An employer sponsoring an employee benefit plan affording benefits such as group health care or disability insurance to its eligible employees likely is aware of the importance of knowing whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101 et seq. (ERISA) governs its plan. ERISA imposes on covered plans a variety of disclosure, reporting and other requirements. At the same time, ERISA coverage changes the litigation landscape significantly when a plan’s decision (such as to deny benefits) is challenged. ERISA coverage generally means preemption of state law–based causes of action arising from plan decisions, while offering an important degree of deference to be given by courts to decisions made by the benefit plan and its plan administrator. Moreover, there is no right under ERISA to a jury trial, which may be an important factor in some cases.

What may be less well known is the manner in which plan sponsors may choose to decide if their plans fall under ERISA. Granted, by broadly defining “employee welfare benefit plan,” ERISA sweeps many arrangements into its regulatory embrace. Plan sponsors, however, should be aware that ERISA contains an exception from its regulatory structure for what otherwise would be covered plans. The exception is found in what is known as the “safe harbor” regulation. Depending on the employer’s goals – under ERISA coverage or not – using the safe harbor exception can play an important role in employee benefit planning.

Starting Point: ERISA Coverage of Employee Welfare Benefit Plans

ERISA defines an “employee welfare benefit plan” as:

[A]ny plan, fund or program which … is established or maintained by an employer or employee organization … to the extent such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries through the purchase of insurance … or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment.… 29 U.S.C. § 1002 (1).

“[A] plan, fund or program under ERISA is established if, from the surrounding circumstances, a reasonable person could ascertain the intended benefits, class of beneficiaries, source of financing, and the procedures for receiving benefits.” Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees, 974 F.2d 391, 399 (3d Cir. 1992), quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982). “[T]he purchase of a group policy or multiple policies covering a class of employees offers substantial evidence that a plan, fund or program has been established.” Id. at 1372-73.
Significantly, no formal written plan is required; indeed, an employer may have created an ERISA plan “even though affected employees had not known of the guidelines” for receiving benefits. Henglein, 974 F.2d at 400, citing Brown v. Ampco-Pittsburgh Corp., 876 F.2d 546 (6th Cir. 1989).

The “Safe Harbor” Exception

In contrast to the broad coverage principles cited above, the U.S. Department of Labor (DOL) has issued “safe harbor” regulations excluding certain group insurance plans from ERISA’s definition of “employee welfare benefit plan.”

Safe harbor applies when:

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 checkoff and to remit them to the insurer

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 checkoff. 29 C.F.R § 2510.3-1(j) (emphasis supplied).

The burden of establishing that a plan comes within the safe harbor is on the party asserting that the exception applies; moreover, he or she must demonstrate that all four factors are met in order to pull the plan within the safe harbor. Morris v. Paul Revere Ins. Group, 986 F. Supp. 872, 878-79 (D.N.J. 1997); Menkes v. Prudential Ins. Co. of Am., 762 F.3d 285 (3d Cir. 2014).

Factors one, two and four are fairly straightforward. For example, whether the employer in any way contributes monetarily to the cost of the plan or profits by it should normally be easy to establish. E.g., McCann v. Unum Provident, 921 F. Supp. 2d 353 (D.N.J. 2013) (the fact that employees covered by the plan received a group discount by virtue of their status as employees satisfies the “contribution” prong of safe harbor). So, too, whether participation in the plan is voluntary should normally be evident. Factor number three of the safe harbor exception, however, introduces the vaguer concept of whether the employer has “endorsed” the plan. This addresses the principle of “employer neutrality” toward the plan.

When the safe harbor regulations were first proposed, the DOL in its explanatory comments stressed that for an employee benefit plan to fall within the safe harbor, the employer “… must not hold out the program as a benefit of employment …” 40 Fed. Reg. 24642, 24643 (No. 111) (June 9, 1975).
The DOL reiterated this principle in the final regulations by including therein the requirement that the employer not “endorse” the benefit program.

This requirement of employer neutrality is the key to the rationale for not treating such a program as an employee benefit, namely the absence of employer involvement.


