



This Webinar Will Start Momentarily.
Thank you for joining us.

Fringe Benefits Considerations

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Presentation Agenda

1

ERISA

2

COBRA

3

Application of ERISA and
COBRA to Specific Benefits



01

ERISA



ERISA Plans

All private plans are subject to ERISA.

These two types of plans are **not** subject to ERISA:

1

Church Plans

2

Governmental Plans

What Plans are Subject to ERISA?

- ERISA applies to employee welfare benefit plans that cover at least one (1) employee
- An “employee welfare benefit plan” is a:
 - » Plan, fund or program
 - » Established or maintained by employer
 - » For the purpose of providing specifically listed benefits, through the purchase of insurance or otherwise*
 - » To participants and their beneficiaries

ERISA applies to fully-insured and self-funded plans

*This factor is typically where the most analysis is required

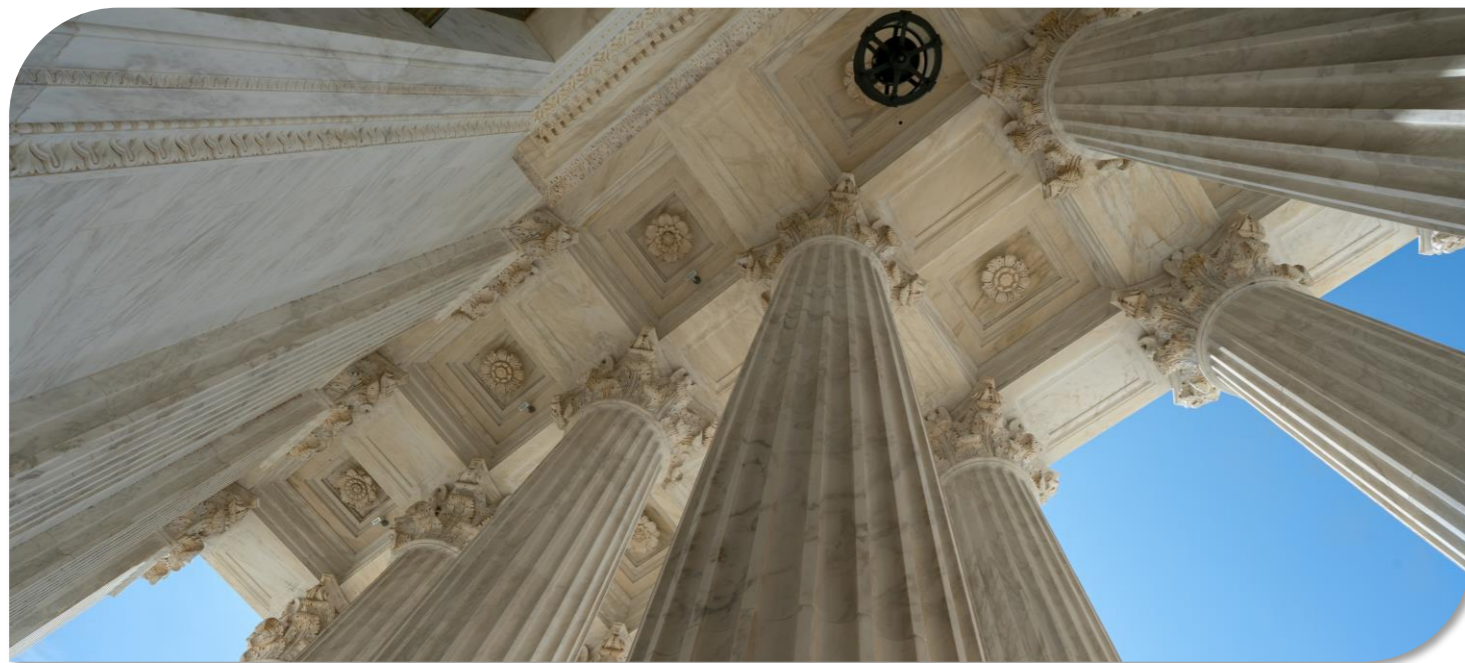
ERISA Factors

1. Plan, fund or program

- Can a reasonable person determine the (1) intended benefits; (2) class of beneficiaries; (3) source of financing; and (4) procedure for receiving benefits

