



Feds Clarify At-Home COVID-19 Test Coverage Rules

Insights

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Three federal Departments recently released FAQs to provide more details as to how employer group health plans may comply with the previously announced requirement to cover at-home OTC COVID-19 tests provided with no prescription or health care provider involvement without cost-sharing or preauthorization. Initial rules that took effect on January 15 created safe harbors for plans to make at-home tests available through a preferred provider network or direct-to-consumer shipping program. Plans that met the safe harbors could limit the number of OTC at-home tests covered per month to no more than eight tests per individual per month, and limit reimbursement for any such tests purchased outside of an established provider network or direct shipping program to no more than the lesser of \$12 or the cost of the test. The original guidance left several questions unanswered concerning delivery of at-home tests and what effect shortages of tests might have on plan sponsors. The new FAQs outline how plans can comply with the original mandate but grant latitude to deal with testing kit scarcity and other issues.

Safe Harbor Modified

The first safe harbor announced in January required plan sponsors to ensure “adequate access” to participants, beneficiaries and enrollees to OTC at-home COVID-19 tests with no upfront out-of-pocket costs. The new FAQs provide that, effective February 4, the Departments will weigh all relevant facts and circumstances to determine whether a plan has provided adequate access and require at least one direct-to-consumer channel and one in-person channel.

Direct-to-consumer channels can include:

- either online or telephone ordering,
- a plan’s pharmacy network,
- a non-pharmacy retailer (including providing coupons to be used at a retailer), and
- an alternative distribution site including independent drive-through or walk-up facilities.

The FAQs also clarify that a direct-to-consumer shipping program can be provided through multiple outlets. Also, a plan that engages a specific in-person retailer where individuals can physically get a test can satisfy the direct-to-seller requirement if that retailer also has an online means of delivering tests.

The FAQs provide that adequate in-person access to at-home OTC testing kits also will be determined based on all relevant facts and circumstances including:

- where participants, beneficiaries and enrollees live,
- the current utilization of a pharmacy network (if used to make tests available), and
- the information provided to individuals regarding the types of kits available and the locations where they can access them.

Plans do not have to cover every available at-home OTC test; they can limit tests to manufacturers with whom a plan has a contractual relationship or from whom a plan has been able to obtain tests. Finally, plans also must cover routine shipping costs in the same way they cover such expenses for other items available through mail order. The FAQs confirm that the \$12 safe harbor limit on non-network tests includes shipping and sales tax.

Educating Employees

Additionally, plans must inform participants, beneficiaries, and enrollees which tests are available under the program, and whether there are differences in what is available under a direct shipping program or in-person network. The Departments can request a plan to provide proof of the information they provide participants, beneficiaries and enrollees to determine its adequacy.

Supply Chain Disruption

The Departments clarify that a plan that has established a direct coverage program that meets the modified safe harbor will not be deemed non-compliant just because it temporarily cannot ensure adequate access due to testing kit supply shortages. In these cases, a plan can still impose limits on the number and covered amount of OTC at-home tests that individuals buy outside of the plan's established channels.

Curbing Individual Sellers and Re-sellers

The FAQs explain that the Departments expect plans to take reasonable steps to prevent and detect fraud and abuse to prevent hoarding behavior and help ensure that virtually everyone can get an OTC at-home COVID-19 test. The Departments consider reasonable steps to include limiting reimbursement to kits purchased from retailers that would normally be expected to sell OTC COVID-19 tests. Thus, plans could disallow reimbursement for tests purchased from an individual or from an online auction or reselling site.

Moreover, a plan could require proof of purchase that identifies the product and seller or an original receipt from the seller to prove the test qualifies under Families First Coronavirus Response Act (FFCRA) guidelines. Finally, a plan can require a participant, beneficiary or enrollee to attest that the test has not been and will not be reimbursed from another source including resale. The FAQs

require plans to clearly explain any substantiation requirements or rules restricting buying tests from resellers.

Tests Not Completely Self-Administered and Read

The FAQs clarify that OTC tests that are not 100% self-service or require health care provider involvement are not subject to either the mandate or subsequent guidance. Rather, such tests must be covered with no safe harbor limits. In other words, if a medical care provider must be involved in prescribing, administering or reading the test, it would be covered under longstanding FFCRA guidance rather than the new OTC at-home testing guidance.

No FSA, HRA or HSA Reimbursement

OTC at-home test kits are qualified medical expenses, so they cannot be reimbursed by both a plan (or insurer) and a health flexible spending account (HFSA), health reimbursement arrangement (HRA) or health savings account (HSA). Plans should caution participants, beneficiaries, and enrollees not to use an HFSA debit card or to otherwise seek reimbursement under an HFSA, HRA, or HSA for the same costs paid or reimbursed by the plan. Individuals should work with HFSA or HRA administrators to correct any improper reimbursements. Similarly, individuals who received HSA reimbursement for covered OTC at-home kits should take steps to include the amounts in gross income or, if possible under IRS guidance, repay the distribution.

Conclusion

The updated FAQs provide some welcome relief to group health plans regarding how they administer covering at-home OTC COVID-19 tests. We will continue to monitor developments and provide updates as we learn more details. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [Employee Benefits and Tax Practice Group](#).

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