

2017

U.S. MASTER™

Employee Benefits Guide



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LATEST GUIDANCE ON EMPLOYEE BENEFITS

The pace of change in the employee benefits field is swift and new benefits-related legislation and regulatory interpretation of earlier legislation occurs seemingly every day. Developments in the legislative and regulatory arenas will have a great impact on employee benefits both now and for many years to come.

In this rapidly changing area, it is essential for employers to keep up to date on what the law requires or allows. With employee benefits consuming more than 40% of employers' compensation costs and health plan costs continuing to increase, employers have no choice but to focus on their employee benefits strategies if they want to attract and retain the best employees and manage their costs efficiently. In addition, employers must comply with many benefit laws, including the Internal Revenue Code, ERISA, COBRA, the Family and Medical Leave Act, and the Health Insurance Portability and Accountability Act, just to name a few.

Moreover, in March 2010, historic health care reform legislation was enacted. The Patient Protection and Affordable Care Act (P.L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) contain significant expansions of health insurance access and coverage for almost all Americans. Complying with these laws will present numerous ongoing challenges for employers. Now that most of these laws' provisions have taken effect, it is important to know the rules and guidance that have been issued to implement reform.

The *2017 U.S. Master Employee Benefits Guide* analyzes recent law changes and provides a general overview of all non-pension employee benefits. It also reflects recent key government rulings and regulations, such as the Department of Health and Human Services' issuances on health care reform. The book starts with the basic rules that employee benefit plans have to meet under ERISA and the tax angles that employers must consider. The remaining portion of the book is a discussion of specific welfare benefits and related issues of design, administration and compliance. Among the specific types of benefits covered are health plans, cafeteria plans, flexible spending accounts, educational assistance, employee assistance programs, and wellness programs. In addition, the book covers health reform extensively, including regulations, notices and other guidance documents that have been issued since enactment.

Practical tips and caution notes are included throughout to prevent employers from making costly mistakes or using their resources inefficiently.

For more information, EMPLOYEE BENEFITS MANAGEMENT provides comprehensive coverage of the full spectrum of employee benefits. To order it or any of our other products, please call 1-800-449-6435 or visit www.wklawbusiness.com/store.

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The Basics of ERISA for Welfare Benefit Plans

The Employee Retirement Income Security Act of 1974, generally referred to as ERISA, is the cornerstone of employee benefits law. ERISA and the Internal Revenue Code (see ¶ 200) are the two key laws that govern welfare benefit plans.

Pointer: **FAST FACTS** on ERISA

ERISA welfare benefit plans must comply with ERISA’s rules on reporting and disclosure and what a plan fiduciary can and cannot do, along with related prohibited transaction rules. These plans must also establish benefit claims procedures.

Employers and employee organizations (such as labor unions) that offer welfare plans for employees are subject to these ERISA rules.

Except for state insurance laws and state laws relating to multiple employee welfare arrangements (MEWAs), ERISA preempts state law.

Employee benefit plans

In general, ERISA applies to “employee benefit plans,” subject to a list of exceptions. Employee benefit plans can be broadly classified into two groups: employee welfare benefit plans and employee pension benefit plans.

Some parts of ERISA (in Title I) apply to both welfare benefit plans and pension plans. Many others (parts of Title I and all of Titles II—IV) apply only to pension plans. The focus of this chapter, and indeed, of this book, is solely on employee welfare benefit plans.

ERISA requirements for welfare benefit plans

As to welfare benefit plans, what does ERISA require? These plans must meet the ERISA rules on:

- 1. reporting and disclosure—both to the Labor Department and to participants (see ¶ 65—140);
- 2. fiduciary responsibility (see ¶ 30);
- 3. prohibited transactions (see ¶ 40); and
- 4. benefit claims procedures (see ¶ 45).

Pointer: Although ERISA has strict vesting, funding, and participation rules that apply to pension plans, these rules do not apply to welfare benefit plans. This means that employers may amend or terminate their welfare benefit plans if they have clearly reserved the right to do so. In addition, employers may fund these plans on a “pay-as-you-go” basis out of their general assets.

Which entities are subject to ERISA?

ERISA applies to employers and to employee organizations that offer ERISA welfare benefit plans.

Employee organizations. An “employee organization” is a labor union or any other organization which exists (either in whole or in part) to deal with employers concerning an employee benefit plan or other matters incidental to the employment relationship.

Which plans are ERISA welfare plans?

