



➤ February 15, 2023

# ERISA Compliance Requirements for All Employers



Presentation By:  
Gloria Pulgarin

# Before We Begin



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## ➤ Presenter



### Gloria Pulgarin

- Gloria is a Regional Vice President of Sales and has been with BASIC for over 24 years.
- She covers Arizona, Nevada and Southern California.
- She specializes in assisting employers with finding cost-effective, value-driven solutions for administration services like FMLA, COBRA, ACA Reporting and ERISA compliance, plus improving their benefits package through BASIC CDA plans.
- She is a member of National Association of Benefits and Insurance Professionals (NABIP)

# ➤ Overview of Topics Discussed

## ERISA Fundamentals for Health and Welfare Plans

- What plans are subject to ERISA?
- What are the implications of ERISA?

## Other Laws Governing Health and Welfare Plans

- Internal Revenue Code
- Taxability of Benefits
- Cafeteria Plans
- Other Applicable Federal Laws
- Various State Laws

## ➤ What is ERISA?

- The Employee Retirement Income Security Act of 1974 is a federal law that sets minimum standards for most employer-sponsored plans (pension and welfare)



## ➤ ERISA Policy Goals

- Primary focus at enactment of ERISA was to protect retirement savings from mismanagement and abuse
- Welfare benefit protection was a secondary purpose; however, the declaration of the policy to protect the interests of participants and beneficiaries applies
  - Requires transparency and accountability
  - Ensures participants have access to information about plans



## ➤ Application of ERISA

- ERISA applies to most employee benefit plans sponsored by employers
- ERISA does not apply to the following plans:
  - Government plans
  - Church plans
  - Plans that exist solely to comply with workers' compensation, unemployment compensation, or state disability insurance plans

## ➤ Benefits Subject to ERISA

- Medical, Prescription Drug (Rx), Dental and Vision Benefits (self-funded or fully insured)
- Health Reimbursement Arrangements (HRA) (except some small employer QSEHRAs)
- Employee Assistance Plans (EAP) providing counseling benefits (referral-only EAPs are not subject to ERISA)
- Short-term disability (STD) benefits if provided through a trust or are fully insured
- Long-term disability (LTD) benefits

## ➤ Benefits Subject to ERISA, Continued

- Group term life insurance
- Accidental death and dismemberment (AD&D)
- Flexible Spending Arrangements (FSA)
  - The medical spending portion of the account is
  - Dependent care and pre-tax premium collection of a 125 cafeteria plan are not
- Most severance benefits (if they do not classify as an on-going administrative scheme)
- On-site medical clinics providing treatment more than for minor injuries and illnesses
- Telemedicine

## ➤ Benefits Not Subject to ERISA

- Plans sponsored by governments or churches ... but be careful with church plans
- Voluntary Plans – Whether or not a plan is voluntary is subject to facts and circumstances
- Many short-term disability plans
- Health Savings Accounts (HSA) generally not subject to ERISA

## ➤ Voluntary Plan Operation for ERISA Exemption

- NO EMPLOYER CONTRIBUTIONS ALLOWED
- Employer cannot “endorse” the program
- Employee participation must be completely voluntary
- Involvement must be limited to permit the insurer to publicize the program, collect premiums by after-tax payroll deduction, and remit premiums to the insurer

# ➤ Voluntary Plan Operation for ERISA Exemption

## Facts that may lead to a determination that the plan is subject to ERISA:

- The employer's name is used in communications with employees
- The benefit associated with other employer sponsored plans
- The employer selects and recommends the benefit to employees
- Benefit materials include a statement that the program is subject to ERISA
- The employer assists employees with claims or disputes
- The employer allows pre-tax deductions for benefits under a cafeteria plan

# ➤ ERISA Compliance Requirements

- A written plan document (no prescribed form)
- Disclosure Requirements
  - Summary Plan Document (SPD)
  - Summary of Material Modifications (SMM)
  - 104(b) Requests
  - Summary annual report (SAR) in some circumstances
- Reporting Requirements
  - Form 5500 must be filed unless exception applies

# ➤ ERISA Compliance Requirements, Continued

- Fiduciary Obligations
  - Must follow the terms of the plan document in a consistent and uniform manner
  - Must exercise prudence in selecting vendors
  - Employer may not mislead plan participants (lie or omit)
  - Bonding requirements (if funded through trust or special account)
  - Prohibited transactions with party in interest (disqualified persons)
  - Prohibition on self-dealing
- Claims and Appeals
- ERISA requirements responsibility of plan administrator, not TPA or insurer



