VII. Voluntary Plans—When Are They Subject to ERISA?

A. Overview of Voluntary Plans

As discussed in Section VI, in order for a plan to be subject to ERISA, it must be “established or maintained” by an employer. This part of the ERISA plan definition requires a minimum degree of participation by the employer in the establishment or maintenance of the plan.[1]

DOL regulations contain a “safe harbor” exception from the ERISA “plan” definition for certain voluntary insurance arrangements under which employees pay the full premium and the employer has minimal involvement.[2] This safe harbor for certain *voluntary* plans is the subject of this Section.[3]

1. What Are Voluntary Plans?

When most people think of voluntary plans, they think of insurance coverages offered to employees on a voluntary basis, with employees paying the whole premium. Voluntary plans are quite common, particularly with small employers that might not otherwise be able to offer their employees basic welfare benefits such as health, life insurance, or disability coverage. While voluntary plans are often suggested to employers by their insurance agents, it has become increasingly common for employees to ask their employer to offer voluntary plans (particularly if the employer does not offer benefits, or where employees wish to supplement existing employer-sponsored benefits).

Voluntary plans sometimes involve group insurance coverage, where the employer signs the insurance contract but employees participate on a voluntary employee-pay-all basis. Dental insurance, for example, is often offered in this manner. Such arrangements can be useful for supplementing basic benefit coverage already in place (e.g., supplemental long-term disability, and supplemental group term life insurance). Note that this type of plan may be subject to ERISA based on the employer’s involvement—and, if it provides health benefits, will likely be treated as a group health plan.

Other voluntary plans involve individual policies that are issued to employees who sign up and pay for the coverage. Examples of such individual policy arrangements (sometimes called worksite benefits) include hospital indemnity, cancer, and other disease-specific coverages. With individual policy arrangements, the employer might allow insurance representatives to contact employees at work, explain the offering, and help interested employees sign up for the coverage. The insurer then sends the employer a bill each month listing the employees who have signed up for the insurance and the monthly premium each employee owes. (As a consequence, the term “list billing” is also used to describe these plans.) The employer collects premiums from the employees through payroll deductions (sometimes made on a pre-tax salary reduction basis under a cafeteria plan).[4] The employer typically sends one premium check to each insurer on behalf of all employees who have purchased that insurer’s product. Sometimes, the insurer will reimburse the employer for the administrative costs of the payroll-deduction and premium-payment service.

---

1 *See, e.g.*, *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 15 EBC 1719 (10th Cir. 1992).

2 DOL Reg. § 2510.3-1(j).

3 As with the safe harbors for payroll practices discussed in Section VI, the voluntary plan safe harbor is not so much an exception to the ERISA plan definition as it is a clarification of what actions demonstrate that the employer maintains the plan. DOL Advisory Opinion 94-23A (July 1, 1994) (the safe harbor “describes certain…insurance programs in which the involvement of the employer…in the operations of the program is so minimal that such involvement does not constitute establishment or maintenance of the arrangement for purposes of ERISA section 3(1)”).

4 Note that, for individual policies providing benefits subject to health care reform’s annual limit and preventive services mandates, DOL and IRS guidance effectively prohibits tax-advantaged payment of premiums, including under a cafeteria plan, and also prohibits most after-tax payment arrangements. DOL Tech. Rel. 2013-03 (Sept. 13, 2013); IRS Notice 2013-54, 2013-40 I.R.B. 287. Furthermore, the rationale of this guidance seems to indicate that allowing pre-tax premium payment for individual policies of any type (including HIPAA-excepted and non-health coverage) would take the arrangement outside the safe harbor. For more information, see subsection C.

2. ERISA Considerations

Are voluntary plans ERISA plans, or are they exempt from ERISA under the voluntary plan safe harbor? If they are subject to ERISA, what are the practical consequences? What must the employer do if it offers voluntary plans that are subject to ERISA? Often, little advance consideration is given to whether voluntary products made available at work might be subject to ERISA. This is partly because insurance professionals who market voluntary products sometimes fail to raise the issue.

The first time an employer might hear that a voluntary plan is subject to ERISA is when an employee sues the insurer for denied benefits and the insurer argues that the voluntary plan is an ERISA plan because of the employer's involvement with it (an insurer often makes this argument to take advantage of favorable ERISA law that limits damages the insurer must pay if it loses the lawsuit).