2. Established or maintained by an employer

- This factor is often the focus of the analysis for whether the voluntary plan safe harbor applies (discussed in upcoming slides)



3. Under the third factor, the plan must offer one or more benefits listed under ERISA

- a) Medical, surgical or hospital care benefits
 - Ex: major medical, dental, vision, prescription drug benefits
- b) Benefits in the event of sickness, accident, disability, death or unemployment
 - Ex: disability plans, sick-pay plans, AD&D, life insurance
 - **However**, even though a plan could be considered a sickness, accident, sick pay or AD&D plan, it is possible that it could be exempt under ERISA (discussed in upcoming slides)

4. To participants or beneficiaries

- Participant = employee or former employee

Exemptions/Exceptions

1. Statutory Exemptions

- Plans sponsored by (1) federal, state or local government or agency (e.g., school district); (2) church; (3) plan maintained or established solely by an Indian tribal government
- Plans solely to comply with workers' compensation, unemployment compensation or disability insurance laws

2. Payroll Practice Safe Harbor

- First, is there an arrangement for payment of:
 - » Wages, overtime, shift premiums, holiday or weekend premiums, certain bonuses
 - » Unfunded sick pay or income replacement benefits (e.g., short-term disability); or
 - » Unfunded vacation, holiday, jury duty or similar pay
- Second, does it also meet these factors:
 - a) payment must come from general assets (i.e., not insured or from a trust)
 - b) payment cannot exceed 100% of standard wages
 - c) Plan does not cover terminated employees

Be cautious to not assign ERISA status to a benefit in plan materials

Exemptions/Exceptions

3. Voluntary Plan Safe Harbor

- a) No employer contribution
 - Employee must pay full amount of premium (usually on an after-tax basis)
- b) Completely voluntary participation
 - Participation cannot be a requirement of employment, no payment by employer, etc.
- c) No employer endorsement of the program*
 - Employer **can** (1) permit the insurer to publicize the program to employees; (2) collect premiums through payroll; and (3) remit premiums to insurer
 - Employer **cannot** (1) select or negotiate with insurer; (2) endorse the plan or associate the plan with the employer's plans; (3) recommend plan to employees; (4) allow use of cafeteria plan (i.e., no pre-tax contributions); (5) assists employees with claims
- d) Employer receives no compensation from insurance carrier
 - Only reasonable compensation (excluding profit) for administrative services actually rendered (i.e., for payroll deductions)

*This factor is typically where the most analysis is required



What does it mean if plan is subject to ERISA?

- ➔ **Plan Document and Summary Plan Description (SPD)**
 - Employee welfare plans subject to ERISA must include all the benefits offered by the plan within a written plan document that describes the terms and conditions related to the plan's operation and administration
 - Plan must also furnish an SPD to plan participants describing the terms of the plan, such as eligibility, a description of the benefits included in the plan and claims procedures
- ➔ **Form 5500**
 - Benefit/plan to be included in the Form 5500 filing
- ➔ **Fiduciary Duties**
 - ERISA imposes a standard of conduct (i.e., fiduciary duties) on plan fiduciaries (duty of loyalty, duty of prudence, duty of diversification, duty to follow plan terms)
- ➔ **Other**
 - Responding to participant requests for information
 - Claims procedures
 - Preemption of state laws