# ➤ Plan Document Requirements



- Must be written
- May include one benefit or multiple benefits
- Must contain the following information:
  - Named fiduciaries
  - Source of funding
  - Amendment & termination procedures
  - Procedure for allocation of responsibilities for administration of the plan
  - Specification of basis on which payments are made to/from the plan
  - HIPAA privacy (if subject to HIPAA); COBRA rights
- Optional/advisable provisions
  - Discretionary language for review purposes, statute of limitations, and venue identification
  - Identification of benefits for Form 5500 purposes
  - Subrogation and reimbursement language
  - Coordination of benefits

## ➤ Summary Plan Description (SPD)

- Primary function of SPD is COMMUNICATION
- Explains benefits to participants in an easily understood manner; it is meant to summarize the terms of the written plan document
- Very different feel depending on whether it is meant to be a “wrapped document” of fully insured benefits or includes self-funded benefits

## ➤ SPD Requirements – Who

### Who is entitled to a copy of the SPD?

- Enrolled employees, COBRA beneficiaries, custodial parent under QMSCO, spouses, and enrolled dependents of deceased employees that remain covered under the plan

# ➤ SPD Requirements – Required Content

## What must be included in SPD?

- Plan Name & Number
- Name, address, telephone number, and EIN of employer sponsoring plan/plan administrator
- Names of participating employers
- Type of plan (benefits provided)
- Type of administration (self-funded or insured)
- Plan fiscal year and plan ID number for Form 5500 purposes
- Agent for the service of process (cannot be employer) and a statement that process may be made upon plan administrator or trustee

## ➤ SPD Required Content, Continued

- Statement of collective bargaining rights, if applicable
- Eligibility and participation rules
- QMSCO procedures – court order providing coverage by non-custodial parent (can be in SPD or separate policy, but SPD should refer to policy and make available free of charge)
- Subrogation/overpayments/reimbursements/coordination of benefits
- Cost-sharing provisions, including deductibles
- Description of plan benefits
- Description of annual, lifetime, or other limits
- Rules regarding provider networks
- Listing of providers must be offered without charge

## ➤ SPD Required Content, Continued

- Any pre-authorization requirements/utilization review
- Summary of plan exclusions
- Description of the plan's claim and appeals procedures
- Authority of plan sponsor to amend or terminate the plan
- COBRA & HIPAA rules (if required by GHP)
- Source of contributions (employer, employees, trust fund, etc.)
- Identification of insurer
- ERISA rights
- NMHPA rights (mother and newborn inpatient stays in hospital after delivery)

## ➤ SPD Requirements – When & How

### When:

- Within 90 days for new participants; within 120 days of plan establishment/new plan
- Once every five years if material changes; and once every 10 years otherwise (even if no material changes)
- Failure to provide SPD to participants could result in a penalty of \$110 per day per participant or beneficiary for each violation

### How:

- Method must be reasonably calculated to ensure actual receipt
- Can be distributed via first-class mail or hand-delivery (best), second or third-class mail, or electronically (if requirements are met)
- Plan sponsor should be prepared to document and produce method(s) of distribution & delivery

## ➤ Other SPD Notes

- Optional Provisions
  - USERRA provisions
  - HIPAA privacy notice
  - Medicare Part D notice of creditable/non-creditable coverage
- Can do combo plan/SPD
  - Eliminates inconsistency
  - Thorough explanations
  - Not really a summary because it is lengthy
  - Evidence of plan amendments – procedures needed
- Booklet from insurer probably not enough
- Wrap document should fill all the gaps – intended to supplement the booklet/certificate with all required information



# ➤ Summary of Material Modifications (SMM)

## **SMM is a summary of plan change (amends the SPD)**

- Generally, must be provided to each participant within 210 days after the end of the plan year in which a material change is made
- If the change is a material reduction, then within 60 days after the date the plan amendment is adopted
  - Material reduction = elimination or reduction of benefit, increase in deductibles or copays, addition of pre-authorization
- And, if the change affects the information in a summary of benefits and coverage (SBC), then 60 days prior to the effective date of the change

