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Group Health Plans and Health Insurance Coverage: Interim Final Rules for Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act

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General Comment

Comment attached

Attachments

IRS-2010-0010-0928.1: Comment on FR Doc # 2010-14488

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Submitted through the Federal eRulemaking Portal

CC:PA:LPD:PR (Reg-118412-10), Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Attention: RIN 1545-BJ51

Ladies and Gentlemen:

The undersigned employers are pleased to submit this response to the request for comments on the interim final rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act ("PPACA") regarding status as grandfathered health plans. The request was published by the Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments") in the *Federal Register* on June 17, 2010.

The undersigned employers are law firms with at least one office in the Washington D.C. metropolitan area who have been affected by the decision of our group health plan insurer, Unicare, Inc. ("Unicare"), to withdraw from the health insurance market in Virginia and effectively withdraw from the health insurance market in Maryland and the District of Columbia. The interim final regulations provide that a group health plan will lose its grandfathered status if the employer maintaining the plan enters into a new policy, certificate, or contract of insurance after March 23, 2010.[1] The interim final regulations do not provide an exception to this rule for employers who are forced to change insurers because the insurer of

[1] Treas. Reg. § 54.9815-1251T(a)(1)(ii); 29 C.F.R. § 2590.715-1251(a)(1)(ii); 45 C.F.R. § 147.140(a)(1)(ii); 75 Fed. Reg. 34541 (June 17, 2010).

their group health plans either withdraws from the health insurance market or effectively withdraws from the health insurance market by reducing its coverage and participant services so significantly that the insurer can no longer provide competitive health care coverage and no longer maintains an effective presence in the regional insurance market. Because Unicare was unable to find a successor to assume and maintain its existing network of providers in the region, we were forced to choose between replacing Unicare with a new provider or maintaining our coverage with Unicare in the face of significant reductions in network coverage and customer service that would have adversely affected plan participants. In making the decision to move to a new insurer, we entered into new contracts with insurers who agreed to provide the same coverage as Unicare on the same terms. But for the replacement of Unicare with a new insurer, our group health plans would be eligible for grandfathered status because we have not changed the terms of our plans that were in effect on March 23, 2010, in any way that would otherwise cause a loss of grandfathered status.

We respectfully request that the Departments revise the interim final rule to provide that the grandfathered status of our group health plans will not be lost solely because our insurer chose to withdraw or effectively withdraw from the health insurance market in our region.

The interim final rules define grandfathered health coverage and describe the types of changes that will cause a group health plan or health insurance coverage to lose grandfathered status. Grandfathered status provides group health plans with valuable assistance as they begin to implement the new requirements under PPACA. Grandfathered health plans remain exempt from certain PPACA mandates, including requirements for an expanded claims and appeals process, application of the nondiscrimination requirements to insured plans, and coverage of specified preventive care without cost-sharing requirements.[2] By maintaining the grandfathered status of their plans for at least another one or two years, employers will have the advantage of more guidance interpreting these complicated PPACA mandates, more time to make plan design decisions in response to this guidance through a thoughtful and reasoned process, and the ability to implement this guidance and communicate changes resulting from implementation of it in an orderly manner that minimizes disruption and confusion for plan participants.

The interim final regulations provide that a group health plan will lose its grandfathered status if the employer maintaining the plan enters into a new

[2] Treas. Reg. § 54.9815-1251T(c); 29 C.F.R. § 2590.715-1251(c); 45 C.F.R. § 147.140(c).

policy, certificate, or contract of insurance after March 23, 2010.[3] The loss of grandfathered status occurs regardless of the employer's reasons for entering into a new arrangement or the level of benefits offered under the new arrangement. Consequently, this regulation denies grandfathered status to group health plans that have no choice but to enter into a new contract of insurance because their current provider is withdrawing or effectively withdrawing from the health insurance market.