It shouldn't be this way. Employers should be apprised up-front that voluntary plans might be subject to ERISA if the employer endorses the plan or otherwise crosses the murky line that makes a voluntary plan an ERISA plan (e.g., permitting employees to pay the voluntary plan premium with pre-tax salary reduction dollars). Apprised of this murky line, employers could structure their voluntary plans to avoid (or at least minimize) ERISA's reach.

> **Warning—Voluntary Plans Have Been a DOL Enforcement Priority.** Plans claiming exemption from ERISA under the safe harbor have, from time to time, been a special focus of DOL investigation. For example, we have seen a DOL audit letter seeking detailed information about the employer's supplemental plans.

B. Issues to Consider Before Offering Voluntary Plans

This subsection summarizes some of the issues that should be addressed by employers that wish to make voluntary plans available at work. For additional information, see the remainder of this Section, which contains a full discussion of these issues and the DOL's safe harbor for voluntary plans.

1. Does the Employer Care About Avoiding ERISA's Application?

As noted above in subsection A, DOL regulations provide a safe harbor under which ERISA does not apply to voluntary insurance arrangements meeting specified requirements—including that employees pay the full premium and the employer has minimal involvement.[5] Determining whether the DOL voluntary plan safe harbor applies is not always easy. Before devoting time and resources to studying the safe harbor, an employer should decide whether avoiding ERISA's application is a priority. An employer may decide that treating a voluntary arrangement as subject to ERISA is easier than worrying about whether an arrangement fits within the voluntary plan safe harbor or will remain within the safe harbor as it is administered over time.

2. Is the Voluntary Plan Subject to Group Health Plan Laws?

An employer that is not at first concerned about avoiding ERISA's application should consider whether its voluntary plan arrangement involves health benefits. Such an arrangement might be considered to be a group health plan[6] for purposes of HIPAA, COBRA, and other laws—including health care reform. That is, when insurance coverage is sold under an arrangement that satisfies the definition of a group health plan, the fact that the coverage takes the form of individual insurance policies will not preclude the arrangement from being regulated as a group health plan under applicable laws.[7] For instance, if ERISA applies to the voluntary plan arrangement, then HIPAA's rules will also apply if the arrangement provides health benefits other than HIPAA-excepted benefits (e.g., certain dental insurance). If HIPAA applies, the employer must ensure that the arrangement complies with HIPAA's special enrollment and other requirements.[8] And coverage that could be offered on a voluntary basis without violating HIPAA would nevertheless be subject to

---

5 DOL Reg. § 2510.3-1(j).

6 See Section VI.J for an overview of the additional ERISA compliance rules that apply to group health plans.

7 *See, e.g., Collins v. Strategic Health Care Mgmt. Servs., Inc.*, 1992 WL 92099 (N.D. Ill. 1992) (individual insurance policy for employee was a group health plan subject to ERISA and COBRA, when, among other things, employer paid premiums, limited the policies employees could select, publicized the policies, and was compensated to administer the policies selected by employees).

8 Another concern, prior to 2014, is that an individual policy's premium structure or other features might violate HIPAA's health-status nondiscrimination rules. HCFA Insurance Standards Bulletin 00-06 (Nov. 2000). This concern is eliminated as of January 1, 2014, when health care reform extends the prohibition against discrimination based on health status, previously applicable only to group health plans, to individual health insurance. PHSA § 2705(a), as added by PPACA, Pub. L. No. 111-148, § 1201(4) (2010). (The effective date for this provision is found at PPACA, Pub. L. No. 111-148, § 1255 (2010).)

other laws such as COBRA if the arrangement were found to be an ERISA plan. Incorrectly assuming that a voluntary health plan is exempt from ERISA and applicable group health plan obligations is risky, particularly because the voluntary insurance policy is likely to be inconsistent with COBRA, HIPAA, and other rules, making compliance difficult, if not impossible. And agency guidance issued in September 2013 (discussed below in subsection C) presents additional issues for health coverage that is subject to specified health care reform mandates. Accordingly, employers might wish to consider not offering voluntary products providing health benefits.

