

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with greenery.

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WORKPLACE 2024

TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction

Liza Magley – (12:05PM-12:15PM)

- Trending Litigation Regarding Government Tax Foreclosures

Rebecca LaPoint – (12:15 PM-12:25PM)

- New OSHA Walk Around Rule

Theresa Rusnak – (12:25PM-12:35PM)

- Recent Transgender Discrimination Cases

John Godsoe – (12:35PM - 12:45PM)

- ERISA 101: Welfare Plans Subject to ERISA

Trending Litigation Regarding Government Tax Foreclosures



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New OSHA “Walkaround” Rule



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Background: Prior Rule

- Permitted an employee-representative authorized by employees to accompany an OSHA CHSO during a physical inspection of the workplace
- Required good cause for a non-employee to represent employees (i.e., needed to show a non-employee third party was necessary to conduct an effective inspection)
 - Interpreted to mean that non-employee representatives needed safety or health expertise to assist CSHO in the inspection (e.g., industrial hygienist or a safety engineer)

OSHA Final Rule

- Issued on April 1, 2024
- Under the amended rule:
 - Non-employee representatives authorized by employees are not limited to persons with formal credentials such as industrial hygienists or safety engineers; and
 - A third-party representative authorized by employees simply has to be “reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience” as determined by the CSHO

Determining Good Cause

- CSHO must determine that there is “good cause” to permit a non-employee third-party to join
- However, OSHA provided no procedure by which the CHSO will make this determination outside of considering the factors listed in the rule (i.e., relevant knowledge, skills or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skill)

Determining Good Cause

- This provides CSHO with a significant amount of discretion
- While employers may inform the CHSO that they do not believe it is appropriate for the third-party representative to join the inspection, the CSHO has the ultimate authority to determine whether and which representatives may accompany the CSHO on the walkaround inspection

Why Does This Matter?

- Grants union access to non-union workplaces
 - Employees in a non-union workplace may designate a union representative as their walkaround representative
 - The commentary released with the new rule specifically addresses this issue and says union representatives will be permitted to represent non-union employees

Timeline

- Effective May 31, 2024
- Anticipate a lawsuit will be filed attempting to enjoin the new Walkaround rule before May 31, 2024

Possible Options For Employers

- If the new rule is not enjoined by May 31, 2024, employers may wish to consider the following options if an OSHA investigator shows up with a union representative:
 - Refuse to allow the union representative onsite. The CSHO may conduct the inspection without the union representative or may seek a warrant to conduct the inspection with the union representative present. Employers would then need to challenge such a warrant

Possible Options For Employers

- Allow the union representative access to the opening conference
 - Require the CSHO to demonstrate the “good cause” for having a union representative present
 - If there is no good cause inform the CSHO that the company is allowing the CSHO access, but that the union representative must leave.
 - The CSHO would then face the same choice: move forward without the union representative or seek a warrant

Possible Options for Employers

- Inform the CSHO that the company challenges the good cause but will allow the inspection to proceed
 - Clarify that while the union representative may participate in the walkaround, the company would not allow the union representative to participate in any supervisory interviews, or any non-supervisory interviews on-site
 - With company management accompanying the CSHO and representative during the walkaround, the company would be able to minimize interaction between the representative and employees

Key Takeaways

- Monitor whether the new Walkaround rule is enjoined
 - Bond will be monitoring
- Ensure procedures are in place to inform management how to respond if a CSHO wishes to inspect the worksite with a union representative

Recent Transgender Discrimination Cases



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ERISA 101: Welfare Plans Subject to ERISA



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Welfare Benefit Arrangements: Questions to Consider

- Does my organization maintain an employee welfare benefit plan that is subject to ERISA?
- For my welfare benefit plans that are subject to ERISA, am I complying with ERISA's document requirements?
- If I am currently out of compliance with ERISA, what steps should my organization take?

ERISA Welfare Benefit Plans

- ERISA employee welfare benefit plan
 - Defined, in part, as a plan, fund, or program that provides “...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....”
- Broad definition

Exemptions From ERISA Coverage

- ERISA statutory exemptions:
 - Governmental plans (as defined in ERISA section 3(32))
 - Certain church plans
 - Plans maintained solely for the purpose of complying with applicable workmen's compensation, unemployment compensation, or disability insurance laws
 - Plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens
 - Unfunded excess benefit plans

Exemptions From ERISA Coverage

- ERISA regulatory exemptions for welfare plans:
 - Payroll practices
 - On-premises facilities
 - Holiday gifts
 - Sales to employees
 - Hiring halls
 - Remembrance funds
 - Strike funds
 - Industry advancement programs
 - Certain group or group-type insurance programs
 - Unfunded scholarship programs
 - Plans without employees
- An exemption only applies to the extent the plan meets the applicable requirements set forth in the regulations.

