

Employee Benefits Report

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Compliance

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The Benefit May Be Voluntary —Does ERISA Apply?

In a 2006 survey of employers of all sizes, more than three-quarters offered voluntary benefits. The popularity of voluntary benefits promises to increase as employers try to enhance benefit programs without increasing costs. But despite their rapid growth, too few employers understand the compliance issues surrounding voluntary benefits.

Are voluntary benefit plans governed by state or federal law? Does the Employee Retirement Income Security Act (ERISA) apply?

ERISA, a federal law, governs any “employee welfare benefit plan” that is “established or maintained by an employer” for the purpose of providing benefits to the plan’s participants and their beneficiaries. This includes some, but not all, voluntary plans, despite the fact that the employer may not make a single dollar contribution to the

plan.

Intent doesn’t determine whether ERISA governs a voluntary plan or not. As a result, you may create an ERISA plan unknowingly and learn about it only after a lawsuit is filed.

What’s So Bad About ERISA?

One of the basic purposes of ERISA is to protect promised benefits. To help accomplish that goal, the statute and regulations require sponsors of ERISA plans to provide summary plan descriptions (SPDs),

adhere to ERISA claims procedures, and to file an annual Form 5500 financial status report. These, and other requirements, make administering an ERISA plan more complex than other plans.

Compliance scorecard

By understanding ERISA rules, you can structure your plans to ensure compliance and keep your company out of hot water. Plans that do not fall under ERISA avoid ERISA’s fiduciary provisions and do not require SPDs, ERISA claims procedures or Form 5500 filings.

To determine whether your voluntary plan falls under ERISA, start with the Department of Labor’s rules detailing “safe-harbor exemptions” from ERISA regulations. To fall within the safe harbor:

- 1 The employer can make no contributions.

This Just In

The IRS has added three types of expenses to the list of medical expenses approved for deductions and reimbursement under a Health FSA, Health Reimbursement Arrangement or a Health Savings Account.

The first expense is an annual physical exam. The second is full-body electronic scans. Although often performed without a doctor’s recommendation, the IRS considers such scans reimbursable because they serve “no non-medical purpose.” (It matters not that this procedure is typically expensive and that cheaper and possibly more effective alternatives exist, such as X-rays.) The third is pregnancy tests, including over-the-counter tests. Anxious mothers-to-be can take comfort that the IRS did not limit the quantity of tests that can be reimbursed.

For details, see Internal Revenue Bulletin 2007-50, Page 1154: www.irs.gov/pub/irs-irbs/irb07-50.





In spite of their popularity and increased visibility, employee assistance programs face some major challenges. An EAP, typically offered in conjunction with a health insurance plan, can help employees deal with personal problems that might adversely affect their work performance, health and well-being. They can include everything from stop-smoking programs to mental health counseling.

Usage rates, however, are hovering around five percent to seven percent. While programs aren't meant to have 100 percent or even 80 percent usage rates, these figures are nevertheless low and could indicate that many workers are not taking full advantage of the benefit.

One explanation for the low usage may be that EAPs are having a tough time shedding their image as a program for treating alcohol abuse. Another reason for low usage rates could be lack of awareness of services. EAP programs can get lost in the clutter of what are often intricate benefits packages.

That's why companies are going to great lengths to enhance employee understanding and awareness of EAPs. The Ford Motor Company, for example, changed the name of its EAP benefits to "employee support services program." Not only is the new name free of any negative connotations, but it also denotes the comprehensive nature and complexity of the benefit.

If you're looking to increase EAP participation, one suggestion is to make EAP information meetings mandatory for employees, both to dispel myths about the nature of the program and to raise awareness about its existence. But even when EAP benefits enjoy a high level of understanding and awareness, other obstacles can stand in the way of effectively reaching all employees who need them.

Getting EAPs Right

Employee assistance programs can help workers with a range of problems and improve their work performance. Unfortunately, the majority of employees don't participate.

Online tools

One way in which EAP providers are stepping up to this challenge is by launching more sophisticated online (and, therefore, more private) tools, such as chat rooms, Web demos, videos and, in some cases even personal coaching. Providers are also beginning to integrate EAP services with work/life programs, creating a one-stop solution to help workers cope with complex personal matters.

In addition to devising novel, innovative support tools for workers, EAP providers are increasingly lending a strategic helping hand to companies. They often provide workforce-related guidance on tactical matters, including mergers and acquisitions, company restructurings and even coping with disasters like Hurricane Katrina.

