COMPLIANCE OVERVIEW

Telemedicine Benefits – Compliance Issues For Employers

Telemedicine is an increasingly popular type of benefit that allows individuals to use technology-based communication (for example, video conferencing) to access medical care without being in the same physical space as a health care provider. Telemedicine can make health care more accessible and affordable for individuals, while also improving employee productivity by reducing health care-related absences.

However, employers that implement telemedicine benefits should be aware of several compliance concerns, including:

- ☑ The Affordable Care Act's (ACA) market reforms;
- ☑ ERISA's reporting and disclosure requirements; and
- ☑ COBRA's continuation coverage requirements.

Employers can address many of these compliance concerns by integrating the telemedicine benefit with their group medical plans. Employers that sponsor high deductible health plans (HDHPs) should also consider how a telemedicine benefit may impact employees' eligibility for health savings account (HSA) contributions.

LINKS AND RESOURCES

- Department of Labor (DOL) website on ERISA health plans and benefits
- IRS Publication 969, Health Savings Accounts and Other Tax-Favored Health Plans

Compliance Concerns

When implementing a telemedicine benefit, employers should consider the following laws:

- ACA market reforms
- COBRA
- ERISA

Integrating telemedicine benefits with a group medical plan can address many compliance concerns.

HSA Eligibility

- Telemedicine programs providing medical benefits before the HDHP deductible is satisfied are normally considered disqualifying coverage for purposes of HSA eligibility.
- Due to the COVID-19 pandemic, HDHPs can provide benefits for telehealth or other remote care services, and COVID-19 testing and treatment, before plan deductibles have been met.

COMPLIANCE OVERVIEW

ACA Market Reforms

Group health plans that do not qualify as "excepted benefits" are subject to a number of market reforms under the ACA. One of these reforms requires non-grandfathered group health plans to **cover certain preventive care services without imposing cost-sharing requirements on the services**. Preventive care services include screenings, examinations and immunizations. If these services are provided by a network provider, the plan cannot impose a deductible, copayment or other cost-sharing.

In most cases, a telemedicine benefit is a group health plan subject to the ACA's market reforms, including the preventive care mandate. In general, a telemedicine benefit cannot comply with the ACA's preventive care mandate on its own because many preventive care services (for example, immunizations) require in-person visits with health care providers. Failing to comply with the ACA's preventive care mandate may trigger an **excise tax of $100 per day** with respect to each individual to whom the failure relates.

Integrated Telemedicine Benefit

A stand-alone telemedicine benefit will most likely violate the ACA's preventive care mandate and subject an employer to potential excise taxes. To avoid this compliance problem, employers can structure their telemedicine benefits as a **component of their group medical plans**. To integrate a telemedicine benefit with a group medical plan the following criteria must be satisfied:

- ☑ Only employees, spouses and other dependents who participate in the employer's group medical plan are eligible for the telemedicine benefit; and
- ☑ Employees can waive coverage only under both the telemedicine benefit and the group medical plan – they cannot waive coverage under just the telemedicine benefit.

When a telemedicine benefit is integrated with a group medical plan, telemedicine charges count toward the medical plan's out-of-pocket maximum and any preventive care services must be provided without cost-sharing.

ERISA

ERISA sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA exempts only two types of employers from its requirements – governmental and church employers. Many plans or programs that provide benefits to employees are considered employee benefit plans subject to ERISA.

Employer-sponsored telemedicine benefits are considered group health plans that are subject to ERISA's requirements. Under ERISA, employers are required to take the following steps with respect to their employee benefit plans:

- ✓ Adopt an official plan document that describes the plan's terms and operations;
- ✓ Explain the plan's terms and rules to participants through a summary plan description (SPD);

- File an annual report (Form 5500) for the plan, unless a filing exemption applies;
- Comply with certain fiduciary standards of conduct with respect to the plan; and
- Establish a claims and appeals process for participants to receive benefits from the plan.

