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EXPENSES RELATED TO COVID-19 AND PREVENTIVE CARE FOR PURPOSES OF HIGH DEDUCTIBLE HEALTH PLANS

Notice 2023-37

PURPOSE

In response to the end of the Coronavirus Disease 2019 (COVID-19) public health emergency (referred to in this document as the PHE) and the National Emergency Concerning the Novel Coronavirus Disease 2019 Pandemic¹ (referred to in this document as the COVID-19 National Emergency), this notice modifies prior guidance regarding benefits relating to testing for and treatment of COVID-19 that can be provided by a health plan that otherwise satisfies the requirements to be a high deductible health plan (HDHP) under section 223(c)(2)(A) of the Internal Revenue Code (Code). Specifically, this notice provides that the relief described in Notice 2020-15, 2020-14 IRB 559, applies only with respect to plan years ending on or before December 31, 2024.

This notice also clarifies whether certain items and services are treated as preventive care under section 223(c)(2)(C). Specifically, this notice clarifies that the preventive care safe harbor, as described in Notice 2004-23, 2004-15 IRB 725, does

¹ On March 13, 2020, by Proclamation 9994 (85 FR 15337 (March 18, 2020)), the President declared a national emergency concerning the COVID-19 pandemic beginning March 1, 2020, under both the National Emergencies Act (Pub. L. 94-412, 90 Stat. 1255 (1976)) and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 93-288, 88 Stat. 143 (1974)) (the Stafford Act). The national emergency has since been extended, with the last announcement of continuation made by the President on February 10, 2023. See The White House, Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic (Feb. 10, 2023), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/>. Subsequently, the President signed H.J. Res. 7 (Pub. L. 118-3, 137 Stat. 6), ending the national emergency under the National Emergencies Act on April 10, 2023, and the Federal Emergency Management Agency gave notice in the **Federal Register** that the national emergency under the Stafford Act would end on May 11, 2023. See <https://www.govinfo.gov/content/pkg/FR-2023-02-10/pdf/2023-02964.pdf>.

not include screening (i.e., testing) for COVID-19, effective as of the date of publication of this notice.² This notice also provides 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 for purposes of section 223(c)(2)(C), regardless of whether these items and services must be covered, without cost sharing, under Public Health Service Act³ (PHS Act) section 2713.

BACKGROUND

Section 223 of the Code permits eligible individuals to deduct contributions to Health Savings Accounts (HSAs).⁴ Among the requirements for an individual to qualify as an eligible individual under section 223(c)(1) is that the individual be covered under an HDHP and have no disqualifying health coverage. As defined in section 223(c)(2), an HDHP is a health plan that satisfies certain requirements, including requirements with respect to minimum deductibles and maximum out-of-pocket expenses.

Generally, under section 223(c)(2)(A), an HDHP is not permitted to provide benefits for any year until the minimum deductible for that year is satisfied. However, section 223(c)(2)(C) provides a safe harbor for the absence of a deductible for preventive care. Under section 223(c)(2)(C), “[a] plan shall not fail to be treated as a high deductible health plan by reason of failing to have a deductible for preventive care (within the meaning of section 1861 of the Social Security Act, except as otherwise provided by the Secretary).” Therefore, an HDHP may provide preventive care benefits

² Although the preventive care safe harbor does not include testing for COVID-19, an HDHP may continue to provide benefits related to testing for COVID-19 before satisfaction of the applicable minimum deductible for plan years ending on or before December 31, 2024, pursuant to this notice.

³ See Pub. L. 111-148, 124 Stat. 119 (March 23, 2010).

⁴ Tax-favored contributions may also be made on behalf of eligible individuals by their employers. See Q&A 19 of Notice 2004-2 (2004-2 IRB 269).

without a deductible, or with a deductible below the minimum annual deductible otherwise required by section 223(c)(2)(A). To be a preventive care benefit as defined for purposes of section 223, the benefit must either be described as preventive care for purposes of section 1861 of the Social Security Act (SSA) or be determined to be preventive care in guidance issued by the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS).⁵ Notice 2013-57, 2013-40 IRB 293, provides that a health plan will not fail to qualify as an HDHP under section 223(c)(2) merely because it provides without a deductible the preventive care health services required under section 2713 of the PHS Act to be covered without cost sharing by a group health plan or a health insurance issuer offering group or individual health insurance coverage.

