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ERISA Reporting and Disclosure: Statutory Exclusions and Exemptions

Penalties for Noncompliance and How to Avoid Them; Management Tools for Benefits Counsel and Plan Sponsors

TUESDAY, AUGUST 14, 2018

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Today's faculty features:

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ERISA Reporting and Disclosure: Statutory Exclusions and Exemptions

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What We'll Cover…..

- Plans Subject To Reporting And Disclosure Under ERISA
- What's Not Covered - Exemptions And Exclusions For Specific Plans
- Form 5500 Annual Reporting
  - Basics
  - Special Rules For Different Plan Types
  - Penalties
- Disclosures From Plan To Participants And Beneficiaries ("**P & B**")
  - Basics
  - Special Rules For Different Plan Types
  - Penalties
- Disclosures From Plan To Others (Employers, Labor Representatives)
- Other Disclosures To Government Agencies Beyond Form 5500
  - Basics
  - Penalties
- Disclosures From Others **To** Plan (Providers, Employers)
- Record Retention Basics
- Best Practices For Counsel And Compliance Professionals

ERISA's Reporting and Disclosure Framework

- Employee Retirement Income Security Act of 1974 ("ERISA")
  - Designed to protect rights of participants and beneficiaries in "employee benefit plans"
- Imposes extensive financial and operational disclosures to
  - Government
    - Internal Revenue Service ("IRS")
    - Department of Labor ("DOL")
    - Pension Benefit Guaranty Corporation ("PBGC")
  - Participants
  - Beneficiaries

"Under this law, which is entitled the Employee Retirement Income Security Act of 1974, the men and women of our labor force will have **much more clearly defined rights** to pension funds and greater assurances that retirement dollars will be there when they are needed. Employees will also be given **greater tax incentives** to provide for their own retirement if a company plan is unavailable. It is certainly appropriate that this law be signed on Labor Day, since this act marks a brighter future for almost all the men and women of our labor force."

What's Covered?

- Employee benefit plans established or maintained by employers
  - Types
    - Employee pension benefit plan
    - Employee welfare plan
  - Legal term of art; not necessarily triggered by existence of formal plan document
- *Donovan* v. *Dillingham* (11th Cir. 1982) – Reasonable person must be able to ascertain four factors:
  1. Intended benefits
  2. Intended beneficiaries
  3. Source of financing
  4. Procedures to apply and collect benefits

What's Not Covered?

- Plans without employees (subject to some IRS reporting)
- Governmental plans
- Church plans
- Dues-financed plans
- Arrangements existing solely because of worker's compensation, unemployment compensation, or disability insurance laws
- Certain Code Section 403(b) plans
- Unfunded excess benefit plans
- Top-hat plans (subject to some DOL reporting)
- IRAs
- Foreign plans
- Payroll practices

What Else's Not Covered?

- Some group or group-type insurance programs (minimal employer involvement)
- Most severance payments/golden parachutes/bonus programs
- SEPs and SIMPLE plans
- On-premises facilities
- Gifts/sales to employees
- Hiring halls
- Remembrance funds
- Strike funds
- Industry advancement programs
- Daycare Centers
- Unfunded scholarship programs
- Funded apprenticeship programs (subject to some DOL reporting)

Discretionary Standards

- ERISA 110(a) provides that the DOL may prescribe alternative methods for satisfying any otherwise applicable reporting or disclosure requirement
- DOL may permit such methods on its own initiative or on request from a plan sponsor
- Alternative methods permitted if:
  - The use of the alternative method is consistent with ERISA's purposes
  - The use of the alternative method provides adequate reporting and disclosure to plan participants and beneficiaries
  - Applying ERISA's regular reporting and disclosure standards would:
    - Increase the costs to the plan
    - Impose unreasonable administrative burdens with respect to the operation of the plan, or
    - Be adverse to the interests of plan participants in the aggregate
- IRS, DOL, and PBGC also may extend deadlines for specific reporting and disclosure requirements in the event of a natural disaster or service in a combat zone

Annual Reporting to Government Form 5500 Basics

- ERISA §103: Annual report for every employee benefit plan subject to ERISA reporting and disclosure
- ERISA § 4065: annual report for plans covered by PBGC termination insurance
- Code § 6058(a): annual return for tax-qualified pension funds
- All three annual reporting requirements satisfied by filing Form 5500 with DOL
- All Large Plan Form 5500 include: type and number of **P & B**, financial, insurance, accountant, service provider and plan fiduciary information
- Limited report for small plans (fewer than 100 participants)
- Form 5500 typically changes each year
- Form 5500 filed electronically and PUBLIC (DOL site or "freeERISA.com")
- Due within 7 months after end of plan year; potential automatic extension until employer's federal tax return due; auto. 2½-month extension with Form 5558
- Plan must make latest Form 5500 available for public inspection and copying and provide to many others upon request

