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Preparing for a DOL Health Plan Audit

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Introduction >

About the Presenters

Erica Storm, Esq.

- Employment and benefits attorney
- Expertise in health care reform and health plan issues
- Educates companies on compliance obligations

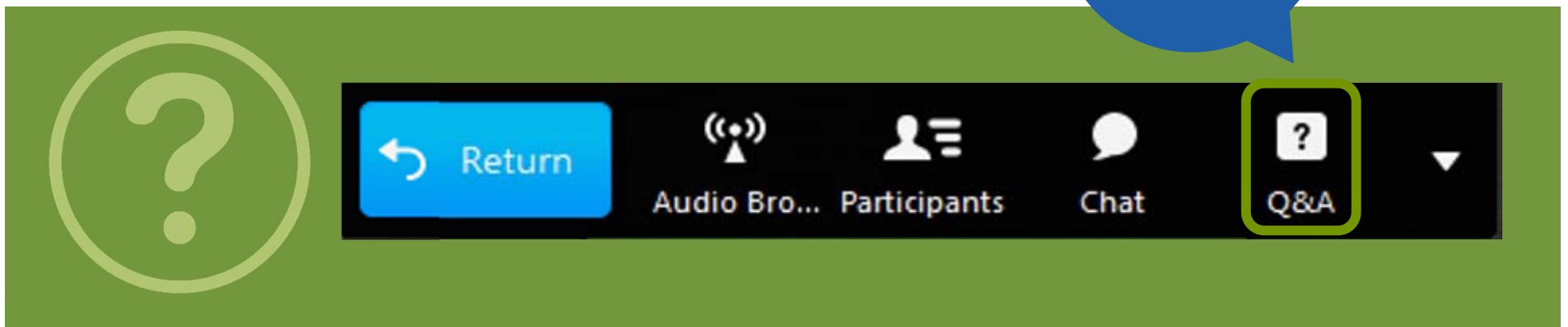
Erin Margerie, Esq.

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

We welcome your questions at any time!

- Questions will be addressed at the end of the session.
- Please choose “Send to All Panelists” when submitting your question.

Click the question mark



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Today's Agenda

- Overview of DOL Audits
 - Audit triggers and process
 - Plan compliance review
 - Plan document requirement
 - Reporting and disclosure
 - Fiduciary responsibility
 - Group health plan requirements
 - Recordkeeping
-

Overview

➤ DOL Health Plan Audits

DOL has broad audit authority

- Audits performed by Employee Benefit Security Administration (EBSA)
- Focus is on ERISA compliance
 - Fiduciary obligations
 - Reporting and disclosure
 - Group health plan requirements
 - Compliance with Affordable Care Act (ACA)

➤ Serious Consequences

Being selected for an audit can have serious consequences for an employer

- Audits are stressful and time consuming
 - Disruption of day-to-day operations
- ERISA violations can be costly
 - Penalties
 - Corrective action
 - Civil litigation and criminal prosecution

During 2019 fiscal year, most DOL investigations resulted in penalties or other corrective action for employers or benefit plans

➤ Minimize Your Risk



- Important to know how to prepare for (and potentially avoid) an audit
- Best time to analyze whether you are ready for an audit is **before DOL knocks on your door**

➤ Key Action Items

Understand common audit triggers and audit process



Confirm compliance with applicable law



Maintain documents to show compliance





Audit Triggers and Process

Common Audit Triggers

Participant complaints

- Plan participants may complain to the DOL about ERISA violations
- In fiscal year 2019, participant complaints triggered 501 new DOL investigations

Form 5500

- Incomplete or inconsistent information is reported on plan's Form 5500

National enforcement priorities

- DOL's national enforcement priorities or projects target agency resources on certain issues
 - For example, DOL's Health Enforcement Initiatives project focuses on compliance with group health plan requirements
-

➤ Avoiding an Audit

Employers can take steps to help minimize exposure to a DOL audit

- Respond to participant questions and requests for information in a timely manner
- File Form 5500 on time and make sure it's accurate and complete
- Distribute participant materials (for example, SPDs) by deadline
- Keep plan documents up-to-date



Common Audit Steps

Receive Audit Letter

- DOL sends a letter to notify employer it has been selected for audit
- Scope of audit can be full-scale or limited review

Respond to Document Request

- DOL audit letter will request certain plan-related information
- May request a large number of documents

Comply with Deadlines

- Audit letter will include a deadline for providing documents
 - Important to respond by deadline
 - Late or incomplete responses may trigger additional document requests, interviews, on-site visits, or even DOL enforcement action
-

➤ Standard Document Request

- Plan document
 - Summary plan description
 - Forms 5500
 - Summary annual reports
 - List of all plan service providers and related contracts
 - All insurance contracts
 - Open enrollment materials
 - Women's Health and Cancer Rights Act (WHCRA) notice
 - Children's Health Insurance Program (CHIP) notice
 - Wellness program materials
 - Plan provisions for mental health and substance use disorder benefits
 - HIPAA compliance documents
 - COBRA compliance documents
 - Information on coverage rescissions, including 60-day advance notice
 - Plan provisions on annual and lifetime limits
 - Plan enrollment rights for dependents up to age 26
 - Summary of benefits and coverage (SBC) and any 60-day advance notices of material changes
 - For non-grandfathered plans, notice of patient protections and selection of providers
 - Procedures for claims and appeals
-

