



Labor & Employment Issues

Client Alert

Pitta LLP
For Clients and Friends
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ARE AT-HOME COVID-19 TESTS FREE EVERYWHERE?

A few weeks ago, President Biden announced new actions to protect Americans against COVID-19, pledging that more than 150 million Americans will be able to get at-home, over-the-counter (“OTC”) COVID-19 tests reimbursed by their private insurance. The measure is in addition to a covered individual’s ability to have tests administered in physician offices, pharmacies, and clinics with no cost sharing to the individual. On January 10, 2022, the Departments of Labor, Health and Human Services (“HHS”), and the Treasury (collectively, the “Departments”) issued guidance in the form of Frequently Asked Questions (“FAQs”) implementing President Biden’s initiative.

BACKGROUND

Effective March 18, 2020, the Families First Coronavirus Response Act (“FFCRA”) required group health plans and issuers to provide benefits for certain services related to testing for detection or diagnosis of COVID-19 up until the end of the national emergency period (declared by the HHS Secretary on January 27, 2020). Group health plans and health insurance issuers are required to provide the benefits without cost-sharing (including deductibles, copayments, and coinsurance), prior authorization or other medical management requirements. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) had amended relevant sections of the FFCRA to require plans and issuers to cover additional diagnostic items and services without any cost-sharing requirements. Accordingly, plans and issuers have been required to cover U.S. Food and Drug Administration (“FDA”) approved COVID-19 testing without cost-sharing or other medical management requirements for the past two years. However, because only recently at-home tests became widely available, the FFCRA mandate applied only to COVID-19 tests administered by a healthcare provider.

In an effort to clarify whether at-home tests would be covered in the same way that COVID-19 tests administered by a healthcare provider are covered, on January 10, 2022, the Departments published FAQs seeking to clarify coverage for at-home COVID-19 testing available over-the-counter. Note, these FAQs do not modify previous guidance addressing coverage for purposes not primarily intended for individualized diagnosis or treatment of COVID-19, including the guidance that states that plans and issuers are not required to provide coverage of testing (including an OTC COVID-19 test) that is for employment purposes.

BIDEN’S INITIATIVE

Generally, the FAQs provide that starting January 15, 2022, group health plans and health insurance issuers are required to cover the cost of OTC, at-home “FDA-approved” COVID-19 tests for covered individuals. The full text of the FAQs can be found at:

<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-51.pdf>.

The FAQs seek to encourage group health plans and health insurance issuers to establish programs that allow participants, beneficiaries and enrollees to receive OTC COVID-19 tests directly through preferred pharmacies, retailers or other entities with no out-of-pocket costs, thus eliminating the need for consumers to submit a reimbursement claim. However, plans or issuers may not limit coverage to only tests that are provided through their preferred pharmacies.

Under the FAQs, group health plans and health insurance issuers have been provided two (2) safe harbors in connection with the provision of the at-home tests. Specifically, the FAQs provide, “plans and issuers should keep in mind the general purpose of the safe harbor – which is to facilitate consumer access and provide for a seamless experience in obtaining free OTC COVID-19 tests. Accordingly, plans and issuers should ensure that participants, beneficiaries, and enrollees are aware of key information needed to access OTC COVID-19 testing, such as dates of availability of the direct coverage program and participating retailers or other locations.”

Under the first safe harbor, a plan or issuer may limit reimbursement for OTC COVID-19 tests from non-preferred pharmacies to either the actual price or \$12 per test, whichever is less, assuming the plan or issuer provides direct coverage of OTC COVID-19 tests through both its pharmacy network and direct-to-consumer shipping program. If the plan or issuer does not provide direct coverage, then the plan or issuer must reimburse for the full cost of each test even if the test costs more than \$12.

The second safe harbor permits a plan or issuer to limit the number of OTC COVID-19 tests covered for each participant, beneficiary, or enrollee to no less than eight (8) tests per thirty (30) -day period provided that the plan or issuer provides coverage without cost sharing and does not impose prior authorization or other medical management requirements on OTC COVID-19 tests. Further, plans and issuers may not limit individuals to a smaller number of tests over a shorter period of time; however, plans are entitled to set more generous limits. This safe harbor only applies to coverage of OTC COVID-19 tests and does not apply to tests administered with a provider’s involvement or prescription.

Note, a plan or issuer may take reasonable steps to ensure that an OTC COVID-19 test for which a covered individual seeks coverage was purchased for the individual’s own personal use (or use by another participant, beneficiary, or enrollee who is covered under the plan or insurance coverage as a member of the individual’s family), provided that such steps do not create significant barriers to obtaining these tests. For example, a plan or issuer could require an attestation that the OTC COVID-19 test was purchased by the participant, beneficiary, or enrollee for personal use, not for employment purposes, has not been (and will not be) reimbursed by another source, and is not for resale.

Additional guidance on this initiative can be found at the following links:
<https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free-tests.html> or <https://www.cms.gov/how-to-get-your-at-home-OTC-COVID-19-test-for-free>.

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