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High Deductible Health Plans (HDHPs) and Health Savings Accounts (HSAs)—How Do Those Plans Work?

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Overview

- ★ The rules for Health Savings Accounts (HSAs) are found in Internal Revenue Code Section 223 and the guidance issued by the IRS
- ★ HSAs are tax-favored custodial accounts that can be contributed to by, or on behalf of, “eligible individuals” who are covered by high-deductible health plans (HDHPs) to pay for certain medical expenses of the eligible individuals and their spouses and tax dependents
- ★ HSAs can be funded on a pre-tax basis through a cafeteria plan

Overview

- ✦ As you can see from the first slide, there are several different plans involved
 - > HDHP (generally an ERISA covered plan that is also subject to the ACA rules)
 - > HSA (likely not an ERISA covered plan but subject to many rules in the Tax Code)
 - > Section 125 Cafeteria Plan (which is used to allow employees to make pre-tax contributions to the HSA)

Overview—HSAs are MAGIC!!

- ✦ An HSA-eligible individual can make contributions (up to statutory limits) to an HSA and get an “above-the-line” tax deduction—or they can contribute on a pre-tax basis via a cafeteria plan
 - > There is state tax in California
- ✦ Investment earnings on HSA funds generally are tax-free and funds withdrawn for qualified medical expenses are not subject to federal taxation
- ✦ Employers that contribute to their employees' HSAs get a federal tax deduction for those contributions. Employer contributions to HSAs are excludible from the employees' gross wages, and are not subject to FICA or FUTA (in most cases)
 - > There is state tax in California

HSA—Basic Rules

- ✦ To be HSA-eligible and contribute to an HSA, an individual must be covered under a qualifying HDHP
- ✦ An individual must not be covered by any impermissible non-HDHP health coverage. This is TRICKY!! A lot of things to consider, such as a health FSA, HRA, on-site medical clinics, telemedicine, etc...
- ✦ The individual must not be enrolled in Medicare and cannot be claimed as a tax dependent by another taxpayer
 - > Again, this is very TRICKY!
 - > Remember, a spouse is NEVER a dependent

HSA—Basic Rules

- ♦ An individual may establish an HSA at any time on or after the date the individual becomes HSA-eligible. An individual must find a qualified HSA trustee or custodian and complete the necessary forms

HSA—Basic Rules

- ★ The maximum annual HSA contribution is an indexed amount (for 2016, \$3,350 for self-only coverage or \$6,750 for family coverage)
 - > There is also a “catch-up” amount
 - > The maximum annual contribution generally is available only for individuals who are eligible individuals for all 12 months during the year because the contribution limits are applied on a monthly basis
 - > There are some special rules
- ★ HSA account holders have a nonforfeitable interest in their account balances

HSA—Basic Rules

- ✦ Neither an HSA custodian nor an employer is required to determine whether HSA distributions are used for qualified medical expenses
 - > This is determined by the HSA-holder and he should maintain records to provide that in the event of an IRS audit

In Depth!

- ★ The first slides provided a broad overview of the rules
- ★ The next portion of the presentation will dig deeper into the rules

HSA Eligibility—Employer Obligation

- ✦ Employers that contribute to an employee's HSA are only responsible for determining the following:
 - > whether the employee is covered under an HDHP or any non-HDHP plan sponsored by that employer; and
 - > the employee's age (for catch-up contributions)
- ✦ Why this matters? Employers must have a reasonable belief, when they contribute to their employees' HSAs, that their contributions will be excludable from the employees' income
 - > If not, then the employer contribution will be subject to federal income tax withholding, FICA and FUTA

HSA Eligibility

- ✦ An individual's status as an eligible individual is determined monthly as of the first day of the month
 - > However, the contributions for a taxable year need not be made until the original filing due date (without extensions) for the HSA holder's tax return
- ✦ To be eligible for HSA contributions, an individual:
 - > must be covered under an HDHP;
 - > must not have other impermissible health coverage;
 - > must not be enrolled in Medicare; and
 - > cannot be claimed as a dependent on someone else's tax return

