

Question	Answer
Note on this month's Q&A: <i>This webinar was designed to focus on document and disclosure issues related to the Affordable Care Act (ACA). However, during the session we received a large number of general ACA related questions unrelated to the webinar content. This Q&A is limited to ACA issues specifically related to the webinar topic and does not attempt to address the wider range of issues raised by attendees. We will be holding a number of ACA related webinars over the next few months that will address some of these other employer issues.</i>	
<p>Q: Are Companies required to complete the employer/insurance question on the exchange notice before we send out by October 1st, or can we wait and let the employee bring it back to us for completion if they need it.</p>	<p>A: The model notice is a suggestion only and does not have to be used in its exact format. It is only mandatory that the notice includes the information listed below (use of the model format and additional information is at the discretion of the employer):</p> <ul style="list-style-type: none">• Informing the employee of the existence of the Marketplace (referred to in the statute as the Exchange) including a description of the services provided by the Marketplace, and the manner in which the employee may contact the Marketplace to request assistance;• Notify employees that if the employer's plan does not provide minimum value (as defined by the ACA), employee's may be eligible for a premium tax credit if the employee purchases a qualified individual health plan through the Marketplace; and• If the employee purchases a qualified health plan through the Marketplace, the employee would lose the tax free employer contribution to any health benefits plan offered, and premiums paid for individual coverage would be made on an after-tax basis. <p>Beyond the information content required by regulation (which is all included on the first page of the model notice), there is not much guidance. So long as the required information is included, additional information regarding things such as the employer tax id, address and phone number or detailed plan information is at the discretion of the employer. It is our recommendation that the employer provide basic eligibility information as well to let employees know whether or not they're eligible for employer-sponsored coverage.</p>
<p>Q: Do you send the notice to a laid off employee? Q: Does Exchange notice have to go to COBRA participants? Q: If we have a previous employee in 2013, do we need to send a notice to them as well or only current employees? Q: notice of exchange for individuals who receive a 1099?</p>	<p>A: All employers, as defined by the FLSA, are required to send the exchange notice to ALL CURRENT EMPLOYEES. Therefore, it is not necessary to send the notice to (a) former employees (laid-off or terminated) or retirees; (b) independent contractors (so long as they are properly classified as independent contractors); (c) or COBRA participants, unless they are still employees (i.e. COBRA due to reduced hours).</p>

<p>Q: It states that the Notice of Exchange must be distributed to "all subsequent new employees" - for how long? New hires through the end of 2013?</p>	<p>A: The guidance does not state an end date. Until further guidance is received, all new hires need to be sent a notice of exchange within 14 days of hire indefinitely.</p>
<p>Q: Can the exchange notice be stapled to paychecks?</p>	<p>A: The guidance recently released specifically states the notice may be provided by first-class mail or electronically if the requirements of the DOL's electronic disclosure safe harbor are met (attached). The guidance does not specifically endorse the distribution of the notice directly to employees at the worksite, but previous comments by the DOL have implied that distribution of the notice with other benefits and enrollment material would be allowed. Further clarification from the DOL regarding this possible method of distribution would be helpful, but we feel that distribution at work as part of an enrollment packet or with payroll is a reasonable method to distribute the notice of exchange. There is no requirement that the employer get a signed statement that they received the notice, but the employer should somehow document in their files the method they use.</p>
<p>Q: Regarding the exchange notice, there are 2 on the DOL website. One to be used when coverage is provided and one when coverage isn't offered. Since the one regarding coverage does have a section that allows the employer to specify who is eligible, is it permissible to send this one to part time and casual employees who aren't eligible for coverage? Or do I need to send the employees not eligible for coverage the notice that says they aren't eligible for coverage?</p>	<p>A: If the employer offers coverage, it is okay to use that model template for all employees (including part-time employees). By stating the basic eligibility terms, all employees will be able to understand whether or not they qualify for employer-sponsored coverage.</p>
<p>Q: Are Health Savings Accounts (HSAs) subject to ERISA rules if the sponsor/employer contributes funds to them? Would they be "integrated" with the health plan in this instance?</p>	<p>A: Most HSAs are exempt from ERISA. An employer may make contributions to HSAs for employees without causing the arrangement to be subject to ERISA if employee participation is voluntary and the employer's involvement is limited. The following employer actions could create an HSA subject to ERISA: (1) limiting an employee's ability to move HSA funds to another HSA or imposing conditions on the use of HSA funds; (2) making or influencing investment choices for HSA funds; (3) representing that the HSAs are an employee welfare benefit plan established or maintained by the employer; or (4) accepting any payment or compensation in connection with an HSA. Keep in mind, the HDHP associated with the HSA will typically be an ERISA plan.</p>

