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# ERISA Compliance FAQs: What is an ERISA Plan?

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for employee benefit plans maintained by private-sector employers. ERISA includes requirements for both retirement plans (for example, 401(k) plans) and welfare benefit plans (for example, group health plans). ERISA has been amended many times over the years, expanding the protections available to welfare benefit plan participants and beneficiaries.

The Department of Labor (DOL), through its Employee Benefits Security Administration (EBSA), 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 through participant lawsuits.

This Legislative Brief includes a set of frequently asked questions (FAQs) to help employers determine whether their employee benefits plans are subject to ERISA.

**WHICH EMPLOYERS ARE SUBJECT TO ERISA?**

ERISA applies to virtually all private-sector employers that maintain welfare benefit plans for their employees, regardless of the size of the employer. This includes corporations, partnerships, limited liability companies, sole proprietorships and nonprofit organizations.

ERISA only exempts two types of employers:

- Employee benefit plans maintained by **governmental employers** are exempt from ERISA's requirements. This exemption includes plans maintained by the federal, state or local (for example, a city, county or township) governments.
- **Church plans** are also exempt from ERISA. A church plan is any employee benefit plan established or maintained by a church or by a convention or association of churches that is exempt from tax under Section 501 of the Internal Revenue Code (Code), and has not made an election under Code Section 410(d) to be subject to ERISA.

**Small employers are subject to ERISA's requirements**, unless they meet the exemption for governmental employers or churches.

**WHICH WELFARE BENEFIT PLANS ARE SUBJECT TO ERISA?**

Many employment plans or programs that provide nonretirement benefits to employees are considered employee welfare benefit plans that are subject to ERISA.

> To qualify as an ERISA plan, there must be a plan, fund or program that is established by the employer for the purpose of providing ERISA-covered benefits (through the purchase of insurance or otherwise) to participants and their beneficiaries.

**ERISA generally applies to the following common employee benefits, regardless of whether they are insured or self-funded:**

- Medical, surgical or hospital benefits;
- Dental benefits;
- Vision benefits;
- Prescription drug benefits;
- Health reimbursement arrangements (HRAs);
- Health flexible spending accounts (FSAs);
- Group life insurance benefits;
- Accidental death and dismemberment (AD&D) benefits;
- Death benefits (other than life insurance);
- Wellness programs (when medical care is provided);
- Employee assistance plans (EAPs) (when medical care is provided);
- Disability benefits, both short-term disability and long-term disability, if insured or funded other than as a payroll practice; and
- Disease-specific coverage (for example, cancer policies that provide medical benefits).

**WHICH WELFARE BENEFIT PLANS ARE NOT SUBJECT TO ERISA?**

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**; 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.

**ERISA generally does NOT apply to the following arrangements:**

- Adoption assistance plans;
- Section 125 premium-only plans (although the plan's benefit components may be subject to ERISA);
- Commuting benefits (that is, transportation allowance, free parking and mass transit passes);
- Dependent care assistance programs (DCAPs);
- Health savings accounts (HSAs)—if the employer's involvement is limited and employee participation is voluntary;
- Pet insurance;
- Financial/retirement planning programs;
- Health, fitness or exercise club membership—if the program does not offer medical care;
- Liability or casualty insurance plans;
- Professional development classes (unfunded);
- Scholarship programs (unfunded);
- Sporting event tickets or discounts;
- Tuition reimbursement;
- Unemployment compensation provided solely to comply with state law; and
- Workers' compensation benefits provided solely to comply with state law.

**WHICH PAYROLL PRACTICES ARE EXEMPT FROM ERISA UNDER THE DOL'S SAFE HARBOR?**

***Payment of Wages***

An employer's payment of compensation for work performed by an employee, including compensation at a rate in excess of the normal rate of compensation for duties under other than ordinary circumstances, does not create an ERISA plan with respect to **wages, overtime pay, shift premiums, and holiday or weekend premiums**.

***Unfunded Sick Pay or Paid Medical Leave Programs***

In addition, payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) is a payroll practice that is not subject to ERISA.

These practices may include **income replacement, short-term disability, salary continuation or paid medical leave programs**.

To fall under the payroll practice exemption, the program must:

- Be unfunded and uninsured;
- Not pay more than an employee's normal compensation; and
- Cover current employees only (that is, does not cover former employees, retirees or other nonemployees).

***Unfunded Vacation, Holiday, Jury Duty and Similar Pay***

Payment of compensation, out of the employer's general assets, for the following time off does not create an ERISA plan:

- Vacations or holidays (including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons);
- Active military duty;
- Jury duty or testifying in official proceedings;
- Periods of time when an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by federal, state or local government funds); or
- Sabbatical leave or time off while pursuing further education.

**WHAT IS A VOLUNTARY PLAN THAT IS EXEMPT FROM ERISA UNDER THE DOL'S SAFE HARBOR?**

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.

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To qualify as a voluntary plan under the DOL's safe harbor, the arrangement must satisfy the following requirements:

- ☑ The program is funded by group (or group-type) insurance;
- ☑ No contributions are made by the employer or employee organization;
- ☑ Employee participation in the program is completely voluntary;
- ☑ 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 deductions 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.

The employer's involvement with the plan is the key for determining whether the plan is exempt under the voluntary plan safe harbor. If an employer endorses the plan, it will fall outside of the safe harbor and may be subject to ERISA. Employer endorsement may include these actions:

- Selecting the insurer;
- Negotiating plan terms or linking coverage to employee status;
- 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 through the employer's Section 125 plan; or
- Assisting employees with claims or disputes.