In March 2020, the Treasury Department and the IRS issued Notice 2020-15. The notice provides that due to the unprecedented public health emergency posed by COVID-19, and the need to eliminate potential administrative and financial barriers to testing for and treatment of COVID-19, a health plan that otherwise satisfies the requirements to be an HDHP under section 223(c)(2)(A) will not fail to be an HDHP merely because the health plan provides benefits for medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible.⁶ As a result, individuals covered by such a plan will

⁵ The determination of whether an item or service is preventive care for these purposes is unrelated to the determination of whether an amount paid for an item or service is medical care under section 213(d) of the Code as an amount paid for the prevention of disease. See Rev. Rul. 79-66 (1979-1 CB 114); *Daniels v. Commissioner*, 41 T.C. 324 (1963); and *Stringham v. Commissioner*, 12 T.C. 580 (1949), (*acq.* 1950-2 CB 4), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950).

⁶ Notice 2020-15 permitted, but not did require, an HDHP to provide these health benefits prior to the satisfaction of the applicable minimum deductible.

not fail to be eligible individuals under section 223(c)(1) merely because of the provision of those health benefits prior to the satisfaction of the applicable minimum deductible.

On January 31, 2020, the Secretary of Health and Human Services (HHS) declared that a nationwide PHE existed as of January 27, 2020, as a result of COVID-19.⁷ This declaration was continually renewed by the HHS Secretary, most recently effective February 11, 2023.⁸ On January 30 and February 9, 2023, respectively, the President and the HHS Secretary announced their intent to end the COVID-19 National Emergency and the PHE on May 11, 2023.⁹ On February 10, 2023, the Federal Emergency Management Agency gave notice in the **Federal Register** that the national emergency under the Stafford Act would end on May 11, 2023.¹⁰ On April 10, 2023, the President signed H.J. Res. 7 ending the national emergency under the National Emergencies Act on April 10, 2023.¹¹

On March 29, 2023, the Departments of Labor, HHS, and the Treasury (the Departments) issued Frequently Asked Questions (FAQs) under the heading, *FAQs About Families First Coronavirus Response Act, Coronavirus Aid, Relief, and Economic*

⁷ See HHS Office of the Assistant Secretary for Preparedness and Response, Determination of the HHS Secretary that a Public Health Emergency Exists (Jan. 31, 2020), available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

⁸ See HHS Office of the Assistant Secretary for Preparedness and Response, Renewal of Determination That A Public Health Emergency Exists (Feb. 9, 2023), available at <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-9Feb2023.aspx>.

⁹ See Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: H.R. 382 and H.J. Res. 7 (Jan. 30, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>; Letter to U.S. Governors from HHS Secretary Xavier Becerra on renewing COVID-19 Public Health Emergency (PHE) (Feb. 9, 2023), available at <https://www.hhs.gov/about/news/2023/02/09/letter-us-governors-hhs-secretary-xavier-becerra-renewing-covid-19-public-health-emergency.html>; Executive Office of the President, Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic (Feb. 10, 2023), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/>.

¹⁰ See <https://www.govinfo.gov/content/pkg/FR-2023-02-10/pdf/2023-02964.pdf>.

¹¹ The April 10, 2023, end of the national emergency under the National Emergencies Act did not change the anticipated end date of the PHE or the end date of the national emergency under the Stafford Act.

Security Act, and Health Insurance Portability and Accountability Act Implementation Part 58 (FAQs Part 58), which address changes in various rules as the result of the end of the COVID-19 National Emergency and the PHE.¹² Question and Answer 8 of FAQs Part 58 states that, while Notice 2020-15 applies until further guidance is issued, the Treasury Department and the IRS are reviewing the appropriateness of continuing the relief in Notice 2020-15 given the anticipated end of the COVID-19 National Emergency and the PHE and anticipate issuing additional guidance in the near future.

