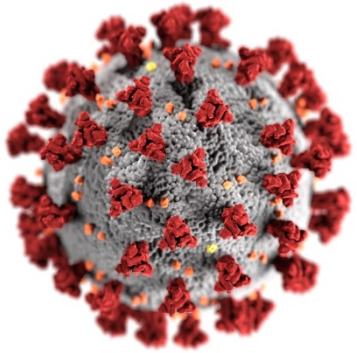


COVID-19 -- Health Plans, HSAs, and Cafeteria Plans: Now What?

Presented By: Darcy L. Hitesman

TODAY'S PRESENTERS:

Darcy L. Hitesman, Attorney

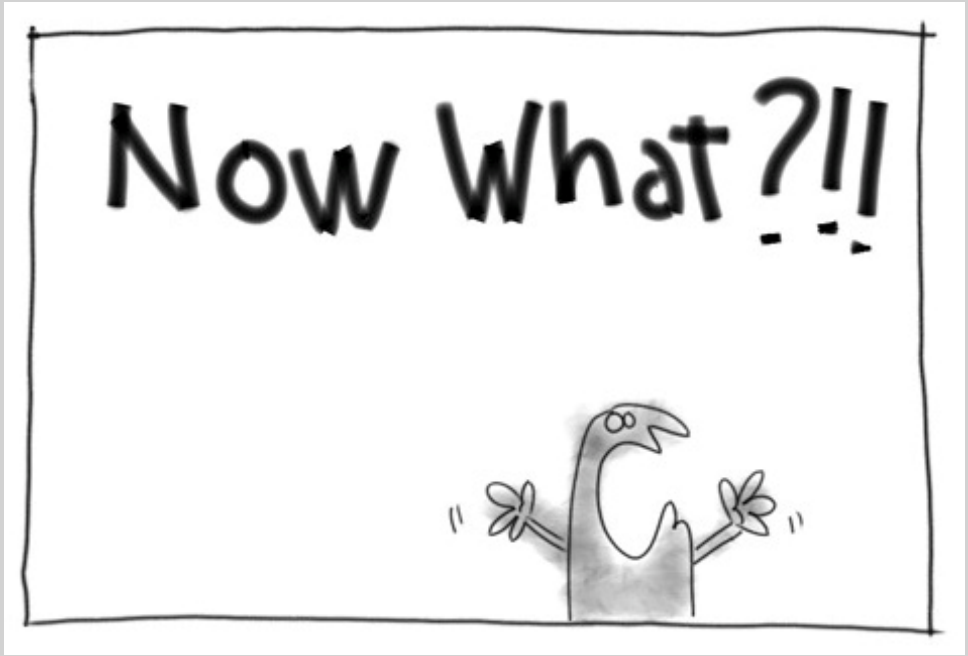
HITESMAN&WOLD P.A.

Mike Melnychuk, President

HR SIMPLIFIED
an Ascensus® company

Introduction

- Families First Coronavirus Response Act ("FFCRA").
  - Signed into law ("enacted") **March 18, 2020.**
  - Effective generally **April 1, 2020.**
- **Friday, March 20, 2020** Treasury and DOL guidance issued IR-2020-57 (direction regarding tax credit, anticipated exemptions for certain small businesses, and 30-day non-enforcement if reasonable and good faith efforts).
- The Coronavirus Aid, Relief, and Economic Security Act (CARES Act).
  - Signed into law ("enacted") **March 27, 2020.**
  - Technical corrections and new areas of need.
- IRS COVID-19-Related Tax Credits (66 FAQs) **March 31, 2020** (last reviewed/updated).
- DOL Temp. Regs. 29 CFR Part 826 (**April 1, 2020**).
- FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 42 (14 FAQs) April 11, 2020.
- And so on and so on.

