2019

Why ERISA Plan Design & Documentation Matters

Presented by Benefit Comply

Why ERISA Plan Design & Documentation Matters

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.

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Agenda

- ERISA Application
- ERISA Requirements
- Plan Documentation
- Form 5500s

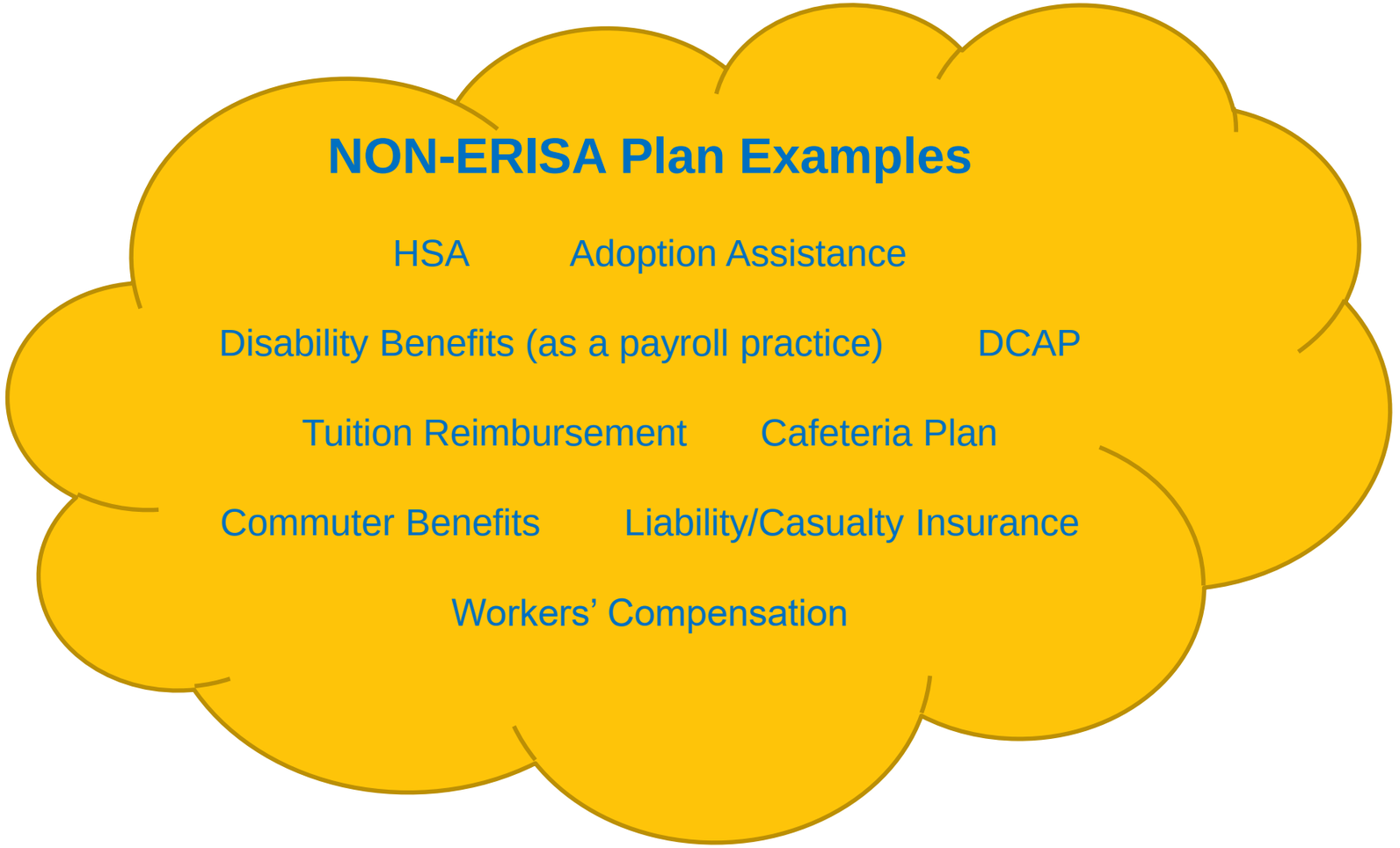
ERISA Application

What is an ERISA Plan?