## ➤ Summary Annual Report (SAR)

### **SAR is a summary of information that appears in Form 5500**

- If exempted from Form 5500, no SAR required
- DOL has model form
- Must be provided to participants annually
- Must be provided within 9 months after the end of the plan year, or 2 months after the extended due date of Form 5500, if later
- Unclear what 5500 changes will do to SAR requirement
- No penalty for failure to send – but if a participant requests one, it must be sent within 30 days of the request (104(b)), or penalty of \$110 per day could apply

## ➤ Form 5500

### What:

- Annual report filed with the federal government for ERISA plans

### Who:

- All plans (insured and self-insured through employer's general assets) with 100+ employees and/or retirees enrolled at the beginning of the plan year
- Self-insured funded through a trust; no minimum employee requirement
- Cafeteria plan that includes medical FSAs with 100+ employees enrolled in medical FSA portion at the beginning of the plan year

## ➤ Form 5500, Continued

### How:

- Must be filed for each plan; can file one for all plans if plan document indicates one filing is intended
- Fully insured benefits need a Schedule A for each insurer
- Self-insured benefits need a Schedule C for each service provider paid more than \$5,000; however, if the service provider is for an unfunded benefit where employee contributions are paid pre-tax under 125 plan, no Schedule C is needed

## ➤ Form 5500, Continued

### When:

- Last day of the 7th month after the plan year ends
- Plan may file for automatic extension of 2½ months

### Penalties:

- \$2,586 per day for late filings, per plan, per plan year – no cap
- Reduced if filed under Delinquent Filer Voluntary Compliance Program (DFVCP); for plans with 100+ participants, \$10 per day up to maximum of \$2,000 per plan per year with a maximum of \$4,000 per plan

## ➤ Wrapping ERISA Benefits

- Insurance documents or third-party contracts (like an EAP provider) may not contain all ERISA required provisions
- Wrapping the underlying policies or documents will fill the ERISA gaps



## ➤ Mega-Wraps of ERISA Benefits

- The ERISA requirements apply to each plan sponsored by an employer
- If an employer sponsors more than one welfare plan, it may be useful to wrap the benefits together
  - Can limit the number of Form 5500s plan sponsors are required to file
  - Can incorporate all the various insurance policies into one master document – employers can distribute all documents as one packet
  - Fills in the gaps in the insurance and other plan documents

## ➤ Claims Procedures

- Plan sponsor must adopt claims procedures that comply with DOL regulations
- Group health plans and disability plans have expanded requirements
- Important to follow the claims procedures for litigation purposes for any self-insured benefits
- Clients should familiarize themselves with claims and appeals language in insurer booklets/certificates or ask insurer to verify in writing that their claims and appeals procedures are compliant



## ➤ Internal Revenue Code



- IRC contains the rules about the tax treatment of employee benefits
- General rule under the IRC is that all income is taxable unless it is specifically permitted as a deduction
- Two sides to tax-favored status: (1) the employer deduction; and (2) the employee deduction
- Besides the inherent positives to offering employees benefits (recruitment, retention, market competitiveness), employers receive tax deduction for most benefits provided to employees

## ➤ Internal Revenue Code, Continued

### Main IRC sections that apply to welfare benefits are:

- §79 - Group-term life insurance
- §104 - Compensation for injuries or sickness funded by employee after-tax contributions
- §105/106 - Amounts received under accident and health plans from employer and employee pre-tax contributions (FSAs, HRAs, medical plan)
- §125 - Cafeteria plans
- §132 - Transportation benefits
- §213 - Qualified medical expenses
- §223 - HSAs

## ➤ Nondiscrimination Rules - Health Plans 105(h)

**Prohibit group health plans from discrimination in favor of HCEs in terms of eligibility and benefits**

- Fully-insured group health plans are not subject to any IRC nondiscrimination requirements
- Self-funded group health plans are subject to the rules

# ➤ Nondiscrimination Rules – Health Plans

## 105(h)

- If a self-funded group health plan has different eligibility rules, contribution rates or benefit structures for various groups of employees, there may be a concern
- Can “disaggregate” the plans into sub-plans for testing purposes so that if each sub-plan covers a nondiscriminatory group, the testing may still be satisfied
  - Hourly vs. salary may work if enough non-highly compensated salaried employees
  - Senior management vs. all other employees, probably won't work
- If plan fails, the value of discriminatory coverage is considered “imputed income” to the HCEs