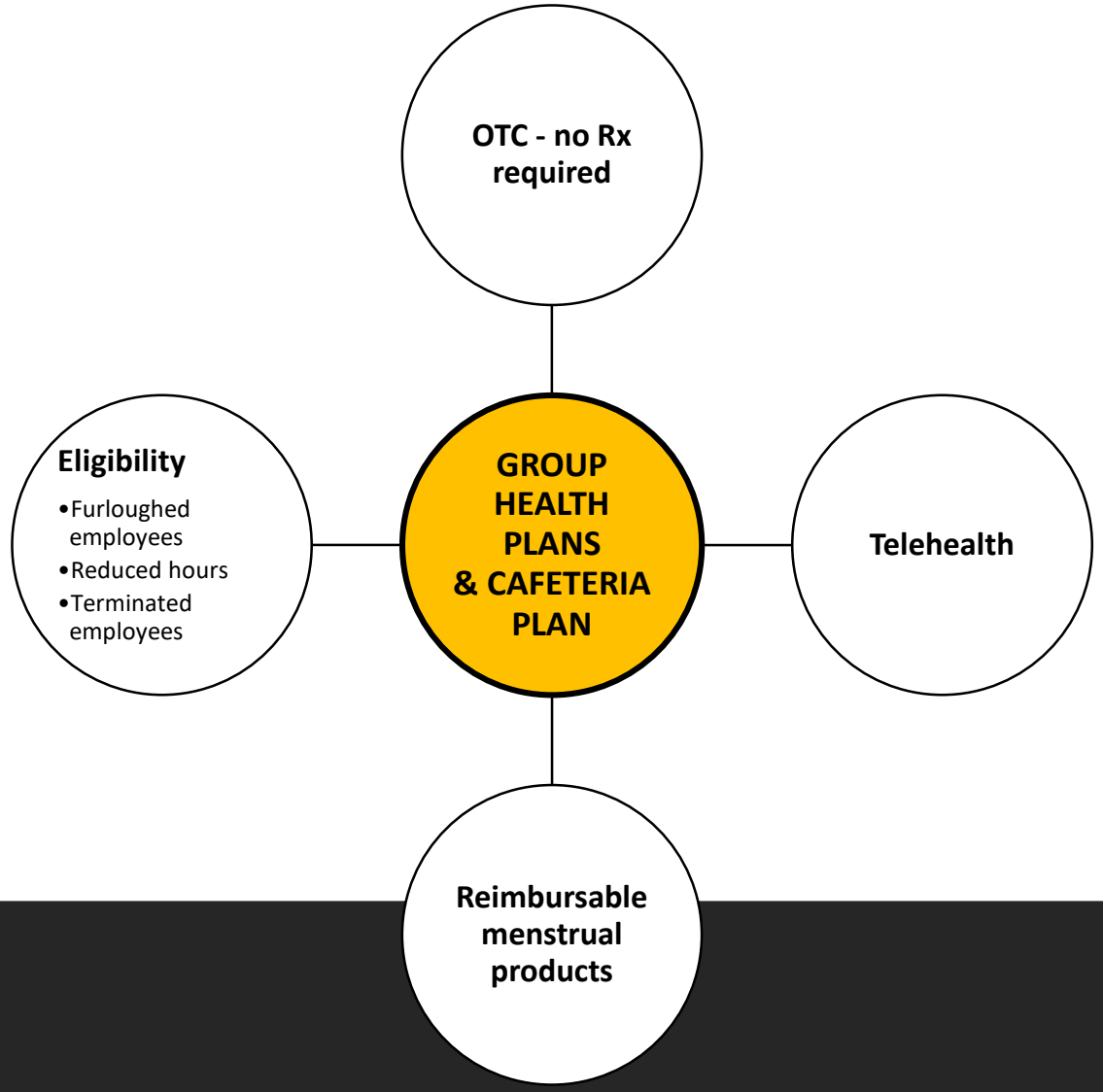


Today's Focus: Implementing the Changes

- Keep in mind these changes do not occur in a vacuum
- Not as simple as just doing it -- even where insurance carrier says okay to do it
- Competing forces
  - General compliance
  - Responding to emergency situation
- Create a context for reviewing what needs to be done to implement changes ***and*** be in compliance with other applicable requirements including the need to amend impacted plans

Today's Focus: Implementing the Changes

- Things to consider include:
  - Administrative systems, including electronic cards
  - Plan documentation (including written plan document and SPD for ERISA entities; just written plan document or non-ERISA)
  - Communication to plan participants and other covered individuals (include retirees, COBRA/continuation persons, QMCSO persons)
  - Timing – many changes already apply
  - Ripple effects – as noted above, changes do not occur in a vacuum
    - Work the change/proposed change through the system
    - Minimize unintended results



Additional issues:

- Impact on ACA reporting/penalties
- Section 139 payment program

Employer Sponsored Group Health Plans

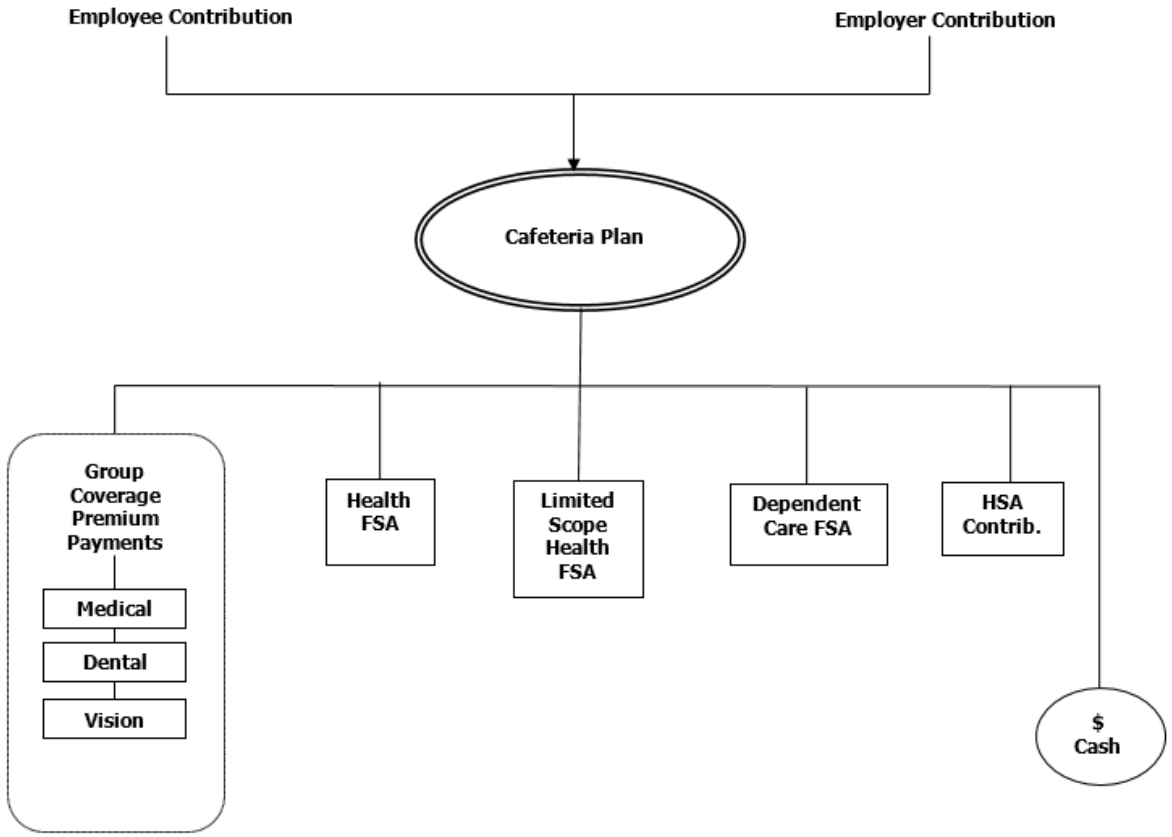
- Start with the group health plan – written plan document
  - ERISA
  - Code
- Inventory your group health plans – remember definition is broad
  - Major medical
  - Dental
  - Vision
  - Wellness
  - EAP
  - On-site medical
  - Health FSA (component through cafeteria plan)
  - Health reimbursement arrangement (limited scope, integrated, retiree only)

Employer Sponsored Group Health Plans

- Identify key group health plan provisions
  - Eligibility
  - Loss of eligibility (reduced hours, termination of employment)
  - Treatment upon re-hire
  - Leaves of absence
    - FMLA
    - Non-FMLA
  - HIPAA Special Enrollment
  - Authority to amend, modify, terminate plan
  - COBRA (and state continuation if applicable)
  - Benefits descriptions

Employer Sponsored Cafeteria Plan

- Many group health plans are part of the employer sponsored cafeteria plan
- Need to consider requirements at both levels
- What does cafeteria plan say – written plan document required under Section 125 of Code
- Suggest map cafeteria plan