- What Is An ERISA Plan?
  - Most employee benefit arrangements, both group health plans and non-group health plans, are employee welfare benefit plans covered by ERISA
  - Any group plan maintained by an employer *"for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise ... 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 …."* ERISA § 3(1); 29 USC §1002(1)

ERISA Application

ERISA Application



ERISA Application

- ERISA Exemptions
  - Government plans
  - Tribal plans
  - Church plans
  - Plans meeting the voluntary safe harbor
    - No employer contributions
    - Participation must be voluntary
    - Limited employer involvement (no employer endorsement)
      - Cannot allow payment of premiums through a cafeteria plan

ERISA Application

- ERISA Pre-Emption
  - Plans subject to ERISA will generally NOT be subject to state laws due to ERISA pre-emption
  - Plans not subject to ERISA (e.g. governmental or church plans) may need to pay more attention to state-specific benefit plan requirements

ERISA Requirements

ERISA Requirements

- Fiduciary Duties
  - Setting and following plan terms, including benefit inclusions/exclusions, eligibility for coverage, claims procedures, etc.
  - Proper handling of funds (plan assets)
- Plan Documentation and Distribution
  - Plan documents
  - Summary plan description (SPD) and summary of material modification (SMM)
  - Summary of benefits and coverage (SBC) and notice of modification
  - Claims handling notices
- Form 5500 filing
  - M-1 Filings
  - Summary annual report (SAR)

ERISA Plan Documentation

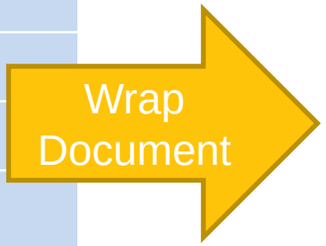
ERISA Plan Documentation

- Plan Document
  - ERISA rules require that every plan *“be established and maintained pursuant to a written instrument”*
  - Examples of typical content:
    - Plan name, number and plan year
    - Eligibility rules and benefits included/excluded
    - Named fiduciary and allocation of responsibilities
    - Description of funding and how payments are made
    - Claims procedures
    - Amendment procedures and distribution of assets upon termination
    - For group health plans, COBRA, HIPAA and other federal mandate descriptions (e.g. mental health parity, USERRA, FMLA, QMCSO)
  - No delivery requirement, but must be made available upon request
  - Recommended annual plan review and amendments when applicable

ERISA Plan Documentation

- Plan Design and Documentation Flexibility
  - WRAP Document
    - Add employer-specific terms as well as address any missing content not included in a certificate of insurance or coverage
    - Bundle multiple benefits (e.g. medical, dental, life) into a single ERISA plan
      - Sometimes referred to as a mega-WRAP or umbrella document

Plan Name	Plan #
Group Health Plan	**501**
Group Dental Plan	**502**
Group Term Life Plan	**503**
Long-Term Disability Plan	**504**
Health Flexible Spending Account	**505**



Acme Company Benefit Plan	Plan #
Group Health Plan	**501**
Group Dental Plan	
Group Term Life Plan	
Long-Term Disability Plan	
Health Flexible Spending Account	

ERISA Plan Documentation

- Plan Year
  - Cannot exceed 12 months
    - It may be necessary to run a short plan year for various business reasons (e.g. going out of business, merger/acquisition, change in plan year)
  - Plan year is generally established by the ERISA plan document, but if there is no plan document or plan year designation, the following may be used to determine the plan year:
    - the deductible/limit year used under the plan;
    - insured policy year; or
    - the employer's taxable year
  - The plan year often matches insurance contract or policy plan year, but they could be different (e.g. extended rate guarantee)
  - A bundled plan (via WRAP document) must have a single ERISA plan year, although the insurance policy year for any insured benefits need not match the plan year for the bundled ERISA plan

ERISA Plan Documentation

- Summary Plan Description (SPD)
  - SPD provides a summary of key plan provisions
  - Some employers also use a single document to serve as both the plan document and summary plan description (SPD)
    - Be careful…must satisfy all requirements for both documents
  - Content requirements - 29 CFR § 2520.102-3 https://www.law.cornell.edu/cfr/text/29/2520.102-3
  - Delivery Requirements
    - Must be distributed: (i) within 90 days of the effective date of coverage; (ii) every 5 years; and (iii) upon request
    - May be distributed by hand, by mail, or electronically as permitted under the DOL safe harbor (i.e. regular workplace access or consent)

ERISA Plan Documentation

- Summary of Material Modification (SMM)
  - SMM provides a summary of material changes to the SPD
  - Each time the plan is materially changed, and a new SPD is not created, an SMM must be provided:
    - Within 60 days following the adoption of a material reduction in plan benefits
    - Within 210 days following the close of a plan year when the change is not a material reduction in benefits
  - Should be included with the SPD whenever distributed until the SPD is updated with the latest changes

