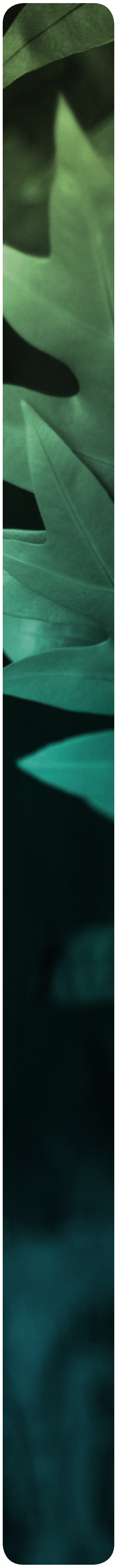


Responses to Issues Raised About the Hawaii HSA Legislation

ERISA Compliance

Are any provisions in this bill directed to employee welfare benefit plans?

No. All provisions are directed to insurers.

Would the proposals in the bill violate federal ERISA by imposing requirements on employers?

No. The proposed HSA bill does not impose requirements on employers.

Does this legislation violate ERISA by requiring an employer to offer a non-HSA plan to employees, as well as an HSA plan?

No. Under the Hawaii Prepaid Health Care Act, employers are already required to offer a non-HSA plan (i.e., the prevalent plan) to employees. This requirement is part of the Hawaii Prepaid Health Care Act, which is exempted from ERISA under federal law.

The proposed Hawaii HSA legislation does not require an employer to offer an HSA plan. However, if an employer wishes to offer a Hawaii HSA to their employees, then the Hawaii HSA legislation requires insurers to continue to offer the prevalent non-HSA plan (which the insurer offers now) to the employer. In other words, the Hawaii HSA bill does not allow an insurer to offer the Hawaii HSA as the only option to employers.

Could this legislation be preempted by ERISA?

No. The bill proposing the creation of an HSA would not be affected by ERISA, because it does not contain mandates directed to employers.

Custodianship of Health Savings Accounts

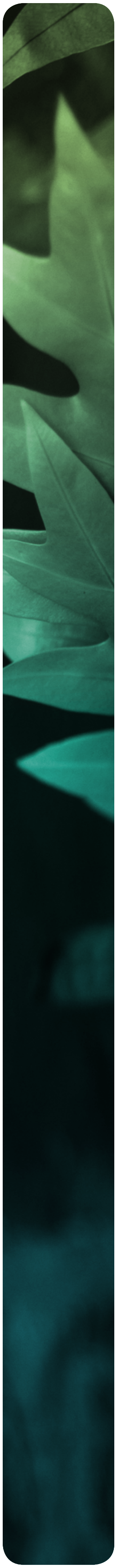
Does the bill require a health insurance plan, not a financial institution, to be the primary custodian or trustee of the HSA accounts?

No. Hawaii's health insurers would prefer not to be HSA custodians or trustees. In other words, Hawaii's health insurers would prefer to focus on insurance (the HSA-eligible insurance plan), not the HSA trust accounts, which would be handled by financial institutions.

Wouldn't a financial institution be better able to accommodate the trust account provisions of this legislation than an insurance provider?

Yes. The IRS provides the specific requirements regarding who may be an HSA custodian or trustee. This is a role financial service companies, not Hawaii insurers, are seeking. HSAs are like IRAs, for which financial service companies are the custodians.

If the health plan has the fiduciary responsibility, during open enrollment if an employee already covered by an HSA plan decides to select a plan offered by another issuer, wouldn't the issuers be required to establish a secured system of transferring trust accounts?



Custodianship of Health Savings Accounts (continued)

No. Insurers would not have the fiduciary duty for Hawaii health savings accounts. The Hawaii health insurer will only be managing the HSA-eligible plan (i.e., the high-deductible health plan), not the health savings account. Custody of HSA trust accounts would be like that of 401K trust accounts, which are set up with a financial institution.

If the employee transfers to a new job wouldn't the issuer be faced with a trust account transfer problem?

No, the HSA account, like a 401K account, belongs to the employee, not to the employer or the insurer. The HSA account goes with the employee if he or she changes jobs.

HSAs Do Not Jeopardize the Prevalent Plan

Could the quality of benefits in the prevalent plan be jeopardized if HSA-eligible plans and HSA accounts are offered? If fewer people enroll in the plan with better benefits, won't the standard be eroded, resulting in the prevalent plan becoming the one with lesser benefits?

No. Not everyone would be eligible for an HSA plan, so an HSA plan can never become the prevalent plan. The Hawaii HSA legislation supports the prevalent plan's better benefits with a provision requiring that a Hawaii HSA not have lower benefits than the prevalent plan. In other words, the benefits provided through a Hawaii HSA would have to be on par with the better benefits of the prevalent plan and could not have lesser benefits. As a result, there can be no erosion of the prevalent plan benefits.

