ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Steven Mindy, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

PASSAGE OF HOUSE BILLS WARRANTS A FRESH LOOK AT HEALTH SAVINGS ACCOUNTS: PART TWO

This is part two of a two-part article. Part one can be found in the September issue of The Self-Insurer

ealth savings accounts (HSAs) provide a tax-favored means for individuals to save and pay for medical expenses not covered by insurance. In order to contribute to an HSA, the individual must be enrolled in a specially defined type of plan called a high deductible health plan (HDHP) and have no other health plan coverage (other than certain limited types of permitted coverage such as vision, dental, accident, specified disease, and certain fixed indemnity coverage).

The combination of an HDHP and an HSA is commonly referred to as a consumer driven health plan. While the premium for the HDHP may be only slightly lower than the premiums for health plans with a lower deductible, the tax savings from the HSA is what generally makes these arrangements attractive.

HSAs were first available starting in 2004. Since then, as traditional health coverage premiums have continued to increase, interest in these types of consumer driven health plans has increased. Survey data indicates that in 2017, 43.7% of persons under age 65 with private health insurance were enrolled in an HDHP, including 18.2% who were enrolled in an HDHP with an HSA.[1]

House passage of proposed HSA improvement legislation (the “HSA Bills”) in July could resolve many potential compliance issues and make HSA/HDHP arrangements even more accessible and easier to use.

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This two-part article provides a brief overview of HSAs and addresses key legislative developments based on the HSA Bills. In Part One we addressed the tax benefits associated with an HSA, who can establish an HSA, what types of coverage qualify as HDHP coverage and what additional coverage may be allowable. In this Part Two we address how much can be contributed, what medical expenses are eligible, and certain ERISA compliance issues

6. What are the HSA contribution rules?

The maximum permitted HSA contribution varies based on whether the coverage is self-only or family coverage, and is subject to adjustment for inflation.

HSA Annual Contribution Limits

Type of HDHP Coverage	2018	2019
Self-only	$3,450	$3,500
Family	$6,900	$7,000

The HSA Bills would increase these amounts so that contributions could be made potentially all the way up to the employee's out-of-pocket exposure.

Individuals age 55 and older and not enrolled in Medicare may make an additional $1,000 contribution each year. This amount is not indexed for inflation. Spouses who are both eligible to contribute to an HSA cannot make this additional contribution to the same account. Each spouse needs to have their own account in order for both spouses 55 or older to make the additional $1,000 contribution. The HSA Bills would simplify this by allowing the additional contribution to go into either spouse's HSA.

Both employers and employees may contribute to an HSA. Total combined contributions cannot exceed the maximum contribution limit.

Employer contributions may be subject to nondiscrimination rules that require the employer to make "comparable contributions" for comparable participating employees in the HDHP. In practice, these comparable contribution requirements seldom apply, as there is an exception for any employer that allows employees to make salary reduction contributions through a cafeteria plan.

7. What medical expenses can be paid tax-free from an HSA?

In general, qualifying medical expenses for HSA purposes are out of pocket medical expenses incurred after the HSA is established. For HSA purposes, medical expenses are defined in the same way that medical expenses are defined under the federal tax laws for purposes of the itemized deduction for medical expenses (without regard to the adjusted gross income limitation on deductible medical expenses).[2]

Under this definition, medical expenses include the cost of diagnosis, cure, mitigation, treatment or prevention of disease and the cost for treatments affecting any part or function of the body. Thus, for example, qualified medical expenses include amounts paid to medical care providers before the deductible under the HDHP is met and for any co-payments or co-insurance after the deductible is met.

Qualified medical expenses also include medical expenses that are not covered by the HDHP, such as vision or dental benefits (if not covered). There is no complete list of qualifying medical expenses; however, the IRS has provided a listing of common expenses in IRS Publication 502.

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Individuals can receive tax-free distributions for qualifying medical expenses, even if they are no longer eligible to contribute to an HSA. Qualifying medical expenses also include expenses incurred by the HSA owner's spouse and dependents.

There are also some important limitations on medical expenses that can be paid tax-free from an HSA:

- Insurance premiums, including for the HDHP, do not qualify for tax-free treatment, unless the premiums are for:
    - Long-term care insurance,
    - COBRA continuation coverage,
    - Health coverage while receiving unemployment compensation under federal or state law,
    - Medicare or other health coverage for an individual age 65 or older (other than premiums for a Medicare supplemental or Medigap policy).
- Medicines that can be legally purchased without a prescription (over-the-counter medicines) cannot be reimbursed from an HSA unless the individual gets a prescription for the medicine. Insulin may be paid for by an HSA without a prescription. The HSA Bills would allow OTC expenses to be an eligible medical expense.
- The medical expenses must be incurred *after* the HSA is established. Medical expenses incurred before the HSA was established don't count, even if the individual was HSA eligible when the expense was incurred. As a result of this limitation, HSA eligible individuals may want to establish their HSA as soon as possible. As we discuss in our next article, the requirement that an expense be incurred after the HSA has been established has caused some administratively difficulty related to the timing of the HSA establishment that would be addressed by the proposed HSA Bills.

8. Are HSAs subject to ERISA?

Whether an HSA is subject to ERISA depends on the level of involvement of the employer. The Department of Labor (DOL) has issued guidance that employers may follow so that their HSAs are not subject to ERISA. Most employers structure their HSA program in accordance with the DOL guidance in order to avoid triggering ERISA application to the HSA. Note that a group HDHP offered by the employer is likely to be a group health plan subject to ERISA even though the corresponding HSA may not be.

Under DOL guidance, an HSA will generally not be subject to ERISA if the following six requirements are satisfied:

- Establishment of the HSA is completely voluntary on the part of the employee.
- The employer does not limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the federal tax laws.
- The employer does not impose conditions on utilization of HSA funds beyond those permitted under the federal tax laws.
- The employer does not make or influence the investment decisions with respect to funds contributed to an HSA.
- The employer does not represent that the HSAs are an employee welfare benefit plan established or maintained by the employer.
- The employer does not receive any payment or compensation in connection with an HSA.

Conclusion: An HDHP coupled with an HSA program may be an attractive choice for many employers and employees. Surveys indicate that such arrangements are becoming more popular as HDHP coverage becomes more predominant. Stay tuned for future articles as we provide an update of new HSA developments. ■

References:

1 https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur201805.pdf

2 The adjusted gross limit is 7.5% in 2018, and increases to 10% in 2019.

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[1]Ranking of top stop loss providers in the United States based on yearly premium as of 03/16/2017 by MyHealthGuide Newsletter: News for the Self-Funded Community, and does not include managed health care providers.

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