Exemptions From ERISA Coverage

- *Fort Halifax* Exemption
 - Certain benefit arrangements that do not require an “ongoing administrative scheme” are not subject to ERISA.
 - *Fort Halifax Packing Co., Inc. v. Coyne*
 - U.S. Supreme Court held that a one-time severance payment was not governed by ERISA because, among other things, it did not require the sort of ongoing administrative scheme characteristic of ERISA.
 - *Fort Halifax* exemption is most commonly applied with respect to severance arrangements.

Benefit Arrangements That Are Often Overlooked By Employers

- Severance pay practices
 - The following severance pay practices may constitute ERISA-covered plans:
 - “ad hoc” severance pay practices
 - Severance pay practices that have never been formally communicated to employees
 - A formal plan is not required for a plan to be covered by ERISA
 - Individual contractual agreements with executives

Benefit Arrangements That Are Often Overlooked by Employers

- Employee Assistance Programs
 - If the program provides more than “referral only” services and provides medical benefits (e.g., counseling services)
- Business Travel Accident Programs
 - Such plans provide disability and death benefits that are covered by ERISA
- Certain Employee “Pay All” Benefits
 - e.g., supplemental life insurance
 - Such plans may be covered by ERISA if there is sufficient employer involvement

Benefit Arrangements That Are Often Overlooked By Employers

- Short-term disability plans
 - Most plans designed to comply with the NYS disability law are exempt from ERISA.
 - However, plans that provide more extensive benefits than those mandated by state law may provide ERISA-covered benefits
- If an employer is in doubt regarding whether a particular benefit arrangement is covered by ERISA, it should take steps as soon as possible to determine the extent to which the benefit plan in question may be covered by ERISA. Waiting for the DOL to make that determination for the employer may be costly.

Don't Forget About Your Cafeteria Plan

- Section 125(d)(1) of the Internal Revenue Code requires cafeteria plans to be in writing
- Cafeteria plans must be operated in accordance with the written plan terms
- Proposed regulations issued by the IRS in 2007 specify those provisions required to be set forth in a cafeteria plan

Overview of Some of the More Important ERISA Document Requirements

- Basic welfare plan document requirements include:
 - Plan
 - Trust (if applicable)
 - Summary Plan Description
 - Summary of Material Modifications
 - Summary of Material Reduction in Covered Services or Benefits
 - Summary of Benefits and Coverage

What Information Is Required To Be Described in the Plan?

- Section 402 of ERISA provides that every employee benefit plan shall:
 - name one or more fiduciaries
 - describe a procedure for establishing and carrying out a funding policy
 - describe plan procedures for allocating plan administration and administrative responsibilities
 - provide an amendment procedure (including identifying individuals with amendment authority)
 - describe the basis on which payouts are made to and from the plan

Utilizing Insurance Contracts as Plan Documents

- Insurance contract or certificate of coverage alone is likely insufficient
 - Typically lack important employer protections (e.g., discretion to interpret plan, reservation of rights)
 - May not be updated properly
 - May be inconsistent with actual plan administration
 - If intended to function as a summary plan description, often lack required provisions

Penalties For Noncompliance

- Penalties for failing to comply with document requirements
 - Failing to maintain a Plan document :
 - No specific monetary penalty
 - May subject employer to possible breach of fiduciary duty claim
 - \$110/day penalty for failing to provide within 30 days upon request
 - Failing to provide SPD or SMM to a participant or beneficiary upon request:
 - \$110/day penalty if not provided within 30 days of request
 - Failing to provide summary of benefits and coverage:
 - \$1,000 fine for failure to provide
 - \$100 per day excise tax for each affected individual

Recommended Steps For Noncompliant Plans

- Consider an internal ERISA audit
 - Identify scope of problem
- If the employer maintains multiple welfare benefit plans, consider a “wrap” plan document
 - Covers multiple benefit arrangements in a single document
 - Simplifies administration
- If problem results in Form 5500 filing failures, consider the Delinquent Filer Voluntary Compliance Program

Questions?



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New York Employment Law: The Essential Guide

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Thank You

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