

This Webinar Will Start Momentarily.
Thank you for joining us.



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April 22, 2021

The ERISA Plan Document Conundrum



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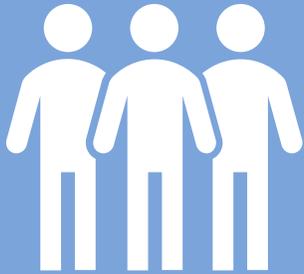
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**Employee Retirement
Income Security Act
(ERISA)**

ERISA COVERAGE

ERISA Broad Coverage



ERISA applies to private sector employers including publicly traded companies as well as nonprofit organizations.

The Basics

Applies to Pension Plans & Employee Welfare Benefits

- Duty to explain key features of the plan
- Provide fiduciary responsibility
- Requires claims procedures
- Gives participants legal rights

Our focus today is on Employee Welfare Benefits

Employee Welfare Benefit Plan:

- Any plan, fund, or program established or maintained by an employer or an employee organization or both for the purpose of providing participants and beneficiaries, through the purchase of insurance or otherwise:
 - Medical, surgical, or hospital care
 - Benefits or benefits for sickness, accident, disability, death, or unemployment
 - Vacation benefits, apprenticeship, or other training programs
 - Day care centers, scholarship funds, or prepaid legal services...

ERISA



Applies to:

- ✓ Medical, surgical, or hospital care
- ✓ Benefits for accident, disability, sickness, or death
 - ✓ Unemployment benefits
 - ✓ Funded vacation benefits
 - ✓ Apprenticeship or other training programs
 - ✓ On-site day care centers
 - ✓ Funded scholarship programs
 - ✓ Prepaid legal services
 - ✓ Some severance pay plans



Does not apply to:

- ✓ Workers' compensation
- ✓ Payroll practices such as wage continuation
- ✓ Paid time off for vacation, holidays, military duty, jury duty
- ✓ Unfunded scholarships
- ✓ On-site workout facilities

VOLUNTARY SAFE HARBOR

Employer does not engage in any of the following activities which constitute endorsement:

- Select or negotiate with the insurer
- Endorse the plan or associate the plan with employer plans (include in materials, or use the employer's name in the plan name)
- Recommend the plan to employees
- Assert that ERISA applies
- Perform administrative functions other than remitting premiums
- Allow use of the cafeteria plan
- Assist employees with claims

Examples

1. Individual critical illness policies
2. Individual hospitalization policies
3. Individual accident policies

Plan Document

PLAN DOCUMENT

Plan document requirements: ERISA 402(a)

- Every employee welfare benefit plan must be established pursuant to a written plan
 - No form or format is prescribed by ERISA 402(a)
 - Plan Administrator is responsible for the plan document; typically, the employer/plan sponsor is the Plan Administrator
 - Required for all ERISA plans; no exemption for small plans
- In addition, IRC 105 requires a written plan for the plan to maintain a tax-qualified status
- The formal written plan creates the promise to pay for covered benefits

PLAN DOCUMENT

Required Content



- Plan terms and conditions such as eligibility and benefits
- Named fiduciary and allocation of fiduciary duties
- A procedure for allocation of fiduciary duties
- Plan amendment and termination procedures
- Claims procedures
- Plan funding and payment provisions
- Distribution of plan assets upon termination of the plan
- For group health care plans:
 - Information regarding COBRA, HIPAA, and other federal mandates such as Women's Health Cancer Rights Act, preexisting condition exclusion, special enrollment rules, mental health parity, coverage for adopted children, Qualified Medical Support Orders, and minimum hospital stays following childbirth

Additional Suggested Provisions



- Discretionary authority
- Use of plan assets to pay for administrative expenses
- Rules restricting and regulating the use of Personal Health Information (PHI), if Plan Sponsor uses PHI (group health care plans)
- Subrogation, Coordination of Benefits, and offset provisions
- Procedures for allocating and designating administrative duties to a TPA or committee
- How insurer refunds (e.g., dividends, demutualization) are allocated to Participants

Distribution



- No general obligation to distribute
- However, ERISA Section 104 provides:

The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.
- Must be provided to participants within 30 DAYS of a written request
- Plan Administrator may be charged up to \$110 a day if not provided within 30 days of request

Summary Plan Description (SPD)

SUMMARY PLAN DESCRIPTIONS

ERISA Section 102(a) requires a summary to be provided that explains the plan terms in a manner calculated to be understood by the average participant

- Plan Administrator is responsible for the SPD; typically, the employer/plan sponsor is the Plan Administrator
- Required for all ERISA plans; no exemption for small plans
- Exemption for “top hat plans”

Purpose is to inform participants and beneficiaries about their plan and how it operates

- Content requirement is the same as the formal plan document, and then some...

