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Grandfathered Plans: Maintaining the Status Quo

The Patient Protection and Affordable Care Act (PPACA) requires insurers and plan sponsors to modify their coverage to comply with statutory healthcare reform. Rather than imposing immediate changes for plans that were in existence on PPACA's enactment date, the statute "grandfathers" certain plans and does not require them to comply with certain reforms. A "grandfathered plan" is an individual policy or group health plan that was in effect on the date the PPACA was enacted (March 23, 2010). Grandfathered plans are exempt from select portions of the reform so long as grandfathered status is maintained.

Maintaining Grandfathered Status

On June 17, 2010, federal regulations were promulgated that provide both guidance for maintaining grandfathered status, and actions that result in the loss of grandfathered status. Individual or group health plans are grandfathered provided the plan had at least one individual enrolled in coverage on March 23, 2010, and continuously covered someone after that date (not necessarily the same person). Thus, a new group health plan (not the renewal of an existing plan) issued after March 23, 2010, is not a grandfathered plan. Employers may add new employees to plans and transfer employees from one plan to another without losing grandfathered status (provided there is a legitimate employment-based reason for the transfer).

The regulations mandate that in order to maintain grandfathered status, providers must maintain records proving that the plans were in effect on March 23, 2010, and those records must be available upon request. Further, any plan materials issued to recipients must include a statement that the provider believes the plan qualifies as a grandfathered plan under PPACA. The regulations list examples of changes that are permissible (meaning they alone will not result in a loss of grandfathered status) and those that are impermissible (meaning the plan will lose its grandfathered status if these changes are made). *See Table 1, below.*

Transition rules protect plans from the loss of grandfathered status if changes were made prior to March 23, 2010, or between that date and the date the governing regulations were promulgated (June 17, 2010). There is also a special rule that protects plans that were maintained pursuant to a collective bargaining agreement (CBA) that was ratified before March 23, 2010. Generally, fully-insured group health plans resulting from a CBA are deemed grandfathered until the date on which that agreement terminates. In other words, changes that are made to these plans that would ordinarily result in a loss of grandfathered status have no effect until the termination of the CBA. This special rule applies only to insured plans (not self-funded plans procured through a CBA which are otherwise subject to the grandfathering rules that apply to non-collectively bargained plans).

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Table 1

PERMISSIBLE CHANGES (These changes will NOT result in the loss of "grandfathered" status)	IMPERMISSIBLE CHANGES (These changes WILL result in the loss of "grandfathered" status)
Enrollment of new employees or additional family members of participating employees	Eliminates all or substantially all coverage for diagnosis/treatment of a particular issue
Changes to a policy or plan's premium	Increases a percentage cost-sharing requirement, such as co-insurance, above the level in effect on March 23, 2010
Changes made to comply with state/federal law	Increases fixed-amount cost-sharing requirements (other than copayments) by 15% or more above medical inflation
Voluntary changes made to comply with PPACA or increase benefits	Employer/Employee-Organization decreases its contribution to a group health plan by more than 5% of its rate on March 23, 2010
Changes to a plan's third party administrator	Certain changes to annual limits and lifetime limits if no such limits were in place on March 23, 2010

For more information on how the recent health care reform legislation affects your company, or the specific requirements for grandfathered plans, please contact [Tom Dowling](#).

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Employment-Related Opinions Issued by the Supreme Court

Following up on our article last month summarizing the status of various Supreme Court cases, the Court has issued decisions in the two employment-related cases that were pending.

Texting Privacy: On June 17, 2010, the Supreme Court in [City of Ontario v. Quon](#), held that a public employer's work-related search of a police officer's personal text messages on a government issued pager did not violate Fourth Amendment privacy rights. Although the employer had a written no-privacy policy, the officer's supervisor had verbally informed employees that they would be allowed to use their pagers for personal reasons outside the scope of the no-privacy policy if the employees paid for any excess usage charges. When the officer and others in his department subsequently exceeded the usage limits on their pagers for several months running, the employer sought to determine whether the existing usage limit was too low to accommodate all work-related text messages. In reviewing transcripts of the officer's text messages, the employer discovered that many were not work-related, and some were sexually explicit. As a result, the employer disciplined the officer.

