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COVID-19 TESTING COVERAGE MANDATE EXPANDED

Jan 14, 2022

Earlier this week, the COVID-19 testing coverage mandate was significantly expanded pursuant to FAQs issued jointly by the Departments of Labor, Health and Human Services and the Treasury (collectively, the Departments). The newly expanded mandate is effective **now** - or more precisely, on January 15, 2022. Following is a discussion of what is required by group health plans (and health insurance issuers) and certain procedural issues with respect to the guidance.

Background: Way back, when the long fingers of COVID-19 began to reach across the country, legislation was enacted to expand access to COVID-19 testing through group health plans. Specifically, the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES Act) required that health plans cover certain COVID-19 tests with no cost sharing and no prior authorization requirements for the duration of the COVID-19 public health emergency declared by the Secretary of Health and Human Services (which was most recently renewed on January 14, 2022). Coverage of COVID-19 tests was required to be provided at the negotiated rate or, in the absence of a negotiated rate, at the public rate.

The expanded testing coverage requirements: Under the new guidance, health plans must:

- Cover over-the-counter COVID-19 diagnostic tests authorized by the U.S. Food and Drug Administration at no cost, either through reimbursement (documentation of proof of purchase may be required) or free of charge;
- Cover authorized COVID-19 diagnostic tests without requiring a health care provider's order, clearance or approval or the imposition of any medical management requirements;
- Not restrict coverage to in-network providers, but may, if the health plan uses a network of preferred pharmacies, retailers, and direct-to-consumer shipping programs through which the tests may be obtained at no cost, limit reimbursement of out-of-network providers to the lesser of $12 or the actual cost of the test;
- Take reasonable steps to ensure adequate in-network access to over-the-counter COVID-19 diagnostic tests through an adequate number of retail locations (both in-person and online); and

- Provide reimbursement for up to eight (8) tests per month for each covered individual, which may be purchased in single or multiple purchases and in single test or multiple test packs (each test in a pack containing multiple tests may be counted as a separate test). In other words, a family of 4 could receive at no cost, or be reimbursed for, up to 32 tests per month. Additional tests outside of the FAQ guidance would be subject to the coverage terms of the health plan.

The failure to take reasonable steps to ensure in-network tests are available through an adequate number of retail locations, or failure to provide such tests in the same time frame as other items under the health plan's direct-to-consumer shipping, renders health plans ineligible to utilize the $12 per test cap for out-of-network tests.

Tests for employment and other purposes: Health plans are not required to cover tests that are not primarily intended for individualized diagnosis or treatment of COVID-19. In other words, health plans are **not** required to cover the cost of tests that are required for employment purposes or purchased by the consumer for resale, or the cost of which have otherwise been reimbursed. Health plans may impose reasonable safeguards to prevent, detect and address fraud and abuse, such as an attestation of purchase for personal use.

Continuation of prior coverage requirements: Health plans must continue to provide coverage for COVID-19 tests that are administered with a health care provider's involvement or prescription pursuant to FFCRA's terms, described above.

More: Health plans are encouraged to provide education to facilitate access, effective use and prompt payment of COVID-19 tests. The FAQs also address resources for obtaining free testing in the community.

Procedural interests: The expanded coverage mandate was implemented by the Departments pursuant to the FFCRA which authorized the Departments to implement requirements of FFCRA through sub-regulatory guidance. The Departments expressed their view that the FAQs are not subject to the notice and comment requirements of the Administrative Procedure Act on two grounds: 1) the FAQs constitute a statement of policy, and 2) good reason, given the urgent need to facilitate the nation's response to COVID (i.e. prior notice and comments would be impracticable and/or contrary to public interest). Such discussion represents a pre-emptive strike against possible procedural challenges. Time will tell whether the precaution was necessary and/or effective.

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