SUMMARY PLAN DESCRIPTIONS

Required Content



- The plan name
- The plan sponsor/employer's name, address, and EIN
- The Plan Administrator's name, address, and phone number (usually the employer/plan sponsor)
- Designation of any named fiduciaries, if other than the Plan Administrator, e.g., claims fiduciary
- The plan number for ERISA Form 5500 purposes, e.g., 501, 502, 503, etc.
- Type of plan (e.g., life, medical, dental, disability)
- Plan Year (which may be different than the insurance policy year)
- Each Trustee's name, title, and address of principal place of business, if the plan has a trust

SUMMARY PLAN DESCRIPTIONS

Required Content

- The name and address of the Plan's agent for service of legal process, and statement that service may be made on Plan Administrator
- The type of plan administration, e.g., administered by contract, insurer, or Sponsor
- Eligibility and enrollment terms
- Description or summary of the benefits provided under the plan
- ERISA statement of Participants' rights
- How insurer refunds (e.g., dividends, demutualization) are allocated to Participants
- Plan Sponsor's amendment and termination rights and procedures
- Summary of any Plan provisions governing the allocation and disposition of assets upon Plan termination
- Summary of any Plan provisions governing the benefits, rights, and obligations of Participants under the Plan on termination or amendment of Plan or elimination of benefits

SUMMARY PLAN DESCRIPTIONS

Required Content

- Claims procedures, including applicable time limits, and remedies available under the plan for claims which are denied in whole or in part and the DOL office contact information
 - May be furnished in a separate document (e.g., a Certificate of Coverage) that accompanies the SPD, provided that the SPD explains that claims procedures are furnished automatically, without charge, in the separate document
- A statement clearly identifying circumstances that may result in loss or denial of benefits
- Source of Plan contributions (employer and/or employee contributions)
- The fact that the employer is a participating employer or a member of a controlled group
- Whether the Plan is maintained pursuant to one or more collective bargaining agreements (and, if so, how to obtain a copy of the CBA)
- Funding method used for accumulation of assets if applicable
- Plan subrogation and reimbursement provisions

SUMMARY PLAN DESCRIPTIONS

Additional Requirements for Group Health Plan SPDs



- Detailed description of Plan provisions and exclusions:
 - Copays, deductibles, coinsurance, eligible expenses, network provider provisions, prior authorization and utilization review requirements, dollar limits, day limits, visit limits, and the extent to which new drugs, preventive care, and medical tests and devices are covered
 - Plan limits, exceptions, and restrictions must be conspicuous
 - A link to network providers should also be provided
- Name and address of health insurer(s), if applicable and a description of the role of health insurers (i.e., whether the Plan is insured or the insurance company is merely providing administrative services)

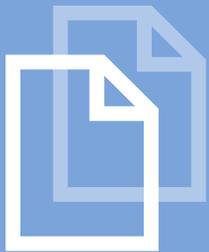
SUMMARY PLAN DESCRIPTIONS

Additional Requirements for Group Health Plan SPDs:

- **Information regarding federal mandates:**
 - COBRA
 - HIPAA
 - Women's Health Cancer Rights Act
 - Newborns' and Mothers' Health Protection Act
 - Qualified Medical Support Orders
 - Preexisting condition exclusion (if applicable), special enrollment rules, mental health parity
- **ACA required notices**
 - Notice of Patient Protections
 - Grandfathered status

SUMMARY PLAN DESCRIPTIONS

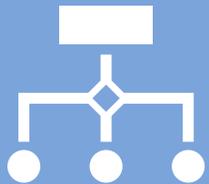
Optional Content



- For insured arrangements, attach the summary of benefits provided by the insurance companies to help assure you have provided an understandable summary of the Certificate of Coverage
- Disclosure regarding the fiduciary's discretionary authority to interpret plan
- Language that in the event of a conflict between the Plan Document and the SPD, the Plan Document controls
- Rules regarding overpayments and erroneously paid benefits

SUMMARY PLAN DESCRIPTIONS

Format Issues



- Separate from written plan document or combined?
 - If combined with the plan document, document should be explicit
- Wrapper SPD
 - Generally, for insured plans where insurance certificate does not qualify as SPD
 - Wraps around insurance certificate and adds missing information
- SPD for wrap plans
 - Single SPD for entire wrap plan
 - Separate SPDs for each component or for separate classes
 - Special language needed

SUMMARY PLAN DESCRIPTIONS

Q Why would anyone use a mini-SPD wrap instead of creating a single document that can act as an SPD for all ERISA benefits?