02

COBRA

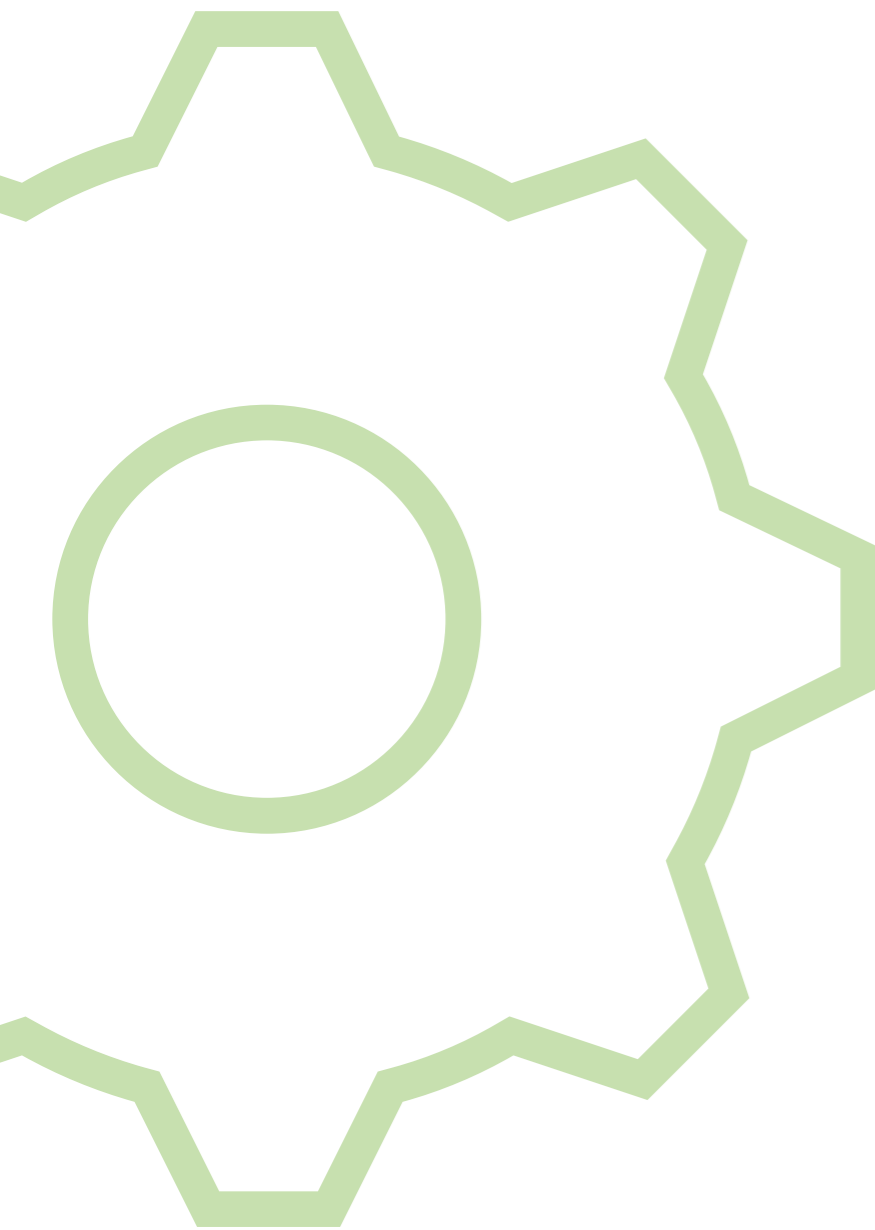


What Plans are Subject to COBRA?

- COBRA applies to group health plans
 - » Group health plans are a subset of ERISA plans
- A group health plan must meet the following:
 - » provides *medical care* to participants and beneficiaries directly or through insurance, reimbursement or otherwise; and
 - » is maintained by an employer
- Medical care = payment for the diagnosis, cure, mitigation, treatment or prevention of disease

**Federal COBRA
applies to fully-
insured and self-
funded plans**

Benefits not typically subject to COBRA



- Some plans may generally be subject to ERISA but not COBRA
 - » **Long-term/short-term disability** – see upcoming ERISA analysis, but COBRA would not apply as no medical care is provided
 - » **AD&D** – subject to ERISA as it provides benefits in the event of sickness or accident, but does not provide medical care
 - » **Group term life** – subject to ERISA as it provides benefits in the event of death, but does not provide medical care
- Employers should carefully examine the plans to ensure they do not offer any ancillary benefits that may be considered medical care subjecting the benefit to COBRA
 - » i.e., If an AD&D plan has a rider for hospitalization, that rider may be subject to COBRA

03

Application of ERISA and COBRA to Specific Benefits

Employee Assistance Program (EAP)



Employee Assistance Program (EAP)

Employment-based programs

- EAPs are not defined under federal law and the benefits and services offered under these programs vary from employer to employer

Typically provided/managed through a third-party EAP vendor

- Benefits can range from providing direct counseling to plan participants or may be limited to providing referrals to qualified individuals outside of the EAP vendor

Offered as stand-alone program or coordinated with employer's wellness program

- Life and disability carriers often include EAP as value-added benefit in conjunction with LTD policy



Examples of EAPs

Substance abuse,
occupational stress,
emotional distress

Major life events: birth,
accidents or death

Health care
concerns

Financial or non-work-
related legal issues

Personal/family/work
relationship issues

Is the EAP Subject to ERISA?

