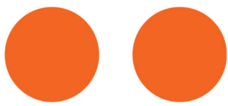

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Voluntary Benefits: Time For An ERISA Checkup

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Multiple benefit consultants report that participation by employees in voluntary benefits is on the rise, in part due to increases in cost sharing under group major medical plans as a result of healthcare reform. Both employees and employers see voluntary benefits as a way to fill the gap on medical costs. In addition to voluntary medical-type benefits, traditional voluntary benefits such as supplemental life insurance and long term disability continue to be popular.

What are voluntary benefits? Simply put, they are any benefit for which the employee pays 100% of the cost, but the focus of this article is on fully insured welfare benefits. Voluntary benefits are found in the smallest medical practice to the largest hospital system. If employee-pay-all insurance is offered at your workplace, read on. Because employers do not contribute to the cost of voluntary benefits, there is a misconception by most that the employer has no responsibilities beyond collecting and remitting premium payments. While this may be true in some cases, in many cases it is not.

What is involved in the ERISA checkup? First, identify all benefits for which employees pay 100% of the cost. Second, identify which are provided by insurance (both group and individual policies). Third, identify which provide welfare benefits. Fourth, for those that are insured welfare benefits, carefully review your role under the ERISA "safe harbor." Fifth, for those that fail to meet the safe harbor, take steps to comply with ERISA. The first two steps are self-explanatory. Let's review the others.

What are welfare benefits? ERISA defines welfare benefits by the type of benefit provided: medical, surgical, or hospital care or benefits; benefits in the event of sickness, accident, disability, death or unemployment; vacation benefits; apprenticeship or other training programs; day care centers, scholarship funds or prepaid legal services; and holiday or severance benefits. This is a broad, inclusive definition. This inclusiveness is ameliorated by several exclusions: payroll practices (e.g., shift premiums and payment of compensation while on jury duty); on-premises facilities (e.g., recreation and dining facilities); holiday gifts (e.g., turkeys); sales to employees (e.g., discount on employer's products); hiring halls; remembrance and strike funds; unfunded scholarships; and certain group or group-type insurance programs (discussed in detail below).

The exclusion frequently relied upon with voluntary benefits is the exclusion for certain group or group-type insurance programs. This exclusion applies only if all of the following requirements are met: (1) no contributions are made by the employer; (2) participation by employees is completely voluntary; (3) without endorsing the program, the sole functions of the employer are to permit the insurer to publicize the program to employees, collect premiums through payroll deduction and remit premiums to the insurer; and (4) the employer must not receive any consideration in connection with the program other than reasonable compensation for administrative services actually provided in connection with the payroll deductions. It is generally evident whether most of

these requirements are met. The third requirement is the one that causes most voluntary benefits to fail the safe harbor because the employer has gone too far and endorsed the benefit. Case law and Department of Labor opinions find the presence of the following factors to be indicative of endorsement (and their absence indicative of no endorsement): selecting the insurance carrier; negotiating the terms of the insurance contract; tying eligibility for participation to employee status; using the employer's name in communications and materials; recommending that employees participate; saying that ERISA applies; allowing premiums to be paid through the employer's cafeteria plan; assisting employees with issues that arise with respect to the benefits offered; and doing more than processing payroll deductions. The specific facts are very important. The more factors found, the more likely is the benefit to be outside of the safe harbor. In a few cases, the presence of a single factor took the benefit outside of the safe harbor. Typical litigation facts involve a benefit that the employer treats as falling within the ERISA safe harbor, but when sued in state court by a participant, the insurer invokes ERISA as a defense. The insurer claims that the safe harbor does not apply, and as an ERISA covered benefit the participant's state law claims are preempted by ERISA. (There is a good chance the insurer took the opposite position when setting up the benefit with the employer). Note: failing to meet the safe harbor should not automatically mean that the plan is subject to ERISA. Technically, it simply means that the employer is unable to rely on the safe harbor to remove the plan from ERISA.

If you want to offer voluntary benefits and have them fall outside of ERISA, it is very important to strictly limit your role as the employer to those clearly permitted by the safe harbor, and avoid any action that could be construed as endorsement.

As a practical matter, many employers find it difficult or undesirable to offer a voluntary benefit in the manner necessary to fall within the ERISA safe harbor. In that case, it will be necessary to comply with ERISA. What are the ERISA obligations? File an annual form 5500 (for smaller employers an exemption may apply); follow the DOL claims procedure; timely respond to participant requests for documents; prepare and distribute a summary plan description and a summary of material modification for amendments to the SPD; and generally carry out administrative obligations as a fiduciary (unless the insurer has taken on the fiduciary role of plan administrator). If the benefit is also a health plan, additional obligations are present, such as COBRA, HIPAA, and healthcare reform compliance.

Voluntary benefits are valued by employees, not only for the gaps they fill but the ability to obtain them at better rates than the employee could get individually. As the employer, a little due diligence on new benefits and a checkup on existing benefits can minimize headaches and complications down the road.

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