Health Savings Account (HSA)

HSAs and ERISA
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Going deeper: understanding the interaction of HSAs and ERISA
Among the many financial and employee benefits of Health Savings Accounts (HSAs), employers also enjoy compliance benefits. Employer involvement — and responsibility — with HSA programs is more limited than with a Health Care Flexible Spending Account (FSA) or a Health Reimbursement Arrangement (HRA). HSAs are individually owned bank accounts, and, unlike FSAs and HRAs, employer HSA programs are typically structured so that they are not employee welfare benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). If employer HSA programs are not subject to ERISA, employers have no obligation to file Form 5500s, provide a written plan document and summary plan description, follow Department of Labor (DOL) claims procedures, offer COBRA continuation coverage, or comply with ERISA fiduciary standards, among other ERISA compliance obligations.

This article first provides some general background on ERISA application to HSA programs and then shares some best practices for avoiding ERISA application.

Field Assistance Bulletin 2004-01
This bulletin states that HSAs generally will not be subject to ERISA where employer involvement with the HSA is limited, whether or not the employee’s health plan is sponsored by an employer or obtained as individual coverage.

An employer may offer an HSA to its employees without establishing an ERISA-covered plan in one of two ways. First, the employer may rely on the group-type insurance safe harbor in 29 C.F.R. § 2510.3-1(j), in which case the employer cannot make contributions to the HSA. Alternatively, an employer may rely on the separate conditions outlined in the bulletin, in which case the employer may or may not elect to make employer contributions to the HSA. The conditions in the bulletin require that the establishment of the HSA must be completely voluntary on the part of the employees and the employer may not:

- Limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the Internal Revenue Code;
- Impose conditions on using HSA funds beyond those permitted under the Internal Revenue Code;
- Make or influence investment decisions with respect to funds contributed to an HSA;
- Represent that an HSA is an employee welfare benefit plan established or maintained by the employer; or
- Receive any payment or compensation in connection with an HSA.

Background on HSAs and ERISA
The DOL has issued Field Assistance Bulletins 2004-01 and 2006-02, which enable employers to help their employees open HSAs without invoking ERISA. The bulletins provide that, although the HSA-compatible health plan sponsored by an employer is an ERISA plan, the HSA itself is not an ERISA plan as long as certain conditions are met.²

1 This article provides high level summary of the Field Assistance Bulletins, but it does not address all points covered in the bulletins.

2 In the Wells Fargo Health Savings Account Administrative Services Agreement includes, employers represent and warrant that their HSA programs are not “plans” subject to ERISA, and employers agree to not take any action that would cause the HSA program to be subject to ERISA, or omit to take any action that would be required to stop the HSA program described from becoming subject to ERISA.
The bulletin also states that the fact an employer imposes terms and conditions that would be required to satisfy tax requirements under the Internal Revenue Code or limits forwarding of contributions through its payroll system to a single HSA provider would not trigger ERISA, unless the employer or HSA provider restricts the ability to move funds to another HSA.

Field Assistance Bulletin 2006-02

This bulletin answers questions that arose out of the 2004 bulletin. Among other things, the bulletin clarifies that:

- An employer may open an HSA for an employee and deposit employer funds into the HSA without violating the “completely voluntary” requirement in the 2004 bulletin. Employees must be able to decide whether to make salary reduction contributions and must be able to move funds to a different HSA provider.

- An HSA is not an ERISA plan simply because the employer pays HSA fees that the employees otherwise would have to pay.

- Employers may limit the HSA providers allowed to market their HSA products in the workplace or may select a single HSA provider to which it will forward contributions without triggering ERISA coverage.

- Employers may provide general information on the advisability of using an HSA in conjunction with the health plan.

- Employers may allow employees to contribute to HSAs through the employer’s cafeteria plan. The FICA and FUTA tax savings that result from HSA cafeteria plan contributions do not violate the prohibition in the 2004 bulletin against an employer receiving “payment or compensation” in connection with an HSA.

Best practices to avoid ERISA application

Below are some best practices we have seen employers use to limit their involvement with the HSA program and potentially avoid ERISA application.