Form 5500
Defined Benefit Plans

- Detailed actuarial status, funding %s, actuarial assumptions and methods for projecting future retirements, forms of distributions
- **Special Focus: Schedule C**: Within 30 days of plan's written request, "covered providers" must disclosure sources of compensation related to plan and plan reports if fail to provide
  - Typically larger plans, many more investment managers that must disclose to plan and then plan must disclose to DOL
  - More complex investment fee structures – hedge fund of funds, partnerships, etc.
- **Issues Under Schedule H**:
  - Must disclose failure to pay benefits when due
  - *What does this mean for missed Required Minimum Distributions and Missing Individuals?*
  - IRS recently issued audit guidelines outlining process for attempting to locate missing individuals due RMDs to support plan's conclusion that participant cannot be located.
  - More likely to have investments not publically valued to report (private equity, hedge funds)
  - More likely to transfer asset and liabilities to another plan or to PBGC
- **Potential Changes To Form 5500**
  - Schedule H – More on alternative investments, hard-to-value assets and investments through collective investment vehicles
  - Detailed reporting for plan salaries and provider fees and how plan allocates expenses to plan and participants

Form 5500
Welfare Benefit Plans

- Welfare Plans that must file Form 5500:
  - Those with 100 or more participants on first day of plan year.
  - Those with trust, or other plan assets (*i.e.,* those that are not "unfunded"), regardless of size
    - Those with employee or retiree contributions that are not operated through a cafeteria plan will not be unfunded.
- Welfare Plans that are exempt:
  - "A welfare benefit plan that covers fewer than 100 participants as of the beginning of the plan year and is unfunded, fully insured, or a combination of insured and unfunded."
  - For this purpose:
    - "An unfunded welfare benefit plan has its benefits paid as needed directly from the general assets of the employer or the employee organization that sponsors the plan."
      - **"Note.** Plans that are NOT unfunded include those plans that received employee (or former employee) contributions during the plan year and/or used a trust or separately maintained fund (including a Code section 501(c)(9) trust) to hold plan assets or act as a conduit for the transfer of plan assets during the plan year."
      - "A welfare benefit plan with employee contributions that is associated with a cafeteria plan under Code section 125 may be treated for annual reporting purposes as an unfunded welfare benefit plan if it meets the requirements of DOL Technical Release 92-01, 57 Fed. Reg. 23272 (June 2, 1992) and 58 Fed. Reg. 45359 (Aug. 27, 1993)."
    - A fully or partially insured plan must have premiums forwarded to insurance carrier within 3 months of receipt

Form M-1

- Form M-1 must be filed for welfare benefit plans covering the employees of two or more employers.
  - "A MEWA is an employee welfare benefit plan or other arrangement that is established or maintained for the purpose of offering or providing medical care to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that the term does not include any such plan or other arrangement that is established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association. See ERISA section 3(40). (Note: Many States regulate entities as MEWAs using their own State definition of the term. Whether or not an entity meets a State's definition of a MEWA for purposes of regulation under State law is a matter of State law.)"
- Not required for an entity that meets the definition of a MEWA because:
  - common control interest of at least 25 percent at any time during the plan year, applying principles similar to the principles applied under section 414(c) of the Internal Revenue Code.
  - change in control (such as a merger or acquisition) that is temporary in nature (*i.e.*, it does not extend beyond the end of the plan year following the plan year in which the change in control occurs).
  - covers non-employees or former employees (such as nonemployee members of the board of directors or independent contractors), no more than 1% of the total number of employees or former employees covered under the arrangement, determined as of the last day of the year.

Form 5500 – Penalties

Penalties For Noncompliance /Failures For Annual Report Include:

- Under Code: $25/day (maximum of $15,000).
- Under ERISA: up to $1,100/day from due date. Plan administrator (Board of Trustees usually) liable under § 502(c)(2).
- For Form 8955 (Annual Statement Identifying Separated Vested Participants): $1 per participant/day (maximum of $5,000).
- Failure to file change in status (example: plan name, address, termination, merger or consolidation): $1/day (maximum of $1,000).
- Failure to file Schedule B/SB/MB (Actuarial Information): $1,000
- Failure to file under DOL's EFAST system: return Form for correction and resubmission; if fail to correct in 60 days, $1,000/day until corrected.
- DOL civil penalty for violation(s) after 11/2/15: up to $2,140/day if after 1/1/18.

Form 5500 – More Penalties

- Person convicted of willful violation fined up to $100,000 or imprisoned up to 10 years, or both; if not an individual, fine up to $500,000.
- Courts impose criminal penalties for willful violations of any reporting and disclosure under ERISA Title I, including Form 5500.
- Incomplete report treated as not filed.
- Penalty avoided by filing late report and paying penalties under Delinquent Filer Voluntary Compliance (DFVC) Program
- Also Criminal Enforcement and Civil RICO for Falsification of Plan-Related Documents.
- General Penalty for Failure To Provide Info Requested by DOL: Up to $152 after 1/1/18 (up to $1,527 per request).

