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## Identifying ERISA Employee Benefit Plans

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This practice note will guide you in identifying employee benefit plans and programs that are subject to regulation under the Employee Retirement Income Security Act of 1974 (ERISA), as amended from time to time. As an advisor to employers who sponsor employee benefit plans, or as counsel to employees participating in a plan, or to employee unions, you need to carefully review the benefits that are being provided to determine ERISA application. If the benefits are subject to ERISA, the employer or employee association sponsoring the plan or arrangement has certain obligations regarding the rights and benefits of employees (and their beneficiaries). If the employer fails to satisfy these obligations, it may face Department of Labor (DOL) enforcement action, civil penalty assessments, and/or participant lawsuits. You therefore need to understand which plans are subject to ERISA requirements and which are exempt.

This practice note covers the following topics:

- Significance of ERISA Coverage
- Determining Whether a Plan Is Covered by ERISA
- Identifying Plans That Are Excluded from ERISA Coverage
- Defining an ERISA Employee Benefit Plan
- Conclusions and Action Steps

### Significance of ERISA Coverage

ERISA is a federal law intended to protect the rights and benefits of benefit plan participants. ERISA preempts most state laws, other than state insurance laws, applicable to ERISA-covered plans. It applies to most private sector employers, including corporations, partnerships, limited liability companies, sole proprietorships, and not-for-profit organizations. ERISA does not require an employer to establish a plan, but only requires that those that do establish an ERISA plan meet certain minimum standards. It relies on the federal court structure to adjudicate disputes not resolved by an established claims procedure and provides courts discretion to award costs to either party, including attorney's fees.

The provisions of ERISA are grouped under four Titles:

- **Title I.** Title I contains most of the compliance provisions of ERISA, including reporting and disclosure, participating, vesting, funding, fiduciary responsibility, enforcement, and administration.
- **Title II.** Title II contains the amendments to the Internal Revenue Code (IRC) made by ERISA.
- **Title III.** Title III established the jurisdictional provisions and sets forth the responsibilities of the Internal Revenue Service (IRS) and the DOL.
- **Title IV.** Title VI contains the defined benefit pension plan termination provisions.

### ERISA Rules Applicable to All Employee Benefit Plans

ERISA covers two sorts of plans: (1) employee pension benefit plans, and (2) employee welfare benefit plans, as defined in ERISA § 3(2) (29 U.S.C. § 1002(2)) and 3(1) (29 U.S.C. § 1002(1)), respectively. As a general rule, all ERISA-covered plans must:

- Provide participants with certain information
- Establish participant benefit claims and appeal procedures
- Give the participants the right to sue for breaches of fiduciary duty or denied benefits –and–

- File annual information returns (Forms 5500), unless the plan qualifies for exemption

ERISA also:

- Imposes fiduciary responsibilities for those who manage and control plan assets (ERISA § 404 (29 U.S.C. § 1104))
- Requires plan fiduciaries to discharge their duties “solely” in the interests of plan participants and beneficiaries (ERISA § 404(a)(1) (29 U.S.C. § 1104(a)(1))) –and–
- Bars certain transactions between a plan and a “party in interest,” a violation of which subjects the fiduciary to prohibited transaction rules that can result in severe penalties to the parties involved (ERISA §§ 406(a), 502(i) (29 U.S.C. §§ 1106, 1132(i)); I.R.C. § 4975)

ERISA Title I provides most definitions and parameters for employee benefit plans and programs, indicating whether they are subject to ERISA coverage. For more information on ERISA fiduciary obligations, see [\*Fundamentals of ERISA Fiduciary Duties\*](#).

#### ***ERISA Rules Applicable to Employee Pension Benefit Plans***

In addition to the duties set forth above, ERISA employee pension benefit plans must also:

- Satisfy minimum standards for participation, vesting, benefit accrual, and funding under the IRC and under ERISA Title I, Parts 2 and 3.
- Limit the forms of benefits and the timing of benefits in accordance with statutory requirements.
- Provide for certain spousal rights.

Under Title IV of ERISA, the Pension Benefit Guaranty Corporation (PBGC) guarantees certain benefits under defined benefit pension plans that are covered under the PBGC rules. ERISA § 4021 (29 U.S.C. § 1321(a)).

