

Publications

Labor and Employment Alert: Permissible Preventive Care under High Deductible Health Plans

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In order to contribute to a health savings account (HSA), an employee must be enrolled in a high deductible health plan (HDHP) and not have disqualifying health coverage. In order for a health plan to qualify as a HDHP, it cannot pay for benefits – *other than preventive care* – before satisfying a deductible of at least \$1,350 single / \$2,700 family. Therefore, correct identification of preventive care benefits is necessary to preserve employees' eligibility to make HSA contributions.

"Preventive care" under a HDHP includes all first dollar preventive care that is required to be provided without cost-sharing under the Affordable Care Act (ACA). IRS Notice 2013-57. Pre-ACA guidance indicated that other items, services and medications might also qualify as preventive care. For example, IRS Notice 2004-50 Q&A-27 stated that "drugs or medications are preventive care when taken by a person who has developed risk factors for a disease that has not yet manifested itself or not yet become clinically apparent (i.e., asymptomatic), or to prevent the reoccurrence of a disease from which a person has recovered." This standard has been the subject of widely divergent interpretations which may now need to be reconsidered.

IRS Notice 2019-45 was published 7/17/2019 in response to Section 6(a) of Executive Order 13877 (6/27/2019), which directed the IRS to "issue guidance to expand the ability of patients to select [HDHPs] . . . that cover low-cost preventive care, before the deductible, for medical care that helps maintain health status for individuals with chronic conditions." The Notice is effective immediately.

Notice 2019-45 provides the following list of items, services and medications that can be treated as preventive care (i.e., covered without application of the deductible) under a HDHP for participants diagnosed with the associated chronic conditions. **Preventive Care for Specified Conditions For Individuals Diagnosed with** Angiotensin Converting Enzyme (ACE) inhibitors

Congestive heart failure, diabetes, and/or coronary artery disease Anti-resorptive therapy

Osteoporosis and/or osteopenia Beta-blockers

Congestive heart failure and/or coronary artery disease Blood pressure monitor

Hypertension Inhaled corticosteroids

Asthma Insulin and other glucose lowering agents

Diabetes Retinopathy screening

Diabetes Peak flow meter

Asthma Glucometer

Diabetes Hemoglobin A1c testing

Diabetes International Normalized Ratio (INR) testing

Liver disease and/or bleeding disorders Low-density Lipoprotein (LDL) testing

Heart disease Selective Serotonin Reuptake Inhibitors (SSRIs)

Depression Statins

Heart disease and/or diabetes

The IRS picked the listed items, services and medications based on their low cost relative to the potential for avoiding exacerbation of chronic conditions that would lead to higher cost treatments. However, that principle cannot be applied to other items, services and medications that are not on the IRS list. The list is intended to be exclusive. The IRS cautioned that Notice 2019-45 “does not expand the scope of preventive care beyond the list.” Do not expect changes in the near future: the IRS stated that it expects to review the list every five to ten years.

What does Notice 2019-45 mean for current practices?

- If your company has a HDHP and the only preventive care items, services and medications currently covered without application of the deductible are the items, services and medications mandated by the ACA, you have the option to cover some or all of the items, services and medications on the list for participants diagnosed with the associated conditions. Because the items, services and medications are not mandated by the ACA, you also have the option to apply normal copays or coinsurance to the items, services and medications on the list.
- If your company sponsors a HDHP and it currently treats other (i.e., different or additional) items, services and/or medications as preventive care (i.e., covered without the application of the deductible), you may want to revisit that treatment in light of Notice 2019-45. Although Notice 2019-45 does not change earlier guidance, the IRS is presenting the list as the exclusive exception to the requirement that

a HDHP apply the deductible to items, services and medications for the treatment of chronic conditions.

