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ERISA Benefit Plan Wraps, SPDs and New ACA Mandates

Structuring and Amending Compliant Plan Wraps, SPDs and Notices

TUESDAY, OCTOBER 8, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Stephen F. Herbes, Assistant General Counsel, **1199SEIU National Benefit & Pension Funds**, New York

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That's a Wrap!

USING WRAP PLAN DOCUMENTS AND SPDS WITH ERISA WELFARE PLANS

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Agenda

- When ERISA Applies
- What ERISA Requires
- What are Wrap Plans and Wrap SPDs
- Why Have a Wrap Plan and SPD
- What a Wrap Plan and SPD Should Include
- Wrap Document Drafting and Planning Considerations
- Questions

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Who Is Subject to ERISA?

- ERISA applies to private employers
  - Note: ERISA does not have a small employer exception
- ERISA generally does not apply to government employers, Indian tribal governments, or churches
  - Churches can elect to be subject to ERISA

What Is Subject to ERISA?

- Employee Welfare Benefit Plans or Welfare Plans
- Employee Pension Benefit Plans or Pension Plans

Employee Welfare Benefit Plans

"any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefits described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)"

-ERISA § 3(1)

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“any plan, fund, or program”

- intended benefits
- class of beneficiaries
- source of financing
- a procedure to apply for and collect benefits

- *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982)

DOL Safe Harbor

A group or group-type insurance program will not be subject to ERISA if:

- no contributions are made by employer or employee organization
- participation is completely voluntary
- employer's or employee organization's sole function is to allow insurer to publicize program, collect premiums, and remit to insurer

Payroll Practice Safe Harbor

- Payment of wages, overtime pay, shift premiums, and holiday or weekend premiums does not create ERISA plan
  - Bonuses are generally not considered ERISA plans unless bonuses systematically deferred till end of employment
- Payment of sick pay out of general assets does not create ERISA plan
  - Creation of separate account to hold assets (*e.g.*, TPA account) could create ERISA plan

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Other Regulatory Exemptions

- On-Premises Facilities (e.g., recreation, dining, etc.)
- Holiday Gifts (e.g., turkeys, hams, etc.)
- Sales to Employees of Employer Articles or Commodities (e.g., store discounts)
- Remembrance Funds (e.g., flowers or small gifts)
- Hiring Halls
- Unfunded Scholarships or Educational Assistance Programs

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Examples of Welfare Plans

- Accidental Death and Dismemberment Insurance
- Apprenticeship Programs
- Business Travel Accident Policies
- Day-Care Centers
- Dental Plans
- Disability Benefits (some)
- Disease-Management Programs
- Drug and Alcohol Treatment Programs

Examples of Welfare Plans

- Employee Assistance Plans (some)
- Flu-Shot Programs Group Term Life Insurance
- Health Flexible Spending Arrangements (Health FSAs)
- Group Health Insurance Plans
- Health Reimbursement Arrangements (HRAs)
- Prepaid Legal Plans
- Prescription Drug Plans
- Severance Pay Plans (some)
- Smoking Cessation Programs (some)

Examples of Welfare Plans

- Vision Plans
- Weight Loss Programs (some)
- Wellness Programs

What Parts of ERISA Apply?

- Part 1 of Title I of ERISA (reporting and disclosure requirements)
- Part 4 of Title I of ERISA (fiduciary responsibility provisions)
- Part 5 of Title I of ERISA (administration and enforcement provisions)

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What Parts of ERISA Apply?

Health-related employee welfare benefit plans may also be subject to:

- Part 6 of Title I of ERISA (continuation coverage provisions)
- Part 7 of Title I of ERISA (health care provisions)

ERISA Welfare Plans

- Must have a written plan document
- Must have a summary plan description (SPD)
- May have to provide a summary of benefits and coverage (SBC)
- Are subject to annual Form 5500 reporting, unless an exemption applies

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Wrap Plan

- Wrap plan document: allows plan sponsor to "wrap" or bundle its various ERISA welfare plans into a single plan
- Creates a single employee welfare benefit plan, for ERISA purposes
- Incorporates the various benefit program components by reference
- AKA: umbrella plan, multi-wrap, big wrap plan
  - As opposed to a "mini" wrap-around plan or SPD for a single benefit program

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Wrap Plan

- Most common types of plans to wrap:
  - Medical
  - Dental
  - Vision
  - Health care flexible spending account (FSA)
  - Short-term disability (if ERISA)
  - Long-term disability
  - Life and AD&D
  - Employee assistance plan (EAP) (if ERISA)

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Wrap Plan

- How is the Wrap Plan document formatted?
  - No legally required format
  - One option:

  A. Main plan document: contains all the requirements for an ERISA plan document or applicable cross-references, plus other recommended provisions
    - e.g., "ABC Company Welfare Benefits Plan"

  - plus…

Wrap Plan

- How is the Wrap Plan document formatted?
  - B. Appendices: list and provide the various component benefit programs that are wrapped
    - e.g., "Participating Plans/Programs"
    - Insurance contracts, certificate of insurance booklets, and other plan descriptions should be incorporated by reference in the wrap plan document and attached to it

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Wrap SPD

- Wrap SPD "wraps around" the benefit booklets for each component plan
- Fills in required and recommended provisions that booklets/summaries do not contain
- Wrap SPD gets distributed along with the benefit booklets/guides to make a complete SPD that satisfies ERISA

Why Wrap?

