



PROSKAUER ROSE LLP

Delivery Pitfalls  
An In-Depth Review of the Potential  
ERISA Compliance Pitfalls With Which Brokers  
and Others Who Sell Disability Products Should Be Familiar

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Peter J. Marathas, Jr.  
Partner, Proskauer Rose LLP  
617.526.9704  
[pmarathas@proskauer.com](mailto:pmarathas@proskauer.com)

# Benefits Compliance Update--2009

## Today's Agenda

- Are You Selling Into the ERISA Market and Why Should You Care?

# What Is ERISA?

- ERISA is a *federal law*
  - The federal law is *supposed to establish* a uniform set of laws so that employers doing business in a number of different states will not be subjected to a variety of different state laws
  - To do this, in general, ERISA *preempts* state laws that *relate to* employee benefit plans

# What Is ERISA?

- However, ERISA *saves* from preemption:
  - State Insurance Laws
    - Including (by case law) HMOs and PPOs
  - State Banking & Securities Laws
  - State Criminal Laws
- ERISA DOES pre-empt state law with respect to self-insured plans

# What Is ERISA?

- Although ERISA's name includes **retirement income**, ERISA impacts **ALL** employee benefits programs
- ERISA principally designed to federalize and unify the field of employee benefits
- ERISA *does not require* employers to provide employee benefits, but regulates when they do

# What Is ERISA?

- ERISA governs two main types of employee benefit plans sponsored by employers:
  - *Retirement Plans*
  - *Welfare Plans*

# What Is ERISA?

- Welfare Plans

- Plan, fund or program established by employer or employee organization that provides to employees through insurance or otherwise:

- Any form of welfare benefit universal to the employee base
- Any health insurance is always covered
- Disability plans (short- and long-term) may be covered

# What Is ERISA?

- Employers Subject to ERISA:
  - ERISA applies to any employee welfare benefit plan if it is established or maintained by an employer or employee organization engaged in commerce
    - Not ALL employers – only those with an “*ERISA GROUP*”
    - ERISA has specific exceptions for churches

# ERISA Coverage—Identifying an ERISA Welfare Plan

- Of interest to us, any plan, fund or program sponsored by an employer that provides for medical, surgical, hospital, disability or life insurance *is governed by ERISA*

# Identifying ERISA Plans

- What constitutes an employee welfare plan subject to ERISA?
  - An ERISA employee welfare plan has three (3) basic elements:
    - Need a plan, fund or program
    - Established or maintained by an “employer”
    - For the purposes of providing ERISA-type benefits through the purchase of insurance or otherwise to participants and beneficiaries

# Identifying ERISA Plans

- What constitutes an employee welfare plan subject to ERISA?
  - Employer for our purposes means an “Employer Group”
    - Group of 2 or more at least one of whom is an “Employee” with no ownership interest in employer

# Identifying ERISA Plans

- Back to the First Requirement: 'YA GOTTA' Have a Plan, Fund or Program
  - General Principles:
    - ERISA does not define what constitutes a plan, fund or program
    - The **sponsoring party's intent is relevant—but not controlling**
    - Formalities are not necessary (no need for a formal written document)
    - The label applied to the benefit arrangement is not controlling

# Identifying ERISA Plans

## — General Principles:

- The purchase of health insurance by a business owner for himself and family does not create an ERISA Plan
- The extension of health insurance to employees likely results in the creation of an ERISA Plan
- A benefit program may become an ERISA plan at any time, irrespective of whether it was an ERISA plan at the time of its establishment

# Identifying ERISA Plans

- The 'Established and Maintained by the Employer' Requirement:
  - Means that the plan, fund or program is *part of* the employment relationship
  - Fact and circumstance test - no authoritative checklist
    - Looks to the employer's *degree of participation*
    - ERISA plans can be established with *little* employer involvement
  - **Often Extremely Difficult to Determine with Insurance Contracts**

# Identifying ERISA Plans

- Connecting the DOTS . . . . .
  - An ERISA Plan will exist if an employer formally establishes a fund, plan or program in writing and administers it in conformance with applicable statutory requirements
  - Less formal arrangements present a more difficult question
  - Courts apply a *facts and circumstances test*, as viewed by a “reasonable person” under the circumstances – the “Reasonable Person” standard

# Identifying ERISA Plans

- The “Reasonable Person” Standard:
  - In short, a “plan, fund or program” is established under ERISA, if under the surrounding circumstances a reasonable person could ascertain:
    - the intended benefits
    - a class of beneficiaries
    - the source of financing and
    - the procedures for receiving such benefits

# Identifying ERISA Plans

- A benefit arrangement does not need to be complicated to qualify as a plan, fund or program
- The existence of an ERISA Plan will depend on the degree of the employer's use of discretion
  - *a minimum degree of discretion may cause the employer to be subject to ERISA*

# Identifying ERISA Plans

- Overview of ERISA Considerations:
  - In order for a plan to be subject to ERISA, it must be established and maintained by an employer for an “Employer Group”
  - This component of the rule requires a minimum degree of participation or endorsement by the employer

# Identifying ERISA Plans

- Overview of ERISA Considerations:
  - Whether an employer has endorsed the insurance is often difficult to determine
  - The DOL has provided "*safe-harbor*" regulations which, if satisfied, will exclude voluntary insurance arrangements from ERISA

