



JONES DAY
COMMENTARY

SURPRISE FOR EMPLOYERS: NO COLLECTIVE BARGAINING EXCEPTION UNDER HEALTH CARE REFORM

The Patient Protection and Affordable Care Act, as amended (“PPACA”), contains a provision titled “Preservation of Right to Maintain Existing Coverage.” This provision, known as the “Grandfathered Plan Rule,” provides that while “grandfathered” group health plans (“Grandfathered Plans”) are exempt from some of the provisions of PPACA, they must still make many of the changes required by PPACA.¹ PPACA also contains a related rule applicable to employer group health plans that are maintained pursuant to one or more collective bargaining agreements (“CBAs”). Although not a model of clarity, this rule covering CBA plans clearly was intended to provide special rules for collectively bargained group health plans. Many expected that, consistent with the approach taken in virtually every

other federal law mandating significant changes in employee benefit plans since the passage of ERISA in 1974, the collective bargaining exception in PPACA would be interpreted to delay the application of PPACA to a CBA plan until the expiration of the existing CBA or CBAs providing for such benefits.

On June 14, 2010, the Departments of Health and Human Services, Treasury, and Labor (the “Departments”) issued interim final regulations regarding the Grandfathered Plan Rule and the related collective bargaining exception. Remarkably, the regulations provide virtually no relief for collectively bargained plans, and no meaningful exception for self-insured collectively bargained plans. Collectively bargained plans are treated the same as all other group health plans under the general Grandfathered Plan Rules (with a minor exception for insured plans). This has the potential to raise significant labor relations issues for employers, especially larger employers that self-insure their group health plans.

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.

A separate *Jones Day Commentary*, “The More Things Change, the More They Stay the Same: Is It Worth Maintaining Grandfathered Status Under the New Health Care Law?” will deal with the other provisions of the Grandfathered Plan Rules. That *Commentary* can be found on the Jones Day web site.

HOW IT USUALLY WORKS WITH COLLECTIVELY BARGAINED BENEFIT PLANS

In general, when federal legislation requires that significant changes be made to employee benefit plans, the question arises whether to require that such changes be made to collectively bargained plans during the term of the existing CBA that provides for such benefits, or to delay the requirement to make such changes until the next time benefits are negotiated in conjunction with a successor CBA. Normally, for CBA plans, effectiveness is tied to a date that is after expiration of the CBA or CBAs in effect on what would otherwise be the effective date of the rule. One reason for this exception is to avoid interference with the collective bargaining process. In such cases, benefits are bargained for in the context of the entire compensation package and in light of other provisions of a CBA that has a specific expiration date. The benefits costs that an employer is willing to assume are part and parcel of the entire CBA package. To force a benefit change by legislative action during the term of the CBA alters the essence of the agreement between the parties.

A recent example of a “normal” collective bargaining exception for employer group health plan changes can be found in the Health Insurance Portability and Accountability Act (“HIPAA”). HIPAA, like PPACA, required significant changes in group health plans. HIPAA contained a provision stating that all of the HIPAA changes would generally apply for plan years beginning after June 30, 1997. However, for plans maintained pursuant to CBAs that were ratified before HIPAA’s enactment, HIPAA provided that the effective date would be the later of June 30, 1997, or the date on which the last of the CBAs relating to the plan terminated. Thus, a CBA plan maintained pursuant to a labor agreement with an expiration date after July 1, 1997 was not required to make the

HIPAA plan changes until the plan year beginning on or after the termination date of the CBA in effect on June 30, 1997.

Under PPACA, unlike HIPAA, effective dates for PPACA’s many requirements are stated separately for the various changes. A special effective date for collectively bargained plans is not included in the individual effective date provisions. Instead, the only place where a separate rule for collectively bargained plans is included is in the Grandfathered Plan Rule. The Grandfathered Plan provisions provide as follows:

(a) No Changes to Existing Coverage –

(1) IN GENERAL – Nothing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of enactment of this Act. . . .

(d) Effect on Collective Bargaining Agreements – In the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers that was ratified before the date of enactment of this Act, the provisions of this subtitle [subtitle C of the Act] and subtitle A [of the Act] (and the amendments made by such subtitles) shall not apply until the date on which the last of the collective bargaining agreements relating to the coverage terminates. Any coverage amendment made pursuant to a collective bargaining agreement relating to the coverage which amends the coverage solely to conform to any requirement added by this subtitle or subtitle A (or amendments) shall not be treated as a termination of such collective bargaining agreement.

(e) Definition – In this title, the term ‘grandfathered health plan’ means any group health plan or health insurance coverage to which this section applies.

The legislative drafting approach raised many questions as to how collectively bargained plans would be treated under PPACA. The new regulations provide answers—but not the answers that were anticipated.

DO COLLECTIVELY BARGAINED PLANS HAVE A DELAYED EFFECTIVE DATE?

