Welcome! We will begin at 3:00 ET.

There will be no sound until we begin the webinar.

Thank you to the following Assurex Global Partners for sponsoring this event:

- Bolton & Company
- C3 Risk & Insurance Services
- CCIG
- Cottingham & Butler
- Cragin & Pike, Inc.
- The Daniel & Henry Co.
- Dean & Draper Insurance Agency
- Henderson Brothers, Inc.
- The Horton Group
- Houchens Insurance Group
- The IMA Financial Group
- INSURICA
- Kapnick Insurance Group
- Lyons Companies
- The Mahoney Group
- MJ Insurance
- Oswald Companies
- Parker, Smith & Feek, Inc.
- R&R Insurance
- RCM&D
- The Rowley Agency
- Starkweather & Shepley
- Sterling Seacrest Pritchard
- WA Group
- Watkins Insurance Group
- Woodruff Sawyer
- York International

October 2023

Gag Clause Attestation and HSA Compliance

Presented by Benefit Comply

Assurex Global Partners

Thank you to the following Assurex Global Partners for sponsoring this event:

- Bolton & Company
- C3 Risk & Insurance Services
- CCIG
- Cottingham & Butler
- Cragin & Pike, Inc.
- The Daniel & Henry Co.
- Dean & Draper Insurance Agency
- Henderson Brothers, Inc.
- The Horton Group
- Houchens Insurance Group
- The IMA Financial Group
- INSURICA
- Kapnick Insurance Group
- Lyons Companies
- The Mahoney Group
- MJ Insurance
- Oswald Companies
- Parker, Smith & Feek, Inc.
- R&R Insurance
- RCM&D
- The Rowley Agency
- Starkweather & Shepley
- Sterling Seacrest Pritchard
- WA Group
- Watkins Insurance Group
- Woodruff Sawyer
- York International

Agenda

- Gag Clause Attestation
  - What is it and why are we doing it?
  - Who is responsible for it?
  - What do employers need to do?
  - Common Questions
- HSA Awareness Day
  - HSA (in)Eligibility
  - HSA Contributions
  - No HSA Account?
  - HSA “In and Out” Eligibility

Gag Clause Attestation:
What & Why?

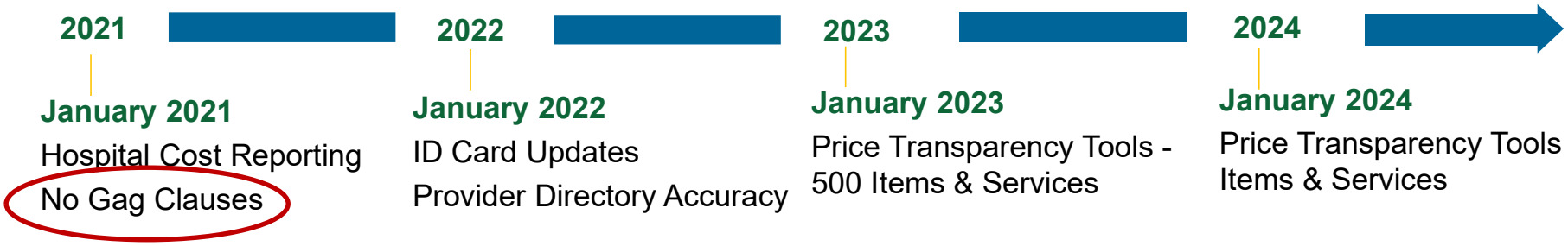
Gag Clause Prohibition

Effective in late 2020, group health plans and carriers prohibited from entering into agreements with service providers containing gag clauses