> **Extra Caution Advisable for Health Coverage.** Because of the additional compliance burdens applicable to group health plans, an employer relying on the voluntary plan safe harbor with respect to health coverage should be especially careful not to engage in activity that might take the plan outside the safe harbor. In addition to COBRA and HIPAA issues, employer involvement in the purchase of individual health insurance policies creates significant compliance concerns under health care reform, which effectively prohibits many arrangements under which employers pay insurers directly, reimburse employees for premiums, or are otherwise involved in the purchase of individual health insurance policies that provide coverage that is subject to key health care reform mandates (generally non-HIPAA-excepted coverage).[*] For further discussion, see subsection C below.

* DOL Tech. Rel. 2013-03 (Sept. 13, 2013) and IRS Notice 2013-54, 2013-40 I.R.B. 287; *see also* IRS Notice 2015-87, 2015-52 I.R.B. 889; IRS Notice 2015-17, 2015-14 I.R.B. 845 (providing limited transition relief for certain types of arrangements); FAQs About Affordable Care Act Implementation Part XXII (Nov. 6, 2014), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf (as visited Oct. 15, 2018); IRS Information Letters 2014-0037 (Sept. 22, 2014) and 2014-0039 (Sept. 22, 2014); and Employer Health Care Arrangements (May 13, 2014), available at http://www.irs.gov/Affordable-Care-Act/Employer-Health-Care-Arrangements (as visited Oct. 15, 2018).

3. *Will Treating the Plan as Subject to ERISA Significantly Increase the Employer's ERISA Reporting and Disclosure Compliance Burdens?*

Most employers already sponsor one or more ERISA-covered plans. For these employers, adding a voluntary plan to the existing array of ERISA benefits may not significantly affect the ERISA reporting and disclosure compliance burden.[9] In fact, it may be easier to fold the new voluntary plan into the existing ERISA compliance framework than to treat it differently from the employer's ERISA benefits.

4. *To Avoid ERISA's Application, Is the Employer Willing and Able to Strictly Follow Voluntary Plan Safe Harbor Over Entire Life of Plan?*

If a voluntary plan is to avoid ERISA's application, it must qualify for the voluntary plan safe harbor when the plan is set up and as it is administered over time. The safe harbor will apply only if the plan is completely voluntary, with no employer contributions. Furthermore, the employer's involvement must be limited to (a) permitting the insurer to publicize the plan, (b) collecting premiums through payroll deductions, and (c) remitting the premiums to the insurer. Finally, the employer must perform these functions without endorsing the plan. The many reported cases and DOL opinion letters on the safe harbor are difficult to reconcile, particularly regarding what constitutes "employer endorsement." However, certain actions by the employer are likely to be treated as endorsement, tending to take the plan outside the safe harbor. These include assisting employees in filing claims under the voluntary plan or in disputes with the plan's insurer, listing the plan among the employer's other benefits, and taking credit for arranging the plan. While any one of these activities might not be enough in itself to take the plan out of the safe harbor, it could create doubt about the safe harbor's application. One activity—allowing employees to pay their premiums for the voluntary plan through the employer's cafeteria plan—has always presented a particular risk, but is even more problematic now, as health care reform effectively prohibits pre-tax premium payment for individual health policies providing benefits subject to health care reform's annual limit and preventive services mandates. Under the rationale of the agency guidance regarding this rule (discussed further in subsection C), it appears that allowing pre-tax premium payment for individual policies (of any type, not only health coverage) would take the arrangement outside the DOL safe harbor.[10]

[9] In this regard, see Section XXI for a discussion of when an employer may wish to combine two or more ERISA benefits into one ERISA plan for compliance purposes, including Form 5500 filing purposes.

[10] DOL Tech. Rel. 2013-03 (Sept. 13, 2013); IRS Notice 2013-54, 2013-40 I.R.B. 287.

5. Can the Employer Accept the Consequences of Failing to Satisfy the Voluntary Plan Safe Harbor?

Despite an employer's best efforts, a court or the DOL may decide that a voluntary plan does not satisfy the safe harbor and should have been treated as an ERISA benefit. Should this occur, the employer may face statutory penalties and be left with unmet compliance obligations.[11]

a. Statutory Penalties

The employer may be subject to statutory penalties for failing to file annual Form 5500s (unless a Form 5500 filing exemption applies)[12] or not responding to participant requests for documents. An employer otherwise subject to the Form 5500 requirement might choose to make a protective Form 5500 filing for the voluntary plan just in case (although this would defeat much of the reason for relying on the safe harbor in the first place).[13] The employer could also respond to participant requests as if ERISA applied.[14] Finally, remember that arrangements subject to ERISA that provide health benefits may also be subject to penalties under other laws such as COBRA, HIPAA, and health care reform.