A It's about distribution and eligibility.

- If an organization doesn't qualify for electronic distribution of SPDs, printing and mailing a single wrap SPD for all ERISA benefits can be expensive and onerous
 - Example: Jane Doe doesn't qualify for electronic distributions. She only elects vision coverage. Does it make sense to send her the Medical and Dental information (which could be more than 100 pages) as well?
- If an individual is eligible for one benefit within the wrap, but not another, very careful drafting is needed

SUMMARY PLAN DESCRIPTIONS

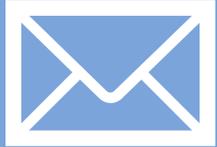
Q Are you required to provide an SPD in a language other than English?

A The SPD does not have to be in a language other than English, however, the plan sponsor may have to provide a notice that assistance in a non-English language is available.

- Provide notice of assistance if either:
 - There are fewer than 100 participants at start of plan year and 25% or more of all plan participants are literate only in the same non-English language, or
 - There are 100 or more participants at start of the plan year and the lesser of (i) 500 or more participants, or (ii) 10% or more of all plan participants are literate only in the same non-English language.
- Provide these participants with an English-language SPD and a notice in the non-English language offering them assistance and the describing the procedures for obtaining such assistance
- Written materials are not required
- Must be calculated to provide them with a reasonable opportunity to become informed as to their rights and obligations under the plan

SUMMARY PLAN DESCRIPTIONS

Distribution



What?

- SPD and any Summaries of Material Modifications (SMMs) not incorporated into SPD

Who?

- Must be distributed to participants
- Under ERISA “participants” are the covered employees; spouses and dependents are “beneficiaries” not “participants”
 - Beneficiaries have a right to receive a copy of the SPD upon request
- Includes COBRA qualified beneficiaries (including spouses and dependents), parent or guardian of child participating under a QMCSO, and retirees.

SUMMARY PLAN DESCRIPTIONS

Distribution



When?

- Following time frames or outside deadlines; in most cases best practice is to distribute sooner
 - Terms of plan might also require more prompt notice
- Within 30 days of a request by a participant or beneficiary
- New Plans – within 120 days after effective date of plan
- New Participants – within 90 days after participant first becomes covered
- Existing Participants – no annual distribution required
 - Amended and restated SPDs (incorporating SMMs) must be furnished to all participants every 5 years unless there have been no changes, in which case SPD must be redistributed every 10 years

SUMMARY PLAN DESCRIPTIONS

Distribution

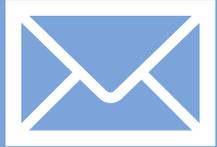


When?

- Upon any modification in the terms of the Plan that is “material” and any change in information required in the SPD.
 - Can be accomplished through an amended and restated SPD or a Summary of Material Modification (SMM)
 - Must be furnished within 210 days after the end of the Plan Year in which the modification is **adopted**
 - However, if change constitutes a material reduction in covered services or benefits under a *group health plan*, must be furnished no later than 60 days after the date on which change is **adopted**
 - Examples from regulations: Elimination of a benefit payable under the plan; reduction in benefits payable under the plan; increases in deductibles, coinsurance, copayments, or other amounts to be paid by a participant or beneficiary; establishment of new conditions or requirements (e.g., preauthorization requirements) to obtaining services or benefits under the plan

SUMMARY PLAN DESCRIPTIONS

Distribution



How?

- Must be furnished in a way “reasonably calculated to ensure actual receipt of the “material” using method “likely to result in full distribution.”
 - Important to retain records demonstrating distribution of SPD
- Hand delivery at work
 - Placing SPD in location frequented by participants is insufficient
 - Also does not work for participants not actively working
- Mail
 - First-class mail to last known address

SUMMARY PLAN DESCRIPTIONS

Distribution



How?