Required to attest to compliance for 2021 – 2023 by Dec. 31, 2023

Annual attestation required each year by Dec. 31

Health Cost Transparency Timeline



January 2021

Hospital Cost Reporting

No Gag Clauses

January 2022

ID Card Updates

Provider Directory Accuracy

July 2022

Carriers & Plan Release Health Plan Cost Data Machine Readable Files

December 2022

RxDC Reporting

January 2023

Price Transparency Tools - 500 Items & Services

June 2023

RxDC Reporting Round 2

December 2023

Gag Clause Attestation

January 2024

Price Transparency Tools - All Items & Services

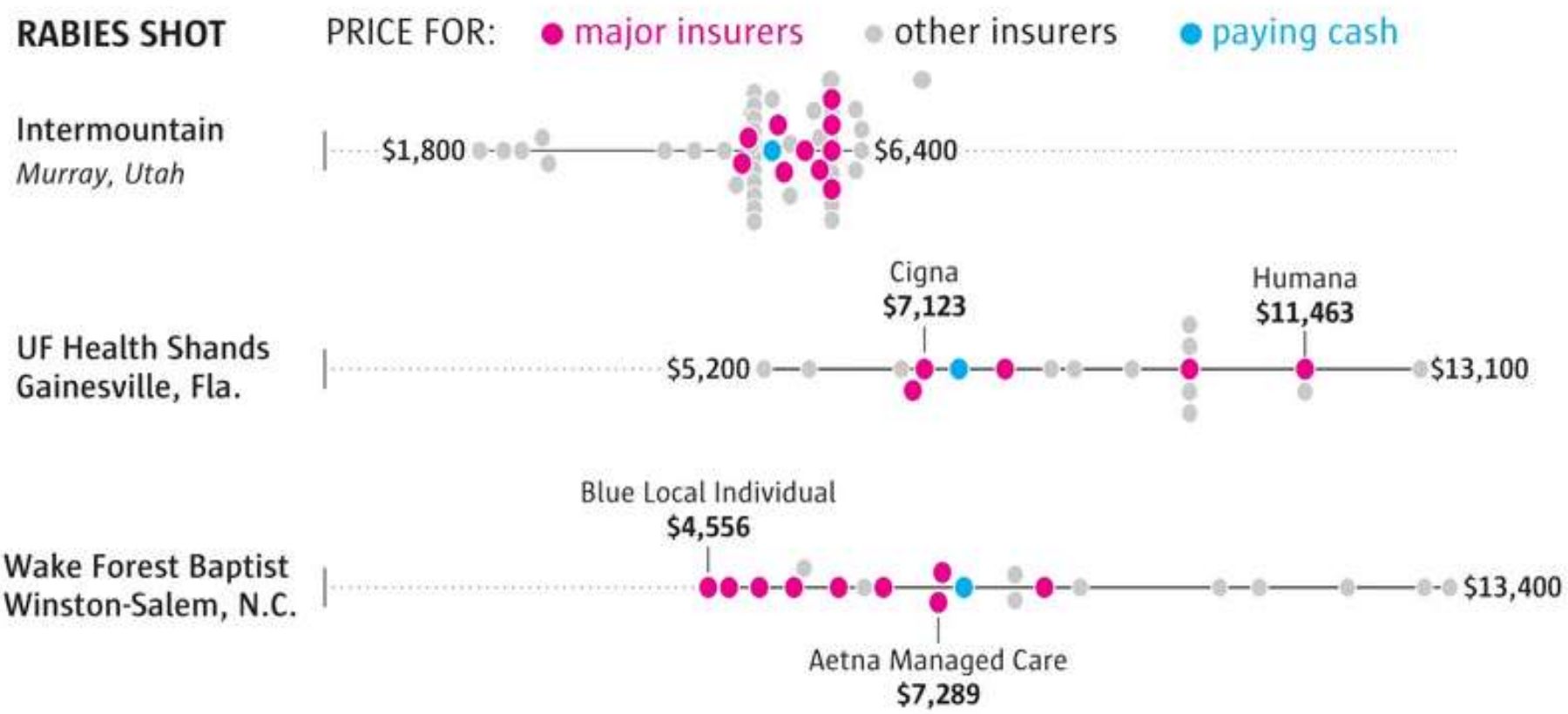
June 2024

RxDC Reporting Round 3

Delayed Until Additional Guidance Is Released

- Prescription Cost Data Machine Readable File
- Provider cost estimate & Advanced EOB

