



Legislative Brief

Health Care Reform: IRS Q&As on OTC Drugs & Debit Cards

The Patient Protection and Affordable Care Act (PPACA) changed the rules for reimbursement of over-the-counter (OTC) medicines and drugs through plans such as health flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs). After December 31, 2010, OTC medicines and drugs (except insulin) may only be reimbursed with a prescription.

Subsequent guidance from the Internal Revenue Service (IRS) limited the use of FSA and HRA debit cards for OTC drug purchases after January 15, 2011. The IRS has now issued [IRS Notice 2011-5](#), which contains new guidance allowing the continued use of FSA and HRA debit cards for the purchase of prescribed OTC medicines and drugs.

The IRS has also issued guidance in the form of Questions and Answers (Q&As) to help individuals understand the new rules for reimbursement of OTC medicines and drugs.

This Fickewirth and Associates Legislative Brief describes IRS Notice 2011-5 and sets forth the Q&As provided by the IRS. Please read below for more information.

IRS Notice 2011-5

IRS Notice 2011-5 modifies previous guidance found in IRS Notice 2010-59, which stated that FSA and HRA debit cards may not be used after January 15, 2011, except at certain pharmacies. Under the new guidance, individuals can continue using FSA and HRA debit cards to purchase OTC medicines for drugs for which they have a prescription.

Effective after **January 15, 2011**, health FSA and HRA debit cards may continue to be used at drug stores and pharmacies, at non-health care merchants that have pharmacies and at mail order and web-based vendors that sell prescription drugs, if:

- Prior to purchase, the prescription for the OTC medicine or drug is presented to the pharmacist, the OTC medicine or drug is properly dispensed by the pharmacist and a prescription number is assigned;
- The pharmacy or other vendor retains a record of the prescription number, the name of the purchaser and the date and amount of the purchase in a manner that meets IRS recordkeeping requirements;
- All of these records are available to the employer or its agent upon request;
- The debit card system will not accept a charge for an OTC medicine or drug unless a prescription number has been assigned; and
- All other rules related to the use of health FSA and HRA debit cards are satisfied.

Health FSA and HRA debit cards may also continue to be used for OTC medicine or drug purchases from health care providers other than pharmacies and mail order and web-based vendors, if:

- The vendor has a health-care related Merchant Code;



Legislative Brief

Health Care Reform: IRS Q&As on OTC Drugs & Debit Cards

- The vendor retains the name of the purchaser and the date and amount of the purchase in a manner that meets IRS recordkeeping requirements;
- All of these records are available to the employer or its agent upon request;
- All other rules related to the use of health FSA and HRA debit cards are satisfied.

IRS Questions and Answers

How are the rules changing for reimbursing the cost of over-the-counter medicines and drugs from health flexible spending arrangements (health FSAs) and health reimbursement arrangements (HRAs)?

Section 9003 of the Affordable Care Act established a new uniform standard for medical expenses. Effective Jan. 1, 2011, distributions from health FSAs and HRAs will be allowed to reimburse the cost of over-the-counter medicines or drugs only if they are purchased with a prescription. This new rule does not apply to reimbursements for the cost of insulin, which will continue to be permitted, even if purchased without a prescription.

How are the rules changing for distributions from health savings accounts (HSAs) and Archer medical savings accounts (Archer MSAs) that are used to reimburse the cost of over-the-counter medicines and drugs?

In accordance with Section 9003 of the Affordable Care Act, only prescribed medicines or drugs (including over-the-counter medicines and drugs that are prescribed) and insulin (even if purchased without a prescription) will be considered qualifying medical expenses and subject to preferred tax treatment.

When will the changes become effective?

The changes are effective for purchases of over-the-counter medicines and drugs without a prescription after Dec. 31, 2010. The changes do not affect purchases of over-the-counter medicines and drugs in 2010, even if they are reimbursed after Dec. 31, 2010.

How do I prove that I have purchased an over-the-counter medicine or drug with a prescription so that I can get reimbursed from my employer's health FSA or an HRA?

If your employer's health FSA or HRA reimburses these expenses, you would provide the prescription (or a copy of the prescription, or another item showing that a prescription for the item has been issued) and the customer receipt (or similar third-party documentation showing the date of the sale and the amount of the charge). For example, documentation could consist of a customer receipt issued by a pharmacy that reflects the date of sale and the amount of the charge, along with a copy of the prescription; or it could consist of a customer receipt that identifies the name of the purchaser (or the name of the person for whom the prescription applies), the date and amount of the purchase and an Rx number.

