

Publications

IRS Issues Guidance on HDHP Relief for COVID-19 Services and Preventive Care

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On June 23, 2023, the IRS issued [Notice 2023-37](#) (the “2023 Notice”) regarding COVID-19-related coverage for HSA-compatible high-deductible health plans (“HDHPs”) and preventive care for HDHP purposes in light of the district court’s decision in [Braidwood Mgmt. Inc. v. Becerra, No. 4:20-CV-00283-O, 2022 WL 4091215 \(N.D. Tex. Sept. 7, 2022\)](#) and 2023 WL 2703229 (N.D. Tex. Mar. 30, 2023).

In 2020, the IRS issued Notice 2020-15 (the “2020 Notice”), which allows HDHPs to cover COVID-19 testing and treatment pre-deductible without affecting HSA eligibility. On March 29, 2023, the IRS issued guidance stating that the relief continues to apply post-PHE until the IRS issues further guidance. [FAQs About Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58](#).

COVID-19 Relief for HDHPs Ends After 2024

The 2023 Notice states that, with the end of the COVID-19 Public Health Emergency and National Emergency, the relief in the 2020 Notice is no longer needed. Thus, the HDHPs are only permitted to cover COVID-19 testing and treatment on a pre-deductible basis for plan years that end on or before December 31, 2024.

GROOM INSIGHT: This means that calendar year HDHPs must subject COVID-19 testing and treatment to the deductible beginning with the 2025 plan year. This gives HDHPs more than a year to transition to applying the deductible to these services. However, non-calendar year HDHPs will have less time since the relief will only apply until the end of the 2023 plan year. This is because a 2024 non-calendar year plan year will end after December 31, 2024.

Preventive Care Safe Harbor for HDHPs Does Not Include COVID-19 Testing

The IRS has issued a series of Notices defining what is permissible preventive care that HDHPs can pay on a pre-deductible basis. In Notice 2004-23, the IRS provided a preventive care “safe harbor” and stated that preventive care for this purpose includes screening services, but does not generally include any service or benefit intended to treat an existing illness. Included in the safe harbor list are infectious disease screening services for Bacteriuria, Chlamydial Infection, Gonorrhea, Hepatitis B Virus, Hepatitis C, HIV, Syphilis, and Tuberculosis.

The 2023 Notice states that screenings for common and episodic illnesses, such as the flu, are not included on the list.

GROOM INSIGHT: This position regarding the flu test may come as a surprise to many employers and issuers. Many HDHPs cover flu testing as a preventive care screening since the test is not intended to treat an existing illness. Employers and issuers with HDHPs that cover flu tests (and similar tests, such as strep test) should consider revising the plan/policy to subject these tests to the deductible or consider whether they can take the position that the testing is still preventive, but outside the safe harbor.

The Notice goes on to state that COVID-19 differs from these types of infectious diseases included in the safe harbor, and thus, the preventive care safe harbor does not include screening (*i.e.*, testing) for COVID-19. This is effective as of the date of publication of the 2023 Notice.

GROOM INSIGHT: Many plans and employers were hopeful that the IRS would take the position that COVID-19 testing could be preventive care in certain circumstances, such as when the person had not yet been diagnosed with COVID-19. One reason the IRS might have taken the position that COVID-19 testing is not preventive care is that might be difficult in practice for a plan to determine when the test was for screening versus when someone had already been diagnosed with COVID-19.

Note that this rule is not relevant to HDHPs until the plan year beginning in 2025. Until then, HDHPs can continue to cover COVID-19 testing pre-deductible under the relief above.

USPSTF “A” or “B” Recommendations Are Preventive Care for HDHPs

On April 13, 2023 following the *Braidwood* decision, the Tri-Agencies issued FAQs that provide initial guidance on how the decision affects the requirement to cover preventive services without cost-sharing under the Affordable Care Act. The FAQs state that, until further guidance is issued, items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010 will be treated as preventive care for purposes of the HSA preventive care safe harbor.

The Notice reaffirms the position in the FAQs and provides 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 for purposes of the HSA preventive care safe harbor, regardless of whether these items and services are preventive care under the ACA.

GROOM INSIGHT: There was confusion about this after *Braidwood* because, in addition to the HSA preventive care safe harbor, the IRS issued guidance after the ACA passed that services that are preventive care for ACA purposes were also preventive care for HDHP purposes. However, all of the services that were impacted by *Braidwood* appear to fit within the HSA preventive care safe harbor. So, this is generally how HDHPs were proceeding, and it is welcome confirmation from the IRS on this point.

The Notice also states that if the USPSTF later recommends COVID-19 testing with an “A” or “B” rating, then the testing would be treated as preventive care under the preventive care safe harbor, regardless of whether it is considered preventive care under the ACA.