Health Cost Transparency

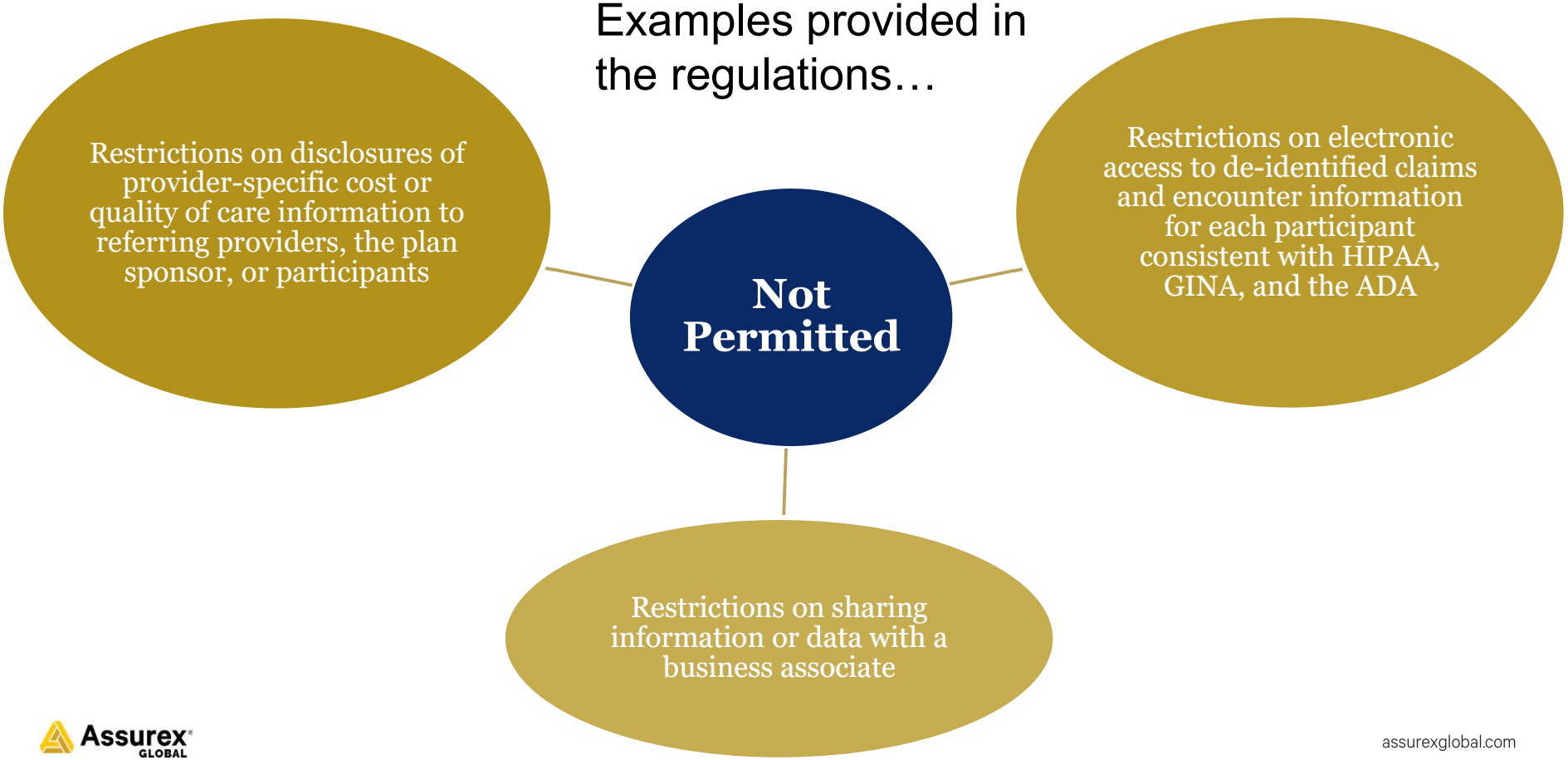


What Is a Gag Clause?

- Might exist in agreements between the plan and:
  - a health care provider;
  - a network or association of providers;
  - a TPA; or
  - another service provider offering access to a network of providers

What Is a Gag Clause?

Examples provided in the regulations…



Gag Clause Attestation

- Gag Clause Attestations – Which Plans Must Comply?

- Applies to plans of all sizes, fully-insured and self-funded, and grandfathered
- Examples:
  - Group medical plans
  - Rx carve-outs (PBMs)
  - Behavioral health networks
  - Telemedicine
  - Direct primary care arrangements

- Does **NOT** apply to:
  - Excepted benefits (e.g., dental, vision, health FSA, EAP)
  - Retiree-only group health plans
  - Account-based plans (e.g., HRAs)

Gag Clause Attestation:
Who?