ERISA: Plan, fund or program providing participants and beneficiaries with *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*

Does the EAP provide medical benefits?

- DOL Advisory Opinions
 - » Treatment of drug and alcohol abuse, stress, anxiety, depression and similar health and medical problems by trained professionals = medical benefits
 - » Program dealing with “health problems and health-related personal problems” and “assistance in connection with problems involving the mental health” = medical benefits
 - » EAP only provides referrals to medical professionals but does not provide treatment or counseling = likely not providing medical benefits



Is the EAP subject to COBRA?

- COBRA: Group health plan that provides medical care
- This will be a similar analysis to whether ERISA applies, based on whether the EAP provides medical care
- If the EAP is determined to provide medical care, it will be subject to COBRA

Considerations Unique to EAPs

- The varying structures of EAPs create unique considerations for how COBRA applies
 - » EAP can be separate or integrated with a group health plan
 - Which benefits is an employee eligible for under COBRA?
 - » EAP may have broad eligibility and cover all employees, regardless of eligibility for group health plan
 - Do we send COBRA notices (General and Election Notice) to all employees?
 - » Employers typically cover the cost of the EAP for employees, because for an EAP to be considered an excepted benefit, the EAP benefit must be paid entirely by the employer
 - How do we determine the COBRA premium for an EAP?

COBRA – Who is eligible for the EAP?

EAP SUBJECT TO COBRA

- If an EAP is offered to all employees (including family members of the employee) regardless of eligibility for other group health benefits (i.e., major medical coverage), this will result in a larger population of COBRA-qualified beneficiaries under the EAP
 - » Larger group of individuals eligible for the EAP must be furnished with COBRA Initial Notice and Election Notice
- Additional COBRA notices not required when EAP offered as integral part of employer's group health plan by only being available to employees enrolled in the non-excepted health plan (i.e., major medical plan)
 - » However, an EAP will not be considered an excepted benefit if EAP eligibility is limited to only employees enrolled in the medical plan, so most times EAPs will be subject to COBRA

COBRA – Which benefits must be offered?

EAP SUBJECT TO COBRA

COBRA continuation coverage must be offered to a qualified beneficiary on the same basis as similarly situated active employees

- COBRA qualified beneficiary covered under EAP in class of employees **not eligible** for group health plan may be restricted to choosing either continued enrollment/disenrollment in the EAP during the annual open enrollment
 - » Need not be offered other benefits under group health plan
- COBRA qualified beneficiary **was eligible** for medical plan in addition to EAP at time of qualifying event, they must be offered COBRA coverage for all benefits in which they were eligible for as active employee at open enrollment

For EAPs that provide benefits outside of medical/health care (i.e., financial, job, legal counseling), COBRA need not be offered for the non-medical benefits if they can be separately offered from healthcare coverage

- Any non-medical benefits would be excluded when calculating applicable COBRA premium for EAP coverage

COBRA – Alternatives for EAPs

EAP SUBJECT TO COBRA

Offering EAP Coverage Automatically

- Employer can continue to offer EAP coverage automatically to all qualified beneficiaries for the maximum COBRA continuation coverage period (typically 18 or 36 months) following the occurrence of a qualifying event
- Employers that offer non-COBRA EAP coverage after an employee (or family member) experiences a qualifying event typically will not require a premium contribution from the employee (or family member)
 - » If the employer offers an EAP as a non-COBRA benefit to employees/family after qualifying event, and requires the employee to begin contributing to the entire cost of the EAP, this could be considered a loss of coverage, which could unintentionally trigger a new obligation for the employer to offer COBRA



Short-Term Disability (STD)



Short-Term Disability (STD)

- ➔ • Employment-based insurance that provides income replacement when employee cannot perform job duties due to a covered illness or injury (i.e., 3-12 months)
- ➔ • Some states require employers to provide STD coverage to employees (i.e., California, New Jersey, New York, Hawaii, Rhode Island)
- ➔ • Funded either by employer and/or employee salary reductions
- ➔ • Taxation
 - » If disability plan is paid for on a pre-tax basis, benefits paid out are taxed
 - » If disability plan is paid for on a post-tax basis, benefits paid out are not taxed

Is STD Subject to ERISA?

