WINSTON & STRAWN LLP

BLOG

IRS Issues Notice Detailing Expanded Availability of Health Savings Accounts under the One, Big, Beautiful Bill Act (OBBBA)

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The Internal Revenue Service (the IRS) recently issued Notice 2026-5 which provides guidance on changes to health saving accounts (HSAs) enacted by the One Big Beautiful Bill Act (OBBBA).

BACKGROUND

OBBBA made three primary changes to HSA eligibility:

1. **Telehealth Safe Harbor:** OBBBA permanently extended the safe harbor that was adopted during the COVID-19 pandemic allowing high-deductible health plans (HDHPs) to provide pre-deductible coverage for telehealth and other remote care services while permitting covered individuals to maintain HSA eligibility.
2. **Direct Primary Care Arrangements (DPCAs):** OBBBA provides that certain DPCAs are not treated as disqualifying health plan coverage under an HSA, thus enrollment in a DPCA will not cause an otherwise-HSA-eligible individual to lose HSA eligibility. OBBBA also provides that fees paid for certain DPCAs are qualified medical expenses (not insurance) and can be paid or reimbursed from an HSA.
3. **Bronze and Catastrophic Plans:** OBBBA amended the definition of an HDHP for HSA-purposes to include Bronze and Catastrophic level plans available on the individual Health Marketplace Exchange (the Exchange)—even if they do not otherwise meet the definition of an HDHP.

For additional information on OBBBA's changes to HSA eligibility and employer-sponsored plans generally, see our blog post here

1. Telehealth

Notice 2026-5 provides that telehealth and remote care services include those on the list of telehealth services payable by Medicare that is published annually by the Department of Health and Human Services (HHS) under section 1834(m)(4)(F) of the Social Security Act (the SSA). For services that are not included on the HHS list, plans should apply the principles of section 1834(m) of the SSA, its implementing regulations, and other guidance issued by HHS defining "telehealth services" and related terms.

Notice 2026-5 also explains that the telehealth safe harbor does not extend to in-person services, medical equipment, or drugs furnished in connection with a telehealth or other remote care service. For example, an HDHP may cover a telehealth appointment pre-deductible in which a physician prescribes a medication. However, coverage for the medication prescribed during that telehealth appointment cannot be provided pre-deductible. This exclusion would not apply if the medication or equipment otherwise qualifies for pre-deductible coverage (e.g., as preventive care).

2. Direct Primary Care Arrangements

Notice 2026-5 provides that a DPCA may not provide items and services to an individual on the condition that they pay a fixed periodic fee to be a member of the arrangement, and bill separately for such items and services. The sole compensation for care provided under the DPCA must be the fixed periodic fee. Notice 2026-5 clarifies that a DPCA fee may be billed at intervals of more than a month but no more than a year, provided that the aggregate fees are fixed and do not exceed the monthly limit on an annualized basis. An HSA may reimburse DPCA fees before the beginning date of the coverage period. DPCA fees may be treated as incurred on (1) the first day of the coverage period, (2) the first day of each month of coverage on a pro rata basis, or (3) the date the fees are paid.

Notice 2026-5 provides that whether an arrangement qualifies as a DPCA depends on the terms of the arrangement. An individual who is a member of an arrangement that provides services other than primary care services may not decline to use such services and treat the arrangement as a DPCA. However, the IRS clarified that providers participating in a DPCA may offer health care items and services outside of the arrangement to individuals regardless of membership in the arrangement and separately bill both members and non-members for those items and services. For example, a DPCA member may see the same provider for both primary care services covered under the DPCA and non-primary care services and be billed separately for those non-primary care services.

Notice 2026-5 clarifies that an HDHP may not provide coverage for DPCA fees before the deductible is met. Generally, an HDHP may not offer primary care benefits—other than those allowed under section 223(c)(2)(C)-(G) of the Code (i.e., telehealth and preventive care)—before the deductible is met. An HDHP may not get around that requirement by providing coverage for the membership fee in a DPCA before the deductible is met. While a DPCA is not treated as a health plan for purposes of disqualifying an individual from HSA eligibility, the IRS notes that section 223 of the Code does not provide that an HDHP may offer a benefit that consists of paying fees for or providing membership in a DPCA pre-deductible. In addition, an HDHP may not count fees paid by the individual for the individual's membership in the DPCA toward the annual deductible or out-of-pocket maximum.

Further, Notice 2026-5 explains that while OBBBA defined "primary care practitioners" by reference to section 1833(x)(2)(A) of the SSA, it did not define "primary care services" by reference to section 1833(x)(2)(B) of the SSA. However, the IRS did not opine on whether, in the absence of guidance, the principles of section 1833(x)(2)(B) of the SSA may be used to determine which items and services are primary care services.

3. Bronze and Catastrophic Plans

Notice 2026-5 provides that bronze and catastrophic plans purchased through an employer-sponsored health reimbursement arrangement (an HRA) such as an individual coverage HRA (an ICHRA) will still be treated as an HDHP. However, bronze plans offered as Small Business Health Options Program coverage (also known as SHOP coverage) through a small employer will not be treated as an HDHP because it is not individual coverage.

Notice 2026-5 also provides that bronze and catastrophic plans purchased off-Exchange on the individual market will be treated as an HDHP if the same plan is available as individual coverage through an Exchange.

Notice 2026-5 also provides relief to individuals and those who receive services at Indian Health Services (IHS) facilities.

WINSTON TAKEAWAYS

We welcome the permanent extension of the safe harbor that allows HDHPs to provide telehealth and remote care services pre-deductible while maintaining HSA eligibility, as this provides certainty for plan sponsors and cost savings for participants.

The guidance that enrolling in a DPCA will not cause individuals to lose HSA eligibility is helpful. However, questions remain regarding how DPCA offerings can be structured so that their services can be reimbursed from an HSA, and what services may be treated as primary care services.

In addition, the guidance provides some flexibility with respect to individuals enrolling in bronze and catastrophic plans off-Exchange or through an ICHRA.

We are anticipating more guidance from the IRS on these topics.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice or your Winston relationship attorney for further information.

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