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Reimbursement of Over-the-Counter Medications: IRS Issues Informative Letter

On July 14, 2009, the Internal Revenue Service (IRS) issued an information letter regarding reimbursement of certain over-the-counter (OTC) items by health flexible spending accounts (FSAs) and health reimbursement arrangements (HRAs). Specifically, the letter provides guidance on whether these items qualify as "medical care" expenses that may be reimbursed. The IRS notes in the letter that it is intended for informational purposes only and does not constitute a ruling by the IRS.

Medical Care Expenses

In the letter, the IRS explains that medical care expenses are amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting a structure or function of the body. Expenses for OTC items may qualify as medical care only if they are "primarily for" the prevention or alleviation of a physical or mental defect or illness. Expenses that merely benefit general health, on the other hand, are considered to be only personal expenses and will not qualify as medical care expenses.

Medical Care Factors

Whether an otherwise personal expense is primarily for medical care is a question of fact. Several objective factors may be considered in making this determination, including:

- The motive or purpose for making the expenditure;
- Whether a physician has diagnosed a medical condition and recommended the item as treatment;
- The link between the treatment and the illness;
- Treatment effectiveness; and
- The proximity in time to the onset or recurrence of a disease.

The "But For" Test

For the expense to be deemed medical care, it must be established that the expense would not have been paid "but for" the disease or illness. That is, the item is not for medical care if the individual would have paid for it even without a medical condition.

Personal and Medical OTC Items

The IRS letter specifically addresses a

number of items that may be both personal and medical in nature, as well as items that are generally used only for medical care.

Personal Items as Medical Care

Certain items may qualify as medical care, or may be personal items, depending on how they are used. For example, a person may use these items to maintain general health, or as toiletries or cosmetics. These are personal uses. However, if it can be shown that the item is used to treat or alleviate a disease or injury, and satisfies the "but for" test, the item may qualify as a medical care expense.

These items include:

- Sunscreen;
- Medical grade face masks;
- Skin products;
- Anti-bacterial hand sanitizers;
- Fluoride rinses;
- Petroleum jelly;
- Fiber supplements; and
- Probiotics.

Medical Care Only Items

Items that have no purpose other than to treat a disease, illness, or mental or physical defect may qualify as medical care. Treatments for the following conditions will most likely qualify as medical care:

- Acne;
- Incontinence;
- Arthritis;
- Constipation;
- Colds and sinus problems;
- Dehydration; and
- Indigestion.

In addition, the following items will

probably qualify as medical care:

- Support braces and shoe inserts for injured or weakened body parts;
- Products that have no purpose but to treat existing skin conditions such as eczema (as opposed to products that are designed to prevent the development of the condition); and
- Wheelchair cushions that are a necessary accessory to a wheelchair.

Excess Cost of Personal Items

The excess cost of an otherwise personal item that is specifically designed to treat or alleviate a medical condition, over the cost of the item without the special features, may be considered an expense for medical care. For example, the cost of specially designed clothing that is used to treat a specific disease, such as diabetic socks, compression hose or orthopedic shoes, that exceeds regular clothing may be a medical care expense. However, these items may also be used for personal or preventive reasons. Whether they are eligible for reimbursement will depend on the facts of each specific case.

Food and Food Thickeners

The cost of food is not a medical care expense if it is a substitute that a person would normally consume to meet nutritional requirements. However, it is possible that food thickeners may be considered a medical care expense. This is a question of fact that must be determined on a case-by-case basis.

Please contact your LDP Consulting Group, A Division of Brown & Brown, Inc. representative with any questions regarding this guidance.

Reducing the Risk of Exposure to Pandemic Influenza in the Workplace

The best strategy to reduce the risk of becoming infected with influenza during a pandemic is to avoid crowded settings and other situations that increase the risk of exposure to someone who may be infected. If it is absolutely necessary to be in a crowded area, the time spent within the crowd should be as short as possible. Some basic hygiene and social distancing precautions that can be implemented in every workplace include the following:

- Encourage sick employees to stay home.
- Promote frequent hand washing with soap, or using hand sanitizer if no soap and water is available. Also, encourage employees to avoid touching their noses, mouths and eyes.
- Tell employees to cover their coughs and sneezes with a tissue, or to use their upper sleeves if tissue is not available. All employees should wash their hands or use a hand sanitizer after they cough, sneeze or blow their noses.