The Court concluded that the employer's search of the officer's personal text messages did not violate his Fourth Amendment privacy rights because the search was reasonable. The search was

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motivated by a legitimate work-related purpose (ensuring that employees were not paying out of their own pockets for work-related expenses) and the search was not excessive in scope (only two months of transcripts were reviewed). Notably, the Court further concluded that the search would also be regarded as reasonable and normal in the private-sector context.

While the *Quon* opinion offers protection to employers, it still suggests that both public and private sector employers should exercise care when monitoring employee use of computers or communication devices. Employers should establish clear no-privacy policies and make certain that supervisors are trained in connection with policies to ensure that they do not waive the employer's rights to enforce them. Moreover, employers should confirm that they have a clearly articulated, work-related purpose before reviewing the contents of employees' computers or communication devices, and structure any such review to limit privacy intrusions if possible.

Labor Arbitration: On June 24, 2010, the Supreme Court issued its opinion in [Granite Rock Co. v. International Brotherhood of Teamsters](#), holding that the district court, not an arbitrator, must decide the question of whether a collective bargaining agreement was formed by the parties. This case resulted when a no-strike provision was inserted in a new collective bargaining agreement and the ultimate question was whether the new agreement was in place to prohibit a continued strike. The Supreme Court reversed the court of appeal's decision and ultimately upheld the trial court's decision in favor of the employer that the new collective bargaining agreement was ratified and the no-strike provision applied.

The Court also declined to recognize a new federal law cause of action under Labor Management Relations Act Section 301 for the international union's alleged tortious interference with the collective bargaining agreement. Casting some light on the Court's view of the actions by the international union, however, the Court provided the employer with various alternatives for pursuing a viable claim for the recovery of damages incurred as a result of the strike. Ultimately this decision will provide employers with additional teeth against an illegal strike and will help determine what damages may be recovered.

For more information on these decisions and how they may affect your employees, please contact [Cicely Lubben](#).

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Department of Labor Clarifies *Loco Parentis* Definition

Under the Family and Medical Leave Act (FMLA), eligible employees are entitled to 12 weeks of job-protected leave in a 12-month period due to the birth of a son or daughter, placement of a new son or daughter for adoption or foster care, and to care for a son or daughter with a "serious health condition." The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." Since the FMLA became law, the U.S. Department of Labor (DOL) has received several requests for guidance on whether employees who do not have a biological or legally recognized relationship with a child may take FMLA leave related to the birth or placement of a healthy child, or to care for a child with a serious health condition. In late June 2010 the DOL issued an [interpretation letter](#) (the DOL Letter) in which it made clear such FMLA leave is available to people who assume the role of caring for a child regardless of whether there is any biological or legally recognized relationship with the child. In announcing the DOL Letter, Labor Secretary Solis stated that the DOL's action "sends a clear message to workers and employees alike: All families including LGBT [lesbian-gay-bisexual-transgender] families, are protected by the FMLA."

The DOL Letter states that whether a person stands in *loco parentis* to a child is "a fact issue dependent on multiple factors." Those factors include, but are not limited to, the degree to which the child is dependent on the individual, the amount of support provided by the individual, and the extent to which duties commonly associated with parenthood are exercised by the individual, who is claiming to stand in *loco parentis*. The DOL Letter further states that, despite language in the FMLA regulations which could be interpreted to the contrary, a person does not need to provide both day-to-day care and financial support to stand in *loco parentis* to a child. In addition, the fact that a child has a biological parent in the home, or both a mother and a father, does not prevent some other person who has no biological or legal relationship with a child from standing in *loco parentis* to the child. As stated in the DOL Letter, "[n]either the statute nor the regulations restrict the number of parents a child may have under the FMLA." Examples referenced in the DOL Letter of persons standing in *loco parentis* to a child include: (1) a grandparent who provided financial support, shelter, food and health insurance; (2) a person who provides day-to-day care, but no financial support, for his or her unnamed partner's child; and (3) a boyfriend who helped his girlfriend's child eat, dress, get ready for bed, took the child to doctor appointments and school, and contributed more than half of the child's financial support. These examples are distinguished in the DOL Letter from a person who merely cares for a child while the child's parents are on vacation.