- Fill in the gaps of policies/booklets
  - ERISA/legal requirements
  - Best practices and recommended provisions
- Administrative ease
  - Form 5500s
  - Summary Annual Reports
- Straighten up documentation and administration

Written Plan Document Requirement

- Every employee welfare benefit plan must be established and maintained pursuant to a written plan document

  (ERISA § 402(a)(1))

Written Plan Document Requirement

- Plan document must:
  - name a fiduciary who will control and manage operation and administration of plan
  - contain a procedure for establishing and carrying out funding policy and method consistent with Title I of ERISA and plan's objectives
  - describe a procedure for amending plan and for identifying individuals with authority to amend plan

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Written Plan Document Requirement

- Plan document must:
  - describe the allocation of plan operation and administration responsibilities
    - enumerated powers of the plan administrator
      - to construe and interpret the plan
      - to decide claims
      - to delegate authority to others
    - description of the plan committee (if applicable) and how it will operate

Written Plan Document Requirement

- Plan document must:
  - describe a procedure for benefit claim denials and "full and fair" review of denials
  - describe the basis on which payments are made to and from plan
  - describe how plan assets will be distributed on plan termination

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Written Plan Document Requirement

- Additional provisions for group health plans:
  - HIPAA privacy and security provisions
  - HIPAA portability provisions (*e.g.*, special enrollment, nondiscrimination)
  - COBRA and USERRA discussion (*e.g.*, COBRA continuation coverage)

Written Plan Document Requirement

- Additional for group health plans:
  - Qualified Medical Child Support Order (QMCSO)
  - Minimum hospital stays following childbirth(Newborns' and Mothers' Health Protection Act)
  - Womens' Health and Cancer Rights Act (WHCRA) notice (reconstructive surgery following mastectomy)
  - Mental health parity disclosures
  - State law continuation rights (if applicable)

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Written Plan Document Requirement

- Additional provisions:
  - Eligibility (cross-reference)
  - Benefits (cross-reference)
  - Exhaustion of claims/appeals procedure
  - Statute of limitations for bringing legal action
  - Governing state law
  - No guarantee of tax consequences

Written Plan Document Requirement

- Additional provisions:
  - Subrogation, reimbursement and/or coordination of benefits provisions
  - No contract of employment
  - Exclusion of independent contractors language
  - Allow the use of plan assets to pay administrative expenses
  - Adopting/participating employers
  - Grandfathered status (if applicable)

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Summary Plan Description Requirement

- Employer must provide plan participants and beneficiaries with a summary of the plan ("summary plan description" or "SPD")
  - Plan administrator is responsible, not TPA or insurer
  - SPD must be provided to COBRA qualified beneficiaries, QMCSO alternate recipients, and representatives or guardians of incapacitated persons
    - Best practice is to send to spouses and dependents of deceased participants still entitled to benefits
  - DOL Reg. § § 2520.102-2 – 2520.102-3

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Summary Plan Description Requirement

- Timeframe
  - 90 days for new participants
  - 120 days for new plans
  - 5 year update if material changes to plan
- Delivery method
  - First-class mail or second- or third-class mail with return/forwarding postage guaranteed and address correction requested
  - Company publication
    - Cover must include notice that SPD is included

Summary Plan Description Requirement

- Electronic disclosure (e.g., email, company website)
  - Must comply with DOL Safe Harbor. See DOL Reg. § 2520.104b-1(c)
- ERISA sets forth specific SPD content, notice, and format requirements
- Wrap SPD: combines with the various benefit booklets to form an ERISA-compliant SPD

Summary Plan Description Requirement

- Summary Plan Description must include:
  - plan name
  - name and address of employer
  - plan sponsor EIN
  - name, address, and phone number of plan administrator
  - name, address, and phone number of agent for service of legal process
  - plan number

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Summary Plan Description Requirement

- Summary Plan Description must include:
  - plan year
  - plan type (*e.g.*, medical, dental, etc.)
  - plan administration type (*e.g.*, insurer, TPA, self-administered)
  - plan contributions and funding
  - plan administrator’s authority (discretion to interpret plan, decide benefits, delegate to others)