#### ***ERISA Rules Applicable to Employee Welfare Benefit Plans***

In addition to the ERISA rules governing ERISA welfare plans, which relate, primarily, to reporting and disclosure requirements, ERISA welfare plans that are health plans must comply with rules governing Qualified Medical Child Support Orders (QMCSOs). Most health plans (including some exempt from ERISA) must also comply with duties relating to other statutes:

- Patient Protection and Affordable Care Act (ACA) (under ERISA §§ 715, 731–732)
- Consolidated Omnibus Reconciliation Act of 1986 (COBRA) (under ERISA § 601–608)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA) (under ERISA § 701)
- Mental Health Parity and Addiction Equity Act (under ERISA § 712)
- Newborns Act (under ERISA § 711)
- Women’s Health and Cancer Rights Act of 1998 (WHCRA) (under ERISA § 713)
- Genetic Information Nondiscrimination Act (GINA) (under ERISA § 702)
- Children’s Health Insurance Program Reauthorization Act (CHIPRA) (under ERISA § 609)
- Michelle’s Law (under ERISA § 714)

However, outside of the health context, welfare plans are subject to far fewer ERISA rules than pension plans.

#### **Determining Whether a Plan Is Covered by ERISA**

Given the extensive requirements applicable to plans covered by ERISA, you need to determine whether the plan you are reviewing is subject to ERISA or whether, while applicable, the application of ERISA is limited. In determining whether a plan is subject to ERISA, ask:

- Does an employee benefit plan exist?
- Does an ERISA plan exemption apply?

Also, remember that an exemption from ERISA is not an exemption from the requirements of the IRC. Certain desired tax benefits will be available only if IRC requirements are met. ERISA may also apply to a plan, but only in a limited way. For example, “top-hat” plans providing retirement income are not subject to many ERISA Title I or any Title IV requirements (see below). An exemption from ERISA is also not an exemption from other statutes, like the IRC (see, e.g., Employee Benefits Guide § 2.04) or, for health plans, from the rules applicable to health plans under statutes other than ERISA, as described in “ERISA Rules Applicable to Employee Welfare Benefit Plans,” above. A health plan is subject to each of those rules unless the applicable statute provides an exemption.

### **Identifying Plans That Are Excluded from ERISA Coverage**

Certain plans are expressly exempt from ERISA Subchapter I (ERISA §§ 2–734). These are:

- Governmental plans
- Church plans
- Plans for purposes of complying with workmen’s compensation, unemployment compensation, or disability insurance laws
- Certain foreign plans –and–
- Unfunded excess benefit plans

ERISA § 4(b)(1)–(5) (29 U.S.C. § 1003(b)(1)–(5)).

Retirement plans of these organizations are also exempt from certain of the qualification rules of I.R.C. §§ 401(a), 403(b), and 457(b) and certain other IRC requirements.

While these plans are not subject to ERISA, they are also not subject to ERISA’s preemption of state laws. In some instances, these laws may impose requirements similar to, or even more onerous than, ERISA. While governmental plans cannot avoid being subject to the laws of the state in which they are created, church plans can avoid being subject to conflicting laws of all 50 states by electing ERISA coverage.

### ***Governmental Plans***

ERISA § 4(b)(1) (29 U.S.C. § 1003(b)(1)) provides that governmental plans are not subject to the provisions of ERISA. Governmental plans that are exempt from ERISA include plans maintained by:

- The federal government
- State governments
- Local governments
- International organizations
- Any agency or instrumentality of any of the foregoing

The Railroad Retirement Plan is also considered a governmental plan.

A plan of an Indian tribal government, subdivision of an Indian tribal governments, or an agency or instrumentality of either is considered a governmental plan for all of the participants that are employees of such entities substantially all of whose services are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

An entity established and maintained by more than one governmental entity can also be considered governmental. This would include, for example, a mosquito abatement district established by several local governments. And a plan to which more than one governmental entity contributes (such as a statewide plan that also covers employees of local governments) is a governmental plan.

Advance Notice of Proposed Rulemaking REG-157714-06, 76 Fed. Reg. 69172 (Nov. 8, 2011) discusses the definition of governmental plan. Advance Notice of Proposed Rulemaking REG-133223-08, 76 Fed. Reg. 69188 (Nov. 8, 2011), discusses the Indian tribal government plans that will be considered governmental plans.

