

ERISA Spring Cleaning: Have You Properly Identified All of Your ERISA Benefits?

Why Is It Important To Properly Identify All of Your ERISA Benefits?

The Employee Retirement Income Security Act ("ERISA") imposes numerous requirements on covered employee benefit plans, including annual report requirements (i.e., a Form 5500 series report) that could result in substantial monetary penalties for an employer if violated. Depending upon the type of ERISA plan involved, those penalties could include:

- a United States Department of Labor ("DOL") penalty of up to \$1,100 a day (the DOL has announced that if certain requirements are satisfied, the applicable penalty will not exceed \$30,000 per year per plan); and/or
- an Internal Revenue Service ("IRS") penalty of up to \$15,000 for a late Form 5500 for certain retirement plans, trusts and annuities, and smaller IRS penalty amounts if certain related forms are not timely filed.

What Are Some of the More Common Errors Made By Employers When Identifying Their ERISA Benefits?

Among the more common errors made by ERISA-covered employers when identifying their ERISA benefits are the following:

- Business Travel Accident Plans – a business travel accident plan generally is subject to ERISA;
- Employee Assistance Plans – an employee assistance plan that provides counseling services, or other services that are not publicly available and that meet certain requirements, could be subject to ERISA;
- Insured Short-Term Disability Plans That Provide More Than the Statutory Minimum – an insured short-term disability plan that provides benefits in excess of those required by state law generally will be subject to ERISA;
- Severance Benefits Provided To Employees Pursuant To a Formula – severance benefits that an employer provides to employees pursuant to a formula, even if it is unwritten, could be subject to ERISA; and
- Deferred Compensation Agreements – a deferred compensation agreement for an employee generally will be subject to ERISA.

What Are the General Types of Plans Subject to ERISA?

The employee benefit requirements in ERISA generally apply to the following types of benefit plans:

- Employee Pension Benefit Plans – an employee pension plan is defined, in part, as any plan, fund, or program which (1) provides retirement income to employees, or (2) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond; and
- Employee Welfare Benefit Plan – an employee welfare benefit plan is defined, in part, as any plan, fund, or program that provides:
 1. medical, surgical, or hospital care benefits, benefits in the event of sickness, accident, disability, death or unemployment, vacation benefits, apprenticeship or other training programs, daycare centers, scholarship funds, or prepaid legal services; or
 2. any benefit described in Section 302(c) of the Labor Management Relations Act, other than pensions on retirement or death and insurance to provide such pensions (this provision adds, among other things, holiday, severance, and similar benefits).

Are Certain Types of Plans Totally Exempt From ERISA?

There are several statutory, regulatory, and case law exemptions that totally exempt certain plans from ERISA coverage. Among the more important of these exemptions are the following:

- Government Plans – a statutory exemption from ERISA exists for plans maintained by the United States government, the government of a state or political subdivision of a state, or any agency or instrumentality of the foregoing;
- Certain Church Plans – a church plan can be exempt from ERISA if it satisfies certain requirements;
- Certain Workers' Compensation, Unemployment Compensation, and Disability Plans – plans maintained solely for the purpose of complying with applicable workers' compensation, unemployment insurance, or disability insurance laws will be exempt from ERISA (this ERISA exemption has been construed very narrowly by the DOL, and if a plan provides any benefit in addition to what is necessary solely to comply with the applicable workers' compensation, unemployment insurance, or disability insurance law, the plan may not qualify for this exemption);
- Certain Group or Group-Type Insurance Programs – a group or group-type insurance program offered by an insurer to employees will be exempt from ERISA if the following requirements are satisfied:
 1. no contributions are made by the employer;
 2. participation in the program is completely voluntary for employees;
 3. the sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions, and to remit them to the insurer (the DOL has strictly interpreted this “no endorsement” requirement, and employers need to be very careful about any documentation that suggests that the program is an employer program); and
 4. the employer 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.
- Certain Other Regulatory Exemptions – the ERISA regulations also include complete exemptions from ERISA coverage for:
 1. certain payroll practices;
 2. certain holiday gifts;
 3. certain remembrance funds;
 4. unfunded scholarship programs;
 5. certain on-premises facilities;
 6. certain sales to employees; and
 7. certain payroll savings plans.
- Case Law Exemption for “Fort Halifax” Arrangements – a “Fort Halifax” arrangement is a case law exemption that generally (1) provides for a lump sum payment or payments made over a short period of time (e.g., one court allowed payments over six months), and (2) does not create a need for an ongoing administrative program for processing claims and/or paying benefits.

What Are Some of the More Common Benefit Arrangements That Are Potentially Subject To ERISA's Form 5500 Annual Reporting Requirement?

Listed below are some of the more common benefit arrangements for active and/or retired employees that are potentially subject to the Form 5500 annual reporting requirement under ERISA:

- qualified retirement plans (e.g., 401(k) plans, profit sharing plans, and defined benefit plans);
- medical benefit plans (including plans providing solely for physical examinations);
- dental benefit plans;
- prescription drug plans;
- vision care plans;
- certain cafeteria plans (for example, if the plan has health flexible spending accounts);
- certain long-term disability plans;
- certain short-term disability plans;
- certain severance plans;
- life insurance plans;
- accidental death and dismemberment plans;
- long-term care insurance plans;
- business travel accident plans;
- legal services plans;
- certain employee assistance plans (for example, if the plan provides counseling services, or provides certain other services that are not publicly available and that meet certain requirements);
- certain bonus programs (for example, if bonus payments are systematically deferred until termination of employment or beyond);
- supplemental unemployment benefit plans;
- certain remembrance funds;
- certain vacation pay plans (e.g., if the plan is funded);
- certain scholarship plans (e.g., if a scholarship plan is funded);
- certain holiday pay (e.g., if a holiday pay plan is funded);
- apprenticeship or training programs (for example, if the applicable initial filing requirement is not satisfied);
- certain “top hat” pension plans or agreements, if the required “top hat” pension plan filing was not made with the DOL within 120 days after the date the plan or agreement was established;
- “golden parachute” plans; and
- voluntary employees’ beneficiary associations (“VEBAs”) that provide ERISA benefits that are not separately administered.