# Identifying ERISA Plans

- DOL Requirements for Voluntary Plan Safe-Harbor:
  - No employer contributions
  - Voluntary employee participation
  - No employer endorsement
  - No employer compensation (other than reasonable compensation for administrative services actually rendered in connection with payroll deductions)

# Identifying ERISA Plans

- DOL Requirements for Voluntary Plan Safe-Harbor:
  - The employer, without endorsing the program, is permitted to:
    - allow insurers to publicize the program to employees
    - collect premiums through payroll deductions, and remit premiums to insurers

# Identifying ERISA Plans

Publicizing the program,

## ■ DO'S:

- Permit insurance presentations in the employers' workplace
- Provide employees with the insurance agent's business card
- Inform employees of the program's availability and direct them to the insurer for further information

## ■ DONT'S

- Employers should not assume too much responsibility and should not:
  - Endorse the program
  - Recommend the voluntary plan to employees
  - Be overly enthusiastic about the program
  - Answer employee questions concerning the program

# Identifying ERISA Plans

- Collecting premiums through payroll deductions:
  - Employers should only agree to collect premiums through actual payroll deductions or dues check offs
  - Once collected, the employer may remit the premiums by corporate check
- Evidence of endorsement:
  - Billing through the employer
  - Employee reimbursement arrangements
  - Deducting premiums from periodic bonuses

# Identifying ERISA Plans

- The following facts have been considered signs of endorsement:
  - Selecting the date of the policy
  - Verifying the full-time employment status of the employees to insurers
  - Maintaining a list of covered employees or tracking employee eligibility status
  - Providing employee information to insurers

# Identifying ERISA Plans

- The following facts have been considered signs of endorsement:
  - Maintaining a file on the policy (including change request forms) and submitting coverage change forms
  - Issuing commencement of coverage certificates to enrolled employees

# Identifying ERISA Plans

- Activities that may constitute employer endorsement:
  - Employer's selection of the insurance company or coverage (evidence of endorsement)
  - Negotiating or suggesting the terms or design (plan terms, benefits, eligibility rules) of the plan (may be endorsement by itself)
  - Linking plan coverage to employee status (evidence of endorsement)

# Identifying ERISA Plans

- Activities that may constitute employer endorsement:
  - Using employer's name or associating plan with other employer benefits (strong indication of endorsement)
  - Recommending the plan to employees (may be endorsement by itself)
  - Saying ERISA applies (may be endorsement by itself)

# Identifying ERISA Plans

- Activities that may constitute employer endorsement:
  - Sending premium notices, assuming liability for premium payments during grace periods (evidence of endorsement)
  - Paying premiums through employer's cafeteria plan (can be endorsement by itself)
  - Assisting employees with claims and disputes

# Identifying ERISA Plans

- Determine whether the prospective customer has (or will be) an Employer Group
- Ask “filter questions” on a continuing basis throughout the relationship, including:
  - During the first contact by an agent,
  - Again, at time of sale,
  - Again, at the time of application, and
  - While coverage is in force

# Identifying ERISA Plans

## Filter Questions:

- Do all employees own a share of equity in the business?
- Is the employer facilitating/promoting a meeting for employees to discuss insurance coverage?
- Is the employer providing a place for you to meet with employees - either as a group or individually?

# Identifying ERISA Plans

## Filter Questions:

- Is the insurance plan advertised, presented, promoted or otherwise treated by the employer as a benefit to employees?
- Is the employer providing financial assistance to employees?
  - Either directly or indirectly through wage adjustments or reimbursements through insurance premiums

# Identifying ERISA Plans

## Filter Questions:

- Does the employer intend to assist with the administration of employee insurance coverage (e.g., providing reminder notices of monthly premium due, collecting and forwarding premiums, other “list billing” services, involvement with claims or other service issues)?
- Is the employer making recommendations or suggestions to employees as to what type of coverage or benefits to choose?

# Identifying ERISA Plans

## Filter Questions:

- Is the employer determining or negotiating the terms of the insurance coverage, including rates?
- Is the employer determining or negotiating whether any employees are eligible for or are to be excluded from insurance coverage?
- Does the employer have the right to terminate the insurance coverage for any or all employees?

# Identifying ERISA Plans

## Filter Questions:

- Are the employees free to shop around for insurance?

# If ERISA Applies....

- If it *appears* that a customer is or has become subject to ERISA:
  - Brokers **should never** provide an employer with an opinion (one way or another) as to whether they are sponsoring an ERISA plan
  - Instead, Brokers should recommend that such customer take steps to determine if an ERISA plan exists and, if so, what compliance is required

# If ERISA Applies....

- If it *appears* that a customer is or has become subject to ERISA:
  - If employers are governed by ERISA, then True Group Coverage and Administration will be required – Individual Coverage and Administration – NOT POSSIBLE

# Why Should Brokers Care?

- Increasingly, employers look to brokers/consultants to provide them with compliance information
  - Marketing materials and other communications may make agency liable if compliance issues develop
  - Competition may attempt to make an issue of information not provided

# Why Should Brokers Care?

- Increasingly, federal agencies are looking at actions of brokers and insurers that sell into the ERISA market
- Good Business Sense to be informed



 PROSKAUER ROSE LLP

Peter J. Marathas, Jr.  
Proskauer Rose LLP  
617-526-9704  
[pmarathas@proskauer.com](mailto:pmarathas@proskauer.com)