



COMPLIANCE ALERT



EMPLOYEE BENEFITS | SEPTEMBER 5, 2019

Departments Adopt Non-Enforcement Policy on Drug Manufacturer Coupons

On August 26, 2019, the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury released an [FAQ](#) that provides guidance to employers, plan sponsors and health insurance issuers regarding a recent HHS regulation that could be read to require group health plans to treat prescription drug manufacturers' coupons as employee cost sharing for purposes of the ACA's out-of-pocket limits, for plan years beginning in 2020. Currently, the ACA's out-of-pocket limits for plan years beginning in 2019 are \$7,900 individual / \$15,800 family. The guidance in the FAQ is effective immediately, and provides that the Departments will not initiate enforcement action against a group health plan or issuer if the plan excludes the value of drug manufacturers' coupons from the ACA's annual limitation on cost sharing, even in circumstances in which there is no medically appropriate generic equivalent available.

The Departments have determined that HHS will address the interplay between manufacturers' coupons and out-of-pocket limits in future guidance.

Overview

In its 2020 Notice of Benefit and Payment Parameters (2020 NBPP), HHS stated that drug manufacturers' support to plan participants—in the form of discounts or coupons—“[is] not required to be counted” toward the cost-sharing limit of participants when a generic version is not available. Due to the strong negative inference in the rule (i.e., that coupons should count toward the

participant's out-of-pocket limit if a generic version is not available), the Departments received requests for clarification on whether group health plans and insurers are required to count the coupon or discount toward the annual cost-sharing with plan participants if a generic equivalent is not available.

If read to *require* a manufacturer's coupon to count toward the out-of-pocket limit, the most significant complication with the HHS rule is that it could disrupt Health Savings Account (HSA) eligibility for individuals who participate in a High Deductible Health Plan (HDHP). If the drug discounts were to apply before the individual satisfies his or her deductible, it could impact eligibility to contribute to an HSA. In fact, under Q/A-9 of IRS Notice 2004-50, discounts for drugs or coupons from manufacturers or providers should not be counted when determining if an individual has met their minimum annual deductible requirements under an HDHP.

The issue arises due to the possible conflict between the 2020 NBPP and IRS Notice 2004-50. If a group health plan is required to count drug coupons or discounts towards out-of-pocket limits, the plan would no longer be HSA-qualified because it would not comply with the requirement under Notice 2004-50 to disregard drug discounts and other manufacturers' and providers' discounts in determining if the minimum deductible for an HDHP has been satisfied and only allow amounts actually paid by the individual to be taken into account for that purpose.

Non-Enforcement Policy

Due to the potential impact on HSA eligibility and conflict between NBPP 2020 and the IRS Notice, the Departments have concluded that further rulemaking surrounding this issue must occur before enforcement can begin. HHS has decided to undertake the rulemaking in the NBPP for 2021 that will be released next year. Until this rulemaking occurs, the Departments will not initiate enforcement action against group health plans or issuers who exclude the value of drug coupons or discounts from the out-of-pocket limit, including in circumstances in which there is no medically appropriate generic equivalent available.

Impact on Employers

Until further guidance is issued, employers, plan sponsors and health insurance issuers may continue to exclude the value of prescription drug manufacturer coupons from participant cost-sharing under the ACA's out-of-pocket limit rules, regardless of whether a medically appropriate generic equivalent is available. In 2019, HHS released the proposed 2020 NBPP in January and the final 2020 NBPP in April. A similar schedule is likely to be followed in 2020 for the 2021 NBPP.

About the Authors: This alert was prepared for Woodruff Sawyer by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Peter Marathas or Stacy Barrow at pmarathas@marbarlaw.com or sbarrow@marbarlaw.com.

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