

Group health plans must still cover contraceptives cost-free

Lost in all the attention paid to the effect of the Supreme Court's *Dobbs v. Jackson Women's Health Organization* on group health plans is the equally important issue of contraception.

The Affordable Care Act already requires group health plans to cover at least one form of contraception in each category of [FDA-approved, cleared or granted contraceptive methods](#) with no cost-sharing for plan participants.

Back in January, the Departments of Labor, Treasury, and Health and Human Services issued frequently asked questions summarizing contraception coverage and providing examples of practices reported to the departments denying this coverage to plan participants. These practices persist, according to the departments, which feel obliged to now issue follow-up [FAQs](#).

Emergency contraception

Emergency contraception is considered a preventive service for which no cost-sharing can be charged. FAQs 5 and 6 make these points:

- Plans must cover emergency over-the-counter contraceptives when prescribed by a physician and are encouraged to cover this medication without cost-sharing if obtained over the counter without a physician's prescription. Plans must also cover this medication when prescribed in advance.
- Health savings accounts, health flexible spending accounts or health reimbursement accounts can reimburse plan participants for the cost of OTC emergency contraception if the cost isn't picked up by another plan or coverage.

Correcting mistakes: Plan participants whose HSAs reimburse them twice for the same medication must include their distributions in their gross income or pay back the HSA. Plan participants whose FSA or HRA reimburse them twice should contact the plan administrator regarding correction procedures.

Reasonable medical management techniques

If there's no official guidance on the frequency, method, treatment, or setting for a preventive service, the plan, relying on clinical evidence, may use reasonable medical management techniques to determine coverage limits.

FAQs 8 and 9 make the following points:

- Medical management techniques won't be considered reasonable unless an easily accessible, transparent and sufficiently speedy exceptions process is available. The exceptions process can't be too burdensome on plan participants or their providers and must cover FDA-approved, cleared or granted products or services that providers determine to be medically necessary. Requiring plan participants to appeal a plan's negative determination isn't reasonable.
- An exceptions process will be easily accessible if plan documentation describes the process (including

how it can be accessed without initiating an appeal), the information the plan requires as part of the exceptions request and contact information for a plan rep who can answer questions related to the process.

- An exceptions process will be transparent if the information regarding the process (including any forms) is included and prominently displayed in plan documents and other materials describing the plan's contraceptive coverage. Plans are encouraged to make this information available on a website and on paper.

The FAQs also contain examples of unreasonable medical management techniques, including denying coverage for all or particular brand name contraceptives and requiring plan participants to fail first when using FDA-approved products or services.

Preemption and nonconforming plans

Certain state legislatures are contemplating banning some FDA-approved, granted or cleared contraceptive medication and devices. FAQs 11, 12 and 13 make clear these state laws will be preempted by federal law and the HHS secretary will investigate and enforce federal law.

The FAQs contain a warning for group health plans, too. The DOL (for ERISA-covered plans) and the Center for Medicare & Medicaid Services (for insured group plans) will investigate noncompliant plans and require them to make corrections. Plans that continue to remain out of compliance may be fined \$100 per day per person under IRC § 4980D.