



## HEALTH CARE REFORM: Legislative Brief

# IRS Confirms Delay of Nondiscrimination Rules for Fully Insured Health Plans

- The ACA includes nondiscrimination requirements for non-grandfathered fully insured health plans, similar to the rules that currently apply to self-funded plans.
- The effective date of these requirements is delayed, pending IRS regulations.
- The IRS recently confirmed that the effective date is still delayed.

**Because regulations have not yet been issued on the nondiscrimination requirement for fully insured plans, IRS officials recently confirmed that the requirement will not be enforced this year.**

The Affordable Care Act (ACA) requires non-grandfathered fully insured health plans to satisfy nondiscrimination rules regarding eligibility to participate in the plan and eligibility for benefits. This requirement was originally set to take effect for plan years beginning on or after Sept. 23, 2010. However, in late 2010, the IRS announced that the nondiscrimination requirement for non-grandfathered fully insured plans is **delayed indefinitely**, pending the issuance of regulations (or other administrative guidance) on how to comply with the requirement.

The IRS has still not issued regulations (or other administrative guidance) on the ACA's nondiscrimination requirement for non-grandfathered fully insured plans. Because the nondiscrimination requirement has been delayed indefinitely pending the issuance of regulations, **IRS officials have confirmed that the requirement will not be enforced this year.**

### **Nondiscrimination Requirement**

The ACA requires non-grandfathered fully insured plans to follow many of the same nondiscrimination rules that currently apply to self-funded plans. Specifically, non-grandfathered fully insured plans will have to satisfy rules similar to those of Internal Revenue Code section 105(h)(2), which prohibits discrimination in favor of highly compensated individuals. This section generally provides that plans must pass two separate nondiscrimination tests—the eligibility test and the benefits test.

When the ACA's nondiscrimination requirement for fully insured plans takes effect, certain plan designs will likely be prohibited, such as plans that only provide coverage to management or executive employees.



Also, after the effective date, employers that violate the ACA's nondiscrimination requirement may face penalties of up to \$100 per day for each affected individual.

### **Effective Date Delayed Indefinitely**

The ACA's nondiscrimination requirement for non-grandfathered fully insured plans was originally scheduled to take effect for plan years beginning on or after Sept. 23, 2010.

However, on Dec. 22, 2010, the IRS released [Notice 2011-1](#), which delays the effective date until after the IRS issues regulations. The IRS recognizes that it would be difficult for employers with fully insured plans to comply with the nondiscrimination requirements without IRS guidance. Thus, Notice 2011-01 provides that **compliance with the nondiscrimination rules will not be required until after regulations (or other administrative guidance) is issued**. In order to give employers time to implement any required changes, the guidance is expected to apply to plan years beginning a certain amount of time after the guidance is issued.

### **IRS Confirmation of Delayed Effective Date**

Although federal agencies have been steadily releasing regulations to implement the ACA, the IRS has still not issued any regulations or other guidance on the nondiscrimination requirement for non-grandfathered, fully insured plans.

The IRS is continuing to work on regulations regarding the nondiscrimination requirement. According to news reports, IRS officials have indicated that these regulations are delayed because the IRS is also updating the nondiscrimination rules that apply to self-insured plans.

Because the IRS has not released regulations, the nondiscrimination requirement for non-grandfathered fully insured plans continues to be delayed. Also, according to news reports, IRS officials confirmed that they will not enforce the nondiscrimination requirement for non-grandfathered fully insured plans this year because they have not issued regulations for employers to follow. Contrary to some news reports, this delay is not new; it was announced by the IRS in Notice 2011-1.