

When ERISA Applies to HSAs

ERISA pertains only when an employer is 'involved'



SECTION 223 of the Internal Revenue Code (IRC) defines a health savings account (HSA) as a trust or custodial account established exclusively to pay qualified medical expenses of an account beneficiary covered by a high-deductible health plan (HDHP). This account may receive tax-favored contributions from the employee, from his employer or from both. Amounts in an HSA may be accumulated over the years or distributed on a tax-free basis to pay for certain medical expenses.

In general, according to the Department of Labor (DOL), HSAs are not viewed as “welfare benefit plans” subject to the Employee Retirement Income Security Act (ERISA). However, as discussed below, this exemption is contingent on the employer’s limited involvement with the HSA, and advisers assisting employers with HSA arrangements need to be aware of such limitations.

Voluntary employee contributions. DOL Field Assistance Bulletin (FAB) 2004-1 states that in order to qualify for ERISA exemption, an HSA must be completely voluntary on the part of the employees. The bulletin goes on to specify those activities an employer must refrain from so as to avoid employer control. An employer cannot 1) limit the ability of employees to move their funds to another HSA; 2) impose conditions on the utilization of HSA funds; 3) make or influence HSA investment decisions; 4) represent that the HSA is an employee welfare benefit plan; or 5) receive any payment or compensation in connection with the HSA.

FAB 2006-2, another piece of guidance from the DOL, also indicates that, in the absence of affirmative consent, an employer may open an HSA for an employee and deposit employer funds into it without violating the requirement that establishment of an HSA by an employee be “completely voluntary.” The intended purpose of this rule is to ensure that any contributions an employee makes to an HSA, including salary reduction amounts, will be voluntary and that the deposit of employer funds does not divest the employee of this control.

Permitted restrictions. FAB 2004-1 also provides that, if movement of HSA funds by employees is unrestricted, certain limitations imposed by an employer will be permitted without jeopardizing the HSA ERISA exemption. These include restricting the forwarding of contributions through the employer’s payroll system to a single HSA provider and permitting only a limited number of providers to advertise or market their products in the workplace.

Prohibition of employer endorsement. It’s important that the employer not “endorse” an HSA provider, or the

employer may be found to have crossed the line and become “involved” with the HSA program.

A similar requirement can be found in the ERISA exemption for employer-sponsored individual retirement account (IRA) programs and 403(b) arrangements. When selecting an IRA provider where an employer offers a SIMPLE [Savings Incentive Match Plan for Employees] IRA plan or a payroll deduction IRA, the employer must remain neutral about the IRA provider. However, the guidance relating to HSAs is more liberal than IRA guidance when it comes to employer contributions or fees paid by employers, which employees would otherwise be required to pay; these employer expenditures are allowed in the HSA context. Further, employers may provide employees with general information on the advisability of using an HSA in conjunction with a high-deductible plan without being treated as endorsing the HSA.

FAB 2006-2 provides further detail regarding employer actions that will not give rise to an ERISA-covered plan by noting that an employer will not be “making or influencing” the HSA investment decisions of employees if it offers the same or similar investments through its HSA program as are provided under its 401(k) plan; however, employees will then need to be “afforded a reasonable choice of investment options and be allowed to move their funds to another HSA.”

Prohibited transactions. Importantly, FAB 2006-2 also reminded employers that HSAs, even if exempt from ERISA, are subject to the prohibited transaction rules of the IRC. Similar to the requirement that employers promptly transmit employees’ salary reduction amounts to a 401(k) plan, an employer that fails to promptly transmit participants’ contributions to the HSA trustee or custodian will violate the code’s prohibited transaction rules, resulting in imposition of excise taxes. In addition, an employer’s receipt of a discount on another product from an HSA vendor that the employer selected could constitute a prohibited kickback; this would raise fiduciary issues as well as prohibited transaction penalties. Cash incentives paid to HSA account-holders would be problematic for the same reasons.

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