

FORD & HARRISON^{LLP}
THE RIGHT RESPONSE AT THE RIGHT TIME

LEGAL ALERT



Legal Alert: Federal Court Finds ERISA-Covered Plan May Be Comprised of Individual Rather than Group Insurance Policies

10/27/2009

Employers should be aware that an employee welfare benefit plan may be comprised of individual, rather than group, insurance policies, as illustrated by a recent federal court decision from Tennessee. In *Alexander v. Provident Life and Accident Insurance Co.*, No. 1:09-CV-27 (E.D. Tenn. Oct. 16, 2009), the court held that a medical practice group established and maintained an employee welfare benefit plan within the meaning of section 3(1) of ERISA through the purchase of insurance for its physician employees. The opinion clarifies that if a class of employees acquires individual policies and, by virtue of their employment relationship with the employer, obtains a benefit that they could not otherwise have obtained – such as a discount on premiums payable under the policies – the employer will be deemed to have established an ERISA plan.

Dr. Alexander was a physician at Arthur S. Keats, M.D. Associates. Disability benefits were provided to him through the purchase of an individual disability income insurance policy, the premiums for which were paid by the medical group subject to a discount by virtue of Dr. Alexander's employment with the group.

The court held, as a matter of law, that this arrangement constituted an employee welfare benefit plan under ERISA. Indeed, section 3(1) of ERISA defines an "employee welfare benefit plan" broadly to encompass

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 day care centers, scholarship funds, or prepared legal services or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). By definition, then, an employee welfare benefit plan or program is distinguished by the following features: (1) it is established or maintained by an employer or employee organization, (2) for the purpose of providing statutorily enumerated benefits, (3) to participating employees or

their beneficiaries. *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982).

Alexander reiterates that nothing in ERISA limits employee welfare benefit plans to group insurance policies. "[T]he purchase of . . . multiple [insurance] policies covering a class of employees offers substantial evidence that a plan, fund, or program has been established." *Donovan v. Dillingham*, 688 F.2d at 1373 (footnote omitted). Other courts have reached similar conclusions. See *Stern v. Provident Life and Accident Ins. Co.*, 295 F. Supp. 2d 1321, 1326 (M.D. Fla. 2003) (employer established a plan by paying premiums for individual disability policies); *Jaffe v. Provident Life and Accident Ins. Co.*, 2000 U.S. Dist. LEXIS 4689 (S.D. Fla. Mar. 21, 2000) (same where the employer entered into a "salary allotment agreement" pursuant to which it paid premiums for coverage under individual disability insurance policies to the owners of an ophthalmology practice and to at least one non-owner employee for eight years, even though the employees later reimbursed the association for the premiums paid); *Massachusetts Cas. Ins. Co. v. Reynolds*, 113 F.3d 1450, 1453 (6th Cir. 1997) (employer established a plan through the purchase of individual disability policies for employees); *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 447 (4th Cir. 1993) ("employers may easily establish ERISA plans by purchasing insurance for their employees"); 26 C.F.R. § 1.105-1(d) (employee benefit plans may be funded by one or more individual insurance policies).

The *Alexander* court also rejected the plaintiff's argument that the Plan was afforded a "safe harbor" from ERISA's strictures. The Department of Labor's so-called "safe harbor" regulation sets forth four criteria, all of which must be met for a group insurance program otherwise qualifying as an ERISA plan to be exempt from the Act. One of these criteria is that no contributions are made by an employer or employee organization. 29 C.F.R. § 2510.3-1(j). Because the medical group showed that it contributed to the Plan by paying premiums for the disability insurance coverage provided to the physician employee, the Plan was not exempt under the safe harbor regulation.

Finally, the court rejected Dr. Alexander's argument that his post-discharge payment of premiums somehow transformed the status of his policy from one that was part of an ERISA plan to one that is not. The court distinguished the situation from those involving group insurance coverage originally obtained as part of an ERISA plan, but later converted to individual coverage through the exercise of a conversion right contained in the policy. Dr. Alexander was not issued a conversion policy.

The Bottom Line

This decision demonstrates that an employee welfare benefit plan may be comprised of individual, rather than group insurance policies. If the plan satisfies the statutory definition of an employee welfare benefit plan, then ERISA applies regardless of the employer's intent. In light of this, employers should evaluate the benefits they provide to employees to determine whether they are subject to ERISA. The author of this Alert, Joelle C. Sharman, jsharman@fordharrison.com, 404-888-3975, or any member of Ford & Harrison's Employee Benefits Group, can assist in such evaluation.