VEHI FAQ

Grandfathered-Plan Status under the ACA, VEHI Health Plans & the Vermont Insurance Exchange

Revised August 2015

Introduction

This FAQ is a continuation of VEHI's efforts to educate school districts, local union leaders and school employees about the impact of the *Affordable Care Act* (ACA) on VEHI health plans that are currently "grandfathered" and "non-grandfathered" under federal law.

Please be advised: VEHI's analysis on retaining grandfathered-plan status is based on United States Department of Labor guidance and good faith interpretations of available regulations. If retaining grandfathered-plan status is important to your group, it's important to understand that making changes to program offerings or contributions have the potential to cause a loss of grandfathered-plan status.

If you have questions that are not addressed below or need greater clarity on the contents or implications of this document, please contact Laura Soares at VSBIT (802.223.5040) or Mark Hage at Vermont-NEA (802.223.6375).

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Question 1: What is a "grandfathered" health plan under the Affordable Care Act (ACA)?

A grandfathered health plan is a plan that existed on March 23, 2010, the day the ACA was signed by President Obama. These health plans are exempt from certain ACA requirements—for example, the rule that eliminates cost sharing for federally recommended preventive services (right now, in most VEHI plans, preventive services carry a modest co-payment or are subject to a deductible or co-insurance).

While grandfathered health plans are exempt from some requirements, these plans have been required to comply with many other changes to comply with the ACA. These requirements have been phased in over a period of time. Certain changes were required for the first plan year beginning on or after September 23, 2010, while others were phased in for the first plan year beginning on or after January 1, 2014. Therefore, the advantage of maintaining grandfathered-plan status has steadily declined since the ACA first became law. Currently, all plans (grandfathered and non-grandfathered plans) must have:

- No annual or lifetime dollar limits on essential health benefits for all plans;
- No rescissions of coverage when people get sick and have previously made an unintentional mistake on their application;
- Extension of parents' coverage to young adults under 26 years old;
- No coverage exclusions for pre-existing conditions; and
- No employment waiting period for coverage greater than 90 days.

Question 2: Can "grandfathered-plan status" be lost, and, if so, how?

Grandfathered-plan status can, indeed, be lost or relinquished. There are six conditions placed on grandfathered health plans under the ACA. If any one of them is violated, an employer's health plan loses grandfathered status. They are listed below, *verbatim*, from a federal government factsheet (http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html). The first five VEHI controls.

Grandfathered health plans…

i. **Cannot Significantly Cut or Reduce Benefits**. For example, if a plan decides to no longer cover care for people with diabetes, cystic fibrosis or HIV/AIDS.
ii. **Cannot Raise Co-Insurance Charges.** Typically, co-insurance requires a patient to pay a fixed percentage of a charge (for example, 20% of a hospital bill). Grandfathered health plans cannot increase this percentage.
iii. **Cannot Significantly Raise Co-Payment Charges.** Frequently, plans require patients to pay a fixed-dollar amount for doctor's office visits and other services. Compared with the copayments in effect on March 23, 2010, grandfathered health plans will be

able to increase those co-pays by no more than the greater of $5 (adjusted annually for medical inflation) or a percentage equal to medical inflation plus 15 percentage points. For example, if a plan raises its copayment from $30 to $50 over the next 2 years, it will lose its grandfathered-plan status.

iv. **Cannot Significantly Raise Deductibles.** Many plans require patients to pay the first bills they receive each year (for example, the first $500, $1,000, or $1,500 a year). Compared with the deductible required as of March 23, 2010, grandfathered plans can only increase these deductibles by a percentage equal to medical inflation plus 15 percentage points. In recent years, medical costs have risen an average of 4-5% so this formula would allow deductibles to go up, for example, by 19-20% between 2010 and 2011, or by 23-25% between 2010 and 2012. For a family with a $1,000 annual deductible, this would mean if they had a hike of $190 or $200 from 2010 to 2011, their plan could then increase the deductible again by another $50 the following year.

v. **Cannot Add or Tighten an Annual Limit on What the Insurer Pays.** Some insurers cap the amount that they will pay for covered services each year. If they want to retain their status as grandfathered health plans, plans cannot tighten any annual dollar limit in place as of March 23, 2010. Moreover, plans that do not have an annual dollar limit cannot add a new one unless they are replacing a lifetime dollar limit with an annual dollar limit that is at least as high as the lifetime limit (which is more protective of high-cost enrollees).

