

EMPLOYEE BENEFITS

On-Site Medical Clinics and the Employer

Employers around the country are increasingly expressing interest in establishing on-site medical clinics as a health care option for their employees. According to the 2020 International Foundation of Employee Benefit Plans (IFEBP) Employee Benefits Survey, approximately 28.6% of public employers and 16.8% of all employers have already established on-site medical clinics for their workers. Additionally, many smaller employers have recently adopted or are considering adopting on-site primary health clinics (either self-administered or in partnership with a clinic group or on-site health care vendor) for their employees.

Employers cite the need to control costs under their major medical plan, shorten periods of absence and increase productivity in the workplace as reasons for adopting an on-site medical clinic model. Employers considering providing on-site health care services to employees and/or their dependents must consider the scope of services they will provide in such on-site facilities and who will be eligible to use those services.

For purposes of this discussion, on-site medical clinics include the following types of facilities:

- **On-Site Medical Clinic** – An employer-sponsored medical clinic located on the employer's premises
- **Near-Site Medical Clinic** - An employer-sponsored medical clinic located near the employees' worksite
- **Shared-Site Medical Clinic** - An employer-sponsored medical clinic that serves multiple employers or employer locations, generally in a near-site setting

The range of services provided by an on-site clinic may vary. On-site medical clinics may offer a range of primary health care services (acute or urgent care, preventive care and diagnostic testing similar to those available at chain grocery, retail and drug store clinics). For example, an employee might visit an on-site medical clinic to obtain the following:

- Diagnosis and treatment of certain minor illnesses and injuries
- Physical examinations, screening tests and vaccinations
- Medications
- Health care counseling, education and similar services

More comprehensive on-site clinics may include primary care, physical therapy, on-site pharmacies and behavioral health services. Some are paired with other wellness services and programs.

Employers with on-site clinics also frequently offer health care services to family members of their employees.

Providing health care services that exceed the **first aid facility exception** (see on next page) leads to the creation of a group health plan, resulting in certain legal obligations and compliance requirements for plan sponsors.

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First Aid Facility Exception

The provision of health care through a facility that is located on the employer's premises will not be considered a group health plan for purposes of ERISA and COBRA under an on-site first aid facility exception if:

- The health care consists primarily of first aid that is provided during the employer's working hours for treatment of a health condition, illness or injury that occurs during those working hours;
- Health care services are available only to current employees (not spouses, dependents, former employees or others); and
- Employees are not charged for the use of the facility.

Application of ERISA

ERISA §733 and corresponding regulations define a "group health plan" to mean "an employee welfare benefit plan to the extent the plan provides medical care (... including items and services paid for as medical care) to employees or their dependents directly or through insurance, reimbursement or otherwise."¹ If an on-site medical clinic offers health care services outside of basic first-aid to employees, and the plan sponsor is subject to ERISA², the on-site medical clinic is considered an employer-sponsored group health plan. As such, the plan is subject to ERISA's general requirements. Employers may separate or integrate the on-site clinic with their major medical plan. Whether the on-site medical clinic is offered separately or is integrated into an employer's major medical plan, it must be formally adopted via a written plan document, participants must be provided a Summary Plan Description (SPD), and the plan is subject to annual Form 5500 reporting requirements.

From a practical perspective, if on-site facility services are offered to employees/family members who are not medical plan participants, the employer should adopt a separate plan document and distribute a separate SPD for the on-site health clinic. Furthermore, separate ERISA Form 5500 reporting requirements will apply. The on-site clinic benefits may also be incorporated into a consolidated ERISA wrap plan, if the employer has adopted a wrap. The documentation and reporting requirements may be satisfied through the wrap plan documentation³ and Form 5500 reporting.

COBRA Continuation Coverage

Per Internal Revenue Code Sections 9832(a) and 5000, "[t]he term 'group health plan' means a plan (including a self-insured plan) of, or contributed to by, an employer... or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families."⁴

Employers sponsoring an on-site medical clinic that qualifies as a group health plan under this definition must offer COBRA continuation coverage to employees (and, if applicable, dependents or spouses) who lose eligibility to use the on-site medical clinic due to certain qualifying events, such as a termination of employment, reduction in hours, death, divorce or legal separation or a child reaching the limiting age under the group health plan.⁵

Note that the COBRA regulations also require that qualified beneficiaries be afforded the same open enrollment rights as other similarly situated active employees, meaning that a former employee might elect only the on-site medical clinic at the time of a qualifying event if an active employee can enroll in the on-site medical clinic separately than the medical coverage, and then each year during their coverage period elect other group health coverage at open enrollment in addition to the on-site health clinic coverage.

Generally, an on-site clinic is considered a self-insured health plan. COBRA rates should be established for no greater than a 12-month determination period, based on an actuarial or past cost calculation intended to reflect the cost of the plan for such period of coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred.

¹According to ERISA §733, "[t]he term 'medical care' means amounts paid for—
(A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body,
(B) amounts paid for transportation primarily for and essential to medical care referred to in subparagraph (A), and
(C) amounts paid for insurance covering medical care referred to in subparagraphs (A) and (B)."

²The plan sponsor will be subject to ERISA if it is a private for-profit or not-for-profit entity that does not fall under the governmental/church exemption under ERISA.

³Note, however, that a wrap plan document and SPD alone may be insufficient to satisfy the requirements with respect to the on-site health clinic. An additional document or provision within the wrap plan document/SPD describing the benefits available through the on-site health clinic may be necessary.

⁴This definition from the Internal Revenue Code applies to ERISA-covered plans. The definition of group health plan contained in the Public Health Services Act, which contains the COBRA provisions that apply to governmental plans, is the same.

⁵[Treas. Reg. 54.4980B-2](#).

