

## Group Plan Questions After Telehealth Coverage Extension

By **Jake Downing, Adam Solander and Jo Szucs** (April 6, 2022, 4:24 PM EDT)

On March 15, President Joe Biden signed into law the 2022 Consolidated Appropriations Act.[1]

The Appropriations Act contains several notable provisions, including funding measures for the U.S. government and emergency financial assistance for Ukraine.

Also buried within the 1,068 pages of legislation is an important extension applicable to telehealth services that benefits group health plans, plan participants and telehealth service providers.

An individual may establish a health savings account — and make and receive contributions on a tax-favored basis — if the individual is covered under a high deductible health plan, or HDHP, and has no other disqualifying health coverage.

If telehealth services are included under the group health plan, HDHP participants were previously required to satisfy the minimum deductible for the year before receiving coverage for those benefits.

This was the case unless benefits were limited to permissible coverage — e.g., preventive care, permitted insurance or permitted coverage — or provided under an employee assistance program, disease management program or wellness program that did not provide significant benefits in the nature of medical care or treatment.

This means that participants in the HDHP were generally required to pay out of pocket for telehealth services they received before the group health plan covered any costs.

The Appropriations Act permits group health plans to provide telehealth services to participants in HDHPs before the participants have satisfied the minimum deductible under the HDHP without jeopardizing the participants' eligibility to participate in an HSA.

If this sounds familiar, it is because the Coronavirus Aid, Relief and Economic Security Act,[2] signed into



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law in March 2020, previously provided for this exception for plan years beginning on or before Dec. 31, 2021.

Specifically, the CARES Act provided that a plan would not cease to be treated as a HDHP if it provided telehealth and other remote care services prior to a participant reaching his or her deductible.

The CARES Act also amended the HSA provisions of the Internal Revenue Code to include telehealth and other remote care services as disregarded coverage for purposes of determining whether a participant with coverage outside of a HDHP may receive telehealth and other remote care services and continue to contribute to an HSA.

While the CARES Act was signed into law and effective March 27, 2020, the IRS applied the exception retroactively to telehealth services provided on or after Jan. 1, 2020, pursuant to IRS Notice 2020-29.

The exception under the CARES Act, as clarified by Notice 2020-29, was only temporary, and expired for plan years beginning Jan. 1, 2022, or later.

While the hope and expectation of many employers and group health plans was that the exception would be extended beyond Dec. 31, 2021, Congress was not able to pass an extension before the end of 2021.

Employers sponsoring HDHPs and HSAs issued a stakeholder letter to congressional leaders in January, requesting reinstatement of the telehealth service exception and clarity regarding retroactive application of the provision of the CARES Act for the first part of 2022.

The stakeholder letter was signed by over 100 employers and telehealth service providers and noted the critical nature of telehealth services during and after the pandemic, especially to participants living in rural areas.

The legislators responded, and included a provision in the Appropriations Act that extends the CARES Act telehealth service exception for the period of March 31 through Dec. 31.

Unfortunately, the Appropriations Act does not provide retroactive relief or guidance regarding the period of Jan. 1 through March 30.

This begs a number of questions for group health plans, plan participants and telehealth service providers.

First, it is unclear how group health plans have been administering their HDHPs since the CARES Act exception expired at the end of 2021.

Either group health plans required participants to satisfy their minimum deductible before receiving telehealth services effective Jan. 1, and must now decide whether or not to change how they are providing telehealth services for the remainder of the year, or they have potentially been in violation of the Internal Revenue Code's rules regarding HSA eligibility, as well as the group health plan's rules regarding the application of the deductible for HDHPs, for the first three months of 2022.

Similar to the CARES Act, it is possible that the IRS will publish guidance in the form of a notice or otherwise that clarifies that the Appropriations Act may be applied retroactively to telehealth services

provided on or after Jan. 1.

It is unclear whether the IRS has the authority to continue its prior interpretation of the CARES Act with respect to the Appropriations Act, or whether additional legislation would be necessary to address the period of Jan. 1 through March 30.

Even if guidance or legislation to address this period is not forthcoming, what would the potential liability be for covering telehealth services for HDHP participants for the first three months of 2022, prior to the date the HDHP participants satisfy their minimum deductible for the year?

A participant in the HDHP could bring suit against the group health plan for failure to comply with the HDHP rules, and for affecting their eligibility to contribute to and receive contributions to an HSA on a tax-favored basis.

The IRS or U.S. Department of Labor could also investigate the group health plan and require it to recoup payments for telehealth services provided during this period, or assess penalties against the group health plan for failure to do so.

While these liabilities are possible, they seem unlikely given the short period involved, the prior guidance from the IRS under the CARES Act, and the benefit to plan participants of leniency.

Second, the Appropriations Act permits group health plans to provide telehealth services to participants in HDHPs before the participants have satisfied the minimum deductible under the HDHP without jeopardizing the participants' eligibility to participate in an HSA, but only for the period of March 31 through Dec. 31.

By providing this temporary relief, legislators have kicked this issue down the road, but have not provided a long-term solution for group health plans wishing to provide predeductible telehealth services to participants.

There is obvious interest in more permanent guidance regarding the application of telehealth services in the health care marketplace.

Beyond the HDHP and HSA rules, Congress, as well as federal and state agencies, responded during to the pandemic by:

- Greatly expanding the telehealth services available for coverage under Medicare;
- Providing grants and annual funding for evidence-based telehealth technologies and networks; and
- Relaxing enforcement measures and penalties under applicable privacy and regulatory frameworks, such as the Health Insurance Portability and Accountability Act, for good faith compliance in relation to the provision of telehealth services.

While certain guidance was clearly in response to, and not intended to be provided beyond, the pandemic, the benefits and widespread use of telehealth services have become more evident over the past two years.

If Congress does not take action beyond 2022 to expand the relief for the provision of telehealth services:

- Participants in HDHPs will be required to pay out of pocket for the telehealth services they receive before the group health plan covers any costs; or
- Telehealth services will need to be limited such that they do not affect participants' HSA eligibility.

Participants' HSA eligibility is not affected by telehealth services that:

- Constitute permitted insurance, e.g., workers' compensation, tort liability insurance, etc.;
- Constitute permitted coverage, e.g., coverage for accidents, disability, dental care, vision care or long-term care;
- Constitute preventative care provided under a HDHP; or
- Are part of an employee assistance program, disease management program or wellness program that does not provide significant benefits in the nature of medical care or treatment.

These restrictions wipe out or at least seriously diminish many of the benefits that telehealth services provide, especially in rural service areas and with respect to certain demographics, e.g., lower income households, individuals with limited mobility or access to transportation to and from care facilities, etc.

While only time will tell, the hope of many group health plans, plan participants and telehealth service providers is that Congress will provide a permanent safe harbor under the HSA rules that permits participants in HDHPs to receive first-dollar coverage for telehealth services.

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[1] <https://www.congress.gov/bill/117th-congress/house-bill/2471/actions>.

[2] <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.