b. Compliance Issues

General fiduciary obligations would apply to the plan under ERISA, which would require a higher standard of conduct by the employer.[15] In addition, the voluntary plan will be out of compliance with the DOL claims procedure requirements, although the consequence—stricter review of benefit denials in court—will fall on the insurer obligated to pay the benefits, as opposed to the employer.[16] On the other hand, ERISA's plan document and SPD requirements will be largely satisfied by the insurance policy and the descriptive booklets provided by the insurer to covered employees.[17]

c. Additional Consequences for Health Plans

If ERISA applies and the arrangement provides health benefits that are subject to HIPAA, COBRA, health care reform, and other laws, then the arrangement must comply with those laws or face considerable penalties for noncompliance. In particular, as discussed in subsection C below, significant compliance concerns arise under health care reform, which effectively prohibits many arrangements under which employers pay insurers directly, reimburse employees for premiums, or are otherwise involved in the purchase of individual health insurance policies that provide coverage that is subject to key health care reform mandates.

6. If ERISA Applies—Or the Employer Wants to Treat the Plan as Subject to ERISA—What Actions Should the Employer Take?

The employer must determine whether the insurer will provide appropriate coverage (with similar features and at a similar cost to employees) if a decision is made to have ERISA apply. For example, if ERISA applies to the arrangement, the employer must file Form 5500 (unless an exemption from filing applies),[18] which means that the insurer will be required to provide the Schedule A information. Also, a voluntary plan that provides health benefits and is subject to ERISA must include provisions regarding COBRA, HIPAA, and other federal mandates, unless the employer qualifies as exempt from those laws.[19] And note that, even if employers are willing to comply with the additional compliance burdens associated with ERISA group health plan status, health care reform effectively prohibits many arrangements under which employers are involved in the purchase of individual health insurance policies providing medical coverage that is subject to key health

---

[11] For an overview of ERISA's obligations, see Section I; for a discussion of correcting compliance mistakes, see Section XXXII.

[12] See Section XXII for a discussion of penalties for Form 5500 failures and the filing exemption for small plans.

[13] *See Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 20 EBC 1150 (1st Cir. 1995).

[14] However, the employer should not say that ERISA applies. See Section XXV for a discussion of participant requests and associated penalties (up to $110/day).

[15] See Section XXVIII on fiduciary obligations.

[16] See Sections XXXIV and XXXV on claims procedures.

[17] See Sections VIII and XXIV, respectively, for details about the plan document and SPD requirements.

[18] See Section XXII for a discussion of which plans must file Form 5500.

[19] For example, under COBRA, certain small employers are exempt.

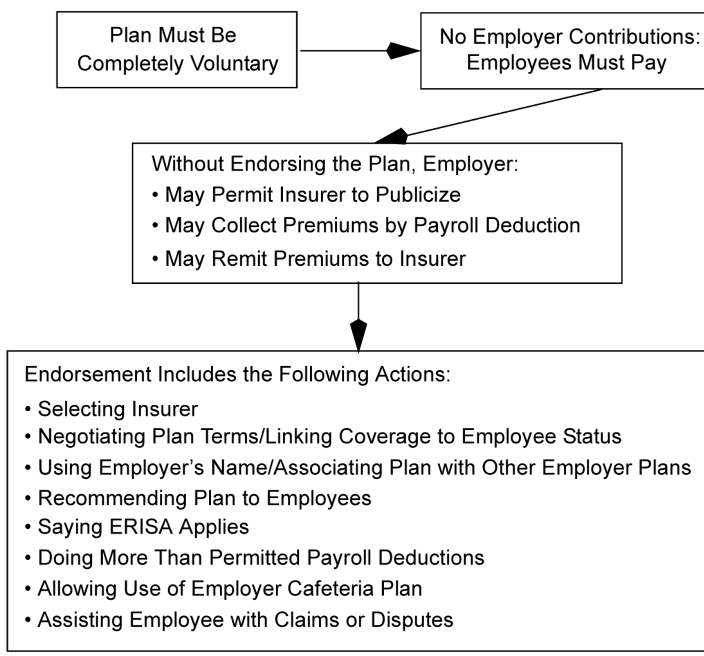
care reform mandates (generally non-HIPAA-excepted coverage).[20] Some insurers may find these burdens too great, while others will be interested enough in the business opportunities to provide an appropriate policy. In addition, the employer should treat the plan as subject to ERISA in all respects, including filing Form 5500s and preparing and distributing an SPD (or adding a description of the plan to an existing SPD).