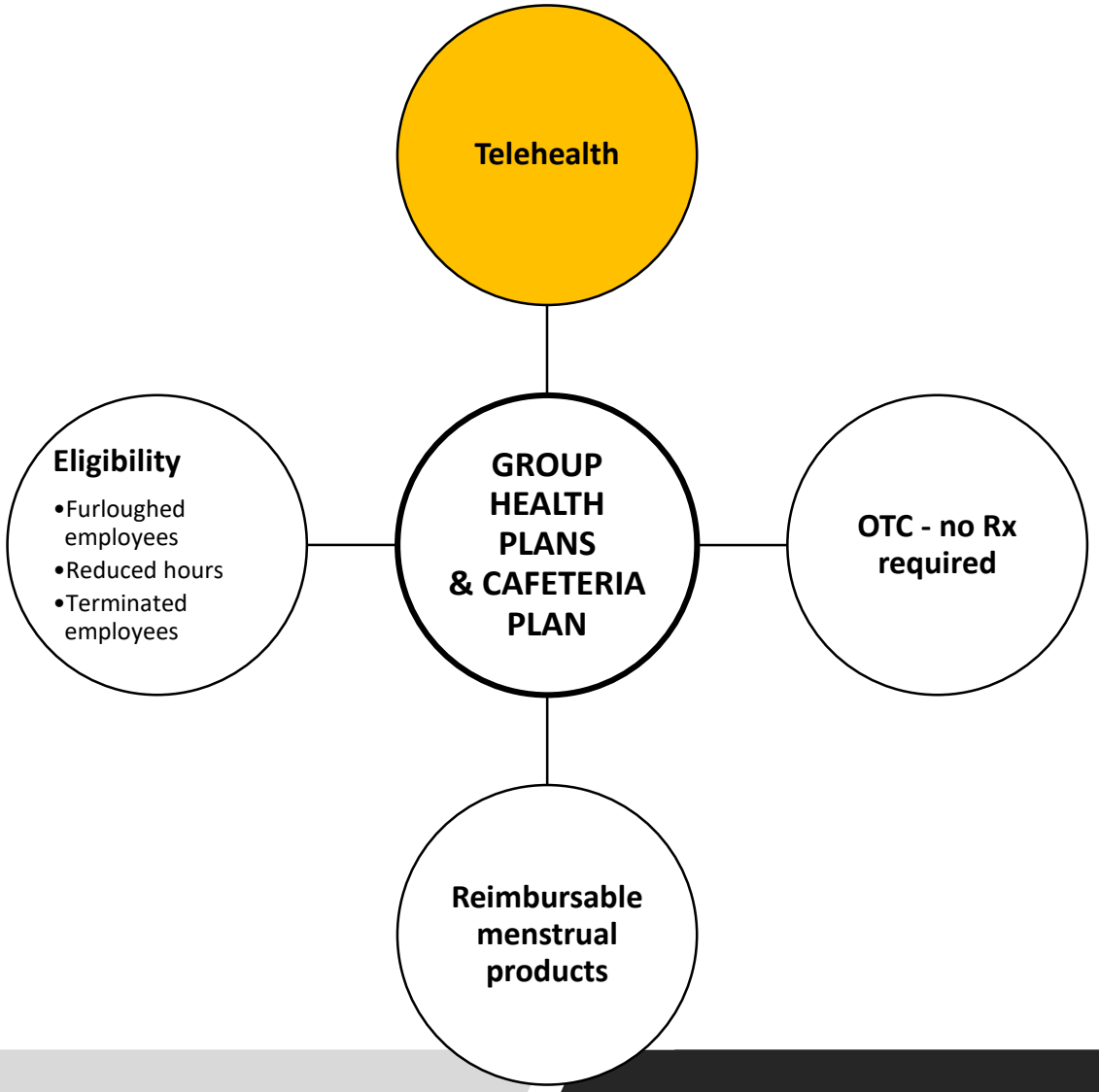


Employer Sponsored Cafeteria Plan

- Review cafeteria plan components – remember components and cafeteria plan must work together
  - If change something in component, evaluate whether need to change cafeteria plan to match
  - Some group health plans will be cafeteria plan components
    - Some group health plan components entirely described within cafeteria plan document (e.g., health FSA)
    - Some group health plan components described within component plan documents
  - Also HSA

Employer Sponsored Cafeteria Plan

- Identify key provisions of cafeteria plan
  - Eligibility
  - Loss of eligibility (reduced hours, termination of employment)
  - Treatment upon re-hire
  - Leaves of absence (FMLA, non-FMLA)
  - HIPAA Special Enrollment
  - Authority to amend, modify, terminate plan
  - COBRA (and state continuation if applicable)
  - Exceptions to irrevocable election rule


Telehealth
Eligibility
•Furloughed employees
•Reduced hours
•Terminated employees
GROUP HEALTH PLANS & CAFETERIA PLAN
OTC - no Rx required
Reimbursable menstrual products

