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### Is EAP an ERISA-covered Benefit? It Depends on the Specific Plan

By Sandra G. Nye, J.D., MSW

ERISA, an acronym for the Employee Retirement Income Security Act of 1974, is a federal law that sets minimum standards for certain employee benefit plans in private industry. ERISA governs health insurance, 401k, profit sharing and some severance plans, and the Department of Labor (DOL) oversees its functioning. Employers are not required to establish pension plans, but those who do are required to meet certain minimum standards. ERISA coverage provides employees with legal rights enforceable by federal law including, COBRA, HIPAA, and the Mental Health Parity and Addiction Equity Act of 2008 (MHPA).

EAPs and their sponsors must ascertain whether they come under ERISA jurisdiction and are subject to ERISA rules. In general, the answer depends on whether the program offers referral-only services or if it provides more direct assistance with problems affecting an employee's physical or mental health. An EAP that provides employees and their dependents with assistance in dealing with major personal problems arising in connection with their physical or mental health may be considered an "employee welfare plan" and subject to ERISA since it "is maintained for the purpose of providing ... medical benefits."

On the other hand, a program offering only referral services is probably exempt from ERISA, because it does not "provide" medical or other welfare benefits. The type of plan is the determining factor. An inquiry may be made to the DOL regarding coverage of a specific program, and the agency then issues advisory opinions. For example:

An EAP had a toll-free number, was staffed by personnel office employees with no special training in counseling or a related discipline, and provided only generally available public information. No professional counselors were used. The DOL held that the EAP was not supplying an employee benefit under ERISA.

An EAP was established with the express intent of increasing employee productivity by encouraging employees to seek assistance for certain defined personal and health problems, mental health and substance abuse problems, and relationship issues. A professional counselor provided weekly services to employees and dependants. Managers could refer employees to the program, and employees could self refer. If indicated and the client agreed, a referral was made to an outside professional or agency not covered under the EAP, but which may have been funded by other employer programs. The DOL held pursuant to ERISA § 3(1): the EAP provided "benefits in the event of sickness." This rendered the EAP an "employee welfare benefit plan," defined as the following: "...Any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that 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, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or prepaid legal services, or (B) any benefit described in [§ 302(c) of the Labor-Management Relations Act of 1947] (other than pensions or retirement or death, and insurance to write such pensions)."

An external, independent EAP provided services to a company's employees. Its trained staff and 24-hour hotline referred program participants to additional resources as needed. The EAP dealt with legal, financial and credit problems; problems concerning mental and physical health, substance abuse, stress, anxiety, depression, and family problems — "benefits" within the meaning of ERISA. In this case, the EAP was deemed an "employee benefit welfare plan" subject to ERISA.

Where an employer allowed an insurer to market individual policies to its employees, provide forms for and make payroll deductions on behalf of participating employees, the program was not considered a plan for ERISA purposes due to the lack of employer involvement in its creation and administration.

An employer-funded EAP, jointly staffed by representatives of the employer and a labor union, offered assistance for health-related problems such as alcoholism and drug dependency. Because the program provided services beyond those available to the general public and offered benefits, some of which were intended to be paid through other employee benefit plans maintained by the employer, the EAP was subject to ERISA.

To reiterate, the answer to the question, "Is EAP an ERISA-covered benefit?" depends on whether the program offers referral-only services — or if it provides more direct assistance with problems affecting an employee's physical or mental health.

#### MHPA Update

The Mental Health Parity and Addiction Equity Act (MHPA) of 2008 is another federal law of great interest to EAPs, so I'll conclude my initial column in the JEA by providing a brief summary:

Beginning Jan. 1, 2010, MHPA aligned mental health/substance abuse (MHSA) benefits and medical/surgical benefits for group health plans with more than 50 employees. MHPA Interim final rules, published in the Federal Register on Feb. 2, 2010, took effect April 5, 2010, and generally are applicable to plans and insurers for plan years that began on or after July 1, 2010. MHPA requires that group health plans offering substance abuse and mental health treatment benefits guarantee that the scope of the benefits is equal to the plans' coverage of medical and surgical benefits. EAPs covered by ERISA and MHPA should address immediately the possibility of significant program changes to conform to the new law.

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