To Participants And Beneficiaries Basic Standards For Communication

- Plan administrators must furnish required documents by measures reasonably calculated to ensure actual receipt by **P & Bs**
- Allowable methods of distribution include: in-hand delivery to employees at their worksites; first class mail or second/third class with return-receipt; publication as a special insert in a periodical distributed to **P & Bs**
- Electronic delivery allowed for some ERISA required documents if DOL safe harbor rules met – generally not for disclosures required of retirement plans
- Separate Treasury Department rules govern electronic disclosure of Code required notices

To Participants And Beneficiaries Basics For Most Plan Types

- Access to Plan Documents Upon Written Request
  - "Plan documents" include "other instruments under which plan is established or maintained" – CBA, Trust, etc.
- Summary Plan Description (SPD)
- Summary of Material Modifications (SMM)
- Claim And Appeals Procedures
  - Detailed disclosures when claim denied with reasons for denial
  - Detailed disclosures when appeal denied with reasons for denial
  - Additional disclosure for disability claims

To Participants And Beneficiaries Defined Benefit Plans

Pension Benefits Statement

- To participants every 3 years or provide annual notice of right to request benefit statement (alternative annual notice of availability).
- All vested participants who are **active** at time statement is prepared.
- Written in manner calculated to be understood by average participant.

Domestic Relations Orders

- Notices upon receipt of Order and Procedures upon request determination of QDRO.

Notice of Application for Retirement Plan Qualification

- To current employees eligible to participate, ineligible employees at same place of employment.
- In cases involving plan terminations, current employees with accrued benefits, former employees with vested benefits and beneficiaries currently receiving benefits.

To Participants And Beneficiaries Defined Benefit Plans

Notice Upon Employment Termination

- ERISA § 105(c) requires plan to send each deferred vested participant an "individual statement."
- Due by due date of Form 8955 (same as Form 5500)
- Includes type of annuity, payment frequency, amount of benefit, any benefits forfeitable if participant dies before certain date.

Notice of Rights of Military Personnel

- Of rights to re-employment by Employer
- Often plans put benefit rights in SPD

Funding Notices

- MANY different notices for Single vs. Multiemployer plans

To Participants And Beneficiaries Defined Benefit Plans

Notice of Amendments Significantly Reducing Rate of Benefit Accruals or Eliminating/Reducing Early Retirement Benefits or Retirement-Type Subsidies (ERISA Section 204(h))

- Provided to each participant and alternate payee whose benefit reasonably expected to be affected by amendment, any labor union representing affected individuals.
- Multiemployer plans must also provide to contributing employers.
- Must provide notice within "reasonable time" before effective – at least 45 days in most cases; small plans and multiemployer plans, 15 days.
- Detailed requirements on content, including approximate magnitude of reduction.
- IRS view: applies even to reduction due to another document (CBA) - common issue for bargained plans.
- Sometimes challenge to determine whether notice applies to that plan change – err on sending given penalties.

PENALTIES:

– Egregious failure to provide timely notice can delay application of reduction.

– Possible excise tax of $100/day per failure (up to $500,000/year if unintentional).

To Participants And Beneficiaries Defined Benefit Plans

Annual Funding Notice for Each Plan Year (AFN)

- Required for all DB plans - Replaces summary annual report for such plans.
- Notice Must be Sent to: **P & Bs**, Contributing Employers, Unions, PBGC.
- Identify plan name, plan administrator's address and telephone number, principal administrative officer, each Plan sponsor's employer identification number and plan number.
- Identify number: (a) retirees; (b) separated and entitled to future benefits; (c) active.
- Describe funding policy (under ERISA § 402(b)(1)) and of investment allocation.
- Advise if plan amendment, scheduled benefit increase or reduction, or other known event taking effect would have "material effect" on plan liabilities or assets for year. If so, plan must provide explanation and projection - to end of plan year - of effect on plan liabilities.
- Provide statement that person, any labor organization or employer may obtain copy of Form 5500 upon request, through DOL's website, or through plan sponsor's website (if applicable).
- DOL Model Notice, but may include more as long as not inconsistent with DOL regulations.
- Notice must be provided no later than 120 days after end of plan year (small plans due within 210 days).
- **PENALTY:** Discretionary of $100/day if timely notice not sent to **P & Bs**.

To Participants And Beneficiaries Defined Benefit Plans

At Retirement

- Explanation of Joint and Survivor benefit forms and consent, including Qualified Optional Survivor Annuity (QOSA)
- Explanation of any other benefit forms
- Estimate of relative/comparative value of different benefit forms available
- Explanation of right to defer benefits and consequences of not deferring
- Rollover Notice For Lump sum/non-annuity distributions (more DC than DB)
- Notice of Suspension of Benefits rules if return to employment
- Notice of tax withholding and election if optional

Other Times

- Notice of Suspension of Benefits rules for continued employment after normal retirement age

To Participants And Beneficiaries Defined Contribution Plans

Pension Benefits Statement

- For participant-directed accounts, at least quarterly. Otherwise, at least once a year.

