

ERISA Plan Documents & SPDs

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Summary

01

Employee Retirement Income Security Act (ERISA)

ERISA Coverage

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



ERISA Coverage

THE BASICS

Applies to Pension Plans and 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 certain specified benefits (next slide)

ERISA Coverage



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 daycare 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's 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 (i.e., pre-tax contributions)
- Assist employees with claims



Examples:

- Individual fixed indemnity policies
- Individual critical illness policies
- Individual hospitalization policies
- Individual accident policies

02

Plan Documents

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 a self-insured health plan to maintain tax-qualified status.
- The formal written plan creates the promise to pay for covered benefits.



Plan Document

REQUIRED CONTENT



- Named fiduciary and allocation of fiduciary duties
- 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 healthcare 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 Child Support Orders and minimum hospital stays following childbirth.

Plan Document

ADDITIONAL SUGGESTED PROVISIONS

- Provisions corresponding to required content of SPD (e.g., benefits provided, eligibility requirements, etc.)
- 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 healthcare 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



Plan Document

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 (SPD), 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

03

Summary Plan Description (SPD)

Summary Plan Descriptions (SPDs)

SPD REQUIREMENTS

ERISA § 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” (plans covering only a select group of management or highly compensated employees)

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 (SPDs)

REQUIRED CONTENT (ERISA §102(B); DOL REG. §2520.102-3)

- The plan name
- The Plan Sponsor/employer's name, address and EIN
- For plans maintained by two or more employers, the association, committee, joint board of trustees, parent or most significant employer of a group of employers all of which contribute to the same plan and a statement regarding the availability of information regarding the participating employers
- 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 the principal place of business, if the plan has a trust

Summary Plan Descriptions (SPDs)

REQUIRED CONTENT (ERISA §102(B); DOL REG. §2520.102-3)

- 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 Plan 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 (SPDs)

REQUIRED CONTENT (ERISA §102(B); DOL REG. §2520.102-3)

- 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)
- 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 (SPDs)

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 (SPDs)

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 Child Support Orders
- Preexisting condition exclusion (if applicable), HIPAA special enrollment rules, and Mental Health Parity and Addiction Equity Act (MHPAEA)
- ACA required notices
 - » Notice of Patient Protections
 - » Grandfathered status

Summary Plan Descriptions (SPDs)

OPTIONAL CONTENT

-  Disclosure regarding the fiduciary's discretionary authority to interpret plan
-  Language indicating 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
-  Statement regarding plan sponsor's right to amend or terminate the plan at any time
-  Language reflecting that the plan is not a contract and does not guarantee future employment with the plan sponsor

Summary Plan Descriptions (SPDs)

LANGUAGE ASSISTANCE REQUIREMENTS

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 the start of the 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 the 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 participants literate only in non-English language with an English-language SPD and a notice in the non-English language offering them assistance and the procedures for obtaining such assistance
- Written materials (such as a translated SPD) are not required
- Must be calculated to provide participants with a reasonable opportunity to become informed as to their rights and obligations under the plan

Summary Plan Descriptions (SPDs)

GENERAL DISTRIBUTION REQUIREMENTS

- SPD and any Summaries of Material Modifications (SMMs) that are not incorporated into the SPD 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 (SPDs)

REQUIRED DISTRIBUTION TIMING



SPD must be distributed:

- Within 30 days of a request by a participant or beneficiary
- **New Plans** – within 120 days after the 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 five (5) years unless there have been no changes, in which case SPD must be redistributed every ten (10) years

Summaries of Material Modification (SMMs)

REQUIRED DISTRIBUTION TIMING

- 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, it must be furnished no later than 60 days after the date on which the 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 obtain services or benefits under the plan



SPDs and SMMs

DISTRIBUTION METHODS

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 a location frequented by participants is insufficient
 - » Plan sponsors using hand delivery may wish to obtain signed receipt from employees
 - » Other distribution methods may be required for participants not actively at work with the plan sponsor
- Mail
 - First-class mail to last known address
 - Electronic Distribution (including email distribution and posting document on website (e.g., intranet or internet)
 - » The following rules on the next slide generally apply to distribution of any document required by ERISA unless special electronic distribution rules apply (e.g., SBC)
- Rules under review by DOL (new rules issued for retirement plans in 2020)

SPDs and SMMs

DISTRIBUTION METHODS

- Safe harbor for electronic distribution
 - » Electronic disclosures permitted without prior consent to participant:
 - (1) who 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.
- Electronic disclosures for other participants permitted only with prior consent
 - » 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

SPDs and SMMs

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 the participant must provide an email address for the receipt of electronically furnished documents
- Prior to obtaining consent, the 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.

SPDs and SMMs

CONSEQUENCES OF FAILURE TO DISTRIBUTE

- No specific monetary penalties unless the 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 standard of review when a court reviews a benefit decision

04

Wrap Documents and Wrap SPDs

Wrap Documents

MAIN PURPOSE

A wrap is used to fulfill one or more plan document obligations imposed by ERISA.

- We will discuss these obligations and the ways wraps can be used to fulfill them in detail in future slides



Wrap Documents

WHAT IS A “WRAP?”

- The term “wrap” is made up
 - » You won’t find it in the rules and regulations
 - » It is referenced in the Form 5500 instructions
- “Wrap” is used to describe a number of different documents that serve a number of different purposes
- For plans subject to ERISA, there are two main documents for which a wrap is utilized:

1

Formal Plan Document

2

Summary Plan Description

Wrap Documents

TYPES

Consolidated Wrap (aka “5500 Wrap”)

- Wrap document combines multiple policies/lines of coverage into a single ERISA welfare benefit plan
 - » Fulfills requirement for establishment under a “written plan” as required by ERISA and § 105 (i.e., self-funded plans), and
 - » Enables filing one Form 5500 for reporting all underlying component benefits.

Wrap SPD

- Incorporates multiple benefit summaries and carrier certificates by reference into a single plan SPD to fulfill ERISA disclosure requirements
- Fills in content gaps to meet content requirements – carrier certificates and policies rarely include information pertaining to:
 - » Plan Name
 - » Plan Number
 - » Plan terms and conditions, such as eligibility and benefits
 - » Named fiduciary
 - » Plan amendment procedures
 - » Plan payment and plan funding provisions

Wrap Documents

TYPES

Required Information Wrapper (Mini-Wrap)

- Wrapper plan document incorporates policy and certificate to create ERISA welfare benefit plan
 - » Fulfills requirement for establishment under a “written plan” as required by ERISA and § 105 (i.e., self-funded plans)

Wrapper SPD

- Used when the benefit is treated as an independent ERISA plan (not included in a consolidated wrap) and the coverage certificate and other plan materials do not contain required disclosures to constitute an SPD
- Provides necessary elements of an SPD to an already existing document, such as a coverage certificate or benefits guide and incorporates carrier certificate by reference
- Fills in disclosure gaps (required information) to satisfy SPD content requirements not included in carrier certificates

SPDs for Wrap Plans

Why use separate wrapper SPDs instead of a single document that can act as an SPD for all ERISA benefits?

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.

“Mega” Wrap

Using a single document that operates as both the Plan Document and SPD (often referred to as a “Mega” wrap).

- ERISA defines the SPD as a plain language summary of the information contained in the plan document
 - » It remains unclear whether this is a viable option as it’s unclear whether or not a document can summarize itself
- Some vendors offer a mega wrap document because the required terms for the formal Plan Document and SPD are so similar
 - » Many compliant SPDs satisfy the formal Plan Document requirement
- If a mega wrap document is used, the document should explicitly state it is meant to operate as both the formal plan document and the SPD

05

Summary

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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