

## COVID-19 and Self-Insured Plans: Unexpected Issues

**UPDATE April 13, 2020** – Based on [FAQs](#) posted April 11 on the DOL website, COVID-19 testing and diagnostic services can now be provided as part of an Employee Assistance Plan (EAP) that qualifies as an excepted benefit. This means that employers should not be faced with the risk that, by extending COVID-19 testing coverage to all employees, they have created a group health plan that must comply with all of the other ACA mandates (e.g. preventive care, essential health benefits, etc.).

The FAQs also:

- Treat serological (antibody) tests as part of the diagnostic tests that must be provided by group health plans under the CARES Act.
- Make clear that expanded telehealth and remote care – even if it is not COVID-19-related – can be offered with no cost-sharing without disqualifying a HDHP or HSA.
- Note that on-site medical clinics continue to be an excepted benefit, which should mean that on-site COVID-19 testing can be provided to all employees without establishing a group health plan subject to ACA mandates.

Unfortunately, the guidance does not yet contemplate extending non-COVID-19-related telehealth to all employees as part of an EAP or other excepted benefit. TPAs and employers have reasonably expressed concerns that it is not always feasible to limit a telehealth call to only COVID-19 diagnosis.

**UPDATE March 30, 2020** – The CARES Act (passed March 28) further expands health plans' obligations to provide COVID-19 diagnostics (to include certain non-FDA approved tests) and preventive care. The CARES Act also helpfully clarified that tele-medicine services can be provided in a HDHP without cost-sharing, without running afoul of HSA requirements.

There is still not relief specifically for employers who want to provide COVID-19 services to otherwise uncovered employees, non-employees, or their dependents.

**UPDATE March 18, 2020** – As we anticipated, the IRS issued guidance in [Notice 2020-15](#) providing that a High Deductible Health Plan (HDHP) will not fail to be a HDHP merely because it provides medical services and items purchased related to testing for and treatment of COVID-19

without requiring satisfaction of the otherwise applicable deductibles. The Families First Coronavirus Response Act (passed March 18) further requires group health plans to cover FDA-approved COVID-19 testing without cost-sharing.

The IRS has not yet provided relief with respect to expanded tele-medicine services. We have discussed this issue with IRS personnel and are hopeful that there will be guidance soon on the issue.

It is less clear that there will be relief that would resolve concerns with extending coverage for COVID-19 services to non-participants or non-employees.

**March 10, 2020** – Certain states (including New York and California) are passing legislation that requires health insurers to provide novel coronavirus (COVID-19) testing without charge to insured members and to take other proactive steps to aid the coronavirus containment effort. The third-party administrators of self-insured plans (Aetna, Anthem, and Cigna among the largest) are being fairly aggressive in extending some of these same practices to the self-insured plans that they administer. More than one is rolling out first-dollar COVID-19 testing, expanded tele-medicine services, waiver of associated co-pays, etc. In most cases, these are being rolled out automatically unless an employer objects in writing by a specified deadline.

Being proactive against COVID-19 is obviously a good thing. However, some of these proposals can cause employers and self-insured plans to run afoul of certain technical legal requirements. For example:

- Waiver of cost-sharing on coverage for non-preventive treatment can disqualify a high-deductible health plan (HDHP), preventing enrollees from contributing to a Health Savings Account (HSA) and causing them to lose the tax benefits of a Limited-Purpose Flexible Spending Account (FSA) offered by the employer.
- Under the Affordable Care Act (ACA), if an employer offers a health plan, it must cover certain aspects without cost-sharing (e.g., preventive care) and meet other mandates. Extending tele-medicine to all employees regardless of whether they are enrolled in the employer's ACA-compliant coverage could create non-compliant coverage.

Based on informal conversations we have had with IRS contacts, we have reason to think that there will soon be favorable written guidance on some of these issues. For example, we are hopeful that the IRS can clarify that COVID-19 testing without cost-sharing is reasonably considered preventive care that can be provided without consequence to participants in a HDHP.

However, guidance may not be forthcoming on other aspects of these efforts. It may be worthwhile for a plan sponsor to take the opportunity to tweak the rollout in a way to minimize any associated legal exposures. Under many third-party administrator (TPA) agreements, employers – not the TPAs – are going to be responsible for exposure related to these types of plan design issues. For example, employers might consider narrowing the enhancements to temporary COVID-19 concerns, continuing co-pays for tele-medicine, carefully defining the population to which these measures are extended, tying the duration of the enhancements to the continuation of the COVID-19 epidemic, and similar efforts.

For specific questions related to your plan, please contact a member of IPB's [Benefits & Compensation team](#).