Domestic Relations Orders

- Notices upon receipt of Order, upon request for Procedures and determination of QDRO

Notice Upon Employment Termination

- ERISA § 105(c) requires plan to send each deferred vested participant an "individual statement."
- Due by due date of Form 8955 (same as Form 5500)
- Includes type of annuity and payment frequency, amount of vested benefit, any benefits forfeitable if participant dies before certain date.

Notice of Rights of Military Personnel

- Of rights to re-employment by Employer
- Often plans put benefit rights in SPD

To Participants And Beneficiaries Defined Contribution Plans

QACA Notice

- Information about automatic enrollment contributions
- 30-90 days before the beginning of each plan year for applicable plans
- Special timing rules for new participants

EACA Notice

- Information about automatic enrollment contributions including, if applicable, withdrawal standards
- 30-90 days before the beginning of each plan year for applicable plans
- Special timing rules for new participants

401(k) Safe Harbor Notice

- Information about safe harbor matching or nonelective contribution formula
- 30-90 days before the beginning of each plan year for applicable plans
- Special timing rules for new participants
- Additional notice required for mid-year changes

Plan and investment fee disclosures

- Information about administrative and investment costs of plan participation
- At least quarterly for participant-directed accounts

To Participants And Beneficiaries Defined Contribution Plans

QDIA Notice

- Describes obligations and rights related to investment of account assets in absence of an investment election
- Generally 30 days before a plan year
- Special rules for new participants

Notice of Right to Divest Publicly-Traded Employer Stock

- Information about rights related to diversification of publicly-traded employer stock

Blackout Notice

- Required whenever there is any period of more than 3 consecutive business days when there is a temporary suspension, limitation, or restriction of:
  - Directing plan assets
  - Diversifying plan assets
  - Obtaining loans
  - Obtaining distributions

404(c) Notice

- Investment-related and certain other disclosures for participant-directed plans
- Must be made before the time investment instructions are to be made

To Participants And Beneficiaries Multiemployer Defined Benefit Plans

Notice Of PPA Zone Funding Status – ERISA § 305(b)

- To P & B, beneficiaries, union, and contributing employers within 30 days of actuary's zone certification to IRS and plan sponsor

ERISA § 101(k) Gives P & B, Union, Employers Right To (By 30 Days of Request):

- Periodic actuarial report (inc. sensitivity testing) in plan's possession for 30 days
- Quarterly, semi-annual, or annual financial report prepared by investment manager, advisor, or other fiduciary in plan's possession for at least 30 days
- Additional information on withdrawal liability requests
- Audited financial statements for any plan year (not just past 6)
- Current Plan document (and amendments), SPD, trust agreement and any other instrument under which plan established or operated
- Participation agreement for that employer during current or 5 preceding plan years
- Form 5500 for any plan year
- Annual funding notice for any plan year
- Latest FIP or RP and applications for amortization extensions filed with IRS
- PLAN MUST REDACT INDIVIDUALLY IDENTIFIABLE OR PROPRIETARY INFO-CHALLENGE IN TIMING

To Participants And Beneficiaries Defined Benefit Plans

POTENTIAL CIVIL PENALTIES For Failure to Send Correct and Timely Disclosures:

- Pension Benefits Statement - ERISA § 502(c)(4), up to $110/day
- Financial Disclosure under ERISA §104(d) or 101(k) or Single Employer Plans under § 101(j) - ERISA § 502(c)(4), increased maximum $1,1,693/day if assessed after 1/1/18 for violation(s) after 11/2/15
- Annual Funding Notice And Notice of Single-Employer Plans Failure To Meet Funding (ERISA § 101(d)) - discretionary of $100/day if timely notice not sent to **P & Bs** (but not for Employers, Unions)

OTHER IMPACTS For Failure to Send Disclosures Correctly and Timely:

- Survivor Annuity Notice and Explanation of Distribution Options - Spouse has claim to benefit if consent not valid
- Notice of Suspension of Benefits for return to/continued employment after normal retirement age
  - Plan cannot offset benefit accruals under Code § 411 or suspend benefits if working, EXPENSIVE
- Claims Denial Notice – fiduciary could lose preferential standard of review in a **P & B** lawsuit

To Participants And Beneficiaries Welfare Benefit Plans

UNIFORM SUMMARY OF BENEFITS AND COVERAGE ("SBC")

- Group health plans and health insurers must provide to participants and beneficiaries a culturally and linguistically appropriate summary (not to exceed 8 pages one-sided) of plan benefits, coverage and cost-sharing arrangements, including exceptions, reductions, limitations, and continuation of coverage information.
- Must be made available during open enrollment or, if the plan does not have open enrollment, 30 days prior to the start of the new plan year.
- Must be provided:
  - To new enrollees (*e.g.*, new hires and dependents acquired through birth or marriage under HIPAA special enrollment rules) prior to enrollment
  - Within 7 business days of a request from a participant or beneficiary.
- A model notice is available, but must be tailored to accurately reflect plan provisions

NOTICE OF CHANGE TO SBC

- Group health plans must provide participants and beneficiaries a culturally and linguistically appropriate notice of any material modification to the SBC.
- Required at least 60 days prior to effective date of change.
- Not required if change relates to renewal of insurance contract.

