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Section 409A Deadline Looms

No Extensions Anticipated

The final deadline for amending all deferred compensation plans to comply with Code Section 409A is **December 31, 2008**. All deferred compensation plans must be reviewed, and in most cases, updated by that date.

Code Section 409A is a very broad statute, and it impacts many arrangements that are not traditionally considered "deferred compensation." Therefore, it is important to review all compensation arrangements well before the **December 31 deadline**.

To get started on reviewing and updating your Code Section 409A arrangements, please call Don Mazursky (404.888.8840), David Putnal (404.888.8836), Glenn Infinger (404.888.8845), Toby Walls (404.888.8870), or Teri King (404.888.8847).



A Benefits Consulting Firm affiliated with Mazursky Constantine LLC

New HSAs Rules from the IRS

The IRS recently issued Notice 2008-59, which offers additional guidance relating to health savings accounts ("HSAs"). Following are some highlights of this guidance:

Employer Contributions

- **Taxation of Contributions for Non-Employees.** Employee and employer contributions to an HSA for an employee's spouse or other non-employee are included in the employee's gross income.
- **Recovery of Contributions to Ineligible Employees.** If an employer's contributions go to an employee who was never an eligible individual, the employer may recover these funds. If the employer does not recover these funds by the end of the employee's taxable year, the contributions must be treated and reported as taxable income to the employee.
- **Recovery of Contributions over the Annual Limit.** An employer can recover annual contributions that exceed the limits under the Internal Revenue Code. If the employer does not recover the contributions by the end of the taxable year, they must be treated and reported on Form W-2 as taxable income to the employee. In addition, for each taxable year, the HSA beneficiary is subject to an excise tax of 6% of the excess contributions.
- **Allocating Contributions to an Earlier Year.** HSA contributions made between January 1 of a year and the deadline for filing the employee's tax return (without extensions) for the prior year may be allocated to the prior year if the employer notifies the employee and the trustee. Contributions designated for the prior year are still reported on the employee's Form W-2 for the year in which the contributions were actually made.

Medicare Premiums

- If an HSA beneficiary has not reached age 65, Medicare premiums for coverage of that beneficiary's spouse do not qualify as medical expenses.

Eligibility Issues

- **Coordination with Employer Health Clinics.** An employee's access to free health care or health care at less than fair market value through an employer's health clinic does not make the employee ineligible for HSA contributions, as long as the clinic does not provide "significant benefits in the nature of medical care." For example, offering physicals, immunizations, allergy injections, nonprescription pain relievers, and treatment of on-site injuries will not qualify as "significant benefits." In contrast, a hospital permitting its employees to receive free treatment at its facilities for all of their medical needs will qualify as significant and jeopardize the employee's HSA eligibility.

- **Contributions after Ceasing to be Eligible.** An employee may contribute to an HSA even if he or she ceases to be an eligible employee, as long as the contributions are only for the months of his or her eligibility.
- **Coordination with HRAs.** An employee that is covered by a health reimbursement arrangement (“HRA”) that reimburses accident and health plan premiums, in addition to paying and reimbursing expenses for vision, dental, and preventative care, does not make the individual ineligible for an HSA.

High Deductible Health Plans

- **Limited HDHP Benefits.** HSAs can be offered along with another employer health plan only if that other plan qualifies as a High Deductible Health Plan (“HDHP”). A health plan will not qualify as an HDHP if it restricts plan benefits to reimbursements for expenses for hospitalization or in-patient care, even if it satisfies the minimum deductible requirements under the Internal Revenue Code.
- **Changes in HDHP Coverage.** An individual switching from family coverage under an HDHP to individual employee-only coverage under an HDHP may count his or her expenses toward the deductible under the individual HDHP coverage. The plan may use any reasonable and consistent method for allocating covered expenses, including allocating all of the expenses incurred by that specific individual or allocating the expenses under the family HDHP on a per-capita basis.

HSA Establishment Dates

- State trust laws determine an HSA’s date of establishment, and most state trust laws provide that a trust’s existence begins when assets are first contributed. If the HDHP coverage becomes effective before the HSA is established (*i.e.*, funded), medical expenses incurred after the HDHP coverage is effective and before the HSA is funded would not be eligible for reimbursement through the HSA. Thus, plan sponsors may wish to fund HSAs on the first date the HDHP coverage becomes effective.

Contact Information. For additional information or for assistance with HSAs, please contact Nicole Bogard (404.888.8830) or Kelly Scott (404.888.8838).

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