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IRS Addresses COVID-19 Testing and Treatment for HDHPs

As a result of the COVID-19 pandemic, high deductible health plans (“HDHPs”) can provide coverage for COVID-19 testing and treatment before the minimum deductible is satisfied without jeopardizing an individual’s ability to have tax-favored contributions made to their health savings account (“HSA”). This relief remains in effect pending future IRS guidance.

On June 24, 2023, the IRS issued Notice 2023-37, announcing that this relief will sunset with respect to plan years ending on or before December 31, 2024.

In addition, IRS Notice 2023-37 states that HDHPs may continue to provide first-dollar coverage for preventive care with an “A” or “B” rating by the United States Preventive Services Task Force (“USPSTF”), prior to satisfaction of the HDHP’s minimum deductible, without jeopardizing the ability of a participant to contribute to an HSA.

■ Background

During the Public Health Emergency (“PHE”), all group health plans (including HDHPs) were required to cover COVID-19 testing without cost-sharing in-network and out-of-network (they were not required to cover COVID-19 treatment without cost-sharing and most plans opted to cover treatment as any other medical expense, subject to deductible and cost-sharing and not first dollar).

As a general rule, an HDHP may not provide first-dollar coverage for medical expenses before a minimum deductible is satisfied, with an exception for preventive care. The IRS issued Notice 2020-15 creating a special exception that permitted first-dollar coverage of COVID-19 testing and treatment without jeopardizing the ability of participants to have contributions made to their HSA.

While the PHE expired on May 11, 2023, this relief remains in effect following the end of the PHE until further guidance is issued. On June 24, 2023, the IRS issued guidance to end this relief.

■ HDHPs and COVID-19 Testing and Treatment

Notice 2023-37 states that HDHPs can continue providing first-dollar coverage of COVID-19 testing and treatment before satisfaction of the HDHP's deductible without jeopardizing HSA eligibility for HDHP plan years ending on or before December 31, 2024. For subsequent plan years, first dollar coverage for COVID-19 testing or treatment will disqualify a participant from HSA eligibility.

According to the guidance, testing for COVID-19 does not currently fit within the preventive care safe harbor set forth in IRS Notice 2004-23, which allows testing for certain illnesses to be covered by HDHPs as preventive care without cost sharing to the participant. As described below, it is also not currently part of the Affordable Care Act's ("ACA's") mandated preventive services.

■ Preventive Services

IRS Notice 2023-37 also states that items and services recommended with an "A" or "B" rating by the USPSTF on or after March 23, 2010, are treated as preventive care under the rules governing HDHPs, regardless of whether these items or services must be covered without cost-sharing under the ACA. Therefore, an HDHP may provide first-dollar coverage of these items and services, prior to satisfaction of the deductible, without jeopardizing the ability of participants in the HDHP to have contributions made to their HSA.

This guidance is in response to the decision in *Braidwood Management v. Becerra* that eliminated the ACA's requirement that plans cover, without cost sharing, those items and services recommended by the USPSTF on or after March 23, 2010, under Public Health Service Act Section 2713.

IRS Notice 2023-37 also states that, if COVID-19 testing receives an "A" or "B" rating in the future from the USPSTF, then HDHPs could provide first-dollar coverage of COVID-19 testing, prior to satisfaction of the deductible, for plan years ending after December 31, 2024, without jeopardizing the ability of participants in the HDHP to have contributions made to their HSA.

■ Employer Action

Employers sponsoring fully insured HDHPs should confirm with their carriers when the COVID-19 testing coverage requirements due to the PHE ended or will end so that appropriate communications can be provided to employees. While many carriers stopped providing first dollar coverage upon the expiration of the PHE, some continued coverage for testing through the end of the plan year. Further, a few states (e.g., California, New Mexico) require fully insured plans to continue to cover COVID-19 testing without cost-sharing.

Employers sponsoring self-funded HDHPs that have continued to provide first-dollar coverage of COVID-19 testing and/or treatment without cost-sharing should review the plan design with their third-party administrator to determine the appropriate timeframe to implement required cost-sharing to maintain HSA contribution eligibility for participants.

- Non-calendar year plans will need to comply with the new requirements prior to December 31, 2024. For example, an HDHP with a June 1 plan year should stop providing first-dollar coverage for COVID-19 testing and/or treatment effective with the plan year that begins June 1, 2024.
- Calendar year plans must comply with the plan year that begins on January 1, 2025.