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ERISA Basics for Health Plans

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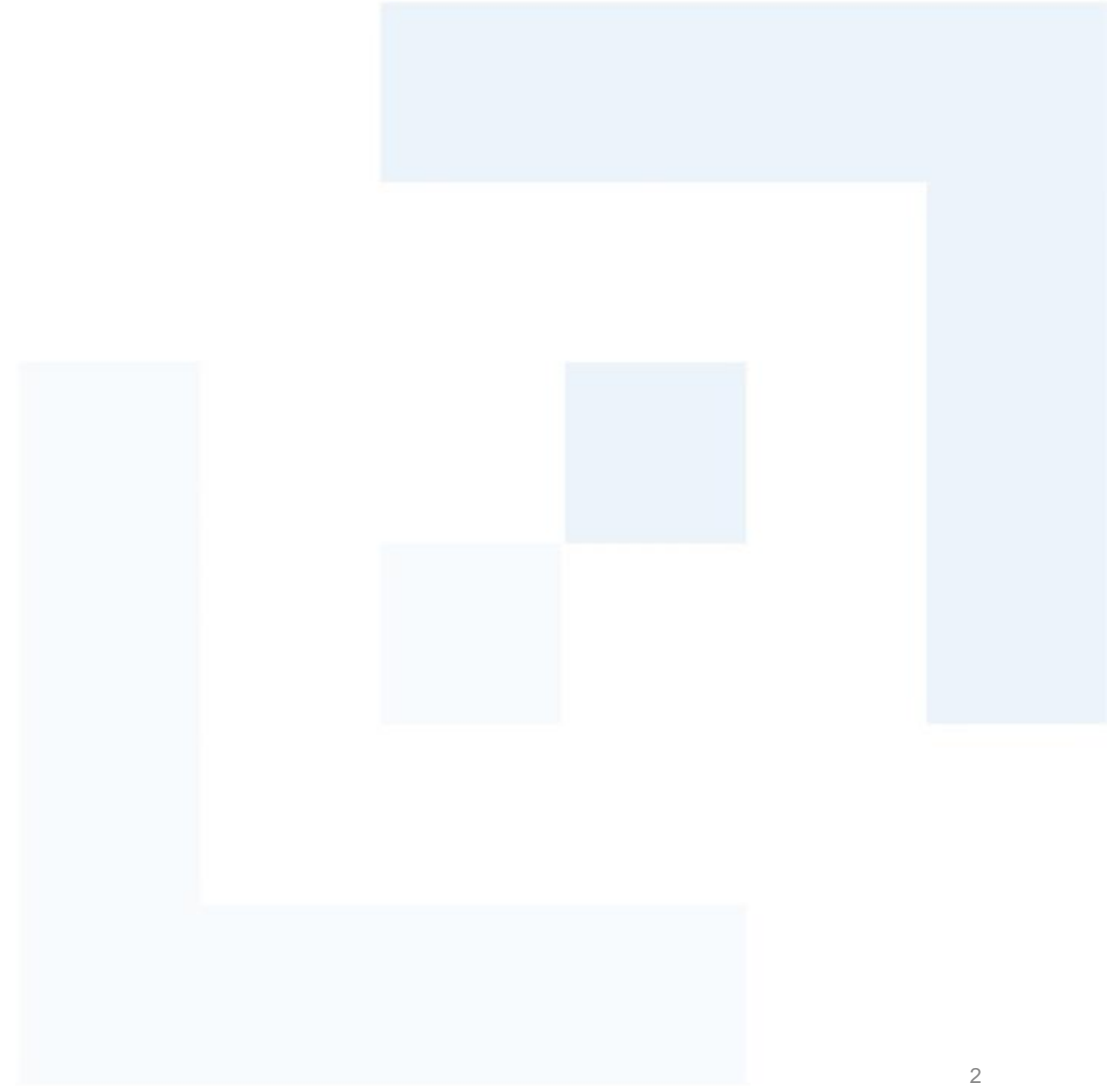
Presenter



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Topics of Discussion

- Introduction to ERISA
- When Does ERISA Apply?
- Consequences of ERISA Coverage
- Plans, “Wrap” Plans, and SPDs
- Emerging ERISA Issues & Best Practices

What is “ERISA”?

