



## VOLUNTARY PLANS:

### *A Safe Harbor from ERISA's Application*

Commonly, the term “voluntary plan” is used to refer to insurance coverage that is offered to employees on a voluntary basis with employees covering the full cost of the premium. Voluntary plans may involve group insurance coverage, such as dental insurance, or individual policies, such as indemnity and disease-specific coverage. Absent an exemption, these employer-provided voluntary plans are subject to the Employee Retirement Income Security Act (ERISA) and its related regulations.

#### Safe Harbor Criteria

Employer-sponsored health benefits are generally considered group health plans subject to ERISA (as well as COBRA and HIPAA), which imposes various compliance obligations on the employer-sponsor. However, Department of Labor (DOL) regulations provide a **safe harbor under which ERISA does not apply** to voluntary insurance arrangements that meet specific criteria.

# 1

#### No Employer Contributions

The first criteria under the voluntary plan safe harbor requires that no contributions be made by the employer (or employee organization). Employer contributions include not only the use of the employer's own funds to directly pay premiums, but also the reimbursement of employee premium expenses. In other words, **employees must be responsible for paying the full premium cost** for coverage under the voluntary plan.

# 2

#### Voluntary Participation

In addition to the prohibition on employer contributions, the voluntary plan safe harbor requires that participation by employees be strictly voluntary. The **employer cannot make participation a requirement of employment**, nor can the employer provide any **inducement or incentive** to employees to encourage participation.

# 3

#### No Employer Endorsement

The third – and most complex – requirement of the safe harbor is the prohibition on employer endorsement of the plan. In short, the employer's level of involvement in the voluntary plan must be

limited; instead, it must be the insurance company, not the employer, that is offering the plan to employees.

**Employer involvement is limited** to permitting the insurer to publicize the program to employees, collecting employee premium payments through payroll deductions, and remitting the collected premiums to the insurer. Any involvement beyond these limited actions, including negotiating the terms or design of the plan, using the employer's name to advertise the plan, and assisting employees with claims and disputes, may be construed as employer endorsement.

## 4

### No Receipt of Consideration

The final voluntary plan safe harbor criteria is the prohibition on employer receipt of consideration from the insurer. This means that the **employer cannot receive any consideration in the form of cash or otherwise** in connection with the program. Thus, any arrangement whereby the employer receives a share of commission from the insurer or any other type of discount or perk in exchange for making the voluntary plan available will cause the plan to fall outside the safe harbor.

## Exemption from ERISA

An arrangement that satisfies all four elements of the voluntary plan safe harbor is exempt from ERISA and its additional compliance obligations. Such an exemption can be quite significant, as it **relieves the employer from requirements such as the preparation of a Plan Document and Summary Plan Description, the annual 5500 filing, and the various fiduciary duties** that would otherwise fall upon a plan sponsor and administrator. In addition, the arrangement's exclusion from being considered a group health plan means that **neither COBRA nor HIPAA will apply**.

## Taxation Issues

One of the elements of the voluntary plan safe harbor is the **prohibition on employer endorsement** of the arrangement. An important consequence of this prohibition is that the employer cannot permit employees to make premium payments through the employer's Sec. 125 Cafeteria Plan. While an employer can, for convenience, collect employee premium payments on behalf of the insurer through payroll deductions, these **payroll deductions must be on a post-tax basis outside of the Cafeteria Plan**.

Therefore, the employer must make clear to employees that premium payments for any voluntary plan will not serve to decrease the employee's taxable income (unlike group health benefits that may be offered through the Cafeteria Plan). An employer that permits the pre-tax payment of premiums for voluntary plans will cause the arrangement to fall outside the safe harbor and will lose the benefit of the ERISA exemption.

## Employer Considerations

While an exemption from ERISA can be valuable, satisfaction of the voluntary plan safe harbor may be difficult to attain for some employers – particularly with regard to the prohibition on employer endorsement. Consequently, employers should carefully consider how important the exemption is and whether it will offer the employer meaningful reprieve from compliance obligations. For example, an employer that already sponsors one or more ERISA-covered plans may not find value in pursuing the exemption for its voluntary plan, as bringing the voluntary plan into the fold of the ERISA-covered plan may be easier than attempting to carve it out. Conversely, an employer that does not already sponsor an ERISA-covered plan may wish to remain free from ERISA’s compliance obligations by satisfying the safe harbor.

An employer interested in pursuing ERISA exemption must be committed to follow the voluntary plan safe harbor over the life of the plan. And despite an employer’s best efforts, a court or the DOL may find that a voluntary plan does not satisfy the safe harbor. Should this occur, the employer may face **statutory penalties** and be left with **unfulfilled compliance obligations**.

In sum, the value of the voluntary plan safe harbor will be different for every employer. For those that see a meaningful benefit to the ERISA exemption, strict adherence to the safe harbor criteria is essential.

## RESOURCES

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*DOL Reg. §2510.3-1(j).* [Website Link](#)

*ERISA Opinion Letter No. 94-23A.* [Website Link](#)

*Peckham v. Gem State Mut. of Utah, 5/21/1992.* [Website Link](#)

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