- **ERISA:** Plan, fund or program providing participants and beneficiaries with medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment
 - » STD likely meets this definition

Does an exception apply?
(see next slide)



Is STD Subject to ERISA?

Is the plan in place solely to comply with state disability insurance law?

- If plan benefits provide only minimum necessary to comply, likely not subject to ERISA
- Benefit enhancements beyond statutory minimums will generally make plan subject to ERISA

Voluntary Plan Safe Harbor

- Does the employer contribute to the plan?
- If the employee contributes, is it after-tax?
- Is participation voluntary?
- Does the employer endorse the plan?

Payroll Practice Exception (frequent exception for STD)

- Payment of an employee's normal compensation out of the employer's general assets, for periods during which the employee is physically or mentally unable to perform duties or is otherwise absent for medical reasons (i.e., income replacement during disability)
 - » Is payment from employer's general assets (i.e., not insured or from a trust)?
 - » Does the benefit only pay up to 100% of the employee's normal compensation?
 - » Does coverage end when the employee terminates employment?

Is STD Subject to COBRA?

COBRA: Group health plan that provides medical care

- STD provides income replacement, not medical care



Likely not subject to COBRA

- If the plan contains ancillary benefits providing medical care (i.e., treatment for chronic pain), those benefits could be subject to COBRA

Long-Term Disability (LTD)



Long-Term Disability (LTD)

- Employment-based insurance that provides income replacement when an employee cannot perform job duties due to a long-term covered illness or injury (i.e., 2 or more years)
 - » LTD typically kicks in after STD benefits are exhausted
- Typically funded by employer
- Taxation
 - » If disability plan is paid for on a pre-tax basis, benefits paid out are taxed
 - » If disability plan is paid for on a post-tax basis, benefits paid out are not taxed

Is LTD Subject to ERISA?

- ERISA: Plan, fund or program providing participants and beneficiaries with *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*
 - » LTD likely meets this definition

Does an exception apply?
(see next slide)



Is LTD Subject to ERISA?

Payroll Practice Exception

- Payment of an employee's normal compensation out of the employer's general assets, for periods during which the employee is physically or mentally unable to perform duties or is otherwise absent for medical reasons (i.e., income replacement during disability)
 - » Are benefits paid by insurance carrier?
 - LTD often is insured so payroll practice exception does not apply
 - » Is payment from employer's general assets?
 - » Does the benefit only pay up to 100% of the employee's normal compensation?
 - » Does coverage end when the employee terminates employment?

Voluntary Plan Safe Harbor

- Does the employer contribute to the plan?
- If the employee contributes, is it after-tax?
- Is participation voluntary?
- Does the employer endorse the plan?

Is LTD Subject to COBRA?

COBRA: Group health plan that provides medical care

- LTD provides income replacement, not medical care



Likely not subject to COBRA



Hospital (and Other) Indemnity Plans



Hospital or Other Indemnity Plans

- Types of voluntary plans that pay a fixed amount based on a particular event
 - » **Example:** Plan pays \$100 per day the individual is in the hospital
- Usually not coordinated with major medical coverage
- Payment is for the event, typically not reimbursement for medical care and not based on the amount of health care expense
- Taxation
 - » If premiums are paid on a post-tax basis, benefits received are not taxable
 - » If premiums are paid on a pre-tax basis, whether the benefits are taxable depends on the amount of unreimbursed medical expenses
 - IRS *proposed* rule: Amounts paid without regard to the actual amount of the incurred medical expense (e.g., \$100 payment per hospital stay) are not considered payments for medical care and therefore are not excludable from an employee's gross income under IRC §105. However, final rules did not adopt this rule, but this could be adopted in future rulemaking.

Is the Plan Subject to ERISA?