- Employee Retirement Income Security Act of 1974
 - Pension plans
 - Welfare plans (including health plans)
- ERISA does not *require* employers to provide benefits, but applies when most employers decide to do so
- Key requirements:
 - Written plan document
 - Summary plan description (SPD)
 - Notices and disclosures
 - Annual report (Form 5500) for large plans (100+ participants)
 - Fiduciary duties

ERISA is a federal law governing certain retirement and health plans that are sponsored by employers. It is premised on the common law of trusts.

Plans Subject to ERISA

- **ERISA applies to “welfare benefit plans”**
 - Plan, fund, or program
 - Established or maintained by an employer, employee organization, or both
 - For purposes of providing one or more enumerated benefits
 - Medical, surgical, or hospital
 - Sickness, accident, disability, death, or unemployment
 - Vacation
 - Apprenticeship or training
 - Daycare center
 - Scholarship funds
 - Prepaid legal services
 - Holiday and severance
 - Housing assistance

Exemptions

- **ERISA does *not* apply to:**
 - Governmental and church plans
 - Plans maintained *solely* to comply with state workers' compensation, unemployment, and disability laws
 - Plans maintained outside the U.S. for nonresident aliens
 - Normal “payroll practices” (e.g., overtime, holiday pay, sick pay, vacation pay, jury duty) if:
 - Paid out of employer’s general assets
 - Paid only to employees
 - Certain voluntary “employee-pay-all” arrangements
 - Employer must not endorse the arrangement

Certain arrangements are not subject to ERISA pursuant to statutory and regulatory exemptions.

Voluntary Benefits

- **A group insurance program is not an ERISA welfare plan if:**
 - Participation is completely voluntary;
 - The employer does not:
 - Make any contributions (pre-tax contributions through cafeteria plan are considered employer contributions);
 - Receive any consideration in connection with the program, other than reimbursement of administrative expenses; and
 - The employer’s sole functions, without endorsing the plan, are to:
 - Permit an insurer to publicize the plan, and
 - Collect premiums through after-tax payroll deductions and remit them to the insurer

Voluntary benefits that are not “endorsed” by the employer may not be subject to ERISA.

Common ERISA Welfare Plans

- Medical
- Prescription drug
- Dental
- Vision
- Medical Flexible Spending Account (FSA)
- Health Reimbursement Account (HRA)
- Wellness Programs
- Life Insurance
- AD&D
- Short-Term Disability
- Long-Term Disability
- Employee Assistance Program (EAP)
 - If provides “medical” benefits
 - Many do (e.g., certain number of paid counseling visits)

Key Terms

- **Welfare Benefit Plan**
 - Plan or program maintained by an employer to provide benefits (e.g., medical, disability) to employees
- **Participant**
 - Employee (or former employee or retiree) who is eligible to receive benefits from the plan
- **Beneficiary**
 - Person eligible to receive benefits from the plan, including spouse/dependents of eligible employee
- **Plan Sponsor**
 - The employer that establishes and maintains the plan
- **Plan Administrator**
 - Person or entity designated to administer the plan
 - Legally responsible for many ERISA requirements
- **Third-Party Administrator**
 - Service provider hired to administer the plan and/or pay claims (“claims payer”)
 - Often *not* the Plan Administrator
- **Fiduciary**
 - Person or entity with legal responsibility for a plan under ERISA
 - “Named fiduciary” and “functional fiduciary”
- **VEBA Trust**
 - Voluntary Employees’ Beneficiary Association (VEBA)
 - Tax-exempt trust funded by the employer and used to pay eligible plan expenses

Consequences of ERISA Coverage

- **Preemption of state law**
 - Federal law (ERISA) generally supersedes state laws and regulations for ERISA plans
- **Special duties for ERISA “fiduciaries”**
 - “Named” fiduciaries
 - “Functional” fiduciaries
 - Personal liability for breaches
- **Statutory and regulatory requirements for ERISA “plans”**

The U.S. Department of Labor has regulatory authority over ERISA plans.

