

## More HSA Guidance

### Do You Have an FSA or an HRA and Want an HSA? More Guidance is Out.

On May 12, 2004, the Internal Revenue Service (IRS) issued additional guidance in Revenue Ruling 2004-45 on the new Health Savings Accounts (HSAs). You may recall our *Management Alert* on January 26, 2004 describing HSAs as new tax-preferred accounts that assist individuals in saving for future health care needs. [click here for a copy of that *Management Alert*] At that time, the new legislation left a number of unanswered questions. The IRS issued guidance in March 2004 regarding preventive care and prescription drug programs under High Deductible Health Plans (HDHPs), which was described in our second *Management Alert* on this topic [click here for a copy of that April 1st *Management Alert*]. Now the IRS has offered guidance on how HSAs interact with other existing types of health care savings vehicles, specifically, health care flexible spending accounts (FSAs) and health care reimbursement accounts (HRAs)<sup>1</sup>. This latest guidance confirms what most practitioners had expected, but the confirmation is good.

Rev. Rul. 2004-45 laid out five different situations where a person may be covered by any one or more of these types of arrangements. In each situation the person is covered by an HDHP.

**Unrestricted Health FSA and HRA.** In the first situation, the person also participates in an unrestricted FSA and an unrestricted HRA. That is, the person may be reimbursed for any unreimbursed medical expenses through one of those two vehicles, including medical expenses that were used to meet the minimum deductible under the HDHP. The FSA and HRA are health plans that do not meet the requirements for an HDHP; therefore, this person participates in a non-HDHP. As a result, the

person is not an eligible individual to contribute to an HSA. The same result applies if the person was covered under a spouse's unrestricted FSA or HRA.

**Limited Purpose Health FSA and HRA.** In the second situation, the FSA and HRA are "limited purpose" arrangements that only reimburse for vision and dental expenses, as well as preventive care medical benefits. In this case, the IRS found the person does not participate in a non-HDHP and, therefore, is still an eligible individual for an HSA because the FSA and HRA only include permitted coverage benefits (vision and dental), which may be offered outside of an HDHP, and preventive care, which may be covered within an HDHP without being subject to a deductible.

**Suspended HRA.** Under the third situation, the person is only covered by an HRA and elects to forgo the reimbursement of medical expenses (that are not permitted coverage or preventive care) for services incurred during a certain coverage period. The employer, however, decides to continue to contribute to the person's HRA during that coverage period. The IRS calls this arrangement a "suspended HRA". In this case, the person is an eligible individual during that suspended coverage period as the HRA does not cover any benefits that an HDHP could not cover (and as a result is not in a non-HDHP).

**Post-Deductible Health FSA or HRA.** The twist in the fourth situation is that the FSA and the HRA only reimburse for medical expenses after the deductible under the HDHP is satisfied. As a result, they reimburse for the coinsurance and copayment amounts only. The IRS calls this a "post-deductible health FSA or HRA." In this case, there is again, no problem with participating in all of the arrangements at once as the FSA and HRA would not be non-HDHPs.

<sup>1</sup> You may wish to refresh your recollection on the differences between FSAs, HRAs and HSAs by looking at the January 26, 2004 *Management Alert* (click on link above), which contains a handy chart for your reference.

**Retirement HRA.** Finally, in the fifth situation the person is covered only by the HRA and the HRA reimburses for post-retirement medical expenses only, called a “retirement HRA”. Here the person is an eligible individual for an HSA before retirement, but loses eligibility to make contributions to the HSA after retirement.

### Will HSAs be ERISA Plans?

In April, the Department of Labor (DOL) issued Field Assistance Bulletin 2004-1 providing guidance on whether HSAs offered through an employer would be “employee welfare benefit programs” under ERISA. That guidance stated that if employer involvement in the HSA is limited, it will not be an ERISA plan, whether or not the employer sponsors the corresponding HDHP. The DOL noted that HSAs are essentially personal health care savings vehicles and not a form of group health insurance. If the employer does little more than contribute funds to an employee’s HSA, an employee benefit plan will not be created.

The DOL guidance explained that there would not be an employer-sponsored ERISA plan if the employee voluntarily established an HSA and the employer did not:

- ♦ limit the ability of employees to move HSA funds to another HSA fund;
- ♦ impose conditions on use of HSA funds, beyond those in the law;
- ♦ make or influence the investment decisions with respect to HSA funds;
- ♦ represent that the HSA was an employee welfare benefit plan; and
- ♦ receive any payment or compensation in connection with the HSA.

Nonetheless, DOL’s guidance would permit an employer to impose certain terms and conditions such as requiring use of payroll deductions and limiting the forwarding of contributions to one or a limited set of HSAs. However, neither the employer nor the HSA provider can limit the ability of the employee to move funds to another HSA beyond the restrictions in the law.

If employer involvement is not so limited, then an employer-sponsored HSA will be an employee welfare benefit plan with the fiduciary and other obligations on such plans. This presents a significant design considerations for employers and for HSA providers who hope to team with employers.

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*Given the new guidance that has been issued since our last teleconference briefing, another briefing will be held to discuss this new guidance on Thursday, May 27th at 1:00 p.m. central time. Participation is free, but prior registration is required. To register and obtain the call-in instructions, visit [www.seyfarth.com/events](http://www.seyfarth.com/events) and register on-line. If you have questions, please call Meridith Fee at [mfee@seyfarth.com](mailto:mfee@seyfarth.com) or (312) 739-6981.*

*If you have questions about HSAs, FSAs, HRAs and whether HSAs are employee benefits plans, please contact the Seyfarth Shaw Employee Benefits Group attorney with whom you work or any Employee Benefits attorney listed on the website at [www.seyfarth.com](http://www.seyfarth.com).*

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