

November 10, 2021

Certain Telemedicine Relief Set to Expire

Telemedicine Benefits Can Raise Compliance Issues

In general, we recommend limiting participation for telemedicine benefits to employees enrolled in an employer's major medical coverage. Offering telemedicine benefits as a standalone benefit plan raises potential compliance issues that are difficult – or even impossible – to solve.

Perhaps the most significant compliance consideration is the plan design mandates under the Affordable Care Act (ACA). Standalone telemedicine benefits are also generally subject to other group health plan compliance obligations, which may include ERISA's summary plan description and reporting requirements, COBRA, and HIPAA.

We also believe most employer-provided telemedicine benefits are disqualifying other coverage for health savings account (HSA) eligibility purposes unless employers take certain steps.

Not Excepted Benefits: We do not believe most telemedicine benefits qualify as “excepted benefits” (as EAPs or another category) or qualify for another exclusion from these compliance obligations.

Temporary COVID-19 Relief for Telemedicine Benefits

In reaction to the COVID-19 pandemic overwhelming in-person patient care services, and in an effort to promote social distancing in health care where appropriate, the federal government enacted several measures providing compliance relief for employer-provided telemedicine coverage.

- [Federal Agency FAQs, dated June 23, 2020](#) (the “FAQs”) – FAQ #14 temporarily relieves standalone telemedicine plans from compliance with most of the ACA's plan design mandates.
- [Coronavirus Aid, Relief, and Economic Security Act](#) (the “CARES Act”) – Section 3701 of the CARES Act temporarily exempts telemedicine from affecting HSA eligibility.
- IRS Notices [2020-15](#) and [2020-29](#) – The notices allow HDHPs to provide testing and treatment for COVID-19 and related respiratory viruses before a participant satisfies the minimum statutory HDHP deductible without affecting HSA eligibility. This relief is effective until revoked by the IRS, and we will not discuss these notices further in this Alert.

This Alert focuses on the expiring telemedicine relief granted under the FAQs and the CARES Act.

Confirmation: We view these relief measures as confirmation that our positions on telemedicine compliance are correct, or there would be no need for this relief.

Temporary Relief from the ACA's Plan Design Mandates

Standalone telemedicine benefits are group health plans and most do not qualify for any exception from the various compliance obligations applicable to major medical coverage, including ERISA, the ACA, COBRA, and HIPAA. While an employer – and/or third party vendor assisting the employer – may be able to address reporting and disclosure obligations with some difficulty, a standalone telemedicine program cannot satisfy the ACA's plan design mandates. For example, we are not aware of any telemedicine program that can independently address the ACA's preventive services mandate. Because of these concerns, we generally believe employers should limit employer-provided telemedicine coverage to employees (and their spouses and dependents) enrolled in employer-provided medical coverage. Doing so allows the telemedicine benefit to piggyback off the major medical plan's compliance with the ACA to meet the plan design requirements it cannot satisfy on its own.

The FAQs temporarily excuse employer-provided, standalone telemedicine benefit programs from compliance with many of the ACA's mandates, including the prohibition on annual & lifetime dollar limits, the preventive services mandate, and coverage for routine patient costs associated with clinical trials. The FAQs do not provide relief for other compliance obligations, such as ERISA's summary plan description requirement (if the plan sponsor is subject to ERISA), COBRA, Form 5500 filing requirements, and the mental health/substance abuse disorder parity rules, and standalone telemedicine benefit programs must still comply with these requirements.

This relief applies to "large employers," defined as employers averaging 51 or more employees during the prior calendar year and at least two employees at the beginning of the current [telemedicine] plan year.¹ The relief allows employers to offer telemedicine coverage to employees who are not eligible for or enrolled in the employer's major medical coverage (e.g. full-time employees who waive medical coverage, ineligible part-time employees, etc.) while simultaneously avoiding the ACA compliance obligations the telemedicine plan cannot satisfy by itself.

The relief applies to plan years that begin *during* the Public Health Emergency (PHE) period, which lasts up to 90 days subject to extensions. The U.S. Department of Health & Human Services has the authority to extend the PHE and has done so seven times. The PHE currently runs through **January 16, 2022**, meaning calendar year telemedicine plans still qualify for relief through the 2022 plan year. However, the relief will not apply to plan years beginning after January 16, 2022 unless HHS renews the PHE again. It seems reasonable to believe HHS will extend the PHE at least one more time to mid-April 2022.

Temporary Relief from HSA Compatibility Issues

The CARES Act temporarily exempts telemedicine from affecting HSA eligibility for HDHP plan years beginning *by or before December 31, 2021*. This means telemedicine coverage is not disqualifying other coverage during the relief period if telemedicine benefits can bypass the statutory minimum annual HDHP deductible and the participant does not pay the fair market value (FMV) of the cost of the telemedicine visits.²

For example, this relief continues to apply to an HDHP with a November 1, 2021 – October 31, 2022 plan year. Unless extended, the current relief will cease to apply to HDHP plan years beginning on or after January 1, 2022. An extension seems plausible, but the IRS does not have the independent authority to do this, and we have no word on whether this will occur prior to December 31, 2021. Employers with HDHP plan years beginning on or after January 1, 2022 should consider an alternative telemedicine design, such as revised cost sharing or limitations until participants satisfy their deductibles, as a contingency should the relief expire.

¹ [Public Health Services Act §300gg-91\(e\)\(2\)](#).

² The standard proxy for the FMV of a telemedicine benefit is \$45 (related to Medicare reimbursement rates). A telemedicine benefit limited to providing preventive services does not affect HSA eligibility without this relief, but these are rare.

Enforcement

Prior to the temporary relief, we were not aware of any pattern of federal agency enforcement with respect to employer-provided telemedicine coverage outside of broad-based audits that were not specific to telemedicine. The relief itself is the strongest ever signal from the federal government that it believes telemedicine benefits are subject to these compliance obligations. We recommend employers discuss their telemedicine benefit programs and compliance obligations with their legal advisors, particularly if and when the temporary relief expires.

Keeping You Informed

We will provide additional information if any additional guidance related to the expiring telemedicine relief becomes available. Please stay tuned and in contact with your client service team.

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