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Preparing for a DOL Audit

Benefit Advisors Network

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Who Audits?

A Number of Agencies Have Jurisdiction Over ERISA Plans

- U.S. Department of Labor (“DOL”)
- U.S. Internal Revenue Service (“IRS”)
- Health and Human Services (“HHS”)
- State Attorneys General (“AGs”)

Who Is Audited?

- Size/Type of Employer Irrelevant
- Don’t Believe Myths
- Every year thousands of ERISA-governed plans are selected for audit by governmental agencies
- DOL has significantly increased audit enforcement and IRS announced it is stepping up examination and enforcement activities and plans to dramatically increase the number of plan returns audited in the current and next fiscal year
- HHS is now getting into the Act, along with State AG’s
- The cynical view is that fed$ need dollar$

The Big Question

How Do Plans Get Selected for Audit?

The Answer

By The Numbers

- Employee Benefits Security Administration (EBSA)
  - EBSA's oversight authority extends to nearly 2.4M health plans covering about 135M participants, and nearly 700M retirement plans with nearly $10T in assets
- EBSA 2019:
  - 1,146 civil investigations closed
    - 770 (67%) resulted in penalties or other corrective action
  - 275 criminal investigations closed
    - 142 persons indicted, 80 criminal investigations closed with guilty pleas or convictions
  - Total Recovery: @ $2.5B ($510M restored through Informal Complaint Resolution)
- Approximately 1/3 of the health plans that were penalized were in excess of $10,000 and 5% in excess of $50,000
- ~80% of personnel engaged in audit activities

What is the Process?

The Process (typically) starts when agency sends letter to plan sponsor:

- Advising sponsor that “plan” is to be reviewed
- Advising sponsor that agency will visit company on a certain date to review plan documentation
- Advising sponsor that on-site visit obviated if sponsor will provide to agency specified documentation—with very short turnaround
- Including a multitude of requests for documentation and information
- Establishing a very short time frame in which to respond

What is the Process

- Client will often turn to broker
  - Should broker assist?
  - Should broker suggest counsel?
- ERISA counsel
  - Can negotiate an extension for response
  - Can assist plan sponsor/broker in assembling responsive materials
- Can review documentation and information for smoking guns
- **Has the benefit of the attorney-client privilege**

What Do They Audit

- Plan Documentation (plan document, SPDs, SMMs, SARs)
- Form 5500s
- Compliance with electronic distribution rules (if distributing electronically)
- Document Retention
- HIPAA Portability, including wellness programs
- HIPAA Privacy
- Cafeteria Plans
- Mental Health Parity (MHPA and MHPAEA)
- ACA

What Do They Audit?

- **Plan Document** – ERISA requires that every employee benefit plan be established and maintained pursuant to a written plan document that describes the benefit structure and guides the plan's operations
- The plan document must be provided to participants and beneficiaries no later than 30 days after a written request
- Common Issues
  - Undocumented Arrangements—often an issue with flex plans, HRAs and EAPs
  - Whether "certificate of coverage" constitutes plan document for insured plans
  - Poor documentation of benefits for self-insured plans
  - Plan documents not on site—problem with prototype providers who only provide "adoption agreement"
  - **Plan documents not properly amended for applicable law**

What Do They Audit?

The Plan Document must include the following information:

- Plan operation details
- Name of the plan administrator; if no plan administrator is named, the company/employer will be the plan administrator and also will be a “named fiduciary”
- Plan administration procedures and any delegation of responsibilities to other parties (e.g., claims review)
- Funding policy and procedure
- Plan amendment and termination procedures
- Explanation of how and when payments will be made under the plan

What Do They Audit?

Summary Plan Description (SPD)

- SPD must be consistent with plan terms
- Copy must be provided to each participant – have demonstrated procedures
- SPD can be provided to employees with enrollment materials

- Common Issues
  - Benefits booklets provided by health insurers are not SPDs
  - SPD does not properly reflect eligibility requirements imposed by employer
  - Does not include required provisions (WHCRA, claims procedures, ERISA rights, etc.)

What Do They Audit?

