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ERISA Compliance for Health & Welfare Plans

VI. What Workplace Fringe Benefits Are Subject to ERISA?

VI.A. Overview of Arrangements Subject to ERISA

A. Overview of Arrangements Subject to ERISA

Many, if not most, employee benefit arrangements—plans, programs, employment practices—that provide non-pension fringe benefits to employees are “employee welfare benefit plans” covered by ERISA. However, there are important exemptions and safe harbors provided under ERISA for certain categories of employee benefits. This Section VI discusses what makes an arrangement subject to ERISA. Subsections B through E detail the key elements of an ERISA plan (a plan, fund, or program established or maintained by an employer to provide listed benefits to employees). Statutory exemptions are addressed in subsection F, and regulatory exemptions in subsections G through I. Special issues for group health plans and specific other plans are addressed in subsections J and K. And the table in subsection L provides an overview of the ERISA status of common welfare benefits.

1. Why Being Subject to ERISA Matters

ERISA's application requires the existence of one or more ERISA plans. If an employer has no ERISA plans, it is simply not subject to ERISA. For many employers, ERISA's application will require several affirmative steps that otherwise would not be necessary (e.g., filing required Form 5500s or responding in a timely way to requests for plan documents from plan participants).¹ In addition, when the sponsor of a plan knows up-front that it is subject to ERISA, there are a number of choices that can be made in plan design and administration to help protect the employer (e.g., reserving discretion to make benefit determinations, limiting the time in which employees may file benefit lawsuits, taking advantage of ERISA preemption to avoid the application to the plan of certain state laws and state-law claims).²

2. Advantages of ERISA Status

When an employee fringe benefit program is not an ERISA plan, employees and beneficiaries of the program generally can sue under state law to recover benefits or payments wrongfully denied. Because the laws of most states impose more expansive remedies than those available under ERISA, their application exposes an employer (or the plan's insurer) to larger damage awards (including consequential and punitive damages). Although ERISA coverage of a fringe benefit program adds the burden of compliance with several obligations, it also protects the sponsoring employer from such state-law claims.³ In addition, benefit claim denials under an ERISA plan are usually entitled to deferential treatment in court. Provided that plan documents are drafted to grant discretion to the plan decisionmaker, the judge reviewing an ERISA denial must, among other things, apply a standard of review more favorable to the plan.⁴

3. ERISA Applies to “Employee Welfare Benefit Plans”

The ERISA definition of “employee welfare benefit plan” can be distilled into four basic elements:

- there must be a plan, fund, or program;
- that is established or maintained by an employer;
- for the purpose of providing specifically listed benefits, through the purchase of insurance or otherwise;
- to participants and their beneficiaries.

The full text of the definition provides that an employee welfare benefit plan is—

any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or daycare centers, scholarship funds, or prepaid legal services, or

(B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).⁵

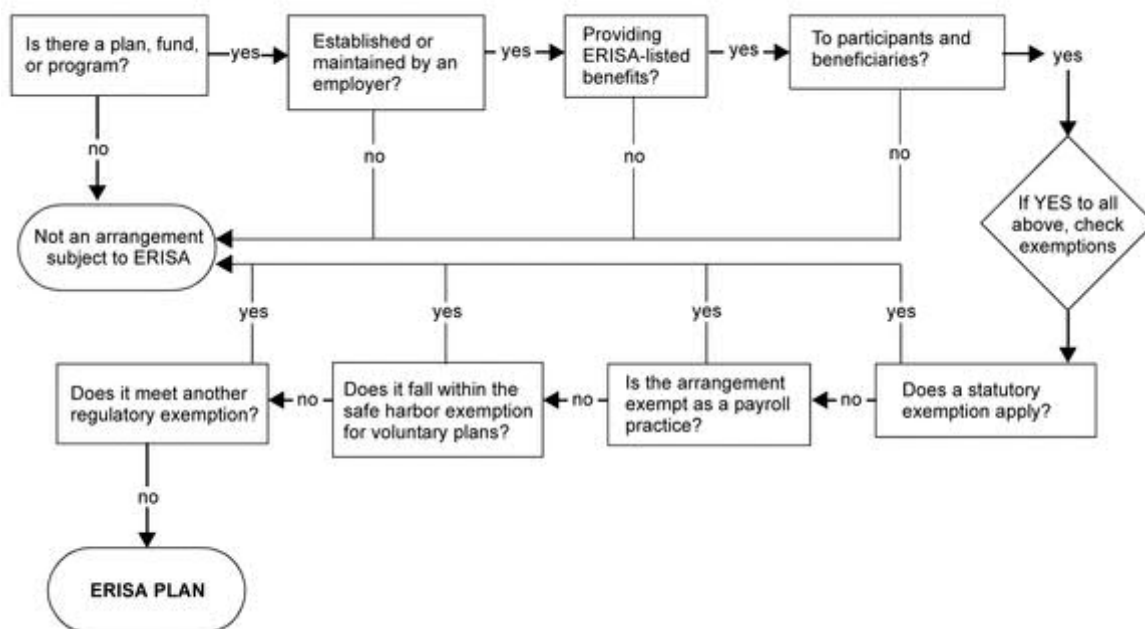
In addition to the elements of the definition itself, there are important statutory exemptions and regulatory safe harbors that carve out arrangements that might otherwise fall within the reach of the definition. The courts have held that whether a particular arrangement constitutes an employee