This is precisely the situation that the undersigned law firms are facing. The undersigned law firms sponsor group health plans that, until recently, were insured by Unicare. As of early 2010, Unicare provided health insurance coverage to at least twenty-two large group health plans in the District of Columbia and to at least thirteen law firms in the Washington, D.C. metropolitan area. As of July 1, 2010, Unicare provided coverage to only two large group health plans in the District and only one law firm. A recent article in *The Washington Post* estimated that at least 3,000 individuals in Virginia, most residents of Northern Virginia, have lost coverage as a result of Unicare's withdrawal from that market.[4]

Unicare made the strategic decision before the enactment of PPACA to begin shifting its business away from the health insurance market in favor of providing dental, vision, life insurance, and disability insurance products.[5] Unicare withdrew from the health insurance market in Illinois, Indiana, Michigan, and Texas in 2009, which represented over eighty-five percent of Unicare's health insurance business.[6] According to *The Washington Post*, approximately 400,000 covered individuals in Illinois and Texas alone were affected by the withdrawal.[7]

At the same time, Unicare began seeking a buyer for its business in the mid-Atlantic region, which includes the Washington, D.C. metropolitan area. Unicare informed us in December 2009 that, while Unicare was seeking a buyer for its mid-Atlantic business, it had not yet been able to attract any potential buyers. Unicare also indicated that it would begin downsizing its customer support services for health insurance coverage provided to plan participants. Unicare, therefore, put

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[3] Treas. Reg. § 54.9815-1251T(a)(1)(ii); 29 C.F.R. § 2590.715-1251(a)(1)(ii); 45 C.F.R. § 147.140(a)(1)(ii); 75 Fed. Reg. 34541 (June 17, 2010).

[4] Lena H. Sun, *UniCare to Drop About 3,000 Virginians from Health Insurance Plans*, THE WASH. POST, June 29, 2010, at B04.

[5] Letter from Robert O'Hara, Director of Sales and Account Management, Unicare, Inc., to Nicole Lark, Firm Wide Compensation and Benefits Director, Covington & Burling LLP (undated) (on file with Covington & Burling LLP).

[6] *Id.*

[7] See note 4, above.

us in an untenable position of having to choose between either continuing our Unicare coverage (without any assurances that a buyer would be found) or beginning the process of contracting with a new insurer. We would have preferred to remain insured by Unicare. However, we determined that the prudent course of action was to begin the process of identifying a replacement insurer.

We, along with most of Unicare's large group clients in the District of Columbia, began seeking new insurers for our group health plans in late 2009 and early 2010. The process for selecting a new insurer extended over several months and involved drafting and distributing a request for proposals, carefully reviewing proposals received from insurers, and negotiating with the selected insurer. Our process was complicated by the fact that we wished to duplicate the coverage provided by Unicare as much as possible so as to minimize disruption to plan participants. For these reasons, we were not able to enter into an agreement with a replacement insurer before March 24, 2010. Consequently, we cannot benefit from the transition relief available to employers who entered into new insurance contracts for their plans on or before March 23, 2010.[8]

We are also not eligible for the transition relief available to plans that modify their terms after March 23, 2010 but before the interim final regulations were issued on June 14, 2010.[9] Although we began the process of identifying a replacement insurer in early 2010, many of us did not enter into contracts with our replacement insurer until it became clear that Unicare would not be able to locate a buyer that would continue Unicare's existing network of providers. This fact did not become apparent until after the interim final regulations were issued. Moreover, to be eligible for this transition relief, employers must rescind the offending change before the next plan year.[10] Therefore, even if we had adopted new contracts before June 14, 2010, we would not have been eligible for this relief because we could not have rescinded our contracts with our replacement insurers without adversely affecting our plan participants.