Who Are “Fiduciaries”?

- **Named Fiduciaries**
 - Every ERISA plan document must identify one
 - May be a person, committee, board of directors, or entity
 - Often the employer or plan sponsor
- **Functional Fiduciaries** ... Anyone who:
 - Exercises any ***discretionary authority or control*** over plan management
 - Exercises ***any authority*** or control over plan assets
 - Has any ***discretionary responsibility*** over plan administration
 - Renders ***investment advice*** for a fee regarding plan assets

ERISA regulates the conduct of “fiduciaries.”

Fiduciary Duties

- **Exclusive Benefit Rule**

- Fiduciaries must discharge their duties solely in the interest of participants and beneficiaries, and ...
- For the exclusive purpose of:
 - Providing benefits, or
 - Defraying reasonable expenses of plan administration

- **Prudent Expert Rule**

- Fiduciaries must act with the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent person acting in a like capacity *and familiar with such matters* would use in the conduct of an enterprise of a like character and with like aims

Fiduciary Duties

- **Plan Document Rule**
 - Fiduciaries must act in accordance with the documents and instruments governing the plan
- **Duty to Inform**
 - Fiduciaries have an obligation to provide required information about the plan and to distribute accurate and complete information
- **Duty to Monitor**
 - Fiduciaries must monitor other fiduciaries and service providers

Fiduciary Liability

- Personal Liability
 - Fiduciaries can be liable for restitution, disgorgement, and other equitable relief
 - Liable “to the extent” person is a fiduciary
- Co-Fiduciary Liability
 - Knowingly participate in breach
 - Enable others to breach
 - Fail to remedy known breach
- Risk Mitigation
 - Fiduciary liability insurance
 - Plan sponsor indemnification
 - Delegation of fiduciary functions

ERISA fiduciaries can be personally liable to the plan and its participants for violating their duties.

Common Fiduciary Acts

- Selecting TPA, PBM, and other service providers (self-funded plans)
- Selecting and monitoring consultants (all plans)
- Interpreting eligibility rules (all plans)
- Managing investment of plan assets (self-funded plans with assets in trust)
- Deciding claims (if discretion is exercised)
- Deciding appeals
- Choosing insurer (for fully insured plans)?

Not all actions related to ERISA plans are “fiduciary” in nature. The decision to establish or terminate a plan, and the determination of a plan’s particular terms, are “settlor” acts that are not subject to ERISA’s fiduciary duties.

Statutory Requirements

- Plan Document
- Summary Plan Description (SPD)
- Summary of Material Modifications (SMM)
- Summary of Benefits and Coverage (SBC)
- Summary Annual Report (SAR)

Health plans that are governed by ERISA are subject to a number of statutory requirements.

Plan Document

- **ERISA requires a *written plan document***
- **Governing document for the terms and rules of the Plan**
 - Eligibility (who and when?)
 - Plan design (self-funded v. insured, benefits offered)
 - Identifies plan administrator, sponsor, additional required information
- **Self-funded**
 - Employer or TPA maintains plan document
 - Sometimes the benefit summary treated as the plan
- **Insured**
 - Insurance carrier maintains plan document
 - Generally the insurance policy is the “plan”

Self-Funded v. Insured

- Employers may self-fund or insure benefits (e.g., group health plans)
 - Insured: policy with an insurance carrier
 - Premiums paid to insurer
 - *Insurer* pays and administers claims
 - **State insurance laws apply to policy**
 - Risk is transferred to insurer
 - Self-Funded (or “self-insured”): employer pays claims
 - Claims paid from employer’s general assets, from a VEBA trust, or from a separate account
 - Employer retains risk
 - **ERISA preempts state laws**

Self-funded ERISA welfare plans generally are not subject to state insurance laws because ERISA “preempts,” or supersedes, those state laws.

