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Application of ERISA to Health Savings Accounts

The Employee Retirement Income Security Act of 1974 ("ERISA") is a federal law passed to protect pension rights. The U.S. Congress, out of concern over corporate mismanagement of worker's retirement funds, passed this act in 1974. ERISA sets minimum standards for pension plans, guaranteeing that pension rights cannot be unfairly denied to or taken from a worker. ERISA provides some protection for workers in the event certain types of pension plans cannot pay the benefits to which workers are entitled, and ERISA requires that employers provide full and clear information about employees' pension rights.

ERISA also protects employees' "welfare" benefits, which include employer-sponsored health insurance, as well as short- and long-term disability insurance. ERISA defines an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness . . . ." One can cull from ERISA's definition three basic components of an employee welfare benefit plan: (1) there must be a plan fund or program; (2) that is established or maintained by an employer; (3) for the purpose of providing medical, surgical, hospital care or sickness benefits.

Where a plan sponsored by an employer meets the definition of an employee welfare benefit plan, both the employer and the plan must comply with certain requirements set forth at Title I of ERISA. Title I of ERISA, which is administered by the U.S. Department of Labor ("DOL"), imposes upon entities sponsoring ERISA plans: (1) extensive reporting, recordkeeping and disclosure requirements (such as having a written plan document, providing a summary plan description to participants and beneficiaries of the plan, and filing a Form 5500); (2) minimum standards for participation, vesting and funding; (3) fiduciary responsibilities and prohibitions from engaging in certain transactions; (4) administration and enforcement requirements (such as having to follow adequate claims processing and appeals procedures); (6) group health care continuation coverage requirements; and (7) requirements relating to the portability, access and renewability of group health care.

The DOL has clarified ERISA's fairly vague definition of "employee welfare benefit plan" by providing "safe harbor regulations" that describe specific plans, funds and arrangements that do *not* constitute welfare plans. Because these arrangements also do not constitute "employee pension benefit plans," they are exempt from Title I's

stringent directives. The safe harbor regulations exclude from ERISA coverage certain group or group-type insurance programs. In general, such insurance programs will be excluded from coverage if: (1) there are no employer contributions; (2) employee participation is voluntary; (3) the employer does not endorse the program; and (4) the employer receives no consideration in connection with the program, other than reasonable compensation for administrative services actually rendered in connection with payroll deductions.

HSAs were created by the Medicare Modernization Act ("MMA") signed by President Bush on December 8, 2003, and are designed to help individuals pay for current health expenses and save for future qualified health expenses on a tax free basis. In general, to be eligible for an HSA, an individual must be covered by a High Deductible Health Plan ("HDHP").[1] In enacting the MMA, Congress recognized that HSAs would be established in conjunction with employment based health plans and specifically provided for employer contributions – but failed to specifically address the application of Title I of ERISA to HSAs – an omission that left many employers concerned and confused as to whether HSAs constitute employee welfare benefit plans covered by ERISA.

The DOL provided much needed guidance in April 2004, when its Employee Benefits Security Administration ("EBSA") issued a Field Assistance Bulletin ("FAB") discussing ERISA's application to HSAs.[2] The guidance makes clear that while private-sector employer-sponsored HDHPs are group health plans subject to ERISA's reporting, disclosure, fiduciary responsibility and other requirements, HSAs generally will not constitute ERISA-covered employee welfare benefit plans. The guidance also clarifies that an employer can make contributions to the HSA of an eligible individual without being considered to have established or maintained the HSA as an ERISA-covered plan, provided that the employer's involvement with the HSA is limited.

According to FAB 2004-1, HSAs meeting the conditions of the safe harbor for group or group-type insurance programs at 29 C.F.R. § 2510.3-1(j)(1)-(4), as summarized above, are not employee welfare benefit plans within the meaning of ERISA. Thus, DOL employer contributions to HSAs will not give rise to an ERISA-covered plan where the establishment of the HSAs is completely voluntary on the part of the employees and where the employer does not: (1) limit the ability of eligible individuals to move their funds to another HSA beyond restrictions imposed by the Code; (2) impose conditions on utilization of HSA funds beyond those permitted under the Code; (3) make or influence the investment decisions with respect to funds contributed to an HSA; (4) represent that

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[1] An HDHP is an employer sponsored health plan that features higher annual deductibles than traditional health plans.

[2] An FAB publishes the technical guidance that EBSA issues to its enforcement staff and is part of the DOL's ongoing effort to help employers, plan sponsors, plan officials and service providers comply with ERISA. FABs are available on the Internet at <www.dol.gov/ebsa>.

the HSAs are an employee welfare benefit plan established or maintained by the employer; or (5) receive any payment or compensation in connection with an HSA.

If an employer offering HSAs to its employees does not follow these restrictions, it is possible that the HSAs will be deemed "employee welfare benefit plans" and that ERISA's rigid rules, regulations and obligations set forth at Title I will apply to govern the employer's behavior (as well as the behavior of the plan, the plan administrators and the plan's service providers). Please also note that unless otherwise exempt from Title I, employer-sponsored HDHPs will be employee welfare benefit plans within the meaning of ERISA and subject to Title I.

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Note: The foregoing should not be construed as legal advice. For application of the complex provisions of ERISA to you or your company's particular issue, please contact a b&e lawyer.