- Electronic Distribution (including email distribution and posting document on website (e.g., intranet or internet)
 - These rules generally apply to distribution of any document required by ERISA unless special rules electronic distribution rules apply (e.g., SBC)
- Rules under review by DOL (new rules issued for retirement plans in 2020)

SUMMARY PLAN DESCRIPTIONS

Distribution



How?

- Every electronic SPD distribution must satisfy the following four requirements:
 1. The administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing the SPD results in actual receipt of transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information);
 2. The electronic SPD is prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable SPDs;
 3. Notice is provided to each participant, in electronic or non-electronic form, at the time the SPD is furnished electronically, that apprises the participant of the significance of the document when it is not otherwise reasonably evident as transmitted and of the right to request and obtain a paper version of the SPD;
 - Must be provided each time document is distributed; periodic general notification insufficient
 4. Upon request, the participant is furnished a paper version of the SPD.

SUMMARY PLAN DESCRIPTIONS

Distribution



How?

- Electronic distribution allowed:
 - Without prior consent to participants who (1) has the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee; and (2) with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties.
 - Home office qualifies
 - Only with prior consent for all other participants
 - e.g., employees who do not use company's computer system as part of day-to-day duties, COBRA participants, and other former employees or non-employees

SUMMARY PLAN DESCRIPTIONS

Distribution

How?

- Electronic distribution prior consent requirements.
 - Affirmative consent required; negative consent insufficient
 - Consent must be provided or confirmed electronically in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent and participant must provide an email address for the receipt of electronically furnished documents
 - Prior to obtaining consent, participant must be informed (electronically or paper) of the following:
 - The types of documents to which the consent would apply;
 - That consent can be withdrawn at any time without charge;
 - The procedures for withdrawing consent and for updating the participant's address for receipt of electronically furnished documents or other information;
 - The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
 - Any hardware and software requirements for accessing and retaining the documents.
 - Additional requirements apply if hardware/software requirements change.

SUMMARY PLAN DESCRIPTIONS

Distribution



Consequences of Failure to Distribute

- No specific monetary penalties unless participant or beneficiary has requested copy
- Potential criminal penalties for “willful violations”
- Courts might base decisions on other document (e.g., enrollment materials, handbook descriptions, brochures, correspondence, charts, and possibly oral communications), especially if there was detrimental reliance
- Between the time an amendment is adopted, and the time notice to participants is given (e.g., via an SMM), the terms of the unamended version of the plan will probably remain enforceable as to participants who detrimentally rely on them
- Potential loss of abuse of discretion review by courts of benefit decisions

Summary of Benefits and Coverage

SUMMARY OF BENEFITS AND COVERAGE

Separate document from the SPD

- A Summary of Benefits and Coverage (SBC) must accurately describe the “benefits and coverage under the applicable plan or coverage”.
- Applicable to group health plans (both insured and self-insured) and insurers (as defined by applicable provisions of the PHSA, ERISA, or the Code).
 - Does not apply to certain “excepted benefits” and retiree-only plans.
- DOL, HHS, and IRS have provided a template intended to be used by all types of plans or coverage designs.
- SBC must be provided no later than the date the renewal materials are distributed. If renewal is automatic, the SBC must be furnished no later than 30 days prior to the first day of the new plan year.

SUMMARY OF BENEFITS AND COVERAGE

Delivery of the SBC



Must be provided to participants and beneficiaries; but single SBC to participant sufficient (unless the plan sponsor knows of a different address for a beneficiary).

- Paper or electronic format
- Electronic distribution rules:
 - For covered participants:
 - In accordance with the ERISA electronic notification requirements
 - In connection with online enrollment or renewal
 - In response to an online request
 - For individuals who are eligible but not enrolled, the SBC may be provided via an internet/intranet posting if individuals are notified in paper form (e.g., a postcard) or by email that the documents are available on the internet/intranet.
- In all cases participants must have the option to receive a paper copy.

Wrap-Up

SUMMARY

- ✓ All ERISA employee welfare benefit plans should have a Plan Document & SPD.
- ✓ This includes fully-insured or self-insured plans.
- ✓ A wrap document may be used to provide required ERISA information and to combine multiple plans into a single plan for Form 5500 filing purposes.
- ✓ Ensure proper distribution in paper or, if appropriate, electronic format.
- ✓ Provide ERISA documents upon request.



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