COMPLIANCE ALERT

$1.7T Government Funding Bill Extends COVID-19 Telehealth Relief

December 28, 2022

Action Required:

- Review the Bill's new rules regarding your benefits and insurance programs.
- Sponsors of HDHPs that would like to extend telehealth coverage should determine whether any amendments are needed.
- Monitor additional federal guidance.

On December 23, 2022, Congress approved a $1.7T government funding bill, the Consolidated Appropriations Act, 2023 ("CAA 2023" or "the Bill"). The new Bill, impacts benefit plans and insurance arrangements by among other things, extending COVID-19 relief for telehealth plans, and making it easier to use 401(k) funds to purchase long-term care insurance.

How Does This New Bill Impact Telehealth Plans?

The CAA 2023 extends for a second time the COVID-19 relief in the CARES Act permitting high deductible health plans (HDHPs) to provide first-dollar telehealth and other remote care services for plan years beginning after December 31, 2022, and before January 1, 2025 (for calendar-year plans, this extends the relief into the 2023 and 2024 plan years). It's also important to note that this relief is optional.

Additionally, the CAA 2023 extends for two years certain COVID-19-related flexibilities and relief applicable to providers of telehealth services covered by Medicare. These Medicare flexibilities would extend through December 31, 2024, regardless of whether the U.S. is still in a PHE period.

How Does This New Bill Impact Long-term Care Insurance?

The CAA 2023 includes the Setting Every Community Up for Retirement Enhancement (SECURE) 2.0 Act of 2022 ("the Act"). Within the Act is a provision that could help 401(k) plan participants pay for long-term care insurance. However, this provision only becomes effective beginning with distributions made three years after the date of the CAA 2023's enactment.

What Should Employers and Plan Sponsors Do Next?

Employers and plan sponsors should review and discuss with their advisors the Bill's new rules applicable to their benefits and insurance programs.

Sponsors of HDHPs that would like to extend pre-deductible telehealth coverage should review current plan language and determine whether any amendments are needed for plan years beginning on or after January 1, 2023. ■

↓ Full Explanation Follows ↓

$1.7T Government Funding Bill Extends COVID-19 Telehealth Relief

On December 23, 2022, Congress approved a $1.7T government funding bill, the Consolidated Appropriations Act, 2023 ("CAA 2023" or "the Bill"). The new Bill, which is expected to be signed by President Biden this week, impacts benefit plans and insurance arrangements by among other things, extending COVID-19 relief for telehealth plans, and making it easier to use 401(k) funds to purchase long-term care insurance.

How Does This New Bill Impact Telehealth Plans?

Telehealth Relief Applicable to HSA Eligibility:

The CAA 2023 extends for a **second time** the COVID-19 relief in the CARES Act permitting high deductible health plans (HDHPs) to provide first-dollar telehealth and other remote care services for plan years beginning after December 31, 2022, and before January 1, 2025 (for calendar-year plans, this extends the relief into the 2023 and 2024 plan years).[1]

Specifically, the Bill extends the CARES Act's telehealth safe harbor that was set to expire on December 31, 2022. This safe harbor provides that an HDHP can temporarily cover telehealth and other remote care services pre-deductible, and an individual can have stand-alone coverage for telehealth and other remote care services pre-deductible, without impacting his/her ability to contribute to a health savings account (HSA). There is no requirement in the safe harbor that the telehealth or other remote care services be "preventive," nor any requirement that these services be applicable only to COVID-19-related care.

It's also important to note that this relief is optional. Sponsors of HDHPs are not required to waive the deductible that would otherwise apply to non-preventive telehealth services, nor offer standalone telehealth coverage.

Telehealth Services Covered by Medicare:

Additionally, the CAA 2023 extends for two years certain COVID-19-related flexibilities and relief applicable to providers of telehealth services covered by Medicare. These include (among other relief):

- Waiving the geographic restrictions and originating site requirements for coverage;
- Expanding the list of practitioners eligible to furnish telehealth services;
- Allowing telehealth services for Rural Health Clinics and Federally Qualified Health Centers; and
- Allowing for telehealth services through audio-only telecommunications.

Additionally, these Medicare flexibilities would no longer be tied to the existence of an HHS-declared public health emergency (or PHE). In other words, they would extend through December 31, 2024, regardless of whether the U.S. is still in a PHE period.

How Does This New Bill Impact Long-term Care Insurance?

