

DOL Provides Important Follow-Up Guidance on HSAs and ERISA Issues

© 2006 By John R. Hickman and Ashley Gillihan, Alston & Bird, LLP

The EBSA issued important guidance on HSAs and ERISA issues in the form of Field Assistance Bulletin 2006-02. FAB 2006-02 follows up on DOL's earlier guidance concerning when ERISA applies to HSAs (FAB 2004-1) and addresses a number of "recurring questions about the guidance and evolving practices regarding the offering of HSAs. HSA custodians, HDHP insurers, employers, financial institutions and service providers should take heed of this very important guidance to avoid running afoul of many frequently overlooked compliance issues. The complete text of the bulletin can be found at <http://www.dol.gov/ebsa/pdf/fab2006-2.pdf>.

The following is a brief overview of the issues addressed in the FAB 2006-02 question and answer (Q&A) guidance:

Q-1: Can an HSA be established without consent and still be voluntary?

An HSA is still "completely voluntary" (an essential element of the FAB 2004-1 safe harbor

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CONEXIS Compliance

IRS Regulatory Updates

Target® Stores Will Accept the Benefit Card in Specific Departments

Participants may now use the Benefit Card at Target® Pharmacy Centers, Target® Vision Centers, and Health Clinics. These healthcare related centers within Target® will use healthcare Merchant Category Codes (MCC's) at their registers which identify them as a pharmacy, optometrist, ophthalmologist, medical or health practitioners. However, the card will not be accepted at the general merchandise checkout aisles in Target® or SuperTarget®.

Most Retailers (Non-Healthcare Merchants) No Longer Accept the Card

Per recent IRS rulings, the Benefit Card may no longer be used at grocery stores and most discount stores like Wal-Mart. However, the participant may continue to purchase prescriptions and FSA qualified over-the-counter healthcare products at these stores and file a claim for reimbursement.

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ERISA exception) even if the employer unilaterally establishes an HSA for employees and subsequently deposits employer funds in the HSA. The intent of the "voluntary" requirement in FAB 2004-1 is to ensure that employee contributions to an HSA, including salary reductions, are voluntary. NOTE: IRS Notice 2004-50 specifically allows an employer to provide negative cafeteria plan elections for HSA contributions so long as the requirements of Rev. Ruling 2002-27 are satisfied. Reading this guidance, FAB 2004-1 and the applicable IRS guidance together, it would appear that ERISA would not apply solely because an employer establishes an arrangement under which accounts are established and pre-tax salary reduction contributions are made by default. Also, it is important to ensure that state and federal banking requirements applicable to account establishment are satisfied.

Q-2: Employers do not trigger ERISA applicability solely by choosing one or more HSA provider to whom it will make contributions.

The DOL clarifies that employer neutrality in communicating that the HSA is an employee welfare benefit plan is a required element of the FAB 2004-1 ERISA exception; however, "endorsement" of the arrangement itself (as typically used in the ERISA group insurance arrangement exception) is not an element.

Thus making contributions to a single HSA custodian, which would normally be construed "endorsement" does not by itself trigger ERISA. CAUTION: There is a thin line between endorsement (as used in the group insurance exception context) and employer neutrality in communicating the arrangement is not an employee welfare benefit sponsored by the employer. Employers will still need to take care in how they communicate the HSA to employees; ensuring that employees understand that the HSA is not an employer sponsored plan despite the fact that the employer has chosen this particular custodian to which it will make contributions.

Q-3 An employer is not "making or influencing investment decisions" in violation of FAB 2004-1 solely by choosing an HSA vendor who offers the same investments offered by the employer under its 401(k) plan as long as employees are afforded a reasonable choice of investments and are not limited in moving funds to another HSA.

Note, however, that a single investment option is not considered to be a "reasonable choice of investments". Does this mean that a single "certificate of deposit" or "interest bearing account" option is problematic by itself? We hope not. One interpretation is that the guidance is referring to situations where the

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investments under the HSA mirror the 401(k). Additional guidance is needed from the DOL on this issue. Also, while although not specifically addressed in the FAB, prior informal conversations with DOL officials indicate that ERISA may be triggered where the employer influences the scope of investments that the HSA custodian/trustee actually offers to its employees (e.g. where the employer requires investments be offered that the custodian/trustee does not typically offer). Finally, while not directly applicable, it remains to be seen how much of the recent Pension Protection Act guidance on investments may apply here.

Q-4 An employer's FICA and FUTA tax savings through a cafeteria plan are not "payment or compensation" that would trigger ERISA under 2004-1.

