



**Presentation to American Benefits Council –
National Health Care Reform: Grandfathered
Plans and the Exception for Collectively-
Bargained Arrangements**

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The Agenda

- What is grandfathering and how does it affect mandated benefit coverage for health plans?
- What is the exception for collectively-bargained arrangements?
- How does the collective bargaining exception apply?



A note at the outset. . .

- This law is very confusing and unclear, particularly as it relates to grandfathering rules and collectively-bargained arrangements

On the one hand:

“In their rush to get out of town with a bundle of seasonal goodies for their constituents, the Members of Congress neglected such details as [commas and] cross references. . . the statute is the product of scissors, tape, and handwritten interlineations by Members rushing to make their planes.” *Hermann v. Cencom Cable Associates, Inc.*, 978 F.2d 978, 980 (7th Cir. 1992)

On the other:

"People [including statute drafters] make mistakes." and "That should come as no surprise, given that [it] is 'an enormously complex and detailed statute,' . . . and the plans . . . can be lengthy and complicated." *Conkright v. Frommert*, 559 U.S. ____ (2010).



What is Grandfathering?

- Qualifying coverage mandates
 - General Rule: Unless grandfathered, all group health plans and insurance coverage (both individual and group) must meet a new set of plan requirements included in PPACA
 - Exception: A group health plan or health insurance coverage in effect as of March 23, 2010 (date of enactment) is "grandfathered" from meeting some, but not all, of the new plan requirements established by PPACA
 - PPACA and Reconciliation Act specifically extend certain plan requirements to grandfathered plans
 - Other provisions such as the employer and individual coverage mandates, voucher provisions, and tax provisions are not subject to the grandfathering rule, so all plans must also comply with those
 - So grandfathering is not a "free pass" from all PPACA requirements



Qualifying Coverage Mandates

- **Key PPACA Provisions Applicable to Grandfathered Plans**

- No overall lifetime benefit maximum and no lifetime dollar limit on specific essential benefits
- Restricted annual benefit maximum for essential benefits (pre-2014)
- Dependent coverage to age 26 (for dependents without employer-sponsored coverage pre-2014)
- No rescission except in case of fraud
- No preexisting condition exclusions for children under age 19
- Prohibits waiting periods longer than 90 days (2014)
- Uniform explanation of coverage



Qualifying Coverage Mandates

- Group health plans that are not grandfathered face new mandates, including the following:
 - Rules on deductible maximums and out-of-pocket maximums
 - Required coverage of preventive services with no cost-sharing
 - Internal and external appeal process rules
 - No prior authorization for ob-gyn visits
 - Emergency care must have same payment in and out of network, and no prior authorization
 - Nondiscrimination for insured plans under the tax Code
- These mandates will *NOT* apply to any plan that is “grandfathered”



What is Grandfathering?

- How do you lose grandfathering?
 - Enrollment of new employees or family members is permitted without losing grandfathering status
 - Plan amendments?
 - PPACA and Reconciliation do not address whether amendments to an existing plan constitute such a difference that the plan is “un-grandfathered”
 - Consider cost issues of losing grandfathering vs. keeping it with the change (if that is permitted)



What is the Special Rule for CBAs?

- Special rule for collective bargaining agreements (CBAs):
 - In the case of “health insurance coverage” maintained pursuant to one or more CBAs between employee representatives and one or more employers,
 - Which was ratified before March 23, 2010 (date of enactment)
 - “the provisions of this subtitle [subtitle C] and subtitle A (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.”
 - Early amendment to conform to coverage mandates (subtitles A and C) are not treated as a termination of the CBA and does not subject plan to early application of PPACA rules

What is the Special Rule for CBAs? *(cont'd)*

- To which types of plans/coverage does the special rule apply?
 - Does the special rule for CBA arrangements apply to both insured and self-insured collectively-bargained plans?
 - As written, the special CBA rule refers to “health insurance coverage”
 - PPACA defines “health insurance coverage” to mean insurance and not self-insurance
 - When PPACA uses the term “group health plan” as opposed to “health insurance coverage” that is a broader term which includes self-insurance
 - Did the members of Congress neglect a detail for which a technical correction is needed? Or, was it intentional?

