

Can Telemedicine services be offered with qualified HSA plans?

At HealthPERX, we believe in partnering with our clients to help them achieve their goals by providing tools that save time and money while also improving the health, wellness and quality of life of the people we serve.

Recently, there have been a variety of views and comments regarding offering employer paid Telemedicine services alongside an HSA plan. The main concern among industry partners and clients is whether an employer could be in violation of IRS regulations and therefore risk being disqualified from participating in the HSA plan.

The purpose of this commentary is to share our analysis and support of why HSA plans and telemedicine benefits are compatible and permissible today. We submit this as our position and encourage our partners and clients to make benefit decisions with this information in mind.

Respectfully,

The HealthPERX Team

Current Laws Regarding Telemedicine and HSA Plans

To date, we have not found a single law or tax code currently in place that states whether Telemedicine can or cannot be offered alongside a qualified HSA plan. There is currently nothing in written form that would allow the IRS to restrict, disqualify, penalize or perform any other form of negative action against a qualifying HSA account that is being offered with an employer paid telemedicine plan. Over 50 million employees currently receive telemedicine benefits, many of which are on HSA plans, without a single disqualification from the IRS.

As a result, statements made in this matter are based on past inferences made from IRS notices and statements. Feel free to share this information with your legal advisor.

But, for sake of the argument, let's explore some of the related issues that are circulating and how they relate to employer paid telemedicine.

There are two fundamental questions that we believe provide significant support to our stance on this issue. One is the question about telemedicine contracted

outside a qualified health plan and the other is the position of the IRS to similar employer paid benefits.

Is Telemedicine Considered Health Insurance?

healthPERX is not health insurance and does not replace your primary care physician. It is a resource platform designed to improve wellness and give employees access to physicians for acute, non-significant medical conditions.

Simply put, telemedicine is not considered health insurance. The definition of what constitutes health insurance coverage is defined by the Public Health Service Act, 42 U.S. Code § 300gg-91 under Section B-1 as follows:

The term "health insurance coverage" means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer.

The telemedicine benefit provided by healthPERX does not align with this definition of health insurance in any way. As a result, we conclude that it is not health insurance and is not subject to the same regulations surrounding health insurance.

But if it is not insurance, what is it? Are there any other benefits out there that are similar? And what does the law say about those benefits and how can we apply that to Telemedicine?

What Does the Law Say Regarding Similar Benefits?

The closest thing in the insurance industry that parallels what telemedicine is would be an Employee Assistance Program (EAP) plan, and there are some very specific IRS bulletins dealing with EAP plans and HSA qualification, the most recent and specific of which is the Internal Revenue Bulletin 2014-43, issued on October 20th, 2014. Section II B, under Employee Assistance Programs, stipulates that for an EAP to constitute **excepted benefits**, which are allowable with an HSA

plan, they must satisfy the following requirements:

1. The EAP plan cannot provide 'significant benefits' in the nature of medical care.
2. The benefits cannot be coordinated with the benefits under another group health plan.
3. No employee premiums or contributions may be required as a condition of participation.
4. The EAP plan may not impose any cost-sharing requirements.

An article posted by fellow advocates of employer paid telemedicine plans addresses point number one thoroughly:

"The first point in this list is the most critical. In determining whether benefits are significant in the nature of medical care or treatment, the amount, scope, and duration of covered services are taken into account. While telemedicine generally can be an important tool in triaging medical concerns in an effort to control costs, it provides treatment for only a small set of conditions, can only treat conditions that can be diagnosed without physical examination of the patient, cannot provide ongoing or follow-up treatment, cannot test for certain conditions and can only prescribe a small subset of drugs.

While telemedicine can be very useful for patients that have a non-emergency health issue, that is where medical care ends. The medical care and treatment via telemedicine does not meet the threshold of "significant medical care."

What Does the IRS Say?

In terms of the benefits being coordinated with the benefit plans under another group plan, the IRS states two specific elements:

1. Participants in the other group health plan must not be required to use and exhaust benefits under the EAP (making the EAP a "gatekeeper") before an individual is eligible for benefits under the other group health plan; and
2. Participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan.