What is a “Plan”?

- Whether a plan sponsor maintains one or more “plans” is based on the terms of the written plan document(s)
- A single ERISA welfare benefit “plan” may include multiple benefits (i.e., health, dental, vision, Rx drug, LTD, STD, life, AD&D, LTC, EAP, etc. may be combined in a single ERISA “plan”)

“Wrap” Plan Documents

- A “wrap” plan document may be:
 - Additional language designed to “wrap around” and incorporate the terms of a single insurance policy, services contract, or benefit description (so that the combined documents will satisfy the ERISA “plan document” requirements); or
 - A document that wraps several different benefits into a single ERISA plan; or
 - A combination of the above

Why Use a “Wrap” Document?

- **Reduce number of Forms 5500**
 - Allows employer to treat multiple benefits as single ERISA “plan”
- **Ensure that employer’s documentation satisfies ERISA’s requirements for plan document and/or SPD**
 - Most insurance policies and service contracts don’t qualify as plan documents
 - Most insurance certificates and benefit descriptions don’t qualify as SPDs
- **Will be important in the event of a DOL audit**
- **May also prove useful in litigation**

Summary Plan Description (Overview)

- **Summarizes key terms of the Plan Document**
 - Eligibility
 - Benefits
 - Claims and Appeals
- **Main source of information for participants**
 - Must be written to be understood by average plan participant
- **Must explain claims procedures**
- **Must list ERISA rights** (and other “boilerplate”)
- **Plan administrator must furnish to participants**
- **May have different SPDs for different groups of participants**

Summary Plan Description (Timing)

- **Distribute to new participants within 90 days**
 - Include SPD in new employee materials
- **Provide an updated SPD every 5 years**
 - If no changes, update every 10 years
- Self-funded
 - Employer or TPA maintains/distributes SPD
- Fully insured
 - Insurance carrier maintains/distributes SPD

“Wrap” SPD

- A “wrap” SPD may be either:
 - A document designed to be provided along with a single certificate or benefit description, so that the combined documents will satisfy the ERISA SPD requirements; or
 - A document that wraps multiple certificates or benefit descriptions into a single SPD for a multiple-benefit “plan”

Emerging ERISA Issues

- **Enhanced Transparency**
 - Consolidated Appropriations Act
 - Transparency in Coverage regulations
 - Service provider fee disclosures
 - PBM fees
- **Litigation Risks**
 - DOL litigation (*Su v. BCBS of MN*)
 - Blue Cross litigation (*Mass. Laborer's v. BCBS*)
 - Aetna litigation (*Kraft Heinz v. Aetna*)
 - Johnson & Johnson litigation (*Lewandowski v. Johnson & Johnson*)
 - Drug costs (*Int'l Union of Operating Engineers v. Eli Lilly*)
- **Focus on Plan Governance**

Best Practices

- **Committee Structure**
 - “Intentional” fiduciaries
 - Reduced risk to outside directors and executives
 - Formal committee charter
 - Minutes and process
- **RFPs for Service Providers**
 - Prudent expert standard
 - Look under the hood
- **Compensation Disclosures**
 - ERISA § 408(b)(2)
 - Request disclosures in advance of new or renewing contract

Questions?



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Bankruptcy, Restructuring, and Creditors' Rights
Corporate and Business Transactions
Data Privacy and Cybersecurity
Employee Benefits
Energy Law
Environmental Law
Family Law
Governmental Affairs
Health Care
Higher Education
Intellectual Property
K-12 Education Law
Labor and Employment
Litigation and Dispute Resolution
Mergers & Acquisitions
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