C. Detailed Review of Voluntary Plan Safe Harbor

DOL regulations provide that, to fall within the voluntary plan safe harbor, an arrangement must satisfy the following requirements:

> For purposes of Title I of [ERISA], the term "employee welfare benefit plan"…shall not include a *group or group-type* insurance program *offered by an insurer* to employees…under which
>
> (1) no contributions are made by an employer or employee organization;
> (2) participation in the program is completely voluntary for employees or members;
> (3) the sole functions of the employer or employee organization with respect to the program are, *without endorsing the program*, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and remit them to the insurer; and
> (4) the employer or employee organization 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 or dues checkoffs.[21]

This subsection contains a detailed discussion of the requirements of the voluntary plan safe harbor, which are illustrated graphically as follows:



The discussion in this subsection references various court cases and DOL advisory opinions addressing the voluntary plan safe harbor. In the vast majority of these cases, the voluntary plan safe harbor issue arose in the context of a benefits lawsuit brought by a covered employee against the insurer; in most cases, the employer was not even a party to the lawsuit.[22] In most cases, the insurer wanted to avoid the employee's state-law claims, which exposed the insurer to higher potential damages and penalties. To do so, the insurer

[20] DOL Tech. Rel. 2013-03 (Sept. 13, 2013); IRS Notice 2013-54, 2013-40 I.R.B. 287. *See also* IRS Notice 2015-87, 2015-52 I.R.B. 889; IRS Notice 2015-17, 2015-14 I.R.B. 845 (providing limited transition relief for certain types of arrangements); FAQs About Affordable Care Act Implementation Part XXII (Nov. 6, 2014), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf (as visited July 9, 2019); IRS Information Letters 2014-0037 (Sept. 22, 2014) and 2014-0039 (Sept. 22, 2014); and Employer Health Care Arrangements (May 13, 2014), available at http://www.irs.gov/Affordable-Care-Act/Employer-Health-Care-Arrangements (as visited July 9, 2019).

[21] DOL Reg. § 2510.3-1(j) (emphasis added).

[22] Although this context is the most common, the issue of ERISA's applicability can also arise in other situations. *See, e.g.*, *Elliott v. Lockheed Martin Energy Sys., Inc.*, 61 F. Supp. 2d 745, 22 EBC 2533 (E.D. Tenn. 1999) (issue was whether ERISA applied so that more deferential arbitrary and capricious standard of review would apply to insurer's benefit denial).

argued that the safe harbor did not apply, making the program subject to ERISA and its more limited remedies. None of these cases, therefore, addresses whether an employer should be liable for ERISA noncompliance in connection with a voluntary plan that fails to qualify for the voluntary plan safe harbor. Consequently, the cases may not provide reliable guidance as to how a court or the DOL would resolve a compliance dispute. Nevertheless, in the event of such a dispute, these cases would likely be considered persuasive authority, as they are the only source of guidance regarding the safe harbor. Interestingly, in several of the cases the plan at issue was clearly maintained by the employer (and thus subject to ERISA), with the employee's argument that ERISA did not apply being essentially a desperation ploy to preserve his or her more valuable state-law claims.

1. Group and Individual Insurance Policies May Fall Within Safe Harbor

By its terms, the voluntary plan safe harbor covers group insurance arrangements.[23] It also covers "group-type" arrangements, a term understood to include the individual policy arrangements commonly associated with voluntary plans.[24]

> **Common Scenarios.** The following scenarios illustrate common voluntary benefit arrangements using individual and group policies:
>
> **Scenario 1.** One or more employees, acting on their own, obtain health insurance under individual insurance policies. Their employer agrees to collect the insurance premiums through payroll deductions and remit them to the insurance companies involved. Provided that all the requirements of the safe harbor are met, this individual policy arrangement would not be subject to ERISA. (Note that, as discussed below in this subsection C, payroll deductions for most individual medical insurance policies may only be made on an after-tax basis.)
>
> **Scenario 2.** An insurance broker proposes to offer voluntary group insurance coverage (e.g., dental insurance) to an employer's employees. The insurance broker markets the insurance coverage directly to the employees. The employer agrees to collect the insurance premiums through payroll deductions and remit them to the insurance company. Provided that all the requirements of the voluntary plan safe harbor are met, this group arrangement would not be subject to ERISA.