### ***Church Plans***

A church plan (defined under ERISA § 4(b)(2) (29 U.S.C. § 1003(b)(2))) is exempt from ERISA unless the plan administrator has elected ERISA coverage under I.R.C. § 410(d) (church plans that have not elected ERISA coverage are referred to as “nonelecting church plans”). This includes:

- A plan established and maintained by a church or a convention or association of churches that is exempt from tax under I.R.C. § 501(a)
- A plan established and maintained by an organization (qualified church-controlled organization, or QCCO), which is:
  - Exempt from taxation under I.R.C. § 501 –and–
  - Controlled by or associated with a church or a convention or association of churches

I.R.C. § 414(e).

Moreover, a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry, regardless of his or her source of compensation, is considered an employee of a church. For example, a chaplain of a university would be considered an employee of a church, even though the university is not a church.

While the statute uses the term church, the exemption applies equally to non-Christian religious organizations. However, the definition of a church plan excludes a plan maintained by a church primarily for the benefit of employees of an unrelated trade or business.

The IRS has issued numerous private letter rulings (PLRs) to church-affiliated hospitals stating that their plans are church plans. See, e.g., I.R.S. Private Letter Ruling 9323031, I.R.S. Private Letter Ruling 9504046, I.R.S. Private Letter Ruling 200401022, and I.R.S. Private Letter Ruling 201319036. While these rulings deal specifically with the status of the plans under the IRC, the DOL has adopted the same position with respect to ERISA coverage. DOL Advisory Opinions 91-14A (Mar. 6, 1991); 93-07A (Mar. 9, 1993); 95-13A (June 19, 1995); and 2004-11A (Dec. 30, 2004). However, the issue has been the subject of a spate of litigation, with some courts holding that such a plan is not a church plan. *Kaplan v. Saint Peter’s Healthcare System*, 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016).

#### ***Plans That Comply with Worker’s Compensation, Unemployment Compensation, or Disability Insurance Laws***

State-sponsored plans maintained solely for the purpose of complying with applicable workman’s compensation laws, or unemployment compensation or disability insurance laws, are not ERISA employee benefit plans. ERISA § 4(b)(3) (29 U.S.C. § 1003(b)(3)).

#### ***Plans Maintained Outside the United States***

Foreign plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens are exempt from ERISA, Subchapter I. ERISA § 4(b)(4) (29 U.S.C. § 1003(b)(4)).

#### ***Unfunded Excess Benefit Plans***

A plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by I.R.C. § 415 on qualified retirement plans (called an “excess benefit plan”) is exempt from ERISA, provided the plan is unfunded. ERISA § 4(b)(5) (29 U.S.C. § 1003(b)(5)). In addition, even an excess benefit plan that is funded is exempt from the participation, vesting, and funding requirements of ERISA Title I, Parts 2 and 3. ERISA §§ 201(7), 301(a)(9) (29 U.S.C. §§ 1051(7), 1081(a)(9)).

#### **Defining an ERISA Employee Benefit Plan**

Even if your plan does not qualify for any of the above exceptions, it will be subject to ERISA only if it is an employee benefit plan. An employee benefit plan is:

- A plan, fund, or program (as opposed to a more informal payroll practice)
- Established or maintained by an employer or an employee organization or both, for the purpose of providing pension or welfare benefits to employees (other than just certain employees not considered in need of ERISA protections) and their beneficiaries. ERISA § 3(3) (29 U.S.C. § 1002(3)).

Thus, certain arrangements that do not satisfy these requirements are excluded from the definition of ERISA employee benefit plan. See, e.g., DOL Advisory Opinion 2015-01A.

#### ***Plan, Fund, or Program***

You first need to determine whether an arrangement constitutes a plan. For example, an employer may have an unwritten agreement with an employee to provide future bonuses if the employee meets certain performance objectives. Or, an employer may provide deferred compensation to its employees.

Courts have addressed this determination and created a four-point test. Under this test, a plan is subject to ERISA if, from the surrounding circumstances, a reasonable person could ascertain:

- The intended benefits
- A class of beneficiaries
- The source of financing –and–
- The procedures for receiving benefits

See *Donovan v. Dillingham*, 688 F.2d 1367 (1982). Courts have also stated that, for a plan to be subject to ERISA, the employer must have an ongoing administrative responsibility to determine who is eligible and what benefits are payable under the plan. If there is no administrative scheme or structure, the plan is not subject to ERISA. See *Fort Halifax Packing Corp. v. Coyne*, 482 U.S. 1 (1987).

