ALERT

Employee Benefits & Employment Law

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CONGRESS MAKES IT EASIER TO USE TELEMEDICINE AND EXPANDS REIMBURSEMENT OPTIONS FOR HEALTH FSAS

The last few months have seen a dizzying amount of COVID-19-inspired federal legislation, regulations, and agency guidance affecting employee welfare benefit plans. Last week, we published an **Alert** describing how the IRS had increased the maximum annual carryover limit for Health Flexible Spending Accounts ("Health FSAs"). This week, we want to highlight two other major developments:

(1) An expansion of the type of medical expenses that can be reimbursed through a Health FSA, and

(2) An easing of the restrictions on participants who use telemedicine services while simultaneously contributing to a Health Savings Account ("HSA") in conjunction with their High Deductible Health Plan ("HDHP").

Both of the changes discussed in today's Alert are the product of Congress in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). One of the changes is permanent, while the other is temporary. And amendments to your plan document may or may not be necessary.

Expanded OTC Drug Reimbursement Opportunities

Among the most unwelcome changes ushered in by the Affordable Care Act was a requirement that over-the-counter ("OTC") drugs could no longer be reimbursed through a Health FSA, HSA, or Health Reimbursement Arrangement ("HRA") in the absence of a *written prescription*. But just as Congress can taketh away, it can also giveth. And the CARES Act did just that, repealing the unpopular rule on OTC drug reimbursements. This means that written prescriptions are not necessary anymore for a Health FSA, HRA, or HSA to reimburse OTC drugs and medicines like Tylenol, Claritin, Tamiflu, etc. (unless, of course, the employer wants to retain that restriction for some reason, and we don't know of any good reason why an employer would want to do so). In other words, employers sponsoring Health FSAs and HRAs are now permitted, but not required, to provide reimbursement for OTC drugs.

The CARES Act also clarified that qualified OTC items eligible for reimbursement now include menstrual care products such as "tampons, pads, liners, cups, sponges or similar products used by women with respect to menstruation."

These are permanent statutory changes, which were made retroactively effective January 1, 2020.

If your plan hard-wired the written prescription requirement for OTC drugs into the written plan document (as most plans did, including those for which we drafted the plan documents) and you would like to provide reimbursement for OTC drugs, it will be necessary for you to amend your plan. *We suggest you contact your employee benefits counsel if your plan document includes this restriction on reimbursement for OTC drugs and you would like to eliminate it (and we do suggest you eliminate it)*.

Avoiding HSA Hiccups with Telemedicine

In the wake of the COVID-19 pandemic, many group health plans are waiving their deductibles and co-payments for telehealth/telemedicine visits, particularly after the Department of Health & Human Services **announced** in March that physicians and other practitioners would not be subject to any administrative sanctions for reducing or waiving normally applicable cost-sharing obligations.

For HDHP participants who are contributing to an HSA, receiving free telemedicine services can be potentially problematic in ordinary times. The reason is that, with the exception of purely preventive services, an HDHP generally cannot waive its deductible (i.e., provide any benefits for medical care until the plan's deductible has been met) without disqualifying the HDHP. If that happens, participants will be ineligible to make HSA contributions. This principle is often referred to as the "no first dollar coverage rule," and it is why HDHP participants typically must pay the full cost of telemedicine services until they have satisfied the plan's deductible.

The CARES Act granted temporary relief from this rigid rule. Originally effective March 27, 2020 (the date that the President signed the bill into law), but made retroactively effective January 1, 2020, via IRS guidance, an HDHP will maintain its qualified status – meaning participants can continue contributing to their HSA – even if the plan provides for telemedicine services of all types (not just preventive services) without any cost sharing. As mentioned, this is not a permanent change. It only applies to plan years beginning before January 1, 2022.

Because HSA contributions are mostly a matter between the participant and the IRS – and not the plan – this change most likely will not require an amendment to your plan document. But it might not be a bad idea to educate employees in your HDHP of this development.

We hope this information is helpful. If you have any questions, please do not hesitate to contact the Employee Benefits and Employment Law team at Hinkle Law Firm.

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