Does the Department of Labor Safe Harbor Regulations Exempt your Client's Policy from ERISA?

By: Audrey C. Dolmovich

I. Does your client's claim fall under ERISA?

Is your client's insurance claim covered by the Employment Retirement Income Security Act of 1974 ("ERISA")? ERISA is a federal law designed to provide federal oversight to employee pension plans and provide uniform national standards rather than having different state laws control the same type of claims. Claims related to insurance provided through an employer, with a few exceptions, fall under ERISA. If your client's claim falls under ERISA, then state law no longer controls the claim.

Your client's claim is not governed by ERISA if she did not obtain her insurance through her employer. The rules seem pretty clear-cut, yet insurance companies often assert that non-ERISA claims are governed by ERISA. So it is important to know why your client's claim is or is not governed by ERISA.

If your client obtained her insurance on her own, but perhaps her employer either assisted in her getting the insurance or was involved with handling the premiums, it can be challenging to determine whether ERISA applies. The Department of Labor listed four factors in its "Safe Harbor" regulation to evaluate in deciding whether your client's plan is excluded from ERISA. In this article, I lay out some issues and arguments you are likely to see, but this is not an exhaustive list of potential arguments and issues. If you have any questions while analyzing your client's case, please feel free to contact us, and we can help you determine ERISA's applicability.

II. The Department of Labor set out four factors to evaluate whether a plan is excluded from ERISA

The Department of Labor's ("DOL") "Safe Harbor" regulation, codified at 29 C.F.R. §2510.3-1(j), excludes any plan from ERISA that meets these four factors:

> (1) the employer makes no contribution to the policy;
>
> (2) employee participation in the policy is completely voluntary;
>
> (3) the employer's sole functions are, without endorsing the policy, to permit the insurer to publicize the policy to employees, collect premiums through payroll deductions and remit them to the insurer; and
>
> (4) the employer receives no consideration in connection with the policy other than reasonable compensation for administrative services actually rendered in connection with payroll deduction.

Thompson v. Am. Home Assurance Co., 95 F.3d 429, 434 (6th Cir. 1996) (citing 29 C.F.R. § 2510.3 1(j)). Each factor is explained in detail below.

i. Were there any employer contributions to the policy?

In the Sixth Circuit, a "contribution" is generally understood to mean "an actual contribution in the form of a partial or full payment of premiums." *Turner v. Liberty Nat. Life Ins. Co.*, 2012 U.S. Dist. LEXIS 28456 at 12 (E.D. Tenn. Mar. 5, 2012). You must determine who paid the premiums for the plan. If your client paid all the premiums for the plan on her own and out of her account, then this factor is met.

Insurance companies often argue that if an employer and the employee get a discount on their premiums because each other purchased a policy, then that is a contribution, and the plan would be governed by ERISA. But that is not always the case.

Gooden v. Unum Life Ins. Co. of Am. is particularly instructive on this issue. 181 F. Supp. 3d 465 (E.D. Tenn. Mar. 30, 2016). Dr. Gooden was a physician at Gessler clinic who bought a disability insurance policy through an insurance agent who sold insurance to specific highly compensated physicians at the clinic. *Id.* Unum offered a premium discount through a billing

program called FlexBill, through which participants are eligible to get the discount if at least three individuals in the same practice bought certain insurance policies and the payments were billed through the employer. *Id.* The participants were individually able to receive discounts on their premiums because of multiple doctors signing up, but the employer did not negotiate for or otherwise endorse the benefits program; the discount was unilaterally offered by Unum. *Id*

When considering a motion to remand back to state court because there would be no federal jurisdiction if ERISA did not apply, the court in *Gooden* addressed whether either the discount given to the group at Gessler or the remittal of payroll deductions constituted a "contribution." The court found that it did not, holding: "a non-negotiated group discount that occurs only because premiums are paid through payroll deductions is not a contribution under the first criterion of safe harbor." *Id*. at 472.

Under *Gooden,* if your client's employer did not negotiate for a group discount, then it is not a "contribution" under the first criterion of safe harbor, and this factor continues to be met.

ii. Was your client's participation or purchase of the policy voluntary?

Next, you must determine whether your client voluntarily bought the policy. This factor is simple in that if your client bought the policy on their own and was not made to do so by their employer, then the purchase was voluntary, and this factor is met.

iii. Did the employer endorse the policy in any way?

To determine whether endorsement exists, it involves looking at "the employer's involvement in the creation or administration of the policy from the employee's point of view." *Thompson*, 95 F.3d at 436-437. *See also Helfman v. GE Group Life Ass. Co.*, 573 F.3d 383, 391 (6th Cir., 2009). If your client bought an individual disability policy from an insurance agent and their employer did not offer incentives or publicize the policies available, then this factor is also met.

If there was some employer involvement, it does not necessarily mean that this factor is not met. The Sixth Circuit adopted a "neutrality" threshold in *Thompson*:

> [A]s long as the employer merely advises employees of the availability of group insurance, accepts payroll deductions, passes them on to the insurer, and performs other ministerial tasks that assist the insurer in publicizing the program, it will not be deemed to have endorsed the program under 29 C.F.R. § 2510.3-1(j)… It is only when an employer proposes to do more and takes substantial steps in that direction that it offends the ideal of employer neutrality and brings ERISA into the picture.

Id. at 436 (quoting *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995). Further, in *Gooden,* the court pointed out that the Sixth Circuit has created non-exclusive factors for a court to consider when analyzing whether an employee has 'endorsed" the plan:

> (1) Has the employer played an active role in either determining which employees will be eligible for coverage or in negotiating the terms of the policy or the benefits thereunder?
>
> (2) Is the employer named as the plan administrator?
>
> (3) Has the employer-provided a plan description that specifically refers to ERISA or that the plan is governed by ERISA?
>
> (4) Has the employer-provided any materials to its employees suggesting that it has endorsed the plan?
>
> (5) Does the employer participate in processing claims?

Gooden, 181 F. Supp. 3d at 465 (E.D. Tenn. Mar. 30, 2016) *quoting Thompson*, 95 F.3d at 436-47.

After evaluating your client's claim using the above factors, it will become clearer whether the employer endorsed the policy.

iv. Did the employer receive consideration or compensation in connection with your client's purchase of an individual policy?

If the employer did not receive any consideration or compensation in connection to your client's purchase of a policy, then this factor is met. If your client's employer received a discount

on its premiums, then courts have given guidance to determine whether the discount amounts to receiving consideration or compensation.

Courts have held that discounts received by the employer as the result of a salary allotment agreement can put the policies at issue outside the safe harbor requirements. For example, in *Alexander v. Provident Life & Accident Ins. Co.*, the court found that a negotiated discount resulting from an agreement for the employer to pay 35% of the premium could be enough to place the policy outside the safe harbor. 663 F. Supp. 2d 627 (E.D. Tenn. 2009). If your client's employer did not negotiate the discount that it received and it did not receive the discount as a result of a salary allotment agreement like that in *Alexander*, then the employer did not receive compensation or consideration, and this factor is met.

Conclusion

If your client's claim meets all of the Safe Harbor criteria, then Safe Harbor applies, and your client's policy is exempt from ERISA. If you are unsure or have a scenario that was not addressed in this article, please feel free to contact our office, and we can help you determine whether ERISA applies to your client's claim.