To Participants And Beneficiaries Welfare Benefit Plans

SUMMARY OF MATERIAL REDUCTION IN COVERED SERVICES OR BENEFITS

- Required when a group health plan is modified in a way that an average person would consider to be a modification or reduction in covered services or benefits
- Required no more than 60 days after adoption, or at regular intervals of no more than 90 days
- Note that a group health plan must provide an SMM at least 60 days **before** a modification becomes effective if it changes information in the Summary of Benefits and Coverage.

NOTICE OF SPECIAL ENROLLMENT RIGHTS

- HIPAA requires that group health plans allow eligible employees to add eligible dependents (and to enroll themselves) in the event of marriage or childbirth or in the event of a loss of other coverage.
- Notice must be given to eligible employees on or before date eligible to enroll in plan
- May be included in SPD or plan's enrollment materials
- Deadlines for participant to give notice of special enrollment event must be included in SPD

To Participants And Beneficiaries Welfare Benefit Plans

NOTICE OF BENEFIT DETERMINATION (EXPLANATION OF BENEFITS, OR EOB, IN A GROUP HEALTH PLAN)

- Timing Requirements for Group Health Plans
  - Urgent: within 72 hours after receipt of claim (sooner if medically necessary)
  - Pre-service: within 15 days of receipt of claim
  - Post-service: within 30 days of receipt of claim
  - Concurrent care: in sufficient time to appeal before reduction or termination of ongoing treatment is effective
  - Additional time is generally allowed if plan needs more time and notice is given
  - Time period is generally tolled while plan is waiting on information from participant
- Disability Claims
  - 45 days from receipt of claim, but up to two additional 30-day extensions permitted if more information is needed and notice is given
- Other Welfare Plan Claims (Life Insurance, for example)
  - 90 days after receipt of claim, but additional 90 days permitted if more information is needed and notice is given

To Participants And Beneficiaries Welfare Benefit Plans

INITIAL COBRA NOTICE

- Must be given to participants and covered spouses within 90 days after group health plan coverage begins
- May be included in SPD if SPD is sent to participant and spouse
  - May be done by single mailing addressed to both parties (*e.g.,* Mr. and Mrs. Joe Smith)

COBRA ELECTION NOTICE

- Must be given to qualified beneficiaries (*i.e.,* participants and their covered spouses and covered dependents) within 14 days after administrator receives notice of qualifying event resulting in loss of group health plan coverage.
- If employer is also COBRA administrator, notice must be given within 44 days after:
  - Date on which qualifying event occurred, or
  - Date of loss of coverage if the plan provides that COBRA period starts on that date

NOTICE OF UNAVAILABILITY OF CONTINUATION COVERAGE UNDER COBRA

- For those not receiving COBRA, they, their covered spouses and covered dependents must be given a notice that COBRA will not be provided
- Provide within 14 days after the administrator receives notice of an occurrence that would have been a qualifying event if COBRA were being provided

To Participants And Beneficiaries Welfare Benefit Plans

NOTICE OF TERMINATION OF CONTINUATION COVERAGE UNDER COBRA

- Notice must be given to qualified beneficiaries as soon as practicable after the administrator determines that continuation coverage is to terminate early, such as for apparent non-payment of premium.
- This enables qualified beneficiary to make payment by end of grace period

NOTICE OF INSUFFICIENT PAYMENT OF COBRA PREMIUM

- If qualified beneficiary sends premium payment but in an insufficient amount, the qualified beneficiary must be notified of the insufficiency within a reasonable time, so as to give an opportunity to correct the deficiency within a reasonable time
  - 30 days is considered reasonable, and allows deficiency to be added to next premium payment
- Notice is not required for a deficiency that is not "significantly" less than the required premium if the deficiency is to be waived (waiver is allowed by regulations)

MINIMUM MATERNITY BENEFITS NOTICE

- Notice must be given, in SPD, of minimum hospital stays for childbirth, as required under federal (Newborns and Mothers Health Protection Act) or state law

To Participants And Beneficiaries Welfare Benefit Plans

WOMEN'S HEALTH AND CANCER RIGHTS ACT NOTICE

- Notice must be given of rights to coverage in the event of a mastectomy
- Must be given annually but may be included in enrollment materials and provided during open enrollment

MICHELLE'S LAW NOTICE

- If any dependent coverage is restricted to student status, notice must be given that coverage will be continued during medically necessary leaves from school
- Note, however, that Affordable Care Act does not permit plans to base coverage for a child under the age of 26 to student status

MEDICAL CHILD SUPPORT ORDER ("MCSO") AND QUALIFIED MEDICAL CHILD SUPPORT ORDER NOTICES ("QMCSO") NOTICES

- On receipt of MCSO, the participant and alternate payees must be notified of QMCSO determination procedures.
- On determination of the status of an MCSO, the participant and alternate payees must by notified of the MCSO's status, within a reasonable time of determination

To Participants And Beneficiaries Welfare Benefit Plans

NATIONAL MEDICAL SUPPORT NOTICE

- Affected persons must be given notice of action on support notices. (See discussion under notices to government agencies.)