Gag Clause Attestation

- Responsibility for Attestation

  - Fully-Insured Group Health Plans
    - Carriers likely to attest on behalf of the plan

  - Self-Funded Group Health Plans
    - TPAs and PBMs may be willing to attest on behalf of the plan, but otherwise the employer must handle the attestation

  - Other Group Health Plan Arrangements
    - Employer must attest for any service providers that will not

Gag Clause Attestation

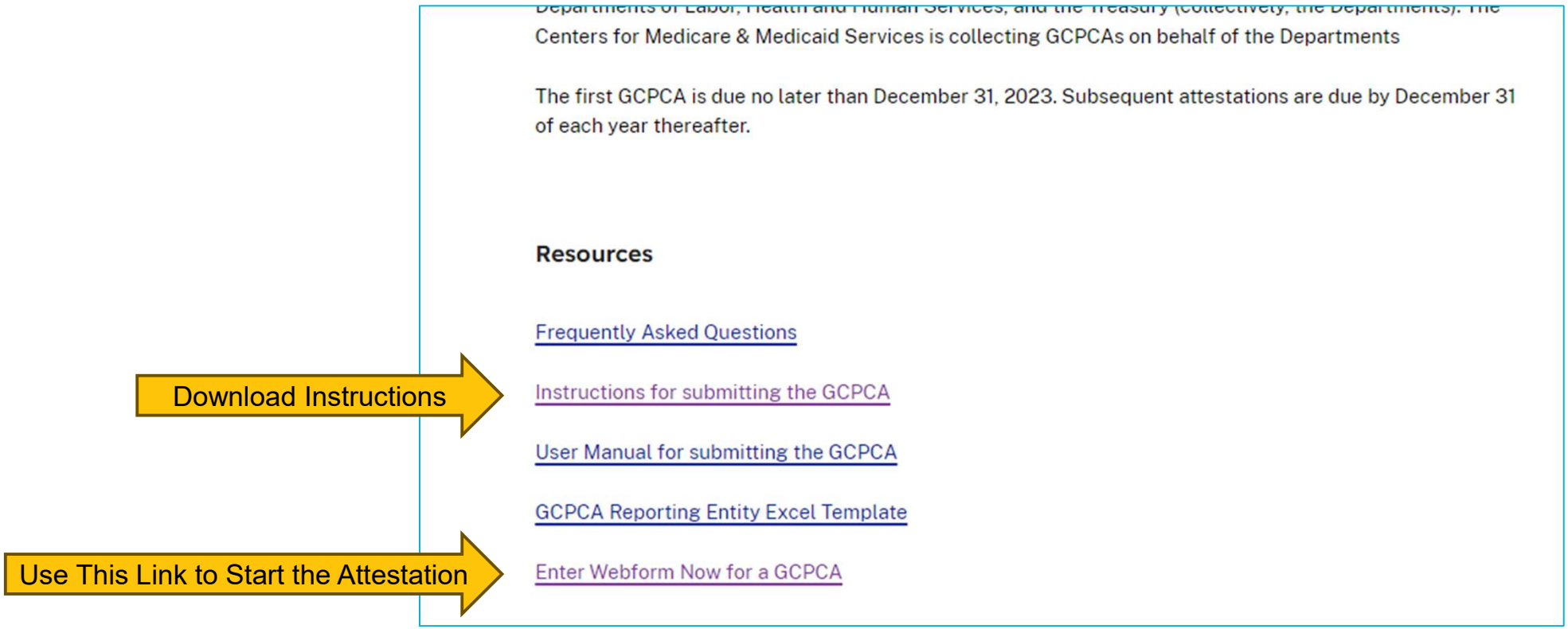
- What Should Employers be Doing Now?
  - Ask vendors and service providers if they will be attesting on behalf of the parts of the employer's plan they are responsible for.
  - If vendor or service provider will not be completing the attestation for the employer ask them to certify that their contracts are in compliance so that the employer can complete the attestation.
    - Some employers will have vendors attesting for part of their plan and the employer attesting for other parts…
  - If employer needs to attest for any part of their plan set up an account on CMS website and prepare to attest
    - (More later)

Gag Clause Attestation: How?

Attestation Process

Go to: https://www.cms.gov/cciio/programs-and-initiatives/other-insurance-protections/gag-clause-prohibition-compliance or search for: CMS Gag Clause Attestation

Attestation Process



Attestation Process

- Step 1 - Obtain Website Access
  - Go to CMS' portal link, enter in an email address, and get a unique code to access
- Step 2 - Complete Attestation Form
  - Fill out information in 5 short sections of the form and then provide signature
- Step 3 - Confirm Submission
  - Download submission receipt and file it in case of future audit or questions

Gag Clause Attestation

- Two Roles – “Submitter” and the “Attester”
  - Both roles could be played by same individual

- Submitter
  - Responsible for initiating the attestation process via CMS’ website and entering in the required information about Submitter, Attester, and group health plan

- Attester
  - Responsible for reviewing the information entered and signing off on plan’s attestation of compliance with the gag clause prohibition rules
  - Must have the legal authority to sign for the company (e.g., the person who signs off on the Form 5500 or Form 1094-C)

Gag Clause Attestation

- Common Questions

  - If the employer offers multiple medical plan options, how many “plans” is the employer attesting on behalf of?