A wide variety of welfare plans come under ERISA (see ¶ 10). Plans providing medical, surgical, or hospital care or benefits for sickness, accident, disability, or death are only some of the types of plans subject to ERISA.

Plan must be in writing

Every plan that is subject to the fiduciary responsibility rules must be established and maintained under a written instrument. This written document must provide for one or more named fiduciaries who have authority to control the plan’s operation and administration.¹ A “named fiduciary” is one who is either named in the written plan instrument or who, in accordance with plan procedures, is identified as a plan fiduciary.

For more information . . .

A discussion on determining which types of welfare benefit plans are subject to ERISA is located at ¶ 10. A checklist of factors is available at ¶ 13.

The reporting rules of ERISA are addressed beginning at ¶ 65.

ERISA’s disclosure rules are covered beginning at ¶ 100.

The fiduciary rules of ERISA are addressed beginning at ¶ 25, while related prohibited transaction rules can be found at ¶ 40.

ERISA rules governing benefit claims are discussed at ¶ 45.

¹Employee Retirement Income Security Act of 1974 (P.L. 93-406, hereinafter referred to as ERISA), ERISA Sec. 402(a).

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Welfare Benefit Plans Subject to ERISA

ERISA reporting and disclosure rules, as well as rules under ERISA governing fiduciary actions, prohibited transactions, and benefit claims denials, apply to welfare benefit plans that come under ERISA.

As a result, an important early step is that of determining exactly which plans are ERISA welfare benefit plans and which plans do not come within the scope of ERISA.

Caution: Determining whether a plan is a welfare benefit plan subject to ERISA can be quite tricky. An employer that wishes to provide benefits to employees without actually creating an ERISA-qualified plan should be extremely careful not to inadvertently create an ERISA plan. This would subject it to ERISA's rules.

Single-event arrangements. Generally, arrangements that are conditioned on a single event are not governed by ERISA because these arrangements do not impose a responsibility on the employer to pay benefits on a regular basis.

Which plans are ERISA welfare plans?

Under ERISA, a "welfare plan" is any plan, fund, or program that an employer or an employee organization establishes or maintains to provide: ¹

1. medical, surgical, or hospital care;
2. benefits for sickness, accident, disability, or death;
3. unemployment benefits;
4. vacation benefits;
5. apprenticeship or other training programs;
6. day care centers;
7. scholarship funds (but only funded scholarship programs);
8. prepaid legal services; or
9. holiday and severance pay plans (or any similar benefits).

Which plans are not ERISA welfare plans?

Certain payroll or workplace practices are specifically exempt from ERISA coverage. Under Labor Department regulations, welfare plans do *not* include the following: ²

1. the payment of overtime pay, shift premiums, holiday premiums, weekend premiums or other compensation payments in excess of the normal rate;
2. the payment of normal compensation out of the employer's general assets for periods when an employee is absent from work because of a physical or mental inability to perform his or her duties or because of medical reasons;

3. the payment of compensation out of the employer's general assets while an employee is absent from work on account of vacation, holiday, military service, jury duty, sabbatical, or educational leave;
4. the maintenance (on the premises of an employer or employee organization) of recreation, dining, or other facilities (other than day care centers) for use by employees or members;
5. the maintenance of facilities, on the premises of an employer, for treatment of minor injuries or illness or rendering first aid in case of accidents during working hours;
6. distribution of gifts such as turkeys or hams by an employer to employees at Christmas and other holiday seasons;
7. sale by an employer to employees of the employer's stock in trade, whether or not at a discount;
8. maintenance by an employer or employee organization of a hiring hall;
9. maintenance by an employer or employee organization of remembrances such as flowers, obituary notices, and small gifts on occasions such as sickness, hospitalization, death, or termination of employment;
10. maintenance of a strike fund;
11. maintenance of an industry advancement program which has no employee participants and does not directly provide benefits for employees;
12. group or group-type insurance programs offered by insurers to employees where the employer or employee organization does not contribute, where participation is voluntary, where the only involvement of the employer or employee organization is in permitting the insurer to publicize the program to employees or members and in collecting premiums through payroll deductions or dues check-offs, and where the employer or employee organization is not compensated by the insurer other than by reimbursement of administrative costs; and
13. maintenance of an unfunded scholarship program under which payments are made solely from the general assets of the employer or employee organization.