The **sixth grandfathering condition**, however, is directly related to collective bargaining and actions taken at the **local level.** Grandfathered health plans also…

vi. **Cannot Significantly Lower Employer Contributions.** Many employers pay a portion of their employees' premium for health plan coverage and this is usually deducted from their paychecks. Grandfathered health plans cannot decrease the percent of premiums the employer pays by more than 5 percentage points (for example, decrease their own share and increase the workers' share of premium from 15% to 25%).

Question 3: Are VEHI health plans "grandfathered" under the terms of the Affordable Care Act?

The great majority of VEHI plans offered by school districts are "grandfathered-plans" at present. There are some exceptions, which will be addressed below.

Question 4: Will the loss of grandfathered-plan status affect school districts with Vermont Health Connect now in operation?

Yes. The impact will depend, first, on whether districts are "small" or "large" employers. Small employers and individuals in the non-group market first entered the Exchange in 2014. The Legislature enacted a definition of "small" in 2012.

From 2014 to 2016, a **"small"** employer for purposes of the enrollment in the Vermont Exchange is any employment entity, for profit or non-profit, that has up to 50 employees. [i]On January 1, 2016, consistent with the ACA, the threshold number for defining a "small" employer will jump automatically to up to 100 employees, which means a "large" employer on that date will mean any entity with more than 100 workers.

If a school district falls under the definition of **"small"** in 2014, and only offers **non-grandfathered** health plans to its employees, it will have to leave VEHI and purchase health benefits on the Exchange for affected groups.

Question 5: If school districts defined as "small" employers and their unions decide to retain grandfathered-plan status for their health plans and stay in VEHI, what must they do at the *local level* to ensure this happens?

At the very least, to voluntarily remain in VEHI with grandfathered-plan status a "small" school district must **not decrease the employer's premium contribution by more than 5 percentage points** from what it was on **March 23, 2010,** or **drop a plan that was offered on March 23, 2010.**

Question 6: Let's say a school district decreases its premium contribution by more than 5 percentage points from what it was on March 23, 2010, only for *two-person* or *family coverage*—but retains the same contribution level in force on March 23, 2010, or does not lower it by *more than* 5 percentage points from what it was on March 23, 2010, for *single coverage*, or vice versa—will the plans affected still lose grandfathered-plan status?

Yes.

Question 7: Can a school district and union agree to no longer offer a particular grandfathered health plan and still maintain the grandfathered-plan status of the remaining health plan options?

Based on current guidance, this is permissible, *but only if specific criteria is met.* If enrollment eligibility is frozen under a plan, so that no new individuals can come into the plan, this change alone will not cause a loss of grandfathered-plan status. But any current enrollees in the frozen

plan must be allowed to retain coverage. In addition, at least one individual must have been continuously covered under the frozen plan since March 23, 2010 (not necessarily the same person, but at all times at least one person).

Alternatively, if a grandfathered health plan is eliminated altogether and employees are transferred from that plan into another plan that is less advantageous to the employee, this will cause the transferee plan to lose its grandfathered-plan status unless there is a bona fide employment reason (see question 8) for doing so. Eliminating a benefit option will also cause a loss of grandfathered-plan status; however, it will only affect the eliminated benefit option. For example, if a plan has 3 benefit options (A, B and C), and option A is terminated and those employees are transferred to option B (without a bona fide employment reason), then A and B will lose grandfathered-plan status, but C will not. (Note: the regulations do not provide clarification on the definitions of "plan" or "benefit option," nor whether they are interchangeable in this context).

Question 8: If a school district transfers employees from one health plan or benefit option to another will the transferee health plan automatically lose grandfathered-plan status?

No, as long as there is a bona fide employment-based reason for the transfer. The U. S. Department of Labor allows the following bona fide reasons:

a) When a benefit option is being eliminated because the insurer is no longer offering the health benefit option;

b) When a benefit option is being eliminated because the insurer no longer offers the health benefit option to the employer (for example, because the employer no longer satisfies the insurer's minimum participation requirement);

c) When low or declining participation by plan participants in the health benefit option makes it impractical for the employer to continue to offer the health benefit option (Note: the regulations do not define "low or declining participation"); or

d) When a health benefit option is eliminated for any reason and multiple health benefit options covering a significant portion of other employees remain available to the employees being transferred.