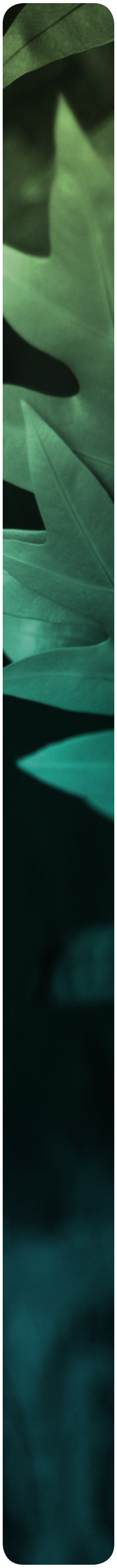
While high-deductible plans mean lower premiums, could an unintended consequence be that more people will avoiding getting health care, unless they are seriously ill because they can't afford the deductible?

No, because the Hawaii HSA legislation meets the same requirements found in any plan offered by Hawaii employers to employees: the employer must contribute the same amount to the employee's HSA account as they would provide to an employee with a prevalent plan. In other words, the employer contribution to the employee's HSA account must cover 80 percent or more of the high deductible. Therefore, the employee will have the same amount of funds to cover the HSA-eligible plan deductible as they would with a conventional plan. And the funds contributed by the employer to the employee's HSA account should cover most, if not all, of the deductible. As a result, there would be no financial incentive for an employee to defer receiving treatment.

For example, the HSA-eligible plan has a deductible of $1,300 for an individual employee and $2,700 for a family. To be approved under Hawaii's current laws, an employer would contribute a minimum of 80 percent of the deductible to the employee's HSA, or at least $1,080 for an individual employee and $2,160 for a family.

The high-percentage contributed by the employer toward the cost of the deductible is the single biggest difference between the mainland HSAs and the proposed Hawaii HSA.

In addition, an HSA-eligible plan will cover preventive care, like well-baby checkups and cancer screenings, which are not subject to the deductible (just like the current prevalent plans).



HSAs Do Not Jeopardize the Prevalent Plan (continued)

Because the Hawaii Prepaid Health Care (PHC) Act only requires an employer to offer one approved health plan, would the Department of Labor and Industrial Relations (DLIR) be unable to explore demand for employers offer a second, conventional, non-HSA primary health care plan to cover employees who are ineligible for an HSA plan (e.g. Medicare enrollees, individuals claimed as a dependent on the prior year's taxes, individuals covered by another policy)?

No. If the Hawaii PHC Act were interpreted to only allow the DLIR to require one plan, that plan would be the approved prepaid health care plan. The proposed HSA legislation proposes an insurer be allowed to sell one approved prepaid health care plan, as well as an additional Hawaii HSA- eligible plan. The two plans would be offered side by side. If an employee could not enroll in the Hawaii HSA, then the employee could enroll in the approved PHC Act plan – the same plan that was always available to the employee.

If an employer offers only the high deductible HSA program plan to all employees eligible for it, would that require all eligible employees to choose the HSA plan? And, if so, could the HSA-eligible plan become the prevalent plan (i.e., the standard-bearing plan for the state)? In addition, If the HSA plan were to become the prevalent plan, could the out-of-pocket maximum that employees pay per year possibly rise from the current level of $1,000 per year to $6,650 per year?

The short answer to all these questions is "No." None of these scenarios could occur. But before explaining why, it's important to note that the 2018 minimum annual deductible of $1,350 and the out-of-pocket maximum of $6,650 aren't related. The annual deductible and the out-of-pocket maximum are two entirely different components of the HSA plan. The above scenarios could not occur for two reasons:

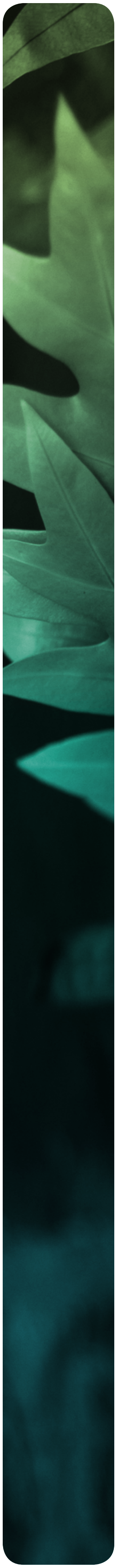
- Not every employee may be eligible for an HSA plan, therefore an HSA plan can never be the prevalent plan.
- The insurer must always sell the employer Hawaii's prevalent plan, the one that insurers currently provide to the employer. As a result, if an employer wants to offer employees the Hawaii HSA, the employer may only do so if the current prevalent plan is offered to employees. In other words, an employer that offers the Hawaii HSA plan will always offer at least two options to employees: (1) the plan the employer currently offers (i.e., the prevalent plan) and (2) the Hawaii HSA plan.

Employer and Employee Responsibilities

Under section 12-12-12, Hawaii Administrative Rules, an employer is only responsible for the cost of the least expensive plan. Any cost differential may be borne by the employee selecting the more expensive plan. Because the cost of a high-deductible plan is less than an approved PHC Act plan, wouldn't the employee be responsible for paying not only 1.5 percent of the employee's wage as permitted by current law, but also the difference in the cost of the two plans, thereby adversely affecting employees financially?