Employer Sponsored Group Health Plans—Telehealth

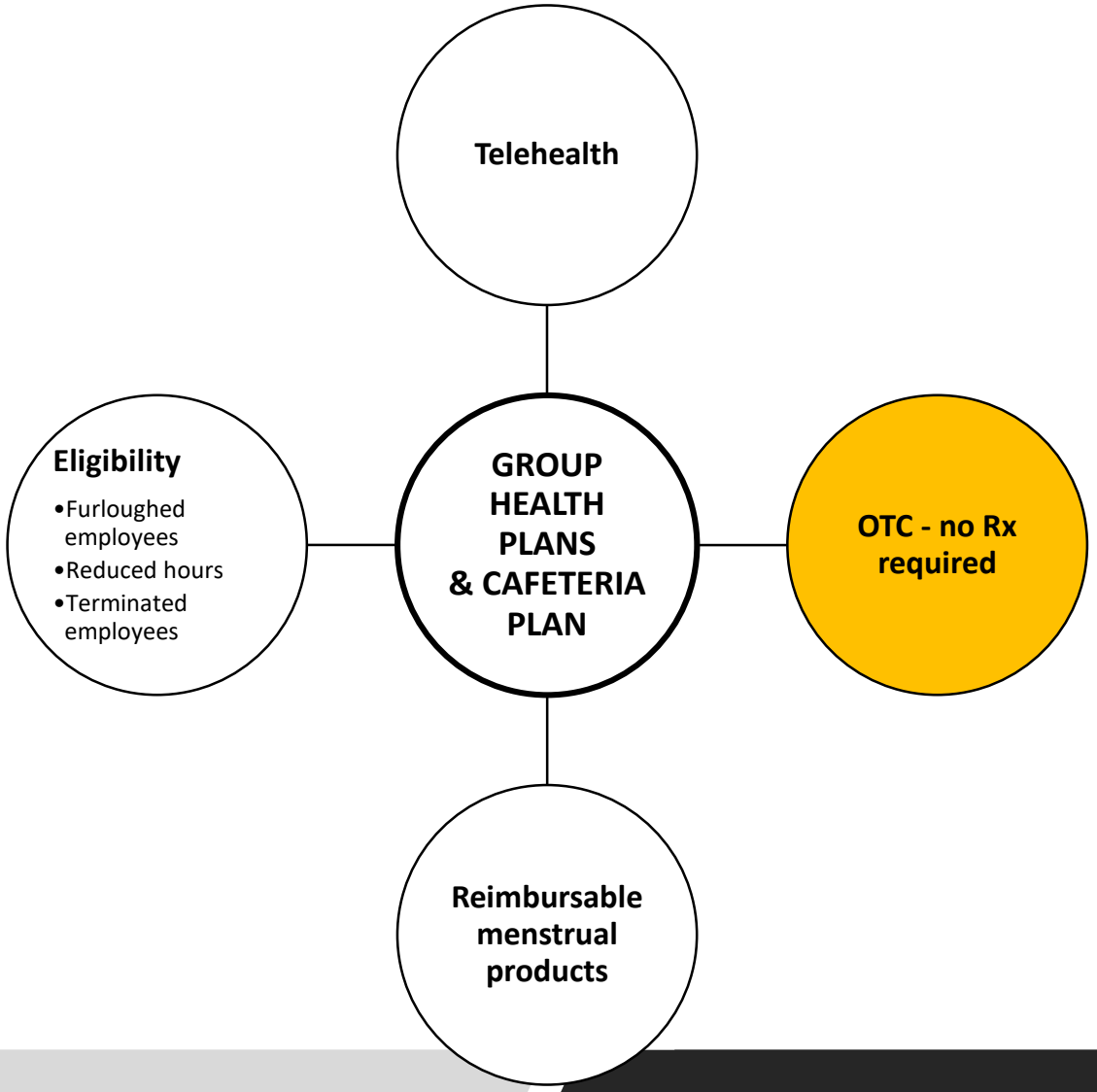
- Telehealth and HDHP status of group health plan
  - Has been an issue prior to Coronavirus
  - Had to charge fair market value prior to deductible satisfaction
- HDHP status
  - HDHP is a medical plan (insured or self-insured) that provides significant medical benefits but, with the exception of preventive care, requires satisfaction of a high deductible set out by statute before the HDHP covers the cost of benefits
  - In order to be eligible to contribute to an HSA, an individual must be covered by an HDHP and not be covered by any impermissible coverage
  - **Critical that the HDHP maintain its status** in order for participants to make HSA contributions

Employer Sponsored Group Health Plans—Telehealth

- HSA provisions amended to allow telehealth (and other remote care services) before HDHP deductible has been met without jeopardizing HDHP status; can still make HSA contributions
  - Telehealth not limited to Coronavirus purposes
- Temporary – plan years beginning on or before December 31, 2021
- Does not change ERISA or ACA rules regarding stand alone group health plans.
  - Must be part of, or integrated with, group health plan that meets ACA mandates.
  - ERISA requirements apply – written plan document, SPD, COBRA, claims procedures, etc.

