

Health Care Reform Management Alert Series

Issue 13

Additional Guidance on Reimbursement of Over-the-Counter Medications

This supplements Issue 4 of our Health Care Reform Management Alert Series, which addressed the new restrictions on reimbursement of expenses for over-the-counter drugs and medications under the Patient Protection and Affordable Care Act (PPACA). (Click [here](#) to access our general summary of health care reform and other issues in this series.)

As stated in Issue 4, beginning January 1, 2011, expenses incurred for medicines or drugs may be paid by or reimbursed from a health care flexible spending arrangement (FSA), health reimbursement arrangement (HRA) or employer-provided plan only if the medicine or drug requires a prescription, the drug is available over-the-counter but the individual obtains a prescription, or the drug is insulin.¹

In Notice 2010-59, the IRS provides guidance on (i) the definition of *prescription*, (ii) the use of debit cards, and (iii) the ability to make retroactive cafeteria plan amendments.

- A *prescription* for purposes of allowing individuals to obtain an over-the-counter medication tax-free is a written or electronic order for a medicine or drug that meets the legal requirements of a prescription in the state in which the medical expense is incurred, and that is issued by an individual who is legally authorized to issue a prescription in that state.
- When using debit cards to purchase over-the-counter medications, additional substantiation (such as a copy of the prescription or other documentation that a prescription has been issued) will be required. The IRS has granted a transition period between January 1, 2011 and January 15, 2011, during which time it will not challenge the use of debit cards for expenses incurred through January 15, 2011; however, on and after January 16, 2011, substantiation must be submitted before reimbursement for over-the-counter medicines can be made.
- Cafeteria plans may need to be amended to conform to the new over-the-counter drug requirements. As a general rule, cafeteria plan amendments may be effective only prospectively; however, an amendment to conform a cafeteria plan to the requirements set forth in Notice 2010-59 that is adopted by June 30, 2011 may be effective retroactively for expenses incurred after December 31, 2010, or after January 15, 2011 for debit card purchases.

¹Similarly, a distribution from health savings accounts (HSAs) or Archer medical savings accounts (Archer MSAs) for a medicine or drug is a tax-free qualified medical expense only if it requires a prescription, the drug is available over-the-counter but the individual obtains a prescription, or the drug is insulin. Amounts distributed for nonqualified medical expenses are includable in gross income and are generally subject to a 20% additional tax.

The January 1, 2011 effective date applies regardless of whether the plan year is a fiscal or calendar year, and regardless of any applicable grace period for a health FSA.

Employers are encouraged to contact their Seyfarth Shaw attorney if they have any questions about this Notice or other Health Reform provisions.

For further details, or if you have any questions regarding the new claims/appeals requirements, contact your Seyfarth Shaw LLP attorney or any Employee Benefit attorney listed on the [website](#), or send your questions to HealthReform@seyfarth.com.

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