

April 20, 2022

# Limited Telemedicine Relief for HDHPs/HSAs Reappears

## But the Relief Creates Compliance Gaps for Many HDHPs

On March 15, 2022, President Biden signed the [Consolidated Appropriations Act, 2022](#) ("CAA 2022") into law. The CAA 2022 includes limited prospective relief excluding telemedicine as disqualifying other health coverage for high deductible health plan ("HDHP") purposes. However, this relief leaves compliance gaps for many employer-sponsored HDHPs, affecting employee eligibility for health savings account ("HSA") contributions during the gap periods.

This Alert summarizes the expired/expiring telemedicine relief under the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), the additional limited relief under the CAA 2022, the compliance gaps created by the CAA 2022 relief for many HDHPs, and potential options for affected employers to preserve employee HSA eligibility.

## Telemedicine as disqualifying other coverage

In most instances, we believe telemedicine is disqualifying other health coverage for HDHP/HSA purposes unless:

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

An HDHP participant with disqualifying other coverage is ineligible to make or receive HSA contributions.

## The expired/expiring CARES Act relief

In order to promote the use of telemedicine and other remote-care solutions during the COVID-19 pandemic, the CARES Act temporarily excluded telemedicine as disqualifying other coverage for HSA contribution eligibility purposes for HDHP plan years beginning by or before December 31, 2021. This meant telemedicine coverage was not disqualifying other coverage during the relief period, even when available at a cost below FMV or before HDHP participants met the required deductible. This relief reinforces the view that telemedicine is generally disqualifying other coverage unless it meets certain conditions (Why would the relief exist otherwise?).

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<sup>1</sup> The unofficial proxy for FMV is a correlation to the Medicare reimbursement rates for telemedicine visits of different lengths.

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

There were efforts to extend this relief before December 31, 2021, but they were not successful and the CARES Act relief lapsed. Since the relief applied to a plan year beginning *by or before* December 31, 2021, the relief continues to apply to many non-calendar HDHP plans with 2021 – 2022 plan years that are still running. For example, the relief is still in effect for a July 1, 2021 – June 30, 2022 plan year. The CARES Act relief does not apply to any HDHP plan year beginning on or after January 1, 2022.

**Other Telemedicine Relief:** The federal government provided additional compliance relief for employer-provided telemedicine coverage from the Affordable Care Act's ("ACA's") plan design mandates. This Alert focuses on the temporary renewal of HSA compatibility relief granted under the CAA 2022. Please see our prior [Alert](#) for information about telemedicine relief under the ACA.

## CAA 2022 reinstates limited telemedicine relief (but leaves compliance gaps)

The CAA 2022 temporarily restores the exclusion for telemedicine as disqualifying other coverage for HDHP/HSA purposes, but it comes with a catch. The exclusion only applies from **April 1, 2022 – December 31, 2022** without any reference to an HDHP's plan year. This creates two potential compliance gaps:

1. This means telemedicine was generally [disqualifying other coverage](#) from January 1, 2022 – March 31, 2022 for HDHP plan years beginning in January, February, or March of 2022; and
2. Telemedicine benefits will become [disqualifying other coverage](#) again beginning on January 1, 2023, even for non-calendar HDHP plan years that began in 2022.

Remember, affected HDHP participants are not eligible to make or receive HSA contributions while they have disqualifying other coverage.<sup>3</sup>

As written, the relief does not apply retroactively to the January 1, 2022 – March 31, 2022 period for HDHP plan years beginning in those months. This relief also differs notably from the CARES Act, because the CAA 2022 relief window makes no reference or allowance for the actual HDHP plan year. The CAA 2022 relief simply expires on December 31, 2022, which will be during the 2022 – 2023 plan year in progress for non-calendar year HDHPs.

**CAA 2022 Relief is Optional:** Please note that the CAA 2022 relief is purely optional. An employer does not have to implement it – although we imagine many will – and can implement it for a shorter period.

### The potential January – March 2022 compliance gap

We address the potential January – March 2022 compliance gap and some options to attempt to address any HSA eligibility issues during the gap period below.

#### Safe and sound

The following employers with HDHPs do not need to do anything to address employee HSA eligibility during the January – March 2022 compliance gap period:

- Employers that did not pair HDHP and telemedicine benefits together;
- Employers with existing HSA-compatible telemedicine benefits that did not implement the CARES Act relief;

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

- Employers that took steps to restore HSA compatibility for their telemedicine benefits when the CARES Act relief expired;
- Employers that implemented the CARES Act relief for a non-calendar HDHP plan with a 2021 – 2022 plan year that did not end in January – March 2022.<sup>4</sup>

### **At risk and corrective options**

The employees of employers who implemented the CARES Act relief and continued providing telemedicine services without restoring HSA-compatibility for HDHP plan years beginning in January – March 2022 were technically ineligible to make or receive HSA contributions during the compliance gap period.