HSA Eligibility Requirement #1—HDHP Coverage

- ✦ In order to be eligible to establish an HSA, an individual must be covered under an HDHP for the months for which contributions are made to the HSA
- ✦ An HDHP must:
 - > meet statutory requirements for annual deductibles and out-of-pocket expenses; and
 - > provide “significant benefits”
- ✦ For self-only HDHP coverage to qualify for HSA eligibility:
 - > the HDHP coverage for an individual must have an annual deductible of at least \$1,300 for 2016 before any reimbursement is made for eligible medical expenses (other than preventive care); and
 - > the sum of the plan's annual deductible and any other annual out-of-pocket expenses that the insured is required to pay, such as co-payments and co-insurance (but not premiums), cannot exceed \$6,550 for 2016

HSA Eligibility Requirement #1—HDHP Coverage

- ✦ Family coverage is any coverage other than self-only coverage
- ✦ For family HDHP coverage to qualify for HSA eligibility:
 - > it must have a deductible of at least \$2,600 for 2016 before any reimbursement is made for eligible medical expenses (other than preventive care); and
 - > the sum of the plan's annual deductible and any other annual out-of-pocket expenses cannot exceed \$13,100 for 2016
- ✦ For individuals with family coverage, no amounts can be paid from the HDHP (other than for preventive care) until the required minimum annual deductible for family HDHP coverage has been satisfied
 - > Watch out for an embedded individual deductible that is at some lower amount!

HSA Eligibility Requirement #1—HDHP Coverage—What Are Considered Significant Benefits?

✦ IRS has not defined “significant benefits,” but has provided examples of noncompliant coverage, such as:

- > restricting benefits to expenses for hospitalization or in-patient care (and excluding out-patient services); and
- > “mini-med” plans (plans that provide only limited fixed indemnity benefits but may also cover certain specified diseases)

✦ Q&A 14 from IRS Notice 2008-59

“Q-14. If a health plan meeting the minimum deductible of § 223(c)(2)(A) restricts benefits to expenses for hospitalization or in-patient care, is the plan an HDHP?”

A-14. No. A plan must provide significant benefits to be an HDHP. A plan may also be designed with reasonable benefit restrictions limiting the plan's covered benefits.”

HSA Eligibility Requirement #1—HDHP Coverage—What Are Considered Significant Benefits?

- ✦ A plan also does not qualify as an HDHP if all of its coverage is “permitted insurance”—insurance under which substantially all of the coverage provided relates to:
 - > liabilities incurred under workers’ compensation laws;
 - > tort liabilities, liabilities relating to ownership or use of property (e.g., automobile insurance);
 - > insurance for a specified disease or illness; and
 - > insurance that pays a fixed amount per day (or other period) of hospitalization
- ✦ For employers, take note of bullets #3 and #4

HSA Eligibility Requirement #1—HDHP Coverage—What Counts Against the HDHP Out-of-Pocket Maximum?

- ✦ Out-of-pocket expenses include cost-sharing such as deductibles and copayments, but do not include premiums. In addition, the HDHP rules do not require the following to be counted against the out-of-pocket maximum:
 - > Out-Of-Network—A network plan will not fail to be a qualified HDHP solely because the out-of-pocket limitation for services provided outside the network exceeds the maximum out-of-pocket limitation allowed for HSA purposes, so long as the plan otherwise meets the requirements of an HDHP
 - > UCR—Amounts charged in excess of usual, customary, and reasonable cost for the service that an individual is required to pay do not count
 - > Penalties—Penalties on individuals who fail to obtain precertification for a specific provider or procedures. IRS Notice 2004-50 provides that such penalties or increased co-payments do not count against the out-of-pocket limit

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ In order to be an eligible individual for HSA purposes, an individual must have no other impermissible health coverage unless it constitutes preventive care or certain permitted coverage
- ✦ IRS Notice 2004-23 provides the following definition of preventive care:
 - > Periodic health evaluations, including tests and diagnostic procedures ordered in connection with routine examinations, such as annual physicals
 - > Routine prenatal and well-child care
 - > Child and adult immunizations
 - > Tobacco cessation programs
 - > Obesity weight-loss programs
 - > Certain listed screening services
- ✦ Preventive care generally does not include any service or benefit intended to treat an existing illness, injury, or condition

HSA Eligibility Requirement #2—No Other Impermissible Coverage

★ From IRS Notice 2004-50

- > Q-26. Does a preventive care service or screening that also includes the treatment of a related condition during that procedure come within the safe harbor for preventive care in Notice 2004-23?
- > A-26. Yes....in situations where it would be unreasonable or impracticable to perform another procedure to treat the condition, any treatment that is incidental or ancillary to a preventive care service or screening as described in Notice 2004-23 also falls within the safe-harbor for preventive care. For example, removal of polyps during a diagnostic colonoscopy is preventive care that can be provided before the deductible in an HDHP has been satisfied.

