

Benefits Insights

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Determining Whether a Welfare Benefit Arrangement is an ERISA Plan

Determining exactly which plans are ERISA welfare benefit plans is complicated. Even minimal employer involvement, in some situations, has led to a court's finding that an arrangement is an ERISA plan. Employers looking to provide benefits to employees without creating an ERISA plan should use extreme caution as they may inadvertently create an ERISA plan, subjecting it to ERISA rules.

An ERISA plan exists if a plan, fund or program is established or maintained by an employer, employee organization or both, for the purpose of providing specified benefits to participants and their beneficiaries.

This checklist, relating to each of these categories, will help guide you in determining if your welfare benefit plan is an ERISA plan.

Plan, Fund or Program?

Could a reasonable person:

- Determine what the arrangement's intended benefits are?
- Determine the class of beneficiaries?
- Determine the source of financing for the arrangement?
- Understand how to apply for or receive benefits under the arrangement?

Established or Maintained?

- Did the employer intend to create a plan? Did the employer's actions suggest that it decided to extend benefits?
- Is the employer clearly involved in the plan administration?

- Does the arrangement include ongoing administration?
- Is the arrangement an informal practice (payroll deduction), or is a funding mechanism present (for example, a separate account or trust)?
- Is there a written plan document?
- Are employees aware of the plan, and have they relied on its existence?

By an Employer, Employee Organization or Both?

Is the arrangement offered by an employer or an employee organization?

For Providing Specified Benefits?

Does the arrangement provide participants and beneficiaries with benefits covered by ERISA as a welfare benefit plan? ERISA applies to the following common employee benefits, regardless of whether they are insured or self-funded:

- Medical, surgical or hospital care
- Dental or vision benefits
- Prescription drug benefits
- Group life insurance benefits
- Accidental death and dismemberment (AD&D) benefits
- Disability benefits, both short-term and long-term (if insured or funded other than as a payroll practice)

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- Health reimbursement arrangements (HRAs)
- Health flexible spending arrangements (FSAs)
- Wellness programs (when medical care is provided)

Does the arrangement cover benefits specifically exempt by ERISA? Under ERISA, welfare benefit plans do not include the following:

- Overtime and other premium pay
- Unfunded sick pay or paid medical leave programs (including short-term disability pay)
- Unfunded vacation, holiday or jury duty pay
- Adoption assistance plans
- Commuting benefits (transportation allowance, free parking or transit passes)
- Dependent care assistance programs
- 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 memberships – if the program does not offer medical care
- Liability or casualty insurance plans
- Professional development classes
- Unfunded scholarship programs
- Sporting event tickets or discounts
- Tuition reimbursement
- Unemployment compensation provided to comply with state law
- Worker' compensation benefits provided to comply with state law

To Participants and Their Beneficiaries?

Do employees receive benefits under the arrangement? Or are the benefits received only by nonemployees? ERISA plans cover employees, former employees, union members and beneficiaries of any of these. A plan that no employees participate in is not an ERISA welfare benefit arrangement.