

Can Our Health Plan Exclude Drug Manufacturers' Coupons From Participants' Cost-Sharing?

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QUESTION: Our group health plan uses a copay accumulator program that does not count drug manufacturers' financial assistance toward participants' cost-sharing limits. We've heard that the agencies have restricted the use of these programs. Can we continue to exclude drug manufacturers' coupons from cost-sharing?

ANSWER: The guidance in this area is in flux, and it is currently uncertain whether your plan may continue to exclude drug manufacturers' coupons from cost-sharing using a "copay accumulator" program. To review, prescription drug manufacturers sometimes offer financial assistance to individuals for certain drugs to help defray costs that might otherwise be an impediment to obtaining the drug. Traditionally, this financial assistance reduced the participant's cost-sharing under the plan. That is, the drug manufacturers would cover all or a portion of the participant's deductible and copayment or other required cost-sharing under the plan (sometimes up to a specified dollar amount), and the manufacturers' payments would count toward the participant's satisfaction of the plan's deductible and cost-sharing limit. Under a copay accumulator program, however, the drug manufacturers' financial assistance does not count toward the plan's deductible and cost-sharing limits. This can result in cost savings to the plan because more of the financial burden is placed on participants and drug manufacturers.

Plan sponsors must ensure that their copay accumulator programs do not violate the requirement that plans adhere to an established annual cost-sharing limit with respect to essential health benefits. Beginning in 2021, HHS regulations permitted, but did not require, plans and insurers to count drug manufacturers' assistance toward the cost-sharing limit. However, in 2023 a court vacated the applicable provision in the regulations. This effectively revives a potential conflict that the vacated regulations were intended to address. Earlier HHS guidance had stated that manufacturers' assistance need not be counted toward a plan's annual cost-sharing limit when a medically appropriate generic equivalent was available, which some stakeholders viewed as implying that manufacturers' assistance must be counted absent a medically appropriate generic equivalent. However, this interpretation potentially conflicts with the rules for high-deductible health plans (HDHPs), under which only amounts actually paid by the individual (i.e., not manufacturers' assistance) may be taken into account when determining whether the HDHP deductible is satisfied.

Essentially, it is uncertain how the rules will be applied in the absence of the vacated provision in the regulations. Until further guidance is issued, you may wish to consult with experienced legal counsel. For more information, see EBIA's Self-Insured Health Plans manual at Section XI.E.7 ("Copay Accumulator Programs for Drug Coupons") and EBIA's Health Care Reform manual at Section IX.B.5 ("What Expenditures Must Be Counted Toward the Out-Of-Pocket Maximum?"). See also EBIA's Consumer-Driven Health Care manual at Section X.J ("Issues Raised by the HDHP Minimum Deductible").

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