1. Communicate that the HSA program is not subject to ERISA. Often, HSA information is communicated with other benefit information covering plans that are subject to ERISA. For example, employers may introduce the HSA during open enrollment while talking about ERISA-covered medical plans. It is typical for employers to explicitly state that the HSA is different from other benefit programs because it is not subject to ERISA. Some employers do this by specifically pointing to the language in Field Assistance Bulletin 2004-01 in their messaging.

2. Take care not to mix messages. While the HSA is not subject to ERISA, the employer-sponsored health plan that accompanies that HSA is likely subject to ERISA. For this reason, we have seen employers take great care not to intertwine the messaging of the HSA with that of the health plan. Many employers avoid using the word “plan” after HSA. When referring to the health plan, employers do not call it the “HSA plan.” Instead, they use terminology such as the “HSA-qualified health plan” or the “HSA-based health plan.”

3. Direct employees to Wells Fargo for help. If you have a call center for your benefit questions, consider directing employees to Wells Fargo Customer Service (1-866-884-7374) for HSA-related support. Because HSAs are individual bank accounts, it makes sense for HSA-related questions to go directly to Wells Fargo. Sending employees to Wells Fargo further clarifies the distinction between the HSA and ERISA-sponsored health plans. Many employers have integrated the Wells Fargo Customer Service information into their communication materials.

4. Provide educational materials. In Field Assistance Bulletin 2006-02, the DOL said it is permissible for employers to provide employees with general information on the advisability of using an HSA in connection with an employer’s HSA-qualified health plan. Wells Fargo has developed easy-to-use educational materials that many of our employers have shared with their employees, not only during the enrollment process but throughout the year, such as at tax time. Employers should review their communication plans with their legal counsel and should be mindful that customizing the standard Wells Fargo communications could trigger coverage under ERISA.

5. Keep the distribution process simple and in the control of the accountholder. At Wells Fargo, the distribution process is entirely in the control of the accountholder. The HSA-qualified health plan does not share information with the HSA. Some HSA administrators offer cross-over claims that directly

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3 While this practice does not cause the HSA to be subject to ERISA, there may be other requirements that prevent opening an HSA in this way.

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pull funds from an HSA as claims are incurred under an HSA-qualified health plan, similar to how the HRA claims process works. While there may be ways to structure such a program so that it does not trigger ERISA or the Health Insurance Portability and Accountability Act (HIPAA), Wells Fargo has chosen not to offer cross-over claims, in part because of the close interaction of the HSA-qualified health plan and the HSA and because of privacy concerns over the potential disclosure of medical information from the plan. Many of our employers appreciate the stream-lined, hands-off approach of our distribution process. Our process reinforces the concept that the HSA-qualified health plan and the HSA are separate, but compatible, products, and keeps it simple for the accountholder to control their HSA distributions. Because the accountholder is in control, our process reduces the likelihood that inaccurate distribution requests will be processed.

Consult your attorney

While the DOL Field Assistance Bulletins are helpful, they require interpretation and application. Please keep in mind that Wells Fargo cannot provide legal advice. Consult with an attorney as you set up your HSA program to make sure that you do not inadvertently make your program subject to ERISA.

Elizabeth J. Kappenman is Senior Counsel at Wells Fargo & Company. Ms. Kappenman supports Wells Fargo Health Benefit Services (HBS), specializing in the administration of Health Savings Accounts (HSAs). Today, HBS holds more than $1.6 billion on deposit for 580,000 account holders, making HBS one of the top HSA administrators nationally.

Ms. Kappenman has in-depth knowledge of the laws affecting HSAs, including the Internal Revenue Code provisions, IRS notices, Affordable Care Act, and DOL Field Assistance Bulletins. In addition to her work of advising on HSAs, Ms. Kappenman specializes in health and welfare benefits and has provided advice on benefit design and compliance with relevant federal and state laws and regulations, including health care reform, HIPAA (privacy and security), ERISA, and the Internal Revenue Code. Ms. Kappenman received her law degree, cum laude, from the Notre Dame Law School. She is a member of the Minnesota Bar.