

Benefit Express



Common Questions Regarding Compliance Issues

By

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ERISA Issues



ERISA Issues

- **Is there a small employer exception for complying with ERISA?**
- No, virtually every private-sector employer is subject to ERISA - there is no size exemption
- This includes corporations, partnerships, and sole proprietorships
- Remember, non-profit organizations are covered as well
- However, the plans of governmental employers and of churches are exempt from the application of ERISA Title I



ERISA Issues

- **Can insurance contracts act as a Plan document for my benefits program?**
- No, they are missing many important provisions
 - Employer's right to amend or terminate the Plan
 - Who is the Plan administrator and its duties
 - Which state law to apply in case of a dispute
 - Subrogation rights
 - Other provisions



ERISA Issues

- **What are the consequences if my employer does not have a Plan document?**
- Could increase the number of Form 5500 filings
- Courts could determine plan terms
- Letters, company communications could become Plan terms
- Fiduciaries could be liable for breaches



ERISA Issues

- **Are there any exceptions from any benefit being considered an ERISA benefit?**
- “Voluntary Employee-Pay-All” Exemption - The employer allows an insurance company to sell voluntary policies to interested employees who pay the full cost of the coverage
- Permits employees to pay their premiums through payroll deductions and permits the employer to forward the deductions to the insurer
- However, the employer may not make any contribution toward coverage and the insurer may not pay the employer for being allowed into the workplace
- The employer may not “endorse” the program - This element is the key element in treating the program as an ERISA benefit. What makes up an endorsement?
 - Selecting insurers
 - Negotiating terms or design
 - Linking plan coverage to employee status
 - Using employer’s name
 - Recommending plan to employees
 - Doing more than permitted payroll deduction



ERISA Issues

- **Is there a small Plan exemption for providing Summary plan Descriptions to employees?**
- No, almost every private sector employee benefit Plan must comply
- **Are there any plans that are exempt?**
 - Exemption of employer-provided daycare centers - DOL Reg. §2520.104-25
 - Exemption of welfare plans for certain select employees - DOL Reg. § 2520.104-24
 - Cafeteria Plans – considered a fringe benefit Plan, but health FSA must comply



ERISA Issues

- **Can insurance contracts serve as a Summary Plan Description for an employer's benefit programs?**
- No, insurance contracts are:
 - missing many important provisions
 - not written in understandable language



ERISA Issues

- **Can corporate officers or board directors be held liable for losses under an ERISA welfare Plan?**
- Yes, if anyone is found to be a functional fiduciary
- A functional fiduciary is anyone who has discretionary authority under the Plan



Cafeteria Plan Issues



Cafeteria Plan Issues

- **In what situations can a participant changes his or her election under a Health FSA during a Plan year?**
- There are only six situations in which participants may be allowed to change his or her election during the Plan year:
 - Change in Status
 - FMLA
 - Medicare
 - QMCSO
 - Special enrollment situations
 - COBRA



Cafeteria Plan Issues

- **Can an employer use a last check to reimburse unpaid amounts?**
- No, an employer may only withdraw those amounts that the employee has elected
 - IRS information Letter - July 9, 1998



Cafeteria Plan Issues

- **Can an employer reimburse an employee for individual insurance coverage under a premium only plan?**
- Yes, but there are possible issues with ERISA, COBRA and HIPAA



Cafeteria Plan Issues

- **Are health FSAs subject to the requirements of HIPAA privacy?**
- Yes, Health FSAs must comply
- There are exceptions for those Plans that have under 50 participants and are self-administered
- Plans must comply separately from insured health Plans



Cafeteria Plan Issues

- **Before a participant can be reimbursed for an expense under a Health FSA, must the participant pay for the expense?**
- No, it is only required that the participant incurred the expense to be reimbursed



Cafeteria Plan Issues

- **Must a participant in a health FSA be offered COBRA upon termination of employment during the year?**
- Yes, but only if the employee has not overspent his or her account
- In most situations, COBRA must only have to be offered until the end of the Plan year



COBRA Issues



COBRA Issues

- **Who is a qualified beneficiary under COBRA?**
- Employees, spouses and dependent children
- Must be covered on the day before the qualifying event
- Also includes a child born or adopted by a covered employee during COBRA
- A spouse added by a COBRA beneficiary during COBRA is not a qualified beneficiary
- Former dependent is a qualified beneficiary and may add children during COBRA



COBRA Issues

- **Can a qualified beneficiary change coverage elections during COBRA?**
- Yes, during annual enrollment, a qualified beneficiary must be given the same coverage choices as active employees



COBRA Issues

- **Can a qualified beneficiary add coverages during open enrollment?**
- Yes, a qualified beneficiary must be given the same options as active employees



COBRA Issues

- **When a qualified beneficiary elects COBRA coverage, must he or she be given a separate election for each benefit offered or one election for all benefits?**
- It depends. If an employer offers medical, dental, and vision under separate plans, the employer must offer the qualified beneficiary three separate elections.
- If the employer offers all benefits under one plan, the employer is only required to offer one election for all benefits