HSA Eligibility Requirement #2—No Other Impermissible Coverage

✦ From IRS Notice 2004-50

- > Q-27. To what extent do drugs or medications come within the safe-harbor for preventive care services under section 223(c)(2)(C)?
- > A-27. ...drugs or medications are preventive care when taken by a person who has developed risk factors for a disease that has not yet manifested itself or not yet become clinically apparent (i.e., asymptomatic), or to prevent the reoccurrence of a disease from which a person has recovered. For example, the treatment of high cholesterol with cholesterol-lowering medications (e.g., statins) to prevent heart disease or the treatment of recovered heart attack or stroke victims with Angiotensin-converting Enzyme (ACE) inhibitors to prevent a reoccurrence, constitute preventive care... However, the preventive care safe harbor under section 223(c)(2)(C) does not include any service or benefit intended to treat an existing illness, injury, or condition, including drugs or medications used to treat an existing illness, injury or condition.

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ♦ IRS Notice 2013-57 states that a health plan will not fail to qualify as an HDHP merely because it provides without a deductible the preventive health services required under the Affordable Care Act

HSA Eligibility Requirement #2—No Other Impermissible Coverage

✦ From IRS Notice 2004-50

- > Q-9. May an individual who is covered by an HDHP and also has a discount card that enables the user to obtain discounts for health care services or products, contribute to an HSA?
- > A-9. Yes. Discount cards that entitle holders to obtain discounts for health care services or products at managed care market rates will not disqualify an individual from being an eligible individual for HSA purposes if the individual is required to pay the costs of the health care (taking into account the discount) until the deductible of the HDHP is satisfied.

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ♦ Example. An employer provides its employees with a pharmacy discount card. For a fixed annual fee (paid by the employer), each employee receives a card that entitles the holder to choose any participating pharmacy. During the one-year life of the card, the card holder receives discounts of 15 percent to 50 percent off the usual and customary fees charged by the providers, with no dollar cap on the amount of discounts received during the year. The cardholder is responsible for paying the costs of any drugs (taking into account the discount) until the deductible of any other health plan covering the individual is satisfied. An employee who is otherwise eligible for an HSA will not become ineligible solely as a result of having this benefit.

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ Types of other coverage that will not violate this requirement:
 - > “Permitted insurance” (described on prior slide—workers compensation, auto insurance, insurance for specified disease, etc...)
 - > Coverage for accidents, disability, dental care, vision care, and long-term care
 - > Limited purpose Health FSAs or HRAs
 - > EAPs and wellness programs that do not provide “significant benefits in the nature of medical care or treatment”
 - > On-site medical clinics that cover only preventive care, or other “insignificant” medical benefits

HSA Eligibility Requirement #2—No Other Impermissible Coverage

✦ Examples of impermissible other coverage:

- > Non-HDHP “carve-out” coverage (includes prescription drug coverage)
- > General purpose Health FSAs or HRAs
- > EAPs and wellness programs that provide more than “significant benefits in the nature of medical care or treatment”
- > On-site medical clinics that provide more than preventive care or “significant” medical care
- > Tricare
- > What about telemedicine?

✦ Next several slides will dive deeper into Health FSAs, EAPs, on-site medical clinics and telemedicine

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ For a Health FSA and for a HRA, remember that often the employee and his/her spouse are covered—there is no election for the coverage, the plan simply provides it
- ✦ For example, if the employee is enrolled in the Health FSA, then the employee and his/her spouse are not HSA eligible
 - > It does not matter if that spouse never makes a reimbursement request—that spouse is covered under the Health FSA

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ Health FSAs can be designed to have a \$500 rollover
- ✦ This small rollover could cause a person to not be HSA eligible
- ✦ Could design it so that the person has the right to forfeit the rollover at the beginning of the year
- ✦ Employer should consider educating employees on these issues

HSA Eligibility Requirement #2—No Other Impermissible Coverage

♦ From IRS Notice 2004-50

- > Q-10. Does coverage under an Employee Assistance Program (EAP), disease management program, or wellness program make an individual ineligible to contribute to an HSA?
- > A-10. An individual will not fail to be an eligible individual...solely because the individual is covered under an EAP, disease management program or wellness program if the program does not provide significant benefits in the nature of medical care or treatment...

