COMPLIANCE ALERT

EMPLOYEE BENEFITS | JANUARY 5, 2022

Telehealth Safe Harbor Extended Beyond Calendar Year 2022

On December 29, 2022, the President signed the Consolidated Appropriations Act, 2023 ("CAA, 2023"), into law. The CAA 2023, which is largely a bipartisan spending bill, includes a new telemedicine safe harbor similar to that which was created under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the CAA, 2022. The safe harbor under the CAA, 2023 applies for plan years beginning on or after January 1, 2023 and before January 1, 2025 (i.e., plan years beginning in 2023 and 2024). 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 in the CAA, 2023 combines with the relief previously provided under the CARES Act (for plan years beginning on or before December 31, 2022) and the CAA, 2022 (for months beginning after March 2, 2022 and before January 1, 2023). This means that both calendar and non-calendar year plans can take advantage of the safe harbor from April through December 2022, then from the start of their 2023 plan year through the end of their 2024 plan year. Unfortunately, there remains a gap under which non-calendar year plans will not be able to take advantage of the safe harbor (i.e., the months of their 2022 plan year that fall into 2023).

Background on Telehealth Safe Harbor under the CARES Act and CAA, 2022

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.

Telehealth Safe Harbor Under the CAA, 2022

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 safe harbor under the CAA, 2022 was identical to the CARES Act safe harbor, except that it applied for the period of April 1, 2022 through December 31, 2022 only (i.e., it was tied to the calendar year, not a plan year).

New Telehealth Safe Harbor Under the CAA, 2023

The new safe harbor is identical to both the prior safe harbors, except that it marries both the plan year approach of the CARES Act with the calendar year approach of the CAA, 2022 to ensure that it applies for both calendar and non-calendar year plans in that it applies for months beginning after March 1, 2022 and plan years beginning on or before December 31, 2021, or after December 31, 2022, and before January 1, 2025.

Conclusion

This multi-year relief allows HDHPs to maintain their HSA-qualified status if they choose to cover telehealth services at no cost and/or without a participant first meeting the applicable deductible for plan years beginning in 2023 and 2024.

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 Woodruff Sawyer 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.