



THE ELUSIVE PLAN DOCUMENT

Who Needs One and Why / Minimizing Compliance Risk



When it comes to employee group health and welfare benefit plans, compliance can feel a bit like hitting a moving target. Just when you're confident your whole program is compliant, there's a change in the law or in a benefit. The result is a reactive, rather than proactive, approach to compliance. This approach leaves an organization open to unwanted levels of risk and audit vulnerabilities.

The reality is, compliance will always be an evolving challenge. It takes diligence and considerable resources to stay on top of constantly unfolding regulations, and plan specifics will always shift from year to year. Yet there are steps your organization can take to reinforce its compliance efforts by building a solid foundation around documentation and compliance processes.

That foundation should center on the plan documents.

For all intents and purposes, virtually all organizations offering health and welfare benefit plans need plan documents.

Taking the right approach to creating and maintaining these foundational documents can go a long way in minimizing compliance risk. For plan administrators focused on compliance, this report offers a deeper dive into building an effective health and welfare program around the elusive plan document.

GETTING TO KNOW ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law enforced by the Department of Labor (DOL), which looks out for participant interests. ERISA requires health and welfare plan administrators (the people who run employee benefit plans) to give plan participants, in writing, the most important facts they need to know about their benefit plans including plan rules, financial information, and documents on the operation and management of the plan. Notwithstanding the virtual absence of design requirements imposed by ERISA on employee welfare plans, ERISA does require that every welfare plan “be established and maintained pursuant to a written instrument.”

Failing to comply can lead to civil and criminal penalties.

Some organizations, including public entities and church plans, are not covered under ERISA. Because they are exempt from ERISA, governmental and church health plans are not required to have a written ERISA plan document. Although ERISA may not apply to these plans, they are still subject to many of the laws that apply to private-sector plans, and still subject to plan documentation requirements under other federal laws. Therefore, the drafters of documents for ERISA-exempt plans often look to ERISA to influence plan documentation requirements under other laws. For example, ERISA-exempt plans are also subject to other federal rules that may have documentation or notice requirements such as the Internal Revenue Code (the Code); the Health Insurance Portability and Accountability Act (HIPAA); the Newborns’ and Mothers’ Health Protection Act (NMHPA); the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA); and the Patient Protection and Affordable Care Act (PPACA).

PUTTING YOUR DOCS IN A ROW

Exactly what constitutes an ERISA “written plan instrument” can be debated.

Certain provisions are required to be in a plan document, certain provisions are wise to have in a plan document, and others have simply historically always been included. The style of a health and welfare plan will vary according to the drafter. All ERISA welfare benefit plans should have a written plan instrument (e.g., medical, life, long term disability, etc.) Most plan sponsors with insured plans think they have a plan document (and they may not). They also think they have a valid “summary plan description” or SPD also required by ERISA to provide participants with an understandable summary of the plan.

Cafeteria plans, including flexible spending accounts or “FSAs”, are another type of written plan required under the Code Section 125 rules. These plans allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from taxes. However, employers have flexibility in terms of plan documentation for cafeteria plans (including FSA) and there are multiple ways to approach how health and dependent FSAs are documented. For ERISA plans, cafeteria plan language (including FSA) can be added to a “wrap” plan document/SPD to satisfy the cafeteria plan documentation requirement. For non-ERISA plans, there are no rules that prohibit an employer from including cafeteria plan language in its plan documentation describing other employee benefits. In either case (ERISA or non-ERISA), the cafeteria plan document could also be a freestanding document that only describes the cafeteria plan.

WHO CREATES THESE DOCUMENTS?

Many organizations have a combination of fully-insured and self-insured plans (e.g. medical is self-funded, vision and dental is fully-insured). In these cases, a combination of external documents and documents prepared internally are used to document the benefit offerings. Arguably, insured plans have a written instrument, typically a combination of the insurance policy between the plan sponsor and the insurance company and a booklet/certificate issued to participants.

The insurance company designs the plan it offers, determines coverage and creates communication for participants. But in many cases, the combination policy and booklet/certificate do not technically satisfy the requirements of an ERISA plan document or an SPD. Self-insured plans must also be documented, but these documents are often created by law firms or benefit professionals.

While many employers rely on insurance policies or contracts and benefit summaries issued to an employer, these documents rarely meet all the requirements of an ERISA plan document.

Many plan sponsors supplement the insurance policy and other written instruments with a wrap document. For plan sponsors with multiple welfare benefit offerings, the use of a wrap plan document provides evidence that the plan sponsor views the benefit program as one plan with different components, and supports one annual Form 5500 filing.

KILLING TWO BIRDS WITH ONE STONE

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Wrap documents are drafting devices used to supplement already existing documentation. A wrap documents “wraps around” the carrier-provided documents and other written instruments to add information required under ERISA but not captured in the carrier and other documents. A wrap document provides the necessary ERISA bells and whistles by incorporating (or wrapping itself around) the insurance policy or similar third-party materials and summaries. The insurance policy and summary booklets remain part of the plan document (reflecting many of the plan’s most important terms and conditions), and the wrap document merely supplements these materials with the necessary additional information.

In instances where there are multiple plans (often with a mix of funding types and document sources), a “mega-wrap” can be used to pull everything under a single document. This mega-wrap document serves a dual purpose—it collects documents regarding more than one type of benefit together to form a single plan, and also provides the ERISA required language. For example, if multiple insured health coverage options are offered, a mega-wrap document brings all of the insurance policies together as a single plan.

Mega-wrap documents are commonly used to collect multiple welfare benefits under a single plan so that only one Form 5500 needs to be filed.

A wrap document can be used to bundle various types of benefits (e.g., medical coverage, dental coverage, LTD, and life insurance) and may include both insured and self-insured benefits. Non-ERISA benefits (like dependent care FSAs) may be bundled with ERISA benefits through a wrap document without becoming subject to ERISA; clear drafting with respect to which benefits are (and are not) subject to ERISA is recommended.

When using a wrap document, it is important to clearly describe which provisions apply to which component benefits, and to avoid conflicts or ambiguities. The mega-wrap document can also be written to include cafeteria plan language required under the Code.

WRAPPING UP COMPLIANCE

All plan documents need to be updated any time changes to plans are made, and these changes need to be communicated to employees. Maintaining a single mega-wrap document may prove to be a more straight-forward drafting device for updating the benefit plan offerings as they change year over year.

All plan documents must be stored and readily available to be properly and timely distributed to all plan participants and beneficiaries by the plan administrator. The plan administrator must make copies available at its principal office and certain other locations. The plan administrator must furnish copies of certain documents upon written request, and must have copies available for examination. The documents include the latest updated SPD, latest Form 5500, and other instruments under which the plan is established or operated.

A STRATEGIC APPROACH IS KEY

The document requirements for group health and welfare plans are very complex. The applicability of certain requirements may depend on a number of factors, including the number of employees covered under a plan and the type of benefits offered. Additionally, a group health or welfare plan may be subject to other requirements, such as certain disclosures required by the Internal Revenue Service or under state law. Employers who have questions are encouraged to consult with their third plan administrators, benefit plan advisors or a knowledgeable employee benefit/ERISA attorney for further guidance.

Plan document compliance is an ongoing process – it is not a “set it and forget it” practice. But with a strategic approach to streamlining documents and properly communicating with participants, plan sponsors can reduce risk, maintain compliance, effectively share important, administer varied group health and welfare programs, and also properly share relevant benefit information with participants.

To learn more about crafting the right plan documentation:

Please contact a Conner Strong & Buckelew representative

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