Employer Sponsored Group Health Plans—Telehealth

- What does HDHP group health plan document say?
  - Looking at group health plan subject to ACA mandates designed to be HDHP
  - Definition of what is paid without having to first satisfy deductible
- Is a plan amendment required?
  - Highly likely because previously had to satisfy deductible before telehealth available at no cost or had to be charged fair market value
    - Not enough for insurance carrier to say okay
    - Not enough for stop-loss carrier to say okay
  - Needs to reflect temporary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Employer Sponsored Group Health Plans—OTC Drugs and Medications

- Rx no longer required for OTC medications
- Two types of group health plans impacted
  - HDHP major medical
  - Defined contribution programs
- And HSAs
- Not temporary

NOTE: May be helpful for employees with Health FSAs negatively impacted by delay in many not-urgent procedures.

Employer Sponsored Group Health Plans—OTC Drugs and Medications

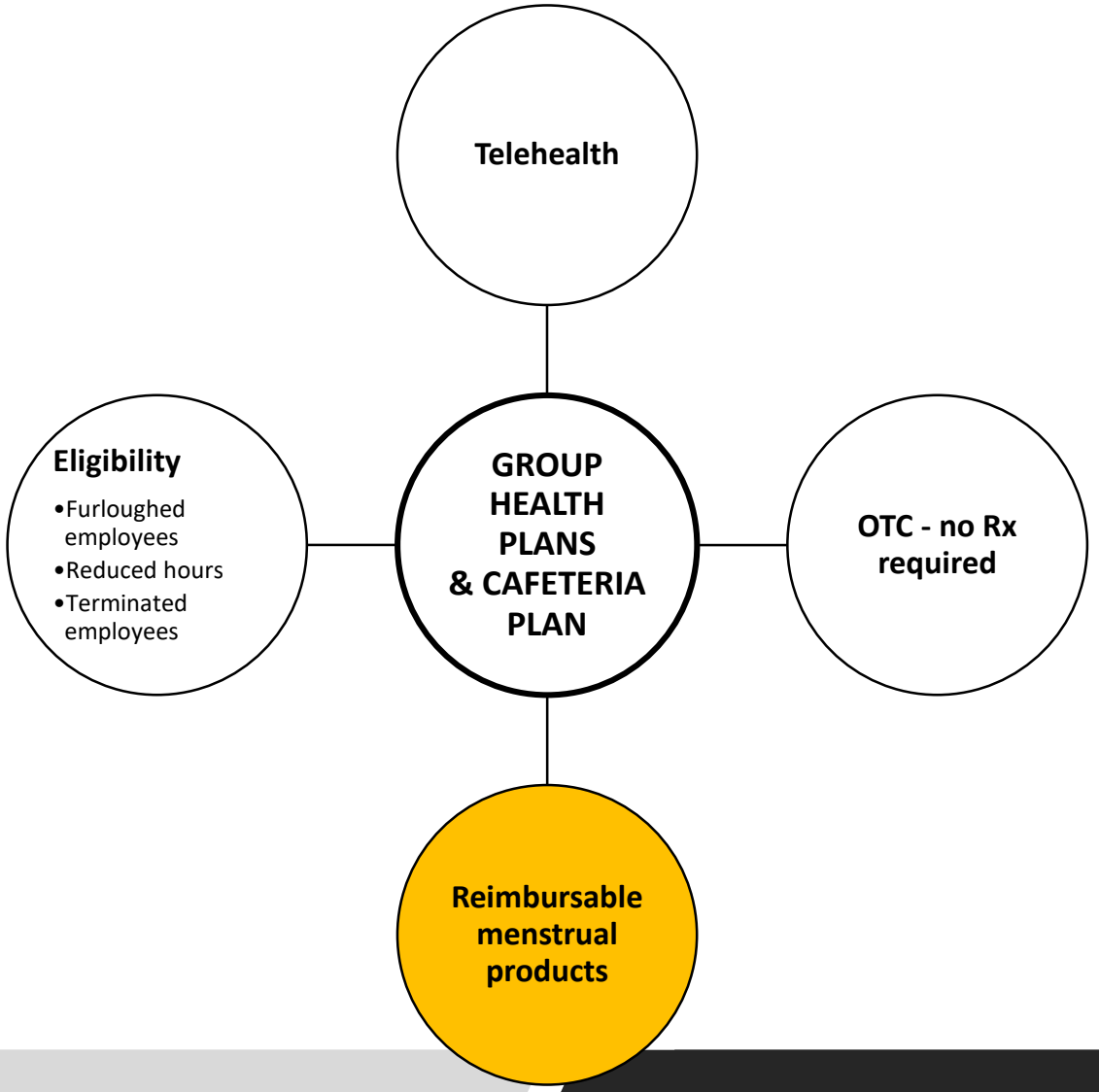
- HDHP status
  - What does plan say about OTC drugs and medicines?
    - May not provide this as a benefit
    - If provides, may restrict until deductible met
- Defined contribution program
  - What does plan say about OTC drugs and medicines?
  - "Over-the-counter drugs and medicines (other than insulin) require a prescription as part of the claim substantiation. For this purpose, a "prescription" means a written or electronic order for a medicine or drug (1) that meets the legal requirements of a prescription in the state in which the medical expense is incurred, and (2) that is issued by an individual who is legally authorized to issue a prescription in that state. Absent this additional claims substantiation, the expense is not reimbursable under the Health FSA Plan."
  - "In accordance with Section 106(f) of the Code."