HIPAA Portability, Privacy & Security

An on-site medical clinic is generally a HIPAA-excepted benefit, meaning it is not subject to HIPAA's general privacy, security, non-discrimination and portability rules applicable to group health plans. Agency guidance from the Labor, Treasury and Health and Human Services Departments is silent as to whether near-site clinics (an employer-sponsored health center located near employees' worksite) or shared near-site clinics are subject to the health plan requirements under HIPAA. Employers offering near-site clinic services should consult with their legal advisors regarding this issue.

However, even though certain HIPAA rules surrounding group health plans may not apply to on-site medical clinics, a clinician working at the on-site clinic is a health care provider, and health care providers are subject to their own HIPAA privacy and security rules in certain cases⁶ as well as applicable state law. If the employer operates the clinic (as opposed to contracting with an outside health clinic), appropriate health care provider privacy and security policies and safeguards may need to be adopted with respect to the clinic.

⁶A health care provider is a covered entity for purposes of the HIPAA privacy and security rules only if it "transmits any health information in electronic form in connection with a transaction covered by" the HIPAA administrative simplification provisions. See 45 CFR §160.103.

Affordable Care Act

The Affordable Care Act (ACA) imposes various requirements on group health plans, such as requiring a non-grandfathered group health plan to cover all preventive care services without cost-sharing. HIPAA-excepted benefits are generally exempt from the ACA's group health plan requirements. Accordingly, if an employer's on-site health clinic qualifies as a HIPAA-excepted benefit, as discussed above, it would be exempt from these ACA requirements.

Impact on HSA Contributions

Under [IRC §223](#), which governs Health Savings Accounts (HSAs), only eligible individuals who are covered by a qualifying high deductible health plan (HDHP) and who have no other disqualifying coverage (other than certain permitted coverage) may make or receive contributions to an HSA. According to [IRS Notice 2008-59](#) (Q&A 10), an individual will remain HSA eligible if they have access to services from an on-site medical clinic that is not considered "significant medical care." While "significant medical benefits" is not

explicitly defined, the example cited in Notice 2008-59 provides a "safe harbor" that permits a participant to make or receive HSA contributions if the on-site medical clinic does not provide services beyond the scope of performing physicals and immunizations (preventive care), administering allergy injections and treating accidental injuries that occur at the place of employment.

On the other hand, IRS Notice 2008-59 indicates that if an employee receives free or reduced cost (i.e., below fair market value) significant medical benefits at an on-site medical clinic before satisfying the statutory minimum deductible, the employee will be ineligible for HSA contributions. Although the IRS has not issued guidance stating so, presumably, HSA eligibility would be preserved if the employee pays the fair market value for any such services.

To help ensure that employees pay fair market value for services provided by the clinic, the on-site clinic could bill the underlying HDHP for each service provided to each member. If applicable, the plan would pay the clinic the allowed amount for the service after applying plan design (deductible and coinsurance). If the participant has not yet satisfied the HDHP's deductible, the clinic would bill the employee an amount equal to the fair market value of the services, less any amounts paid by the plan (if any). Under the ACA, certain preventive care services must be covered by the health plan without cost sharing. Coverage for preventive care services provided by the on-site medical clinic will not affect the individual's HSA eligibility. Alternatively, the clinic could bill the employee, and the employee could then submit a claim to the HDHP if the employee has satisfied their minimum deductible.

Another possible approach some plan sponsors have taken to help employees remain HSA eligible when an employer offers an on-site medical clinic is establishing a fixed monthly access fee for the on-site clinic's services. However, this may involve significant risk because (a) the employer would not take into account the specific services received by the employee, (b) the fixed fee could be considered an insurance arrangement and therefore be ineligible to be counted against the insured's annual deductible (and could not be reimbursable on a tax-free basis by the employee's HSA), and (c) if the IRS determines the fee does not equate to fair market value, employees may have excess HSA contributions resulting in additional taxable income and excise tax penalties.

Other Applicable Laws that May Affect On-Site Clinics

- Under the Tax Code, the provision of medical care or payment for medical care for current or former employees, their spouses and dependents is excludable from an employee's federal income taxes, and employers may deduct the value of coverage provided from their corporate tax returns.
- An on-site clinic is considered a self-insured group health plan. Therefore, the on-site clinic is generally subject to the nondiscrimination requirements of Section 105(h) of the Tax Code.
- If domestic partners and their dependents (or other individuals associated with the employee who are not the employee's health care tax dependents) are eligible to use the on-site or near-site clinic, the fair market value of the benefit must be added to the employee's taxable income and the actual benefit becomes taxable.
- Under the ADA the on-site clinic may be required to provide accommodations to disabled employees or covered dependents to ensure access to services. Employers sponsoring on-site clinics should also ensure that they abide by ADA restrictions on exams and disability-related inquiries.
- Certain states may require licensing of on-site clinics.
- With respect to the treatment of accidental on-the-job injury, workers' compensation and OSHA may affect the operation and services provided by on-site clinics.
- Specific laws regarding the handling and disposal of certain materials and biohazards may apply.
- PCORI fees generally are not payable with respect to on-site medical clinics because they are typically considered HIPAA excepted benefits.
- The cost of coverage provided under an on-site medical clinic plan must be included in the W-2 reporting of the aggregate cost of health coverage if the on-site medical clinic constitutes a group health plan and the plan sponsor charges a premium for COBRA continuation coverage under the on-site medical clinic plan. If the plan sponsor is not subject to COBRA or allows employees to continue participation in the on-site medical clinic following a COBRA qualifying event without paying a COBRA premium, W-2 reporting is not required.

Employers considering implementing on-site medical clinics should consult with their legal and tax advisors to ensure they comply with all applicable state and federal laws.





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