Health Plan Documentation: What You and Your Clients Need to Know

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Department of Labor (DOL) audit activity is increasing, and many employers are not prepared. The DOL audit process requires employers to produce an extensive list of documentation, and that documentation must be fully compliant with applicable law. Many employers, however, take their health plan documentation for granted. They assume the paperwork provided by the insurer or HMO is all they need to meet their legal responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA) and other related federal laws. This assumption is generally incorrect. The certificate booklet (CB) or evidence of coverage (EOC) provided by the insurer/HMO almost never satisfies ERISA plan documentation rules. In order for an employer to satisfy its obligations under ERISA—and be prepared in the event of an audit by the Department of Labor (DOL) or a participant lawsuit—the employer will generally have to supplement the insurer/HMO's written materials with "wrap" documents.

Plan Document

The plan documentation requirements under ERISA start with the "plan document." Section 402 of ERISA states that, "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). We typically refer to this as the "plan document" requirement. The plan document is the legal document which governs the plan and its administration.

Certain terms—described in section 402—must be included in the plan document. In the case of a fully insured plan, these terms are rarely included in the insurer/HMO's documentation.

The plan document does not have to be distributed to participants. It will, however, be among the first documents asked for in the event of a DOL audit, and it will be essential in the event of a lawsuit. In addition, if a participant asks for a copy of the plan document, it must be provided within 30 days or the plan administrator will face a penalty of $110 per day.

Summary Plan Description

Unlike the plan document, the "summary plan description" (SPD) must be distributed to participants. The SPD translates the legal terminology in the plan document into language that is "calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). The SPD must be "sufficiently accurate and comprehensive to reasonably apprise . . . participants and beneficiaries of their rights and obligations under the plan."

Changes to plan terms that have not been incorporated into the SPD must be described in a summary of material modifications or reductions (SMM or SMR). An SMR must be provided within 60 days of adoption of a change in eligibility or benefits.

The DOL has issued an extensive set of regulations that outlines the items that must be included in the SPD (as well as regulations governing the format, distribution, and foreign language requirements for the SPD). In the case of a fully insured plan, many of the mandatory provisions will be included in the insurer/HMO's CB or EOC. It is exceedingly rare, however, if not unheard of, for the insurer/HMO's documentation to include all the terms required by the ERISA regulations. As a result, the employer must supplement the insurer/HMO's documentation, and the most common vehicle used to do so is a "wrap" document.

Summary of Benefits and Coverage

The Affordable Care Act (ACA) added a new disclosure requirement: the "summary of benefits and coverage" (SBC). The SBC supplements, but does not replace, the SPD. The SBC has its own set of content, distribution, and foreign language regulations. New guidance and templates were issued in 2016. The new SBC templates must be used during the first open enrollment period on or after April 1, 2017.

What Is a Wrap Document?

A wrap document is a vehicle a plan may use to supplement the terms provided by the insurer/HMO. The CB/EOC provided by the insurer/HMO includes essential plan information that must be provided to participants but, as noted above, it does not include all the terms required by the ERISA plan document and SPD rules. To supplement the insurer/HMO materials, the plan administrator may draft and distribute "wrap" documents. These wrap documents include the terms required by ERISA but omitted by the insurer/HMO, as well as other terms that are helpful in the administration of the plan and that the plan administrator wants to be certain are communicated to plan participants.

The Overlap of ACA and ERISA

Most employers and producers know that the ACA requires certain changes in plan terms (such as offering coverage to dependents up to age 26), or mandates that certain notices be added (such as a statement of grandfather status, when applicable). But many employers have overlooked the impact that ACA measurement periods and offers of coverage have had on the eligibility provisions in the plan document and SPD.

Under the ACA, in order to avoid a § 4980H(a) or (b) penalty, most "applicable large employers" (ALEs) must establish measurement methodologies in order to determine which of their employees qualify as full-time employees under the ACA. ALEs must then ensure that they offer coverage to anyone who qualifies as a full-time employee under one of these measurement methodologies. Employers sometimes overlook, however, their obligation to ensure that these measurement methodologies—which are critical to a determination of who is eligible for and receives an offer of coverage—are fully described in their plan documents and SPDs. If they are not adequately described, there will be a disconnect between the ALE's goal of avoiding the 4980H penalties and the employee's right to coverage under the terms of the plan. In addition, in the event of an audit by the IRS to determine whether the ALE owes a 4980H penalty, the employer will have difficulty establishing that all full-time employees were actually eligible for and offered coverage.

Whose Responsibility Is It?

The obligation to comply with ERISA rests solely with the "plan administrator," and under ERISA the "plan administrator" is typically the employer. A "plan administrator" is a defined term under ERISA, and it is not the same thing as the "contract administrator," such as the TPA, who may provide administrative services to the plan. A well written plan document and SPD will confirm these roles. When the DOL sends an audit letter, or a suit is filed, it is the plan administrator who will be answerable and who will pay any penalties owed for failure to comply with applicable law.