## ➤ Nondiscrimination Rules – Non-Health Plans

- Disability plans are not subject to nondiscrimination rules
- Group term life is subject to nondiscrimination rules for coverage under \$50,000
- §125 plans are subject to nondiscrimination rules for the plan overall + component parts
  - Health FSA also subject to rules
  - Dependent FSA also subject to rules

## ➤ Cafeteria Plans

- A cafeteria plan is simply a program that employers can use to help employees pay for certain expenses, like health insurance and dependent care, with pre-tax dollars
- If employees must pay for benefits with pre-tax contributions, then the employer must adopt a cafeteria plan
- Solely governed by the Internal Revenue Code – which is always focused on the taxability of benefits
- Choice is between pre-tax benefits and unreduced salary
- Not subject to any of ERISA's requirements unless there is a health FSA component
- There are completely separate requirements from ERISA, can include requirements in wrap, mega-wrap documents, or in a stand-alone document

## ➤ Elections

- Under the cafeteria plan, eligible employees will make a prospective (not retroactive) election of benefits and salary reduction amounts, including amount contributed to the health FSA
  - At each annual open enrollment for all eligible employees
  - Within 30 days of hire for new employees
- Generally, elections are **irrevocable** for the coverage period - COVID relief is available upon plan sponsor discretion

# ➤ Applicable Laws - ACA



## Applies to group health plans

- New notice requirements:
  - Grandfathered plan status
  - Summary of Benefits and coverage (SBC)
  - Notice of exchange eligibility – one time notice for new hires
- W-2 reporting of health benefit costs
- Play or pay penalties – On November 22, 2021, the IRS released proposed regulations to provide reporting relief (extend to March 2 to provide to individuals - - IRS filing deadline remains the same, can post to website for self-insured plans for part-time and non-employees) – Good faith effort in effect for the last six years no longer will be available
- Dependent children covered under end of the month in which they turn 26
- PCORI Fees (apply through 2029 based on 10 year extension in 2019) –
  - For plan years that ended on or after Oct. 1, 2022, and before Oct. 1, 2023 (including calendar year plans), the fee is **\$3.00** per person covered by the plan, up from \$2.79 a year earlier.
  - For plan years that ended on or after Oct. 1, 2021, and before Oct. 1, 2022, the fee is **\$2.79** per person, up from \$2.66 the year before.



## ➤ Applicable Laws, Continued

### **Health Insurance Portability and Accountability Act (HIPAA)**

- Focus is on portability and privacy
- Office charged with oversight is Human and Health Services (HHS)

### **Consolidated Omnibus Budget Reconciliation Act (COBRA)**

- Focus is on right to continue benefits after certain events
- Office charged with oversight is Employee Benefits Security Administration (EBSA)

## ➤ Applicable Laws, Continued

### **Family Medical Leave Act (FMLA)**

- Focus is providing job rights and benefits for employees who take approved leave
- Office charged with oversight is Wage and Hour Division (WHD) of DOL

### **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

- Focus is on providing job rights and benefits for employees in active military duty
- Office charged with oversight is the Veterans' Employment & Training Service (VETS) of the DOL

## ➤ Applicable Laws, Continued

### **Age Discrimination in Employment Act (ADEA)**

- Focus is on ensuring nondiscriminatory practices for older employees (at least 40)
- Office charged with oversight is the Equal Employment Opportunity Commission (EEOC)

### **Americans with Disability Act (ADA)**

- Focus is on ensuring nondiscriminatory practices for disabled employees
- Office charged with oversight is the Civil Rights Division of the DOJ

# ➤ Applicable Laws, Continued

## **Pregnancy Discrimination Act (PDA)**

- Focus is ensuring nondiscriminatory practices for pregnant individuals
- Office charged with oversight is the Equal Employment Opportunity Commission (EEOC)

## **Genetic Information Nondiscrimination Act (GINA)**

- Focus is on ensuring nondiscriminatory practices based on genetic information
- Office charged with oversight is the Equal Employment Opportunity Commission (EEOC)

## **Mental Health Parity and Addiction Equity Act (MHPAEA)**

- Focus is on ensuring nondiscriminatory practices for mental health treatment
- Office charged with oversight is the Centers for Medicare & Medicaid (CMS)
- **DOL has stated that compliance is top priority**