COBRA Issues

- **When does entitlement to Medicare terminate COBRA?**
- If a qualified beneficiary's Medicare entitlement occurs after COBRA is elected, then the qualified beneficiary's COBRA coverage can be terminated even though Medicare does not provide a benefit package as generous as the COBRA plan



COBRA Issues

- **What is the effect on COBRA coverage if a covered employee becomes entitled to Medicare before the qualifying event?**
- When a covered employee's qualifying event (i.e. a termination of employment or reduction of hours) occurs within the 18-month period after the employee becomes entitled to Medicare, the employee's spouse and dependent children (but not the employee) become entitled to COBRA coverage for a maximum period that ends 36 months after the covered employee becomes entitled to Medicare



COBRA Issues

- **Does an employer still have to offer COBRA to a qualified beneficiary if he or she becomes entitled to Medicare before the qualifying event?**
- Yes, when a qualified beneficiary is entitled to Medicare prior to electing COBRA, he or she still gets COBRA coverage. The COBRA offer cannot be withheld because of Medicare entitlement.



COBRA Issues

- **One of my employees dropped his spouse from health coverage during annual enrollment and then files for divorce a few months later. Does the employer have to offer the spouse COBRA coverage?**
- Yes, the spouse is entitled to elect COBRA only if:
 - The divorce actually occurred and
 - The employee eliminated or reduced the spouse's coverage "in anticipation" of the divorce



HIPAA Issues



HIPAA Issues

- **Does HIPAA require that an employer has to offer health coverage to every employee?**
- No, If an employer's health plan is insured, there are no nondiscrimination requirements
- No group health plan may discriminate under HIPAA against any individual or dependent as to eligibility for coverage, continued eligibility for coverage, or premiums based on:
 - health status
 - medical condition, including physical and mental illness
 - claims experience;
 - receipt of health care
 - medical history
 - genetic information
 - evidence of insurability, including conditions arising out of domestic violence; or
 - disability



HIPAA Issues

- **Can an employer require every employee to complete a health risk assessment before being covered by its health plan?**
- No, the EEOC has noted “that conditioning the availability of employer-provided health insurance on an employee’s participation in [an HRA] might well render participation in the assessment involuntary, making unlawful any disability-related inquiries or medical examinations that are part of the assessment”



HIPAA Issues

- **Under what situations may an employer offer a discount or impose a surcharge on premiums to employees?**
- Wellness programs that condition eligibility for a reward upon a participant's ability to meet a standard that is related to a health factor are permissible only if they meet satisfy each of the following five requirements:
 - The reward must be no more than 20% of the cost of coverage
 - The program must be designed to promote health or prevent disease
 - The program must give individuals an opportunity to qualify for the reward at least once a year
 - The reward must be available to all similarly situated individuals
 - The plan must disclose that alternative standards (or waiver) are available



HIPAA Issues

- **Can an employer offer any other wellness programs to employees?**
- Wellness programs that do not condition eligibility for a reward upon a participant's ability to meet a health standard (which we refer to as "participation-only programs") are permissible if participation in the programs is available to all similarly situated individuals.
- Examples of such programs include:
 - incentives to participate in a health fair or testing (regardless of outcome)
 - waiver of co-payment/deductible for well-baby visits
 - reimbursement of health club membership;
 - reimbursements for smoking cessation programs (regardless of outcome); and
 - a program that rewards employees for attending a monthly health education seminar



HIPAA Issues

- **Are any wellness benefits offered to employees taxable?**
- Yes, if the benefit does not qualify either as an “eligible medical expense” under Code Section 213 or a “fringe benefit” under Code Section 132



HSA Issues



HSA Issues

- **Which individuals are eligible to make or receive contributions to an HSA?**
- For any month, an eligible individual is defined as any individual who:
 - is covered only by a high-deductible health plan (HDHP) as of the first day of such month
 - is not also covered by any other health plan that is not a HDHP (with certain exceptions for plans providing certain limited types of coverage)
 - is not enrolled in benefits under Medicare and
 - may not be claimed as a dependent on another person's tax return



HSA issues

- **An individual is covered by an HDHP for 2007. He also covers his dependent children under his HDHP. His wife also covers the dependent children under her health plan that is not HDHP, but not the husband. Is husband eligible to contribute at the higher family coverage level if his dependents are covered by a health plan that is not an HDHP**
- Yes. As long as the eligible individual is not covered by his or her spouse's health plan that is not a high deductible health plan, that individual would be eligible to make HSA contributions
- Since the dependents are not eligible to make HSA contribution, it does not matter if any dependent is covered by a health plan that is not a HDHP
- If an employee has family coverage, the dependents can be covered by another Plan that is not a high deductible



HSA Issues

- **If an employee's spouse participates in a Health FSA during the year and the spouse can be reimbursed for the employee's expenses, will that right make the employee ineligible to participate in a HSA?**
- **Yes, even if the spouse never submits a claim for reimbursement the employee's expenses under the Health FSA**



HSA Issues

- **If an employer adopts a HDHP during the year, may an employee elect to terminate participation in a Health FSA?**
- No, a change in cost or coverage is not a allowable reason to change an election during the year for Health FSAs