<p>Q: Can you post an electronic copy of the SPD on the company's intranet and notify the employees of this and therefore satisfy the requirement of distribution to all employees?</p> <p>Q: If your employees that DO NOT have access to a computer at work, but have agreed in writing to receive these types of documents at an email address they have provided, is that acceptable?</p>	<p>Employers may use electronic distribution if the DOL electronic distribution safe harbor rules are followed. In general electronic distribution can be used for the following employees:</p> <p>(I) Plan participants that have the ability to access electronic documents at any location where they are reasonably expected to perform their duties as employees and whose duties include access to the employer's electronic information system; or</p> <p>(II) Any individual that has affirmatively consented, in either electronic or non-electronic means, to receive documents through electronic media, as long as</p> <p>(a) The individual agreed to receive documentation electronically, in a manner that reasonably demonstrates the individual's ability to access information in the same electronic format that will be used to provide the information that is the subject of the consent, and has provided an address (i.e., home email address) for the receipt of electronic documents; and</p> <p>(b) prior to consenting, the individual is provided a "clear and conspicuous statement" indicating:</p> <ul style="list-style-type: none"> (i) the types of documents to which the consent will apply, (ii) that consent may be withdrawn at any time, (iii) the procedure for withdrawing consent and for updating the address at which the electronic documents will be received, (iv) the right to request a paper version of any documents provided electronically, and (v) any software or hardware requirements for accessing and retaining the documents.
<p>Q: Did you include LTC and accident plan for ERISA?</p>	<p>A: Accidental Death & Dismemberment (AD&D) is subject to ERISA.</p> <p>Long-term care plans could be subject to ERISA to the extent that it provides reimbursements for nursing care.</p>
<p>Q: Do business with less than 50 total employees have to have a written Plan document and written Cafeteria Plan?</p>	<p>A: ERISA plan documents - There is no size restriction on employers subject to ERISA. ERISA Title I apply to any employee welfare benefit plan if it is established or maintained by (i) an employer engaged in commerce or in any industry or activity affecting commerce; (ii) any employee organization(s) representing employees engaged in commerce or in any industry or activity affecting commerce; or (iii) both. Therefore, yes, small employers must have written plan documents for ERISA plans.</p> <p>Cafeteria plan documents - Code §125(d) requires that a cafeteria plan be in writing. The proposed regulations indicate that if there is no written cafeteria plan, or the written plan does not comply with applicable requirements regarding content and timing of adoption, then the plan is not a cafeteria plan and employees' elections between taxable and nontaxable benefits will result in gross income. Therefore, yes, small employers must have a written cafeteria plan.</p>

Q: Who adopts new Cafeteria plans? IRS or just the company?	A: The employer adopts cafeteria plans. Neither Code §125 nor the proposed regulations specify how an employer must adopt a cafeteria plan. Employers should ensure that the plan is adopted by resolution of the board of directors (or an entity authorized by the board to adopt the plan), or an officer authorized to adopt benefits plans should sign the plan document or a separate certificate of adoption.
Q: Do SPDs need to be distributed to COBRA participants, even if they are posted on the carrier website? Our Medical/Dental participants have access to these documents via the carrier site, once the member has registered and logged into their own account.	<p>A: Under DOL regulations, the plan administrator of a welfare benefit plan is required to furnish SPDs (and SMMs) only to participants covered under the plan. By statutory definition, the term “participant” means an employee or former employee of any employer who is or may become eligible for benefits under an ERISA plan or whose beneficiaries are or may be eligible for benefits (which would include COBRA participants). It is only acceptable to provide the SPD electronically if the DOL safe harbors for electronic distribution are met.</p> <p>Also, the insurance contract provided to individuals by the insurance company often does not include all of the information required to be in an SPD.</p>
Q: Do the same rules for Welfare Benefit Plan Document & Cafeteria Plan documents apply to HRA's that are separate from your regular plan?	A: Yes, HRAs are generally subject to ERISA and therefore require plan documents. Many employers draft a single plan document and SPD that includes various benefits offered by the employer (e.g. a major medical plan, an HRA, and dental benefits) even if these benefits are administered by different entities.
Q: Does the IRS require an SPD?	A: No, the SPD is required under ERISA.
Q: Does the SBC still need to be limited to 8 pages? Can any style of 12 point font be used?	A: Yes. The statute requires that the SBC be presented in a uniform format, utilize terminology understandable by the average plan participant, not exceed four double-sided pages in length, and not include print smaller than 12-point font. However the DOL has issued temporary relief from enforcement of the 8 page rule if the employer is making a good faith effort to comply, and it is necessary for the document to exceed 8 pages to clearly communicate the benefits.
Q: Effective 2014, we no longer need to provide HIPAA certificates to employees when their coverage are terminated? Please advise. Thank you.	A: HIPAA certificates will no longer need to be provided effective December 31, 2014. The proposed effective date recognizes that participants may still need these certificates during 2014 to avoid PCEs under non-calendar-year plans.
Q: If we don't have open enrollment, are we still required to distribute an SBC?	A: Yes. The SBC is required to be provided upon (a) open enrollment/renewal; (b) initial enrollment; (c) special enrollment; and (d) upon request. The SBC must be included with open enrollment materials. However, if renewal is automatic, the SBC must be provided no later than 30 days prior to the first day of the new plan year.