2. Employer Contributions to Plan Are Not Permitted

Any employer contribution toward the insurance coverage sold under a voluntary plan will take the plan outside the voluntary plan safe harbor.[25] Employer payment includes not only use of the employer's own funds to directly pay premiums but also reimbursement of employee premium expenses, including arrangements under which the payment or reimbursement is made on a tax-advantaged basis under IRS Revenue Ruling 61-146 (which would include HRAs and other tax-free reimbursement arrangements).[26] An employer will be treated as contributing to the plan even where the contribution is partial,[27] insignificant,[28] or

---

23 DOL Reg. § 2510.3-1(j).

24 Preamble, 40 Fed. Reg. 34526 (Aug. 15, 1975) (explaining that previously proposed regulations were amended to include "group-type" programs "in response to comments which indicate that many programs of the sort intended to be described by [the regulation] technically are not group insurance programs because no master contract is issued to an employer"); *but see Brine v. Mut. of Omaha Ins. Co.*, 99 F. Supp. 2d 744 (E.D. La. 1999) (safe harbor found inapplicable to individual policy arrangement).

25 DOL Reg. § 2510.3-1(j)(1). *See also Fitzgerald v. Cont'l Assurance Co.*, 2008 WL 5427635 (E.D. Ky. 2008) (plan, viewed as a whole, failed safe harbor where employees paid premiums for plan's dependent life component, but employer made contributions for other components, including basic life); *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d 1050, 42 EBC 1762 (D. Ariz. 2007) (rejecting argument that employer was contractually bound to make premium payments for employees where employer did not actually absorb any portion of premium costs); *Burgess v. Cigna Life Ins. Co. of N.Y.*, 2005 WL 3501897 (W.D. Tex. 2005) (plan failed safe harbor because, among other reasons, employer paid LTD premiums for employees earning less than $50,000).

26 DOL Tech. Rel. 2013-03, § II.B (Sept. 13, 2013); IRS Notice 2013-54, § II.B, 2013-40 I.R.B. 287 (description of "employer payment plan"). See below in this subsection C for further discussion of this agency guidance regarding employer payment plans.

27 *Crull v. GEM Ins. Co.*, 58 F.3d 1386 (9th Cir. 1995) (recognizing that "there is little economic difference (excepting tax consequences) between in-kind payments of health insurance and deductions from an employee's payroll" but nevertheless acknowledging the distinction made on this basis by the safe harbor).

28 DOL Advisory Opinion 94-23A (July 1, 1994) ($.25 contributions to "fluctuation reserve" under policy).

made only for some employees.[29] Where coverage is provided automatically without cost to employees, the plan will clearly fall outside the safe harbor.[30] But some courts have held that an employer's payment of an employee's insurance premiums does not constitute a "contribution" for safe harbor purposes where the full amount of the payment was reported as gross income on the employee's W-2.[31] Guidance on employer payment plans issued by the DOL and IRS under health care reform would appear to treat any payment or reimbursement for individual health coverage as an employer payment unless (a) employees could choose between cash and an after-tax amount to be applied toward the individual health coverage, or (b) the payment was made under a payroll practice of forwarding post-tax wages to the health insurer at the direction of employees, provided the conditions of the voluntary plan safe harbor were otherwise met.[32] Notably, the underlying rationale of this agency guidance seems to indicate a view that allowing pre-tax premium payment for any individual policy (i.e., including non-health coverage) takes the arrangement outside the DOL safe harbor and makes it subject to ERISA. Effective for plan years beginning on or after January 1, 2020, however, final regulations allow reimbursement for individual health coverage through HRAs and other account-based plans meeting certain conditions, and provide a separate regulatory safe harbor excluding qualifying individual coverage from the ERISA definitions of "employee welfare benefit plan" and "welfare plan" if applicable requirements are met.[32.1]

The argument that permitting employees to pay for voluntary coverage through the employer's cafeteria plan constitutes an employer contribution—because employees pay less for the coverage by paying premiums with pre-tax dollars—has generally been rejected by courts.[33] (Note, however, that even if this practice is not considered an employer contribution, it may be viewed as employer endorsement, as discussed below.) Another argument posits that discounted premiums constitute an employer contribution because the discount would not be available absent the employment relationship. Some courts have found an ERISA plan to exist on this basis.[34] But there was no ERISA plan where individual policyholders were given a group discount not negotiated by the employer, and there were no other indicators of employer endorsement.[35] Distinguishing factors in the different outcomes appear to be the extent of the employer's involvement in negotiating the discount and with other aspects of the arrangement.