The healthPERX plan design does not require a participant to use our benefits before they are eligible for benefits under their group's health plan and

participation in our plan is not in any way dependent on participation in another plan. Rather, our plan is open to everyone. All members can receive the benefits of the program offered by their employer. Further, there is no integration of data, claims, reporting or any other type of coordination with the group plan. It is a completely separate program.

Finally, we do not require employee premiums or contributions in order to participate in this program, nor do we impose any cost-sharing requirements.

So, if telemedicine is most closely related to an EAP benefit in terms of its current classification, and we meet all four requirements in order to be considered an **excepted benefit, we again find that employer paid telemedicine passes the test.**

What happens if the IRS does rule against Telemedicine?

What is the Worst Case Scenario?

Laws can change. Just because something is acceptable today does not mean it will be acceptable in the future.

So, what happens if the IRS does come out with a tax code, bulletin or notice that specifically addresses telemedicine and HSAs, and it is an unfavorable stance?

We believe it is highly unlikely that this will ever happen.

Telemedicine carries with it benefits for the employer in terms of health care savings, reduced absenteeism and increased productivity. Employees save time, money and benefit from improved health and wellness. The healthcare industry benefits by allowing them to focus on more "significant" healthcare issues.

We know from experience that by offering telemedicine as a complementary benefit, together with our utilization tools, the benefit provides value and positive ROI the very first year.

If an employee cannot be treated through our physician network due to their condition being beyond the scope of telemedicine services ("significant medical care"), the physician will direct them to go to a clinic or an ER. This is a complementary service meant to provide relief and treatment for acute needs.

What about First Dollar Coverage on a Telemedicine Plan with a \$0 Medical Consult Fee?

A National Consulting Firm's Legal Counsel came to the following opinion...

Telehealth services do not provide "significant benefits in the nature of medical care." The IRS Bulletin below demonstrates a benefit not providing significant benefits in the nature of medical care, even if it provides access to free health care, does not negate an HSA:

IRS Bulletin:

http://www.irs.gov/irb/2008-29_IRB/ar11.html

Q-10. Is an otherwise eligible individual who has access to free health care or health care at charges below fair market value from a clinic on an employer's premises an eligible individual under § 223(c)(1)?

A-10. An individual will not fail to be an eligible individual under § 223(c)(1)(A) merely because the individual has access to free health care or health care at charges below fair market value from an employer's on-site clinic if the clinic **does not provide significant benefits in the nature of medical care** (in addition to disregarded coverage or preventive care).

Alternative:

Some clients whose legal advisors have recommended a more conservative approach have recommended their clients offer telemedicine WITH a medical consult fee to be paid by the employee.

They opted to offer the telemedicine benefit with a \$10, \$20 or \$45 consult fee to their HSA participants.

We can create two plans for an employer group to allow differentiation between HSA Eligible employees and non-HSA eligible employees.

For the Sake of Argument . . . What happens if the IRS comes out with a tax code, bulletin or notice that specifically addresses Telemedicine and HSA's?

What would actually happen?

The best way to predict future action is to talk to attorneys who specialize in Benefits and ERISA regulations as well as take a look at the past. That is what we did. What we found and what we were told is, in cases where the IRS implements a new ruling that redefines a specific regulation, they **provide a period of recovery to adhere to the new law and they do not penalize companies retroactively.**

So, if the IRS ruled against employer paid telemedicine and there were violations of IRS regulations, we would either work with our clients to re-design our plan or we would gracefully part ways and help our clients comply with the new laws.

Telemedicine is possibly the single most important healthcare tool that has come to market in the last few decades. It will continue to have a significant impact on the healthcare industry, helping countless people and employers save money and improve their health and well-being.

We firmly believe that we are in compliance with current regulations, and we also believe that if the IRS is going to move in any direction regarding telemedicine, it will do so in a manner that does not retroactively impact any business but instead helps expand its use and maximize its impact.

The Choice is Yours

The decision on how to proceed always remains with you, our customer.

Our job is to provide you with enough information to make an informed decision. Regardless of the path, we are here to make that decision work for you and your organization.

As with any new benefit like telemedicine, we do encourage our clients to consult knowledgeable compliance experts to get both sides of the discussion.

If your company would like a referral to a nationally renowned attorney specializing in ERISA regulatory compliance matters, we would be more than happy to assist you.

Please don't hesitate to contact us to discuss further.