



PARTNERSHIP FOR EMPLOYER-SPONSORED COVERAGE

January 14, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretaries Becerra, Yellen and Walsh:

The Partnership for Employer-Sponsored Coverage writes concerning the recent guidance by the Department of Health & Human Services (HHS), Department of Labor – Employee Benefits Security Administration (EBSA), and the Treasury Department – Internal Revenue Service (IRS) (the Departments) that beginning tomorrow, January 15, 2022, individuals with private health insurance coverage or covered by a group health plan will be able to seek reimbursement for over-the-counter COVID-19 diagnostic tests. We share the Administration's goal to provide Americans access to free testing and agree that mitigating the spread of COVID-19 remains a shared responsibility. However, as written, the guidance creates operational and compliance challenges that will complicate its implementation.

The Partnership for Employer-Sponsored Coverage (P4ESC) is an advocacy alliance based in Washington, D.C., for employers of all sizes and the millions of hardworking Americans and their families who rely on employer-sponsored coverage every day. Employer-sponsored coverage is the backbone of our nation's health care system, insuring the lives of over 181 million Americans. P4ESC is working to ensure that employer-sponsored coverage is strengthened and remains a viable, affordable option for millions of job creators and American families for decades to come.

Implementation Period

First and foremost, the guidance allotted only four days of notice before this requirement goes into effect. This is an unrealistically short implementation deadline by which employers and health insurers will need to inform health plan participants of the methods of coverage and the parameters of its preferred provider network, if applicable. Plans will have to be amended to provide for reimbursement for tests, likely as a preventative benefit.

Communication of the Requirement to the Public

The Departments are conveying the message to Americans that such tests are “for free¹” at the point of sale. Such verbiage may set unrealistic expectations for health plan participants as well as individuals seeking tests in stores. Nationwide, participants will soon look to the retailers who sell OTC COVID-19 tests and will likely only learn at the point-of-sale that they must pay for the product and submit the receipt to the payor for reimbursement afterward. Educating participants and customers will require time and great effort.

Preferred Networks

The Departments envision that health plans will set up preferred network safe harbors allowing participants to procure tests directly through pharmacies. Under such a program, participants could get their tests from a preferred pharmacy and would not need to submit reimbursement claims. If participants go outside the arrangement, the health plan only needs to reimburse them \$12 per test; the participant would be required to pay the difference. While P4ESC applauds this effort to lower the cost of the requirement upon health plans, the short implementation timeline provided by the Departments makes establishment of such relationships before the requirement becomes effective nearly impossible.

We expect most employer plans and insurance issuers would strongly prefer to establish the direct coverage network envisioned by the Q#2 safe harbor in the FAQs to negotiate rates and cap unnegotiated exposure at \$12 per test. However, plans have little time to obtain assurances that any pharmacies, online outlets, or other resources will agree to participate. Additionally, in general, plans are at least once removed working through vendors, including TPAs, PBMs, and ASO providers to secure these arrangements and thus are not in direct control. Indeed, we may find such arrangements extremely challenging to establish given the alternative appears to be a requirement that plans reimburse participants and beneficiaries for whatever the cash price of the test is set at unilaterally by such seller. While consumers will feel the initial pain of the purchase and must go through the hurdles to get reimbursed by their plan, this requirement shifts the ultimate cost to the plan. This, along with supply shortages, are strong disincentives to necessary parties to make and deliver the required arrangements needed for employers to utilize the Q#2 safe harbor.

Test Availability

The Departments require health plans to cover eight tests per covered individual per month. Participants may receive reimbursement for purchased tests regardless of whether they have any symptoms or have had any exposure to COVID-19. Similarly, participants need not have received any assessment, diagnosis, or order from a health care provider. This will result in additional demand upon the already short supply of COVID-19 tests.

¹ See, for instance, “How to get your At-Home Over-The-Counter COVID-19 Test for Free”
<https://www.cms.gov/how-to-get-your-at-home-OTC-COVID-19-test-for-free>

We urge HHS to consider the lack of OTC COVID-19 test kit supply at retail settings, relative to the increase in demand that will result from this requirement, and the impact it will have on the customer experience. We are concerned that under the guidance employers will be held responsible for failing to provide “adequate” access to tests when such shortcomings are beyond their control. Although the FAQs call for employers to take “reasonable” steps to ensure adequacy, in these uncertain times, with supply shortages and mere days to make any arrangements employers are left with little assurance that any steps they take to help provide tests will protect them from penalties and maintain their good employee relations.