# ➤ Applicable Laws, Continued

## **Women's Health and Cancer Rights Act (WHCRA)**

- Focus is ensuring reconstructive benefits for women after breast cancer
- Office charged with oversight is the EBSA

## **Newborns' and Mothers' Health Protection Act (NMHPA)**

- Focus is on providing minimum stays for mothers and newborns after childbirth
- Office charged with oversight is EBSA

## **Medicare**

- Focus is on providing medical coverage for seniors and disabled Americans
- Office charged with oversight is Center for Medicare & Medicaid Services (CMS) & Various State Laws

## ➤ Various State Laws



- Many states have mini-COBRA laws that impose COBRA-like requirements on small employers
- Many states have FMLA-type laws that impose requirements on small employers
- State insurance laws may apply to insurers that provide policies
- No-fault insurance laws can affect coordination of benefits provisions

# BASIC's ERISA Solution



# ERISA Document Overview

“Cheat Sheet” for Documents and Notices

## ERISA ESSENTIALS *by BASIC*

Document	Type of Information	To Whom	When
<b>Required Documents for all Group Welfare Benefits</b>			
Summary Plan Description	Primary vehicle for informing participants and beneficiaries about their ERISA rights under the Plan. Must be written for average participant and be sufficiently comprehensive to apprise covered persons of their benefits, rights, and obligations under the plan. Must accurately reflect the plan's contents as of the date, not earlier than 120 days prior to the date the SPD is disclosed.	Participants and those beneficiaries receiving benefits.	Automatically to participants within 90 days of becoming covered by the plan or within 30 days of a participant's request. However, a plan has 120 days after becoming subject to ERISA to distribute the SPD. Updated SPD must be furnished every 5 years if changes are made to SPD information or plan is amended. Otherwise, it must be furnished every 10 years.
Summary of Material Modification	The administrator of an employee benefit plan shall furnish a summary description of any material modification to the plan and any change in the information required to be included in the summary plan description to each participant covered under the plan and each beneficiary receiving benefits under the plan.	Participants and beneficiaries.	Not later than 210 days after the plan year in which the changes are adopted.
<b>Required Documents for most Group Welfare Benefits with more than 100 participants</b>			
Summary Annual Report	A narrative summary of the financial information contained on the Form 5500.	Participants covered under the plan during the applicable plan year, including COBRA participants and terminated employees who were covered under the plan.	Automatically to participants and pension plan beneficiaries receiving benefits within 9 months after end of plan year, or 2 months after the extended due date for filing the Form 5500.



# ERISA Document Overview

“Cheat Sheet” for Documents and Notices

## ERISA ESSENTIALS *by BASIC*

Document	Type of Information	To Whom	When
If your Plan is Grandfathered, the following Health Plan Notices are required			
Grandfathered Plan Status	Notice must disclose that the plan is grandfathered and must include contact information.	Participants and beneficiaries.	Notice must be included in any plan materials describing the benefits or health coverage.
Women's Health and Cancer Rights Act (WHCRA)	Notice describing required benefits for mastectomy-related reconstructive surgery, prostheses, and treatment of physical complications of mastectomy.	Participants.	Notice must be furnished upon enrollment and annually.
Children's Health Insurance Program Reauthorization Act (CHIPRA)	Employer (rather than plan) must inform employees of possible premium assistance opportunities available in the state they reside.	All employees regardless of enrollment or eligibility status.	Notice must be furnished annually.
HIPAA Special Enrollment	Notice that provides a clear, user-friendly explanation of individual rights with respect to special enrollment where an eligible employee (or their dependents) has declined health coverage to enroll out side of a plan's open enrollment period. There are two types of special enrollment: loss of eligibility for other coverage and certain life events, such as marriage, birth adoption or placement for adoption.	Any employee who is eligible to enroll in the employer' group health plan.	Eligible employees at or before the time they are initially offered the opportunity to enroll in the employer's group health plan.

# ➤ ERISA Essentials - We've got you covered!

- WRAP Summary Plan Description (SPD)
- Plan Document – including annual amendments
- ERISA/PPACA Required Model Notices
- PCORI 720 Form Instructions
- Form 5500 & Filing if applicable
- Schedule A & C and Summary Annual Report (SAR) if applicable
- Non-Discrimination Testing (additional charges apply)
- Access to BASIC's Compliance Team



# Before Q&A



SHRM  
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QUESTIONS





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