

SUMMARY

HSA Comparability Regs

Last Friday, the Internal Revenue Service released final regulations on the section 4980G excise tax for employers' Health Savings Account ("HSA") contributions. The excise tax applies to any employer HSA contribution that does not satisfy the statutory rule on "comparability." In general, the comparability rule requires that employers make the same contribution to all individuals who are in the same category of employee (*i.e.*, full-timers, part-timers, former employees) and have the same level of High Deductible Health Plan ("HDHP") coverage. Many employers and providers were concerned that the proposed regulations on comparability would preclude employers from making variable HSA contributions even where such variation would result in increased contributions for lower paid workers. These final regulations set the rules for determining comparable contributions and modify the proposed rules to provide greater flexibility to employers who sponsor HDHPs and desire to make HSA contributions, including the following:

- The comparability rules do *not* apply to any employer HSA contribution if an eligible employee with HDHP coverage has the *opportunity* to make any salary reduction contribution to an HSA under an employer cafeteria plan. In such case, all employer contributions to the HSA are subject to the section 125 cafeteria plan nondiscrimination rules rather than the comparability rules.
 - A number of employer groups and providers requested that the proposed regulations be clarified to apply section 125 rather than the more restrictive comparability rule.
 - Applying the section 125 nondiscrimination test generally will facilitate the use of matching contributions, employer "seed" contributions, and other variable HSA contributions (*e.g.*, increased contributions for participation in a disease management program) that could not be accommodated under the comparability rule but are likely to pass the section 125 nondiscrimination test when nonhighly compensated employees are eligible for similar benefits to the highly compensated employees.
 - The section 125 rules apply regardless whether the employee actually makes any pre-tax contribution to the HSA as long as the employee has the opportunity to do so.
 - The result is that most employer plans will be tested under section 125 and the comparability rules will not come into play. *Note:* New section 125 proposed regulations are expected later this summer or early fall that may provide more specificity on the scope and application of the nondiscrimination rules to all cafeteria plan benefits, including HSA contributions.
- If the comparability rules apply, the final regulations clarify the following:

- Collectively-bargained employees may be excluded in determining whether contributions are comparable to non-collectively bargained employees.
 - The term “comparable contributions” is defined to mean, in part, the same dollar amount or the same percentage of the deductible for each comparable group (*e.g.*, same dollar amount or percentage of deductible for all those with self-only HDHP coverage, and same dollar amount or percentage of deductible for all those with the same level of family HDHP coverage, such as self plus one, self plus two, etc.)
 - In determining whether contributions are comparable, part-timers, full-timers, and former employees are tested separately.
 - COBRA participants need not receive any contribution in order to satisfy the comparability test.
 - An employer can choose to provide comparable contributions only to those employees or former employees who participate in the employer’s HDHP (*i.e.*, the employer need not contribute to an HSA of an employee who receives HDHP coverage through a spouse’s employer.)
 - Best efforts should be made to locate employees who have departed and not yet received a comparable HSA contribution for the applicable period.
 - The final regulations reserve on the employer’s obligation with respect to an employee who is eligible for a contribution but who does not open an HSA.
- The final regulations are effective for contributions made on or after January 1, 2007.

Please call Cathy Creech or Seth Perretta at 202 347 2230 if you have any questions.