➤ Prepare for Investigation

If you are selected for audit, consider these steps:

- Establish contact person at company
 - Consider hiring legal counsel
 - Negotiate or clarify scope of document request and ask for deadline extension, if necessary
 - Review documents for accuracy and consider providing explanation of any discrepancies
 - Prepare staff for on-site visits and interviews
-

➤ Possible Audit Outcomes



Correction of
noncompliance

Penalties

Litigation



Compliance Review

➤ Health Plans Subject to ERISA

Most health plans maintained by private sector employers are subject to ERISA

Subject to ERISA

- Corporations
- Partnerships
- Sole proprietorships
- Nonprofit organizations

Exempt from ERISA

- Governmental plans
 - Church plans
-

ERISA Requirements

Plan Document

**Reporting and
Disclosure**

**Fiduciary
Responsibility**

**Group Health Plan
Requirements**





Plan Document

› Plan Document

- Every ERISA plan must have a **written plan document** describing the benefits provided
- Wrap document for insured benefits
 - Insured benefits controlled by terms of contracts/policies
 - Wrap document is combined with contract/policy to provide missing provisions
 - Wrap plan can include multiple benefits





Reporting and Disclosure 

➤ Summary Plan Description (SPD)

- Document used to communicate plan benefits, rights and obligations
- 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

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

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 certain requirements met
-

➤ 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
 - New template for plan years beginning on or after Jan. 1, 2021

Summary of Benefits and Coverage: What this Plan Covers & What You Pay for Covered Services Coverage Period: [See Instructions]
Coverage for: _____ | Plan Type: _____

The Summary of Benefits and Coverage (SBC) document will help you choose a health plan. The SBC shows you how you and the plan would share the cost for covered health care services. NOTE: Information about the cost of this plan (called the premium) will be provided separately. This is only a summary. For more information about your coverage, or to get a copy of the complete terms of coverage, [insert contact information]. For general definitions of common terms, such as allowed amount, balance billing, coinsurance, copayment, deductible, provider, or other underlined terms, see the Glossary. You can view the Glossary at [www.\[insert\].com](#) or call 1-800-[insert] to request a copy.

Important Questions	Answers	Why This Matters:
What is the overall deductible?	\$	
Are there services covered before you meet your deductible?		
Are there other deductibles for specific services?	\$	
What is the out-of-pocket limit for this plan?	\$	
What is not included in the out-of-pocket limit?		
Will you pay less if you use a network provider?		
Do you need a referral to see a specialist?		

(T) - OMB control number: 1545-0047/Expiration Date: 12/31/2019; (DOL) - OMB control number: 1210-0147/Expiration date: 5/31/2022
(HHS) - OMB control number: 0938-1145/Expiration date: 10/31/2022 Page 1 of 5

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

Small Welfare Plan Exemption

- Fewer than 100 covered participants at the beginning of the plan year (includes employees, not dependents)
 - 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 certain conditions met
-



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 act in accordance with the documents governing the plan**

- Must follow plan documents for eligibility decisions and payment of plan benefits
-

➤ 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
 - DOL may assess a **20 percent penalty**
 - Removal
 - Criminal penalties
 - Voluntary correction program is available
-



Group Health Plan Requirements



➤ Applicable Laws

DOL will review compliance with applicable laws during a health plan audit

Law	Requirements
ERISA	<ul style="list-style-type: none">• Proper plan administration• Proper payment of plan benefits• Fiduciary issues (for example, self-dealing)
ACA	<ul style="list-style-type: none">• Coverage of dependent children to age 26• Coverage of preventive care services• Participant notice regarding patient protections• Claims and appeals procedures• Market reforms (for example, no lifetime or annual limits on essential health benefits)• Emergency services

Applicable Laws

Law	Requirements
HIPAA	<ul style="list-style-type: none">• Special enrollment in specific situations (for example, birth or adoption of a child)• No discrimination based on certain health factors
Newborns' and Mother's Health Protection Act (NMHPA)	<ul style="list-style-type: none">• Minimum hospital stays after childbirth
Women's Health and Cancer Rights Act (WHCRA)	<ul style="list-style-type: none">• Benefits for reconstructive surgery following mastectomy
Mental Health Parity and Addiction Equity Act (MHPAEA)	<ul style="list-style-type: none">• Coverage for mental health and substance use disorder benefits cannot be less favorable than coverage for medical/surgical benefits



Recordkeeping >

Recordkeeping System

Establishing a recordkeeping system for important benefit plan documents is a key step in preparing for a DOL audit

- Retaining complete and accurate records helps:
 - Move the audit process along
 - Provide accurate picture of your employee benefits
 - Keep copies of participant notices and records showing distribution
 - As a general rule, keep these records for at least **seven years**
 - If service provider keeps records, verify retention and availability
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Questions? >



Thank you! 

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