waiting Periods.** Plans may not impose waiting periods in excess of 90 days for plan years beginning on or after January 1, 2014.
- **No Annual Limits on the Dollar Value of Benefits.** Plans (other than a grandfathered individual insurance coverage) will no longer be able to impose even "restricted annual limits" on the dollar value of benefits for plan years beginning on or after January 1, 2014.
- **Extended Coverage for Adult Children.** In plan years beginning on or after January 1, 2014, Grandfathered Plans must extend coverage to adult children until they attain age 26 regardless of their eligibility for alternative employer-sponsored coverage.
- **Compliance with Standards for Uniform Description of Coverage.** No later than September 23, 2012, plans must comply with the new standards for providing to enrollees a uniform summary of benefits and explanation of coverage. Plans will also be required to provide a 60-day advance notice of material modifications to plan coverage.

Importantly, group health plans, including Grandfathered Plans, will be further affected by the PPACA mandates because employers sponsoring such plans will independently become subject to additional requirements respecting health coverage (*e.g.*, the automatic enrollment requirement under PPACA that applies to employers with at least 200 full-time employees that offer employees enrollment in one or more health benefits plans).

VI. CONCLUSION

In light of the restrictions imposed under the Grandfathered Plan regulations, plan sponsors and issuers will need to carefully consider whether it is cost-effective or otherwise desirable to maintain Grandfathered Plan status. Decisions about whether to retain or relinquish Grandfathered Plan status will be complex. They will depend upon existing plan design features and whether the cost savings or other business objectives that may be achieved by remaining grandfathered outweigh the savings that could be obtained by making cost-cutting changes that go beyond those permitted by the regulations. The decision also may be significantly affected by the preferences of plan participants.

This is one in a series of *Commentaries* Jones Day intends to provide to our clients and friends on the provisions of PPACA. We will provide additional guidance on how the provisions of PPACA, and the developing regulatory framework, affect employer-sponsored health plans and their sponsoring employers as developments occur.

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