December 29, 2022

Telemedicine Relief for HDHPs/HSAs Extended

Law provides relief through 2023 and 2024 HDHP plan years

On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 ("CAA 2023") into law. The CAA 2023 excludes telemedicine as disqualifying other health coverage ("disqualifying coverage") when provided in conjunction with a high deductible health plan (HDHP) for HDHP plan years that begin in 2023 and 2024. This extends the existing telemedicine relief that was set to expire on December 31, 2022.

This Alert summarizes the issue of telemedicine as disqualifying coverage, prior COVID-19 telemedicine relief, and the scope of the new extension.

Telemedicine as disqualifying coverage

An HDHP participant with disqualifying coverage is ineligible to make or receive HSA contributions but can still use existing HSA funds. Generally, telemedicine is disqualifying 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 (≈$45)[1] prior to meeting the statutory minimum annual HDHP deductible.[2]

A brief summary of telemedicine relief during the COVID-19 pandemic

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") excluded telemedicine as disqualifying 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 Consolidated Appropriations Act, 2022 ("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.

Other COVID-19 telemedicine relief

IRS Notice 2020-15 permits HDHPs to provide coverage for COVID-19 testing and treatment without affecting an

[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.

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.

The DOL, HHS, and IRS 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 current PHE is set to expire on January 11, 2023, but most expect HHS to extend it for another 90-day period. HHS indicated it intends to provide a reasonable advance warning before letting the PHE expire, and HHS has not issued any warning that it intends to let the PHE lapse on January 11th.

The relief extension

The CAA 2023 extends telemedicine's exclusion from disqualifying coverage for HDHP plan years that begin before January 1, 2025. This means the relief applies to HDHP plan years that begin in 2023 and 2024, which would include any non-calendar plan year that begins in 2024 (e.g. a July 1, 2024 – June 30, 2025 plan year).[3]

Temporary versus permanent relief

With many requesting telemedicine's permanent exclusion from disqualifying coverage, you might ask why Congress opted for another temporary solution. 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 because it creates the following logic problem under the statute:

- The relief allows a virtual outpatient visit to bypass the HDHP deductible without affecting the individual's eligibility for HSA contributions, but
- A HDHP participant cannot bypass the HDHP deductible to receive the same services (assume non-preventive) through an in-person outpatient physician visit without jeopardizing their HSA eligibility.

Employer action

Employers do not need to take any action to take advantage of this relief. If an employer previously communicated to employees that it might have to charge for telemedicine if the existing relief expired, it can now communicate that this is not the case.

[3] The CAA 2023 does not retroactively close the earlier January 1, 2022 – March 31, 2022 compliance gap.

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