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ IRS Notice 2004-50 contains numerous examples. Below is one example.
 - > Example (1). An employer offers a program that provides employees with benefits under an EAP, regardless of enrollment in a health plan. The EAP is specifically designed to assist the employer in improving productivity by helping employees identify and resolve personal and work concerns that affect job performance and the work environment. The benefits consist primarily of free or low-cost confidential short-term counseling to identify an employee's problem that may affect job performance and, when appropriate, referrals to an outside organization, facility or program to assist the employee in resolving the problem. The issues addressed during the short-term counseling include, but are not limited to, substance abuse, alcoholism, mental health or emotional disorders, financial or legal difficulties, and dependent care needs. This EAP ... does not provide significant benefits in the nature of medical care or treatment.

HSA Eligibility Requirement #2—No Other Impermissible Coverage

- ✦ Coverage provided by on-site clinics was addressed in IRS Notice 2008-59
- ✦ An example in that Notice states that the employer's on-site clinic could offer the following without jeopardizing the employees' HSA eligibility: (1) physicals and immunizations, (2) injecting antigens provided by employees (e.g., performing allergy injections), (3) a variety of aspirin and other nonprescription pain relievers, and (4) treatment of injuries caused by accidents at the plant
- ✦ If the employer's on-site clinic offers free or reduced-cost significant medical benefits, employees who have access to the clinic will not be "eligible individuals" for purposes of the HSA rules
- ✦ There is no IRS guidance that addresses the consequences of an employee paying at least fair market value for his or her on-site clinic benefits—but arguably that should work

HSA Eligibility Requirement #2—No Other Impermissible Coverage

♦ Telemedicine

- > It depends on the coverage provided
- > Is it like the EAP exception—does not provide significant benefits in the nature of medical care or treatment...
- > Or does that telemed doctor prescribe drugs to treat the employee's illness?
 - If so, seems like impermissible coverage

HSA Eligibility Requirement #3—Not Enrolled in Medicare

- ✦ Individuals who are “entitled to Medicare benefits” are not eligible to contribute to an HSA
- ✦ To be entitled to Medicare, an individual generally must be both eligible for Medicare AND enrolled in Medicare
- ✦ If an individual is enrolled in either Part A or Part B of Medicare, he/she cannot contribute to an HSA. For individuals already receiving Social Security retirement benefits prior to age 65, enrollment in Medicare Part A is automatic upon reaching age 65
- ✦ Individuals who have not yet applied for Social Security benefits prior to age 65 must affirmatively file an application for Medicare benefits in order to enroll in Medicare

HSA Eligibility Requirement #3—Not Enrolled in Medicare

- ✦ In general, an individual already receiving Social Security benefits cannot waive Medicare Part A—he/she will automatically be enrolled in Part A of Medicare at age 65
 - > That is, if an individual is receiving Social Security benefits, he/she cannot opt out of Medicare Part A in order to qualify for participation in an HSA
- ✦ For Social Security benefits due to age, “full retirement” age is the age at which a person may first become eligible for full or unreduced benefits
 - > However, no matter what a person’s full retirement age is, a person may start receiving Social Security benefits (at a reduced amount) as early as age 62, if certain requirements are met

HSA Eligibility Requirement #3—Not Enrolled in Medicare

- ✦ If an individual does not enroll in Medicare when he/she is first eligible (and is not enrolled in Social Security), his later enrollment in Medicare (either through enrollment for Social Security benefits or enrollment specifically for Medicare) may be retroactive for six months
 - > Example from CMS: Part A coverage begins the month the individual turns age 65, provided he or she files an application for Part A (or for Social Security or RRB benefits) within 6 months of the month in which he or she becomes age 65. If the application is filed more than 6 months after turning age 65, Part A coverage will be retroactive for 6 months
- ✦ Therefore, in the example above, the individual will be retroactively enrolled in Medicare Part A for the preceding six months, making him HSA ineligible for those six months

HSA Eligibility Requirement #4—Not Claimed as Dependent on Someone Else's Tax Return

- ✦ The deduction for HSA contributions does not apply to any individual who can be claimed as a personal exemption deduction (e.g., as a “dependent”) on another taxpayer's federal income tax return