Don't discriminate

It's important to remember that you cannot force an employee to obtain counseling or therapy in routine disciplinary matters. Such a requirement violates the Americans with Disabilities Act (ADA) and can create employee relations problems. However, you can always inform employees of the availability of your EAP and the services available, and generally encourage use of the EAP. And you can certainly require that employees maintain certain standards of behavior and performance on the job.

In rare instances, the ADA does permit you to require, as a condition of continued employment, that an employee be examined by a physician or mental health professional. That exception is limited to situations in which your organization reasonably believes, based on objective evidence, that the employee has a medical condition that impairs his or her ability to perform essential job functions, or the employee poses a direct threat to his or her safety or the safety of co-workers. Before requesting such an examination, consult with your attorney. ■

Why an EAP?

✦ **Reduced turnover:** Recruiting, replacement and training costs can easily exceed 25 percent of an employee's annual salary. An EAP can increase employee retention by helping supervisors address employee performance issues and by helping employees manage personal problems affecting their work performance.

✦ **Increased productivity and employee satisfaction:** By assisting employees with concerns such as child or elder care, family issues and emotional problems, an EAP can help employees and their families lead healthier lives at work and at home. This benefit is also valuable to employees because it is easy and confidential.

✦ **Decreased absenteeism and sick leave:** At least 25 percent of health costs are related to emotional or mental health problems, such as stress, depression, anxiety and substance abuse. After implementing an EAP, organizations often report significant declines in employee absenteeism and workers' comp claims.

✦ **Increased management effectiveness:** Managers and supervisors can learn effective ways to address an employee's personal problems and performance issues before they become major liabilities. They will also learn how and when to refer employees to the EAP.

✦ **Reduced risk of litigation:** EAPs can help employees respond effectively to workplace harassment or discrimination. They can also guide supervisors in how best to intervene in difficult situations before employees seek legal action. ■

— Source: MHN



Compliance

ERISA—continued from Page 1

- 2 Employee participation must be voluntary.
- 3 The employer's function must be limited to collecting premiums through payroll deductions and remitting them to the insurer.
- 4 The employer cannot receive consideration in connection with the program (other than reasonable compensation for administrative services performed).

If your plan meets all four requirements, it's free of ERISA regulation – maybe. However, there are additional considerations related to the fairly generic wording of the original ERISA regulation.

In a defining case in the field (*Butero v. Royal Maccabees Life Insurance Co.*), the Eleventh Circuit Court of Appeals specified seven areas that define whether a plan is “established or maintained by the employer.”

- 1 Employer representations in internally distributed documents.
- 2 Employer oral representations regarding the plan.
- 3 Employer's establishment of a fund to pay benefits.
- 4 The manner in which benefits are paid.
- 5 Employer failure to correct known perceptions of a plan's existence.
- 6 Reasonable understanding of the employees.
- 7 Employer intent.

Given these factors, you can see how easy it is to unwittingly create an ERISA plan. In a 2006 case similar to the one above, a feder-

al appellate court determined in *Moorman v. Unum Provident Corp.* that an ERISA plan had been created. Although the employer had no apparent intent to create an ERISA plan, the court concluded the employer had done enough to lead a reasonable employee to think that the voluntary disability program was employer-sponsored, emphasizing that:

- ✓ The plan was referenced in the employee handbook as a benefit for full-time employees.
- ✓ The plan was the sole plan of its type available and the employer had selected the waiting period.
- ✓ The employer participated in defining who was eligible for coverage.
- ✓ The employer maintained claim forms facilitating the payment of benefits.

For employers, voluntary plans can offer the advantage of minimal paperwork—if ERISA does not apply. To ensure ease of administration, you can ask a benefits expert to review your voluntary plan to verify that it does not fall under ERISA regulations.

However, even if ERISA does apply, voluntary benefits help employers round out employee benefit offerings at no cost (or little cost, if the employer pays a portion of premium or handles administration). These optional benefits can serve as value-added tools to help attract and retain top talent. Just don't be fooled into thinking voluntary plans are free from the regulations that govern employer-sponsored benefits. ■

The Growing Popularity of Voluntary Benefits

Recently, the voluntary benefits universe has expanded to include a wide variety of products and services, such as health-related discount products, pet care, legal plans, travel services and mortgage programs, which don't require any medical underwriting. While life insurance is often cited as the most popular voluntary benefit plan, specialized medical coverage, such as critical-illness or cancer insurance, are among the fastest-growing requests. Both short- and long-term disability plans also are gaining in popularity.