Q-5 Employers can pay the employees' HSA fees without triggering ERISA.

Caution: Guidance is still needed from IRS as to whether direct withdrawal of fees from the HSA will be considered a non-taxable distribution.

Q-6 HSA Vendors may offer their employees the same HSA product that they offer "in the regular course of business" to the public without triggering ERISA.

Although good news, additional detail is still needed. For example, prior IRA related guidance

from the DOL indicates that ERISA applies where IRA custodian's charge their own employees a fee. Although not directly applicable to HSAs, it raises the question as to whether employers may charge their own employees a fee if they charge non-employee HSA accountholders a fee? Informal guidance from DOL officials indicates that a market fee may be charged to employees who establish HSAs with the employer/HSA custodian without triggering ERISA. Also, since employers generally can pay HSA fees, we believe that discounted fee for employees should be permissible as well.

Q-7 An employer is considered to have received "payment or compensation", and thus triggers ERISA (and potential prohibited transaction issues), if it receives any discounts on other products offered by HSA vendors selected by the employer.

For example, it would appear that an arrangement where the HSA product is combined with other products offered by the HSA Vendor (e.g., other administrative services or HDHP coverage) and the vendor charges a lower fee for such products as a result of the HSA relationship than where the product is offered on a stand-alone basis would result in issues for the employer. Such receipt of compensation may also be in violation of the prohibited transaction rules.

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Q-8 EBSA clarifies that an employer's failure to promptly forward employee HSA contributions to the HSA custodian is a prohibited transaction under IRS 4975 (without regard to whether ERISA applies).

Caution. Although not specifically stated, failure of an HSA administrator to forward such contributions to the HSA custodian would appear to also be a prohibited transaction.

Q-9 The class exemptions previously issued for IRAs (e.g., where the IRA custodian/trustee provided nominal incentives or reduced or no cost banking services/products to IRA owners) do NOT apply to HSAs.

Thus, any incentive provided to HSA account holders (other than those deposited in the HSA under AO 2004-09) are generally impermissible - absent an HSA specific individual or class exemption.

Q-10 EBSA reaffirms the DOL's guidance in DOL Adv. Op. 2004-09A that it is not a prohibited transaction to offer a cash incentive for establishing an HSA so long as the incentive is paid directly to the HSA.

Presumably, payment to the individual's personal account would be a prohibited transaction.

Q-11 Addresses whether a line of credit issued by the HSA Vendor and the HSA accountholder is a prohibited transaction.

EBSA merely restated general law in this area. While certain activities are clearly prohibited (e.g., borrowing or pledging the HSA assets, or "receiv[ing] a benefit in his or her own individual capacity as a result of opening or maintaining an HSA" the mere issuance of credit by an HSA vendor in an arms length transaction and the account holder's directing HSA funds to the credit line vendor for HSA expenses paid with a credit card are not automatically prohibited. {Note: credit could not be issued on the condition that the account holder assign his rights to HSA funds to the credit line vendor, but voluntary, revocable payments directed by the account holder to the credit line vendor do not appear to be automatically impermissible.} The answer depends on the particular facts and circumstances. EBSA refers to DOL Adv. Op. 89-12A as general guidance. {In 89-12A, the DOL held that offering free checking services to IRA accountholders who invest a portion of the IRA assets with bank owned mutual funds was a prohibited transaction). Although not directly applicable to HSAs, the concept set forth in the 89-12A and the subsequent IRA rulings is that it is a prohibited transaction to provide an accountholder with consideration for his personal account as a result of establishing or maintaining an HSA or for using HSA funds.

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Please note: *Several other retailers are in the process of implementing system enhancements to meet IRS requirements that will allow them to accept the card. The timeframe for other retailers to make the necessary enhancements is unknown. CONEXIS will issue additional updates as soon as more information is available.*


Multiples of Co-Pays

Effective immediately, multiples of co-pays (up to five times the applicable co-pay amount) will be allowed in accordance with IRS Notice 2006-69.

What does this mean for card users? Currently, if an FSA participant has two co-pays during a single visit to a healthcare provider, they are required to swipe each co-pay separately. The new IRS Notice allows participants to make a single swipe for up to five times of their co-pay amount for such multiple co-pays.

