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"Voluntary" Benefits – Are Your Programs Actually Exempt from ERISA?

Finding and retaining talented employees seems as difficult a task now as it has ever been. To attract and retain the best employees, many employers are increasingly finding that they must offer not only competitive wages and generous paid leave policies, but also a unique and varied suite of employee benefits.

For many large employers, this means offering not only standard profit sharing or 401(k) retirement plans and group health plans, but also allowing insurance companies to market increasingly common types of group supplemental insurance products (such as accident, critical illness, hospital indemnity, and cancer insurance) to their employees as voluntary, employee-pay-all insurance programs.

When these types of voluntary insurance programs are made available to employees, many employers may assume the programs are exempt from the provisions of ERISA.

But are these types of voluntary programs really exempt from ERISA? This question is one that has long been more nuanced than many employers are aware. And, because of a flurry of recent putative class action lawsuits involving voluntary programs that have been filed by plaintiffs' firms over the past six months, this question is even more relevant and important right now – one worthy of a fresh and deeper look.

The DOL's "Voluntary" Plan Safe Harbor Exemption – Not So Easy To Satisfy

Under ERISA's regulatory scheme, health and welfare programs that fall within the definition of "employee welfare benefit plan" are generally subject to ERISA's provisions. Being subject to ERISA carries significant administrative burdens, as well

as certain protections, for employers. Importantly, though, it also means that ERISA's fiduciary duty framework applies.

A U.S. Department of Labor (DOL) safe harbor exempts voluntary programs from ERISA by excluding them from the definition of an "employee welfare benefit plan." The safe harbor provides that the term "employee welfare benefit plan" does not include "a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which:

- No contributions are made by an employer or employee organization,
- Participation in the program is completely voluntary for employees or members,
- The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deduction or dues checkoffs and to remit them to the insurer, and
- The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs."

Easy enough, right? Simply satisfy the four prongs of the voluntary plan safe harbor, and all is well because ERISA does not apply. No ERISA fiduciary duties, no worrying about Form 5500 filings, etc.

Not so fast! The voluntary plan safe harbor, though seemingly straightforward, is actually fairly narrow. Employers often unknowingly take certain actions that amount to the "endorsement" of the voluntary program, thereby vitiating the safe harbor and potentially triggering ERISA's application.

"Endorsing" a voluntary program might include any of the following: (i) promoting or otherwise encouraging employees to participate in the voluntary program; (ii) using the employer's name and/or logo on materials related to the voluntary program; (iii) seeking out, selecting, and/or negotiating with a particular insurer for the voluntary program; (iv) stating on voluntary program materials or otherwise that ERISA applies to the program; (v) allowing employees to pay premiums for the voluntary program on a pre-tax basis through a cafeteria plan; and (vi) assisting employees with

enrolling in or submitting claims under the voluntary program.

Recent Litigation Brings ERISA Status for Voluntary Programs to the Forefront

In late December 2025, a well-known ERISA plaintiffs' firm filed four lawsuits in the form of putative class actions alleging that certain employers and their consultants violated ERISA's fiduciary duties under voluntary benefit programs. At least two more lawsuits have been filed in early 2026.

Like the excessive fee litigation cases that were filed with respect to qualified retirement plans beginning roughly 20 years ago, these new voluntary program cases in the welfare plan space have generally been filed against large employers and allege that as ERISA fiduciaries, the employers and their consultants violated ERISA's fiduciary duties and engaged in prohibited transactions under ERISA. Chief among the fiduciary allegations are that the employers and their consultants allowed employees to pay higher premiums to the insurers than the employees should have paid, while at the same time brokers and consultants were paid excessive commissions and compensation, all because the alleged ERISA fiduciaries were asleep at the wheel with respect to the voluntary programs.

As these cases proceed, a threshold question (which is likely to be a factual determination in each case) is whether the voluntary benefit programs at issue actually are subject to the provisions of ERISA, including ERISA's fiduciary duty framework. That, in turn, will likely turn on how closely an employer has followed the DOL's voluntary plan safe harbor and/or whether the employer has taken actions that effectively "endorse" the voluntary program.

What Employers Should Do

Employers that have allowed insurers to market these types of voluntary programs to their employee populations, and who are currently taking the position that the DOL's voluntary plan safe harbor applies, should take a fresh and careful look at whether all of the elements of the safe harbor have been met with respect to their voluntary benefit programs.

If an employer finds that, because of its actions, one or more of its voluntary programs are likely to be determined as being subject to ERISA, it may wish to begin

treating its voluntary programs as such. This may include adding the voluntary programs to any wrap welfare plan the employer maintains for Form 5500 reporting purposes, as well as subjecting the voluntary programs to the same ERISA fiduciary oversight process that the employer engages in with respect to its other ERISA plans.

This blog post was drafted by Eric Miller, an attorney in the Overland Park, Kansas, office of Spencer Fane. For more information, visit spencerfane.com.

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