ERISA Plan Documentation

- Summary of Benefits & Coverage (SBC) & Uniform Glossary
  - SBC acts as a uniform tool providing a simple way to compare plans
  - Required for all group health plans, but not excepted benefits (e.g. stand-alone vision or dental, health FSA)
  - Content requirements – Template and instructions –https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/summary-of-benefits
  - Delivery Requirements
    - Must be distributed to all plan participants: (i) upon initial enrollment; (ii) upon annual enrollment; (iii) upon special enrollment; and (iv) upon request
    - Method of delivery – hand delivery, mail or electronically as follows:
      - For covered participants: (i) those who enroll online may receive the SBC electronically with their enrollment; (ii) those who don't enroll online may receive the SBC electronically if the DOL safe harbor is met
      - For those who are eligible but not enrolled, notification (by paper or e-mail) that the SBC is available on the Internet

ERISA Plan Documentation

- Notice of Modification
  - Mid-year material changes to benefits described in the SBC require a notice of modification
  - Must be provided 60 days in advance of the effective date of the change

ERISA Plan Documentation

- Common Mistakes or Missing Content
  - Plan name and number
  - Named fiduciary(ies) and allocation of responsibilities
  - Distribution of plan assets upon plan termination
  - Employer-specific processes/procedures
  - Accurate eligibility rules
  - Limitations or requirements for the handling of benefit claims and litigation
  - Inconsistency between documents (e.g. plan document, SPD, employee handbook, insurance contract)
  - Failure to keep things up-to-date (e.g. eligibility rule changes, vendor changes)
  - Language granting the plan sponsor discretionary authority to interpret the plan terms

****Insurer prepared documentation will represent the insurer's best interests and be drafted to comply with state requirements (not necessarily ERISA requirements)*

ERISA Plan Documentation

- Why Does It Matter?
  - Liability for additional benefits/coverage
  - Civil penalties for:
    - Breach of fiduciary duties
    - Up to $110/per day penalty for failure to distribute the SBC or failure to respond to written document requests from plan participants
  - Audit risk (especially by the Department of Labor)
  - Litigation risk
    - Less favorable standard of review by the courts (i.e. increased scrutiny)
    - Without defined terms, decisions will be made based on past practices and extrinsic (outside) evidence will generally be permitted
    - Fiduciary duty to follow plan document terms requires careful drafting and up-to-date documentation
  - Form 5500 compliance
    - Form 5500 reporting requirements will depend upon plan year and plan setup (e.g. bundled benefits via WRAP document)

Form 5500s

Form 5500s

- Basics
  - A tool used by the IRS and DOL to:
    - Collect and share information about employee benefit plans; and
    - Oversee enforcement of ERISA and Tax Code rules
  - Find forms, electronic filing requirements and other assistance at - https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500
  - Filings are public information - https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1

Form 5500s

- Who Must File?
  1. ERISA welfare plans covering 100 or more participants at the beginning of a plan year
     - Count employees and former employees, but not spouses or dependents
  2. Funded ERISA benefit plans
     - Unfunded vs. Funded
       - Unfunded means plan costs are paid out of the employer’s general assets
  3. Most multiple employer welfare arrangements (MEWAs)

Form 5500s

- How Many Form 5500s Should Be Filed?
  - General Rule: A Form 5500 for each ERISA plan with 100 or more participants
  - If there is a WRAP document bundling benefits into one ERISA plan, only one Form 5500 is required
    - All benefits within the plan will be listed, even if less than 100 participants
    - Line 8b codes and Schedule As as applicable

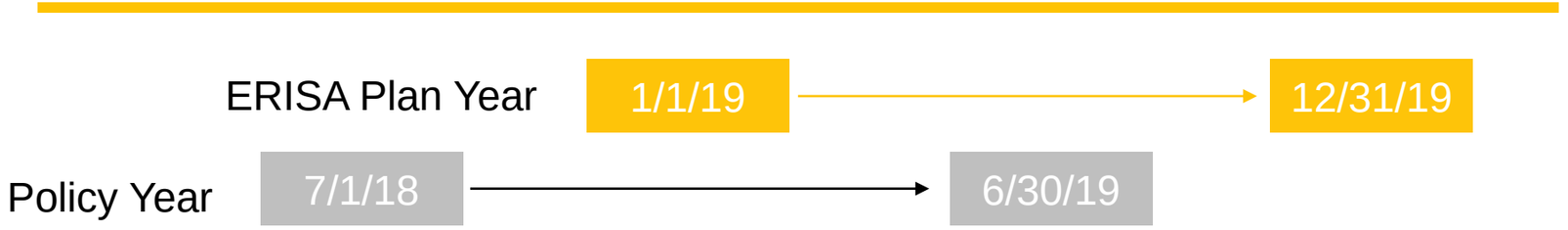
Acme Group Health Plan	Plan #501
Group Health Plan	75
Group Dental Plan	65
Group Term Life Insurance Plan	103
Long Term Disability Plan	75
Health Flexible Spending Account	18

