Employee Benefits Alert

Willis

November 2006 — Issue No. 88

DOL Issues Further Guidance on Health Savings Accounts

Health Savings Accounts (HSAs) are individual employee accounts established under Internal Revenue Code Section 223 that are used to pay or reimburse qualified medical expenses of eligible individuals.

In 2004 the Department of Labor (DOL) issued HSA guidance through Field Assistance Bulletin 2004-01, and since the 2004 guidance, the DOL has received ongoing questions directly related to that prior guidance. On October 27, 2006 the DOL released another Field Assistance Bulletin (2006-02) which answered questions that were directly related to the 2004 guidance.

Field Assistance Bulletins are used by DOL offices around the country in enforcement activity, but obviously, the guidance contained within these bulletins provides employers useful insight into the rules surrounding HSA administration.

Background

The 2004 Field Assistance Bulletin (FAB) set out the following general rule, and then attached several refinements. *Employer contributions to HSAs will not convert the HSA into an ERISA plan as long as the establishment of the HSA is completely voluntary.*

The 2004 FAB then outlined actions that an employer must avoid if the HSA is to be considered completely voluntary. Those actions included the following:

- Employers cannot restrict an employee's ability to move HSA funds from one HSA to another;
- Employers cannot impose utilization rules on HSAs if those rules are more restrictive than Code Section 223;
- Employers may not make or influence employees' investment decisions with respect to funds contributed to an HSA;
- Employers cannot advertise the HSA as an employee welfare benefit plan established or maintained by the employer;
- Employers cannot receive any payment or compensation in connection with an HSA.

With that introduction, the following is a general overview of the 2006 FAB.

Avoiding ERISA plan status – Many employers who adopt HSAs that are fully funded by employees choose to avoid the application of ERISA with regard to those HSA accounts. The DOL has clarified how an employer can avoid ERISA status by following one of two alternatives:

The first alternative is for the HSA to be offered as a "voluntary" benefit that is exempt from ERISA under a regulation that applies to "voluntary" benefits. That provision requires the following:

- No employer contributions toward the HSA;
- Participation in the HSA is completely voluntary for employees;
- The employer does not endorse the HSA, but permits advertising about the HSA and collects (and forwards) employee contributions to the HSA; and
- The employer receives no consideration (other than reimbursement for actual administrative costs) in connection with the HSA.

The second alternative, further clarified in this FAB, permits the employer to engage in certain activities with respect to the HSA while still avoiding ERISA status. Under the FAB, the employer may:

- Unilaterally open an HSA for an employee and make employer contributions to the HSA;
- Limit the number of HSA providers that advertise their services to employees (The employer may even choose one HSA provider to which the employer will forward its contributions.);
- Select an HSA provider offering only a small selection of investment options (If the employer chooses to direct its contributions to only one HSA provider, that provider must offer a "reasonable choice" of investment options to the employees, and that "reasonable choice" would mean more than one investment option.);
- Pay HSA fees that employees would normally be required to pay;
- Realize lower FICA and FUTA obligations because employees are lowering their taxable wage base by contributing to an HSA. The FAB did note, however, that any discounts that the employer receives on non-HSA products from HSA vendors would constitute employer compensation and would make the HSA subject to ERISA.

Prohibited transaction issues – The FAB notes that, if an employer receives discounts on non-HSA products from its HSA vendor(s), those discounts would likely be viewed as prohibited transactions under ERISA. Prohibited transactions will result in a return of the amount at stake and a minimum 20% penalty.

Additionally, the FAB clarified that it would not be considered a prohibited transaction for an HSA provider to offer a cash incentive to employees in exchange for establishing an HSA. This exception to the prohibited transaction rules would require the vendor to deposit the incentive into the individual's HSA.

As with ERISA-governed benefits, employers must promptly transmit participants' HSA contributions to the HSA vendor, because the DOL plan asset regulations apply to all workplace HSAs through the prohibited transaction provisions of the Internal Revenue Code. That means that the contributions must be made as soon as reasonably practicable, but in no event more than 90 days after the end of the pay period (remember that the 90 days is not a safe harbor. If the amounts can reasonably be deposited sooner, they must be).

The final point in the 2006 FAB addressed the issue of credit cards associated with an HSA account. The FAB noted that no prohibited transaction would result merely from an HSA account holder directing the payment of his/her HSA funds to the credit card vendor to reimburse the vendor for HSA expenses paid with the credit card.

Comments: Though this most recent guidance is helpful, it does not address all outstanding issues. For instance, employers still do not have formal guidance about whether or not employers may automatically initiate an HSA for an employee at open enrollment time through a "negative election." For the time being, however, a key representative of the Employee Benefits Security Administration noted that the DOL is not planning any more Q&A responses in the near future. He noted that the DOL is, instead, turning its attention toward case-by-case issues rather than gearing up to provide more generic information to employers on this subject.

U.S. Benefit Office Locations

Anchorage, AK (907) 562-2266	Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200
Birmingham, AL (205) 871-3871	Boise, ID (208) 340-0645	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000
Charlotte, NC (704) 376-9161	Chicago, IL (312) 621-4700	Cincinnati, OH (513) 762-7661	Cleveland, OH (216) 861-9100
Columbus, OH (614) 766-8900	Dallas, TX (972) 385-9800	Denver, CO (303) 218-4020	Detroit, MI (248) 735-7580
Eugene, OR (541) 687-2222	Farmington, CT (860) 284-6137	Florham Park, NJ (973) 410-1022	Ft. Worth, TX (817) 335-2115
Grand Rapids, MI (616) 954-7829	Greenville, SC (864) 232-9999	Houston, TX (713) 625-1023	Jacksonville, FL (904) 355-4600
Knoxville, TN (865) 588-8101	Las Vegas, NV (702) 562-4335	Long Island, NY (516) 941-0260	Los Angeles, CA (213) 607-6300
Louisville, KY (502) 499-1891	Memphis, TN (901) 248-3100	Miami, FL (305) 373-8460	Milwaukee, WI (414) 271-9800
Minneapolis, MN (763) 302-7100	Mobile, AL (251) 433-0441	Mountain View, CA (650) 944-7000	Naples, FL (239) 514-2542
Nashville, TN (615) 872-3700	New Orleans, LA (504) 581-6151	New York, NY (212) 344-8888	Omaha, NE (402) 778-4851
Orlando, FL (407) 805-3005	Philadelphia, PA (610) 964-8700	Phoenix, AZ (602) 787-6000	Pittsburgh, PA (412) 586-1400
Portland, OR (503) 224-4155	Roswell, NM (505) 317-3397	St. Louis, MO (314) 721-8400	San Diego, CA (858) 678-2000
San Francisco, CA (415) 981-0600	San Juan, PR (787) 725-5880	Seattle, WA (206) 386-7400	Spokane, WA (206) 386-7400
Tampa, FL (813) 281-2095	Washington, DC (301) 530-5050	Wilmington, DE (302) 477-9640	

Willis Employee Benefits Alert is produced by Willis' Legal & Research Group. The information contained in this publication is not intended to represent legal advice and has been prepared solely for educational purposes. You may wish to consult your attorney regarding issues raised in this publication. Wills publications appear on the Internet at: www.willis.com © Copyright 2006