Business of BENEFITS .COM
PUBLISHED BY Robert J. Toth, Jr

ERISA Coverage Checklist

Is the Client's 403(b) Plan ERISA Covered?
What Do You Do About It?

STEP 1: DETERMINE STATUS OF ORGANIZATION OF PLAN SPONSOR

I. Is plan sponsor a Governmental Organization?

1. Types NEVER covered by ERISA
   - State university chartered by the state.
   - Community or junior college
   - K-12 Public School

2. Types TYPICALLY not covered by ERISA
   - Special purpose, government run 501(c)(3) organizations: certain county run hospitals; research orgs; advocacy organizations may be treated as governmental organization if company is established by a state or county:
     —Is Board or key officers appointed by the government?
     —Is the organization subject to open meeting laws?
     —Can receive minimal government funding
   - Charter school. Check to see if local or state school authority established and controls the Board of the school.

3. Is it neither a non-501(c)(3) government organization, nor an educational institution? If so, the plan cannot be a 403(b) plan, and needs to be handled under a corrections program, but still never becomes covered by ERISA.

II. Is it a Church Organization?

1. Is the sponsor a church, convention of churches, or church controlled organization (including a church run school or hospital, or other "civil" organizations or 501(c)(3)), or "associated" with it? An organization is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches. If so, ERISA exempt

2. Has it affirmatively elected to be covered by ERISA? If not, ERISA exempt.
   - Affirmative statement needed on the Form 5500 to elect ERISA.
   - Filing Form 5500 itself won't do it.

- Adopting ERISA terms in plans doesn't cause ERISA coverage

III. Tax exempt organization

1. Does the organization have 501(c)(3) status? If not, not only fails 403(b) status, but also becomes ERISA covered.

2. Test for level of employer involvement in the plan. If too much involvement, then become ERISA covered.
   - Employer contributions? Any employer contribution, or right of employer in plan document to give employer contribution, will trigger ERISA coverage, even if contribution was in the past.
   - One vendor? Serious risk of ERISA coverage. If so, must test to see if it is unreasonable or prohibitively expensive to offer a second vendor. Effectively, the smaller the employer, the more better chance to avoid coverage.
   - Rights under contract exercisable only by employee? If employer as any rights, ERISA trigger (example, mapping,)
   - Does employer exercise any discretion, such as approving loans, transfers or hardships? If so, ERISA covered.
   - Has employer hired a TPA (other than the product provider) to exercise discretion? If so, ERISA covered.
   - Has Employer negotiated terms or price? If so, ERISA covered
   - Has employer received any compensation, such as marketing fee? If so, ERISA covered.
   - Is employer promoting it to its employees as "its retirement plan?" If so, significantly increased risk of ERISA coverage.

3. Things that WON'T trigger ERISA coverage
   - Maintain plan document
   - Hire compliance coordinator
   - Reasonably limit providers
   - Review and correct tax defects (such as excess contributions), and submit to the IRS for corrections.
   - Keeping records, certifying records to third parties.
   - Terminating plan.

V. Employers with more than one plan

1. Does client make matching contributions to one plan that is based on elective deferrals to another (even if one is a 40(a) plan)? If so, the 403(b) plan will be ERISA coverage.

2. Does employer make all employer contributions to one plan, and allow unrelated employee elective deferrals to another? If so, significant risk of ERISA coverage for the elective deferral plan UNLESS both plans are treated completely separate; employer does not exercise discretionary over the elective deferral program, and does not promote it as its retirement plan.

STEP 2: FIXING ERISA COVERAGE

I. Past ERISA errors.

Determine whether client should have been treating itself as an ERISA program, but has not. If this is the case:

- File corrective Form 5500s under the Delinquent Filers Voluntary Compliance Program
- Establish proper plan governance, reporting and disclosure
- Establish proper fiduciary process
- Notify vendor

II. ERISA review

If treated itself a an ERISA plan, conduct ERISA review to determine whether rules have been met: vendor listing it as ERISA plan, plan document and Summary plan description in place, proper statements.

III. New ERISA status

Determine whether new rules require plan to be treated as ERISA plan. If so:

- Establish firm date where ERISA plan was adopted, treating prior dates as non-ERISA
- Adopt plan document as of that date
- File a “first year” Form 5500
- Establish proper plan governance, reporting, disclosure and fiduciary processes
- Notify vendor