Summary Plan Description Requirement

- Summary Plan Description must include:
  - statement of ERISA rights
  - statement about controlling document(s)
  - information about plan trustees and collective bargaining agreements (if either are applicable)
  - description of plan amendment and termination provisions
  - wrap SPD should identify which plans/programs/benefits the wrap SPD applies to

Summary Plan Description Requirement

- Wrap SPD items that *may* be cross-referenced:
  - information about plan eligibility
  - claims procedures and limitations on bringing suit
  - subrogation, coordination of benefits, recovery, etc.
  - description of circumstances resulting in loss/denial of benefits
  - description of plan benefits

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Summary Plan Description Requirement

- Additional for group health plans:
  - disclosures around: COBRA, HIPAA, Affordable Care Act, GINA, USERRA, WHCRA, etc.

    → review the booklets to determine what can be cross-referenced and what should appear in wrap SPD
  - other requirements specific to group health plan SPDs, such as detailed description of benefits: co-pays, conditions covered, limits, exclusions, etc.

    → cross-reference to booklets

Summary of Benefits and Coverage Requirement

- Affordable Care Act requires delivery of Summary of Benefits and Coverage (SBC)
  - Health insurance issuer must provide SBC to plan sponsor
    - Seven days after receipt of health coverage application
  - Health insurance issuer or plan administrator must provide SBC to participants and beneficiaries
    - No later than first date participant is eligible to enroll himself or beneficiary in coverage
    - No later than first day of coverage (if changes made to SBC between enrollment and coverage date)

Summary of Benefits and Coverage Requirement

- Health insurance issuer or plan administrator must provide SBC to participants and beneficiaries
  - No later than 90 days from enrollment (if individual entitled to special enrollment under IRC)
  - Either on the date written renewal application materials distributed to plan sponsor (for benefit options in which participant or beneficiary is enrolled) or 30 days prior to first day of new policy year (for automatic renewal)
  - Within 7 business days after request
- Single SBC can be sent to participants and beneficiaries at same address

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Summary of Benefits and Coverage Requirement

- Content
  - Regulations describe content and form of SBC
    - Uniform definitions, description of coverage, description of cost-sharing provisions, information about continuation of coverage, premium information, examples, etc.
    - 12-point or larger fond
    - Four double-sided pages
    - Notice of language services and written translation of SBC in non-English language upon request in certain counties
  - For coverage on or after January 1, 2014, SBC must include statement as to whether plan provides minimum essential coverage and whether plan pays at least 60% of total benefit costs

Summary of Benefits and Coverage Requirement

- Model SBC is available on DOL website

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Penalties for Non-Compliance

- Participants, beneficiaries, or fiduciaries can sue to enforce ERISA's written plan document requirement (ERISA § 502(a)(3))
- Plan administrator can be charged up to $110 per day per participant for failing to provide copy of written plan document or SPD within 30 days of request

  (ERISA § 502(c)(1); DOL Reg. § 2575.502c-1)

Penalties for Non-Compliance

- Any individual or company that willfully violates written plan document requirement could be subject to fine of $100,000 or 10 years imprisonment, or both (ERISA § 501)
  - If fine is imposed on a company, it can be increased to $500,000

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Penalties for Non-Compliance

- Gaps in plan documentation invite the courts to decide the plan terms for you
  - *e.g.*, employer's authority to construe and interpret the plan terms, discretion to determine benefits and payments
- Various notice/disclosure/administration violations can lead to excise taxes/penalties
  - *e.g.*, Form 8928 requires self-reporting of excise taxes for certain COBRA, HIPAA, Affordable Care Act violations

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DOL Audits

- Increased audit activity around employee benefit plans, including welfare plans
- Typical requests—see Attachment
- Plan document and SPD are at the top of the list
- Particular focus on compliance with Affordable Care Act provisions

Form 5500

- Primary reporting obligation imposed on employee welfare benefit plans by Title I of ERISA is Form 5500
- Generally, plan administrator must file annual report with Department of Labor for each separate ERISA plan
  - Annual report is filed on Form 5500

Form 5500

- Each ERISA welfare plan is subject to the annual Form 5500 reporting, unless an exemption applies
- Multiple welfare benefit programs → multiple 5500 reports each year
- Single wrap plan that incorporates multiple welfare benefit programs →

  single 5500 report each year

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Form 5500

- Exemptions
  - Plans with fewer than 100 participants at beginning of year are exempt (DOL Reg. § 2520.104-20(a))
    - Critical date is first day of plan year
    - Change in number of participants during plan year may affect next year's Form 5500 requirement, but won't affect current plan year