Employer Sponsored Group Health Plans—OTC Drugs and Medications

- Rx “no longer required”
- Common approach is to apply retroactively – not without issues.
  - For expenses previously submitted and denied because no Rx – common approach would be to require resubmission by participant.
  - Special consideration if non-calendar plan year and retroactive reaches back into completed plan year.
  - May be a lag for electronic payment cards
    - If swipe and not allowed, pay and submit the old-fashioned way including claims substantiation
  - Discuss with third party administrator – need to be on same page

Employer Sponsored Group Health Plans—OTC Drugs and Medications

- Still must be medical expense (as opposed to general health and well being)
  - May require documentation on medical necessity but not Rx
  - Basically going back to pre-ACA requirements
- Plan amendment to reflect terms and conditions of OTC changes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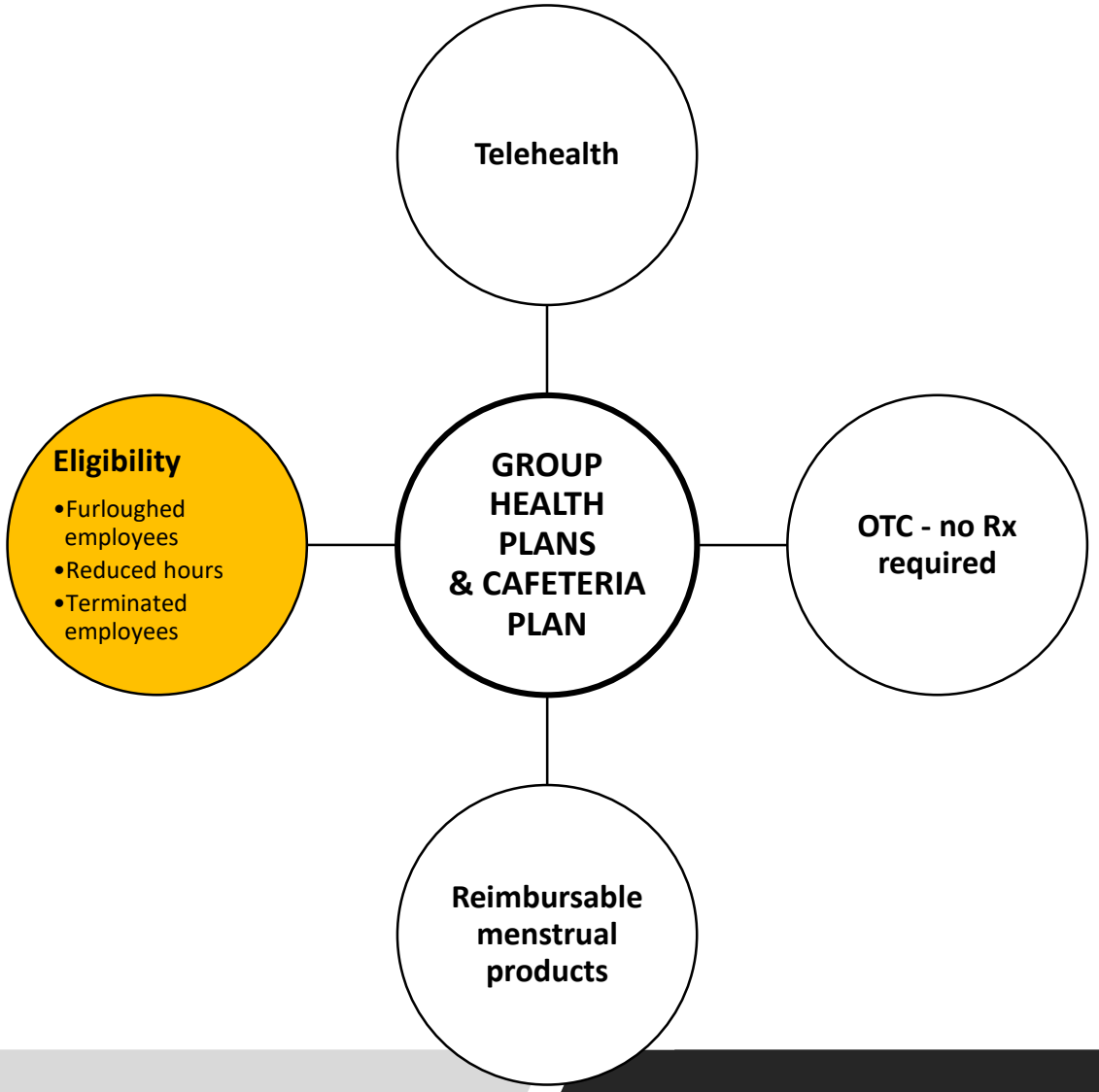
Reimbursable Expense: Menstrual Products