HSA Issues

- **Can an employee participate in either a Health FSA or a HRA in the same month and still be eligible to make or receive contribution to an HSA?**
- No, unless the employee's situation is one of the following:
 - The employee's expenses reimbursed under a Health FSA and/or an HRA are limited to dental, vision and/or preventive care benefits ("Limited Purpose Health FSA or HRA")
 - The employee suspends participation in an HRA for the year ("Suspended HRA")
 - Health FSA or HRA pays expenses above the deductible of the HDHP ("Post-Deductible Health FSA or HRA"). If the deductible limits of the HDHP and the HRA are different, contributions to the HSA are limited to the lower of the deductibles
 - HRA pays or reimburses the employee's expenses incurred after the employee retires ("Retirement HRA")



HSA Issues

- **Can an employer amend its general purpose FSA to a limited purpose Health FSA during the year?**
- It is unclear
- An employer may amend its Health FSA during the grace period to a limited purpose Health FSA



HSA Issues

- **Must an individual participate in a HDHP for the entire calendar year to contribute the full amount?**
- For calendar years beginning before 2007, yes
- For calendar years beginning after 2006, no, but must be covered by the HDHP for the “testing period”
- The testing period is the period beginning with the last month of the taxable year and ending on the last day of 12th month following such month



HSA Issues

- **If an individual has family coverage under a HDHP with a \$3,000 deductible, how much can he or she contribute for 2006 and 2007?**
- For 2006: \$3,000
- For 2007: \$5,650

- For years beginning in 2007, the requirement limiting HSA contributions to the lesser of specified dollar amount or the annual deductible under the HDHP has been repealed



HSA Issues

- **A married couple participates in single coverage with two separate HDHPs of unrelated employers with a \$4,000 deductible. How much can they contribute to their HSAs?**
- The total contribution can not exceed \$5,650 for 2007.
- The contribution can be split any way as long as one spouse does not receive more than \$4,000 for any year



HSA Issues

- **An employer sponsors a HSA and requires employees to establish their HSAs at a particular financial institution. Once contributions are made to the HSA, the employee directs contributions to be transferred to an other institution. Can an employer limit the employees' ability to transfer?**
- **No, once contributions are made to an employee's HSA, they are owned by the employee and he or she has complete freedom to transfer funds**



HSA Issues

- **May participants transfer health FSA or HRA balances to an HSA?**
- Yes, but meet the following requirements:
 - The employer amends the plan effective by the last day of the plan year to allow Qualified HSA distribution
 - A Qualified HSA Distribution has not previously been made for that employee with respect to that Health FSA or HRA
 - The employee has HDHP coverage as of the first day of the month during with the distribution occurs, and is otherwise an eligible individual
 - The employee elects by the last day of the plan year to have the employer make a Qualified HSA Distribution



HSA Issues

- The Health FSA or HRA makes no reimbursements to the employee after the last day of the plan year
- The employer makes the distribution directly to the HSA trustee or custodian by the fifteenth day of the third calendar month following the end of the plan year, but after the employee becomes HSA eligible
- The distribution does not exceed the lesser of the balance of the Health FSA or HRA on September 21, 2006 or the balance on the date of the distribution
- After the distribution, there is a zero balance in the Health FSA or HRA and the employee is no longer a participant in any non-HSA compatible health plan, or before the first day of the eligible distribution, the general purpose Health FSA or HRA is converted to an HSA-compatible plan for all participants



HSA Issues

- **Can an individual transfer his or her IRA balances to a HSA?**
- Yes, but meet the following requirements:
 - An individual may make a one-time contribution to a HSA of an amount distributed from his or her IRA
 - The contribution must be made in a direct trustee-to trustee transfer
 - Amounts distributed from the IRA are not includible in the individual's income to the extent that the distribution would otherwise be includible in income
 - Such distributions are not subject to the 10-percent additional tax on early distributions



HSA Issues

- The amount that can be distributed from the IRA and contributed to a HSA is limited to the otherwise maximum deductible contribution to the HSA computed on the basis of the type of coverage under the HDHP at the time of the contribution
- The amount that can otherwise be contributed to the HSA for the year of the contribution from the IRA is reduced by the amount contributed from the IRA
- No deduction is allowed from the amount contributed from an IRA to a HSA



HSA Issues

- **If an employer want to make contributions to employees' HSAs, what requirements must be met?**
- An employer must make available comparable contributions (e.g. same amount or the same percentage of deductible) on behalf of all employees with comparable coverage during the same period (e.g. single/family)
- An employer is now allowed to make larger HSA contributions for non-highly compensated employees than for highly compensated employees.
- An employer may also make different contributions to part-time employees, former employees, and collectively bargained employees



HSA Issues

- **Who has to correct the HSA if either the employer or the employee over contributes to the employee's HSA?**
- It is the employee's responsibility



HSA Issues

- **If a HSA participant receives a distribution from his HSA to buy a big screen TV, is that distribution allowed? Is it taxable? Would the answer be different if he or she had other unreimbursed medical expenses later during the same taxable year?**
- **The distributions would be taxable if the HSA participant has no unreimbursed medical expenses during the year**

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Questions?

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