ERISA: Plan, fund or program providing participants and beneficiaries with *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*

- » Plan pays for benefits in the event of a sickness or accident
- Many times, employers think they are offering a “voluntary” plan, but they still unintentionally endorse the plan and therefore the voluntary plan safe harbor under ERISA may not apply
- These types of plans are often borderline as to whether ERISA applies

Does an exception apply?
(see next slide)



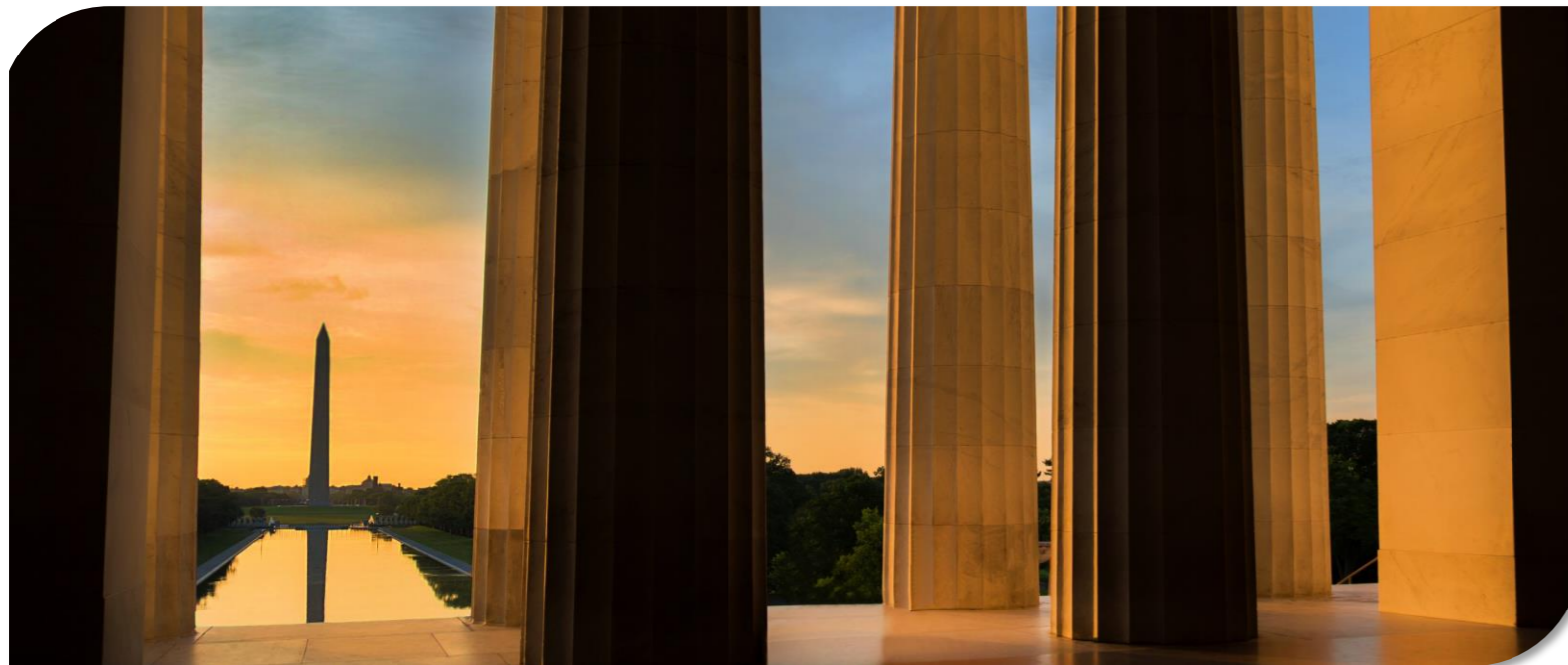
Is the Plan Subject to ERISA?

Payroll Practice Exception – likely does not apply

- Payment of an employee's normal compensation out of the employer's general assets, for periods during which the employee is physically or mentally unable to perform duties or is otherwise absent for medical reasons (i.e., income replacement during disability)

Voluntary Plan Safe Harbor

- Does the employer contribute to the plan?
- If the employee contributes, is it after-tax?
- Is participation voluntary?
- Does the employer endorse the plan?
 - » Common issue for hospital and other indemnity plans, as the employer often unintentionally endorses these plans by:
 - Selecting a specific carrier
 - Negotiating the terms of the plan
 - Limiting employee eligibility by employee status
 - Recommending the plan to employees



Is the Plan a HIPAA-excepted Benefit?

