ERISA Compliance for Health Plans

The Employee Retirement Income Security Act (ERISA) is a federal law that sets minimum standards for group health plans. Among other things, ERISA generally imposes five key requirements on group health plans:

Plan Document Requirement

All ERISA-covered benefit plans, including group health plans and other employee benefit plans, must, by law, be administered in accordance with a written plan document. Among other things, ERISA generally requires a welfare plan document to contain the following provisions:

- **Named fiduciaries**. The document must name one or more fiduciaries that have the authority to control and manage the operation and administration of the plan.
- **Allocation of responsibilities**. The plan must include a procedure for allocating responsibilities for plan administration and operation.
- **Benefit payment**. The plan must state the basis on which benefits are paid to and from the plan.
- **Claims procedures**. The plan must have a specific procedure for processing benefit claims and appeals that complies with DOL regulations.
- **Portability, special enrollment, and nondiscrimination provisions**. The plan must describe certificates of coverage, special enrollment rights, and nondiscrimination rules.
- **Privacy of health information**. Group health plans must contain plan language protecting the medical privacy of plan participants and beneficiaries.

Many employers assume that insurance contracts for fully insured products are written plan documents. Insurance companies, however, draft their contracts to comply with state insurance laws, and, as a result, the contracts do not contain many of the ERISA-required or recommended provisions. As a result, employers must draft an entire plan document or create a **"wrap" plan document** to meet ERISA's requirements. A wrap plan document is designed to meet plan documentation requirements under ERISA and other federal laws and to incorporate all other welfare plans, insurance contracts, and other relevant documents into a single plan. These materials can be kept together for administrative ease.

Unless requested, the written plan document does not need to be furnished to employees.

Summary Plan Description Requirement

ERISA requires the administrator of an employee benefit plan to furnish participants and beneficiaries with a summary plan description (SPD). An SPD describe certain provisions of the written plan document in understandable terms. Among other information, an SPD must describe:

- Cost-sharing provisions, including premium, deductible, coinsurance, and copayment amounts for which the participant or beneficiary will be responsible
- The extent to which preventive services are covered under the plan
- Whether, and under what circumstances, existing and new drugs are covered under the plan

- Whether, and under what circumstances, coverage is provided for medical tests, devices, and procedures
- Provisions governing the use of network providers, the composition of provider networks and whether, and under what circumstances, coverage is provided for out-of-network services
- Provisions requiring pre-authorizations or utilization review as a condition to obtaining a benefit or service under the plan

Many employers wrongly assume that documents provided by an insurance company for fully insured products satisfy the SPD requirements. As a result, employers must draft an entire SPD or create a **"wrap" SPD** to meet ERISA's requirements. A wrap SPD is designed to meet ERISA's requirements by incorporating and supplementing documents provided by insurance companies.

SPDs must be provided to plan participants as follows:

- Within **90 days** after the employee becomes a participant in the plan.
- Within **60 days** of adopting a material reduction in covered services or benefits. A material reduction in covered services generally includes increases in premiums, deductibles, coinsurance amounts, and copayment amounts. Alternatively, you can provide notice of a material reduction in covered services via a Summary of Material Reduction in Covered Services or Benefits document during the same time period instead of a new SPD. Click here for more information.
- No later than **210 days** after the end of a plan year in which a material modification that is not a material reduction in covered services or benefits is adopted. Material modifications include a change in carriers, eligibility requirements, or participant contributions. Alternatively, you can provide notice of a material modification via a Summary of Material Modifications (SMM) document during the same time period instead of a new SPD.
- Every **5 years** if changes are made to SPD information or the plan that are not material modifications or reductions in covered services or benefits.
- Every **10 years** if no changes are made to SPD information or the plan.

COVID-19-Related Deadline Extensions

Due to the COVID-19 pandemic, the federal government extended the time to furnish benefit statements and other notices and disclosures required under ERISA (such as the SPD), if good faith efforts are made to provide the documents as soon as administratively practicable. These deadlines were initially extended by disregarding an Outbreak Period from March 1, 2020, until 60 days after the announced end of the National Emergency (or such other date announced by the Departments). Under federal law, this period could not exceed one year, meaning that the relief was expected to expire on Feb. 28, 2021.

However, Disaster Relief Notice 2021-01 extends the relief beyond this date in some situations, while emphasizing that plan administrators should continue to make reasonable accommodations to prevent the loss of or delay in payment of benefits. The deadlines for individuals and plans subject to the initial relief are extended until the earlier of:

- One year from the date they were first eligible for relief; or
- 60 days after the announced end of the National Emergency (the end of the Outbreak Period).

On the applicable date, the time frames for individuals and plans with periods that were previously disregarded will resume. In no case will a disregarded period exceed one year.

Electronic Distribution

An SPD generally may be distributed electronically if the plan administrator takes steps to ensure that the system for furnishing documents results in actual receipt of the material. Ways to ensure receipt of an SPD include using return-receipt or notice of undelivered email features, or conducting periodic reviews or surveys to confirm receipt. In addition, in order to provide materials electronically:

- The administrator must take steps reasonably calculated to ensure that the system protects the confidentiality of personal information relating to the individual's accounts and benefits;
- The electronically delivered documents must be prepared and furnished in a manner consistent with the style, format and content requirements applicable to the particular document;
- Notice must be provided to each participant, beneficiary or other individual, at the time a document is furnished electronically, that informs the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., "The attached document describes changes in the benefits provided by your plan.") and of the right to request and obtain a paper version of such document; and
- Upon request, the participant, beneficiary or other individual must be furnished a paper version of the electronically furnished documents.

Unless an individual has the ability to effectively access documents furnished in electronic form at any location where the individual is reasonably expected to perform his or her duties as an employee, and access to the employer or plan sponsor's electronic information system is an integral part of an individual's job duties, he or she must **affirmatively consent** to receive documents through electronic media. In the case of documents to be furnished through the Internet or other electronic communication network, consent must be given 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. Prior to consenting, the individual must be provided with a clear and conspicuous statement indicating:

- 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 individual'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.

For more information on the requirements for distributing plan documents through electronic media, please click here.

Form 5500 Requirement

ERISA generally requires group health plans to annually file a report with the U.S. Department of Labor that contains financial and other information about the plan. This filing is made via **Form 5500**, and must be filed electronically by **July 31** using either the IFILE web-based filing system or an approved vendor's software. Among others, the following group health plans are generally exempt from the Form 5500 requirement:

- Fully insured group health plans with **fewer than 100 participants** as of the beginning of the plan year
- Unfunded group health plans with **fewer than 100 participants** as of the beginning of the plan year. An unfunded group health plan has its benefits paid as needed directly from the general assets of the employer that sponsors the plan.
- Group health plans sponsored by **churches**
- Group health plans sponsored by **governments**

Click here for more information on the Form 5500 requirement.

Summary Annual Report Requirement

Employers that are required to comply with the Form 5500 requirement must also provide each plan participant with a **Summary Annual Report**, which provides a narrative summary of the information in the Form 5500. The Summary Annual

Report generally must be distributed annually **within 9 months** after the end of the plan year. Model language for a Summary Annual Report is available here.

Fiduciary Requirements

ERISA also sets standards and rules governing the conduct of plan fiduciaries. In general, a "fiduciary" is any person who exercises discretionary authority or control over the management of a plan, or management or disposition of the assets of a plan. Among other things, fiduciaries must discharge their duties **solely in the interest of plan participants and beneficiaries.** Click here for more information on ERISA's fiduciary requirements.