The DOL Letter also states that where an employer has questions about whether an employee's relationship with a child is covered under the FMLA, "the employer may require the employee to

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provide reasonable documentation or statement of family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed."

Bottom Line: If an employer receives a request for FMLA leave from an employee who has no known biological or legally recognized relationship with the child, the employer may not automatically deny the request. Instead, the employer should ask the employee for a written statement explaining the employee's relationship with the child so that the employer can determine whether the employee is asserting the existence of some family relationship or other indication of responsibility for the care or financial support of the child. Employers should also consider whether they want to update their FMLA policies to address this issue.

For more information on the FMLA and the affect of this recent DOL Letter, please contact [Laura Kipnis](#).

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Inside Washington

New Laws, Regulations and Agency Guidance

ADA. . .The Tenth Circuit, which governs Kansas, Colorado, New Mexico, Oklahoma, Utah and Wyoming has recently issued two decisions favorable to employers under the ADA. In [Duvall v. Georgia-Pacific Consumer Products, L.P.](#), the Court held that a position filled by a temporary employee is not considered "vacant" for reassignment purposes when identifying a reasonable accommodation under the ADA. The second decision in [Wilkerson v. Shinseki](#) found that, although an employee was disabled, he was not "otherwise qualified" for the position at issue because the obese and diabetic employee could not pass the annual physical exam which imposed job related and uniform standards that were a business necessity. . . The Department of Transportation rolled out the first [federal rule](#) which provides ADA disability protections to individuals with disabilities who travel on boats and ships. The proposed rule applies to public ferry systems and cruise ships. It will become effective 120 days after publication.

DOL. . .The extension of unemployment benefits remains in limbo as [a bill](#) was passed by the House of Representatives, but not by the Senate, which now remains on recess until July 12, 2010. [DOL Secretary Solis](#) has urged passage of the proposed bill by the Senate as the economy shows signs of growth with 100,000 private sector jobs being filled in the month of June. Unfortunately, this gain was offset by the loss of 250,000 census worker positions by the government. . .Deputy Secretary of the DOL, Seth Harris, [testified](#) before Congress on June 17, 2010, in support of the [Employee Misclassification Prevention Act](#). The bill targets the issue of employers who misclassify their employees as independent contractors. This has been a growing

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concern of the DOL as employers look for ways to reduce employment costs while crawling out of the recession.

NLRB. . .The recent Supreme Court decision in [New Process Steel v. NLRB](#) has eradicated 600 NLRB decisions previously issued by the two member Board. The underlying case was brought by a company which challenged the Board's recognition of a union at its plant in Indiana. The company argued that the Board did not have the authority to rule on the decision with less than a majority of the Board in place. The Supreme Court agreed. The Board operated with three vacant seats for a 27-month period and, in effect, all decisions rendered during this time frame are no longer valid and must be re-analyzed by the Board. The NLRB has issued a [press release](#) recognizing this decision and its impact. . .As to the current status of the Board, with the recent appointment and confirmation by the U.S. Senate of Mark Pearce and Brian Hayes, and the recess appointment of Craig Becker (appointed by the President in late March), the Board currently has five members for the first time since 2007. One member of the prior two-member Board, Peter Schaumber, however, will have his appointment expire at the end of August. Whether or not another member will be appointed prior to August, the future Board has a long road ahead of it as it attempts to address the prior 600 cases in addition to those that have recently been filed.

For more information regarding "Inside Washington," please contact [Mindy McPheeters](#).