Plan administrators too often assume that their insurer, broker, or TPA will provide them with fully compliant documentation. As noted earlier, for fully insured plans, the insurer/HMO's documentation rarely fulfills the plan administrator's compliance obligation. Furthermore, since producers cannot provide legal advice and most producer malpractice policies exclude ERISA compliance from the list of covered claims, producers are generally not in the best position to ensure that an employer is fully compliant with ERISA and other related employee benefit laws.

Why It Matters

DOL audit activity is increasing. In addition, now that ALEs are filing a significant amount of plan data with the IRS through the Forms 1094-C and 1095-C, it is not beyond reason to assume that the IRS will soon begin auditing plans for compliance. We are also in an environment where there is increased focus on employee rights and benefits, and employers need to have their documentation ducks in a row in the event of a lawsuit, because the rights and obligations of the both the employer and the employee are determined by the documentation. Employers need to be prepared.

Other circumstances mandate good plan documentation. For example, if a key human resources employee leaves, are the benefit plans ready for the hand-off? If the company is contemplating a merger, will the lawyers conducting the due diligence be able to adequately assess the status of the benefit plans that will be impacted by the change?

Plan administrators should not think of the plan documentation requirements as simply a burden, however—a paperwork hurdle that needs to be overcome. A well crafted plan document and SPD can protect the plan and the plan administrator. In addition to mandatory terms, the plan document and SPD are opportunities to communicate terms that are helpful to the administration of the plan, and that clarify—for both the administrator and the employee—eligibility, benefits, rights, and obligations. For example, through the documentation the plan administrator can preserve, and communicate to the participant, important provisions such as reserving the right to amend or terminate the plan, establishing the standard of a review in the event a claim is reviewed in court, outlining a methodology to correct administrative errors, explaining the scope of possible eligibility audits, and describing the right of subrogation.

One Size Does Not Fit All

Just as every employer is different, every plan is different. The language in the plan document and SPD is legally binding, and plan administrators need to fully appreciate the consequences of the choices they make when drafting these documents. Furthermore, each employer may have a different set of goals and mandates that need to be reflected in the plan document and SPD. A cookie cutter document may not adequately reflect the plan administrator's intent, and it may not be tailored to fit the unique needs of the employer or the expectations of the participants. Just as with an employee handbook, each plan document and SPD should fully and accurately reflect the essential terms of that employer's benefit plan, that employer's objectives, and that employer's culture.

The Impact on Small Employers

Many small employers assume that the ERISA plan documentation requirements do not apply to them, and all they have to provide to participants is the insurer/HMO's CB/EOC and SBC. That assumption is incorrect. The ERISA plan document and SPD requirements apply with equal force to all employers, regardless of size. If a small employer does not have a plan document, or does not have a plan document or SPD that is fully compliant with ERISA, the small employer has the same potential liability as a large employer. Thus, small employers generally need wrap documents to the same extent as large employers.

Don't Forget Your Cafeteria Plan

Many employers allow their employees to contribute to the group health plan pre-tax through the employer's cafeteria plan. The employer may also include, within that cafeteria plan, a health or dependent care flexible spending account. In all of these instances, the employer has created a cafeteria plan, and under governing tax law, the employer must have in place a written cafeteria plan document. *See* 26 U.S.C. § 125(d), and related proposed regulations. At the same time the employer is updating its ERISA health plan documents, the

employer should also ensure that its cafeteria plan document is in place and reflects recent changes in applicable law.

Conclusion

In the new ACA universe, there is a greater focus on health plan compliance. DOL audit activity is increasing. With information reporting (the 1094/1095 forms), it is quite likely that the IRS will begin looking more closely at health plan terms and compliance. In the event of an audit, or a participant request for documentation, plan administrators have a short window of time to respond. Other circumstances—such as a change in management or a potential merger—could result in decision makers taking a closer look at benefit terms and compliance. Employers need to be prepared. Putting compliant documentation in place will take time and resources, but the effort made will benefit the employer in the long run.

More information about ERISA disclosure requirements may be found on the DOL's webpage, including in the following document: U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Reporting and Disclosure Guide for Employee Benefit Plans*** (September 2014).

Editor's Note: Marilyn Monahan is an attorney specializing in ERISA, COBRA, ACA, and other employee benefit and insurance law. She is our featured speaker for our January Compliance Meeting, where she will be offering a 1 hour CE course on health plan compliance. This is a perfect meeting to bring your staff and your clients! Marilyn Monahan can be reached at Monahan Law Office, 4712 Admiralty Way, #349, Marina del Rey, California 90292; (310) 301-3300 (o) (310) 301-3309 (fax) marilyn@monahanlawoffice.com