

ERISA Compliance for Health and Welfare Plans

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- Session phone number: (877) 668-4493
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The background of the slide is a photograph of the United States Capitol building in Washington, D.C. The image shows the iconic white dome on the left and the neoclassical portico with its tall columns on the right. The sky is a clear, pale blue. A green triangular graphic element is in the top right corner. A semi-transparent white banner is overlaid across the middle of the image, containing the title and date. The text is in a bold, sans-serif font, with the title in green and the date in a lighter green. The presenters' names are in a grey font. The company logo is in orange and white.

ERISA Compliance for Health and Welfare Plans

May 2015

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and Erin Margerie, Esq.

Kinloch
CONSULTING GROUP, INC.

Introduction

Today's Presenters

Erica Storm, Esq.

- *Employment and benefits attorney*
- *Expertise in Affordable Care Act and other health plan compliance issues*
- *Educates companies on compliance obligations*

Erin Margerie, Esq.

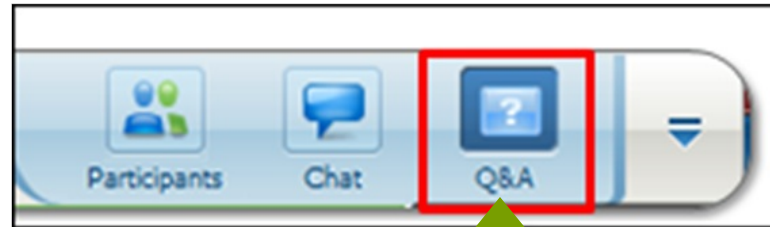
- *Employment and benefits attorney*
- *Primary focus: employee benefit compliance and health plan issues*
- *Creates educational materials and compliance resources*

Webinar Logistics

To call in to
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We welcome your
questions at any time!
Questions will be
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your questions.

Today's Agenda

- Introduction to ERISA
- Covered Employers and Plans
- Plan Document Requirement
- Reporting and Disclosure
- Fiduciary Rules
- Enforcement

What is ERISA?

ERISA

Employee Retirement Income Security Act

- Enacted in 1974
- Sets minimum standards for pension and welfare plans provided by employers to protect employees

Title I: Protection of Employee Benefit Rights

- Part 1: Reporting and Disclosure
- Part 4: Fiduciary Responsibility
- Part 5: Administration and Enforcement
- Part 6: COBRA Continuation Coverage and Additional Standards for Group Health Plans
- Part 7: Group Health Requirements (HIPAA, NMHPA, MHPA, WHCRA)

ERISA Preemption

- ERISA will generally preempt state laws that relate to ERISA plans
- State insurance laws continue to apply to insurers
 - State laws regarding insurance policies will not be preempted
 - Insured ERISA plans indirectly subject to state law
- ERISA plans cannot be deemed to be insurance companies
 - Self-funded ERISA plans cannot be regulated by state insurance laws

Who Must Comply with ERISA?

Employers Subject to ERISA

Most private sector employers are subject to ERISA

Subject to ERISA

- Corporations
- Partnerships
- Sole proprietorships
- Nonprofit organizations

Exempt from ERISA

- Governmental plans
- Church plans

Key Actors

Plan

- Separate entity
- Subject to ERISA requirements
- Can sue and be sued

Plan Sponsor

- Creates and maintains the plan
- For single employer plans, the employer is the plan sponsor

Plan Administrator

- For single employer plans, employer is the default Plan Administrator
- Another entity may be designated in plan documents
- Not the same as a TPA
- Directly responsible for ERISA compliance

Which Plans are Subject to ERISA?

Employee Welfare Benefit Plans

A plan, fund or program



Established or maintained by an employer



For the purpose of providing welfare benefits to participants and beneficiaries

Welfare Benefits

- Medical, surgical or hospital benefits
- Scholastic, accident, disability, death or unemployment benefits
- Vacation benefits
- Apprenticeship or other training benefits
- Day-care centers
- Scholarship funds
- Prepaid legal services
- Holiday and severance benefits
- Housing assistance benefits

Statutory Exemptions

- Governmental and church plans
- Programs maintained solely to comply with state-law requirements for:
 - Workers' compensation
 - Unemployment compensation
 - Disability insurance
- Plans maintained outside of the U.S. for nonresident aliens

Payroll Practices

Payments that are made as an employer's normal "payroll practice" are exempt from ERISA




Includes payment of:

Wages, overtime pay, shift premiums and holiday or weekend premiums

Sick-pay or income replacement benefits

Vacation, holiday, jury duty and similar pay



Amounts must be paid out of employer's general assets to current employees

Voluntary Plans

Certain “voluntary employee-pay-all” arrangements are exempt from ERISA

Exempt arrangements

- Employer allows insurance company to sell voluntary policies to interested employees
- Employees pay full cost of coverage
- Employees pay premiums through payroll deductions
- Employer forwards deductions to the insurer