The entire plan must file Form 5500

Participant count on first day plan year

Form 5500s

- When Is Filing Required?
  - Standard deadline is 7 months after the close of the ERISA plan year
    - Also required for short plan years
    - Optional 2-1/2 month extension of time may be requested
    - Example – For a calendar year plan, the standard deadline would be July 31st. The extended deadline would be October 15th
  - ERISA plan year is generally the same as the insurance contract/policy plan year, but not always
    - When it is different, the policy year ending date (and corresponding Schedule A) must fall within the ERISA plan year



Form 5500s

- Form 5500 Schedules
  - Schedule A
    - Generally required only for a fully-insured plans
    - Typically prepared by the carrier
  - Schedule C
    - Generally required only if the plan is “funded” (i.e. assets of the plan are segregated from the general assets of the plan sponsor)
    - Used to report information about service providers paid by the plan
  - An unfunded self-funded (self-insured) plan is typically required to file only the main portion of the Form 5500 without any schedules

Form 5500s

- M-1 Filings
  - Multiple employer welfare arrangements (MEWAs)
    - Formed when unrelated entities share benefit plans, for example:
      - Entities without enough common ownership to form a controlled group under §414 (i.e. <80% common ownership)
      - Affiliated service groups
      - Benefit plans covering non-employees such as independent contractors, owners or board members
  - MEWAs are generally required to annually file a Form M-1 and Form 5500 regardless of number of participants
    - Exception when non-employees make up less than 1%
    - Exception when there is 25% or more common ownership between entities sharing benefit plans

Form 5500s

- Penalties for Non-Compliance
  - Maximum penalty is $2,194 per day (up to $800,810 per year)
  - Standard penalty is $300 per day up to $30,000 per year for non-filers, and $50 per day (with no cap) for late filers
  - Exposure is increased if there are multiple plans versus a single ERISA plan under which multiple plans are bundled via a WRAP document

Form 5500s

- Delinquent Filer Voluntary Compliance Program (DFVCP)
  - Reduction in penalty exposure
    - $10 per day up to $2,000 per year
    - Capped at $4,000 per plan
  - If the organization is first contacted by the DOL relative to delinquent filings, the opportunity to file under the DFVC program is no longer available
  - Absent a WRAP document that combines all benefits into a single ERISA plan, each benefit will be deemed a separate plan for penalty purposes
  - Helpful websites
    - FAQ - https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/dfvcp.pdf
    - Penalty calculator and online payment instructions - https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/dfvcp

Form 5500s

- Example – Failure to File for 3 Years

Acme Group Health Plan(s)		Plan #501 (Benefits Bundled via WRAP Doc)		Plans #501, #502, #503 (No WRAP Doc)
Maximum Penalty (no filing)		$800,810 x 3 = **$2,402,430**		$800,810 x 3 x 3 = **$7,207,290**
Standard Penalty (no filing)		$30,000 x 3 = **$90,000**		$30,000 x 3 x 3 = **$270,000**
Standard Penalty (late filing)		$18,250 x 3 = **$54,750**		$18,250 x 3 x 3 = **$164,250**
DFVCP		$2,000 x 3 = $6,000 **Capped at $4,000**		$2,000 x 3 x 3 = $18,000 **Capped at $12,000**

Summary Annual Report (SAR)

- Definition
  - A summary annual report (SAR) is a boiled-down summary of the Form 5500
- Application
  - Required for any plan subject to Form 5500 filing
  - Exception for self-insured plans without any segregation of assets in a trust or otherwise (unfunded)
- Template
  - 29 CFR 2520.104b-10 - https://www.law.cornell.edu/cfr/text/29/2520.104b-10
- Distribution Requirements
  - Must be distributed annually within 2 months from the date Form 5500 is due
  - May be distributed by hand, by mail, or electronically as permitted under the DOL safe harbor (i.e. regular workplace access or consent)

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