

Legislative Brief

Health Care Reform: Nondiscrimination Rules Apply to New Fully-Insured Group Health Plans



Executive Summary

Under health care reform, some fully-insured group health plans will be required to comply for the first time with federal nondiscrimination rules related to compensation. These rules prohibit discrimination in favor of highly-compensated individuals (HCIs). They will apply to **non-grandfathered fully-insured plans only** and are effective for plan years beginning on or after **September 23, 2010**.

This Legislative Brief describes the nondiscrimination rules that apply to non-grandfathered group health plans under health care reform. Please read below for more information.

Nondiscrimination Rules

The Patient Protection and Affordable Care Act (PPACA) requires non-grandfathered fully-insured plans to follow many of the same nondiscrimination rules that, up until now, have applied only to self-funded plans. Because grandfathered plans are exempt from these nondiscrimination rules, existing plans that are designed to favor HCIs may want to make the effort to retain grandfathered status. If grandfathered status is lost, discriminatory plans will have to be amended or face potential excise tax penalties.

Specifically, PPACA provides that non-grandfathered fully-insured plans must satisfy the requirements of Internal Revenue Code Section 105(h)(2), which prohibit discrimination in favor of highly compensated individuals. To satisfy the nondiscrimination rules, these fully-insured plans must pass two separate nondiscrimination tests: the eligibility test and the benefits test.

A highly-compensated individual for purposes of these rules is an individual who is:

- One of the five highest paid officers;
- A shareholder who owns more than 10 percent in value of the stock of the employer; or
- One of the highest paid 25 percent of all employees (other than an employee excludable as described below).

The rules are effective for these fully-insured plans for plan years beginning on or after **September 23, 2010**.

Eligibility Test

To pass the eligibility test, a plan must benefit one of the following:

- At least 70 percent of all employees;
- At least 80 percent of all employees who are eligible to benefit under the plan (if at least 70 percent of all employees are eligible to participate in the plan); or
- A nondiscriminatory classification of employees.

In running the eligibility test, an employer may exclude certain employees from consideration. These are employees who:

- Have not completed three years of service;

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- Have not attained age 25;
- Are part-time or seasonal;
- Are collectively-bargained; or
- Are non-resident aliens who do not receive U.S. earned income.

In order to have a nondiscriminatory classification of employees, there must be a bona fide business reason for the classification and a sufficient ratio of non-HCIs must benefit. Examples of reasonable classifications generally include specified job categories, compensation categories (such as hourly or salaried), and geographic location.

Benefits Test

To pass the benefits test, all benefits provided to the HCIs who participate in the plan must be provided to all other participants as well. Also, all the benefits available for the dependents of HCIs must be available on the same basis for dependents of all other participants. The regulations and IRS guidance indicate that the level of employer contributions should not discriminate in favor of HCIs.

A plan may have a maximum reimbursement limit for any single benefit or combination of benefits, but the maximum limit attributable to employer contributions must be uniform for all participants and their dependents. The limit may not be modified due to a participant's age or years of service.

There are two components to the benefits test. A plan must not:

- discriminate on its face in providing benefits in favor of HCIs; OR
- discriminate in favor of HCIs in actual operation (whether a plan discriminates in operation is determined on a facts and circumstances basis).

A plan will discriminate on its face if the plan document contains discriminatory provisions that favor HCIs. A plan could discriminate in operation if it is amended or terminated so that the duration of the plan (or benefit) favors HCIs, or if the plan approves certain claims for medical expenses for HCIs but denies them for non-HCIs without a permissible reason for treating them differently. However, a plan will not be considered discriminatory just because HCIs participating in the plan use a broad range of plan benefits to a greater extent than do other employees participating in the plan.

As with many areas of health care reform, additional information or regulations regarding these nondiscrimination rules would be helpful. The McInnes Group will continue to monitor developments in this area and will keep you informed.

This Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

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