HSA Contributions

- ✦ The annual HSA contribution limit (for 2016, \$3,350 for self-only coverage or \$6,750 for family coverage) is calculated each month, and a contribution can be made only for months in which the individual actually meets (or is treated under the full-contribution rule as meeting) all the requirements
- ✦ An individual who was an eligible individual may make an HSA contribution for a month in which he or she was HSA-eligible, even if he or she ceases to be an HSA-eligible individual
- ✦ HSA contributions for the eligible individual's taxable year must be made by the date for filing his or her federal income tax return for that year

HSA Contributions

- ✦ An additional annual “catch-up” contribution (currently \$1,000) may be made for eligible individuals who are age 55 or over
 - > A married couple may make two HSA catch-up contributions if both spouses are at least age 55, but a separate HSA must be established in the name of each spouse
- ✦ In addition, under the full-contribution rule, a full yearly contribution is also permitted for someone who is HSA-eligible for only a portion of the year if the individual is an eligible individual on December 1st of that year
 - > However, the individual will suffer adverse tax consequences if he or she does not remain HSA-eligible (for reasons other than death or disability) during the 13-month “testing period,” which begins with the December of the year for which those contributions were made and ends on the last day of the 12th month following that December

HSA Contributions

- ✦ HSA contributions are nonforfeitable
- ✦ The IRS has provided guidance on limited situations where mistaken HSA contributions can be returned to the employer (IRS Notice 2008-59)
 - > the employee on whose behalf the employer mistakenly makes the HSA contributions was never eligible for HSA contributions;
 - > the employer mistakenly contributes to the employee's HSA in excess of the contribution limits; or
 - > There is "clear documentary evidence demonstrating that there was an administrative or process error"

HSA Contributions

- ✦ In a recent IRS Chief Counsel Memo, it provided some additional examples of the type of errors which may be corrected:
 - > An amount withheld and deposited in an employee's HSA for a pay period that is greater than the amount shown on the employee's HSA salary reduction election
 - > An amount that an employee receives as an employer contribution that the employer did not intend to contribute but was transmitted because an incorrect spreadsheet is accessed or because employees with similar names are confused with each other
 - > An amount that an employee receives as an HSA contribution because it is incorrectly entered by a payroll administrator (whether in-house or third-party) causing the incorrect amount to be withheld and contributed
 - > An amount that an employee receives as a second HSA contribution because duplicate payroll files are transmitted

HSA Contributions

- > An amount that an employee receives as an HSA contribution because a change in employee payroll elections is not processed timely so that amounts withheld and contributed are greater than (or less than) the employee elected
- > An amount that an employee receives because an HSA contribution amount is calculated incorrectly, such as a case in which an employee elects a total amount for the year that is allocated by the system over an incorrect number of pay periods
- > An amount that an employee receives as an HSA contribution because the decimal position is set incorrectly resulting in a contribution greater than intended

HSA Contributions

- ✦ Excess HSA contributions are:
 - > not deductible (if made post-tax) or not excludable from the individual's income (if made pre-tax); and
 - > subject to a 6% excise tax for each year they remain in the HSA
- ✦ To avoid the 6% excise tax for excess contributions, the individual can:
 - > withdraw the excess contributions by the due date, including extensions, of his or her tax return for the year the contributions were made; and
 - > withdraw any income earned on the withdrawn contributions and include the earnings in "Other income" on his or her tax return for the year the contributions and earnings were withdrawn

HSA Distributions

- ✦ HSA account holders generally can receive HSA distributions at any time and for any purpose
 - > HSA trustee/custodian may place reasonable restrictions on minimum amount and frequency of distributions
- ✦ HSA distributions are tax-free if made for “qualified medical expenses”
 - > Defined as expenses for medical care under Code Section 213(d), for the account holder and his or her spouse or tax dependents, to the extent that those amounts are not reimbursed by insurance or otherwise
 - > For taxable years beginning after December 31, 2010, medicines and drugs (other than insulin) can only be qualified medical expenses if “prescribed” (regardless of whether they can be obtained without a prescription)

HSA Distributions

- ✦ HSA distributions other than for qualified medical expenses are included in the HSA holder's gross income and generally subject to an additional 20% tax
- ✦ This additional tax does not apply for:
 - > payments made following the account holder's death;
 - > payments made after the account holder has attained age 65;
 - > payments made after the account holder becomes disabled;
 - > excess contributions returned to the account holder, if done in accordance with Code's requirements; and
 - > permitted rollover contributions to an HSA
- ✦ The HSA trustee/custodian and the contributing employer are not required to determine whether HSA distributions are used for qualified medical expenses