In the end, we were forced to change insurers because participants would have been much worse off if we had continued to retain Unicare. Unicare withdrew from the health insurance market in Virginia and effectively withdrew from the health insurance markets in Maryland and the District of Columbia by disbanding its network of providers and virtually eliminating sales and account

[8] Treas. Reg. § 54.9815.1251T(g)(2)(i)(A); 29 C.F.R. § 2590.715-1251(g)(2)(i)(A); 45 C.F.R. § 147.140(g)(2)(i)(A).

[9] Treas. Reg. § 54.9815.1251T(g)(2)(i)(C); 29 C.F.R. § 2590.715-1251(g)(2)(i)(C); 45 C.F.R. § 147.140(g)(2)(i)(C).

[10] *Id.*

services in these markets.[11] (At the end of 2009, Unicare had approximately 28 service managers and 25 to 30 account managers. As of August 16, 2010, Unicare had eliminated all service managers and retained only two account managers.)[12] Unicare did not find a buyer for its health insurance coverage in our region and replaced its existing network of providers with a significantly smaller provider network for the Washington, D.C. metropolitan area on July 1, 2010.[13] Accordingly, our plan participants would have suffered from significant network disruption and increased out-of-pocket costs if we continued to retain Unicare. In addition, due to employee attrition, Unicare outsourced its first-level customer service responsibilities in April 2010, thereby reducing the quality and responsiveness of its customer service for our participants.[14]

We took all reasonable steps necessary to act in our participants' best interests – we met with Unicare to determine the likelihood that a buyer would be located, invested significant time and expense in selecting a replacement insurer who could provide comparable health benefits, and refrained from entering into an agreement with a replacement insurer until we were certain that Unicare would be unable to continue providing the same level of benefits and customer service to participants. We also ensured that the change from Unicare to the new insurer did not result in any other changes to our group health plan that could lead to a loss of grandfathered status. Nevertheless, the interim final regulations penalize us by providing that our plan has lost grandfathered status because Unicare decided to effectively withdraw (and in some cases formally withdraw) from the mid-Atlantic health insurance market.

In our case, the interim final regulations produce a nonsensical result. If we had chosen to retain Unicare as the insurer of our plan in the District of Columbia and Maryland, our plan would have grandfathered status despite significant adverse effects on plan participants in the form of a drastically reduced provider network, increased out-of-pocket costs, and outsourced customer service. By changing to a replacement insurer, we have preserved the original coverage that our participants received from Unicare and their access to a substantial network of providers but, because those benefits are being provided by a different insurer, our plans have lost grandfathered status.

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[11] E-mail from Pennie Hinds, Senior Vice President, Willis Group, to Mary C. DeYoung, Associate, Covington & Burling LLP (August 11, 2010, 4:41pm EDT) (on file with Covington & Burling LLP).

[12] Email from Pennie Hinds, Senior Vice President, Willis Group, to Nicole Lark, Firm Wide Compensation and Benefits Director, Covington & Burling LLP (August 16, 2010, 9:44am EDT) (on file with Covington & Burling LLP).

[13] See note 5, above.

[14] *Id.*

We respectfully request that the interim final regulations be amended to provide that a group health plan will not cease to be grandfathered under PPACA for entering into a new policy, certificate, or contract of insurance after March 23, 2010, if (1) the change was necessitated by the withdrawal or effective withdrawal of the plan's existing insurer from the health insurance market in the region; and (2) the replacement policy, certificate, or contract of insurance does not make any changes to benefits under the plan that would otherwise result in the loss of grandfathered status. For this purpose, an effective withdrawal occurs when an insurer reduces its coverage and participant services so significantly that the insurer can no longer provide competitive health care coverage to participants and no longer maintains an effective presence in the regional insurance market.

The undersigned law firms appreciate the opportunity to provide these comments on the interim final regulations. If the Departments have any questions concerning our comments, or if we can be of further assistance, please contact John B. Waters at (202) 662-6000.

Sincerely,

JWaters

John B. Waters
Executive Director
Covington & Burling LLP

Additional Signatory:

Wiley Rein LLP