What is the Special Rule for CBAs? *(cont'd)*

- What does it mean to be “maintained” pursuant to one or more CBAs?
 - Whatever type of plan is covered by the special CBA rule must be “maintained” pursuant to one or more CBAs
 - Issue relates to whether the presence of non-union employees covered by the plan means the special CBA rule does not apply
 - Historic definition of “maintained”
 - “Traditional” interpretation: If at least 25% of the covered population was subject to the CBA, the entire plan is “maintained” pursuant to the CBA
 - There were some unique cases of higher percentages; but the general rule was a 25% test

What is the Special Rule for CBAs? *(cont'd)*

- What does it mean to be “maintained” pursuant to one or more CBAs?
 - Bifurcated approach to “maintained”
 - Another view applied deferred effective dates only to the portion of the plan covered by employees subject to the CBA
 - NOTE: The PPACA special CBA rule refers to “coverage” maintained pursuant to the CBA and not “plans” maintained
 - COBRA used a bifurcated approach (based on 1987 proposed regulations)
 - Anyone remember “Section 89” (health care nondiscrimination rules from 1986 which were repealed)? This also used a bifurcated approach.
 - Some PPA rules for qualified plans apply a bifurcated approach; also qualified plan mandatory disaggregation rules in definition of a “plan” support this view

What is the Special Rule for CBAs? *(cont'd)*

- What does it mean to be “maintained” pursuant to one or more CBAs?
 - How would a bifurcated approach work?
 - PPACA references “coverage” maintained under the CBA
 - What if one “plan” has multiple levels of coverage based on different CBAs?
 - Do you look at which CBAs adopted which different levels of coverage so that each level applies at a different time?
 - Do you look at the basic “coverage” regardless of the different bargained levels and treat the overall arrangement as subject to the rule?



What is the Special Rule for CBAs? *(cont'd)*

- What does it mean to be “maintained” pursuant to one or more CBAs?
 - Traditional vs. Bifurcated may depend on “policy” reasons for CBA rule
 - Is the CBA rule meant to impact the entire arrangement or is it meant only to impact those who are covered by collective bargaining and not the “tag along” employees?

What is the Special Rule for CBAs? *(cont'd)*

- Assuming CBA rule applies, what does it mean?
 - Subtitles A and C shall not apply to the coverage until the last CBA expires
 - Wording is very expansive. All of subtitles A and C (including the basic employer mandates) shall not apply until the last CBA expires
 - Upon expiration of the last CBA, subtitles A and C (presumably including grandfathering) should then apply
 - Interim voluntary amendments do not cause early termination of the CBA
 - Need to review each of these concepts carefully



What is the Special Rule for CBAs? *(cont'd)*

- Assuming CBA rule applies, what does it mean?
 - Does it mean what it says?
 - The mandates applicable to grandfathered plans typically apply “for plan years beginning on or after the date that is 6 months after the date of enactment of this Act”
 - These effective date rules seem to apply without regard to the special CBA rule expansive statement that all the mandates do not apply until expiration of the last CBA
 - Question – which of the two different effective dates applies when neither refers to the other?

What is the Special Rule for CBAs? *(cont'd)*

- Assuming CBA rule applies, what does it mean?
 - Two ways to read the rules, depending on the “intent”
 - Is the purpose of the special CBA rule to provide an extended time to comply for collectively-bargained plans and not disrupt bargaining cycles?
 - Is the purpose of the special CBA rule to accelerate all the mandates for these plans and then eliminate grandfathering for collectively-bargained plans at expiration of the last agreement?
 - Either way, there are still unanswered questions

What is the Special Rule for CBAs? *(cont'd)*

- What does the special CBA rule mean?
 - Do grandfathering plan mandates apply to collectively-bargained plans subject to the special CBA rule?
 - On the one hand:
 - If purpose is not to disrupt bargaining cycles and to be consistent with similar deferred effective dates for collectively-bargained plans in prior legislation, then grandfathering rules should not apply to collectively-bargained arrangements until expiration of the last CBA applicable to the coverage
 - Otherwise, there would not be a difference between a collectively-bargained arrangement and a non-bargained grandfathered plan not subject to the special CBA rule
 - Also, this view is consistent with the ability to voluntarily comply before the expiration of the CBA