---

29 *Helfman v. GE Group Life Assurance Co.*, 573 F.3d 383, 47 EBC 1533 (6th Cir. 2009) (rejecting argument that safe harbor exception applied to individual who reimbursed his premiums, but not to majority of employees in plan, whose premiums were paid by employer); *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *partially overruled on other grounds by, Yates v. Hendon*, 541 U.S. 1 (2004) (employer paid full premium for one employee); *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 18 EBC 2140 (2d Cir. 1994) (employer made contributions for certain management employees only); *Burgess v. Cigna Life Ins. Co. of N.Y.*, 37 EBC 1917 (W.D. Tex. 2005) (disability plan did not fall within safe harbor and was subject to ERISA where employer paid premiums of certain, but not all, employees).

30 *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839 (9th Cir. 1994); *Mem'l Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 12 EBC 1897 (5th Cir. 1990).

31 *B-T Dissolution, Inc. v. Provident Life & Accident Ins. Co.*, 175 F. Supp. 2d 978 (S.D. Ohio 2001) (employer did not "contribute" to employee's premium payments for purposes of safe harbor because full amount of payments was reported as gross income on employee's W-2); *compare with Crooms v. Provident Life & Accident Ins. Co.*, 484 F. Supp. 2d 1286 (N.D. Ga. 2007) (LTD plan did not fall within safe harbor where professional corporation paid full annual premiums and individual did not report these amounts as income); *Cowart v. Metro. Life Ins. Co.*, 444 F. Supp. 2d 1282 (M.D. Ga. 2006) (individual's failure to report premium payments as income on W-2 (and resulting avoidance of income tax on premiums) prohibited him from later claiming, for purposes of safe harbor, that premiums were treated as income).

32 DOL Tech. Rel. 2013-03 (Sept. 13, 2013) and IRS Notice 2013-54, 2013-40 I.R.B. 287. *See also* IRS Notice 2015-87, 2015-52 I.R.B. 889; IRS Notice 2015-17, 2015-14 I.R.B. 845; FAQs About Affordable Care Act Implementation Part XXII (Nov. 6, 2014), available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xxii.pdf (as visited July 9, 2019); and Employer Health Care Arrangements (May 13, 2014), available at http://www.irs.gov/Affordable-Care-Act/Employer-Health-Care-Arrangements (as visited July 9, 2019). Several IRS information letters have reiterated the compliance problems and potential excise taxes associated with these arrangements: IRS Information Letters 2016-0019 (Mar. 2, 2016); 2016-0005 (Feb. 8, 2016); 2014-0037 (Sept. 22, 2014) and 2014-0039 (Sept. 22, 2014).

32.1 DOL Reg. § 2510.3-1(l). *See also* Preamble to Final Regulations on HRAs and Other Account-Based Group Health Plans, 84 Fed. Reg. 28888 (June 20, 2019). The regulations are intended to expand the availability and permitted use of HRAs and allow HRAs to be used in conjunction with nongroup health coverage. For more information, see Section VI.

33 *Turner v. Liberty Nat. Life Ins. Co.*, 2012 WL 711357 (E.D. Tenn. 2012) (contribution should be interpreted to mean an actual financial contribution in the form of full or partial premium payment); *Hrabe v. Paul Revere Life Ins. Co.*, 951 F. Supp. 997 (M.D. Ala. 1996). As discussed below in subsection C.5, use of the employer's cafeteria plan may constitute employer endorsement of the voluntary plan—another method by which the arrangement might fall outside the safe harbor.

34 *Bommarito v. Nw. Mut. Life Ins. Co.*, 2018 WL 3537118 (E.D. Cal. 2018) (employer contributed to program by facilitating discounted premiums); *Brown v. Paul Revere Life Ins. Co.*, 2002 WL 1019021, 28 EBC 1426 (E.D. Pa. 2002). For related issues, see the discussion below regarding linking plan coverage to employee status.