Certain payroll practices are considered payment of compensation to an employee rather than an ERISA employee benefit plan. This includes:

- Compensation for services performed –and–
- Compensation for periods in which the employee is:
  - Physically or mentally unable to work for medical reasons (such as pregnancy, physical examination, or psychiatric treatment) –or–
  - Able to work but does not, due to vacation, military duty, jury duty, training, and similar functions

29 C.F.R. § 2510.3-1(b).

#### ***Established or Maintained by an Employer or an Employee Organization or Both***

Certain kinds of plans, although they provide benefits, are not considered established or maintained by an employer, and are not ERISA employee benefit plans. These include:

- **Non-ERISA tax-sheltered annuities (non-ERISA 403(b) plans).** Tax-sheltered annuities or custodial accounts described in I.R.C. § 403(b) established for certain nonprofit organizations are exempt from ERISA if:
  - **No employer contributions.** All purchases are pursuant to salary reduction agreements or agreements to forego increases in salary.
  - **Voluntary program.** Participation by employees is completely voluntary.
  - **Enforceable by participants only.** All rights under the contracts are enforceable solely by the participant or beneficiary (or agent thereof).
  - **Limited employer involvement.** The employer has limited involvement in the program. 29 C.F.R. § 2510.3-2(f). If you are reviewing a 403(b) plan, carefully review the responsibilities assumed by the employer to determine whether the plan is ERISA-exempt. For more information, see *Creating and Maintaining I.R.C. Section 403(b) Plans*.
- **Certain group or group-type insurance programs.** Group or group-type insurance programs offered by an insurer to employees or members of an employee organization in which:
  - All contributions are made by employees or members of an employee organization.
  - Participation in the program is voluntary.
  - The function of the employer or employee organization with respect to the program, without endorsing the program, is limited to permitting the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues check offs, and to remit them to the insurer.
  - 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 deduction or dues check off.

29 C.F.R. § 2510.3-1(j). These plans commonly provide insured welfare benefits like short-term disability, accidental death and dismemberment, or life insurance, on a voluntary basis.

Pay particular care to avoid employer endorsement of the program. This signals existence of an ERISA plan. An employer or employee organization will be considered to have endorsed a group or group-type insurance program if:

- The employer or employee organization expresses to its employees or members any positive, normative judgment regarding the program.
- The employer or employee organization urges or encourages employee or member participation in the program.
- The employer engages in activities that would lead an employee or member reasonably to conclude that the program is part of a benefit arrangement established or maintained by the employer or employee organization.

*DOL Advisory Opinion 94-25A* (July 11, 1994). *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) provided that the following activities constitute endorsement:

- Selecting the insurer
- Deciding on key terms, such as portability and the amount of coverage
- Determining eligibility
- Incorporating the policy terms into the summary plan description for its cafeteria plan –and–
- Retaining the power to alter compensation reduction for tax purposes

#### ***For the Purpose of Providing Pension or Welfare Benefits***

To qualify as an ERISA employee benefit plan, the plan must be:

- An employee welfare benefit plan under ERISA § 3(1) (29 U.S.C. § 1002(1))
- An employee pension benefit plan under ERISA § 3(2) (29 U.S.C. § 1002(2)) –or–
- A plan that is both an employee welfare benefit plan and an employee pension benefit plan

ERISA § 3(3) (29 U.S.C. § 1002(3)). Moreover, as described under “Significance of ERISA Coverage,” above, the effects of ERISA coverage will differ, depending on the type of plan.

#### ***Pension Benefit Plans***

An employee pension benefit plan is any employer or employee organization-sponsored plan, fund, or program that:

- Provides retirement income to employees –or–
- Provides benefits that result in a deferral of income by employees for periods extending to the termination of covered employment or beyond

ERISA § 3(2)(A) (29 U.S.C. § 1002(2)(A)). As in the case of welfare plans, a pension plan must have at least one common-law employee to be an ERISA plan. 29 C.F.R. § 2510.3-3(c)(1). Thus, a retirement plan covering only partners, for example, is not an ERISA plan. *Robertson v. Alexander Grant & Co.*, 798 F.2d 868 (5th Cir. 1987); *Gladwell v. Reinhart* (In re Reinhart), 477 Fed. Appx. 510 (10th Cir. Utah 2012). A pension plan that covers only a self-employed individual, or the self-employed individual and his or her spouse, without any common law employee also participating, is also not covered under Title I of ERISA.

