



ACA, HIPAA AND FEDERAL
HEALTH BENEFIT
MANDATES:

PRACTICAL

Q &

A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

IRS EXPANDS SCOPE OF PREVENTIVE CARE FOR HSA PURPOSES FOR INDIVIDUALS WITH CHRONIC CONDITIONS

On July 17, 2019, the IRS issued new guidance that makes health savings accounts (HSAs) more user-friendly by allowing a high deductible health plan (HDHP) to cover certain treatments for chronic conditions before the plan's deductible is satisfied.

The IRS had been considering issues relating to preventive care for HSA purposes for some time. IRS Notice 2019-45 was released less than 30 days after the President signed an Executive Order directing the Treasury and IRS to issue guidance on the issue. Notice 2019-45 provides some welcome clarification.

WHY DOES THE DEFINITION OF PREVENTIVE CARE MATTER?

An HDHP generally cannot pay any benefits before the deductible is met; the individual is responsible for 100% of covered medical expenses before the deductible is reached. The one exception to this rule is for certain preventive care. A broader definition of preventive care makes an HDHP more attractive to employees and provides an incentive for individuals to seek needed preventive care if it is covered by their plan.

The IRS has previously addressed the scope of preventive services that can be provided under an HDHP in several different rulings and notices. This prior guidance has not included much detail on permitted preventive care for many common chronic conditions.

EXPANDING THE SCOPE OF PREVENTIVE SERVICES

Notice 2019-45 lists 14 specific treatments for certain chronic conditions that are considered "preventive care" for HDHP/HSA purposes.

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 new guidance is effective immediately, meaning that employers can rely on the Notice now in covering the services listed in the Notice. The IRS intends to review this list of items and services approximately every 5 to 10 years. Hopefully, review and updates will occur more frequently; medical developments may quickly make such a list behind the times.

CONSIDERATIONS FOR EMPLOYERS

There are a number of issues for employers to keep in mind as they review their HDHP coverage or consider offering an HSA-compliant HDHP:

- ❖ Any services or items that are considered preventive care under prior IRS guidance continue to be treated as preventive care for HDHP/HSA purposes.
- ❖ Notice 2019-45 does not require a plan to cover the listed services or items or restrict whether cost-sharing may be imposed with respect to covered services.
 - Non-grandfathered health plans are required under the Affordable Care Act (ACA) to cover certain preventive services without cost-sharing. The list of required preventive services is addressed in other rules and is not impacted by Notice 2019-45.

- ❖ The IRS has not provided an exhaustive list of what is considered preventive care, and some HDHPs may already treat some of the items and services listed in Notice 2019-45 as preventive care. Plan sponsors should review their HDHP in light of the new guidance and consult with their own advisers regarding any issues. In some cases, if the current preventive care list is overly broad, or the procedure for identifying specific diagnoses (as required by the

IRS Notice) is not in place, the new guidance may actually narrow some employers' lists of allowable preventive care.

- ❖ Remember that employees may have certain limited types of coverage in addition to the HDHP and still qualify for an HSA. HDHPs are intended to make individuals more aware of and involved in their health care decisions by ensuring that the individual has “skin in the game” for medical expenses before the deductible is met. Thus, in general, individuals may not have health coverage in addition to an HDHP and also qualify for an HSA. A limited exception applies, however, for certain types of permitted insurance and permitted coverage. Under this exception, individuals can have certain types of coverage and still be eligible to contribute to an HSA. Permitted insurance and coverage includes:
 - Accident and disability coverage
 - Insurance coverage for a specified disease (e.g., cancer) or illness (sometimes called “critical illness” coverage)
 - Hospital indemnity insurance coverage that pays a fixed amount per day (or other period) of hospitalization
 - Dental and vision care
 - Long-term care





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CONCLUSION

The new guidance provides some helpful clarification as to the scope of preventive services that may be provided under an HDHP for persons with chronic conditions. Employers who offer HDHPs/HSAs or are considering doing so should review their plans with the new guidance in mind and consult their advisors as to any design changes.

In some cases, if the current preventive care list is overly broad, or the procedure for identifying specific diagnoses (as required by the IRS Notice) is not in place, the new guidance may actually narrow some employers' lists of allowable preventive care.

As for possible future guidance, hopefully the IRS will continue to look at these issues and provide updates more frequently than the 5 to 10-year timeframe mentioned in the Notice. The need to appropriately define the scope of permitted preventive care services remains an on-going issue, as HSAs expand, more individuals need to manage chronic illnesses, and there are continued improvements in medical care. ■