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Voluntary Benefits Issues

Voluntary benefit plans are plans that are insured, completely optional for election, and paid for by employees. Typically, voluntary benefits include life, dental, vision, disability, critical illness and hospital indemnity insurance. Employers are often surprised to learn that their "voluntary benefits" are truly not voluntary under ERISA, and that, consequently, they have not met their ERISA compliance obligations (which include the requirement to file a Form 5500, provide an SPD to plan participants and comply with ERISA's claims procedures.

A. **DOL Safe-Harbor Voluntary Benefit Exemption**. DOL regulations provide a safe harbor under which ERISA does not apply to certain voluntary group, or group type insurance programs. To fall within the safe-harbor, the program must meet several specific requirements, including that it be established as a voluntary, 100% employee pay-all arrangement and that the employer have minimal involvement.

B. **Employer Involvement**. Under the DOL safe-harbor, employer involvement will be considered minimal if the sole function of the employer is, without endorsing the program, to permit the insurer to publicize the arrangement to employees and to collect premiums from employees through payroll deductions and remit them to the insurer. DOL guidance states that "endorsement" occurs if the employer urges or encourages participation in the program or engages in activities that would lead employees to reasonably conclude that the program is part of a benefit arrangement established or maintained by the employer. Actions that can be construed as endorsement include: 1) taking some position or action on behalf or in coordination with the insurer, such as making suggestions or negotiating with the insurer as to plan design; 2) representing the plan to employees as part of its benefit package, such as incorporating the terms of the insurance program into a SPD or characterizing the program as an employer program in a brochure; 3) assisting employees with claims or disputes; 4) deciding key contract terms (such as amount of coverage), or deciding issues of employee eligibility; or 5) permitting pre-tax premium payments through the employer's cafeteria plan.

C. **Recommendations.** Employers with programs that they believe to be ERISA-exempt voluntary benefits should evaluate those arrangements and the employer involvement with those arrangements to confirm that they meet the DOL safe-harbor exemption. If avoiding ERISA's application is not a priority, an employer may want to consider whether it is appropriate to treat a voluntary arrangement as subject to ERISA and include it in a wrap plan document with other employer-provided health and welfare plans.