<p>Q: Is an SPD required for 125 plans, specifically FSA or HSA plans?</p>	<p>A: A section 125 (cafeteria) plan itself is not subject to ERISA and does not require an SPD, but many of the benefits run through a section 125 plan are subject to ERISA and require SPDs. A health FSA, because it provides medical benefits, is subject to ERISA and must provide an FSA. A health spending account (HSA) is not generally subject to ERISA and does not require a SPD.</p>
<p>Q: Must the SPD be in participant's primary language; or is English only acceptable?</p>	<p>A: Employers must include a one-sentence statement clearly indicating how other language services will be provided in SBCs sent to an address in specified counties of the United States. The counties in which this must be done are those in which at least 10% of the population in the county is literate only in the same non-English language. The HHS website provides a list of counties which meet this threshold at http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/clas-data.html.</p> <p>Most employers include this statement on all SBC if they have employees in any of the listed counties, instead of trying to send out different SBCs based on where an employee lives.</p> <p>Written translations of the SBC must be provided upon request in the four applicable non-English languages. In order to assist with compliance with this language requirement, written translations for the SBC template and the uniform glossary are now available on the HHS website in all four applicable languages—Spanish, Chinese, Tagalog, and Navajo at http://www.cms.gov/cciiio/programs-and-initiatives/consumer-support-and-information/summary-of-benefits-and-coverage-and-uniform-glossary.html</p>
<p>Q: is there a minimum size limit to the SPD requirement</p>	<p>A: No, all group health plans subject to ERISA must provide an SPD.</p>
<p>Q: What is a cafeteria plan document? Is it only a POP document?</p>	<p>A: A cafeteria plan document describes the program for providing employees with a way to pay for benefits pre-tax. It could be a premium-only plan (POP), or it could include a variety of other benefits as well (i.e. health FSA, dependent care FSA, life insurance).</p> <p>A cafeteria plan document must contain all of the following information: • description of available benefits; • participation rules; • election procedures; • manner of contributions; • maximum amount of contributions; • the plan year; • if purchase or sale of paid time off (PTO) days is offered, the ordering rules for use of non-elective and elective PTO; • if the plan includes flexible spending arrangements (FSAs), the plan's provisions complying with any additional requirements for those FSAs; • if the plan includes a grace period, the plan's provisions complying with IRS requirements regarding the grace period; and • if the plan includes distributions from a health FSA to employees' HSAs, the plan's provisions complying with IRS requirements regarding such distributions.</p>

Q: One of our health carriers advised that the HRA did not qualify as "integrated" simply because it is with an outside TPA. Can you comment?	A: The DOL has issued guidance that makes it clear an HRA can still be considered integrated with a medical plan even if different administrators are used.
Q: To be clear, for multiple lines of coverage placed at various carriers, one ERISA wrap document can suffice for all plans/carriers/certificates?	A: Yes and the employer can create one plan document that incorporates various benefits offered though different insurance contracts and administrative services agreements.
Q: Is what we're discussing true for both self funded and fully insured? For our fully insured clients typically the carrier handles most of these requirements of plan documents.	A: The insurance contracts provided by a health insurer to plan participants often do not include all of the elements required for an SPD. ERISA imposes the SPD responsibility on the plan sponsor (typically the employer), consequently it is the employer responsibility to determine if documents provided by the insurance company fulfill the employer's SPD requirement.
Q: Who's the plan sponsor for a fully insured plan?	A: The employer is generally the plan sponsor.
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