# Employee Benefits
# & Status with the DOL


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# ERISA Overview

## Is the Employee Benefit Subject to ERISA?

- Life, Disability, Retiree Medical and Qualified Retirement Plans are subject to ERISA § 3(1)
- ERISA covers a plan, fund or program having the following characteristics:
  - Established or maintained by an employer or employee organization
  - Purpose of providing benefits to participants or beneficiaries, through the purchase of insurance or otherwise

# ERISA Overview

## What is a Prohibited Transaction ("PT")?

- Two kinds of PT's under ERISA:
  - PT between a plan and party-in-interest ("PI") — ERISA §406(a)
    - PI is:
      - Employer who sponsors employee benefit plans
      - Captive more than 50% owned by employer
  - PT involving fiduciary self-dealing — ERISA §406(b)
- Using a wholly owned captive would most likely be a PT

**Significant penalties will apply if PT exists**

# ERISA Overview

## What is a Prohibited Transaction ("PT")?

- PT Transactions — (ERISA §406(a))
  - Sale, exchange, or leasing of property between plan and PI
  - Furnishing of goods, services, or facilities between plan and PI
  - Transfer to, or use of plan assets by or for benefit of, PI

**Potential Issue: Payment of premiums to a captive insurer could be a "transfer of plan assets" to a PI**

# ERISA Overview

## What is a Prohibited Transaction ("PT")?

- Fiduciary Self-Dealing Transactions — (ERISA §406(b))
- A Fiduciary shall not:
  - Deal with plan assets in own interest or for own account
  - Act in any transaction involving plan assets on behalf of any party with interest adverse to plan (ERISA only)
  - Receive consideration from party dealing with plan in transaction involving plan assets

**Potential Issue: ER/plan fiduciary is self-dealing where it owns a captive that insures the employee benefit plan risks**

# ERISA Overview

## Types of Prohibited Transaction Exemptions (“PTE”)

- Statutory
- Class
- Individual
  - Columbia Energy (2000)
  - ADM (2003) — Basic Life, AD&D, Supplemental Life
  - Coca-Cola (2013) — Basic Life, AD&D, Supplemental Life
  - Intel (2013) — Basic Life, AD&D, Supplemental Life

# ERISA Overview

## PTEs

- Class exemptions — apply to a broad range of transactions and do not require Department of Labor ("DOL") review
  - PTE 79-41 — 50% of the captive's business must be with parties unrelated to the employer; the related insurance must be directly written
    - If a captive satisfies this 50% test, the captive can be used to fund directly written employee benefits without the DOL's approval
- Private/individual exemptions — apply to an applicant's case and require DOL review
  - Easiest if based on a prior individual exemption

# Captive Requirements

- In order to get a prohibited transaction exemption:
  - Licensed by a U.S. domicile to conduct insurance transactions including reinsurance transactions involving employee benefits
  - Valid Certificate of Authority from the domiciliary state's Insurance Commissioner that is not revoked nor suspended
  - Must have undergone an examination by an independent certified public accounting firm during the last fiscal year
  - Must be licensed to conduct reinsurance transactions by a State whose law requires an actuarial review of reserves to be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority

# DOL Critical Success Factors

- The Plan will pay no more than adequate consideration for the insurance contracts
- No reinsurance commissions will be paid by the Plan with respect to the direct sale of such contracts or the reinsurance thereof
- There will be immediate and objectively determined benefits to the Plan's participants and beneficiaries – benefit enhancements
- A majority of plan savings will be shared with employees
- In subsequent years, the formula used to calculate premiums will be similar to formulae used by other insurers
- The Plan will only contract with insurer(s) with a rating of A or better from A.M. Best Company, or another equivalent rating from another rating agency
- An Independent Fiduciary analyzes the transaction and renders an opinion that the requirements above have been complied with

# Why Are Benefits Under Focus

## Relevant Revenue Rulings on Risk Distribution

- Revenue Ruling 92-93 concluded that certain employee benefits program, specifically life insurance (and disability) written in a captive is unrelated business (third party) since it is insurance for the employees and their beneficiaries and not for the company
  - This Revenue Ruling provides a clear path for considering life and disability benefits to be third party business
- Covid-19 resulted in organizations having to restructure employee benefit programs and captives are becoming a mainstay of long term strategies

# Other Benefits to Consider

- Medical Stop-Loss
- International Benefits
- Voluntary Benefits
- Pensions

| Program | Potential Savings (Percent of Frictional Costs) |
|---|---|
| Life Insurance | 15% to 35% |
| Retiree Medical | 10% to 25% |
| Disability | 15% to 35% |
| Multinational Benefits | 15% to 25% |
| Medical Stop Loss | 5% to 25% |

# Questions?

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