SEGAL Bulletin

Benefits, Compensation and HR Consulting

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Comprehensive HSA Guidance

On July 23, 2004, the Treasury Department and the Internal Revenue Service (IRS) released the last in a series of guidance on health savings accounts (HSAs).[1] This wide-ranging guidance was issued in the form of 88 questions and answers.[2] On the whole, the guidance addresses several big-picture issues that are important to employers. The guidance makes it clear, however, that there are many complex issues that employers will need to consider as they move forward, especially how to design the accompanying high-deductible health plan (HDHP), including its deductible structure, and how that design will impact maximum HSA contribution levels.

NOTICE 2004-50 AND THE BIG PICTURE

In this guidance, the IRS discusses several issues that will make it easier for employers to offer HSAs and to offer them alongside some of their traditional benefit offerings.

EAPs and Disease Management or Wellness Programs

Employees will be able to contribute to HSAs and take advantage of employee assistance programs (EAPs) and disease management or wellness programs offered by their employers, as long as these programs do not provide "significant benefits in the nature of medical care or treatment." For example, the following would be permissible:

- An EAP that provides free or low-cost, short-term counseling to identify issues impacting job performance and the work environment,
- A disease management program that identifies employees (and family members) who have, or are at risk for, certain chronic conditions, and
- A wellness program that provides a wide range of education and fitness services designed to improve overall fitness and health. Health screenings could be part of this program.

The guidance also states that employers can condition the employer's contribution to the employee's HSA on the employee's participation in health assessments, disease management or wellness programs provided the employer makes HSA contributions through a Section 125 cafeteria plan.

Preventive Care

Earlier guidance defined the term "preventive care," which is important because such care may be offered without the employee (or family member) having to first meet the applicable minimum deductible. The general distinction is between care that is preventive in nature (not subject to the deductible) and care that is intended to treat an existing illness, injury or condition (subject to the deductible). This new guidance states that the following constitute preventive care:

- Medication taken to prevent a disease or condition by a person who has risk factors but no symptoms of the disease or condition. The example given is the treatment of high cholesterol with cholesterol-lowering medications (*e.g.*, statins) to prevent heart disease.
- Medication (*e.g.*, ACE inhibitors given to heart attack or stroke victims) taken to prevent a

[1] HSAs were created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law No. 108-173).

[2] Notice 2004-50 is available on the following page of the IRS Web site: http://www.irs.ustreas.gov/pub/irs-drop/n-04-50.pdf Previous HSA guidance is available on the following page of the Treasury Department's Web site: http://www.ustreas.gov/offices/public-affairs/hsa/technical-guidance Segal Company *Bulletins* on the previous HSA guidance can be accessed from the Segal Web site: http://www.segalco.com

reoccurrence of a disease from which a person has recovered.

- Medication used in connection with preventive care services discussed in earlier guidance (for example, obesity weight loss and tobacco cessation).
- Treatment that is "incidental or ancillary to" a preventive care service or screening, where it would be unreasonable or impractical to perform another procedure to treat the condition. The example given is the removal of polyps during a diagnostic colonoscopy.

Other Clarifications

This guidance clarifies that employers:

- May make "matching" contributions to employees' HSAs but only if the employer makes HSA contributions through a Section 125 cafeteria plan;
- May permit employees to start, stop, increase or decrease their HSA contributions (through salary reduction) at any time during the plan year, on a prospective basis only;
- Do not have to make a year's worth of promised HSA contributions available at the beginning of the plan year;
- Must determine which of the employer's health plans each employee is covered by, the amount of the deductible under the employer's HDHP, and each employee's age (relevant to catch-up contributions); and
- May not recoup any portion of the employer's contribution to an employee's HSA.

The guidance prevents HSA trustees (*i.e.*, bank or insurance company trustees) from restricting distributions (*e.g.*, a trustee cannot mandate that distributions be used for qualified medical expenses only). It is unclear whether an employer can restrict distributions (such as including requirements in a cafeteria plan).

NEXT STEPS FOR PLAN SPONSORS

Plan sponsors that already added HSAs to their benefit offerings will need to review this guidance with plan professionals to determine if the HSA and the HDHP were designed properly. Plan sponsors that are considering an HSA for next year (or beyond) will need to make sure that their plan design is consistent with this guidance and previous guidance. While some issues are relatively straightforward (for example, the permissibility of matching contributions through a Section 125 plan), other issues (especially the design of the HDHP's deductible structure and how that impacts maximum HSA contribution levels) present significant design challenges and will warrant close scrutiny.

As with all issues involving the interpretation or application of laws, plan sponsors should rely on their attorneys for authoritative advice on the new Medicare law and regulatory guidance. Segal can be retained to work with plan sponsors and their attorneys on HSAs.

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