

IRS Issues Guidance on COVID-19 Expenses for HDHPs

Introduction

On June 23, 2023, the Internal Revenue Service (IRS) published Notice 2023-37¹ which provides guidance on how High Deductible Health Plans (HDHPs) can cover COVID-19-related expenses before the minimum deductible is satisfied, although only for plan years ending on or before December 31, 2024. Notice 2023-37 also clarifies that the “preventive care” safe harbor for HDHPs does not include COVID-19 screening and that items and services recommended with an “A” or “B” rating by the United States Preventive Services Task Force (USPSTF) on or after March 23, 2010 are treated as preventive care services for purposes of the HDHP preventive care safe harbor regardless of whether these items and services must be covered without cost-sharing under the Affordable Care Act (ACA).

Background

To be eligible to make contributions to a Health Savings Account (HSA), an individual must be covered by an HDHP and cannot be provided benefits under the HDHP until the minimum deductible for that plan year has been satisfied; an exception to this is for coverage for preventive care services.² In response to the COVID-19 National Health Emergency, the IRS issued Notice 2020-15.³ This guidance allowed HDHPs to provide benefits associated with testing for and treatment of COVID-19 either without a deductible or with one that is below the otherwise required minimum annual deductible; therefore, an HDHP providing such care on a no- or low-cost basis would not fail to qualify as an HDHP. Consequently, employees’ eligibility to make contributions to their HSAs was not jeopardized, even if medical expenses related to COVID-19 testing or treatment were paid by the HDHP.

On March 29, 2023, the Department of Labor (DOL) Employee Benefits Security Administration (EBSA) – in conjunction with the Departments of Health and Human Services and the Treasury (collectively, the “Agencies”) released guidance in the form of Frequently Asked Questions (FAQs)⁴ addressing – in part - how the end of the Public Health Emergency (PHE) on May 11, 2023 would impact requirements to cover COVID-19 diagnostic testing and vaccines. The FAQs affirmed that the relief provided in Notice 2020-15 would continue to apply following the end of the PHE until further guidance is issued.

COVID-19-Related Expense Relief for HDHPs Ends in 2024

Notice 2023-37 provides that, due to the end of the PHE, the relief described in Notice 2020-15 will apply only for plan years ending on or before December 31, 2024. As of the subsequent plan year, the HDHP is not permitted to cover testing and treatment expenses related to COVID-19 without a deductible or with

¹ [Expenses Related to COVID-19 and Preventive Care for Purposes of High Deductible Health Plans - Notice 2023-37 \(irs.gov\)](https://www.irs.gov/notice/2023-37)

² Internal Revenue Code § 223(c)(1)

³ <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

⁴ [FAQs about Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58 | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov/ebsa/press-releases/20230329-faq-covid-19)

a deductible below the minimum deductible (for individual or family coverage) for an HDHP as of the end of 2024.

Therefore, for a health plan that otherwise meets the HDHP requirements to qualify as an HDHP – and thereby preserve the ability of individuals covered on such plans to make HSA contributions – a calendar-year HDHP will be required to apply the cost of COVID-19-related expenses to the plan deductible beginning with the 2025 plan year. Non-calendar HDHP plan years (e.g., June 1, 2023 – May 31, 2024), however, will have less time before the expiration of this relief (i.e., through the end of the plan year that ends in 2024), as the 2024 non-calendar plan year will end after December 31, 2024 (e.g., June 1, 2024 – May 31, 2025).

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

The IRS has described in previous guidance⁵ the preventive care that an HDHP can offer either without a deductible or with one that is below the otherwise required minimum annual deductible, establishing a safe harbor for preventive care services under the HSA eligibility rules under the Internal Revenue Code (the “Code”). Examples include periodic health examinations (such as annual physicals), routine prenatal and well-childcare, immunizations, tobacco cessation programs, obesity weight-loss programs and a list of screening services (including, in part, screenings for various cancers and heart and vascular diseases).

According to Notice 2023-37, this preventive care safe harbor does not generally include any service or benefit intended to treat an existing illness, injury, or condition. Screenings for common and episodic illnesses (e.g., the flu) are not included in the list of preventive care screening services. Therefore, effective as of the date of Notice 2023-37, the preventive care safe harbor for purposes of HDHPs does not include screenings for COVID-19.

USPSTF A and B Recommendations Are Preventive Care for HDHPs

The ACA requires group health plans and insurers to provide certain preventive services without cost-sharing, including certain evidence-based items and services recommended by the USPSTF, the Health Resources and Services Administration, and the Advisory Committee on Immunization Practices. On June 11, 2019, the USPSTF released a recommendation with an “A” rating that clinicians offer HIV Preexposure Prophylaxis (PrEP) with “effective antiretroviral therapy to persons who are at high risk” of acquiring HIV. This triggered a coverage requirement for plans and insurers for plan years beginning on or after June 30, 2020.

In *Braidwood Mgmt., Inc. v. Becerra*, the District Court for the Northern District of Texas (the “District Court”) held that the members of the USPSTF were unconstitutionally appointed and therefore do not have the authority to determine the preventive services that must be covered by private health plans. On March 30, 2023, the District Court vacated⁶ all actions taken by the Agencies on or after March 23, 2010 to implement and enforce the ACA’s preventive health services mandate in response to “A” or “B” service recommendations made by the USPSTF.

⁵ <http://www.treasury.gov/offices/public-affairs/hsa/pdf/notice2004-23.pdf>

⁶ https://affordablecareactlitigation.files.wordpress.com/2022/09/gov.uscourts.txnd..330381.92.0_1.pdf

On April 13, 2023, the Agencies issued FAQ guidance⁷ in response to the District Court’s decision addressing the impact on the requirement to cover certain preventive health services without cost-sharing. In part, the FAQs explained that – until further guidance is issued – items and services with a USPSTF recommendation of “A” or “B” ratings on or after March 23, 2010 will be treated as preventive care for purposes of the HDHP preventive care safe harbor, irrespective of whether these services must be covered without cost-sharing under the ACA.

Notice 2023-37 affirms this FAQ guidance. This means that, if the USPSTF were to recommend COVID-19 testing with an “A” or “B” rating, then that testing would be treated as preventive care for purposes of HSA eligibility rules, irrespective of whether such no-cost coverage is required under the preventive services mandate of the ACA.

Closing

This notice provides a transition period – for employers, HDHP plan sponsors, and HSA holders – with respect to the expiration of the relief introduced in Notice 2020-15 and the classification of COVID-19 testing as preventive care. During this transition period, HDHPs can continue to provide no- or low-cost benefits for COVID-19 testing without impacting the HDHP’s classification as an HSA-compatible health plan until the end of the plan year ending on or before December 31, 2024. During this transition period – and prior to plan years beginning in 2025 - employers with HDHPs that cover COVID-19 testing as a preventive care screening should review and – if necessary – revise their plan policy documents to ensure these tests are subjected to the HDHP’s deductible no later than the beginning of the HDHP’s 2025 plan year. We will continue to monitor these developments – such as whether the USPSTF will recommend COVID-19 screening with an “A” or “B” rating in the future (in which case such testing would be treated as preventive care under the safe harbor) - and remain abreast of future guidance as COVID-19 relief continues to unwind.

The preceding general summary is intended to educate employers and plan sponsors on the potential effects of government guidance on employee benefit plans. This summary is not and should not be construed as legal or tax advice. As always, we strongly encourage employers and plan sponsors to consult competent legal or benefits counsel for all guidance on how the guidance applies in their specific circumstances.

⁷ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-59>