COMPLIANCE ALERT

EMPLOYEE BENEFITS | MARCH 18, 2022

Congress Passes Another Temporary Telehealth Safe Harbor

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On March 15, 2022, the President signed the Consolidated Appropriations Act, 2022 (H.R. 2471) into law ("CAA 2022"). The CAA 2022 is largely a spending bill but also includes, among other things, a much-anticipated new telemedicine safe harbor similar to what was created under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The safe harbor allows high deductible health plans (HDHPs) to cover medical and behavioral health treatment before participants meet their deductibles (i.e., without cost sharing). The safe harbor applies from April 1, 2022 through December 31, 2022, regardless of plan year.

Background on Telehealth Safe Harbor under the CARES Act

On March 27, 2020, the CARES Act became law. While the CARES Act was largely an economic package intended to stabilize individuals and employers during COVID-19-related shutdowns, it also included several measures directly related to employee benefits. One specific provision was the safe harbor under which HDHPs could cover telehealth and other remote care without cost-sharing. As a result, no-cost telehealth could be provided to plan participants for any reason—not just COVID-19 related issues—without disrupting HSA eligibility.

The CARES Act safe harbor was a temporary measure, applying only to plan years beginning on or before December 31, 2021, which means, for calendar year plans, the safe harbor expired on December 31, 2021. Without the safe harbor, telehealth programs that provide "significant benefits" in the nature of medical care or treatment generally disrupt HSA eligibility. Whether benefits are "significant" is a facts and circumstances determination. That said, in cases where a telehealth program provides robust benefits, such as medical advice and diagnosis for a broad range of non-emergency, common medical illnesses, general referrals to other provider types (including the emergency room), and certain prescription drugs for common medical illnesses, it may be difficult to support an argument that it does not provide "significant" benefits, in the absence of specific IRS guidance.

New Telemedicine Safe Harbor

The safe harbor under the CARES Act was well-received, and as the December 31, 2021, deadline approached, there was a strong effort among stakeholders to encourage lawmakers to either extend the safe harbor or make it a permanent measure. Accordingly, on March 10, 2022, Congress passed the CAA, 2022, which was subsequently signed into law on March 15, 2022. The new safe harbor under the CAA, 2022 is identical to the CARES Act safe harbor, except that it applies for the period of April 1, 2022 through December 31, 2022 only (i.e., it is tied to the calendar year, not a plan year).

Many carriers and other administrators assumed that, if passed, the measure would have a retroactive effect (back to January 1, 2022); however, for calendar year plans or plans with plan years ending prior to March 2022, there is a gap from January 1, 2022 through March 31, 2022 in which HDHPs may not be treated as a HDHP if covering certain medical or behavioral health telemedicine services without cost sharing, which impacts HSA eligibility for individuals.

Conclusion

Depending on the applicable plan year, the following apply for employers:

- For 2022 plan years that began before April 1, 2022 (e.g., calendar year plans), there is a gap period for which HDHPs were not authorized to maintain their status as an HDHP if covering telehealth services without a participant first meeting the applicable deductible (assuming the telehealth services are "significant benefits" for HSA purposes). Therefore, from January 1, 2022 through March 31, 2022, if a HDHP covered participant's virtual medical or behavioral health care without cost sharing, the plan may not be treated as a qualified high deductible health plan. Beginning April 1, 2022, however, this changes, and telemedicine service can be covered without cost-sharing through the end of the calendar year, unless the safe harbor is further extended. An extension would require another change in law by Congress.
- For non-calendar year plans which began on or after April 1, 2021, the safe harbor under the CARES Act will be extended by the CAA, 2022 beyond the end of the plan's applicable plan year and apply through the end of the calendar year (December 31, 2022).

Employers are encouraged to discuss this optional relief with their insurance broker, medical plan carrier, or third-party administrator to ensure proper administration.

This alert was prepared for [Insert Agency Name] by Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on ERISA-governed and non-ERISA-governed retirement and welfare plans, executive compensation, and employment law. Contact Stacy Barrow or Nicole Quinn-Gato at sbarrow@marbarlaw.com or nquinngato@marbarlaw.com.