How does this change affect over-the-counter medical devices and supplies?

The new rule does not apply to items for medical care that are not medicines or drugs. Thus, equipment such as crutches, supplies such as bandages, and diagnostic devices such as blood sugar test kits will still qualify for reimbursement by a health FSA or HRA if purchased after Dec. 31, 2010, and a distribution from an HSA or Archer MSA for the cost of such items will still be tax-free, regardless of whether the items are purchased using a prescription.



Legislative Brief

Health Care Reform: IRS Q&As on OTC Drugs & Debit Cards

Will I need a prescription to use my health FSA, HRA, HSA or Archer MSA funds for insulin purchases after Dec. 31, 2010?

No. You can continue to use your health FSA, HRA, HSA or Archer MSA funds to purchase insulin without a prescription after Dec. 31, 2010.

I use health FSA funds for my copays and deductibles. Will I still be able to reimburse those expenses with health FSA funds after Dec. 31, 2010?

Yes. Copays and deductibles continue to be reimbursable from a health FSA after Dec. 31, 2010. Similarly, funds from an HRA can continue to be used for these expenses and a distribution from an HSA or Archer MSA for these purposes will be tax-free.

My company gives me two extra months beyond the end of the year to submit claims for health FSA expenses incurred during the year. What happens if I purchase over-the-counter medicines or drugs without a prescription in 2010 but do not submit the claim for those expenses until January 2011? Will they qualify for reimbursement?

Yes. The new restriction on plan reimbursements for the cost of over-the-counter medicines or drugs without a prescription applies only to purchases that are made after 2010.

My company's health FSA includes a provision for a grace period, so that if I don't spend all of the money in my health FSA by Dec. 31 in a given year, I can still use the amount left in my health FSA at the end of the year to reimburse expenses I incur during the first 2 ½ months of the following year. If I buy over-the-counter medicines or drugs without a prescription during the 2 ½ month grace period of 2011, can I still use the amount left in my health FSA at the end of 2010 to reimburse those expenses?

No. The change applies to purchases made on or after Jan. 1, 2011. Thus, even if your employer's plan includes the 2 ½ month grace period provision, the cost of over-the-counter medicines and drugs purchased without a prescription during the first 2 ½ months of 2011 will not be eligible to be reimbursed by a health FSA.

If my health FSA or HRA issues a debit card that I use to pay for over-the-counter medicines or drugs, will I still be able to use the card to purchase over-the-counter medicines or drugs after Dec. 31, 2010?

Generally, yes, if you have a prescription for the medicine or drug. For expenses incurred in 2010, you may continue to use an FSA or HRA debit card to purchase over-the-counter medicines or drugs (whether or not you have a prescription) at pharmacies and from mail order and web-based vendors that sell prescription drugs. Starting after Jan. 15, 2011, you may continue to use an FSA or HRA debit card to purchase over-the-counter medicines or drugs at these vendors, so long as you obtain a prescription for the medicine or drug, the prescription is presented to the pharmacist, and the medication is dispensed by the pharmacist and given an Rx number.

For further information, including guidance on purchases of over-the-counter medicines and drugs from health care providers other than pharmacies and mail order and web-based vendors (such as physicians or hospitals), see [IRS Notice 2011-5](#). For guidance on debit card purchases at "90 percent pharmacies," see [IRS Notice 2010-59](#).



Legislative Brief

Health Care Reform: IRS Q&As on OTC Drugs & Debit Cards

If I use HSA or Archer MSA funds to reimburse the cost of over-the-counter medicines or drugs purchased after Dec. 31, 2010 without a prescription, what taxes will I incur?

If you have an HSA or Archer MSA, the amount of the distribution for expenses that are not qualifying medical expenses will be includable in your gross income and subject to an additional tax of 20 percent.

More Information

For a copy of the Q&As, see www.irs.gov/newsroom/article/0,,id=227308,00.html.

For a copy of IRS Notice 2011-5, see www.irs.gov/pub/irs-drop/n-11-05.pdf.

For a copy of IRS Notice 2010-59, see www.irs.gov/pub/irs-drop/n-10-59.pdf.

Source: Internal Revenue Service

This Fickewirth and Associates Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

Content © 2011 Zywave, Inc. All rights reserved.