#### **Qualified Retirement Plans**

Plans that are “qualified” under I.R.C. §§ 401(a) and 501(a) are ERISA pension benefit plans because they are designed to provide retirement income to employees. Examples are:

- 401(k) plans
- Profit-sharing plans
- Stock bonus plans
- Money purchase pension plans
- Target benefit plans
- Employee stock ownership plans
- Defined benefit plans, including cash balance and other statutory hybrid plans

The term pension plan applies regardless of the methods of calculating the contributions made to the plan. While ERISA pension benefit plans include plans commonly providing a pension or annuity benefit, they include those plans that typically provide non-annuity distributions, in lump sum or installment, capable of rollover to other plans or individual retirement arrangements. Thus, ERISA pension plans include profit-sharing plans, stock bonus plans, 401(k) plans, and ESOPs, even though these plans are not commonly referred to as pension plans. See [Checklist—Types of Qualified Retirement Plans](#) for more information.

#### ERISA 403(b) Plans

I.R.C. § 403(b) provides that certain employers may make tax-deferred contributions on behalf of employees to annuities or custodial accounts that meet certain requirements. Plans providing for such contributions are referred to as “tax deferred annuities or custodial accounts,” “tax sheltered annuities or custodial accounts,” or simply “403(b) plans.” The employers permitted to maintain such plans are:

- Tax-exempt religious, charitable, scientific, testing for public safety, literary, or educational organizations described in I.R.C. § 501(c)(3) –and–
- Public schools

A 403(b) plan may be exempt from ERISA if it is:

- A plan of a public school (exempt as a governmental plan)
- A nonelecting church plan
- A plan with limited employment involvement, as discussed under Defining an ERISA Employee Benefit Plan — Established or Maintained by an Employer or an Employee Organization or Both

All other 403(b) plans are subject to ERISA regulation as employee pension benefit plans.

#### Individual Retirement Accounts and Individual Retirement Annuities (IRAs)

Two categories of IRAs are excluded by regulation from the definition of employee pension benefit plan:

- **IRAs without substantial employer involvement.** The terms employee pension benefit plan and pension plan do not include an IRA if:
  - No contributions are made by the employer or employee association.
  - Participation is voluntary.
  - The employer, without endorsement, permits the sponsor to publicize the program.
  - The employer does not receive consideration, other than reasonable compensation for payroll services. 29 C.F.R. § 2510.3-2(d).
- **Certain state savings programs.** The terms employee pension benefit plan and pension plan do not include an IRA established and maintained pursuant to a state payroll deduction savings program, provided that:
  - The program is established under state law.
  - The program is implemented and administered by the state, which includes responsibility for investing the savings or selecting employee investment alternatives.
  - The state assumes responsibility for the security of payroll deduction and savings.
  - The state notifies the employees of their program rights and their enforcement.
  - Participation is voluntary.
  - All rights of the employees are enforceable only by the employees or the state.
  - The program limits employer involvement.
  - The employer does not contribute to the program and does not incentivize employees to participate.
  - The employer’s involvement is required by state law.
  - The employer has no discretionary authority, control, or responsibility under the program.

- The employer does not receive any direct or indirect consideration other than an amount that reasonably approximates expenses under the program. 29 C.F.R. § 2510.3-2(h).

Even IRAs that do not fall within the above categories (e.g., those issued under Simplified Employee Pensions or SEPs) are nevertheless exempt from the requirements of Parts 2 and 3 of Title I of ERISA. (ERISA § 201(6), 29 U.S.C. § 1051(6); ERISA § 301(a)(7), 29 U.S.C. § 1081(a)(7)). The requirements from which they are exempt include:

- Minimum participation standards
- Minimum vesting standards
- Benefit accrual requirements
- Requirement of joint and survivor annuity and preretirement survivor annuity
- Form and payment of benefits
- Mergers and consolidations of plans or transfers of plan assets
- Recordkeeping and reporting requirements
- Multiple employer plans and other special rules –and–
- Funding requirements

Moreover, as a practical matter, the employer’s fiduciary duties are limited with respect to such plans, because employees, rather than the employer, manage the IRAs under the plan.