PREMIUM ASSISTANCE NOTICE

- Employees must be given notice regarding eligibility for assistance under Medicaid or the Children's Health Insurance Program ("CHIP").
- This notice may be included in the plan's open enrollment materials.
- A model notice is available from the DOL.

PATIENT PROTECTION MODEL NOTICE

- If non-grandfathered group health plan requires a participant to designate primary care provider, notice must be given of ACA rights, such as to make their own choice from available providers, to designate a pediatrician for a child, and for a woman to receive gynecological care without going through a primary care provider
- May be included in SPD, open enrollment materials or other benefit description, and should be included in materials for new enrollees.
- A model notice is available

To Participants And Beneficiaries Welfare Benefit Plans

GRANDFATHERED HEALTH PLAN DISCLOSURE

- Grandfathered group health plans must explain annually that the plan is believed to be grandfathered and that certain consumer protections thus may not apply
- Must include in any open enrollment and other plan materials provided to a participant or beneficiary, including materials for new enrollees, describing benefits, and must include contact information for questions and complaints.
- A model notice is available.

MEDICARE PART D NOTICE OF CREDITABLE COVERAGE

- This lets Medicare-eligible individuals know whether the group health plan's prescription drug coverage is sufficiently comparable to Medicare that the individual will not be penalized for delaying Part D coverage.
- This must be given
  - At least once a year before October 15th (start of annual Medicare Part D enrollment period)
  - Whenever a Medicare-eligible employee, spouse or dependent enrolls in the plan
  - Whenever there is a change in the creditable or non-creditable status of the group health plan's prescription drug coverage
  - Whenever an eligible or covered individual requests the notice
- May be included in open enrollment materials if distributed before October 15th

To Participants And Beneficiaries Welfare Benefit Plans

NOTICE OF PRIVACY PRACTICES

- Must be given to participants in a group health plan at enrollment and within 60 days of a material revision to the notice
- Every 3 years, participants must be notified that a Notice of Privacy Practices is available and how to obtain it; alternatively, the notification may be included in the plan's open enrollment materials

NOTICE OF BREACH FOR UNSECURED PROTECTED HEALTH INFORMATION

- In the event of a breach, each affected individual must be given notice
- Notice given by first class mail at last known address, or by e-mail if the individual specifically authorizes electronic notification
- Due within 60 days of discovery of breach
- Also, must usually be filed with HHS and in some cases with prominent media outlets (see discussion in government reporting section)

To Participants And Beneficiaries Welfare Benefit Plans

EXCHANGE NOTICE

- Group health plans must provide all active employees with a notice about the ACA exchanges and their options for health coverage.
- Must be given to new employees within 14 days of hire.
- Model notice is available

WELLNESS PROGRAM DISCLOSURE

- Notice must be given to participants and beneficiaries eligible to participate in a wellness program that requires individuals to meet a standard related to a health factor in order to obtain a reward, and must describe the reward and what they must do to earn it
- Notice must be in all materials that describe the terms of the wellness program
  - SPDs, open enrollment materials, for example
- Alternatively, if materials merely mention that wellness program is available without describing its terms, this disclosure is not required in regular plan materials and can be given specifically with materials describing the program and its requirements
- DOL has provided model language for such notice

To Other Interested Parties
Single Employer Defined Benefit Plans

- Notice of Transfer of Excess Pension Assets to Retiree Health Benefit Account - to Plan Administrator, Labor Union
- Contribution Reports for Certain Plans
- Notice of Request for Extension of Amortization Period - to Labor Union
- AFN for Defined Benefit Plans (ERISA § 101(f)) - to Employers, Unions, PBGC
- Notice of Application for Qualification of Retirement Plan - to Unions Representing Participants
- Multiple Reports/Disclosure Relating to Pension Plan Termination Insurance
- Notice of PTE Application – DOL determines who are "interested persons" entitled to notice depending on exemption being requested, based on applicant’s description