HSA Trust/Custodian Requirements

- ★ HSAs must be established with a qualified HSA trustee or custodian
 - > Banks
 - > Life-insurance companies
 - > Approved IRA and Archer MSA custodians
- ★ Entities other than banks and insurers who satisfy certain requirements can request approval to be non-bank trustees in accordance with the procedures for non-bank IRA trustees
- ★ In all cases, a written trust agreement is required

HSA Reporting

- ✦ HSA Trustee/Custodian Reporting Obligations
 - > Must report contributions on Form 5498-SA (HSA, Archer MSA, or Medicare Advantage MSA Information)
 - > Must report account distributions on Form 1099-SA (Distributions From an HSA, Archer MSA, or Medicare Advantage MSA)
 - > Forms 5498-SA and 1099-SA must be filed with the IRS, and a copy must be provided to the account holder
- ✦ HSA Account Holder Reporting Obligations
 - > Must report contributions and distributions on Form 8889 (Health Savings Accounts (HSAs))—filed as an attachment to Form 1040
 - > Must report uncorrected excess contributions on Form 5329 (Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts)
- ✦ Contributing employers must report employer contributions in Box 12 of the employee's Form W-2 (Code W)

Additional Rules

The next slides will discuss:

- ✦ Certain Affordable Care Act rules;
- ✦ Application of ERISA to HSAs;
- ✦ The need for a Section 125 plan; and
- ✦ The Cadillac Tax

Additional Rules—ACA

- ✦ Separate from the HDHP rules, ACA limits permissible out-of-pocket maximums for in-network essential health benefits under non-grandfathered group health plans.
- ✦ For 2016, those limits are: \$6,850 for self-only coverage; and \$13,700 for other-than-self-only coverage
- ✦ Beginning in 2016, ACA also requires “embedded” individual out-of-pockets for in-network benefits under other-than-self-only coverage (if non-grandfathered) in certain cases—essentially if the plan’s other-than-self-only out-of-pocket is greater than the maximum permitted out-of-pocket for self-only coverage
- ✦ According to IRS/DOL FAQ, an employer can offer an HDHP that complies with both the applicable IRS HDHP limits and the embedded out-of-pocket maximum

Additional Rules—ACA

✦ Example of Embedded Out-of-Pocket Maximums

- > For 2016 in-network benefits, an HDHP provides a \$2,600 deductible and \$13,000 out-of-pocket maximum for other-than-self-only coverage. Because this out-of-pocket maximum is greater than the ACA's maximum permitted out-of-pocket maximum for self-only coverage (\$6,850), the \$6,850 self-only out-of-pocket maximum applies to each covered individual.
- > Individual #1 incurs \$8,000 in eligible in-network expenses. Individual #2 incurs \$4,000 in eligible in-network expenses. Neither Individual #1 nor Individual #2 has incurred any other expenses.
- > The plan must cover \$1,150 of Individual #1's in-network expenses (\$8,000 - \$6,850) with no cost-sharing—even though the \$13,000 out-of-pocket maximum for other-than-self-only coverage has not been met.
- > However, the plan can apply cost-sharing to all of Individual #2's \$4,000 in in-network expenses because Individual #2 has not met his/her \$6,850 embedded out-of-pocket maximum and the \$13,000 out-of-pocket maximum for other-than-self-only coverage has not been met.

Additional Rules—ERISA

- ★ There are two instances when ERISA will not apply to an HSA—if the HSA meets the voluntary plan safe harbor requirements set forth in DOL Regulation Section 2510.3-1(j) (“Voluntary Plan”) or if the HSA meets the test set forth by the DOL in Field Assistance Bulletins 2004-01 and 2006-02 (“DOL FABs”)

Additional Rules—ERISA

- ★ Voluntary Plan. Of the many requirements for the Voluntary Plan rule, there are two requirements which likely cannot be met: (1) the employer cannot “endorse” the plan and (2) the employer cannot make any contributions to the plan
- ★ With regards to endorsement, several court cases have found endorsement when the employer’s name is associated with the plan—such as where information distributed to employees about the plan contained the employer’s logo
- ★ Likely cannot meet this exception from ERISA

