SEYFARTH SHAW
MANAGEMENT ALERT

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IRS Guidance Paves Way For HSAs

On July 23, 2004, the Internal Revenue Service ("IRS") issued Notice 2004-50 which provides even more guidance with respect to health savings accounts ("HSAs")[1]. The 30 pages of guidance (which consists of 88 questions and answers) can be accessed by clicking on the following link: http://www.irs.gov/pub/irs-drop/n-04-50.pdf. In general, the Q&As give answers that will make it easier for employees and employers to find HSAs attractive health care options when combined with a high deductible health plan ("HDHP").

Highlights

Among the many answered questions, Notice 2004-50 says that:

- An HDHP can have reasonable lifetime and annual limits on benefits.
- An HDHP can offer a prescription drug discount card.
- Some prescription drugs can be "preventive" and not disqualify an HDHP.
- Individuals over age 65 can contribute to HSAs if they are not in fact enrolled in Medicare; mere eligibility is not a disqualifier.
- Any person can contribute to an eligible individual's HSA; not just the individual or a family member.
- Employers cannot restrict use of HSAs to payment of medical expenses; the account must be available for any withdrawal by the individual.
- An employer can match HSA contributions through its Section 125 cafeteria plan.

One Thorny Issue

Not all the answers in Notice 2004-50 resolve the issues; some raise additional legal and administrative issues that will need careful attention.

One, Q&A 10, addresses whether or not an employee assistance program ("EAP"), wellness program or disease management program will be considered a "health plan." This is important because individuals are not able to participate in an HSA if they are covered by a health plan that is not a high deductible health plan ("HDHP"). Specifically, Q&A 10 sets forth a new standard that provides that a program that does not provide *significant benefits in the nature of medical care or treatment* will not be considered a "health plan" for purposes of Internal Revenue Code Section 223 governing HSAs. Consequently, coverage under an EAP, wellness program or disease management program will not make an individual ineligible to contribute to an HSA, provided that the program does not provide *significant benefits* in the nature of medical care or treatment. Unfortunately, Q&A 10 does not discuss what constitutes "significant benefits," but does provide that in determining whether a program provides significant benefits, certain screening and other preventive care services will be disregarded

Clearly, the IRS has realized that the prevalence of EAPs, wellness and disease management programs would hinder the availability of HSAs to many individuals and has attempted to find a way around the unintended problem. Although this is good news for employers offering HDHPs with access to HSAs and for employees wanting to participate in these programs, the conclusion in Q&A-10 that a program is not a health plan if it does not provide significant medical benefits is not supported by statutory or regulatory authority and should not be relied upon for other purposes. For example, in determining whether or not an employer-sponsored EAP, wellness program or disease management program is subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Consolidated Omnibus Reconciliation Act of 1985, as amended ("COBRA") or the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"), the Q&As in Notice 2004-50 should not be relied upon. If an EAP, wellness program or disease management program is subject to ERISA, it must comply with several ERISA requirements governing claims, reporting and disclosure, and fiduciary obligations. If an ERISA program is a group health plan, it will be subject to additional claim procedures and SPD

[1]See our previous Management Alerts on HSAs at www.seyfarth.com. (HSAs - 01/26/04 and More HSAs - 05/18/04)

requirements. In addition, group health plans are subject to COBRA continuation coverage requirements, qualified medical child support order requirements, and HIPAA portability and privacy rules.

The Department of Labor has opined that an EAP providing counseling services provides "medical benefits" and will constitute an employee welfare benefit plan subject to ERISA. Similarly, federal regulations provide that the HIPAA privacy rules will apply to health plans that provide or pay for the cost of medical care (as defined in the Public Health Service Act). Medical care costs include amounts paid for the diagnosis, care, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting the structure or function of the body. Given this broad definition of medical care, if an EAP provides anything more than an assessment of an individual's condition and referral to a health care provider, the services would most likely fall within the definition of medical care and the program would be subject to the HIPAA privacy rules.

Thus, although maintaining an EAP, wellness program or disease management program may not be an impediment to setting up an HSA, these programs may still constitute "health plans" for purposes of HIPAA, ERISA and COBRA. Each program should be independently reviewed to make sure that it complies with applicable federal and state laws.

If you have any questions concerning whether or not your wellness programs, disease management programs or EAPs are subject to HIPAA, ERISA and COBRA, or if you have any questions with respect to HSAs or the newly issued guidance on HSAs, please contact the Seyfarth Shaw Employee Benefits Group attorney with whom you work or any Employee Benefits attorney on the website at www.seyfarth.com.

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