To Other Interested Parties Multiemployer Defined Benefit Plans

- AFN for Plans (ERISA § 101(f)) to Employers, Unions, PBGC
- Summary Annual Disclosure Under ERISA § 104(d) to Employers, Labor Unions representing participants
- Disclosures Under ERISA § 101(k)) to Employers, Unions
- Annual Copy of Funding Improvement or Rehabilitation Plan to Employers, Unions – PENALTY up to $1,344/day after 1/1/18 for failure to adopt FIP/RP
- Notice of Benefit Suspension (ERISA § 101(m)) to Unions
- Notice of Adjustable Benefit Reduction (ERISA § 305(e)) to Unions
- Notice of Application for Qualification of Retirement Plan To Unions
- Notice of PTE Application – Same as Single Employer Plan
- Other IRS and DOL Notices and Reporting Rules
- Multiple Reports/Disclosure Relating to Pension Plan Termination Insurance
- **Multiemployer Defined Benefit Plan – Employers and Withdrawal Liability**

To Other Interested Parties Multiemployer Defined Benefit Plans

ERISA Section 104(d) (New in 2008)

- Plan sends to unions and employers within 30 days after filing Form 5500 each plan year
- Describes contribution schedules and benefit formulas under plan and any modifications
- # employers obligated to contribute to plan
- A list of employers that contributed more than 5% of total contributions
- # participants for whom no employer contributions made in past 3 plan years
- Whether plan in critical or endangered status, and, if so, actions to improve funding status
- How to obtain copy of plan's funding improvement plan or rehabilitation plan and relevant actuarial and financial data
- # employers that withdrew during prior plan year and aggregate amount of withdrawal liability assessed
- If plan merger or transfer, actuarial valuation of assets and liabilities for affected plans during year preceding merger or transfer
- If plan sought or received amortization extension or used shortfall funding method
- Right to obtain copy of Form 5500, SPD and any SMM upon written request

To Government Beyond Form 5500

Retirement Plan Notices To Government For:

- Application for Qualification of Retirement Plan - to IRS
- Prohibited Transaction Exemption Application - to DOL
- Reporting and Payment of Excise Taxes on Form 5330 - to IRS
  - For minimum funding failure, excess contributions or benefits, prohibited transactions, reversions, 204(h) violations
- Merger, Consolidation, Spinoff, or Transfer and Determination Application for Terminating Retirement Plan - to IRS
- Transfer of Excess Pension Assets to Retiree Health Benefit Account to - IRS and DOL
- Distributions (Forms 1099-R, 1099-LTC, and 1099-SA) and Withholding of Taxes - to IRS
- Request for Extension of Amortization Period - to IRS, Notice to PBGC

To Government Beyond Form 5500

Form 8955-SSA

- ERISA § 105(c) requires plan to send each deferred vested participant an "individual statement."
- Form 8955 Filed annually with DOL by both defined benefit and defined contribution plans with Form 5500.
- Form 8955-SSA replaces old Schedule SSA.
- Form 8955-SSA asks whether plan administrator "provided an individual statement to each participant required to receive a statement."
  - Requirement is NOT new, Form 8955 just first time IRS asked about it.

To Government
Beyond Form 5500

Single Employer Defined Benefit Plans

- Form 5310 (Application for Determination on Terminating Plan) - to IRS
- Forms to Pension Benefit Guaranty Corporation
- Form 10 – Reportable Events and Form 220 – Unpaid Contributions
- Reporting and Disclosure Relating to Pension Plan and Termination Insurance
  - Standard termination notices and filings
  - Distress termination notices and filings
  - Disclosure of distress or involuntary termination information
  - Post-reportable event reporting
  - Advance reporting For significant underfunding
  - Notice of missed contributions exceeding $1 million
  - Annual employer financial and actuarial information reporting for some controlled groups maintaining plans
  - Certain downsizing events If employers electing under Section 4062(e)
- PBGC Premium information filing

To Government
Beyond Form 5500

Multiemployer Defined Benefit Plans

- Multiemployer Plans in Endangered or Critical Status (ERISA Section 305(b)(3)) - to IRS and PBGC
- Application to Suspend Benefits - to IRS
- Notice of Insolvency - to PBGC and IRS
- Notice of Insolvency After Mass Withdrawal - to PBGC
- Application for Financial Assistance - to PBGC
- Notice of Mergers - to PBGC
- Notice of Partition - to PBGC

To Government Beyond Form 5500 – Welfare Benefit Plans

BREACH NOTIFICATION FOR UNSECURED PROTECTED HEALTH INFORMATION

- In addition to notifying affected individuals (see earlier discussion), breach notice must be filed with HHS:
  - At same time as participant notification (within 60 days of discovery) for breaches involving 500 or more individuals
    - Must also be provided to prominent media outlets
  - Within 60 days after end of year for breaches involving fewer than 500 individuals

NATIONAL MEDICAL SUPPORT NOTICE

- Employers must either send Part A to the state agency, or Part B to the plan administrator, within 20 days after the date of the notice, or sooner if reasonable
- Administrator must complete and return Part B to the state agency
  - Within 40 business days after its date, or sooner if reasonable
  - Must also provide required information to affected persons
- Under certain circumstances, employer may be required to send Part A to the state agency after the plan administrator has processed Part B.