Introducing the Hawaii HSA plan would change nothing because the situation described already exists. Many employers currently offer a UHA or HMSA plan and a Kaiser plan which are priced differently. The employer may only pay the cost for the Kaiser plan and the employee may have to pay the difference for the UHA or HMSA plan.

Not every employee may be eligible for an HSA plan, therefore an HSA plan cannot be the prevalent plan.



Employer and Employee Responsibilities (continued)

Employer contributions to the HSA are intended to be used by the employee to pay for qualified medical expenses. If the employee uses that money for non-medical purposes, would the employee may face federal tax penalties (currently 20 percent and withdrawn money is taxable income)? And could that result in the money not being available for its intended use when a medical need arises?

Even though the facts stated regarding qualified expenditures and penalties are correct, it's highly unlikely an employee would withdraw funds for something other than health care payments because of the tax penalty.

The Hawaii HSA puts the employee in more control over their health care dollars and the IRS gives the employee tax benefits for properly using those health care dollars for the employee's medical needs. For doing this, employees receive three tax benefits: (1) no income tax is paid on that portion of an employee's earnings contributed to the HSA, (2) when the funds in the HSA are taken out to pay for health care needs, they are again exempt from taxes, and (3) interest earned in the HSA is tax-free. It makes sense that if the IRS is going to give tax benefits for the proper use of health care dollars, then the IRS will penalize those who choose not to use their health care savings as intended.

This concept is similar to non-retirement or early withdrawals from a 401K plan. Employees pay tax penalties if the withdrawal from their 401K is not for an allowable withdrawal.

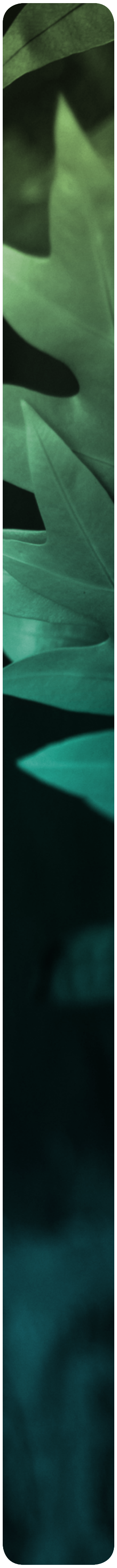
Employers choosing to use HSA accounts must fully understand the financial commitment required, including the annual expense to fund the account. With Hawaii's transitory nature of employment, isn't it likely that employers may not realize the impacts on the HSA program resulting from the employee turnover?

It is correct that employers must understand the nature of the Hawaii HSAs before they offer it as an option to their employees. This should not be a problem, however, given that the process for an employer receive approval to offer a Hawaii HSA option is quite rigorous and requires a thorough understanding of the HSA and HSA-eligible plans. First, the employer must submit their request for approval of their Hawaii HSA option to the Hawaii Prepaid Health Care Advisory Council. This requires documentation about the Hawaii HSA option be provided and the possibility the employer may be questioned by the Council. The Council will then make a recommendation to the Director of the Department of Labor and Industrial Relations (DLIR).

The Director of the DLIR may consider the Council's recommendation and then approve or disapprove of the employer's request to offer a Hawaii HSA option. This approval process will help ensure that employers understand the Hawaii HSA option.

As business people, it is likely employers will know their employee turnover rate and whether it makes sense to offer the Hawaii HSA option to their employees. In addition, many employers have insurance consultants assisting them in the decision-making process, with regard to what plans are the best fit for their company and their employees.

Most importantly, should the employer for some reason find the Hawaii HSA option is not a good option, the employer could then discontinue offering the Hawaii HSA option at the next renewal period.



Coverage and Benefit Questions

Is it correct to say that the spouse of an individual with an HSA-eligible plan must also have an HSA-eligible plan and cannot have another health plan, unless he or she is not covered by the HSA-eligible plan?

That's correct.

With regard to benefits, under the proposed Hawaii HSA-eligible plan, wouldn't additional benefits be limited to workers' compensation laws, tort liabilities, or liabilities related to property ownership or usage; specific diseases or illnesses, or a fixed amount per day (or other period) for hospitalization?

Yes, but if an employee is concerned about losing the additional benefits he or she is currently receiving, the employee can simply remain in the existing prevalent plan offered by the employer. An employee does not have to take the HSA-eligible plan if one is available.

What's the difference between the HSAs offered on the mainland and the Hawaii HSA proposed in the legislation?

The single biggest difference is the rule that the proposed Hawaii HSA-eligible plan must go through the approval process that will require the employer to contribute about 80 percent or more of the deductible to the employee's HSA account. The employer contribution on the mainland is typically less, often much less, than 80 percent of the deductible.

How much of the deductible is paid by the employer contribution in the proposed Hawaii HSA legislation?

As a result of the insurer's approval process for an HSA-eligible plan, the employer will contribute about 80 percent of the deductible to the employee's HSA-eligible plan.

For example, the HSA-eligible plan has a 2018 deductible of $1,350 for an individual employee and $2,700 for a family. To be approved, an employer would contribute a minimum of about 80 percent to the employee's HSA plan, which would be at least $1,080 for an individual employee and $2,160 for a family.