Employers commonly integrate (or wrap) their telemedicine benefits with their group medical plans. Combining these benefits under one ERISA plan allows employers to more easily satisfy ERISA's requirements. For example, rather than treating the telemedicine benefit as a separate ERISA plan, the telemedicine benefit can be described in the group medical plan's SPD and included in the plan's Form 5500 filing, if applicable.

COBRA

COBRA requires covered group health plans to offer continuation coverage to employees, spouses and dependent children when group health coverage would otherwise be lost due to certain specific events, called qualifying events.

COBRA generally applies to group health plans maintained by private-sector employers that had at least **20 employees** on more than 50 percent of typical business days in the previous calendar year. COBRA does not apply to group health plans maintained by small employers (those with fewer than 20 employees) or churches. There are also special coverage rules for government employers, although, as a practical matter, most government group health plans are required to offer continuation coverage.

Telemedicine benefits are considered group health plans that are subject to COBRA because they provide medical care. As explained above, employers typically bundle their telemedicine benefits with their group medical plans, so that only employees who participate in the group medical plan are eligible for telemedicine benefits. When the benefits are integrated, the employer should design its COBRA practices so that only qualified beneficiaries who elect COBRA for the group medical plan are eligible for telemedicine benefits.

HSA Eligibility

Employers that offer HDHPs that are compatible with HSAs should consider how a telemedicine benefit may impact participants' HSA eligibility. The Internal Revenue Service (IRS) has not specifically addressed the impact of telemedicine on HSA eligibility. However, the general rules for HSA contributions strictly limit the types of health plan coverage that eligible individuals may have.

To be eligible for HSA contributions, an individual generally cannot have health coverage other than HDHP coverage. This means that an HSA-eligible individual cannot be covered under a health plan that provides coverage below the HDHP minimum annual deductible. Whether telemedicine is disqualifying coverage for HSA purposes depends on how the telemedicine benefit is structured.

Also, there are special rules for HDHPs due to the COVID-19 pandemic. Effective March 27, 2020, the CARES Act allows HDHPs to provide benefits for telehealth or other remote care services before plan deductibles have been met, for plan years beginning before Jan. 1, 2022. Effective March 18, 2020, the Families First Coronavirus Response Act (FFCRA) requires group health plans and health insurance issuers to cover COVID-19 testing without imposing any cost sharing (such as deductibles, copayments or coinsurance) or prior authorization or other medical management requirements. IRS

Notice 2020-15 confirmed that HDHPs can pay for COVID-19 testing and treatment before plan deductibles have been met, without jeopardizing their status as HSA-compatible.

As a general rule, aside from the special rules noted above, telemedicine programs that provide free or reduced-cost medical benefits before the HDHP deductible is satisfied are disqualifying coverage for purposes of HSA eligibility. Under the IRS' general rules for HSA eligibility, a telemedicine program may not prevent an individual from contributing to an HSA if the program satisfies one of the design options described below.

- **The telemedicine program is offered as part of the HDHP and the program's benefits are subject to the HDHP deductible (with the exception of preventive care benefits).** This means that participants would be required to pay the fair market value of the services (or managed care rates for discounted health services, if applicable) until the HDHP deductible is satisfied. Once their HDHP deductibles have been satisfied, employees can have access to free or low-cost medical benefits without jeopardizing their HSA eligibility.
- **The telemedicine program is not considered a "health plan" under the HSA eligibility rules because it does not provide significant benefits for medical care or treatment**. Unfortunately, the IRS has not provided specific rules for determining when medical benefits are significant. The IRS has indicated, however, that the amount, scope and duration of covered services should be taken into account. Because telemedicine benefits are often similar to the services covered under the HDHP, it may be difficult for most telemedicine programs to satisfy this exception.
- **Benefits under the telemedicine program are limited to preventive care services**. Because most HDHPs are required to cover preventive care benefits without cost sharing, this design option may not be attractive for many employers.