Summary Plan Description (SPD)

- Distribution Requirements
- SPD must be provided within 120 days after a plan first becomes subject to ERISA
- SPD must be provided within 90 days after an individual becomes a participant
- SPD must be provided every five years if there have been any changes to the plan during the five-year period
- SPD must be provided every ten years if there have been no changes to the plan
- If material reduction in covered services is made to plan, notice of the reduction must be provided within 60 days after the adoption of the change (unless SPDs are issued at least every 90 days)
- Participants and beneficiaries may also make written request for a copy of the SPD

What Do They Audit?

Summary of Material Modification (SMM)

- Copy of SMM must be provided to each participant no later than 210 days after the end of the plan year in which the change is adopted
- No prescribed format for SMM
- SMM can be in letter, memo or other format
- An updated SPD can be provided instead of the SMM
- SMM may be combined with other documents
- Plan identifying information should be included

What Do They Audit?

Summary of Benefits and Coverage (SBC)

- Applies to all group health plans (other than excepted benefits)
  - Describes benefits available under the plan
  - SBC must include an internet address where an individual can review the Uniform Glossary and contact information for obtaining a paper copy
- **Timing**
  1. Must be provided with enrollment materials and at renewal
  2. SBC must be provided to special enrollees within 90 days
  3. SBC must be provided upon request within 7 days
- Electronic delivery is permitted for those enrolling online or who are notified that SBC is available online (e.g., via postcard or email)
  - Failure to comply may result in $1,176 fine per occurrence

What Do They Audit?

Summary of Benefits and Coverage (SBC)

- Advance notice of modification
  - If a plan makes a material modification in any of the plan terms that would affect the content of the SBC that is not reflected in the most recently provided SBC, the plan must provide notice of such change
  - Advance notice requirement does not apply to changes that occur in connection with a renewal or reissuance
- **Timing**: Notice must be provided no later than 60 days prior to the date on which the modification will become effective

What Do They Audit?

Summary Annual Report (SAR)

- Prescribed format
- SAR must be provided by the end of the ninth month after the close of the plan year (September 30 for calendar year plans)
- Extension of two months granted if Form 5558 completed and submitted with Form 5500

- Common Issues—Health Plans
  - Common misconception that SARs are not required for health plans
  - If a Schedule A is required (or the plan is funded through a trust), a SAR is required

What Do They Audit?

- **Form 5500** – Always a Part of Every Audit
  - Form 5500 must be filed by the end of the 7th month after the close of the plan year
  - Extension of 2½ months if Form 5558 timely filed
  - Health care FSAs, medical, dental, long-term disability, AD&D and group term life plans are required to file Form 5500
  - **Common Misconception:** There is **NO BLANKET EXEMPTION for tax-exempt entities**
- Required for welfare plan if there are 100+ employees participating on first day of the plan year
  - Premium Only Plans not required to file Form 5500
  - Dependent care FSAs generally not required to file Form 5500
  - Late Filers: Delinquent Filer Voluntary Compliance (DFVCP)
  - SAR required if Schedule A is Filed (or plan is funded)
- Required for all retirement plans
  - Large plans (100+ participants) must include audit each year
  - Small plans may not be required to have audit

What Do They Audit?

Form 5500 – Checklist

- Maximum penalty for failure to file: $2,233/day
- DOL may impose lower penalties under programs for Late or Non-Filers
  - Late Filers - Plan administrators filing a late annual report (i.e., after the date the report was required to be filed, including extensions) may be assessed $50 per day, with no limit, for the period they failed to file, determined without regard to any extensions for filing
  - Non-Filers - Plan administrators who fail to file an annual report may be assessed a penalty of $300 per day, up to $30,000 per year, until a complete annual report is filed
- Consider Delinquent Filer Program (only available prior to audit)
- For Welfare Plans: Consider a Wrap Plan Document

What Do They Audit?

Form 5500 – Extensive Changes Were Proposed

- Changes would have applied to plan years beginning in 2019
- Would have eliminated small plan exemption for group health plans
- Other changes included:
  - Expanded use of Schedule C for certain small plans
  - Schedule J that required reporting information such as plan design, the categories of benefits provided, whether the plan is an HDHP or includes an HRA or FSA, whether the plan is grandfathered, the number of individuals offered as well as how many elected COBRA, claims payment policies and practices, enrollment data, financial disclosures, denied claims information, cost sharing, and identification of service providers such as TPAs, pharmacy benefit managers (PBMs), or wellness providers
  - Additional questions, such as whether the SPD and SBCs are in compliance, whether coverage is provided in compliance with applicable laws, including HIPAA, GINA, MHPAEA and the ACA

What Do They Audit?