Form 5500

- Exemptions
  - Unfunded plans are exempt (DOL Reg. § 2520.104-20)
    - "Unfunded" = benefits paid from employer's general assets on an as needed basis
    - Plan that uses insurance to pay benefits is not unfunded plan and must file Form 5500 unless another exemption applies

Form 5500

- Exemptions
  - Small insured employee welfare benefit plans are exempt (DOL Reg. § 2520.104-20)
    - Benefits paid exclusively through insurance policies or HMOs

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Form 5500

- Exemptions
  - Small insured employee welfare benefit plans are exempt (DOL Reg. § 2520.104-20)
    - Premiums paid directly from general assets or partly from participant contributions
      - Premiums must be remitted to insurer or HMO within 3 months after being withheld or contributed

Form 5500

- Exemptions
  - Small insured employee welfare benefit plans are exempt (DOL Reg. § 2520.104-20)
    - Contributing participants must receive insurance refunds within three months, and participants must be informed when they enter plan about plan's provisions for allocating refunds

Form 5500

- Exemptions
  - Combination unfunded/insured employee welfare benefit plans are exempt (DOL Reg. § 2520.104-20)
  - Unfunded or insured employee welfare benefit plans provided to select group of management or highly compensated employees are exempt (DOL Reg. § 2520.104-24)

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Form 5500

- Exemptions
  - Employer-sponsored day-care centers are exempt (DOL Reg. § 2520.104-25)
  - Group insurance arrangements can file one Form 5500 on behalf of all participating employer plans

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Wrap Plan and SPD

- Recap: why use wrap documents
- Drafting considerations and best practices
- Planning considerations

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Wrap Plan Document and SPD

- Purposes of wrap plan document and SPD
  - fill in gaps left by insurance contract and certificate of insurance booklet so employee welfare benefit plan complies with ERISA
  - streamline 5500 reporting requirements
  - clean up documentation and administration

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Drafting Considerations

- Carefully review underlying benefit program documents
  - ensure provisions appear properly in underlying documents (*e.g.*, eligibility)
  - determine what provisions must be added/supplemented in wrap plan and wrap SPD
  - determine what provisions can be cross-referenced (*e.g.*, claims)
  - do not (unintentionally) provide additional benefits in the wrap plan document and SPD

Drafting Considerations

- Avoid creating conflicts between the documents
  - be consistent in referencing plan names, number, etc.
  - will likely require updates and revisions to underlying benefit program documents
  - watch for "General Information" in the booklets

Drafting Considerations

- *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011)
  - SPD conflicted with plan document: SPD terms would have provided more favorable benefits than the plan document
  - Among other things, Supreme Court determined that the terms of the retirement plan document, not SPD, should be enforced
  - Not yet clear how this will apply to welfare plans

Drafting Considerations

- *US Airways, Inc. v. McCutchen*, 2013 BL 101433 (2013)
  - What expenses can a plan be reimbursed for, where it paid medical expenses on behalf of a participant who recovered from a third party?
- All, if expenses covered equal or exceed recovery?
- Some, reduced pro rata for attorneys fees?
- None of it?
  - As usual, the answer depends on plan language

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Drafting Considerations

- *US Airways, Inc. v. McCutchen*, cont'd
  - SPD provided:

    If [the plan] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, ... [y]ou will be required to reimburse [the plan] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise.
  - Court said plan could recover for its expenses, minus its proportional share of attorneys fees (plan was silent on fees).
  - What do your plans say?

Drafting Considerations

- *Johnson v. Prudential Insurance Co.*
  No. 2:11-cv-664, S.D. Ohio (Oct. 31, 2012)
  - Employer's wrap plan document established employer's authority to interpret plan terms and delegate administration functions
  - Court determined the wrap plan was part of the "written instrument" establishing the plan
  - Wrap plan (employer has authority) plus insurer's benefits booklet (insurer decides claims) together meant insurer's claim determination was reviewed on more favorable "arbitrary and capricious" standard

Planning Considerations & Reminders

- Establishing wrap documents creates opportunities to:
  - establish/formalize benefits committee
  - review vendor/TPA agreements
- Employer must adopt the wrap plan document (*e.g.*, board resolutions)

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Planning Considerations & Reminders

- Do not forget to distribute the wrap SPD!
  - Establish and document procedures for distributions of all disclosures
- Keep the wrap plan and SPD up to date
  - Changes in carriers, benefit programs, claims administration, corporate entities, participating employers
  - And, of course, changes in law

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Planning Considerations & Reminders

- Form 5500 Considerations
  - Unbundling to avoid Form 5500 requirement may create issues
  - Wrapping multiple plans may require final Form 5500 to be filed for each plan
  - Plan numbers assigned to terminated plans must be retired and new plan number must be assigned

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Questions?

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