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## More Guidance on Coverage of Over-the-Counter COVID-19 Tests

February 10, 2022

As discussed in our previous [Client Alert](#), group health plans and insurers must cover certain over-the-counter (“OTC”) COVID-19 tests in accordance under the [Families First Coronavirus Response Act](#) (“FFCRA”), as modified by the [CARES Act](#). Federal regulators recently released additional FAQ guidance that modifies and clarifies the requirements to provide coverage for OTC COVID-19 tests.

This Client Alert explains the additional guidance and the steps employers should consider taking to provide coverage for OTC COVID-19 tests.

### ***What flexibility do plans have in establishing a direct-to-consumer shipping program or direct coverage through an in-person network?***

Effective February 4, 2022, a “direct-to-consumer shipping mechanism” is any program that provides direct coverage of OTC COVID-19 tests for participants, beneficiaries, or enrollees without requiring the individual to obtain the test at an in-person location. The shipping program does not have to provide exclusive access through one entity, as long as the program allows a participant to place an order for direct shipment of an OTC COVID-19 test, and the plan covers reasonable shipping costs related to the tests.

Additionally, for in-person networks, a plan must ensure that participants, beneficiaries, or enrollees have access to OTC COVID-19 tests through an “adequate” number of locations, determined based on all relevant facts and circumstances. A plan provides adequate access to OTC COVID-19 tests through its direct coverage program if that coverage consists of tests from a limited number of manufacturers, such as those with whom the plan has a contractual relationship or from whom the plan has been able to obtain OTC COVID-19 tests directly.

### ***Are plans permitted to address suspected fraud and abuse related to OTC COVID-19 tests?***

Yes. Although the FFCRA prohibits medical management of COVID-19 diagnostic testing, plans may still take reasonable steps to prevent, detect, and address fraud and abuse. For example, plans could (i) establish a policy that limits coverage of OTC COVID-19 tests purchased from established retailers; (ii) disallow reimbursement of tests purchased from private individuals via an auction, resale marketplace, or an in-person or online person-to-person sale; (iii) request reasonable documentation of proof-of-purchase that identifies the product and seller, such as a UPC code, serial number, or original receipt; or (iv) require an affidavit or other attestation that the test has not been, and will not be, reimbursed by another source.

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While plans can address fraud and abuse, the steps must be reasonable. Plans may not require individuals to submit multiple documents or complete numerous steps that unduly delay access to, or reimbursement for, OTC COVID-19 tests.

### ***Do the OTC COVID-19 coverage requirements extend to tests that require external processing?***

No. To be eligible for coverage as an OTC test, the test must be obtainable without a prescription, and completely used and processed without the involvement of a laboratory or other health care provider.

### ***How does the coverage of OTC COVID-19 tests impact health flexible spending arrangements (“FSAs”) and similar account-based plans?***

The cost of OTC COVID-19 tests purchased by an individual are reimbursable medical expenses under a health FSA or health reimbursement arrangement (“HRA”). However, an individual cannot be reimbursed more than once for the same medical expense. Consequently, such costs are not reimbursable by a health FSA or HRA if the OTC COVID-19 testing cost is paid or reimbursed by a plan, and any health FSA or HRA distribution taken to reimburse costs paid by the plan is taxable income for the employee if not repaid.

### ***Will enforcement action be taken against plans that cannot provide adequate access to OTC tests due to supply shortages?***

No, so long as a plan has established a direct coverage program that meets the requirements of the safe harbor.

## **Action Items**

Employers should:

- Confirm that their direct coverage programs meet the requirements of the safe harbor.
- Review their health plan’s direct-to-consumer shipping and in-person test regimes for compliance with the updated guidance.
- If a plan implements a policy to prevent fraud or abuse, notice should be provided to participants regarding the applicable restrictions, such as the retailers for which participants can receive reimbursement for purchased tests.
- Plans should advise individuals not to seek reimbursement from a health FSA or HRA for the cost (or the portion of the cost) of OTC COVID-19 tests paid or reimbursed by the health plan.
- Health FSAs and HRAs may need to assist individuals in correcting a mistaken reimbursement from a health FSA or HRA for an OTC COVID-19 test that was covered by a health plan.

If you have any questions about the OTC COVID-19 test requirements, updating your plan documents, or preparing educational materials for your participants, please contact a member of the [Kutak Rock Employee Benefits Practice Group](#).

