

06/23/23 Alert 2023-06

**Employee Benefits Compliance**

## IRS Ends COVID-19 Testing and Treatment Flexibility for HSA Compatible HDHPs

On March 11, 2020, the IRS issued [Notice 2020-15](#), addressing the impact of COVID-19 testing and treatment on Health Saving Account (HSA) compatible High Deductible Health Plans (HDHPs). The Notice provided that *until further guidance is issued* a health plan that otherwise satisfies the requirements to be a HDHP under IRC § 223 will not fail to be an HSA compatible HDHP because the health plan provides medical care services and items related to the testing for and treatment of COVID-19 prior to the satisfaction of an applicable minimum deductible. The breadth of this relief was unprecedented in that the Notice provided, "that *all medical care services received and items purchased associated with testing for and treatment of COVID-19 . . . will be disregarded for purposes of determining the status of the plan as an HDHP.*" (Emphasis added.)

On June 23, 2023, the IRS issued [Notice 2023-37](#), ending the flexibility allowed under Notice 2020-15 for HSA compatible HDHPs to cover COVID-19 testing and treatment. Specifically, this new Notice provides that the relief described in Notice 2020-15 applies only with respect to plan years ending on or before December 31, 2024. That means that calendar year plans beginning on January 1, 2024, can continue to offer COVID testing (or other treatment) below the deductible of an HSA compatible HDHP only for that final 2024 plan year ending on December 31, 2024. Non-calendar year plans beginning in 2023 can also continue to offer COVID testing (or other treatment) below the deductible of an HSA compatible HDHP only for their final 2023 plan years and not for plan years beginning in 2024. Lastly, Notice 2023-37 clarifies that the HSA preventive care safe harbor does not include COVID-19 testing effective as of the date of publication of the Notice (but COVID testing could still be covered through the end of plans years permitted under the Notice) but reminds plan sponsors that items and services recommended with an "A" or "B" rating by the United States Preventive Services Task Force (USPSTF) on or after March 23, 2010, are treated as preventive care regardless of whether these items and services must be covered (this would include COVID-19 vaccines but not testing). This is in response to the Texas federal district court decision in *Braidwood Management Inc. v. Becerra* (see [Alert 2023-05](#)).

Employers sponsoring HSA compatible HDHPs that chose to continue to cover COVID-19 testing after the expiration of the COVID-19 testing coverage mandate ended on May 11, 2023, with the end of the Public Health Emergency should work with Third Party Administrators (TPAs) on eliminating that coverage for plan years ending after December 31, 2024.

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