35 *Gooden v. Unum Life Ins. Co. of America and Unum Group Corp.*, 2016 WL 3059752 (E.D. Tenn. 2016).

Once an employer makes a contribution to the plan, consideration of the other safe harbor elements becomes irrelevant.[36] However, by ceasing to make contributions under an otherwise voluntary plan, an employer could potentially bring the plan back under the voluntary plan safe harbor.[37]

3. Plan Must Be Completely Voluntary for Employees

The voluntary plan safe harbor requires that participation by employees be "completely voluntary." Making participation in a benefit program a requirement of employment would, of course, violate the safe harbor. Beyond this obvious point, there is little guidance on how to interpret this requirement. Few cases address this element; those that do typically involve situations where coverage under the program was automatic and fully paid by the employer.[38] Payment by the employer also violates the no-employer-contribution requirement and is sufficient reason by itself to take a program outside the safe harbor. In short, the cases provide little real guidance on this aspect of the safe harbor. It would seem consistent with the completely voluntary requirement for an insurer to insist that a certain minimum number of employees participate in a particular benefit program before it is offered by the insurer. One DOL opinion letter suggests, for example, that it was appropriate under the safe harbor for the insurer to alter the coverage based on the demographics of the group of employees choosing to participate.[39] We know of no guidance addressing another potential issue: whether individual employees may be required to remain covered for a minimum time after they voluntarily become covered by a plan.

4. Employer Functions Must Be Limited to Those Listed in Voluntary Plan Safe Harbor

To satisfy the voluntary plan safe harbor, the insurance company—not the employer—must offer the plan. Therefore, the employer's level of involvement in a voluntary plan is "the key for determining whether a plan is exempt" under the safe harbor.[40] Obviously, an employer must have some contact with a voluntary plan marketed to employees in its workplace. Recognizing this, the voluntary plan safe harbor allows three basic employer functions in connection with such plans:

- permitting the insurer to publicize the program to employees;
- collecting premiums through payroll deductions; and
- remitting the premiums collected to the insurer.

Each of these functions is discussed in more detail below. In addition, the courts have approved of certain "ministerial functions" that are "ancillary" to the specifically permitted ones. These ancillary functions are also discussed below.

a. Employer May Permit Insurer to Publicize the Program to Employees

Employees must know that a voluntary plan exists to take advantage of it. The voluntary plan safe harbor therefore allows the employer "to permit the insurer to publicize the program to employees." This includes permitting insurance presentations in the workplace; acting as intermediary between employees and

---

36 *See, e.g., Brundage-Peterson v. Compcare Health Servs. Ins. Corp.*, 877 F.2d 509, 11 EBC 1649 (7th Cir. 1989); *Berry v. Provident Life & Accident Ins. Co.*, 2007 WL 1795837, 41 EBC 2461 (D.S.D. 2007) (analyzing first prong of safe harbor, court relied on salary allotment agreement, policy application, and tax document representations to conclude that employer contributed to premium payments, and that safe harbor did not apply).

37 *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 18 EBC 2140 (2d Cir. 1994).

38 *See, e.g., Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988); *see also The Meadows v. Employers Health Ins.*, 826 F. Supp. 1225 (D. Ariz. 1993) (participation in plan was not "completely voluntary" for purposes of safe harbor where employer agreed, in insurance application, to 100% participation of all eligible employees for life and AD&D insurance). *But see Arndt v. Concert Health Plan Ins. Co.*, 2010 WL 151996 (M.D. Fla. 2010) (rejecting argument that plan participation was not completely voluntary because MEWA required certain employers to have at least 75% of their employees participate in plan; court reasoned that there was showing that employee at issue was required to participate); *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d 1050, 42 EBC 1762 (D. Ariz. 2007) (rejecting argument that plan participation was not completely voluntary where plan required minimum levels of participation; court noted that participation requirements were relatively low (i.e., the greater of ten employees or 25% of eligible employees), and were imposed by insurer to make plan financially advantageous to administer).

39 DOL Advisory Opinion 83-03A, 1983 WL 22492 (Jan. 17, 1983) ("the characteristics of an employee group may permit [the life insurance issuer] within sound underwriting practices to waive evidence of insurability").

40 DOL Advisory Opinion 77-54, 1977 WL 5421 (Aug. 8, 1977) (citing DOL Advisory Opinion 75-06, 1975 WL 4518 (Nov. 3, 1975)).