Note: The fact that a change was collectively bargained does not absolve or change the grandfathered-plan rules.

Question 9: If school districts merge will their health plans lose grandfathered-plan status as a result of the merger?

Our interpretation of the law is that a merger will **not** jeopardize the grandfathered-plan status of health plans, provided the purpose of merging is NOT to extend grandfathered health plan coverage to employees who would otherwise be enrolled in or eligible for a non-grandfathered health plan. The federal anti-abuse rules governing grandfathered health plans allow for mergers and acquisitions. Here is the relevant language that explains how grandfathered-plan status can be lost in the wake of a merger: **"If the principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered health plan, the plan ceases to be a grandfathered health plan" (§54.9815-1251T(b)(2)(i), on page 34558 of Federal Register Vol. 75, No. 115, June 17, 2010).**

In short, if a merger produces the **result** that grandfathered-plan status continues, there should not be a problem; but if a merger or consolidation is principally for the **purpose** of extending grandfathered-plan status, the affected employers are likely to run afoul of the ACA's anti-abuse regulations.

Question 10: How will a mandated change in employers for school employees affect the grandfathered or non-grandfathered-plan status of the health plans offered to them?

This question arises specifically in the wake of Act 153 in Vermont, whose implementation will lead to "special education" employees having a new employer at the **S.U. level**. Under this scenario, we believe the grandfathered or non-grandfathered-plan status of the health plans available to these employees from their new employer will not be affected. Why?

First, based on the language cited in Question 9, the fundamental purpose of Act 153 is not to extend grandfathered-plan health coverage to employees. Second, grandfathered-plan status is assessed on a benefit package by benefit package basis. So, if veteran employees are transferred into a new employment relationship where only grandfathered health plans are offered, and there has been no violation of the anti-abuse provisions in federal law, those plans would remain grandfathered-plans. The status quo would hold as well if the plans were non-grandfathered.

This said, some number of veteran employees currently in grandfathered health plans will find themselves transferring employment to an S.U. district that currently offers only non-grandfathered plans, which would lead inevitably, and perhaps sooner than anticipated, to enrollment in the Exchange for these employees. This matter should be flagged in collective bargaining discussions around health insurance as Act 153 comes to fruition.

Question 11: If a school district ADDS a VEHI plan to its collective bargaining agreement post-March 23, 2010, is that plan grandfathered?

No. For example, if a school district added the $1,200 Comprehensive or $1,800 HSA Plan to its CBA **AFTER** March 23, 2010, the plan would be non-grandfathered, even though both were available from VEHI prior to March 23, 2010. Put differently, if a VEHI health plan is new to a school district—but not new to VEHI—it is non-grandfathered if it became an option after March 23, 2010. (This last point is relevant in discussions around implementation of Act 153, too.)

Question 12: What does this mean for a "small" school district and its local union that had agreed, AFTER March 23, 2010, to offer ONLY the $1,200 Comp or $1,800 HSA Plan to its employees, and had eliminated as options the VHP, JY and the $300 Comp Plans (or other VEHI plans)?

It means the school district would have been required to move all its employees to the Exchange in 2014 if the employer had up to 50 employees or in 2016, which is when the definition of "small" employer rises to up to 100 employees).

Question 13: Can districts offer a combination of grandfathered and non-grandfathered health plans? (We'll call these districts "hybrids.")

Yes. To date, this has happened more by accident than design. Most school districts still offer the JY/$300 Comp/VHP Plans, or some combination, and were doing so **BEFORE** March 23, 2010; a much smaller number added the $1,200 Comp and $1,800 HSA Plan **AFTER** March 23, 2010.

In this "hybrid" scenario, the JY/$300 Comp/VHP Plans are grandfathered-plans and the $1,200 Comp and $1,800 HSA Plan are non-grandfathered, so most employees would be in established grandfathered health plans and the rest, a much smaller number (in some cases just a handful), are in a non-grandfathered plan.

Question 14: Will "hybrid" districts be required to purchase health insurance on the Exchange in 2014 or 2016 for workers in non-grandfathered health plans, even if most of their other employees are in VEHI plans that are grandfathered-plans?

