

Publications

COVID-19 Relief is Ending for HSA-Compliant High Deductible Health Plans and Preventive Care is Clarified

Related Attorneys

Jacquelyn Meng Abbott

Jennifer Bibart Dunsizer

Dawne McKenna Parrish

Evan C. Sumner

Wendy M. Swary

Related Services

Employee Benefits and Executive Compensation

Employment Counseling

Labor and Employment

CLIENT ALERT | 8.22.2023

During the COVID-19 Public Health Emergency (Public Health Emergency) and the COVID-19 National Emergency (National Emergency), the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) provided COVID-19 relief for high deductible health plans (HDHPs) coupled with a health savings account (HSA). On June 23, 2023, in Notice 2023-37, Treasury and the IRS announced that the COVID-19 relief for HDHPs is coming to an end.

Background - HDHPs and COVID-19 Relief

Internal Revenue Code Section 223 permits an eligible participant to make or receive contributions to an HSA up to a certain amount if the participant is enrolled in an HDHP that meets certain requirements. For example, in general, an HDHP may not cover medical care services and items before the participant satisfies the minimum annual deductible otherwise required by Internal Revenue Code Section 223(c)(2)(A) based on self-only or family coverage (Applicable HDHP Minimum Deductible). An exception is provided for certain preventive care benefits.

During the Public Health Emergency, Treasury and the IRS issued Notice 2020-15 which allows HDHPs to provide health benefits related to COVID-19 testing and treatment before the Applicable HDHP Minimum Deductible is satisfied. Importantly, this relief means that participants covered by HDHPs are not disqualified from making or receiving contributions to an HSA merely because COVID-19 services are provided with no deductible or upon satisfaction of a deductible that is set below the Applicable HDHP Minimum Deductible. On March 29, 2023, Treasury and the Departments of Labor and Health and Human Services (Tri-Agencies) issued FAQs^[1] announcing that Treasury and the IRS were reviewing the appropriateness of continuing this COVID-19 relief given the anticipated end of the Public Health Emergency and the National Emergency.

End of COVID-19 Relief

In Notice 2023-37, Treasury and the IRS announced that the COVID-19 relief provided under Notice 2020-15 is no longer needed and the relief will only continue for **plan years that end on or before December 31, 2024**. For calendar year HDHPs, this means that COVID-19 tests and treatment may continue to be provided without a deductible or with a deductible that is set below the Applicable HDHP Minimum Deductible for the 2023 and 2024 plan years. For non-calendar year HDHPs, the relief will end sooner. For example, an HDHP with a plan year that begins April 1, 2023 and ends March 31, 2024 may only cover COVID-19 testing and/or treatment without a deductible or with a deductible below the Applicable HDHP Minimum Deductible until March 31, 2024.

COVID-19 Testing Is Not Preventive Care Under Safe Harbor

Since 2004, the IRS has issued various guidance to address the type of benefits that may be considered preventive care and be covered before a participant meets the Applicable HDHP Minimum Deductible without affecting HSA eligibility. For example, in Notice 2004-23, the IRS set forth types of services and items that qualify under the preventive care safe harbor in Internal Revenue Code Section 223(c)(2)(C). In Notice 2023-37, Treasury and the IRS note that the Appendix to Notice 2004-23 includes Infectious Diseases Screening Services for certain types of infections but also notes that screenings for common and episodic illnesses, such as the flu, are not included. Accordingly, Treasury and the IRS state that they view COVID-19 testing differently from the types of infectious diseases specified in Notice 2004-23 and clarify that the preventive care safe harbor as described in such guidance does not include testing for COVID-19.

Note: While COVID-19 testing is not preventive care, COVID-19 vaccinations are considered to be preventive care.

Preventive Care Items and Services Recommended by USPSTF

In Notice 2023-37, Treasury and the IRS also re-affirmed their earlier position that items and services recommended by the U.S. Preventive Services Task Force (USPSTF) with an “A” or “B” rating on or after March 23, 2010 are treated as preventive care, regardless of whether such items or services must be covered without cost-sharing. This position is consistent with FAQs^[2] which were issued by the Tri-Agencies following the March 30, 2023 decision in *Braidwood Management Inc. v. Becerra*^[3] (*Braidwood*).

In *Braidwood*, a district court in Texas held that all compulsory preventive care coverage requirements in response to an “A” or “B” recommendation by the USPSTF made on or after March 23, 2010 (the date of enactment of the Patient Protection and Affordable Care Act) violate the Appointments Clause of the United States Constitution and are unlawful. However, the U.S. Court of Appeals for the Fifth Circuit has approved an administrative stay of the district court decision while the case is pending appeal.

Next Steps for Plan Sponsors

- Employers that sponsor an HSA-compatible HDHP may only take advantage of the COVID-19 HDHP relief under Notice 2020-15 for **plan years that end on or before December 31, 2024**. Plan sponsors should ensure the COVID-19 HDHP relief does not extend beyond the applicable plan year end.

- Employers that sponsor an HSA-compatible HDHP should review plan documents and any communications to determine whether and when revisions may be required to reflect the end of the COVID-19 HDHP relief period.
- Employers who sponsor non-grandfathered health plans must continue to treat items and services with a rating of “A” or “B” recommended by the USPTSF as preventive care and provide such items and services *without cost-sharing* (at least until the Fifth Circuit issues its decision). Regardless of whether such items and services must continue to be provided without cost sharing (which will depend on the final decision in *Braidwood*), plan sponsors may continue to treat such USPTSF “A” or “B” recommended items and services as preventive care when covered under HSA-compliant HDHPs.

Contact your Vorys employee benefits attorney if you have any questions about how the new Treasury and IRS guidance or the *Braidwood* decision may affect plans you sponsor.

^[1] *FAQs About Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58 (March 29, 2023).*

^[2] *FAQs About Affordable Care Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 59 (April 13, 2023).*

^[3] *Braidwood Management Inc., et al., v. Xavier Becerra, et al.*, Civil Action No. 4:20-cv-00283-O (U.S. District Court for the Northern District of Texas).