Restrictions

- Employer may not contribute to cost of coverage
- Insurer may not pay the employer
- Employer may not endorse the program

Plan Document Requirement

Plan Document

- Every ERISA plan must have a **written plan document** describing the benefits provided
- An ERISA plan may exist without a written plan document but will be out of compliance
 - Possible to inadvertently create an ERISA plan
- Wrap document for insured benefits
 - Insured benefits controlled by terms of contracts/policies
 - Contracts/policies will not contain all provisions required for ERISA plan document
 - Wrap document is combined with contract/policy to provide missing terms

Plan Document Provisions

- The plan document should address:
 - Benefits and eligibility
 - Funding of benefits
 - Treatment of insurance refunds and rebates
 - Standard of review for benefit decisions
 - Designation of named fiduciary
 - Plan amendment and termination procedures
 - Required provisions for group health plans
 - Other substantive provisions applicable to certain plans (such as subrogation and reimbursement clauses and coordination of benefits provisions)
 - Procedures for allocating and delegating plan responsibilities

Reporting and Disclosure

Summary Plan Description (SPD)

- Document used to communicate plan benefits, rights and obligations
- Terms will generally be enforced if more beneficial to participants than the plan document
- Most plans must have an SPD
 - Very limited exceptions apply
 - No exception for small plans
- Provided by Plan Administrator
 - Even if another entity drafts the SPD

SPD Distribution

Deadlines

- Provide within 90 days after participant becomes covered under the plan
- Updated SPD must be provided every 5 years (10 years if no changes)

Approved Distribution Methods

- First-class mail
- Hand delivery
- Electronic distribution if requirements met

SPD Content

ERISA provides detailed content requirements for welfare plan SPDs

- Plan identifying information
- Description of benefits and eligibility rules
- Statement regarding circumstances causing loss or denial of benefits
- Description of amendment, termination and subrogation provisions
- Information regarding contributions and funding
- Claims procedures
- Statement of ERISA rights
- Additional group health plans requirements
- Prominent offer of assistance in a non-English language (if required)

Insured plans: insurance booklet will usually **not** meet requirements
Solution: **wrap SPD document** that contains ERISA elements

Summary of Material Modifications (SMM)

- Material changes to information contained in SPD must be communicated to plan participants
- Plan Administrator can use a summary of the material modifications instead of issuing a new SPD
- Deadlines:
 - 210 days after the end of the plan year in which a modification is adopted
 - If change is a material reduction in group health plan benefits or services, deadline is 60 days after date of adoption
 - ACA imposes 60-day advance notice rule

Summary of Benefits and Coverage (SBC)


Short summary of benefits and coverage under the plan required by the ACA



Must be provided by Plan Administrator and insurer

Non-duplication rule allows one party to distribute SBC

At enrollment, re-enrollment and upon request



Must provide 60 days' advance notice of any material modification of plan terms or coverage not reflected in most recent SBC

Participant Requests for Documents

- The Plan Administrator must furnish certain documents upon written request by a participant or beneficiary
 - Latest SPD, SMMs and annual report
 - Any bargaining agreement, trust agreement or contract
 - Any other “instrument under which the plan is established or operated”
- Documents must also be available at plan office
- Copies must be provided within 30 days (reasonable copying fees may be charged)
- Penalties of up to \$110/day may be assessed for failing to respond to request

Form 5500 Reporting

Many ERISA plans must report plan information to the DOL each year using Form 5500

Significant penalties

- Up to \$1,100/day for missing or incomplete 5500s
- Criminal penalties for willful failures
- Voluntary correction program available

Exemptions

- Full or partial exemption
- Depend on size and funding method

Form 5500 Exemptions

Small welfare plans – full exemption

- Fewer than 100 covered participants at the beginning of the plan year
- Must be unfunded (benefits paid from general assets of employer) or insured (benefits paid through an insurance policy that is not stop-loss insurance) or a combination
- Can accept participant contributions if conditions met

Large welfare plans – partial exemption

- Exempt from providing some of the required information
- If unfunded, insured or a combination
- Financial information (Schedule H) and accountant's opinion

Form 5500 Basics

Deadline

- Last day of the 7th month after plan year ends (July 31 for calendar year plans)
- Automatic 2 ½ month extension available

Plan Administrator

- Is responsible for signing and filing 5500
- Generally the plan sponsor unless another entity is designated

Electronic Filing

- All Form 5500s must be filed electronically using EFAST2
- Can use DOL web application or third party software

Delinquent Filer Program

DFVCP

- Delinquent Filer Voluntary Correction Program
- Available if issues not identified by DOL

