



COMPLIANCE INSIGHTS

ERISA

Plan Documents and 5500 Filings

February, 2019

Overview

ERISA contains several reporting and disclosure obligations. The most prominent are the requirement to prepare and distribute a Summary Plan Description (SPD) and complete a Form 5500 filing annually for each ERISA “plan.”

How a plan sponsor chooses to structure underlying ERISA documents can determine the number of ERISA plans maintained by the employer/plan sponsor. This in turn establishes the number of required annual Form 5500 filings. These rules are discussed in detail below along with recommendations to simplify these ERISA reporting and disclosure requirements.

Plan Documents, Summary Plan Descriptions, and Wraps

Summary Plan Descriptions

ERISA requires virtually every employee benefit plan to have a summary plan description (SPD) and to furnish copies to each individual entitled to receive the SPD. There is no exception for small employers.¹

An SPD must be furnished to each participant and to each beneficiary receiving benefits under the plan. “Participant” means an employee or former employee of any employer who is or may become eligible for benefits under an ERISA plan or whose beneficiaries are or may be eligible for benefits. Because the definition is not limited to current employees, it generally includes COBRA qualified beneficiaries, covered retirees, and other former employees who may remain eligible under a plan.

For a participant newly covered under an existing plan, an SPD must be automatically furnished within 90 days after the participant first becomes covered. For new plans, the plan administrator must automatically furnish an SPD within 120 days after the plan first becomes subject to ERISA. An updated SPD must also be automatically furnished at least every five years if there have been material changes. If no material changes were made in the preceding ten-year period, a copy of the most recently distributed SPD must be furnished every ten years. Because of the pace of legal and regulatory changes these five and ten year distribution time frames seldom apply. Rather, documents are updated and provided far more frequently.

Summaries of Material Modification (SMM) or Reduction (SMR)

An SMM is a document disclosing Changes to an SPD and is required anytime there is a “material modification” in the terms of the plan or any change in the information required to be in the SPD. Except for a definition of a material reduction in group health plan covered services (discussed below), there is no guidance regarding when

¹ Governmental and church plans are exempt from ERISA reporting and disclosure obligations.

a modification is “material.” Generally, if an amendment changes the information required to be disclosed in an SPD, an SMM should be distributed. A plan administrator must furnish an SMM within 210 days after the end of the plan year in which a modification or change is adopted. However, most plans provide SMMs well before the 210 day statutory deadline. Most commonly, plan changes are made annually in connection with the underlying plan year or contract renewal and are communicated through Open Enrollment Materials, which should be labeled an SMM. This strategy keeps documents current and limits unnecessary communications. DOL treats all SMMs properly furnished but not yet incorporated into an updated SPD as part of the SPD.

Any modification or change to a group health plan that is considered a "material reduction in covered services or benefits provided under the plan," is treated slightly differently. Although such changes in connection with the underlying plan year or contract renewal can still be communicated through Open Enrollment Materials, mid-year material reductions require special communication. A material reduction is generally: (1) a change that reduces or eliminates benefits payable under the plan, including a reduction that occurs as a result of a change in formulas, methodologies or schedules that serve as the basis for making benefit determinations; (2) increased premiums, deductibles, coinsurance, copayments, or other amounts to be paid by a participant or beneficiary; (3) a reduction in the service area covered by a health maintenance organization; (4) new conditions or requirements (e.g., preauthorization requirements) required to obtain services or benefits under the plan.

With these or similar changes an SMM that is often captioned as a Summary of Material Reduction (SMR) must be provided no later than 60 days after the date of adoption of the modification or change. Again, the 60 day statutory timeline is seldom followed because participants have a right to advanced notice of any significant mid-year changes under general principles of contracts law. Specifically, a participant could argue they had a vested right to benefits as previously described until given notice of the change. Code §125 cafeteria plan election change rules also come into play when there are mid-year changes to coverage or cost that are significant. Under cafeteria plan election change rules a significant change to the cost or coverage of medical benefits allows for election changes and effectively creates an additional limited open enrollment opportunity. Because of these two principles, advance notice of significant benefits changes is generally required. The Affordable Care Act has a separate required benefits disclosure, a Summary of Benefits and Coverage (SBC). Under the ACA, if a change to a plan would change the information disclosed in the SBC, an updated SBC must be furnished 60 days in advance of the change.