- Employees should avoid close contact with their coworkers and customers (maintain a separation of at least six feet). They should avoid shaking hands and always wash their hands after contact with others. Even if employees wear gloves, they should wash their hands upon removal of the gloves in case their hand(s) become contaminated during the removal process.
- Provide customers and the public with tissues and trash receptacles, and with a place to wash or disinfect their hands.
- Keep work surfaces, telephones, computer equipment and other frequently touched surfaces and office equipment clean. Be sure that any cleaner used is safe and will not harm your employees or office equipment. Use only disinfectants registered by the U.S. Environmental Protection Agency (EPA), and follow all directions and safety precautions indicated on the label.
- Discourage employees from using other employees' phones, desks, offices or other work tools and equipment.
- Minimize situations in which groups of people are crowded together, such as meetings. Use e-mail, phones, IM and text messaging to communicate with each other. When meetings are necessary, avoid close contact by keeping a separation of at least six feet, where possible, and ensure there is proper ventilation in the meeting room.
- Reducing or eliminating unnecessary social interactions can be very effective in controlling the spread of infectious diseases. Reconsider all situations that permit or require employees, customers, and visitors (including family members) to enter the workplace. Companies which permit family visitors onsite should consider restricting/eliminating that option during an influenza pandemic. Worksites with onsite daycare should consider in advance whether these facilities will remain open or will be closed, and the impact of such decisions on employees and the business.
- Promote healthy lifestyles, including good nutrition, exercise and smoking cessation. A person's overall health impacts their body's immune system and can affect their ability to fight off, or recover from, an infectious disease.

See www.cdc.gov/flu/protect/preventing.htm for more information.

2010 Health Insurance Cost Predictions

The predictions for health care trends are now being released for 2010 and the outlook continues to be grim. These trends are forecasts for projected changes in health plans' per capita claims cost, as determined by insurance carriers, major insurance carriers (MCOs) and third-party administrators (TPAs).

The following factors can affect a trend: inflation, cost-shifting, fixed deductibles and copayments, utilization increases, use of more expensive treatment options, government-mandated benefits and technology changes. As a general rule, there is usually a high correlation between trend rates and actual cost increases as determined by carriers. Despite this, changes for plan sponsors may not be as similar compared to projected trends because of the uniqueness of the company.

Mercer Health & Benefits reports that employers are expecting nearly a nine percent increase in the cost of their group health care plans in 2010. Many survey respondents also stated that they are planning to cut their health care benefit budgets more than usual in 2010 due to the recession. Preliminary survey findings attributed the higher costs among recession-affected employers to an increase in stress-related illnesses among employees and layoffs.

PricewaterhouseCoopers (PwC) reported similar findings: that costs will rise in part because many are worried about losing their jobs, and because of this, are using their health care more frequently while they still have it. Not only are workers seeking medical care that they might have otherwise put off, but PwC also reports an increase in stress-related illness.

According to the Segal Group, Inc., medical plan projections for the majority of managed care plans are similar to those found in 2009 – ranging from 10.2 to 10.8 percent. Quite the opposite, high-deductible health plans (HDHPs) are projected to increase by just over one percentage point to 11.9 percent in 2010.

Segal also reported that medical plan cost trends this year will be more than four times greater than the annual increase in average hourly earnings. With obvious pressure on plan sponsors, most are not waiting for federal health care reform and are accelerating their efforts to control health costs on their own. Attempting to curtail this increase, many plans have eliminated or greatly reduced coverage for brand-name drug classes while reducing copayments for primary care visits and increasing copayments for visits to specialists. An increasing number of plan sponsors are also monitoring wellness and disease management programs through incentive-based initiatives.

Open Enrollment Education Opportunities

Open enrollment is a period of time each year when employers permit new employees to enroll in a health plan and allow current employees to make changes to their existing medical coverage. During open enrollment employees may decide to change plans, add or drop a dependent, or add an optional program such as a dental plan.

Employers can assist employees during open enrollment by distributing materials that explain new health options and changes to existing benefits. To facilitate employees selecting the plan option that best meets their family's needs, employers should provide information about the following:

- A general summary of what benefits are covered by the plan
- Limits on coverage, as well as limits on coverage for certain disorders
- Preexisting condition clauses that restrict coverage for a specific period of time
- Coverage for preventive services, procedures and medications
- Extent of medication coverage, particularly for new drugs
- Cost-sharing (i.e., premium contribution, deductible, copayment or coinsurance requirements)
- Consumer-directed health plans (high-deductible health plans) or other non-traditional plan types

Nine methods that employers can use to improve their open enrollment communication strategies are:

1. Communicate frequently with employees regarding their health coverage options, but avoid overwhelming them with information. Give them ample time to absorb new information, ask questions and express concerns.
2. Use simple terms to explain any changes.
3. Thoroughly explain the goals and rationale of health care benefits to managers and business leaders so they can effectively explain health plans to employees.
4. Be ready to answer questions and face challenges from management and employees regarding changes.
5. Be honest and direct when discussing health benefits, especially if employees are facing cost increases for their coverage.
6. Discuss the "5 Cs" of enrollment with employees: **C**ost, **C**overage information, **C**hanges to plans, **C**omparison's to last year's plans and options, and **C**urrent options.
7. Provide information to employees about the health care providers that will be available to them in new or revised plan options.
8. Provide testimonials from other employees about their experiences with changes in health care coverage.
9. Use a variety of methods to communicate with employees; for example, use the Web, printed materials and face-to-face discussions.

Please contact your LDP representative for more information.