

Identifying an “ERISA Plan”

Definition: A plan, fund, or program established or maintained by an employer for the purpose of providing specifically listed benefits, through the purchase of insurance or otherwise, to participants and their beneficiaries.

1 THERE MUST BE A PLAN, FUND, OR PROGRAM

- » This means a reasonable person could ascertain:
 1. the intended benefits
 2. a class of beneficiaries
 3. the source of financing
 4. the procedures for receiving benefits
- » There must also be a commitment to pay benefits systematically, including an ongoing administrative responsibility or scheme to determine eligibility and calculate benefits.
- » A written plan document (or absence of a document) does not determine whether a plan is covered by ERISA.

3 FOR THE PURPOSE OF PROVIDING SPECIFICALLY LISTED BENEFITS, THROUGH THE PURCHASE OF INSURANCE OR OTHERWISE,

- » Medical, surgical, or hospital care
- » Benefits in the event of sickness, accident, disability, death, or unemployment
- » Vacation benefits
- » Apprenticeship or other training programs
- » Daycare centers
- » Scholarship funds
- » Prepaid legal services

2 ESTABLISHED OR MAINTAINED BY AN EMPLOYER

- » The plan must be part of the employment relationship.
- » **Self-Insured Plans:** If established or maintained by employer.
- » **Fully Insured Plans:** If employer pays insurer to administer the plan (or purchases insurance).

4 TO PARTICIPANT AND THEIR BENEFICIARIES

- » Employees or former employees eligible to receive a benefit (from an employee benefit plan covering employees or their beneficiaries.)
- » May include retirees or COBRA qualified beneficiaries

EXEMPTED PLANS

- » **Government Plans** (maintained by the government of the U.S., a state, or political subdivision)
- » **Church Plans** (maintained by a church or convention or association of churches that is exempt under Code Sec. 501; however, this does not include a plan maintained primarily for the benefit of employees who are employed in connection with unrelated trades or businesses)
- » Plans maintained by **Indian tribal governments**, but only if all in the plan are employees of the tribal government and their services as employees are in the performance of essential governmental functions (but not in the performance of commercial activities)
- » Plans maintained solely to comply with worker's compensation, unemployment compensation, or disability insurance laws
- » Plans maintained outside of the U.S. for nonresident aliens
- » Payment of wages, unfunded sick pay, or income replacement benefits
- » Unfunded vacation, holiday, jury duty, and similar pay

PLAN VERIFICATION PROCESS

- 1. List All Plans, Funds, or Programs**
 - » Include fringe benefits of any type or size, even if informal or unwritten.
- 2. A. Disregard Benefits Not Maintained by an Employer**
 - » For example, certain insurance policies paid entirely by employees. See Voluntary Plans below.
- B. Disregard Benefits Not Listed in ERISA**
 - » See Definition page.
- C. Disregard Benefits Not Provided to Employees or Their Beneficiaries**
 - » Generally, benefits provided **only** to persons who are not employees, former employees, or their dependents are not subject to ERISA.
- 3. Disregard Benefits Exempted From ERISA**
 - » See Definition Page.
- 4. Disregard Benefits Exempted Under DOL Regulations**
 - » See Definition page.
- 5. List ERISA Benefits**
 - » These are the (benefits) subject to ERISA's compliance obligations.

VOLUNTARY PLANS

Programs that offer employees the opportunity to purchase benefits through the employment relationship. Examples include disability or disease-specific benefits.

These benefits are not deemed to be “maintained” by an employer and therefore, are not subject to ERISA, (even though they provide ERISA-type benefits), provided that the plan satisfies the regulatory Safe Harbor for rule.

To satisfy the Safe Harbor Rule, the voluntary plan must be an insurance program under which:

- 1.** no contributions are made by an employer;
- 2.** participation in the program is completely voluntary for employees or members;
- 3.** the sole functions of the employer with respect to the program are (without ensording the program):
 - a.** to permit the insurer to publicize the program to employees or members; and
 - b.** to collect premiums through payroll deductions or does check-offs and remit them to the insurer; and
- 4.** the employer 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 check-offs.

The most difficult part of applying the Safe Harbor Rule is determining whether an employer has endorsed the program. Examples of employer activities ‘deemed’ to be endorsements include:

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

In general, any employer involvement (apart from Safe Harbor Rule Permissions) should be carefully reviewed.

EXAMPLES

For the following examples, assume the employer pays at least a portion of the cost of the plan or benefit.

Non-ERISA benefit plans assume the benefit is “unfunded” (i.e., uninsured and paid from the employer’s general assets not from a fund or trust). Note that any plan requiring or accepting employee contributions will be considered “funded.”

Plans Generally Considered to be ERISA Plans:

- » Business Travel Accident Insurance
- » Cancer Insurance
- » Day Care Center
- » Dental Benefits
- » Disability (STD, LTD) insured or funded other than payroll practice
- » Disease Specific Coverage
- » Drug and Alcohol Treatment Programs
- » Employee Assistance Plans that offer medical care (e.g., mental health or substance abuse counseling)
- » Executive physicals
- » Health Flexible Spending Arrangements (FSAs)
- » Health Reimbursement Arrangements (HRAs)
- » Flu Shot Programs
- » Legal Plans
- » Life Insurance
- » Mini-Med Plans
- » Nurse Help Lines
- » On-Site Clinics (if medical care provided is beyond first aid)
- » Severance Pay Plans
- » Vision Plans
- » Wellness Plans with biometric screening
- » Medical Insurance

Plans Generally NOT Considered to be ERISA Plans:

- » Accidental Death & Dismemberment
- » Adoption Assistance
- » Auto Insurance
- » Cafeteria Plans (Premium only)
- » Commuting Benefits
- » Dependent Care Assistance Programs (DCAPs)
- » Disability (STD, LTD) funded as payroll practice
- » Disability Insurance solely to comply with state law
- » Educational Assistance Programs
- » Employee Assistance Plans that do not provide medical care (e.g., referral-only programs)
- » Exercise or Fitness Center Benefits
- » On-Site First Aid Clinics (treatment of work injuries or first aid only)
- » Sick Pay Plans
- » Training Benefits
- » Tuition Reimbursement
- » Vacation Pay Plans

Take note: Look at the benefits provided by each program. For example, employer sponsored auto insurance may be an ERISA plan if the policy provides for medical payments. Generally, if a plan offers non-ERISA benefits in combination with ERISA benefits, the plan will be subject to ERISA.