Thus, if an employer in any way “endorses” the program, then it cannot be said to have maintained the required “disconnect” from the benefit plan. “[P]lans are not subject to ERISA in cases where employers are disconnected from the program such that it is clear that the program represents a ‘third party’s offering’ to employees.” Ziesemer v. First Unum Life Ins. Co., 2006 U.S. Dist. LEXIS 59618 (D.N.J. Aug. 18, 2006), citing and quoting Schneider v. UNUM Life Ins. Co. of America, 149 F. Supp. 2d 169, 177 (E.D. Pa. 2001) and Thompson v. American Home Assurance Co., 95 F.3d 429, 436 (6th Cir. 1996). In Johnson v. Watts Regulator Co., 63 F.3d 1129 (1st Cir. 1995), the First Circuit articulated the appropriate test for satisfying the safe harbor “endorsement” prong as follows:

[A]n employer will be said to have endorsed a program within the purview of the … safe harbor regulation if, in light of all the surrounding facts and circumstances, an objectively reasonable employee would conclude on the basis of the employer’s actions that the employer had not merely facilitated the program’s availability but had exercised control over it or made it appear to be part and parcel of the company’s own benefit package. …

Johnson, 63 F.3d at 1135 (emphasis supplied).

As shown by the first bolded phrase in the quote above, the test is objective and governed by the employer’s own actions. A party cannot satisfy its burden by claiming that it did not subjectively know that ERISA governed or by claiming ignorance of its employer’s actions with respect to the plan at issue. The question then becomes what facts should be considered in deciding if there has been an endorsement.

Endorsement Issues

“Endorsement” of a plan may take many forms. For example, an employer might expressly identify the plan as an offered benefit of employment in an employee handbook and/or present it as a benefit of employment during new-employee orientation.

Other forms of endorsement may be more subtle. The employer might place its name and company logo on plan documents describing the plan benefits. Ziesemer, slip. op. at 24 (“The face of the Gildermann Plan shows that Gildermann, Inc. endorsed it. The plan itself is embossed with the words ‘Gildermann, Inc. Your Policy Number 460730 … Your Long-Term Disability Plan’”), citing Schneider, 149 F. Supp. 2d at 181 (finding endorsement where an employer allowed its logo to be printed on promotional material and made reference to the plan as its own).
As noted, the safe harbor regulations require the employer to keep the benefit plan at arm’s length. An employer that encourages its employees to enroll in the plan would most likely be found to have endorsed it (as well as having strayed from the hands-off approach required by the regulations). However, small differences in how the employer presents the plan make the difference in whether ERISA or its safe harbor applies. A comparison of two cases illustrates this point.

In *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 977 (5th Cir. 1991), endorsement was found where the employer provided its employees with a booklet on the plan that included the employer’s name, referred to the plan as “our plan,” and encouraged employees to “give [the accident insurance] program careful consideration” as it could be “a valuable supplement to your existing coverages.” *Id.* at 977.

By contrast, no endorsement was found where the employer distributed sales brochures that were prepared by the insurer and included within the text of the brochure a letter on company letterhead recommending enrollment in these words: “Your company makes available to you a program of Group Voluntary Accident Insurance that will provide protection for both occupational and non-occupational accidents. We believe this to be an attractive program available at substantially lower cost than similar coverage purchased on an individual basis.” The employer (Watts Regulator) did add the caveat: “however, the decision is, of course, entirely an individual one.” *Johnson*, 63 F.3d at 1136-37, 1140. Viewing the record in its entirety, the *Johnson* court decided, perhaps surprisingly, that there was a difference between “recommending” enrolling into what the employer opined was a good plan and an actual “endorsement” within the meaning of safe harbor. *Id.* at 1136.

The *Johnson* court distinguished *Hansen* in two ways. First, it noted that in *Hansen* the corporate logo was embossed on the plan booklet, “making it appear that the employer vouched for the entire brochure (and for the plan).” *Id.* at 1137. By contrast, the *Johnson* court noted that “only Watts’s letter [typeset within the brochure] bore its imprimatur.” *Id.* at 1137. Second, the booklet at issue in *Hansen* described the policy as the company’s plan (“our plan”), while the letter from Watts, while typeset into the booklet, described the policy as a plan offered by another organization. Rejecting the argument that this was mere “semantics,” the *Johnson* court concluded that “in the difference between ‘our plan’ and ‘a plan’ lies the quintessential meaning of endorsement.” *Id.* at 1137, citing, e.g., *Sorel v. CIGNA*, 1994 WL 605726, at 2 (D.N.H. Nov. 1, 1994) (holding that a statement describing a policy as employer’s plan on the first page of a plan description indicates endorsement).

The foregoing shows how careful plan sponsors must be in presenting their benefit plans to their beneficiaries. They must plot their goal – ERISA or safe harbor – and navigate their course accordingly.

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