A recent study by LIMRA International found that more than 60 percent of 2,000 employees surveyed consider the availability of voluntary or supplemental benefit options at least ‘somewhat important.’ The driving factors behind these purchases were convenience of payroll deduction and price.

Eastbridge Consulting estimated worksite sales of life and health products paid by employees through payroll deduction to be \$4.3 billion in 2005, an increase of 3.4 percent over the previous year. ■

ACCIDENTAL—continued from Page 4

seen circumstance caused a death that is unrelated to a malfunction of the body. An example of “malfunction of the body” would be someone that suffered a stroke or heart attack while driving. If the heart attack or stroke occurred before the accident and the accident was the result of that bodily malfunction, death as a result of the accident would not be covered.

In the case of death, many policies require this unfortunate incident to occur within ninety days of the accident for the

benefits to be paid. In addition, policies usually stipulate that the cause of death must be directly related to the injuries incurred from the accident.

It's important to keep in mind that AD&D policies do not cover death by any form of illegal or crime-related activities. Policies also don't cover death by suicide or death by a malfunction of the body.

And because they don't cover death from illness, an AD&D policy is no substitute for life insurance coverage. Nevertheless, AD&D policies provide a valuable benefit

for employees who use their bodies to earn their livelihood. There are several types of coverage available:

- * Employee coverage, which covers the employee only; and
- * Dependent coverage, which covers an employee's spouse or registered domestic partner and/or their dependent children

Is AD&D coverage right for your company? We can help you analyze your current benefit program and employee needs. ■



Should You Offer Accidental Death and Dismemberment Insurance?

Accidental death and dismemberment (AD&D) coverage is not an option many people enjoy talking about. This type of coverage pays out extra money to those who have died or lost a limb, vision or hearing as a direct result of an accident.

AD&D coverage is a valuable addition to any employer's benefits package, particularly for the vast majority of workers who do not have individual disability insurance. It's particularly attractive to young workers, who statistically are more likely to die from accident than illness. For these workers, AD&D is substantially cheaper than regular life insurance and may be an attractive alternative if the benefit is offered on a voluntary basis.

If your company plans on picking up the tab, the incredibly low cost of premiums might come as a pleasant surprise. This is because the occurrence of accidental death and other losses covered is extremely rare, so insurance companies do not pay out very often. Hence, AD&D insurance is among the least expensive benefits you can offer. However, for the families of an employee

who suffers an accidental death or dismemberment, the benefit will prove valuable indeed.

You can provide coverage in a separate AD&D policy, or by simply adding coverage to term life policies you already have in place through an accidental death and dismemberment rider. With an AD&D rider, the insurance company will pay a "double indemnity." This means if a covered accident caused the insured's accidental death, the beneficiary would receive the life policy's death benefit, plus a benefit under the AD&D rider.

AD&D coverage doesn't help just the family of a deceased, however. Many policies will pay benefits if a covered accident causes an insured to lose extremities, hearing or sight. The extent of benefits payable depends on the extent of loss. For example, a policy might pay half of the death bene-



fit to the insured for the accidental loss of one hand or arm or one foot or leg. If the insured lost two or more limbs (combination of arms and legs), the policy would pay the entire face value (death benefit) to the insured.

AD&D policies may also cover the sudden loss of vision. The same principles apply. If an insured loses one eye (or its use), the policy would pay one half of the benefit. If he/she loses both eyes, then the insured will receive the entire face value of the policy.

Coverage questions

Before offering AD&D coverage, it's important to understand – and to convey to employees – what AD&D covers and what it doesn't.

Accidental death means that an unfore-

ACCIDENTAL—continued on Page 3

Insured Consumers Ignore Prices

Consumers want health care pricing data, according to a consumer survey by The Regence Group. The survey found that seven of 10 surveyed would seek out information about prices and quality of nonemergency medical services, such as a baby delivery or a diagnostic test if it were readily available. The survey report notes that having health insurance shields consumers from the "true cost of care." Insured consumers tend to focus more on quality than price, whereas the uninsured care more about price. ■

Helping Boomers Who Help Elderly Parents

One of the biggest challenges for employers over the next 10 to 15 years will be problems related to aging Boomer employees caring for elderly parents. Employers can respond by providing senior-specific services, such as providing nutritional advice, helping employees secure reliable elder supervision/care and helping workers better understand Medicare coverage and eligibility. An employee assistance program (EAP) provides the perfect outlet for these services; for more information, see P. 3. ■