

ADDITIONAL GUIDANCE ON HSAs

On March 30, 2004 the IRS released additional guidance on Health Savings Accounts (HSAs) in the form two IRS Notices, a Revenue Ruling, and a Revenue Procedure. While the additional guidance does not make any material changes in the current interpretation of HSAs, it does provide for some safe harbor, transition periods in relation to prescription drug cards and payment of claims incurred prior to the date an HSA was established.

On April 7, 2004 the Department of Labor (DOL) released additional guidance on HSAs in the form a Field Assistance Bulletin. The Bulletin provided the DOL's interpretation on the interaction of ERISA with HSAs and provided confirmation that generally an HSA will not be considered employee welfare benefit plan and will not be subject to ERISA.

On May 12, 2004 the IRS released Revenue Ruling 2004-45 relating to the interaction of HSAs with other health plan arrangements such as Flexible Spending Accounts (FSA) and Health Reimbursement Arrangements (HRAs). In general the ruling confirmed that individuals covered under a traditional health FSA or HRA are not eligible for coverage under an HSA because the first dollar coverage under the FSA or HRA would not meet the requirements to be a high deductible health plan.

In June 2004, the IRS released Notice 2004-43 providing a safe harbor transition period in relation to High Deductible Health Plans (HDHP) that by State mandate are required to provide certain benefits at 100% or less than the minimum deductible to qualify as an HDHP. The IRS also released three sample forms in June relating to HSAs: Form 5305c – Health Savings Custodial Account, Form 5305b – Health Savings Trust Account, and Form 8889 – Individual Tax Payer HSA Reporting Form. All three forms are currently in their proposed format, but may be relied on as compliant until final forms are released.

The following summarizes the provisions of each piece of additional guidance.

IRS NOTICE 2004-23 (Preventive Care)

Because the original HSA legislation provided an exception for preventive care that allows it to be paid outside the deductible of the high-deductible health plan (HDHP), the IRS felt it was necessary to define what preventive care includes. This Notice provides additional guidance defining preventive care as including:

- Periodic health exams, including related lab and x-ray services.
- Routine prenatal and well-child care exams.
- Immunizations, child or adult.
- Tobacco cessation programs.
- Obesity weight-loss programs.
- Screening services.

It also indicates that preventive care does not include any service intended to treat an existing condition.

The regulation does not require that a plan provide coverage for preventive care or that, if it is provided, it be paid outside the plan deductible.

IRS NOTICE 2004-25 (Claim Payment)

Due to the short period of time between the enactment of the HSA legislation and its effective date, there has been a shortage of trustees or custodians prepared to handle an HSA. This Notice addresses that issue by providing a one-time exception to the requirement that an HSA only reimburse claims incurred after the date the HSA was established. For the 2004 calendar year only, if an HSA is established on or before April 15, 2005, it can

reimburse otherwise eligible expenses incurred prior to the date the HSA was established but not earlier than the first day of the month in which the individual was eligible to have an HSA.

IRS REVENUE RULING 2004-38 (Prescription Drug Cards)

This Revenue Ruling formally adopts the long-term position that was anticipated when the original HSA legislation was passed. It affirms that if an individual is covered under an HDHP and a prescription drug card that provides benefits after a copay, that individual is not eligible to participate in an HSA. If the drug card did not provide any benefit until the minimum deductible for a HDHP was satisfied or it was part of the HDHP and subject to deductible, the individual would be eligible to participate in an HSA. At the same time this long-term position was released, a transitional relief provision to it was released in IRS Revenue Procedure 2004-22.

IRS REVENUE PROCEDURE 2004-22 (Prescription Drug Cards)

This Revenue Procedure provides transitional relief from the requirements of Revenue Ruling 2004-38 by allowing individuals who would otherwise be eligible to participate in an HSA, except for having coverage under a prescription drug card, to be considered eligible based solely on the deductible of the HDHP and disregarding the prescription drug card coverage until January 1, 2006.

DOL FIELD ASSISTANCE BULLETIN 2004-1

This Field Assistance Bulletin states the DOL's position that an HSA is separate and distinct from the high deductible health plan (HDHP) it accompanies and to the extent that the employer/plan sponsor has a limited role in relation to the HSA it does not constitute an employee welfare benefit plan under ERISA. However, it should be equally noted that an HSA may be considered an employee welfare benefit plan subject to ERISA if the employer/plan sponsor engages in any of the following activities in relation to the HSA:

1. Creates a benefit plan under which the use of an HSA is not voluntary to the employee.
2. Limits the ability of individuals to move HSA funds.
3. Limits the type of expenses that HSA funds can be used to pay.
4. Makes or influences the investment decisions relating to the HSA funds.
5. Presents the HSA as an employee welfare benefit plan established and maintained by the employer.
6. Receives any payment or compensation in relation to the HSA.

The Bulletin also clearly states that this position in relation to the HSA does not change the fact the HDHP is an employee welfare benefit plan and subject to ERISA, unless otherwise exempt.

IRS REVENUE RULING 2004-45 (Interaction with Other Health Arrangements)

This Revenue Ruling confirms the legislative intent of HSAs by stating that in general the use of a full coverage health FSA or HRA in connection with HDHP would disqualify the plan from meeting the requirements of an HDHP and any individual from being eligible for an HSA. This disqualification is the result of the first dollar benefits provided by the FSA or HRA prior to the satisfaction of the minimum deductible requirement for an HDHP.

However, the ruling does provide four examples of acceptable use of a health FSA or HRA in relation to an HSA.

1. **Limited Purpose Health FSA or HRA.** An FSA or HRA that reimburses only those items that are listed as "permitted coverage" or "permitted insurance" under the HSA regulations, and expenses for preventive care.
2. **Suspended HRA.** An HRA under which an election has been made, prior to the start of the coverage period, to suspend payment or reimbursement of expenses under the HRA for any item incurred during the suspension period.
3. **Post Deductible Health FSA or HRA.** An FSA or HRA that does not provide reimbursement or payment of medical expenses until after a deductible is satisfied that meets the minimum requirements for an HDHP. If the deductible for the FSA or HRA is separate from that of the HDHP, the lowest of the deductibles will be used for purposes of determining allowed contributions to the HSA.
4. **Retirement HRA.** An HRA that provides for reimbursement of medical expenses incurred after retirement only and does not provide a current benefit to the individual. Upon retirement, the individual would no longer be eligible for an HSA.

IRS NOTICE 2004-43 (Transitional Relief for States where HDHP's are not available due to State mandates)

This Notice provides transitional relief from the requirements for an HDHP by allowing plans that would otherwise qualify as an HDHP under the regulation, to be considered as an HDHP until January 1, 2006. This exception only applies to plans that do not meet the qualifications to be an HDHP due to compliance with State

mandates that require payment of certain benefits at 100% or at less than the minimum HDHP deductible. Such mandates must have been in effect on or before 1/1/2004.