welfare benefit plan is a question of fact.⁶ An arrangement that relates to the provision of benefits but does not include the statutory elements, for example by not directly providing benefits to employees and their dependents, will likely not be subject to ERISA.^{6.1}

Note on Terminology—ERISA Plan. Throughout our discussion, we use the shorthand term “ERISA plan” when referring to an employee welfare benefit plan—the term is never used in this manual to refer to an employee pension benefit plan.

4. Identifying ERISA Benefits

Described briefly below are the steps that should be followed to determine whether benefits are provided under an employee welfare benefit plan covered by ERISA. Each element is discussed in detail in the indicated subsections of this Section VI. The following flowchart shows the questions to ask along the route to determining whether a benefit arrangement is subject to ERISA. Of course, this analysis would only be undertaken by an employer subject to ERISA, as discussed in Section V.



a. List All Plans, Funds, or Programs

Prepare a list that identifies all workplace plans, funds, or programs that provide fringe benefits of any type or size, even if informal or unwritten. Subsection B discusses what constitutes a “plan, fund, or program.”

b. Determine Whether Benefits Are Maintained by an Employer

Certain workplace benefits are not provided or maintained by an employer (e.g., certain individual insurance policies obtained and paid for by employees). The employer does not have ERISA compliance obligations for these benefits. Subsection C contains a discussion of when a benefit is considered to be maintained by an employer.

c. Determine Whether Benefits Are Listed in ERISA

Benefits of a type not listed in the ERISA §3(1) definition of “employee welfare benefits plan” are not subject to ERISA (e.g., adoption assistance or transportation benefits). Subsection D contains a discussion of the type of benefits subject to ERISA.

d. Determine Whether Benefits Are Provided to Employees or Their Beneficiaries

For a plan to be subject to ERISA, benefits must be provided to “participants” or “their beneficiaries,” where participant is defined to include only employees or former employees of the employer providing the benefit plan. Benefits provided only to non-employees or their dependents generally are not subject to ERISA. Subsection E discusses ERISA participants and beneficiaries.

e. Determine Whether a Statutory Exemption Applies

ERISA does not apply to certain benefits (e.g., benefits provided under governmental or church plans). Subsection F addresses these statutory exemptions.

f. Determine Whether a Regulatory Exemption Applies

The DOL has authority to exempt particular types of welfare plans from ERISA. Subsections G, H, and I (along with Section VII regarding voluntary plans) discuss these regulatory exemptions and safe harbors.

g. List ERISA Benefits

Prepare a new list of the remaining fringe benefit programs. These are the benefits subject to ERISA's compliance obligations.

Special Issues and Table of Common Benefits. Certain ERISA benefits that present special issues are analyzed in more detail in subsections J and K. Also, a table analyzing the ERISA status of commonly encountered benefits appears in subsection L.

1 See Sections XXII and XXV, respectively, for a discussion of these requirements, and see Section I for a general overview of ERISA compliance obligations.

2 See Sections XI, XXXVI, and XXXIX, respectively, for a discussion of these requirements.

3 See Section XXXIX for a discussion of ERISA preemption of state laws and Section XXXVI for a discussion of the limited remedies that may be ordered in ERISA litigation. *See also Chase v. Prudential Ins. Co. of Am.*, 2008 WL 697301 (E.D.N.Y. 2008) (dismissing state-law breach of contract and consumer fraud claims as ERISA-preempted where plan document established employer endorsement sufficient to take plan outside DOL voluntary plan safe harbor).

4 See Sections XI and XXXVI for a discussion of discretionary language and its effect on the standard of review in court.

5 ERISA §3(1). Although not the focus of this manual, a plan, fund, or program established or maintained by an employee organization, like a union, can also be an ERISA plan.

6 *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 14 EBC 1909 (5th Cir. 1991).

6.1 *See, e.g.*, DOL Advisory Opinion 2017-01A (Jan. 13, 2017) (employer association's program of providing administrative services for members' employee benefit plans was not an ERISA plan).

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