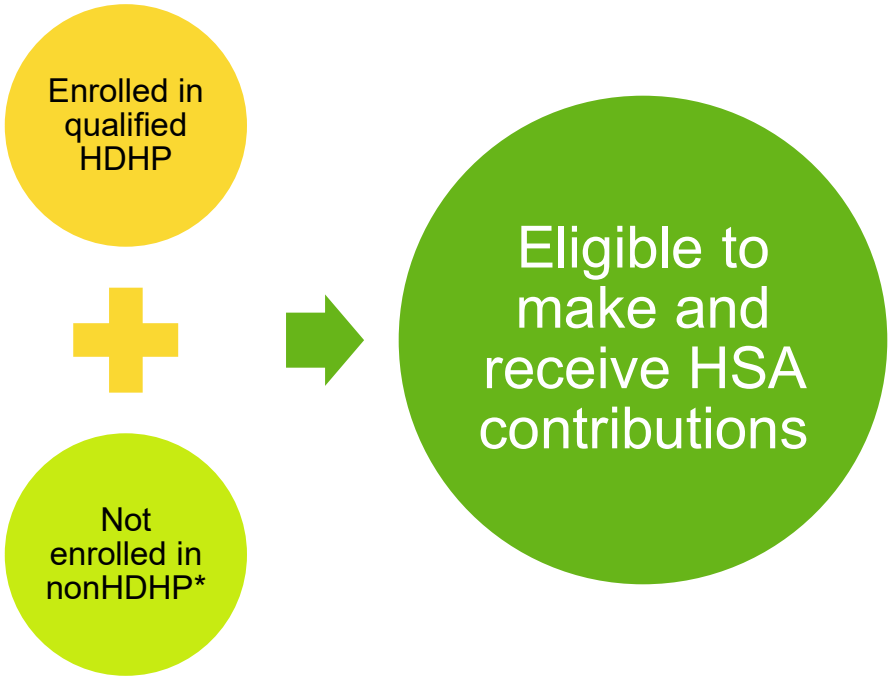
  - What if a plan changed service providers during the 2021 -2023 attestation period?

  - What should an employer do with documentation from service providers verifying compliance with the gag clause prohibition?

  - What should an employer do if some service providers are unwilling to cooperate?

Happy (Belated) National HSA Awareness Day! October 15th

HSA (In)Eligibility



- So what happens if an employee's HSA eligibility changes midyear?

* E.g. general purpose Health FSA, Medicare, spouse's nonHDHP, spouse's general purpose Health FSA, etc.

HSA (In)Eligibility

- Not a question of when an employee can make contributions but how much
  - An employee who is HSA eligible only part of the year has their maximum annual contribution limit prorated based on the number of months they are HSA eligible.
  - For each calendar month in the year, is the employee HSA eligible on the first day of that month?
  - Annual contribution limit is 1/12 of the normal annual contribution limit (based on type of HDHP coverage and employee's age) for each month they are eligible.

Bonita has single HDHP coverage and no disqualifying nonHDHP coverage as of January 1, 2023. In May, Bonita turns 65 and enrolls in Medicare Part A effective May 1, 2023. Bonita is HSA eligible 4 months in 2023. Her maximum annual contribution for 2023 is $3,850 *(single HDHP coverage)* + $1,000 *(catch up contribution)* x 4/12 = $1,616.67.

Joseph is a 45 year old new hire and enrolls in family HDHP coverage as of October 1, 2023. He had no HDHP coverage prior to this date and no disqualifying HDHP coverage after this date. Joseph is HSA eligible 3 months in 2023 so his maximum annual contribution for 2023 is $7,750 *(family HDHP coverage)* x 3/12 = $1,937.50).

HSA (In)Eligibility

December 1st Rule.

- If employee is HSA eligible on December 1st employee can contribute the full annual contribution limit for the year *as long as they maintain HSA eligibility for the entire next calendar year*.
- If they do not maintain HSA eligibility the following year they will owe taxes and penalties on amount of contribution that exceeds prorated maximum for prior year.