For Example: *If a participant with a \$20 per family member co-pay were to take their two children to the doctor at the same time, they only need to swipe the Benefit Card one time for \$40, instead of swiping the card twice for \$20 for each co-pay.*

IRS Notice 2006-69 reaffirms the three methods for auto-adjudication outlined in previous guidance (IRS Revenue Ruling 2003-43) to include:

1. Co-pay Matching;
2. Recurring Expense Matching; and
3. Real-time Substantiation 

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Communication is Key to Benefits Understanding and Appreciation

Bruce Shutan

Think your employees have a clear understanding and appreciation of their benefits? Better think twice, concludes a new survey of high-level HR and benefit executives from more than 128 companies across a number of industries and company sizes.

Charlton Consulting Group, Inc., a benefits communications consultancy, found that a mere 5% of survey respondents said their employees fully understand and appreciate the value of their total compensation packages. In addition, more than one-third of respondents said employees don't understand the value of their total compensation at all.

David Janus, a principal of the firm, was somewhat surprised not only by these findings but also to learn that while 96% of respondents considered total compensation statements a powerful communication tool for helping employees understand and value their benefit plans, 55% do not use them. His sense is that, while HR and benefit professionals understand the value of total compensation statements, they often get moved down the "to do" list because of the large number of other projects competing for their attention.

Lack of understanding and a low level of appreciation for the total compensation structure together offer industry practitioners an

opportunity to develop channels to deliver a more meaningful 360-degree view for employees. As such, the research concludes that communication effectiveness is the determining value – not so much the richness of the benefit package itself.

Power of personalization

The key to improving employee understanding and appreciation of the value of their total compensation package is to present employees with comprehensive information that's personalized, according to Janus. One recommended area is showing an employer's share of annual health care cost contributions, which will give a complete picture of the overall benefits cost equation at a time when so many employees are feeling the sting of cost-sharing strategies.

"Employees focus on salary and bonuses, and it's very easy for them to lose sight of the fact that in most cases they receive a wealth of other benefits that come with a hard-dollar value," he says.

The ultimate aim is to deliver communications in a more engaging and personalized manner in hopes of bridging the knowledge gap. Janus advocates

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an approach that favors concise messages that do not overload employees with information – a delicate balancing act that isn't always easy to attain short of outsourcing this task to a service provider with expertise in this area.

Nearly 60% of survey respondents handle both the production and delivery of benefit communications internally, which certainly casts a light on the role outsourcing this work would play on increasing the number of total comp statements and improving qualitative results. "A number of our clients have said that they were not achieving the level of quality they're looking for in terms of a more professional and effective presentation by doing it in house," Janus reports, noting that outsourced communication would free up HR and benefit staffers to make a more strategic contribution within their organizations.

While many employers have moved total compensation communications to the Web, printed communications still dominate. Decisions about format, according to Janus, are driven to a large extent by the degree to which an employer has moved other communications to the Web. "Whether the decision is made to go with print or the Web," he adds, "a clean, concise and well thought out presentation is the key to effective communication."

Link to shareholder value

The survey doesn't point to any clear differences about HR and benefit practices based on company size, but it does suggest that 79% of respondents whose organizations actively communicate total compensation information believe that employees have at least a moderate level of understanding and appreciation of their total compensation versus 66% overall.

Other survey highlights worth noting:

- 93% of respondents believe personalized communications are valuable tools for recruiting and retaining employees.
- Health insurance was seen as the most understood and appreciated benefit (84%), while disability insurance was the least understood benefit (44%). Possible explanations of the latter include the fact that most employees rarely use this benefit and it's usually employer-paid, insulating them from knowing the true cost and terms of coverage.


"The overall goal of communicating more effectively is an important one," notes Janus, who cites a recent Watson Wyatt Worldwide study showing a link between employers that communicated well with their employees and

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shareholder return. These firms, in fact, were found to have a 19.4% higher market premium than those that did not excel at employee communication – the point being they were likely to have a more engaged and motivated workforce.

Janus predicts more employers will implement a total compensation communications program in the years ahead “because it’s an efficient and cost-effective means by which to increase the return on investment being made in comp and benefits. And as the economy continues to move away from physical assets being the central business investment, human capital will play an increasingly critical role as a higher premium is placed on knowledge workers for a competitive advantage.” 


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If you have any questions, please feel free to contact John Hickman (jhickman@alston.com 404-881-7885) or Ashley Gillihan (agillihan@alston.com 404-881-7390). 

Employer’s job description – everyone that is eligible has been offered it and everyone that is on it is still eligible. That protects you and your employer!



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Include Number Crunching in your Holiday Feasting: End of Year is a Good Time to Review Financial Plan

Milwaukee Journal Sentinel, The (KRT)

Erin Hagemann makes her living through numbers.