Previously Procured Tests

Our member trade associations have received many questions about employers that have procured OTC tests in bulk for their workforces for both convenience and employment continuity/workforce safety purposes. We have several requests related to this circumstance:

- It is our impression, pursuant to the provision where a plan may identify the party from which individuals may obtain no-cost OTC tests, that the direct provision of such tests from the employer (as the identified party) to employees and covered family members can be counted against the otherwise applicable 8-test per person minimum in the Q#3 safe harbor if they are generally provided or made available for diagnosis purposes. However, confirmation of this direct provision counting against the 8-test minimum would be greatly appreciated.
- Similarly, it is our impression that such no-cost, direct provision of tests by the employer as the source identified by the plan will satisfy or contribute to satisfying the Q#2 safe harbor requirements concerning direct coverage. Again, confirmation of such impression would be greatly appreciated.
- We respectfully request that the Departments clarify that although plans are not required to provide tests to employees for employment purposes (or any purposes other than diagnosis), tests provided by employers to employees either voluntarily or under a legal requirement and that the employee voluntarily or mandatorily uses or could use for employment-related testing should be counted against the 8-test requirement as it pertains to that covered individual. In our view it appears duplicative, wasteful, and unnecessarily burdensome to not count tests that are already distributed and in-use. If an employer is already requiring once a week testing for employment purposes, such individual is unlikely to benefit from or require two more tests that week.

Gating Allowance

As a practical matter, we understand the potential convenience of procuring eight or more tests per person per month at one time. We are concerned, however, about a number of factors including but not limited to: supply shortages (as mentioned above), confused and hostile consumers, and misplaced blame on the retailer, the employer, or the plan. Additionally,

applying a “uniform coverage-like rule” to the eight-test per month requirement is unduly burdensome on employer plans and fails to adequately protect plans from potential fraud and abuse. The FAQs expressly disallow “gating” of OTC test acquisition in periods or quantities less than eight per month (or 30 days) (e.g., four tests per two-week period) to utilize the Q#3 safe harbor. This is an unreasonable condition and is ripe for abuse and waste.

Considering supply uncertainties and challenges, we believe it is unreasonable to expect that eight or more tests will be available to the individual at the beginning of the month or 30-day period. Additionally, this requirement forsakes the supplier’s (including the employer for direct provision) circumstantial realities attempting to support a community versus a single person or family. Also, it is unclear from the guidance whether the passage of time in the month or 30-day period is permitted to reduce the eight-test requirement pro rata. Presuming that covered individuals will attempt to obtain OTC tests as they need them or anticipate needing them, allowing each individual to obtain 8 tests or be reimbursed for 8 tests obtained on the last day of the month (or as the period wanes) creates an incentive to stockpile tests for future periods or for unacceptable purposes, e.g., to resell.

For these reasons, under the fraud and abuse protections, we respectfully request that plans be permitted to adopt reasonable, ratable gating of the acquisition or reimbursement requirement. Further, we request that that after a week or other identified period elapses and no tests are obtained by an individual (as shown by receipt date or other applicable record), the plan be alleviated of obligation to cover, reimburse, or provide tests acquired after the close of such period supposedly attributable to such period.

Request for Delay and Policy Adjustments

While we understand the urgency of providing tests and the breadth of the statutory authority under which these requirements were promulgated, we believe a 60-day delay in the application of the requirements is justified for stakeholders to understand the rules, the market dynamics, supply chain issues, and to make workable arrangements to comply. In the alternative, we respectfully request that employer plan sponsors be permitted to elect coverage under and administer their plans in a good faith effort manner to avail themselves of the Q#2 safe harbor immediately as of the January 15, 2022 effective date, while they continue to work in good faith to establish the requisite “direct coverage” arrangements otherwise envisioned.

Additionally, we respectfully request that the requirement for “direct coverage” to provide “adequate” access include both in-person retail and online direct shipping be made in the alternative, i.e., change the “and” to an “or”. These are two very different types of arrangements and may need additional vendors and suppliers to establish. Relatedly we note that many employers intend to direct ship or allow at-workplace pick-up of no-cost tests for at least the employee, if not all covered individuals. This should be recognized under the direct coverage requirements, contributing to full satisfaction of the safe harbor prerequisites.

Conclusion

In closing, we stand with the Administration in our desire to bring this pandemic under control and understand the importance of testing in that effort. We believe our requests here will allow employers and their plans to provide meaningful and substantial coverage while shouldering a actually viable financial and logistical burden in this effort. Additionally, we believe the more constrained and controlled distribution requested will lead to more equitable outcomes and testing availability across the population. We were all witness to various “runs” on groceries and other supplies during this pandemic; we are concerned that without gating and other reasonable controls we will see more of such behavior with OTC tests.

We would welcome the opportunity to discuss this issue with you or your staffs. If such a meeting would be amendable to you, please have your staff contact P4ESC’s Executive Director Neil Trautwein at neiltrautwein@gmail.com.

Sincerely,

The Partnership for Employer Sponsored Coverage

www.p4esc.org