What Should Be Done Once the Benefits Subject to ERISA Have Been Identified?

Once the benefits that are subject to ERISA have been identified, an analysis should be made as to which of the ERISA requirements apply to such benefits. Such requirements could include, among other things, ERISA’s plan document, summary plan description, summary of material modifications, annual report, benefit claims procedure, bond, and fiduciary requirements. The analysis of the applicable ERISA requirements should include a review of ERISA’s regulatory exemptions, as such exemptions could make it unnecessary to comply with at least some of the ERISA requirements.

The ERISA requirement that often creates the most financial exposure for an employer is the failure to file an annual report (i.e., a Form 5500 series report) for an ERISA-covered benefit. Among the more helpful regulatory exemptions that have exempted ERISA benefits from the need to file a Form 5500 or other annual report are the following:

- Exemption for Certain Plans With Fewer Than 100 Participants – Welfare benefit plans satisfying each of the following three requirements will be exempt from, among other things, the requirement to file a Form 5500 or other annual report:
 1. the plan has fewer than 100 participants at the beginning of the plan year;
 2. plan benefits are:
 - (a) paid as needed solely from the general assets of the employer maintaining the plan;
 - (b) provided exclusively through insurance contracts or policies issued by an insurance company or similar organization which is qualified to do business in any state or through a qualified federal health maintenance organization, the premiums for which are paid directly by the employer from its general assets or partly from its general assets and partly from contributions by its employees (provided that contributions by participants are forwarded by the employer within three months of receipt); or
 - (c) both; and
 3. in the case of an insured plan:
 - (a) refunds, to which contributing participants are entitled, are returned to them within three months of receipt by the employer; and
 - (b) contributing participants are informed upon entry into the plan of the provisions of the plan concerning the allocation of refunds.
- “Top Hat” Pension Plan Exemption – A “top hat” pension plan is an unfunded pension plan or agreement that is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. A “top hat” pension plan or agreement will be exempt from, among other things, the requirement to file a Form 5500 or other annual report if the employer files with the DOL a “top hat” pension plan letter containing certain information within 120 days after the date such plan or agreement was established.
- “Top Hat” Welfare Plan Exemption – Welfare benefit plans satisfying the requirements set forth below (commonly referred to as “top hat” welfare benefit plans) will be exempt from, among other things, the requirement to file a Form 5500 or other annual report if:
 1. the plan is maintained by an employer primarily for the purpose of providing welfare benefits for a select group of management or highly compensated employees; and
 2. plan benefits:
 - (a) are paid as needed solely from the general assets of the employer;
 - (b) are provided exclusively through insurance contracts or policies, the premiums for which are paid directly by the employer from its general assets, issued by an insurance company or similar organization which is qualified to do business in any state; or
 - (c) both.

If a Required Form 5500 Has Not Been Filed For An ERISA Benefit, What Should Be Done?

If an employer discovers that it has not filed a required Form 5500 for an ERISA benefit, the potential monetary penalties to the DOL and/or the IRS can be expensive depending upon the type of plan and the number of years involved. Fortunately, the DOL, the IRS and the Pension Benefit Guaranty Corporation (“PBGC”) have developed voluntary compliance programs or procedures that will allow an eligible plan administrator to substantially reduce the potential penalties for a late Form 5500, as long as the eligible plan administrator has not been notified in writing by the applicable government agency that there has been a failure to timely file a Form 5500. These programs and procedures include the following:

- DOL’s Delinquent Filer Voluntary Compliance Program – The DOL developed the Delinquent Filer Voluntary Compliance Program (“DFVC Program”) in order to make it easier and less costly for eligible plan administrators to voluntarily file late Forms 5500 for retirement plans and welfare benefit plans covered by ERISA. The DFVC Program includes the following reduced penalty amounts: (1) a reduced “per filing” cap (i.e., the maximum penalty for a single late Form 5500 or other annual report) of \$750 for small plans, and \$2,000 for large plans; (2) a “per plan” cap that limits the penalty to \$1,500 for a small plan and \$4,000 for a large plan, regardless of the number of late Forms 5500 or other annual reports filed for the plan at the same time; (3) a reduced penalty of \$750 for “top hat” pension plans; and (4) a special “per plan” cap of \$750 for certain small plans sponsored by an organization that is exempt from tax under Section 501(c)(3) of the Internal Revenue Code.
- IRS Filing For Tax-Qualified Retirement Plans – If a plan administrator has not timely filed a Form 5500 for a tax-qualified retirement plan, an IRS Form 8955-SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) must be filed for the applicable year in accordance with the requirements of IRS Notice 2014-35 in order to be eligible for certain IRS penalty relief. This filing does not have to be made for welfare benefit plans. The IRS also will provide certain other penalty relief if the requirements of the DFVC Program have been satisfied.
- PBGC Relief – The PBGC has agreed to provide certain penalty relief for a plan administrator for failure to timely file a Form 5500 where the conditions of the DFVC Program have been satisfied.

Employers that have properly identified all of their ERISA benefits and identified any late Forms 5500 or other annual reports can substantially reduce the potential penalties by taking advantage of these filing relief programs and procedures.

If you have any questions about this memorandum, please contact any member of our Employee Benefits and Executive Compensation Group listed below.

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