# COMPLIANCE OVERVIEW

## Voluntary Benefits – ERISA Compliance Exemption

Voluntary benefits are optional benefits that employers may offer to enhance their traditional benefits packages. Offering voluntary benefits allows an employer to include a variety of benefits that are attractive to employees in their benefits package without adding to their organization's costs. While voluntary benefits are typically employee-paid, payments can be automatically deducted from employees' paychecks and remitted to the insurance carrier.

Employers can minimize their compliance obligations by structuring their voluntary benefits to qualify for a safe harbor exemption under the Employee Retirement Income Security Act (ERISA). This exemption is significant because it relieves an employer of ERISA's various compliance requirements for its voluntary benefits, such as distributing a Summary Plan Description (SPD) and filing an annual report (i.e., Form 5500).

The employer's involvement with a voluntary benefit is the key to determining whether it is exempt under ERISA. If an employer endorses the benefit, it will fall outside the safe harbor exemption and may be subject to ERISA. Employers that want to fall under the ERISA exemption should follow the safe harbor rules and ensure they do not take actions that endorse the voluntary benefit.

### LINKS AND RESOURCES

- U.S. Department of Labor (DOL) regulations containing the safe harbor exemption for voluntary benefits
- DOL website on ERISA compliance for health plans and benefits

### Exemption Requirements

To fall under the safe harbor exemption, a voluntary benefit must satisfy these conditions:

- 100% employee-paid;
- Voluntary employee participation;
- No employer endorsement of the benefit; and
- No consideration paid to the employer from the carrier for offering the benefit.

### Common Types

The following are common types of voluntary benefits:

- Life insurance;
- Long-term care insurance;
- Critical illness insurance;
- Disability insurance;
- Dental or vision insurance;
- Hospital indemnity insurance;
- Accident insurance; and
- Legal assistance programs.

## ERISA

ERISA sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA exempts only two types of employers from its requirements: governmental and church employers. Through its Employee Benefits Security Administration, the DOL enforces most of ERISA's provisions. Violating ERISA can have serious and costly consequences for employers that sponsor welfare benefit plans, either through DOL enforcement actions and penalty assessments or participant lawsuits.

If an employee benefit is exempt from ERISA, the employer does not have to comply with the requirements outlined below for that benefit. On the other hand, employers that sponsor ERISA plans are generally protected against lawsuits for punitive and other types of damages under state laws with respect to their benefit plans. An ERISA exemption means that these protections do not apply to the employer (or insurance carrier) with respect to that benefit.

### Key Compliance Requirements

Under ERISA, employers are generally required to take the following steps with respect to their employee benefit plans:

- Adopt an official plan document that describes the plan's terms and operations;
- Explain the plan's terms and rules to participants through an SPD;
- File an annual report (Form 5500) for the plan unless a filing exemption applies;
- Comply with certain fiduciary standards of conduct with respect to the plan; and
- Establish a claims and appeals process for participants to receive benefits from the plan.

Employee benefit plans that provide medical care may be subject to additional compliance requirements for group health plans, such as COBRA's continuation coverage requirements and HIPAA's privacy and security requirements.

### Covered Benefits

Many plans or programs that provide nonretirement benefits to employees are considered employee welfare benefit plans that are subject to ERISA. For example, ERISA generally applies to medical benefits, dental and vision benefits, accident and sickness benefits, life insurance, disability benefits and disease-specific coverage, such as cancer insurance policies. To qualify as an ERISA plan, there must be a plan, fund or program established by the employer for the purpose of providing ERISA-covered benefits to participants and their beneficiaries.

Certain welfare benefit plans that would otherwise fall under ERISA have been specifically exempted by DOL regulations. These exemptions include:

- A safe harbor exemption for certain payroll practices, such as the payment of wages, unfunded sick leave and paid medical leave or unfunded vacation and holiday pay; and
- A safe harbor exemption for voluntary plans.

In addition to these exemptions, certain benefit arrangements do not fall under ERISA's definition of a welfare benefit plan. These include, for example, pet insurance, adoption assistance plans, dependent care assistance programs, liability or casualty insurance, or financial planning programs.

## Exemption for Voluntary Plans

The DOL's safe harbor exemption for certain voluntary insurance arrangements generally applies where the full premiums are paid by employees and the employer has minimal involvement. To qualify as a voluntary plan under the DOL's safe harbor, the arrangement must be a group (or group-type) insurance program that satisfies the following requirements:

1. No contributions are made by the employer (or employee organization);
2. Employee participation in the program is completely voluntary;
3. 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; and
4. The sole functions of the employer, with respect to the program, are, without endorsing the program, to permit the insurer to publicize the program to employees, collect premiums through payroll deductions or dues checkoffs, and remit them to the insurer.

Numerous DOL advisory opinions and court cases have addressed the DOL's safe harbor exemption for voluntary plans over the years. Unfortunately, the courts' decisions have not always been consistent, which has created some uncertainty regarding the safe harbor's parameters. However, there are some overall limits that employers should consider when reviewing the safe harbor exemption, as outlined below.

### 1. No Employer Contributions

The safe harbor exemption does not apply to an insurance arrangement where the employer contributes toward the cost of the coverage. A plan would clearly fall outside the safe harbor if coverage were 100% employer-paid and free for all employees. The safe harbor is also inapplicable if the employer's contribution is only partial or insignificant or only for some employees. An employer is treated as contributing to the coverage regardless of whether it directly pays premiums to the insurer from its own funds or makes tax-free reimbursements to employees for their premium payments. However, an employer does not make contributions when it merely forwards the premium payments to the insurer for employees.

### 2. Voluntary Employee Participation

Employees' participation in a benefit program must be completely voluntary for the benefit to fall under the safe harbor exemption. Unlike other elements of the safe harbor exemption, this requirement is fairly straightforward. Requiring employees to participate in a benefit program (for example, making participation a condition of employment) would violate this safe harbor requirement.

### 3. No Employer Compensation

To qualify for the safe harbor exemption, the employer cannot receive any payments from the insurer offering the coverage other than reasonable compensation for administrative services actually rendered in connection with payroll deductions or dues checkoffs. The DOL has not provided guidance on what would qualify as reasonable compensation for purposes of the safe harbor exemption.

### 4. Limited Employer Involvement

The employer's involvement with the program is frequently the key to determining whether it is exempt from ERISA under the voluntary plan safe harbor. This determination is often difficult to make because it depends on the facts and circumstances involved with each specific benefit offering. If an employer endorses the program, it will fall outside the

safe harbor and may be subject to ERISA. It is not exactly clear what factors (or combination of factors) may lead the DOL or a court to conclude that an employer has endorsed a program, but the safe harbor clearly allows an employer to perform the following three basic functions:

1. Permitting the insurer to publicize the program to employees;
2. Collecting premiums through payroll deductions; and
3. Remitting the premiums collected to the insurer.

Employers that want to take advantage of the safe harbor exemption should be cautious about engaging in activities that go beyond these three basic functions, as it is difficult to predict what actions the DOL or a court may view as an endorsement. For example, employer endorsement may include these actions:

- Selecting the insurer;
- Negotiating plan terms or linking coverage to employee status (e.g., providing a premium discount to current employees);
- Using the employer's name or associating the plan with other employee benefits;
- Recommending the plan to employees;
- Saying that the plan is subject to ERISA;
- Doing more than making payroll deductions (for example, sending premium notices or assuming liability for premium payments due during grace periods);
- Allowing employees to pay premiums on a pre-tax basis through the employer's Section 125 plan; and
- Assisting employees with claims or disputes.