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‘Voluntary’ requirements for supplemental insurance policies under ERISA: What are they and why do they matter?

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Many employers make supplemental benefits such as critical illness coverage, hospital indemnity and other fixed indemnity coverage, as well as accident and disability coverage, available to their employees. These benefits are commonly referred to by employee benefits advisors, insurers, and brokers as supplemental or “voluntary” benefits to distinguish the benefits from employer-sponsored primary health coverage and retirement plans. Although not part of The Employee Retirement Income Security Act of 1974 (ERISA), these supplemental insurance benefits are offered by insurers at the worksite and premiums are paid through payroll deduction.

Even though “voluntary” is common terminology for these benefits, the term also has a specific meaning under ERISA. If the voluntary plan requirements under ERISA are met, then the arrangement through which supplemental plans are made available by insurers is not subject to ERISA requirements. Some benefits arrangements that are commonly referred to as “voluntary” do not meet the definition for a voluntary plan under ERISA, for example, because the employer contributes to the plan.

Some benefits arrangements that are commonly referred to as “voluntary” do not meet the definition for a voluntary plan under ERISA. Employers need to understand what a voluntary plan is within the meaning of ERISA to avoid inadvertently creating an ERISA-covered plan.

For many employers, the additional compliance that ERISA adds is not an issue, for example, if they already have benefits plans subject to ERISA, such as a major medical group health plan. Others, however, may prefer to stay outside of ERISA. That’s why it’s important for employers to understand what a voluntary plan is within the meaning of ERISA to avoid inadvertently creating an ERISA-covered plan.

The key element in determining whether a plan is voluntary under ERISA is the level of involvement of the employer.

This article discusses what it means for a supplemental plan to be voluntary under ERISA and provides a high-level overview of related issues compared to providing benefits through a more formal employer sponsored program. This article is limited to supplemental products, which are also known as “excepted benefits” because they are excepted from Affordable Care Act mandates. Different issues arise with other products, including individual market primary medical plans.

What is a voluntary plan under ERISA?

Most benefits offered by employers to employees through the worksite are employee benefit plans subject to ERISA. However, there is a safe harbor exception from ERISA for supplemental coverage if the employer provides payroll deduction for the cost of the policy but does not otherwise fund, endorse or sponsor the program. Benefits such as critical illness coverage, hospital indemnity and other fixed indemnity coverage, as well as accident and disability coverage, can qualify for an ERISA exemption under this safe harbor. The key element in determining whether a plan is voluntary under ERISA is the level of involvement of the employer.

What are the elements of the ERISA voluntary plan safe harbor?

The safe harbor has four parts, all of which must be satisfied:

- No contributions are made by the employer.
  - Any employer contributions take the plan out of the safe harbor.
  - Pretax salary reduction contributions through a cafeteria plan also likely take the arrangement out of the safe harbor, although there is somewhat mixed guidance on this issue.
- Participation in the program is completely optional for employees.
  - This means that the employee has complete discretion whether or not to purchase the policy.
- The employer does not endorse the program or the insurance coverage.
  - This is the element where most of the issues usually arise and is very dependent on the particular facts and circumstances.
- The employer cannot receive any consideration in connection with the program, other than reimbursement of actual reasonable expenses (excluding any profit) for administrative services actually rendered in connection with payroll deductions.

What types of employer actions are and are not prohibited endorsement?

Whether an employer is taking action that crosses the line to prohibited endorsement is very dependent on the facts and circumstances. One action that by itself is not considered prohibited endorsement may take the arrangement out of the safe harbor when looked at together with other actions and the arrangement as a whole.

The following are some common employer actions that are generally permitted under the voluntary plan safe harbor:

- ✔ Permitting the insurer to publicize the program, such as through worksite presentations, including to come to the workplace to sign up employees for coverage directly with the insurer.
- ✔ Collecting premiums by payroll deduction.
- ✔ Paying premiums collected to the insurer.
- ✔ Keeping business cards of the insurance agent(s) on hand for employees, notifying employees about the availability of the arrangement and directing them to the insurer for more information.

The following are common employer actions that individually (or taken together) increase the risk that a plan will fall out of the safe harbor and into ERISA:

- ✔ Signing a group contract with the insurer.
- ✔ Selecting the insurer, negotiating the plan with the insurer or designing the plan (an arrangement is more likely to come within the safe harbor if an insurance company or agent first approaches the employer, rather than if the employer seeks out the insurer).
- ✔ Describing the plan as subject to ERISA or including the plan in an ERISA Summary Plan Description.
- ✔ Assisting employees with claims.
- ✔ Referring to the coverage as part of the employer's benefit package and/or employer actions encouraging.

What if the plan I thought was a 'voluntary' plan is subject to ERISA?

It is important to keep in mind that employers may choose to offer supplemental products through an ERISA-covered group plan – and many do. Also, employers that offer group health plan coverage or have a retirement plan, such as a 401(k) for their employees, are already dealing with ERISA.

ERISA has a variety of requirements. For example, ERISA requires that the plan must be administered in accordance with a written plan document and the employer or plan administrator must provide employees a Summary Plan Description describing the plan. ERISA also imposes annual (Form 5500) reporting requirements on most plans. There is a very important exception from ERISA for fully insured plans with fewer than 100 participants. The employer or other plan administrator may be subject to fiduciary rules for some actions, such as when handling ERISA-covered contributions. Depending on the benefits offered, other requirements may apply, such as The Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy or The Consolidated Omnibus Budget Reconciliation Act (COBRA) if the coverage is subject to ERISA.

Conclusion

Many employers already have ERISA-covered plans and choose to offer supplemental benefits on a group plan basis. The determination of whether a plan meets the voluntary plan safe harbor under ERISA depends on all the details of the arrangement.

The bottom line for employers who want to have a high-level of certainty that their plan is not subject to ERISA is to limit their involvement to actions that clearly fall within the safe harbor and to structure payroll deductions so that insurance premiums are paid on an after-tax basis. Employers should consult with their own advisors to determine whether their arrangement is subject to ERISA.

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