To Government Beyond Form 5500 – Welfare Benefit Plans

CREDITABLE COVERAGE DISCLOSURE NOTICE TO CENTERS FOR MEDICARE AND MEDICAID SERVICES ("CMS")

- Must be provided online to CMS within 60 days after the beginning of the plan year.
- Also required within 30 days of the termination of a plan's prescription drug coverage or after a change in the creditable status of the plan.

FORM 990

- Welfare plans funded through tax-exempt VEBAs must file Form 990 (or Form 990-EZ, if applicable), within 4½ months after the end of the plan year.

FORM W-2

- Employers must report the cost of all applicable employer healthcare coverage on each employee's W-2.
- Small employers (those with fewer than 250 Forms W-2) and those that contribute to multi-employer plans are exempt.
- Form must also be sent to participants before February 1st of each year.

To Government Beyond Form 5500 – Welfare Benefit Plans

FORMS 1094-C AND 1095-C/1095-B and 1095-C

- Employers with 50 or more full-time employees (including full-time equivalents) in the preceding calendar year must file one of more Forms 1094-C, and must file Form 1095-C for each employee who
  - was a full-time employee of the employer for any month of the calendar year, or
  - was provided coverage for any month of the calendar year
- These forms tell the IRS who the full-time employees are, and of those, who was made an offer of coverage and whether the coverage met the requirements of the employer mandate. They also show who has coverage.
- Must be filed by February 28th if filing on paper, or by March 31st if filing electronically, of the year following the calendar year to which the return relates.
- The employer must furnish a copy of Form 1095-C (or a substitute form) to the employee.
- Insurers must file Form 1095-B for each participant (or beneficiary if not tied to a covered participant) who had coverage during any month of the year
- Form 1094-B is filed as a cover page when insurer is filing Forms 1095-B.

To Government Beyond Form 5500 – Welfare Benefit Plans

FORM 8928

- Group health plans must self-report compliance failures and pay related excise tax.
- Must be filed with IRS on or before the due date for the responsible party's federal income tax return.
  - For multi-employer or multiple employer plan, must be filed on or before the last day of the 7th month following the end of the plan year.
  - For a failure under Section 4980E or 4980G, must be filed on or before the 15th day of the 4th month following the calendar year in which the noncomparable contributions were made.
  - Due date can be extended.

FORM 720 TO REPORT PCORI FEE

- Sponsors of self-insured health plans must report and pay the Patient-Centered Outcomes Research Institute ("PCORI") fee.
- Due no later than July 31st of the calendar year immediately following the last day of the policy or plan year to which the fee applies.

MEDICARE SECONDARY PAYOR ("MSP") REPORTING REQUIREMENTS

- Information about participants and beneficiaries who are also enrolled in Medicare must be reported to the Secretary of Health and Human Services, to enforce the Medicare Secondary Payor rules.

Disclosures To Plan From Others
Service Provider Disclosure

- ERISA § 408(b)(2) allows services under reasonable contract if no more than reasonable compensation paid.
- DOL Regulations effective July 2011 address "reasonable contract."
- Disclosure required for defined benefit and defined contribution plans:
  - In 2011 when regulations took effect; then prior to entering into or renewing contract; and upon change to any disclosed information.
- Covers providers expected to receive $1,000 or more for "covered services" for:
  - fiduciary or investment advisory services
  - recordkeeping or brokerage services to participant-directed plan
  - legal, actuarial, custodial, third party administration, insurance, investment advisory or valuation services, **if** provider receives indirect compensation – meaning monetary or non-monetary compensation (including meals, gifts, etc.) from any source other than plan, unless non-cash of $250 or less during term of contract.
- More disclosure about fee, including description of services, direct and indirect compensation and compensation paid among related parties.
- Trustees must: (1) request in writing required information if not received; (2) notify DOL if provider does not provide within 90 days of request; and (3) evaluate whether to terminate or retain provider in light of failure.

Record Retention Basics

- **Why it matters**: DOL, **P & Bs**, or fiduciary may sue to enjoin any violation or enforce ERISA R&D requirements or for equitable relief.
- Maintain records on matters subject to required disclosure for not less than current plus 6 years after filing date of applicable document.
- Consider state statute of limitations in your jurisdiction – maybe longer.
- Even if subject to exemption or simplified reporting requirement under ERISA §104(a).
- Records maintained must provide sufficient detail to verify/check accuracy and completeness
- ERISA § 209(a)(1) requires employer to maintain records with respect to all employees sufficient to determine benefits due
- Defined benefit plan employee service records – keep indefinitely?

Best Practices/ Communication Strategies

- Consider Plan Distribution Policy/Procedures (or reviewing TPA's)
- Consider Record Retention Policy (or reviewing TPA's)
- Team Sport – coordinate with plan, TPA, employer, union (if applicable), other professionals
- Designate the disclosure point person (usually at Fund Office/TPA) to coordinate all disclosures through a central person/department for consistency, timeliness, experience.

QUESTIONS?