A plan's SPD includes all the SMMs that have been provided but not yet incorporated into a new or updated SPD.

Plan Documents

In addition to the mandate to prepare and distribute SPDs, ERISA requires that a plan "be established and maintained pursuant to a written instrument." This seemingly separate mandate is the source of widespread confusion about whether there is a separate ERISA plan document requirement.

Historically, plan administrators took one of two approaches: (1) label the SPD as both an SPD and plan document, or (2) designate any carrier or TPA document describing benefits in detail as the plan document and then prepare an accompanying SPD that includes additional requirements and employer specific information (like legal agent for service of process). Note that even if a carrier or TPA document is labeled an SPD it will not satisfy SPD content requirements so a separate complete SPD is required.

A 2011 Supreme Court opinion created further confusion and led to a practice of creating separate plan documents that serve little purpose other than restating much of the SPD's required content. Although the question of whether ERISA requires two documents was not directly in dispute, the opinion included language that suggests that plan documents and SPDs must be separate documents.² It is not clear what impact this

opinion may have in future cases involving welfare plans. Rather than attempting to maintain a separate plan document that serves no practical purpose, an approach that meets the two documents requirement is to designate carrier or TPA documents describing actual benefits in detail as the plan document and then prepare an accompanying SPD. Although there are some concerns with designating a third party's document as the "plan document" this is the solution embraced by many if not most plan sponsors.

Wrap Documents

As discussed above, how a plan sponsor chooses to structure underlying ERISA documents can determine the number of ERISA plans maintained by the employer. If an employer maintains a separate SPD (or fails to maintain an SPD) for each ERISA benefit it will have several separate ERISA plans and each plan must file a separate Form 5500. To avoid repeating required SPD content across multiple separate SPDs for each benefit and to limit the number of required Form 5500 filings most employer/plan sponsors choose to "wrap" or bundle all of their ERISA plans by creating a single "wrap SPD."³ A wrap SPD will generally incorporate by reference the carrier or TPA materials for each underlying ERISA benefit and then provide all of the ERISA and employer specific content required for SPDs. Although an employer can choose to maintain as many or as few ERISA plans as they want, having as few ERISA plans as possible simplifies administration.

Cafeteria Plans

A cafeteria plan under Code §125 allows employees to pay for certain qualified benefits on a pre-tax basis through payroll deductions. A cafeteria plan must be maintained pursuant to its own separate written plan document. However, a cafeteria plan is not an ERISA welfare benefit plan, so no specific disclosure requirements apply to cafeteria plans themselves. Any ERISA benefits paid for with pre-tax dollars through a cafeteria plan (e.g., medical premiums or a health flexible spending account) are subject to ERISA, and the SPD requirement and other ERISA rules apply to these benefits. Also, the impact of the cafeteria plan rules, like irrevocable elections, on ERISA benefits funded through the cafeteria plan should be disclosed in the SPD or Wrap SPD for ERISA plan(s).

Form 5500 Filings and SARs

The primary reporting obligation under ERISA for welfare benefit plans is the annual Form 5500 filing with the Department of Labor (DOL). Form 5500 consists of a main body and various schedules.

Importantly, not all schedules are necessary for all plans. Several schedules are only required for self-funded plans that maintain a trust (e.g. Schedule Hand accompanying independent qualified public accountant's opinion). The only exception to the requirement to file Form 5500s is small unfunded (no trust) and/or insured plans with fewer than 100 participants at the beginning of the plan year.

