



## How to Keep HSAs Exempt from ERISA, *SHRM*, ft. Tad Devlin

*Overinvolvement in HSAs can lead to law's application - A SHRM article written by Allen Smith, J.D. - published August 21, 2017.*

*Employers should not, through good intentions, become overinvolved in employees' decisions to invest in health savings accounts (HSAs). Overinvolvement could inadvertently lead to triggering Employee Retirement Income Security Act (ERISA) coverage of the accounts—and employer obligations under ERISA—when ordinarily, HSAs are not covered.*

*An employer can unilaterally open an HSA for an employee and deposit employer funds into the HSA, noted Tad Devlin, an attorney with Kaufman Dolowich & Voluck in San Francisco. This does not deprive the HSA account holder of control and responsibility and therefore does not give rise to an ERISA-covered plan.*

*"It is extremely important for the employer to communicate that the HSA program is not subject to ERISA when introducing the HSA in conjunction with employment-based health plans," Devlin said. He recommended avoiding the use of the word "plan" after HSA to avoid confusion among employees about whether it is covered by ERISA.*

### Consequences of Being Subject to ERISA

Devlin noted that if the HSA program were subject to ERISA, employers would have to:

- File Form 5500s annually with the Department of Labor (DOL).
- Provide a written plan document and summary plan description.
- Follow DOL claims procedures.
- Offer COBRA continuation coverage.

"An employer sued under ERISA would be subject to penalties and potentially prevailing party attorney's fees," Devlin noted.