Additional Rules—ERISA

- ✦ DOL FABs. The following requirements (set forth in the DOL FABs) must be met in order for an HSA to be exempt from ERISA:
 - > (1) the employees' contributions to the HSA must be completely voluntary;
 - > (2) the employer must not limit employees' ability to move funds to another HSA;
 - > (3) the employer must not impose conditions on the utilization of the HSA funds;
 - > (4) the employer must not make or influence HSA investment decisions;
 - > (5) the employer must not represent that the HSAs are an ERISA plan; and
 - > (6) the employer must not receive any payment or compensation in connection with the HSA

Additional Rules—ERISA

- ✦ With regards to requirement #4 (*i.e.*, not make or influence HSA investment decisions), DOL Field Assistance Bulletin 2006-02 states, “The mere fact that an employer selects an HSA provider to which it will forward contributions that offers a limited selection of investment options or investment options that replicate the investment options available to employees under their 401(k) plan would not, in the view of the Department, constitute the making or influencing of an employee’s investment decisions giving rise to an ERISA-covered plan, so long as employees are afforded a reasonable choice of investment options and employees are not limited in moving their funds to another HSA.”

Additional Rules—ERISA

- ✦ With regards to requirement #6 (*i.e.*, must not receive any payment or compensation in connection with the HSA), the DOL has provided very little guidance on this issue
- ✦ It has stated that the employer's FICA and FUTA tax savings from offering an HSA via salary reductions would not be considered impermissible payment or compensation
- ✦ However, an employer receiving a discount on another product from an HSA vendor that the employer has selected would constitute the employer's receiving an impermissible payment or compensation

Additional Rules—ERISA

- ✦ In the event the HSA is subject to ERISA, there are several unanswered questions as to how the employer will satisfy certain ERISA requirements. For example, how does the employer complete the Form 5500 for the HSA? How does COBRA apply to the HSA?
- ✦ Just be sure to follow the rules described above so that ERISA does NOT apply!!

Additional Rules—Section 125

- ★ An employer that contributes to its employees' HSAs outside of a cafeteria plan will be subject to an excise tax equal to 35% of all of its contributions for a calendar year unless it makes comparable contributions for all comparable participating employees for each coverage period during that year
- ★ These rules are IMPOSSIBLE to meet—ok, not impossible, but very difficult
- ★ Use the Section 125 exception!

Additional Rules—Section 125

- ✦ The comparability rules do not apply to HSA contributions that an employer makes through a Section 125 plan
- ✦ When HSA contributions are made through a Section 125 plan, the 125 nondiscrimination rules apply, which are easier to understand and comply with
- ✦ Amend the 125 plan so that employees can make additional pre-tax HSA salary contributions
 - > This will allow for the treatment of all employer HSA contributions to be treated as made through the 125 plan

Additional Rules—Cadillac Tax

- ✦ Becomes effective in 2018
- ✦ A non-deductible 40% excise tax on high-cost group health plan (GHP) coverage under Section 4980I
 - > Certain types of coverage excluded
- ✦ Applies to the portion of the cost of coverage that exceeds the statutory limits
 - > \$10,200 for self-only coverage and \$27,500 for other than self-only coverage
 - Limits are indexed for future years based on the Consumer Price Index (not the rate of medical inflation)
 - > Cost of coverage to be determined under rules “similar” to those for defining applicable premiums of COBRA coverage

Additional Rules—Cadillac Tax

- ✦ Assessed against the “coverage provider”
 - > Insured plan — Health insurer
 - > HSA or Archer MSA — Employer that makes contributions
 - > Self-funded plan (major medical, HRAs, health FSAs) — “Person that administers the plan benefits” (controlled-group rules apply)
- ✦ Assessed on a calendar-year basis
 - > Excess amount calculated on a monthly basis
 - Calculated by the employer
- ✦ IRS has not yet issued any regulations
 - > Proposals for future guidance issued in 2015
 - Notice 2015-16 (February)
 - Notice 2015-52 (July)
 - > Proposals request comments on various aspects of the tax

Additional Rules—Cadillac Tax

- ✦ Specific types of coverage subject to the tax include:
 - > Major medical (insured and self-funded)
 - > Health FSAs
 - > HRAs
 - > **HSAs (employer and employee contributions)**
 - **IRS has proposed excluding after-tax employee contributions**
 - > Hospital indemnity or other fixed indemnity insurance if paid on a pre-tax basis
 - > On-site medical clinics (some exceptions proposed by the IRS)
- ✦ Could be the death of HSAs (but we hope not!)

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