#### *Welfare Benefit Plans*

An employee welfare benefit plan is defined in ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A), as any plan, fund, or program that provides through the purchase of insurance or otherwise:

- Medical, surgical, or hospital care
- Benefits or benefits in the event of sickness, accident, disability, or death
- Unemployment
- Vacation benefits
- Apprenticeship or other training programs
- Day care centers
- Scholarship funds
- Prepaid legal services
- Holiday and severance pay plans

ERISA § 3(1)(B) (29 U.S.C. § 1002(1)(B)) expands the above list to include any benefit described in Section 302(c) of the Labor Management Relations Act of 1947 (LMRA) (other than pensions on retirement or death, and insurance to provide such pensions).

Remember that if the plan does not provide a welfare benefit described in either ERISA § 3(1)(A) (29 U.S.C. § 1002(1)(A)) or LMRA § 302(c) (29 U.S.C. § 186(c)), the plan is not a welfare benefit plan.

#### *Special Rule for Severance Arrangements*

Depending on its exact provisions, a severance arrangement can be:

- An arrangement that is not an ERISA employee benefit plan
- An employee pension benefit plan –or–
- An employee welfare benefit plan

Typically, you will prefer that a severance plan or program is not an ERISA pension plan, but that it is an ERISA welfare plan or not an ERISA plan at all. The following guidance will help you to determine which category your severance plan falls into:

- **One-time payments are not plans.** A severance payment is not an employee benefit plan if it is a one-time, lump sum payment that does not create the need for an ongoing administrative scheme. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). However, if you wish to take advantage of this exception, you must be careful that the arrangement is truly a one-time event. If the employer develops a pattern or practice of providing severance benefits, severance payments will be subject to ERISA.
- **Severance plans may qualify for ERISA welfare plan status.** A severance plan is an ERISA employee welfare benefit plan, and not an ERISA pension plan, if it is not excluded from ERISA under the preceding paragraph and:
  - Payments are not contingent upon the retirement of the employee.
  - The amount of the severance payment does not exceed twice the amount of the employee's compensation for the preceding year.
  - All payments to the employee are made within 24 months after the employee's termination of employment (unless the employee is terminated in connection with a limited program of terminations).

29 C.F.R. § 2510.3-2(b).

It is impractical to have a severance plan comply with the requirements as to the form of benefits and funding requirements applicable to an ERISA pension benefit plan. Thus, if your severance plan does not meet one of the above exceptions to being characterized as a pension plan, you should structure it as a top-hat plan (see below) to avoid ERISA coverage. For further discussion on ERISA exemption of severance plans, see [\*Checklist — ERISA Considerations for Severance Benefits\*](#).

#### *Plans That Are Not Pension Plans*

Whether a plan is a pension plan for purposes of ERISA depends on whether it provides for definite and ascertainable benefits to employees over a period of years, for post-employment, and/or for retirement purposes. 26 C.F.R. § 1.401-1()(2), (b)(1)(i). The employee pension plan rules apply only to those forms of employer-funded benefits that relate primarily to retirement income. Thus, the following forms of employer provided benefits, including forms of compensation paid at or near retirement, are not covered by the employee pension plan rules:

- **Severance pay plans.** Severance arrangements that qualify as ERISA welfare plans (see above) are not ERISA pension plans. 29 C.F.R. § 2510.3-2(b).
- **Bonus programs.** Bonus payments made by an employer to its employees for work performed are not ERISA pension plans unless the payments are systematically deferred to the employee's termination of employment or beyond, thereby providing retirement income to the employees. 29 C.F.R. § 2510.3-2(c).
- **Gratuitous payments to pre-ERISA retirees.** Voluntary, gratuitous payments by an employer to former employees are exempt from ERISA Title I requirements, if:
  - Payments are made from the employer's general assets
  - The former employees separated from service before September 2, 1974 (ERISA's enactment date)
  - Payments commenced before that date –and–
  - Each former employee receiving such payments receives annual notice that payments are gratuitous and do not constitute a pension plan (29 C.F.R. § 2510.3-2(e))
- **Supplemental payment plans.** While an employer arrangement to provide former employees with supplemental retirement income is a pension plan, providing supplemental payments after September 26, 1980 is treated as made under an ERISA welfare plan (and not an ERISA pension plan) for purposes of ERISA Title I, if:
  - Payment is made out of:
    - The general assets of the employer –or–
    - A separate fund established and maintained solely for this purpose
  - Payment per month does not exceed a supplemental payment factor –and–
  - The payment occurs on or after the last day of the month to which the calculation relates (29 C.F.R. § 2510.3-2(g))