The Fifth Circuit has ruled that the mere payment of a health insurance policy and premiums by an employer does not constitute a welfare benefit plan.³

Caution: There are some types of benefits that are a "close call" when it comes to determining whether the plan is an ERISA welfare benefit plan. The decision could ultimately rest on how the benefits are paid. For example, as noted earlier, a plan that provides vacation benefits is an ERISA welfare benefit plan. However, an employer that pays compensa-

tion, out of its general assets, to employees who are on vacation leave has not created an ERISA plan.

Pointer: It is important to differentiate between the ERISA benefit and the mechanism under which it is provided. For example, a pre-tax premium plan in which health premiums are deducted from employees' salaries and paid to a group health plan provider is not a separate welfare benefit plan under ERISA. The plan is a mechanism by which the health plan is funded and does not provide benefits described in ERISA 3(1).⁴

Welfare plans exempt from ERISA

The provisions of ERISA Title I (the title dealing with employee benefit rights) do *not* apply to the following types of plans:⁵

1. government plans;
2. church plans;
3. state-mandated plans (i.e., those maintained solely to comply with applicable workers' compensation laws, unemployment compensation, or disability insurance laws);
4. plans maintained outside of the United States primarily for the benefit of nonresident aliens;
5. top-hat welfare benefit plans (i.e., plans that provide benefits only for a select group of management or highly compensated employees); and
6. health savings accounts (HSAs).

Pointer: The Employee Benefits Security Administration (EBSA) has stated that, although HSAs are generally not employee welfare benefit plans for purposes of ERISA, an employer-sponsored high deductible health plan (HDHP), under which an employee must be covered to be eligible for an HSA, is covered by ERISA.⁶

Plans without employees

For purposes of Title I of ERISA (protection of employees' rights), a plan is not an employee welfare plan if it has no participants who are "employees."⁷ This exception does not apply to an apprenticeship or other training program.

For example, suppose a partnership offers a health plan under which the only participants are the partners. This plan is not considered a welfare plan for purposes of Title I of ERISA.

However, if the same health plan covers partners and employees, it is considered a welfare plan for purposes of Title I.

Letters that an employer sent to two former employees upon the termination of their employment regarding continued welfare benefits did not constitute free-standing benefit plans under ERISA.⁸

Caution: Although a plan is not subject to Title I of ERISA because it has no participants who are employees, it must still satisfy all of the applica-

ble requirements of the Internal Revenue Code in order to qualify for tax-favored employee benefit treatment.

Spouses of owners or partners. For purposes of these rules, an individual and his or her spouse are not considered employees of a business that is wholly owned by that individual or by the individual and his or her spouse. Also, a partner in a partnership and his or her spouse are not employees with regard to the partnership.

¹ ERISA Sec. 3(1) and 3(4); ERISA Reg. § 2510.3-1.

² ERISA Reg. § 2510.3-1(b).

³*Shearer v. Southwest Service Life Insurance Company*, CA-5, No. 07-20646, January 31, 2008.

⁴ PWBA Opinion Letter 96-12A, July 17, 1996.

⁵ ERISA Sec. 4(b).

⁶ EBSA Field Assistance Bulletin 2004-1, April 7, 2004.

⁷ ERISA Reg. § 2510.3-3(b).

⁸*Johnson and Edwards v. Lend Lease Real Estate Investment*, CA-8, Dkt. No. 06-1158, October 31, 2006.

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Checklist for Determining Whether Welfare Benefit Arrangement Is an ERISA Plan

Inadvertently creating an ERISA plan could have unintended, and expensive, consequences for employers. In some situations, even minimal employer involvement has led to a court's finding that an arrangement has created an ERISA plan. However, determining whether a particular arrangement is an ERISA plan sometimes can be surprisingly tricky.

In a nutshell, an ERISA plan exists if: ¹

1. a plan, fund, or program
2. is established or maintained
3. by an employer or an employee organization, or both
4. for the purpose of providing specified kinds of benefits
5. to participants or their beneficiaries.

Below is a checklist of factors relating to each of these categories that can assist an employer in determining whether a benefits arrangement is an ERISA plan.

PLAN, FUND, OR PROGRAM?

- ☐ Could a reasonable person ascertain what the intended benefits of the arrangement are?
 - ☐ An employee need not show the exact dollar amount he or she would expect to receive in benefits, as long as a court is able to ascertain benefits due under the plan.
 - ☐ If payments are made on an *ad hoc* basis to only a few employees, an ERISA plan is not established because intended beneficiaries cannot reasonably be ascertained.
- ☐ Could a reasonable person determine the class of beneficiaries?