GUIDANCE

The Treasury Department and the IRS have determined that, with the end of the COVID-19 National Emergency and the PHE, the relief described in Notice 2020-15 is no longer needed. Accordingly, this notice modifies Notice 2020-15 to provide that the relief described in Notice 2020-15 applies only with respect to plan years ending on or before December 31, 2024. For subsequent plan years, an HDHP is not permitted to provide health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (for self-only or family coverage) for an HDHP, except as otherwise provided in this notice.

The Treasury Department and the IRS note that Notice 2004-23 provides that preventive care under section 223(c)(2)(C) includes, but is not limited to, screening services as specified in the Appendix to Notice 2004-23. However, preventive care does

¹² See <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-58> and <https://www.cms.gov/ccio/resources/fact-sheets-and-faqs/downloads/faqs-part-58.pdf>. Question and Answer 5 of FAQs Part 58 states that the Treasury Department, the IRS, and the Department of Labor “anticipate that the Outbreak Period will end July 10, 2023 (60 days after the anticipated end of the COVID-19 National Emergency).” The Treasury Department and the IRS, in coordination with the Department of Labor, clarify that the Outbreak Period ends July 10, 2023, irrespective of the last day of the national emergency under the National Emergencies Act or the last day of the national emergency under the Stafford Act.

not generally include any service or benefit intended to treat an existing illness, injury, or condition. As part of the preventive care safe harbor, the Appendix to Notice 2004-23 includes Infectious Diseases Screening Services for the following infections: Bacteriuria, Chlamydial Infection, Gonorrhea, Hepatitis B Virus Infection, Hepatitis C, Human Immunodeficiency Virus (HIV) Infection, Syphilis, and Tuberculosis Infection. Screenings for common and episodic illnesses, such as the flu, are not included on the list. Accordingly, the Treasury Department and the IRS are of the view that COVID-19 differs from the types of infectious diseases included in the preventive care safe harbor as specified in Notice 2004-23, and this notice clarifies that the preventive care safe harbor as described in Notice 2004-23 does not include screening (i.e., testing) for COVID-19, effective as of the date of publication of this notice.

In addition, the Treasury Department and the IRS note that on April 13, 2023, the Departments issued FAQs entitled, *FAQs About Affordable Care Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 59 (FAQs Part 59)*, which provide initial guidance on how the decision in *Braidwood Management Inc. v. Becerra*¹³ affects the requirement to cover preventive services without cost sharing under PHS Act section 2713.¹⁴ Question and Answer 7 of FAQs Part 59 states that, until further guidance is issued, items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010, will be treated as preventive care for purposes of

¹³ Civil Action No. 4:20-cv-00283-O (N.D. Tex. March 30, 2023). On May 15, 2023, the Fifth Circuit issued an administrative stay of the decision pending appeal, and the Fifth Circuit issued a further Order regarding the stay pending appeal on June 13, 2023.

¹⁴ See <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-59> and <https://www.cms.gov/files/document/faqs-part-59.pdf>.

section 223(c)(2)(C) of the Code, regardless of whether these items and services must be covered, without cost sharing, under PHS Act section 2713.

Consistent with the position taken in Question and Answer 7 of FAQs Part 59, this notice provides that items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010, are treated as preventive care for purposes of section 223(c)(2)(C) of the Code, regardless of whether these items and services must be covered, without cost sharing, under PHS Act section 2713. Accordingly, if COVID-19 testing were to be recommended with an “A” or “B” rating by the USPSTF, then that testing would be treated as preventive care under section 223(c)(2)(C) of the Code, regardless of whether it must be covered, without cost sharing, under PHS Act section 2713.

EFFECT ON OTHER GUIDANCE

Notice 2020-15 is modified. Notice 2004-23 is clarified.

DRAFTING INFORMATION

The principal author of this notice is Jennifer Friedman of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes), though other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Jennifer Friedman at (202) 317-5500 (not a toll-free number).