

"Free" COVID tests are causing headaches for employers

Although it makes for a good political headline, nothing is free.

Group health plans are required to cover the cost of over-the-counter covid test kits, up to eight tests per 30-day period, by arranging for employees to walk into their local CVS or Walgreens and pick them up at no cost or reimbursing them for 100% of the cost. We won't bother pointing out that insurers will eventually pass these costs along in the form of higher premiums.

Free tests aren't available to employees who need to take them because they're not vaccinated. Unless you mandate the tests these employees must take, how you discern this is beyond our powers of comprehension. There are other pitfalls you need to be aware of regarding these "free" tests.

The FSA/HSA trap

We've written many times about the tax code's prohibition on double-dipping — getting a double tax benefit on the same tax item, like taking a deduction and a tax credit for the same wages paid to the same employee.

But the principle also applies if employees have flexible spending accounts or health savings accounts. They can't put in for reimbursements for the test kits they otherwise get for free or are reimbursed for through their group health plan. Nor should they want to. If they put in for reimbursement, their FSAs/HSAs will be debited needlessly.

You need to remind employees to not plunk down their FSA or HSA debit card at the pharmacy when they pick up their free tests. If your group plan will reimburse employees, remind them to save their receipts.

Exceptions to the double-dipping prohibition: Employees who buy more than eight tests a month or employees who go to an out-of-network pharmacy and spend more than \$12 per test kit—the difference would be reimbursable.

Reality check: \$900 for a "free" test

As we said—someone is paying for those free tests. And this someone—in this case a diagnostic lab—is suing group plans for the cost of physician-ordered covid tests and related services.

According to the plaintiff, the public cash price per test was \$900. The lab sued under a provision of the Coronavirus Aid, Relief, and Economic Security Act requiring group plans to reimburse providers for diagnostic tests in an amount equal to the cash price listed by providers on public websites.

The defendant group plans to assert the CARES Act is intended to benefit patients only and doesn't contain a private right to sue. They wanted the case dismissed.

A federal trial court disagreed and ruled for the lab, finding there was an implied right to sue to enforce the

law's payment provisions.

Congress wanted widespread covid testing, which could only be accomplished by private entities quickly incurring the cost of establishing testing sites across the country and procuring the necessary supplies to administer tests. Legislative impatience with the finer points of the relationship between providers and insurance companies to properly allocate those costs or to determine appropriate pricing is evidenced by the inclusion of a mandatory methodology for determining the rate to be paid if the parties did not have the time or cooperation to negotiate rates. A private right of action to recover the mandated reimbursement is fully consistent with the legislative scheme.

Besides, the court said, the defendant group health plans haven't suggested what recourse providers would have if they couldn't sue.

The case is *Diagnostic Affiliates of Northeast Houston, LLC v. United Healthcare Services, Inc.*

It's unlikely the court will address the issue of whether \$900 per covid test is reasonable, because all CARES Act required testing entities to do was post their prices, reasonable or not, to a public website.

Additional clarity on free COVID tests

Last month the Departments of Labor, Health and Human Services, and Treasury released FAQs establishing two safe harbors for group plans, including self-insured plans, that must provide free over-the-counter covid tests to employees and their families:

- **Under safe harbor #1**, plans can arrange to provide OTC tests directly to employees through their pharmacy networks, preferred retailers, and direct-to-consumer shipping programs. Reimbursements to employees who buy tests outside those networks may be limited to the lower of \$12 per test or the actual cost (\$24 for test kits with two tests per pack).
- **Under safe harbor #2**, plans can reimburse employees instead of providing tests directly. Plans choosing to reimburse employees may limit reimbursement of OTC tests to eight tests per 30-day period or calendar month per enrollee.

Safe harbor #1 appears to be less desirable for insurers, since they'd have to do a lot more up-front work when compared to just cutting checks back to employees. Employees, on the other hand, would probably prefer safe harbor #1, since they incur no immediate out-of-pocket costs.

So to enhance the viability of safe harbor #1, the departments have issued a further set of [FAQs](#), which became effective Feb. 4, 2022.

One safe harbor, two options

The only tests covered by these rules, according to the FAQs, are FDA-approved OTC tests. Excluded are tests using self-collected samples, but that require processing by a lab or other health-care provider to return results (e.g., home-collection PCR tests).

According to the FAQs, group plans have significant flexibility in how they establish direct-to-consumer shipping or direct coverage programs. Whether employees' access under either of these options is adequate, depends on the facts and circumstances.

- Plans won't run afoul of the safe harbor if they're temporarily unable to provide adequate access due to supply shortages.
- Group plans covering small employers may be able to meet this standard if they cover only employees who live and work in a localized area and establish a distribution center at a nearby location.

Plans have two options.

Option #1: Direct-to-consumer mechanism. A direct-to-consumer shipping mechanism can include online or phone ordering and may be provided through pharmacies or other retailers, the plan directly, or another entity on the plan's behalf.

- Plans don't have to provide exclusive access through one entity, as long as employees' orders are shipped directly to them. Plans can satisfy this condition if, for example, they contract with Speedy Pharmacy or Sparky Pharmacy and employees can place orders through Speedy's or Sparky's website.
- Plans pick up reasonable shipping costs.
- Plans inform employees of which tests are available and the choices employees have to request tests.

Option #2: In-person networks. Plans must ensure employees have access to an adequate number of locations where they can pick up tests. Locations can include pharmacies, other retailers or independent distribution sites. **Adequacy depends on the following:**

- Where employees are located.
- How often employees use their plans' pharmacy networks.
- How plans notify employees of these retail locations, distribution sites, or other distribution mechanisms.
- How plans notify employees of which tests are available.

Plans don't have to contract with every pharmacy on the block to satisfy this aspect of the safe harbor. The FAQs note it may be considered adequate if plans provide tests from a limited number of manufacturers, such as those with whom they have contractual relationships or from whom they've been able to obtain tests directly.

After discussing the options with your insurer, you need communicate the following to employees:

- Where they can pick up free test kits.
- Through whom test kits may be ordered online.
- Your insurer's price, the brands and quantity limitations on free test kits.
- The documentation employees must retain for reimbursement (e.g., claim forms, receipts, UPC symbols, attestations).
- The reimbursement process (e.g., by mail or online).

Fraud prevention

The FAQs issued in January allow plans to institute fraud-prevention protocols. But those FAQs were aimed at employees who were trying to game the system by buying tests in quantity and reselling them.

The new FAQs beef up plans' fraud-fighting abilities by allowing them to deny reimbursement to employees who buy tests from private individuals, from sellers using online auctions, or from resale marketplaces. Plans can require employees to provide proof of purchase clearly identifying the product and the seller (e.g., UPC codes or other serial numbers), sellers' original receipts, or other documentation.