

Voluntary Plans and ERISA

Voluntary plans are generally programs that offer employees the opportunity to purchase benefits through the work-place. These benefits are not deemed to be maintained by an employer and therefore are not subject to ERISA (even though providing ERISA type benefits) **if the plan satisfies the DOL regulatory safe harbor for voluntary plans.**

Actionable Items Under ERISA:

- Plan Document
- Summary Plan Description
- Summary of Material Modification
- Respond to participant requests
- File Form 5500 if required

In order to satisfy the safe harbor, the following elements must be met:

- No employer contributions or endorsement of the plan
- Employee participation is completely voluntary
- Employer functions (without endorsing the program) is to (1) permit the insurer to publicize the program to employees, and (2) collect premiums through payroll deductions and remit to the insurer
- Employer receives no consideration in the form of cash or otherwise in connection with the program other than reasonable administrative fees

DOL considerations for endorsing a program include, but are not limited to:

- Negotiating the terms of the coverage
- Associating the employer's name with the plan
- Recommending a plan
- Allowing employee to pay for coverage through a cafeteria plan
- Assisting employees with claims or disputes

In general, any employer involvement apart from that permitted by the DOL safe harbor requirements should be carefully reviewed with the assistance of legal counsel.

Employer considerations for voluntary plans:

- Does the employer have a concern about avoiding ERISA application?
 - Determining safe harbor compliance is not always easy
 - Complying with ERISA may be easier than voluntary compliance
- Does being subject to ERISA increase the employer's reporting and disclosure requirements?
 - Adding voluntary benefits to an existing ERISA plan may not increase obligations
- Is the voluntary plan subject to Group Health Plan laws?
 - If the insurance coverage arrangement satisfies group health plan definition, then HIPAA, COBRA and other rules may apply making compliance difficult
- Will the employer be able to meet the safe harbor requirements over the life of the plan?
- Is the employer risk adverse to satisfying the safe harbor requirements?
- Penalties could apply for failing to file an annual Form 5500 or not responding to participant requested documents if it is found the plan was subject to ERISA and did not comply

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