Not necessarily. Employees in non-grandfathered health plans would enroll in an available grandfathered health plan at open enrollment to continue in employer-sponsored coverage. Even with grandfathered-plan options, school districts and the local union may agree to offer products on the Exchange as well.

Question 15: Can employees in a "hybrid" district voluntarily transfer to or re-enroll in a grandfathered VEHI plan offered by the district?

Yes…provided at least one grandfathered health plan is offered. In other words, an employee enrolled in a non-grandfathered $1,200 Comp can still move to a grandfathered VHP, JY or $300 Comp Plan, depending on their open enrollment period and the health plans that are available. The district and its union may also agree to offer non-grandfathered plans through the Exchange in addition to or instead of VEHI grandfathered plans.

Question 16: If a school district and local union bargain a change that results in a VEHI health plan moving from unmanaged mental health care to managed mental health care benefits (for example, offering the JY Plan with managed mental health care rather than the JY plan with unmanaged benefits), will this negate the grandfathered-plan status of the health plan affected?

No—provided the six conditions listed earlier that govern grandfathered-plan status are not violated.

Question 17: How will the state monitor the loss of grandfathered-plan status?

At present, insurance companies are responsible for notifying the state of which employers have non-grandfathered plans. Insurers will also notify the state when employers with grandfathered-plans lose that status. VEHI provides this information upon request. To the best of our knowledge, there is no reporting obligation required of employers at this time.

Question 18: School districts, generally, employ and bargain with three distinct classifications of workers: teachers, support staff and administrators. If one group of workers bargains an agreement that decreases the employer's premium contribution by more than 5 percentage points from what it was on March 23, 2010, but the other two do not, does the district lose grandfathered-plan status for ALL its plans, thus affecting all its employees?

We believe the answer to this question is NO. Ultimately, this matter depends on the meaning of "similarly situated individuals" as defined in federal regulations. An employer is permitted to treat participants in its health plans as ***"distinct,"*** even though they are ***"similarly situated"***—in this case, employed by a public school—***"if the distinction between or among the groups of participants is based on a bona fide employment-based classification consistent with the employers' usual business practice."*** What is a "bona fide employment classification"? That is determined on the basis of "all relevant facts and circumstances," including, "full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date

of hire, length of service, current employee versus former employee status, and different occupations."

Our interpretation is that ESP, teachers and administrators can be treated as distinct groups of "similarly situated individuals" given the criteria above.

Question 19: If collective bargaining leads to an agreement where employees who do the same work end up paying different premium contributions for the same grandfathered-plan coverage, could that jeopardize the grandfathered-plan status of the plans?

It might. We wish we could be more definitive on this one. Suffice to say, that if you treat "similarly situated" workers differently in respect to premium contributions, regulators might conclude that you must forfeit grandfathered-plan status.

Question 20: What should a school district and union do if they have lost or will lose grandfathered-plan status due to the terms of a new bargaining settlement?

Contact VEHI, and we will help you understand your options and next steps.

Question 21: Is VEHI willing to speak to school boards and local unions together or separately on these matters?

Yes. We believe joint informational sessions are very useful to understanding the impact of the ACA and its grandfathered-plan provisions on school districts and their employees. Please contact Laura Soares at VSBIT (223-5040) or Mark Hage at Vermont-NEA (223-6375) to set up a meeting.

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[i] *33 V.S.A. § 1811(a)*

(3) (A) Until January 1, 2016, "small employer" means an entity which employed an average of not more than 50 employees on working days during the preceding calendar year. The term includes self-employed persons to the extent permitted under the Affordable Care Act. Calculation of the number of employees of a small employer shall not include a part-time employee who works fewer than 30 hours per week or a seasonal worker as defined in *26 U.S.C. § 4980H*(c)(2)(B). An employer may continue to participate in the Exchange even if the employer's size grows beyond 50 employees as long as the employer continuously makes qualified health benefit plans in the Vermont Health Benefit Exchange available to its employees.

(B) Beginning on January 1, 2016, "small employer" means an entity which employed an average of not more than 100 employees on working days during the preceding calendar year. The term includes self-employed persons to the extent permitted under the Affordable Care Act. The number of employees shall be calculated using the method set forth in *26 U.S.C. § 4980H*(c)(2). An employer may continue to participate in the Exchange even if the employer's size grows beyond 100 employees as long as the employer continuously makes qualified health benefit plans in the Vermont Health Benefit Exchange available to its employees.