### *Plans That Are Not Welfare Plans*

29 C.F.R. § 2510.3-1 lists certain types of plans that are exempt from ERISA because they are not recognized as providing welfare benefits:

- Payroll practices such as overtime pay, shift premiums, holiday premiums, vacation pay, military duty pay, jury duty pay, etc.
- On premises recreation, dining, and first aid facilities
- Holiday gifts
- Sales to employees
- Maintenance of a hiring hall facility
- Remembrance funds providing flowers, an obituary notice, or a small gift on sickness, hospitalization, death, or termination of employment
- Strike funds providing funds to striking union members
- Industry advancement programs
- Certain group-type insurance programs –and–
- Unfunded scholarship programs

29 C.F.R. § 2510.3-1 and 2.

### ***Plans That Do Not Cover Employees***

Plans that do not cover employees are exempt from ERISA. 29 C.F.R. § 2510.3-3(b). However, if a plan includes any common law employees, it will become subject to ERISA, even with respect to individuals who are not employees.

#### *Sole Proprietors / Partners*

A plan that covers only the sole owner of an unincorporated business or partners in a partnership is not subject to ERISA. 29 CFR § 2510.3-3(b). Moreover, the spouse of a business owner or partner is also not considered an employee for this purpose. 29 C.F.R. § 2510.3-3(c).

#### *Industry Advancement Programs*

A program maintained by an employer or a group or association of employers that has no employee participants and does not provide benefits to employees or their dependents is exempt from ERISA. 29 C.F.R. § 2510.3-1(i).

#### *Independent Contractors and Misclassified Employees*

Special problems arise in the case of individuals characterized as independent contractors. The determination of who is an employee as opposed to an independent contractor is complex. See the IRS page on "[\*Independent Contractor \(Self-Employed\) or Employee?\*](#)" If you are trying to avoid ERISA coverage by having a plan cover independent contractors but not employees, you need to make very sure that the individuals characterized as independent contractors are not in fact employees.

### ***Plans That Cover Only Employees Not Considered in Need of ERISA Protections***

Certain individuals, although employees, are considered by virtue of their employment status to have a sufficiently good bargaining position that ERISA protections are unnecessary. Plans covering only such employees are not subject to ERISA.

#### *Sole Owner of Incorporated Business*

As indicated above, a plan that covers only the sole owner of a corporation, or only the sole owner and his or her spouse, is not subject to ERISA even if the owner is an employee of the corporation. 29 C.F.R. § 2510.3-3(c)(1).

#### *Top-Hat Plans*

A plan that is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees (top-hat plan) is technically subject to ERISA. However, while the plan may be an ERISA employee benefit plan, it is not subject to the special requirements for ERISA pension plans relating to participation, vesting, funding, and fiduciary responsibility. ERISA §§ 201(2), 301(a)(3), 401(a)(1) (29 U.S.C. § 1051(2)).

A top-hat plan is not exempt from the reporting and disclosure requirements or the administration and enforcement provisions under ERISA. However, in lieu of filing an annual Form 5500, it can comply with the reporting and disclosure requirements by merely filing a one-time brief statement. 29 C.F.R. § 2520.104-23.

ERISA does not provide statutory definitions of “select group,” “management,” or “highly compensated employees,” and the DOL has not issued regulations defining these terms. Generally, the definition is narrower than the definition of “highly compensated employee” that is set forth in I.R.C. § 414(q). For more information, see [Highly Compensated Employee Definition for Qualified Retirement Plans](#) and Employee Compensation and Benefits Tax Guide ¶ 1402.2.

### Conclusions and Action Steps

You, as an advisor to an employer, a participant who is seeking to exercise his or her rights to benefits, or a union, must be able to determine what rights and duties, if any, are imposed by ERISA. Most employee benefits are clearly subject to ERISA. However, you should investigate whether:

- The benefits are provided by a plan
- If so, whether the plan is a governmental or church plan –and–
- If the benefits are provided by a plan other than a governmental or church plan, whether the plan is excluded from ERISA by DOL regulations

If a plan is subject to ERISA, you need to determine whether it is:

- A pension plan –or–
- A welfare plan

And, you then need to ensure that it complies with all ERISA requirements applicable to the relevant type of plan.

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