- Specified disease and fixed indemnity policies in the group market are often considered HIPAA-excepted benefits (i.e., not subject to certain ACA mandates)
- To qualify as a HIPAA-excepted benefit, the plan must meet the following:
 - » the coverage is provided under a separately policy, certificate, or contract of insurance
 - » no coordination exists between the provision of such benefits and any exclusion under any plan maintained by that employer; and
 - » benefits are paid for an event regardless of whether benefits are provided for the same event under any group health plan maintained by the plan sponsor
- The plan must also provide a notice (**effective for plan years beginning on or after 1/1/25**)
 - » Employer/plan sponsor that offers hospital or other fixed indemnity plans must provide a notice clarifying that the coverage is not a replacement for comprehensive medical coverage and outlining the coverage's limitations
 - » The IRS provides a template notice and the employer should include the notice on the first page of any marketing, application, and enrollment materials in at least 14-point font

Is the Plan Subject to COBRA?

COBRA: Group health plan that provides medical care



Likely not subject to COBRA if the plan only reimburses a per day amount based on the event as it is not seen as reimbursing the actual medical care

- *However*, if there is a more complex arrangement where the payments are closely tied to the individual's medical expenses, it could be seen as providing medical care and therefore subject to COBRA

Lifestyle Spending Account (LSA)



Lifestyle Spending Account (LSA)



Employment-based, employer-funded programs

- LSAs are not defined under federal law and the benefits and services offered under these programs vary from plan to plan



Employer funds an account for the employee for discretionary spending on a variety of items

- Employer has flexibility to determine what expenses are reimbursable with the LSA
 - » Usually between \$500-\$2,000 a year in value



Typically provided/managed through a third-party vendor

Examples of LSA Expenses



PHYSICAL WELLNESS

fitness memberships, recreational sport expenses, fitness trackers, nutrition



EMOTIONAL WELLNESS

non-medical counseling (i.e., marital, life), personal development, meditation apps



FINANCIAL WELLNESS

financial advising, estate planning



FAMILY WELLNESS

childcare, adoption



OTHER

home office equipment, caregiving, etc.

Taxation of LSA Programs

Taxable fringe benefit


- Not designed to take advantage of any code section that would allow LSA amounts to be excludable from income

Taxable Amount?

- Most employers only tax the amounts that are actually reimbursed to the employee (i.e., include only the reimbursed amount in the employee's gross income)
- “Constructive receipt”: The entire amount made available to the employee should be taxable because employees are in constructive receipt of the value made available to them, regardless of utilization



Is the LSA Subject to ERISA?

- **ERISA:** Plan, fund or program providing participants and beneficiaries with *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*
 - » Application of ERISA is not impacted by whether the benefit is taxable or non-taxable
- 
- Depends on what expenses can be reimbursed under the LSA
 - » If LSA is structured to not reimburse §213(d) health care/medical expenses, not subject to ERISA
 - Be cautious in covering smoking cessation, chiropractic/acupuncture treatment or mental health therapy that would be a § 213(d) health care expense
 - » If the expense is dual purpose (i.e., gym membership), avoid conditioning the benefit on employee's medical status or include that a recommendation from a medical professional is necessary before joining a gym


Is the LSA Subject to ERISA?

- Payroll practice safe harbor likely not applicable
 - » Not payment for wages, sick pay, vacation, income replacement or similar pay
- Voluntary safe harbor not applicable
 - » LSA is typically funded through employer contributions



Is the LSA Subject to COBRA?