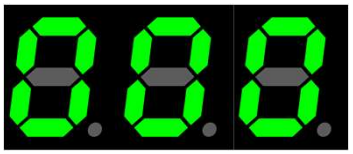
Prorating rule also applies if employee changes type of HDHP coverage during the year.

- E.g. Kelly (age 30) is enrolled in single HDHP coverage as of January 1, 2023. Kelly has a baby in July and enrolls her new child on the plan. Kelly has no disqualifying HDHP coverage. Kelly's maximum 2023 contribution limit is ($3,850 x 7/12) + ($7,750 x 5/12) = $5,475 (note July counts as single coverage because that was what was in effect on July 1).

HSA (In)Eligibility

- Employee can contribute up to the prorated maximum anytime during the year and up to April 15 of the following year.
  - But if they contribute more than the prorated maximum they will have an excess contribution which they must withdraw and pay income taxes or they will owe income taxes and an ongoing 6% excise tax on the excess contributions.

Tracking HSA Contributions



- Employer can only make tax free HSA contributions through payroll (employer or employee pretax deductions) if it is reasonable for the employer to believe the employee is entitled to such tax-free contributions.

- This creates an obligation for the employer to track the amount of contributions through payroll to ensure they do not exceed the maximum annual contribution limit.
  - It is not reasonable to believe the employee is entitled to more tax-free HSA contributions than can be legally contributed in a year.
  - Employers are not required track outside coverage that may affect HSA eligibility
    - But once the employer is aware the employee is not HSA eligible, HSA contributions through payroll must stop or be reduced.
  - Employer is not required to track prorated maximums.
    - Most employers will simply stop all HSA contributions once they are aware the employee is no longer HSA eligible, even if the employee could contribute more under the prorated maximum.

No HSA

- What happens if employee fails to complete paperwork to open HSA with the trustee?
- **Best Practice**
  - Include language in benefit communications that if HSA is not open by the time the employer is ready to make employer contributions and/or deposit employee contributions, the employer contribution will be forfeited and the employee contributions will be returned as taxable income. Employer contributions will not be made up if the employer later opens the account.
  - If this was not communicated ahead of time, can always be communicated once you discover the account is not open by giving the employee a deadline to open the account.
- Other options
  - Hold onto employer contributions until account is opened (holding onto employee contributions is problematic)
  - Pay out employer contributions in taxable cash (but might encourage employees to deliberately not open account)

No HSA

- What if the employee is unable to open HSA, e.g. because of credit / banking history or opening account is delayed by trustee or some other reason beyond the employee's control?
  - We recommend you follow the same rule but perhaps allow for some additional time or flexibility if the reason the account is not opened is not the employee's fault.
  - If the employee is ultimately not able to open the account, employer is not obligated to make up employer HSA contributions – the employee is simply not eligible for that benefit if there is no place to make that contribution

HSA “In and Out” Eligibility Rules

“In” Rules (a/k/a contributions)

- Whether an employee is eligible to make and receive HSA contributions and how much depends solely on whether the employee is HSA eligible *(HDHP coverage, no nonHDHP coverage)*, what type of HDHP coverage they have *(single, family)*, and the employee’s age.
- It makes no difference whether other family members are enrolled on the HDHP, are HSA eligible, or how old they are.
  - **Example:** Luka enrolls himself (age 60) and his spouse (age 64) on the employer’s HDHP. In February 2023, Luka’s spouse turns age 65 and enrolls in Medicare Part A but also remains enrolled on the HDHP. Luka has no disqualifying nonHDHP coverage throughout the year.
  - Luka is HSA eligible and can contribute up to the family HDHP maximum plus $1000 catch up contribution for 2023.
  - His spouse’s Medicare coverage and their age have no affect on how much Luka can contribute to his HSA.

HSA “In and Out” Eligibility Rules

“Out” Rules (a/k/a distributions)

- Once funds are properly contributed to an HSA, the employee can use those funds tax-free to pay for the medical expenses of:
  - The employee
  - The employee’s spouse
  - The employee’s tax dependents
- The funds can be used for an eligible family member’s medical expenses regardless of whether that family member is enrolled on the HDHP or are themselves HSA eligible.
- It doesn’t even matter if the employee is still HSA eligible – HSA eligibility only affects the ability to make contributions, not take tax-free distributions.
- The employee cannot use tax-free HSA funds for their adult children’s medical expenses unless that child is a tax dependent *(even though that adult child can be enrolled in the HDHP up until age 26.)*

October 2023

Gag Clause Attestation and HSA Compliance

Presented by Benefit Comply