The CAA 2023 includes the Setting Every Community Up for Retirement Enhancement (SECURE) 2.0 Act of 2022 ("the Act"). Within the Act is a provision that could help 401(k) plan participants pay for long-term care insurance (LTCI). However, this provision only becomes effective beginning with distributions made three years after the date of the CAA 2023's enactment.

Under this provision, the Act permits individuals to withdraw funds from their 401(k) accounts to pay for LTCI coverage without being subject to the 401(k)'s normal 10% early withdrawal penalty. The distribution cannot exceed the lesser of the insurance cost, 10% of the vested account, or $2,500 (as adjusted). It should also be noted that the participant would still have to include the 401(k) distributions used for this purpose in taxable income (even though not paying the 10% early withdrawal tax penalty).

What Are Some of the Funding Measures and Other Provisions in the Bill That May Impact Employers and Plan Sponsors?

- **Mental Health Enforcement Grants for States:** In addition to providing financial support to several mental health and substance use disorder programs and providers, the CAA 2023 amends the Public Health Service Act to create state grants tied to enforcement of the Mental Health Parity and Addiction Equity Act (MHPAEA). Specifically, the Bill authorizes grant making authority of $10 million to CMS for five years for states that apply for such grants and that agree to request the nonquantitative treatment limitation ("NQTL") analysis required under the MHPAEA, as amended by the Consolidated Appropriations Act, 2021. This additional funding appears to have been designed to ensure that state agencies are enforcing this NQTL analysis requirement in a

[1] It should be noted that this relief extension provision in the Bill appears to create a gap for non-calendar year plans because neither the prior relief, nor the new, extended relief, will apply to the months of the 2022 plan year that fall in 2023.

manner that is more uniform and consistent with federal agencies.

- Other Medicare Changes: In addition to the above-referenced Medicare changes, the Bill increases provider reimbursement under Medicare in order to reduce anticipated medical provider reimbursement cuts set to become effective January 1, 2023. Providers were facing cuts of roughly 4.5%, which will now be reduced to 2% in 2023 and 3.25% in 2024. While this change is applicable only to Medicare fee for service, to the extent that group health plans and insurers base provider reimbursement rates on the underlying Medicare reimbursement rates, these increases could have an impact on future plan expenditures and premiums.

What Was Not Included in the Bill?

Notably, the CAA 2023 did not include two proposals that were a subject of regular discussion in the negotiations leading up to its passage. These were (1) the adoption of a stronger enforcement scheme for alleged MHPAEA violations,[2] and (2) addressing (in the view of some medical providers) the problem of insufficient reimbursement of dialysis services for group health plan enrollees who are eligible for Medicare based on end-stage renal disease (ESRD) in light of a recent Supreme Court decision.[3]

What Should Employers and Plan Sponsors Do Next?

Employers and plan sponsors should review and discuss with their advisors the Bill's new rules applicable to their benefits and insurance programs. Regarding the telehealth provisions of the Bill, sponsors of HDHPs that would like to extend pre-deductible telehealth coverage should review current plan language and determine whether any amendments are needed for plan years beginning on or after January 1, 2023.

The government agencies tasked with implementing and enforcing the rules in the new Bill will likely soon release new regulations and guidance designed to assist employers and plan sponsors with putting these new rules into effect. We will continue to provide updates on those developments as they arise. If you have any questions about how this new Bill may impact your organization's benefits and insurance arrangements, please contact your Corporate Synergies Account Manager. ■

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

[2] With respect to MHPAEA enforcement, prior proposals considered imposing civil monetary penalties for violations of MHPAEA and enhanced litigation opportunities for plan participants and the U.S. Department of Labor. While these proposals were not included in the Bill's final text, we expect that they will likely be proposed in new legislation in the next Congress.

[3] With respect to dialysis benefits, proposals were discussed to counter the effects of a June, 2022 Supreme Court decision, ***Marietta Mem'l Hosp. v. DaVita Inc.***, which held that the Medicare Secondary Payer (MSP) rules do not operate to mandate a designated level of benefits for dialysis services so long as the coverage terms for the dialysis services are uniformly applied to all covered individuals. These proposals sought to amend the MSP rules to impose a parity standard on plans and issuers with respect to dialysis services and other chronic conditions. As with the MHPAEA enforcement proposals, we expect that these MSP-related proposals will also resurface in proposed legislation in the next Congress.