



Employer Comparable HSA Contributions Regulations

Treasury and the IRS issued on July 28, 2006 final regulations concerning Health Savings Account (HSA) comparability rules. Comparability rules provide that an employer contributing to one employee's HSA must contribute comparable amounts to all employees who have HSAs.

The final regulations expand the flexibility of the proposed rules issued on August 2005. Specifically, employers will be able to make different comparable contributions based on different variations of family coverage, and exclusions for employer contributions made through cafeteria plans were clarified. Also, an exception was given for the comparability requirement for groups of collectively bargained employees.

These regulations apply to employer contributions to HSAs made on or after January 1, 2007.

Background

The Medicare Prescription, Improvement and Modernization Act of 2003 (Act) established HSAs for taxable years beginning after December 31, 2003. Section 4980G was also added to the Act which imposes an excise tax on the failure of an employer to make comparable contributions to the HSAs for its employees for a calendar year.

Proposed Regulations

On August 26, 2005 the IRS and Treasury released proposed regulations implementing comparability requirements that must be met for employer contributions for eligible employee's HSAs. These regulations are to be relied upon in the interim until the final regulations are issued.

Under the proposed rules, employers that elect to make contributions to their employees' HSAs are required to make comparable contributions for all employees who (1) are eligible individuals enrolled in a high deductible health plan (HDHP), (2) are in the same category of employment and (3) have the same category of coverage.

The three employment categories are:

- Current full-time employees (those who usually work at least 30 hours per week)
- Current part-time employees (those who work fewer than 30 hours per week)
- Former employees (excluding individuals on COBRA coverage)

The two categories of coverage are:

- Self-only coverage
- Family coverage

The proposed rules emphasize that the three categories of employment and two categories of coverage are the only basis for differentiating the levels of an employer's contributions. Therefore, an employer cannot contribute different amounts or percentages for:

- Different collective bargaining groups
- Management or non-management groups
- Employees who participate, e.g., in disease management or wellness programs
- Employees based on age or service criteria

The excise tax that applies if employer contributions do not satisfy the comparability rules is 35 % of the aggregate contributions that the employer has made to employee's HSAs for the year.

The comparability rules do not apply to contributions made through a cafeteria plan. These contributions include an employee's salary reduction contributions, employer matching contributions that an employee may elect to receive in cash, and any other employer contributions that an employee may receive in cash or have contributed to an HSA. Cafeteria plan contributions are subject to nondiscrimination rules under Code section 125, but not the comparability rules.

Final Regulations

The issued final regulations adopted the provisions of the proposed regulations with certain modifications. In particular, the final regulations include the following features:

- An exception from the comparability requirement for groups of collectively bargained employees;
- The ability to make different comparable contributions based on different variations of family coverage;
- Further clarification of the exclusion from the comparability requirement for employer contributions made through a cafeteria plan.

Collective Bargained Employees- the final regulations provide that employees who are included in a unit of employees covered by a bona fide collective bargaining agreement between employee representatives and one or more employers are not comparable participating employees, if health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers. Collective bargained employees are, therefore, disregarded for purposes of Section 4980G.

Family Coverage - the final regulations allow family HDHP coverage to be subdivided into the following additional categories of HDHP coverage:

- Self plus one
- Self plus two
- Self plus three or more

In addition, the final regulations provide that an employer's contribution with respect to the self plus two category may not be less than the employer's contribution with respect to the self plus one category and the employer's contribution with respect to the self plus three or more category may not be less than the employer's contribution with respect to the self plus two category.

Cafeteria Plan Contributions - under the final regulations, if employees are allowed to contribute to an HSA by salary reduction through a cafeteria plan, all employer contributions to the employee's HSA will be treated as being made through a cafeteria plan (and thus excluded from the comparability rules). However, contributions to an HSA made through a cafeteria plan are subject to the section 125 nondiscrimination rules (eligibility rules, contributions and benefits tests and key employee concentration tests).

Summary

The provisions of the final regulations are designed to accommodate the needs of employers for additional flexibility in designing plans to provide health benefits for employees while preserving the protections of the comparability rules. HSAs and HSA-compatible health insurance have enabled many employers - especially smaller employers - to provide meaningful, affordable health coverage to their employees.