Electronic Delivery

- ERISA Includes a Number of "Notice" Requirements:
  - SPDs
  - Plan Amendments
  - SARs
  - COBRA Notices
  - HIPAA Special Enrollment Rights Notice
  - Women's Health and Cancer Rights Act (WHCRA) Notice
  - Qualified Medical Child Support Order (QMCSO)

Raymond Thomas v. CIGNA
An instructive reminder that employers who rely on electronic delivery of plan-related documents must follow some fairly specific rules to make sure their documents are *delivered* and not just *furnished*

What Do They Audit?

ERISA permits electronic disclosures if certain requirements are met

The Basics:

- Steps taken to furnish documents are calculated to result in actual receipt
  - Use return-receipt or notice of undelivered e-mail features
  - Conducting periodic reviews or surveys to confirm receipt
- Steps taken to safeguard confidentiality of personal information
- Electronically delivered documents are prepared in a manner consistent with the style, format and content requirements applicable to the document
- A paper version of the electronic document must be available on request (at no charge)
- Each time an electronic document is furnished, a notice (electronic or paper) must be provided to each recipient describing the significance of the document

What Do They Audit?

Once the basic requirements are met, documents may be furnished to two classes of potential recipients:

1. Participants who have the ability to access documents through employer's electronic information system located where they are reasonably expected to perform duties
   - Employees working from home or on travel are covered
   - Distribution through a kiosk in a common area in the workplace does not comply with the requirements
2. Other participants
   - Retirees and terminated participants with vested benefits, beneficiaries, alternate payees
     - Must affirmatively consent to receive the documents electronically
     - Must provide an electronic address
     - Must reasonably demonstrate their ability to access documents in electronic form

What Do They Audit?

Document Retention

- Basic Rule: employee benefit plan documents and documents required by ERISA must be retained for six years after the date of filing, resolution, or amendment
- Common misconception: agencies only look back three years—**NOT TRUE**
- It is a good internal practice for the official plan documents to be retained for the life of the plan, so that the plan sponsor has a paper trail of the plan from its inception
- Materials should be preserved in a manner and format that permits ready retrieval
- All records including annual reports, disclosures, amendments and resolutions should be retained

What Do They Audit?

Document Retention – What to Keep

- Original signed plan documents and amendments
- Corporate resolutions/committee actions related to the plan
- Plan disclosures and communications to participants--Form 5500s, SARs, SPDs, SMMs, etc.
- Financial reports, audits, and related statements
- Trust documents
- Nondiscrimination and coverage testing results
- Disputed claim records in the event of future litigation
- Payroll and census data used to determine eligibility and contributions
- Notices of Creditable/Non-creditable coverage

What Do They Audit?

HIPAA Portability

- Extensive & Focused Audit Activity on Portability
- Provide notice of special enrollment rights
- Ensure plan does not discriminate based on health factors

What Do They Audit?

HIPAA Privacy Standards

- Increase penalty provisions under HITECH
- Don’t forget any state privacy laws that may apply to employees
- Identify group health plan’s current uses and disclosures of protected health information, including the individuals who have access to protected health information
- Analysis of use and disclosure
- Plan Document Amendments
- Business Associate Agreements
- Policies and Procedures
- HIPAA Privacy Officer
- Privacy Notices
- Breach/Encryption Protocols

OCR Phase III Audits

- Phase I - OCR developed plan to conduct HIPAA audits
- Phase II – Implementation of audit process (via patient complaints and random desk audits)
- Phase III – Unannounced visits from OCR to review HIPAA policies and procedures
- Pay extra attention to areas of "heightened risk," including:
  - Risk assessment
  - Authorizations
  - Minimum necessary use and disclosure
  - Notice of privacy practices
  - Breach notification and incident response
  - Access controls

What Do They Audit?

Cafeteria Plan

- Plan Documentation is a Big Issue
- Non-Discrimination Testing
  - All components of the cafeteria plan must be tested annually
  - Keep documentation for six years
  - Be prepared for IRS Audit

What Do They Audit?