Importantly, the 100 participant headcount is determined separately for each separately maintained ERISA plan. That means that a very small employer that does not have 100 covered participants on any one ERISA benefit may not want to wrap or bundle ERISA benefits if they would exceed the 100 participant count on all of their ERISA benefits combined. The unbundled ERISA plan could avoid the form 5500 filing requirement altogether while the bundled or wrapped plan would need to file a single form 5500. On the flip side, a growing organization that chooses to file single 5500s as their various plans pass the 100 participant threshold, rather than bundle benefits into a single plan, could end up with numerous 5500 filings for a single plan year.

Form 5500 is due seven months after the end of the plan year. This means that regular filing deadline for calendar-year plans is July 31 of the year following the plan year to which the Form 5500 relates. An extension of up to 2-½ months is available for employers that request an extension using Form 5558 (Application for Extension of Time to File Certain Employee Plan Returns). Form 5558 must be filed with the IRS (not with the DOL) before the standard

² CIGNA Corp. v. Amara, 131 S. Ct. 1866, (2011).

³ ERISA plans could also be wrapped or bundled at the plan document level if an employer choose to create and maintain a separate underlying plan document separate from any carrier or TPA documents.

5500 filing deadline. Thus, a calendar-year plan with the 2-½ month extension must file no later than October 15. All Form 5500s must be filed electronically through DOL's [EFAST2 Filing](#) webpage.

Form 5500s that are filed late or not at all can use the DOL's [Delinquent Filer Voluntary Compliance](#) (DFVC) Program to come into compliance with reduced penalties. For most plans the applicable penalty for a late filing is \$10 per day for each day the report is late not to exceed \$2,000. If there is more than one delinquent filing for the same plan, the maximum penalty amount is \$2,000 for each annual filing not to exceed \$4,000 per plan.

Plan administrators are required to provide participants with a summary annual report (SAR) that describes the content of the Form 5500 each year. SAR(s) must be furnished within nine months of the end of the plan year. If an extension to file the Form 5500 is obtained, the plan administrator must furnish the SAR within two months after the extension. Notably, the SAR requirement also applies to the year in which the plan terminates even if there are technically no covered participants at the time of the SAR distribution.

Furnishing ERISA Documents and Disclosures

SARs, SPDs and SMMs can be provided directly to participants (in hand delivery), by mail (preferably first class mail) or electronically if certain safe harbor conditions are met. Electronic disclosure is permitted for participants with regular daily access to workplace computers as an integral part of employment duties. Otherwise, electronic disclosure requires express written pre-consent meeting format and content requirements. Leaving documents in common workplace break room or providing access via a computer kiosk will not satisfy ERISA's disclosure requirements. For a more detailed discussion of the DOL electronic Disclosure safe harbor see our summary, [Electronic Disclosure Guidelines](#).

Penalties

Although ERISA does not impose a penalty for failing to have a written plan document, a penalty of up to \$110 per day may be triggered if a plan document is not distributed within 30 days of a participant's written request. Under ERISA's general enforcement provisions, participants and beneficiaries may bring a lawsuit to enforce the disclosure requirement and potentially the breach of fiduciary duty. In addition, during a DOL audit, the DOL investigator will require an employer to present all applicable plan documents. Criminal penalties may be imposed on any entity that willfully violates any disclosure requirement under Title I of ERISA, which includes the plan document rules. The penalty per conviction could be up to \$100,000 or imprisonment for up to ten years. A fine imposed on a company can be increased up to \$500,000.

Conclusion

The most basic level of health and welfare plan compliance is to ensure that SPDs or a proper wrap SPD is in place and that Form 5500(s) are timely filed. Employer/plan sponsors should know how many ERISA plans are in place and make strategic decisions as to how many plans should be separately maintained or consolidated. Properly distributing SPD, SMMs and SARs is also critical. Employer/plan sponsors should understand electronic distribution rules and acquire additional consents to electronic distribution when necessary to limit costly and sometimes voluminous paper mailings.

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Rev. 02-2019

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