What is the Special Rule for CBAs? *(cont'd)*

- What does the special CBA rule mean?
 - Do grandfathering plan mandates apply to collectively-bargained plans subject to the special CBA rule?
 - On the other hand:
 - If the rule is intended to apply grandfathering to collectively-bargained plans at the outset and then eliminate grandfathering at the end of the CBA so that all of PPACA applies for union-covered plans, then:
 - Do you read general grandfathering rules to override special CBA rule prior to expiration of the last CBA?
 - Do you read the special CBA rule to mean that, at expiration, everything applies (other than grandfathering)?
 - Note: If grandfathering applies under the CBA rule and does not end at expiration of the last CBA, then the CBA rule has no separate meaning from general grandfathering

What is the Special Rule for CBAs? *(cont'd)*

- What does the special rule mean?
 - Consider the following facts for a plan in existence on March 23, 2010 and covered by a CBA ratified before that date:
 - First plan year after enactment is January 1, 2011
 - First plan year after September 23, 2010 is January 1, 2011
 - CBA expires September 30, 2010
 - Upon expiration of the agreement in September 2010, does PPACA apply to that plan without regard to grandfathering rules and the January 1, 2011 date? Presumably not.
 - Does this plan lose grandfathering altogether?
 - A non-collectively-bargained plan would still be grandfathered; does this plan lose that status simply because it was collectively bargained (particularly where the CBA expired before January 1, 2011)?

What is the Special Rule for CBAs? *(cont'd)*

- What does the special rule mean?
 - Do arrangements subject to special CBA rule benefit from grandfathering status at expiration of last agreement?
 - Subtitles A and C shall not apply to the coverage until the last CBA expires
 - If the purpose is a deferred effective date for collectively-bargained arrangements, then once the last CBA expires, subtitles A and C apply, including grandfathering
 - Grandfathering applies to plans and coverage in effect on date of enactment
 - Expiration of CBA does not mean termination of plan/coverage with establishment of a new plan/coverage once a new agreement is reached

What is the Special Rule for CBAs? *(cont'd)*

- What does the special rule mean?
 - When exactly does PPACA apply at the expiration of the last CBA?
 - Subtitles A and C shall not apply to the coverage “until the date on which the last of the collective bargaining agreements relating to the coverage terminates”
 - Does that mean immediately on expiration? Or does it mean the first plan year after expiration?
 - Literally applies immediately upon expiration
 - However, what about the grandfathered rules that apply “for plan years beginning on or after the date that is 6 months after the date of enactment of this Act”?
 - Possible resolution = Later of grandfather rule date or CBA rule date

What is the Special Rule for CBAs? *(cont'd)*

- Summary of Issues:
 - Grandfathered plans are subject to certain but not all mandates
 - Grandfathered plans are those in effect on March 23, 2010
 - Not clear whether subsequent acts cause loss of grandfathering
 - Plans subject to collective bargaining are subject to a special CBA rule
 - “Health insurance coverage”
 - “Maintained” pursuant to one or more CBAs
 - Ratified before March 23, 2010
 - Provisions “shall not apply” until the last CBA relating to the coverage terminates
 - Voluntary changes allowed

What is the Special Rule for CBAs? *(cont'd)*

- Summary of Issues *(cont'd)*
 - But, the special CBA rule raises numerous questions
 - Does it apply to self-insured plans? Or insured plans only?
 - What does “maintained” mean? To whom does the special CBA rule apply?
 - 25% rule vs. bifurcated approach
 - Does the special CBA rule override grandfathering?
 - Are collectively-bargained plans required to comply with grandfathered plan mandates before expiration of the last CBA?
 - Does grandfathering expire at expiration of the last CBA?
 - What happens on the date of expiration of the last CBA?
 - Does PPACA apply immediately or at the applicable plan year following?



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