

Insights, News & Events

## TELEMEDICINE: PROCEED WITH CAUTION

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One of the hottest benefit trends in 2017 is the adoption of free or low-cost “telemedicine” programs to provide employees easy and affordable access to medical care. However, you need to proceed with caution when introducing such a program to your organization, as it could raise a host of compliance and excise tax issues.

### WHAT IS “TELEMEDICINE”?

The term “telemedicine” generally refers to health-related services delivered to employees over the telephone or internet. They typically allow individuals to communicate with a healthcare specialist on topics such as non-specific wellness information about health conditions, primary care diagnoses, and advice regarding prescription drug services. To encourage usage, employers often subsidize the cost of the services or offer them free of charge, which could create issues for employees covered by a Health Savings Account (HSA).

### CONCERN NO. 1: HSA ELIGIBILITY

Employers who adopt a telemedicine program alongside a high-deductible health plan (HDHP) need to be sure they do not inadvertently disqualify their covered employees from HSA eligibility. An HSA allows individuals who are covered under an HDHP to defer compensation on a pre-tax basis for the purpose of paying eligible medical expenses. In addition, the HSA participant must not be covered under any “disqualifying coverage,” which includes any health coverage that provides a benefit prior to meeting the HDHP

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deductible, and is often referred to as “first dollar coverage.”

The IRS rules allow an exception from the first dollar coverage prohibition for certain types of coverage, including “permitted insurance” (e.g. workers compensation, per diem hospital benefits), “excepted benefits” (e.g. stand-alone dental or vision benefits), preventive care services, certain employee assistance programs (EAPs), and discount card programs. Telemedicine programs alone will not prevent an individual from contributing to an HSA, and, in fact, some may be able to coordinate copays with the employer’s group health plan.

However, many telemedicine programs go beyond providing preventive care or EAP benefits, and therefore do not fall within the exceptions listed above. Thus, a telemedicine benefit could count as disqualifying coverage, for example, if the employer pays a portion of the telemedicine consultation, or if the participant pays less than fair market value for the consultation before meeting the HDHP deductible. Any telemedicine program providing primary care or prescription drug services, in particular, would likely trigger IRS scrutiny, unless the employer can establish that the cost passed on to participants is the fair market value.

## **CONCERN NO. 2: CREATION OF ERISA GROUP HEALTH PLAN**

Employers offering access to a telemedicine program to all employees regardless of group health plan enrollment could inadvertently create a separate ERISA group health plan. If the program provides primary care or prescription drug services, it would qualify as a separate group health plan under ERISA, COBRA, HIPAA, and other federal laws.

Of most concern is potential group health plan status under the Affordable Care Act (ACA), which imposes a series of coverage mandates on virtually all group health plans. One such mandate is to provide certain preventive care that must be administered in person (e.g. immunizations and screenings), making it impossible for a telemedicine program to be in compliance. An employer whose stand-alone telemedicine program fails to satisfy any of the ACA’s market reforms is subject to excise taxes of \$100 per day “with respect to each individual to whom such failure relates.” In other words, inadvertently establishing a non-compliant ACA group health plan could expose you to excise

taxes up to \$36,500 per year for each participant in the plan.

One way to minimize the risk of creating a separate group health plan is by permitting only employees who are enrolled in your group health plan to utilize the telemedicine benefits. In this way, the telemedicine program can be integrated with the group health plan to meet the ERISA and ACA requirements. However, you would still need to ensure the program is compliant with the other group health plan mandates, including making the program available to qualified beneficiaries through COBRA.

## **WHAT DOES THE FUTURE HOLD?**

To date, the federal agencies enforcing these laws have remained mostly silent with respect to the compliance obligations of telemedicine programs. Until the government issues guidance that specifically exempts telemedicine benefits from group health plan status or from interfering with HSA eligibility, you should consult with legal counsel before establishing such a program. By doing so, you can discuss the potential risks and ensure you are not subject to excise taxes, and that your employees are not subject to unintended income and excise taxes for participating in disqualifying HSA coverage.

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