There is no official guidance from the IRS (or elsewhere) authorizing the use of retroactive corrections to address this compliance gap. The IRS has a long history of allowing good-faith retroactive corrections for compliance issues (through both official programs and unofficially). Employers may find it preferable to attempt a good-faith correction instead of simply accepting that a number of employees were ineligible to make or receive HSA contributions during the gap period,<sup>5</sup> and we recommend affected employers discuss this with their legal counsel and/or tax advisors.

The following list of potential options is not exhaustive. An employer's legal counsel and/or tax advisor may present additional options or assign different weight to the options discussed below.

1. Do nothing: The IRS does not have the independent authority to amend a compliance gap created by statute. However, it is possible the IRS will choose to look the other way and not enforce potential HSA eligibility issues during the January – March 2022 compliance gap period. Unless the IRS takes an official non-enforcement position (and we note it has not as of the publication date of this Alert), doing nothing unfortunately poses a compliance risk for the affected HSA participants.
2. Retroactively charge FMV for visits during the gap period: An employer could coordinate with its telemedicine vendor to charge HDHP/HSA participants the FMV for any telemedicine visits received during the gap period, at least prior to meeting the minimum statutory HDHP deductible (if that level of administration is feasible). This only applies to employees who used telemedicine during the gap period and is a good-faith attempt to restore the telemedicine benefit retroactively to a position where it did not bypass the statutory minimum HDHP deductible.

This option works best if the telemedicine vendor administers it, particularly since telemedicine vendors may be unwilling to share utilization information with employers. The argument for the employer to administer this and charge the FMV for any visits is weaker unless the employer remits the copayments to the telemedicine vendor. The employer should not collect and keep the copayments.

3. Impute income for visits during the gap period: An employer might choose instead to impute income equal to the FMV for any telemedicine visits received by HDHP/HSA participants during the gap period, at least prior to meeting the minimum statutory HDHP deductible (again, if that level of administration is feasible).

This is not as thorough a solution as actually charging affected employees the FMV of any visits, but it is an effort to correct the HSA eligibility issue and likely better than doing nothing in the absence of the IRS officially taking a non-enforcement position. This option is also available if a telemedicine vendor is unwilling to participate in Option #2 above.

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<sup>4</sup> In most cases, this means a non-calendar year HDHP with a plan year beginning in April – December 2021, however, some of those HDHPs may have ended early due to a short plan year.

<sup>5</sup> In general, this will require the affected employees to take corrective distributions from their HSAs to avoid penalties.

4. **Last month rule:** The last month rule treats an individual who is HSA-eligible as of December 1<sup>st</sup> as having been HSA-eligible for the entire calendar year. This rule allows an individual to contribute up to the annual HSA maximum contribution limit based on their tier of HDHP coverage (self-only or a tier including one or more dependents) as of December 1<sup>st</sup>. We have seen this approach suggested several times as a fix to allow affected employees to contribute up to their full annual limit, but we believe it has three significant administrative issues:
  - a) **Eligibility** – The affected individual must be HSA-eligible on December 1<sup>st</sup> to take advantage of the last month rule. This may not ultimately be the case for a number of affected employees.
  - b) **HSA contribution amount** – The last month rule’s adjustment to an individual’s maximum HSA contribution amount requires the individual to remain HSA-eligible through the entire following calendar year (in this case, through 2023). If an individual taking advantage of the last month rule loses HSA eligibility during this period, their contribution limit for 2022 is pro-rated retroactively and could result in excise tax liability for individuals with excess 2022 contributions as a result. The HSA rules do not require employers to police this, but employers should consider warning employees about it.
  - c) **New HSA participant timing** – Many employees were new HSA participants during the January – March 2022 compliance gap period. We believe relying on the last month rule as a corrective option will inevitably lead to a number of employees receiving HSA reimbursements during the gap period before they were actually eligible to establish an HSA.

## Beginning January 1, 2023

Unless the federal government extends the CAA 2022 limited telemedicine relief or adopts other similar relief, employers that take advantage of the optional CAA 2022 relief should take steps to restore HSA compatibility for their telemedicine benefits by January 1, 2023.

## Employer action

We recommend affected employers discuss their telemedicine benefit programs and compliance obligations with their legal counsel and/or tax advisors, evaluate their risk, and consider whether to take a course of action to address any compliance gap issues. As of the publication date of this Alert, we have no information regarding whether the IRS will enforce this compliance gap created by the CAA 2022. Employers also need to consider whether to implement the CAA 2022 relief for the April 1, 2022 – December 31, 2022 period.

## About the author



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