

Are HSA Contribution Programs Ever Subject to ERISA?

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QUESTION: We are planning to add an HDHP and to make company contributions to employees' HSAs. We have been told that an HSA contribution program—unlike the HDHP coverage—would not be subject to ERISA. Is that always true, or are there circumstances in which ERISA might apply?

ANSWER: Employer-facilitated HSA contribution programs generally are not subject to ERISA. Even though HSA funds may be intended to provide medical care, HSAs are viewed as personal accounts that are not ERISA-covered welfare benefit plans, so long as employee participation is completely voluntary and the employer's involvement is limited. However, there are ways in which an HSA contribution program could become subject to ERISA. Those ERISA triggers should be avoided because ERISA's compliance obligations were not crafted with HSAs in mind, and it is not clear how and whether all of ERISA's requirements could be satisfied by an HSA program.

The DOL has established two safe harbors from ERISA coverage that may apply to workplace HSA programs. One, the voluntary plan safe harbor for group or group-type insurance programs, does not allow employer contributions, so for your purposes, we will focus instead on the HSA-specific safe harbor, which allows employer contributions. Under that safe harbor, employer contributions will not result in ERISA's application if all of the following requirements are met:

- *Voluntary Employee Contributions.* An employer using the safe harbor can unilaterally establish HSAs for employees and deposit employer funds into those accounts. But any contributions made by employees, including salary reduction contributions, must be voluntary.
- *Portable Funds.* An employer's program may limit forwarding of HSA contributions to a single HSA provider without triggering ERISA. But the employer cannot limit what happens after that initial deposit; employees must be able to move funds to another HSA if they desire.
- *Unrestricted Use of Funds.* Some employers may wish to impose conditions on how HSA funds are used, such as a requirement that funds be used only for qualified medical expenses. Any such restrictions, however, will cause the arrangement to fall outside the safe harbor.
- *No Employer Influence.* When selecting an HSA provider, employers may choose trustees or custodians that offer only a limited selection of investment options or options replicating those available under the employer's 401(k) plan. Generally, however, the employer cannot make or attempt to influence employees' investment decisions.
- *Not Represented as an ERISA Plan.* This requirement seems simple, but it is also easily violated. Participant communications must not represent the HSA program as part of an ERISA plan, or as an ERISA plan of its own, and should include appropriate disclaimers indicating that the HSA is not part of an ERISA plan. From a drafting perspective, the HSA provisions should not be included in an ERISA plan document. While bundling non-ERISA and ERISA benefits will normally not make the non-ERISA benefits subject to ERISA, careful drafting and communications are required to ensure that the HSA satisfies the safe harbor.

- *No Employer Compensation.* The employer cannot receive any direct or indirect payment or compensation in connection with its employees' HSAs. This rule precludes discounts on other products that the employer may purchase from the HSA vendor, and may raise questions in other situations (e.g., bundled arrangements). This prohibition does not preclude making HSA contributions through a cafeteria plan; the employment tax savings realized by the employer is not considered compensation for this purpose.

Failure to meet any one of these elements will cause the program to fall outside the safe harbor. Although a program involving employer actions or program rules not specifically authorized by the safe harbor might still avoid ERISA, any variations should be discussed in advance with counsel.

For more information, see EBIA's Consumer-Driven Health Care manual at Section XVIII.C ("HSAs and ERISA").

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