- **COBRA:** Group health plan that provides medical care



COBRA would not apply as long as the LSA does not reimburse medical care expenses

Commuter Benefits



Commuter Benefits

Reimbursement of qualified transportation fringe benefits on a non-taxable basis:

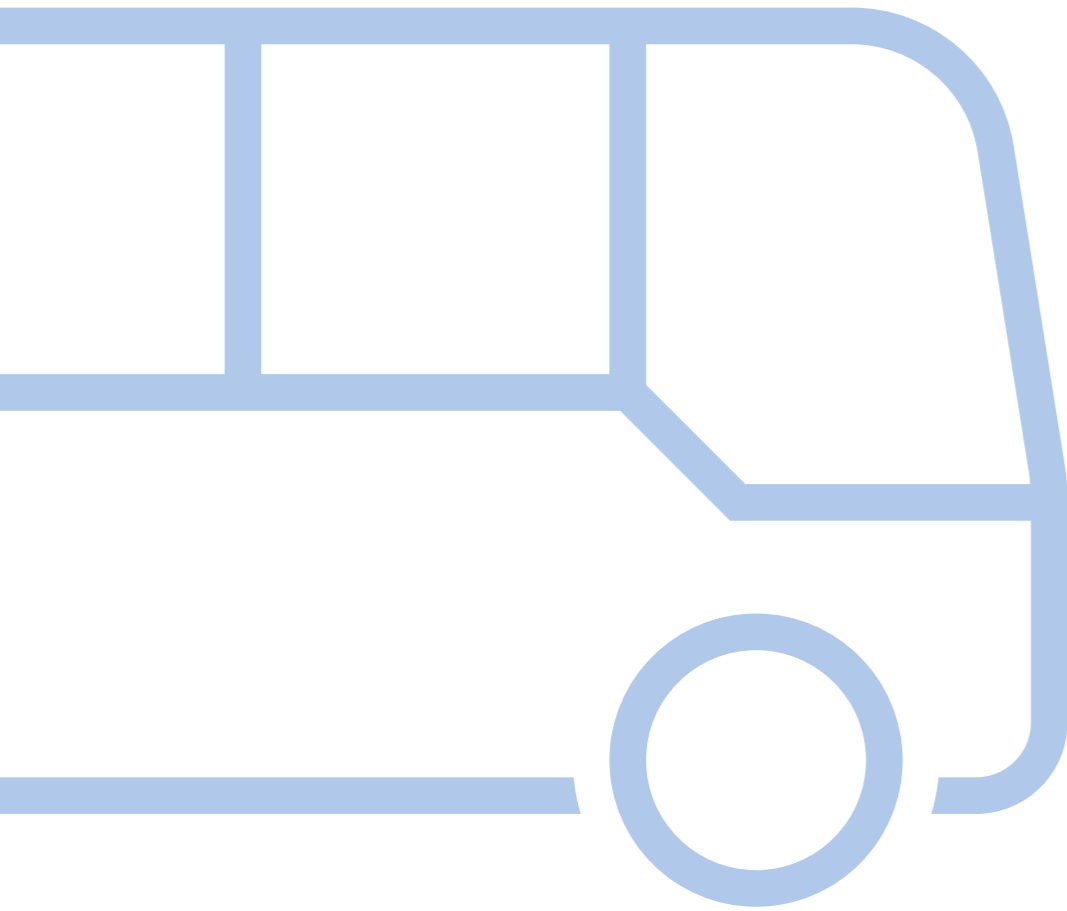
- Pre-tax contributions by employee (i.e., to a commuter benefit account)
- Tax-free reimbursement by employer for employee's qualified expense

2024 Contribution Limit (includes EE + ER contributions):

- \$315/month for transit/vanpooling
- \$315/month for qualified parking

Certain states and cities have commuter benefit requirements with different program requirements that should be reviewed with legal counsel (i.e., San Francisco, New Jersey, New York, etc.)

Types of Commuter Benefits



Qualified parking

- Parking on or near employer's business premises
- Parking at location where employee commutes to work

Transit passes/commuter reimbursement

- Transit passes – must use FSA-style debit card (instead of direct cash reimbursement from employer) if card is “readily available”

Vanpooling

- Transport to and from residence and place of employment via commuter highway vehicle

Are Commuter Benefits Subject to ERISA?

ERISA: Plan, fund or program providing participants and beneficiaries with *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*

- Commuter benefits do not offer *medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment*



Not subject to ERISA

- Even though commuter benefits are not subject to ERISA and therefore do not require a plan document, it is recommended to have a written communication/documentation describing the terms of the program (i.e., eligibility, contribution limits, Section 132 requirements, etc.)

Are Commuter Benefits Subject to COBRA?

COBRA: Group health plan that provides medical care

- Commuter benefits do not offer medical care



Not subject to COBRA

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