Mental Health Parity and Addiction Equity Act

- In 2019, DOL reviewed 186 plans (including service providers) for MHPAEA compliance and cited 12 violations
  - In the course of one investigation, the service provider reported providing services to 99 self-insured and 210 fully-insured plans, covering 67,724 participants
- Big focus on non-quantitative treatment limitations (NQTL)
  - NQTLs are limits on the scope or duration of treatment that are not expressed numerically (such as medical management standards, formulary design and methods for determining usual, customary and reasonable charges)
  - NQTLs may include: (i) network tier design, and (ii) restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan or coverage

What Do They Audit?

Wellness Programs that are part of the group health plan

- For health-contingent wellness programs:
  - Reward must not exceed 30% of cost of coverage – if dependents may participate, limit is 30% of the cost of the family coverage
    - Up to 50% if the wellness plan includes smoking cessation
  - Reasonably designed to promote health or prevent disease
  - Opportunity to qualify at least once per year
  - Reward must be available to all similarly situated individuals
- Consider whether rewards under a wellness program impact a plan's grandfathered status under the ACA
- Wellness plans should be reviewed for compliance with ERISA, ADA and GINA

What Do They Audit?

Health Risk Assessments

- Not really an audit issue
- Be advised that while the DOL says non-results oriented, mandatory HRA's are ok, EEOC disagrees
  - Seff and Flambeau cases are instructive, although final EEOC regulations reflect EEOC's position that these cases were both wrongly decided
  - Most recently, in EEOC v. Orion, court held that the ADA's safe harbor provision did not apply to the employer's wellness program
  - Employers that want to avoid potential EEOC/Americans with Disabilities Act (ADA) issues should not mandate participation in wellness/HRAs
    - Limit rewards/penalties to 30% of the total cost of coverage, as required under the ADA

What Do They Audit?

ACA Compliance – Agencies are auditing

- For plans that claim to be Grandfathered:
  - Disclosure statements regarding grandfathered status included in material distributed to participants and beneficiaries describing the benefits provided under the plan; and
  - Records documenting the terms of the plan on March 23, 2010, along with any ancillary documents required to verify the status of the grandfathered plan; and
  - SPD provisions if the Age 26/Other Employment Exclusion is Claimed

What Do They Audit?

ACA Compliance – Agencies are auditing

- For group health plans
  - Eligibility
  - The plan's choice provider disclosure notice, along with a list of participants who received that notice
  - Documents relating to the plan's emergency services benefits
  - Documents relating to the preventive services
  - The plan's internal claims and appeals procedures
  - Notices relating to adverse benefit determinations, the plan's final internal adverse determination notice, and the plan's final external review determination notice
  - Contracts or agreements with independent review organizations or third party administrators providing external review

What Do They Audit?

ACA Compliance – Agencies are auditing

- For group health plans (cont.)
  - For plans with dependent care coverage, a sample of the notice describing enrollment opportunities relating to coverage of children up to age 26
  - A list of any participants who had coverage rescinded and the reason for such rescission
  - If the plan imposes or has imposed a lifetime limit since September 23, 2010, documents relating to that limit for each plan year
  - If the plan has imposed an annual limit since September 23, 2010, documents relating to that limit

What Do They Audit?

Occupational Safety and Health Administration ("OSHA") may come knocking soon, too

- DOL & OSHA have standards and procedures for handling retaliation complaints for an employer's failure to comply with the ACA
- Protected activities include:
  - Employee's receipt of any cost-sharing subsidy under the ACA
  - Employer can't retaliate or otherwise discriminate against employees whose lack of coverage may subject employer to tax penalty
  - Traditional whistleblower activity regarding alleged violations of Title I (health insurance reforms)

What Do They Audit?

Takeaways for Handling ACA Whistleblower/Retaliation Complaints

- Implement effective compliance, notification and investigation programs
- Adopt and implement clear policies addressing conduct prohibited by the ACA and prohibiting retaliation against employees who raise concerns about policy violations
- Consider implementing a hotline to encourage employees to first raise any concerns directly with employer before taking their claims to OSHA
- Inform managers about scope of the ACA protections and policies prohibiting retaliation
- Consider developing policies and procedures for monitoring compliance with the ACA
- Keep records of unsatisfactory employee conduct to defeat inference that an adverse employment action was taken by an employee's ACA report
- Consult with counsel and investigate before making any adverse employment action against any employee who has engaged in activities protected by the ACA

Questions?

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