Certain provisions of PPACA apply to Grandfathered Plans for the first plan year that begins on or after September 23, 2010. These include coverage for dependents to age 26, prohibition of lifetime limits, and prohibition on rescissions. Other PPACA changes have later effective dates for Grandfathered Plans, such as the prohibition on excessive waiting periods. Under the “normal” rules for CBA plans contained in prior legislation, one would have expected that any provisions that changed benefits under a CBA plan would not have been required to be included in the plan until the last applicable CBA terminated and the changes to the benefits were subject to bargaining.

In contrast to this “normal” approach, however, the interim final regulations provide that *all* CBA plans are Grandfathered Plans, that they are subject to the rules applicable to Grandfathered Plans, and therefore, that CBA plans do *not* have a delayed effective date different from other Grandfathered Plans. The preamble to the regulations states:

Therefore, collectively bargained plans (both insured and self-insured) that are grandfathered health plans are subject to the same requirements as other grandfathered health plans, and are not provided with a delayed effective date for ... Act provisions with which other grandfathered health plans must comply. Thus the provisions that apply to grandfathered health plans apply to collectively bargained health plans before and after termination of the last of the applicable collective bargaining agreements.

This reading of the statutory language is unprecedented in its substantial impact on collectively bargained plans during the term of an applicable CBA. The Departments could have interpreted the statutory provisions in a manner that would allow collectively bargained Grandfathered Plans to have a delayed effective date. However, they chose instead a more obtuse and restrictive reading of the statute. This will increase the costs of administering and providing benefits pursuant to collectively bargained group health plans in the middle of a collective bargaining cycle and force employers

to scramble to meet collective bargaining obligations associated with such mid-term modifications while weighing options to deal with the added costs.

LIMITED RELIEF FOR INSURED COLLECTIVELY BARGAINED PLANS

Under the regulations, Grandfathered Plan status is lost if too many changes are made to the cost or coverage provisions of the plan. Essentially, to determine if a plan has made too many changes to retain Grandfathered Plan status, all collective changes made to the plan after March 23, 2010 are compared to the terms of the plan on March 23, 2010. In addition, if the issuer of an insurance policy that provides benefits under a plan changes or if a new policy is issued to a plan, the plan generally loses Grandfathered Plan status. (Our companion *Commentary* on Grandfathered Plan Rules, which can be found on the Jones Day web site, discusses these requirements in detail.)

The interim final regulations do provide limited relief for insured collectively bargained plans. An insured collectively bargained plan will not lose its Grandfathered Plan status until the termination of the last CBA relating to the coverage. This means that an insured collectively bargained plan will not lose Grandfathered Plan status during the term of the current CBA, even if changes are made to the cost or coverage provisions of the plan. This does not mean that the collectively bargained plan gets a “free pass” for any cost and coverage changes made during the term of the applicable CBAs. Rather, it simply means that the potential loss of Grandfathered Plan status is delayed until the termination of the last CBA relating to the coverage. After the termination of the CBA, the collective changes made to the plan after March 23, 2010 will be compared to the terms of the plan as they existed on March 23, 2010 to determine if the insured plan retains Grandfathered Plan status.

In addition, any change in insurance issuers during the term of the current CBA, by itself, will not affect Grandfathered Plan status. In other words, an insured collectively bargained plan may enter into a new group health insurance policy

during the term of the current CBA, and it may renew that policy after the CBA expires, without adversely affecting Grandfathered Plan status (provided that no changes have been made to cost and coverage terms that would independently affect Grandfathered Plan status). Any change to a new group insurance policy after the expiration of the current CBA, however, will result in the loss of Grandfathered Plan status.

Thus, insured collectively bargained plans get some relief, but not much, because an insured collectively bargained plan is still required to comply with all of the PPACA changes applicable to Grandfathered Plans.

THE IMPACT OF THE REGULATIONS ON CBAs

Employers with collectively bargained group health plans will have no choice but to make the changes required by PPACA. This will begin with a first set of required changes for the first plan year beginning on or after September 23, 2010. Our separate *Commentary* on the Grandfathered Plan Rules and our White Paper on PPACA, "Impact of Health Care Reform Legislation on Employer-Sponsored Group Health Plans," discuss the changes and can be found on the Jones Day web site. As long as the group health plan retains grandfathered status (again, see our companion *Commentary* on the Grandfathered Plan Rules), only certain PPACA changes will be required. As noted above, insured coverage under a collectively bargained group health plan generally will be treated as a Grandfathered Plan until the last of the CBAs applicable to the plan terminates.

Making changes in a collectively bargained group health plan during the term of the CBA has labor law and labor relations implications. The actions required of an employer will depend on the terms of the applicable CBAs and the level of cooperation of the union or unions involved.

CONCLUSION

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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