- Menstrual products now reimbursable under health FSA, HRA, HSA
- Not temporary
- Expenses incurred on or after January 1, 2020
- What does plan document say?
  - May not have anything specific
- Similar issues to OTC changes regarding retroactive to January 1, 2020
  - If denied and can resubmit, plan amendment to reflect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Eligibility – Beyond Legislation/Guidance

- Lots of questions regarding changing eligibility
  - Expanding eligibility
  - No loss of coverage where otherwise would be loss of coverage
  - Thoroughly consider ripple effects
- Plan language (each group health plan and cafeteria plan)
  - What group health plans being addressed
    - Major medical
    - Dental
    - Vision
    - Health FSA
    - Others
  - What do plans say regarding eligibility?
  - How is the plan impacted if expand eligibility?
  - Does plan need to be amended?
  - Does cafeteria plan need to be amended to accommodate change in group health plan?

Eligibility – Beyond Legislation/Guidance

- Furloughed employees
  - Not terminated; still on payroll; not working/not being paid
  - Identify group health plans involved – just major medical or more?
  - Deemed eligible
    - Notwithstanding eligibility language under plan, deemed eligible
    - Means no loss for purposes of COBRA
    - What if employee does not want coverage or cannot afford coverage – cannot go to marketplace and get subsidy
    - If employer is paying entire cost, no authority to recoup when employee returns – not FMLA
    - Plan amendment to reflect
  - COBRA triggered
    - Not required to shift entire cost plus 2%
    - Can keep status quo on cost share or 100% employer paid
    - If employee does not want or cannot afford, does not elect COBRA; can go to marketplace and get subsidy
    - If employee elects COBRA but does not return, months count towards COBRA period

Eligibility

- Reduced hours where would otherwise lose eligibility
  - Working some hours but not full compliment of hours
  - Deemed eligible (see above)
  - COBRA triggered (see above)
- Terminated employees
  - COBRA triggered

Communication is Critical

- Because changes already in effect, primary emphasis on determining (1) what you must do, and (2) what you are going to do even though not required AND then communicating to those impacted
- Plan amendment usually required first but under the circumstances, communication and operations paramount
- Need to promptly amend but first order of business is to communicate and operate
- Communicate carefully because amendment will need to match communication
  - Vet changes for ripple effects

Additional Issues

Additional Issues

- ACA reporting
- Section 139 payments

ACA Reporting

- Applicable Large Employer (ALE) under ACA
- 1094/1095 reporting
  - Offer coverage to at least 95% full-time employees for purposes of penalty a
    - Remember full-time based on stability period if use look back measurement period
  - Coverage must be minimum value and affordable for purposes of penalty b
- If affordability based on W-2 wages, may have issues
- Emergency Paid Sick Leave – certain situations paid at 2/3 average regular wage rate; probably not a big issue because two weeks of paid leave
- Extended FMLA – after first two weeks, up to 10 weeks paid FMLA but at 2/3 average regular wage rate
- May have to increase employer paid portion to satisfy affordability

Section 139 Payments

- Section 139 of the Code allows an employer to make tax free “qualified disaster relief payments” to employees and tax deductible by employer.
- Qualified disaster – includes declaration by the President on March 13, 2020, that Coronavirus Pandemic is a disaster under the Stafford Act.
- “Qualified disaster relief payments” – payments made by employer to employee for certain purposes; reasonable and necessary personal, family, living, or funeral expenses related to the disaster provided expenses not reimbursed or paid through another source.
- Not taxable to employee under federal law (e.g., not wages, not 1099 income); might be treated differently under state law
- Recommend (not ERISA and written document not required under Section 139) employer adopt a policy establishing the program as evidence that payments are Section 139 payments.
  - Reasons for payments
  - Claims submission
  - Substantiation
  - Attestation not covered through another source and will not seek coverage/reimbursement from another source

Questions

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thank you!

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