Correcting Form 5500 failures

- File a completed Form 5500 for the year
- Pay a reduced penalty

Penalties

- Small plans: \$10/day up to \$750 per year (\$1500 for multiple years)
- Large plans: \$10/day up to \$2,000 per year (\$4,000 for multiple years)

Summary Annual Report (SAR)

- Plans required to file Form 5500 must provide participants with a summary of the information in the Form 5500
- SAR contents (if reported on 5500):
 - Funding and insurance information
 - Basic financial information
 - Rights to additional information (full annual report)
 - Offer of assistance in non-English language (if required)
- Must be provided within 9 months of the end of the plan year
 - If extension granted for 5500, within 2 months of extension period

Recordkeeping Rules

- ERISA plans must maintain records documenting information that is required by the plan's Form 5500
- Recordkeeping rule applies to plans that are exempt from filing the Form 5500
- Records must be maintained for at least six years after the Form 5500 filing date

Fiduciary Responsibility

ERISA Fiduciaries

Anyone performing fiduciary functions is an ERISA fiduciary

Fiduciary
functions

- Exercising discretionary authority or control regarding management of an ERISA plan
- Exercising any authority or control over management or disposition of plan assets
- Rendering investment advice for a fee
- Having discretionary authority or responsibility in administration of the plan

Fiduciary Duties

- **Duty of Undivided Loyalty**
 - Act solely in the best interest of plan participants and beneficiaries
- **Exclusive Benefit Rule**
 - To use plan assets for the exclusive purpose of paying plan benefits or reasonable expense of plan administration
- **Prudent Person Standard**
 - To act with the care, skill, prudence and diligence that a prudent person in similar circumstances would use
- **Duty to Diversify Investments**
 - To diversify the plan's investments to minimize the risk of large losses
- **Duty to Act in Accordance with the Documents Governing the Plan**

Fiduciary Issues

Settlor Functions

- Fiduciary duties do not apply
- Include business decisions such as amending and terminating plans

Delegating Fiduciary Duties

- Duties can be delegated to others if permitted by the plan
- Plan sponsor retains ultimate responsibility

Fiduciary Breaches

- Personal liability for damages or profits
- Special fiduciary penalties assessed by DOL
- Removal
- Criminal penalties

Plan Assets

Plan Asset Obligations

- Plan assets
 - Confer additional compliance obligations
 - Can make a plan “funded” vs. “unfunded”
- Welfare plans do not always have to hold assets in trust
- Creating plan assets
 - Participant contributions
 - Giving an ERISA plan a beneficial ownership interest (usually a formal trust fund for the plan)
- Handing plan assets (or funds or other property) may require a fidelity bond
 - Protects plan against fraud or dishonesty
 - Applies when funds are segregated from general assets
 - Not applicable to insured plans in most cases

Exclusive Benefit Rule

- Plan assets must be used for the exclusive purpose of paying plan benefits and reasonable administrative expenses
- Does not require plan assets to be held in a separate trust fund (but see trust rule)
- Employer must be able to show that assets were used properly

Trust Rule

Plan assets must be held in a formal trust account for the benefit of the plan

- Deposits of plan assets must be made by certain deadlines

Most plans that accept participant contributions are exempt from the trust requirement

- Participant contributions made under a cafeteria plan do not have to be held in trust
- Participant contributions under an insured plan not required to be held in trust if forwarded directly to insurer
- Issues may arise if contributions held in separate accounts or insurance refunds not returned to participants on time

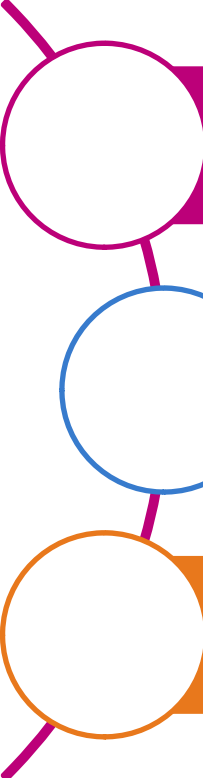
ERISA Enforcement

ERISA Enforcement

- The U.S. Dept. of Labor (DOL) enforces ERISA Title I
- Primary enforcement responsibility held by Employee Benefits Security Administration (EBSA)
- ERISA violations can be costly for employers
 - DOL investigations
 - DOL enforcement actions
 - DOL penalties
 - Employee lawsuits

Enforcement Statistics

During the DOL's 2014 fiscal year



EBSA oversaw 2.4 million health plans, and a similar number of other welfare plans

EBSA closed 3,928 civil investigations. Of these, **64.7 percent** triggered monetary results or other correct action

EBSA filed 107 civil lawsuits and closed 365 criminal investigations. EBSA's criminal investigations led to the indictment of 106 individuals

Questions?



Thank you!

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