

Publications

The IRS Issues Two Notices Regarding Preventive Care and Medical Care

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On October 17, 2024, the IRS issued two Notices: one regarding preventive care services that an HSA-compatible high deductible health plan (“HDHP”) can cover on a pre-deductible basis and another allowing the cost of condoms to be treated as Code section 213(d) medical care expenses.

Notice 2024-75

[Notice 2024-75](#) clarifies the list of benefits that an HDHP can provide on a pre-deductible basis as preventive care. Under the Notice, the following benefits are preventive care for this purpose:

- *Oral Contraceptives:* All over-the-counter (“OTC”) oral contraceptives for a participant potentially capable of becoming pregnant, including, but not limited to, OTC birth control pills and emergency contraception, regardless of whether they are obtained with a prescription. This is effective for plan and policy years that begin on or after December 30, 2022.

GROOM INSIGHT: Under the ACA, plans and policies must cover FDA-approved, -granted, or -cleared contraceptives, including OTC.

- *Male Condoms:* All benefits for male condoms, regardless of whether obtained with a prescription and regardless of who purchases them. This is effective for plan and policy years that begin on or after December 30, 2022.

GROOM INSIGHT: Under the ACA, plans and policies must cover preventive care and screenings for women as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (“HRSA”). The Notice states that, while the HRSA-supported guidelines previously included only female condoms, the HRSA-supported guidelines were expanded in 2021 to encompass contraceptives that are not female-controlled, such as male condoms. However, the Notice states that the expanded HRSA-supported guidelines made no changes to the recommendations regarding male sterilization (e.g., vasectomies). Thus, male sterilization is not considered preventive care for purposes of the ACA or HSA eligibility rules.

- *Breast Cancer Screening:* Breast cancer screenings, including MRIs and ultrasounds. Notice 2024-75 updates the list of HDHP safe harbor screenings in Notice 2004-23. Thus, this is effective retroactive to April 12, 2004, which is the date Notice 2004-23 was published.

GROOM INSIGHT: The safe harbor list in Notice 2004-23 only included mammograms and no other types of breast cancer screenings. So, Notice 2024-75 adds other types of breast cancer screenings to that list. Note that this only includes screenings and not mammograms, MRIs, or ultrasounds if someone has already been diagnosed with breast cancer.

Under the ACA, plans and policies must cover mammograms with no cost-sharing for certain individuals, but plans and policies are not required to cover with no cost-sharing other types of screenings, such as MRIs and ultrasounds. Thus, an HDHP is not required to cover MRIs and ultrasounds with no cost-sharing, but the Notice allows an HDHP to do so on a pre-deductible basis if it would like.

- *Continuous Glucose Monitors (“CGMs”):* CGMs, as long as they measure glucose levels using a similar detection method or mechanism as other glucometers (i.e., piercing the skin) (this does not include smartwatches or smart rings). This includes CGMs that both monitor and provide insulin. If, however, the CGM also performs other medical or non-medical functions (other than minor functions, such as time and date functions), then those functions also must be preventive care for an HDHP to be able to cover the device pre-deductible. The IRS notes that Notice 2024-75 clarifies Notice 2019-45. Thus, this is effective retroactive to July 17, 2019, the effective date of Notice 2019-45.
- *Insulin:* The Inflation Reduction Act of 2022 amended Code section 223(c) to permit HDHPs to cover “selected insulin products” on a pre-deductible basis. The Notice clarifies this rule applies “without regard to whether the insulin product is prescribed to treat an individual diagnosed with diabetes or prescribed for the purpose of preventing the exacerbation of diabetes or the development of a secondary condition.” IRS interprets Code section 223(c)(2)(G) to include any devices used to administer or deliver the selected insulin products. This is effective retroactive to plan and policy years beginning after December 31, 2022.

GROOM INSIGHT: Notice 2019-45 provides that specified services and items, including glucometers and insulin, are treated as preventive care for HDHP purposes and thus can be covered on a pre-deductible basis. However, under Notice 2019-45, this is only when prescribed (1) to treat an individual diagnosed with diabetes and (2) for the purpose of preventing the exacerbation of the diabetes or the development of a secondary condition. While Notice 2019-45 provides that glucometers are treated as preventive care, it does not directly refer to CGMs.

The ACA does not require that plans and policies cover CGMs or insulin with no cost-sharing as preventive care. Thus, an HDHP is not required to cover CGMs and insulin with no cost-sharing, but the Notice allows an HDHP to do so on a pre-deductible basis if it would like.

Notice 2024-71

[Notice 2024-71](#) provides a safe harbor under Code section 213(d) for amounts paid for condoms. The Notice states that “depending on the specific facts and circumstances, amounts paid for condoms may or may not be considered medical expenses under section 213(d).” However, the Notice provides a safe harbor under which the IRS will treat amounts paid for condoms as amounts paid for medical care under Code section 213(d).

The Notice goes on to say that, because amounts paid for condoms are treated as expenses for medical care under Code section 213(d), the amounts are also eligible to be paid or reimbursed under a health FSA or HRA and paid or reimbursed tax-free from a major medical plan or HSA.

There is no effective date in the Notice, so presumably the safe harbor is effective beginning on October 17, 2024, the date of publication of the Notice.