

THE ECFC FLEX REPORTER

The ECFC FLEX Reporter provides in-depth coverage of developments affecting the administration of cafeteria plans, flexible spending arrangements (FSAs), health reimbursement arrangements (HRAs), and health savings accounts (HSAs).

Articles in The ECFC FLEX Reporter are authored by nationally recognized attorneys and consultants, and edited by John R. Hickman, a partner in the Employee Benefits Practice Group of Alston & Bird, LLP.

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Top Three Questions Regarding High-Deductible Health Plans and COVID

By Katie Bjornstad Amin, Esq., and Christine Keller, Esq., Groom Law Group

1. Are HDHPs required to cover COVID vaccines with no cost-sharing?

The short answer is yes.

As background, the ACA requires group health plans, including HDHPs, to cover certain preventive care services with no cost-sharing. One category of such services is “immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC) with respect to the individual involved.”

Plans must cover without cost-sharing new ACIP recommendations starting with the plan year that begins on or after the date that is one year after the date the recommendation is issued. On the other hand, if the ACIP drops a recommendation, the plan must cover the immunization only through the end of the plan year. The one exception is that a plan can stop covering the immunization immediately if it is subject to a safety recall or is otherwise determined to pose a significant safety concern by a federal agency authorized to regulate the item. An ACIP recommendation is considered to be issued on the date on which the CDC Director adopts the recommendation, which is the earlier of the date the recommendation is: (1) published in the *Mortality and Morbidity Weekly Report*; or (2) reflected in the Immunization Schedules of the CDC.

In recent weeks, there has been a flurry of changes with respect to COVID vaccines:

- On May 28, HHS Secretary Robert F. Kennedy, Jr. announced that the CDC no longer recommends the COVID vaccine for healthy pregnant women and children.
- On May 29, the CDC revised the recommended immunization schedule for healthy children to state that the COVID vaccine is permissive and “informed by the clinical judgment of a healthcare provider and personal preference and circumstances.” The schedule appears to list COVID vaccines for adults, so it seems like the vaccine is still a recommendation for healthy pregnant women.

- On June 9, Kennedy announced the removal of all 17 voting members of the ACIP.
- On June 11, Kennedy announced eight new ACIP members.

Although not entirely clear, it appears that none of the above actions changed the ACIP's recommendation with respect to COVID vaccines. The ACIP is scheduled to meet on June 25-27, 2025. But, it is not clear whether the ACIP can make changes to its recommendations if the member positions are only partially filled. If so and the ACIP *no longer recommends the COVID vaccine for some or all groups* and this is adopted by the CDC Director, HDHPs must continue to cover the vaccine with no cost-sharing, but can stop doing so for the impacted groups after the end of the plan year. However, HDHPs can stop covering the vaccine with no cost-sharing immediately if the vaccine is either (1) subject to a safety recall or (2) otherwise determined to pose a significant safety concern by a federal agency authorized to regulate the vaccine.

2. If the ACIP's recommendation changes, can HDHPs continue to cover COVID-19 vaccines pre-deductible?

The short answer is yes.

Notice 2004-23 provides that an HDHP can cover vaccines pre-deductible as preventive care. Notice 2013-57 also provides that an HDHP can cover ACA-required preventive care pre-deductible. Thus, currently, an HDHP can cover the COVID vaccine pre-deductible under both Notices. Even if the ACIP recommendation changes, however, and the vaccine is no longer ACA-required preventive care, HDHPs can continue to cover the vaccine pre-deductible under Notice 2004-23.

3. Can an HDHP Cover Other COVID Testing and Treatment Pre-Deductible?

The short answer is generally no.

In March 2020, the IRS issued Notice 2020-15, which provided that an HDHP can cover COVID testing and treatment pre-deductible. On February 10, 2023, the IRS issued Notice 2023-37, which provided that the relief described in Notice 2020-15 applies only with respect to plan years ending on or before December 31, 2024. For subsequent plan years, an HDHP is not permitted to provide COVID testing and treatment pre-deductible.

The IRS also noted that it does not consider COVID testing to fit under the preventive care safe harbor in Notice 2004-23, reasoning that:

Notice 2004-23 provides that preventive care under section 223(c)(2)(C) includes, but is not limited to, screening services as specified in the Appendix to Notice 2004-23. However, preventive care does not generally include any service or benefit intended to treat an existing illness, injury, or condition. As part of the preventive care safe harbor, the Appendix to Notice 2004-23 includes Infectious Diseases Screening Services for the following infections: Bacteriuria, Chlamydial Infection, Gonorrhea, Hepatitis B Virus Infection, Hepatitis C, Human Immunodeficiency Virus (HIV) Infection, Syphilis, and Tuberculosis Infection. Screenings for common and episodic illnesses, such as the flu, are not included on the list. Accordingly, the Treasury Department and the IRS are of the view that COVID-19 differs from the types of infectious diseases included in the preventive care safe harbor as specified in Notice 2004-23 . . .

The IRS noted, however, that an HDHP could cover COVID testing pre-deductible if the USPSTF recommends COVID testing with an "A" or "B" rating.

The IRS did not address the fact that, in many cases, an individual who takes a test for COVID has not yet been diagnosed with COVID and thus the test is arguably not treating an existing illness, injury, or condition.