

# HSA Employer FAQ

## Common Employer Questions:

Q: If an employer does not contribute to an HSA, is the HSA subject to IRC Section 125 nondiscrimination testing? Or does that requirement apply only if there are employer contributions?

A: All HSA contributions, whether employee, employer, or a combination of both, made through a Section 125 cafeteria plan are subject to IRC nondiscrimination testing. Note: Contributions to employee HSAs that are not made through an employer's cafeteria plan are subject to IRC "comparability rules" which are generally stricter than the IRC nondiscrimination rules. If employer contributions do not satisfy the comparability rules, the contributions are subject to a 35% excise tax.

Q: If an employee terminates employment, can an employer retrieve the employer contributions it made to the terminated employee's HSA account?

A: No, employer contributions to the HSA account of an employee who has terminated employment are generally irretrievable.

Q: If an employer contributes to HSAs and is subject to FMLA, is the employer required to continue HSA coverage during FMLA leave like other health plan coverage?

A: No. An HSA is an individual bank account and not a health plan, so the health plan continuation requirements under FMLA do not apply. However, the employer could choose voluntarily to continue HSA contributions during leave.

Q: Is an HSA an ERISA-covered group health plan? Is a plan document, summary plan description, Annual 5500 reporting, or COBRA continuation coverage required for HSAs, like other plans?

A: No. An HSA is not a group health plan. An HSA is an employee's personal bank account, and therefore, the standard compliance obligations applicable to group health plans do not apply. However, employers are required to ensure that employees do not enroll in HSAs if they are enrolled in non-compatible HSA coverage of the employer. In order to encourage HSA enrollment and prevent enrollment of HSA-eligible employees, enrollment communications should clearly explain the conditions for HSA-eligibility.

Q: How does the state tax treatment of HSAs differ from federal tax treatment?

A: HSAs are governed by federal tax rules. However, to the extent a state assesses an income tax, then each state determines whether it will follow the federal guidelines or establish its own rules with respect to the taxation of HSA contributions and distributions. A few states do not follow the federal HSA tax guidelines. As a result, contributions and distributions that may be tax-free at the federal level may be taxable in those states.