



SPECIAL Alert

In This Issue

In this eighth issue of our Special Alert for 2006, we will discuss the recently released Department of Labor guidance addressing Health Savings Accounts (HSAs) and ERISA. In general, employers that sponsor HSAs do not need to consider the HSA as an ERISA plan. The Department of Labor initially released guidance on this issue in 2004 and they have received many requests to clarify the 2004 guidance.

The Field Assistance Bulletin 2006-02 provides more clarification of employer involvement with HSAs and at what point, significant employer involvement will mean the HSA should be subject to ERISA. ERISA compliance requires significant action on the part of employers. Employers offering HSAs should know what actions may subject their HSA offerings to ERISA.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“Health Savings Accounts - Are They ERISA Plans?”

More and more employers are launching high deductible health plans and offering employees the ability to contribute funds to a Health Savings Account or HSA. HSAs are tax-exempt trusts or custodial accounts established for the purpose of paying qualified medical expenses in conjunction with a high deductible health plan. These accounts are governed by Section 223 of the Internal Revenue Code.

Many employers are confused on how to treat the HSA portion of their plans. Should HSAs be treated as ERISA plans? The Department of Labor (DOL) recently released Field Assistance Bulletin 2006-02 that addressed several questions regarding the status of HSAs and ERISA.

First, it is important to understand that most employer-sponsored high deductible health plans are subject to ERISA. As such, health plans are subject to all the requirements of ERISA, such as COBRA, HIPAA, SPDs, fiduciary obligations, claim requirements and so on. The DOL initially released guidance in 2004 that indicated that unless employers had a significant hand in designing and managing the HSA, the HSA portion of a Consumer Driven Health Plan would not be subject to the requirements and protections of ERISA. The 2004 DOL bulletin provided the following guidance on how to struc-

ture an HSA and not invoke the requirements of ERISA:

- HSA participation must be completely voluntary for the employee.
- Employers cannot limit the ability of participants to move their funds to another HSA.
- Employers cannot impose limits on the utilization of HSA funds beyond what is permitted by the IRS.
- Employers should limit their influence on the investment decisions with respect to HSA funds.
- Employers should not represent that the HSA is a welfare plan established and maintained by the employer.
- Employers should not receive any compensation in connection with the HSA.



The DOL has been inundated with questions and requests for clarifications on the above guidelines. The new guidance provides more detailed information on what type of employer involvement with HSAs is considered acceptable, without pushing the HSA into the realm of an ERISA plan. The

new Field Alert provides the following additional clarifications:

- An employer can set up an HSA in the absence of an employee's consent and deposit funds into the HSA. The voluntary participation indicated in the previous guidance referred to employee contributions. Employee contributions to the HSA must be voluntary. Please note, the ability for the employer to create an HSA on behalf of an employee will be dictated by the HSA vendor requirements.
- An employer can offer an HSA and provide general information on the advisability of using an HSA without that being considered "endorsing" the HSA. In addition, the employer could offer just one HSA vendor to employees and not be considered as "endorsing" the vendor.
- Employers will not be seen as influencing investment options if they offer an HSA vendor that limits investment options to the ones offered by their 401(k) plans.



- If the employer allows contributions to the HSA to be made via their cafeteria plan, the FICA and FUTA savings related to those contributions will not be viewed as "compensation" in connection with the HSA.
- The employer can choose to pay any service fees related to the HSA and not cause the HSA to be treated as an ERISA plan.
- If an employer chooses an HSA vendor that will discount another service for the

employer as a result of placing the HSA business with that vendor, this would be viewed as "compensation" in relationship to the HSA. This

would give rise to fiduciary and prohibited transaction issues. An employer should avoid any type of vendor consideration that could be viewed as compensation.

- HSA vendors are permitted to offer cash incentives to employees to establish HSAs.

The new guidance does state employers are required to transmit any contributions to HSAs made through payroll deductions to the HSA vendor as of the earliest date the employer can segregate the con-

tributions from their general assets. Employers have flexibility on when they deposit employer contributions to the accounts, but if contributions are taken from employee's pay, those contributions must be forwarded to the HSA vendor as soon as the employer is reasonably able.

Most employers offering high deductible health plans are offering employees access to an HSA, even if they choose not to make a contribution to the account. Employers do not want to push their HSA into the realm of an employer-sponsored ERISA plan. This would force the employer to meet all kinds of requirements related to an ERISA plan, such as creating and distributing plan documents, COBRA and HIPAA obligations, and claims review and appeal procedures. In addition, employers would need to meet a number of fiduciary requirements, including preparing the annual Form 5500. When a trust is used to fund benefits, the process of preparing the 5500 becomes infinitely more complicated.

It is in the employer's best interest to follow the government guidelines in setting up HSAs to make sure they do not cross the "ERISA" line. If you have any questions regarding HSAs and ERISA, please contact your McGraw Wentworth Account Director. **MW**

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