Voluntary plans offered by the employer include many types of benefits, from the voluntary dental and vision plans to worksite benefits. Often people assume these voluntary, employee pay-all type arrangements are not subject to the Employee Retirement Income Security Act (ERISA), however the ERISA exemption is not automatic. The Department of Labor (DOL) provides a voluntary plan safe harbor which exempts some plans from ERISA, but a plan or arrangement must satisfy all of the following parameters to meet the safe harbor requirements:

- no employer contributions;
- participation in the plan is completely voluntary;
- employers may collect premiums through payroll deductions and may permit the insurer to publicize the program to employees, but the employer cannot endorse the plan;
- employers may only receive limited compensation in connection with the program for reasonable administrative services rendered in connection with payroll deductions.

An employer may decide that it is simpler to treat the plan as subject to ERISA rather than trying to make sure it fits within the safe harbor. However they must first look to see if any of the voluntary plans involve health benefits. If the arrangement is considered a group health plan then not meeting the safe harbor would also make it subject to HIPAA, COBRA and a host of other laws including the Affordable Care Act. If HIPAA applies, the plan must comply with special enrollment. If the plan is subject to COBRA all notices including language in plan documents must be provided which can be a problem as most voluntary insurance policies are not consistent with COBRA. In addition, if the plans are subject to ERISA, a Form 5500 may need to be filed, a Summary Plan Description (SPD) provided to all participants and beneficiaries and all ERISA reporting and disclosure requirements met.

Employers who want to take advantage of the safe harbor may inadvertently “endorse” the plan. Some possible ways of endorsing include an employer selecting the insurer, recommending the plan to employees, providing pre-tax deductions for the voluntary benefits and assisting employees with claims or disputes. Promoting the plan as an employer-provided benefit by incorporating language into the plan enrollment materials could violate the safe harbor although including the insurer’s materials seems to be allowed. The DOL may perceive the employer has endorsed the plan by allowing pre-tax payroll deductions of the voluntary plan benefits. The IRS prohibits pre-taxing premiums of most individual health premiums. The guidance does not address non-health individual policies but the DOL may see this as infringing on the safe harbor.

Fines and penalties have recently increased and can accrue quickly if these plans are not treated accordingly. An employer who fails to provide a plan document and SPD upon request can be subject to $147 a day penalty while a failure to file a Form 5500 can cost $2,063 per day per plan.

Employers must choose whether to subject the voluntary plans to ERISA or to abide by the safe harbor. Either way, they should fully comply with all aspects of the regulation to maintain their position.

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