As assistant director of corporate development for Actuant Corp. in Butler, Hagemann, an accountant, spends days evaluating potential acquisitions for the maker of hydraulic and electrical tools.

But around Thanksgiving every year, Hagemann, 29, applies the same number-crunching skills to making decisions with her husband, Alan, 30.

As the holidays approach, the Germantown couple make a rough financial plan for the coming year, considering everything from what health insurance plan to select to how much to give to charity.

"I look at numbers, look at what last year's experience was," she said. "We also take a look at an annual budget, what do we plan on or what is our goal to save during the year."

The Hagemanns' annual review is a very important and intelligent exercise, something that should be on everyone's to do list this time of year, experts say.

For many, the process begins with choosing among health and retirement plans offered by their employers.

Health plan selection boils down to how much choice a person wants in picking providers and how much risk they want to assume on their own. Plans that limit participants to certain doctors and those with higher deductibles, or the thresholds at which coverage begin, generally are cheaper.

That requires making judgments about what may happen in the year ahead, said Daniel Burkwald, president of Burkwald & Associates Inc., an insurance adviser in Pewaukee. It is an inexact science.

"Bad things happen beyond our control, and something acute may come up and cost tens of thousands of dollars," he said. The question then becomes "are you prepared to assume that risk?" he said.

For couples such as the Hagemanns, who both work, the choices can be compounded if their employers offer different plans.

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The Hagemanns decided to carry their primary insurance through Alan's job, where more people are employed so rates are cheaper. But they have set up a flexible spending account through Erin's employer, because it allows them access to the money in it with a debit card, she said.

Flexible spending accounts are set up on 12-month periods, with most coinciding with a calendar year. Unlike health savings accounts, money in a flexible spending account cannot be carried over from one period to the next. So making sure accounts are empty at the end of the 12-month period is another important year-end chore for many people.

Investment decisions

Both Hagemanns participate in 401(k) plans at their jobs, and another year-end choice is deciding how much to put in them in the following 12 months.

At Actuant, that includes deciding whether to put the money into a traditional or a Roth 401(k). Money is put into a Roth 401(k) after-tax, but withdrawals are, in most circumstances, tax-free. That is exactly the opposite tax treatment of the traditional type.

The Roth option is becoming more widespread, said Kelli Send, senior vice president of Francis Investment Counsel, Hartland, which specializes in 401(k)s. Next year, about half their clients will offer them, she said.

The Hagemanns do not have children, but if they did, there are also decisions to be made about college savings, according to Joseph F. Hurley, founder of the savingforcollege.com Web site in Pittsford, N.Y.

For parents or grandparents who want to put money aside for a child, it is important to remember the annual limit of \$12,000 that any person can give another tax free, Hurley noted. If the 2006 exclusion is not used by year end, it is lost.

In Wisconsin, contributions of up to \$3,000 annually to the EdVest college saving plan can be deducted from state income taxes, but again the benefit cannot be carried over from one year to the next, Hurley said. So persons who want the deduction on their 2006 returns must make the contribution by the end of the year.

Cull investment losers

Now also is a good time to review investments, said accountants Dave Jensen of Walkowicz,

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Boczkievicz & Co. S.C., Waukesha, and Lyn Gamerdinger of Kolb + Co., Brookfield.

Long-term capital gains can be offset by long-term losses, they said. So as the year ends, people with gains should study their portfolio to see if there are any losers to sell.

Now is also a good time to find out what was paid for a stock that was sold, said Jensen. Not only will it provide an exact number for a gain or loss, but it is also easier to get the information from a broker now than it will be during the last-minute tax rush in April.

Buying mutual funds contains its own trap at year end. Many funds pay out dividends and capital gains at the end of the year, and when the payments are made, the value of fund shares drops by the same amount. But in most cases, the dividends and capital gains are taxable. So to avoid taxes, it makes sense to wait to buy the funds until after the payouts are made.

Reviewing life insurance coverage and wills also is a good idea at the end of the year, especially if a major change in circumstances, such as marriage, the birth of a child or death of a parent, is anticipated.

For Erin Hagemann, there is one additional item on the year-end list.

"I am a tax geek," she said. "I basically look at where am I year-to-date from an income perspective and from a withholding perspective." If the withholding does not match the couple's anticipated tax bill, "I will make adjustments to my W-4," she said.

That decision is not hard, she explained. It is all in the numbers. 🍷

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