

November 21, 2022

Expiring Telemedicine Relief for HDHPs/HSAs

Current Relief Set to End on December 31, 2022 for all HDHPs

On March 15, 2022, President Biden signed the [Consolidated Appropriations Act, 2022](#) ("CAA 2022") into law. The CAA 2022 included temporary relief by excluding telemedicine as disqualifying other health coverage when provided in conjunction with a high deductible health plan (HDHP). However, this relief only applies from April 1, 2022 – December 31, 2022 without regard to an HDHP's actual plan year.

This Alert summarizes the issue of telemedicine as disqualifying other health coverage, the expiring telemedicine relief under the CAA 2022, prospects for further relief, and employer considerations to preserve employee health savings account (HSA) eligibility beginning on January 1, 2023.

Telemedicine as disqualifying other health coverage

A HDHP participant with disqualifying other health coverage is ineligible to make or receive HSA contributions but can still use existing HSA funds. Generally, telemedicine is disqualifying other health coverage unless:

- Telemedicine benefits are not available until after an HDHP participant meets the statutory minimum annual HDHP deductible (known as a post-deductible benefit);
- Telemedicine benefits are only preventive and/or are limited to certain COVID-19 services; or
- HDHP participants must pay the fair market value (FMV) cost for the telemedicine visit (\approx \$45)¹ prior to meeting the statutory minimum annual HDHP deductible.²

Limited telemedicine relief during COVID-19 pandemic

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") excluded telemedicine as disqualifying other health coverage for HDHP plan years that occurred during 2020 as well as plan years that began on or before December 31, 2021. Congress did not manage to pass legislation extending this relief until the CAA 2022 in March 2022, which was after the CARES Act relief expired.

The CAA 2022 prospectively restored this relief from April 1, 2022 – December 31, 2022, but this left a small compliance gap for HDHP plan years beginning in January, February, or March of 2022. We discussed this extension and gap in a [prior alert](#), and it appears the IRS adopted an approach of passive non-enforcement for the compliance gap for HSA eligibility purposes.

As of the date of this Alert, the CAA 2022 relief is set to expire on December 31, 2022, and telemedicine coverage will again generally become disqualifying other health coverage beginning on January 1, 2023 (even for non-

¹ The unofficial proxy for FMV is a correlation to the Medicare reimbursement rates for telemedicine visits of different lengths. We do not recommend setting the FMV lower than this amount.

² Employers do not have to adjust the cost of telemedicine visits once a participant meets the deductible, and many do not.

calendar year HDHPs). This means affected HDHP participants will not be eligible to make or receive HSA contributions as of that date unless the telemedicine benefit meets one or more of the conditions described earlier.³

Other COVID-19 Relief: [IRS Notice 2020-15](#) permits HDHPs to provide coverage for COVID-19 testing and treatment without affecting an individual's ability to make or receive HSA contributions. [IRS Notice 2020-29](#) expanded the exception to include diagnostic testing for influenza A & B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV). This guidance is effective until revoked by the IRS.

COVID-19 vaccination is a preventive service – and a part of the ACA preventive services mandate – and can bypass the HDHP deductible without affecting HSA eligibility. The DOL, HHS, and IRS also will not enforce the Affordable Care Act's plan design mandates against a standalone telemedicine program when offered to employees who are not eligible for the employer's major medical coverage (see [Q/A #14](#)). This relief applies to a telemedicine plan year that begins *before* the end of the COVID-19 national public health emergency (PHE) as determined by HHS. The PHE is set to expire on January 11, 2023, but most expect HHS to extend it for another 90-day period.

Prospects for further disqualifying other health coverage relief

There is significant bipartisan support in Congress to extend the telemedicine exclusion as disqualifying other health coverage on a temporary or permanent basis.

Two bills introduced in 2021 are still before Congress and would make the relief permanent (minor language tweaks are now necessary):

1. [H.R. 5981](#) from Representatives Steel (R. CA – 48) and Lee (D. NV – 3); and
2. [S. 2097](#) from Senator Kennedy (R. LA).

Representatives Steel and Lee recently promoted their bill in a [Congressional blog post](#), and both won re-election in November. The Alliance for Connected Care presented [data supporting the telemedicine relief in October](#), and a broad group of stakeholders [recently requested](#) Congress extend this relief prior to 2023.⁴

It is reasonable to believe that additional relief will occur, but it is not clear when this might happen. Will the relief occur before January 1, 2023? Will the relief occur after this but be retroactive to January 1, 2023? Will the relief be after-the-fact again and leave another compliance gap? Any relief may need to be included in broader legislation in order to become law, and this may further affect timing.

Note: The relief has broad support and clearly makes sense in the context of promoting social distancing in reaction to a health crisis, but it is less intuitive as permanent relief. The relief allows a virtual outpatient visit to bypass the HDHP deductible without affecting the individual's eligibility for HSA contributions, but an in-person outpatient physician visit through the HDHP to receive the same services cannot.

³ This does not affect an individual's ability to use existing HSA funds from prior eligible contributions.

⁴ Marsh McLennan Agency, its parent company (Marsh), and sister company (Mercer) are signatories to this letter.

Employer considerations

Employers relying on the existing relief to offer telemedicine benefits with a \$0 or below FMV copayment to HDHP participants may wish to consider:

- Discussing contingency plans with their telemedicine vendor(s) in order to preserve HSA contribution eligibility for affected participants if an extension does not appear before the end of this year;
- Communicating the potential need to change the cost of telemedicine visits to participants; and
- Reviewing the issue with their legal and/or tax advisors.

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