
PROPERLY DOCUMENTING WELFARE PLANS

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Since the passage of the Employee Retirement Income Security Act of 1974 (“ERISA”), most of the attention has been focused on compliance issues related to retirement plans. Lately, the Department of Labor (“DOL”) and the Internal Revenue Service (“IRS”) have been paying an increasing amount of attention to welfare plans. Employers, therefore, should take a close look at their welfare programs to make sure they are being administered in compliance with ERISA and the Internal Revenue Code. Employers should pay particular attention to their welfare plan documents and summary plan descriptions.

Welfare Plan Documents

All ERISA-covered plans including welfare plans must be administered in accordance with a written plan document.¹ ERISA requires a welfare plan document to contain the following provisions:

- *Named fiduciaries.* The document must name one or more fiduciaries that have the authority to control and manage the operation and administration of the plan.²
- *Allocation of responsibilities.*³ The plan must include a procedure for allocating responsibilities for plan administration and operation.
- *Funding policy.*⁴ Plans that are completely unfunded (*i.e.*, benefits are paid solely from the employer’s general assets) are not required to have a funding policy.⁵
- *Benefit payment.*⁶ The plan must state the basis on which benefits are paid to and from the plan.
- *Claims procedures.*⁷ The Plan must have a specific procedure for processing benefit claims and appeals that complies with DOL regulations.
- *Amendment procedures.*⁸ A provision allowing the employer to amend the plan frequently is not included in an insurance contract.
- *Distribution of assets on plan termination.*⁹ Many insured plans do not address this requirement because many assume welfare plans do not have plan assets. Any welfare plan that accepts participant contributions has plan assets.
- *Portability, special enrollment and nondiscrimination.*¹⁰ The plan must describe certificates of coverage, special enrollment rights and

¹ ERISA §402.

² ERISA §402(a)(1).

³ ERISA §402(b)(2).

⁴ ERISA §402(b)(1).

⁵ DOL Advisory Opinion 78-108A (Mar. 31, 1978).

⁶ ERISA §402(b)(4).

⁷ ERISA §503.

⁸ ERISA §402(b)(3).

⁹ ERISA §402(d)(2).

¹⁰ ERISA §§701 to 734.

nondiscrimination rules. Currently, the DOL is applying considerable attention to proper documentation and administration of these rules.

- *Privacy of health information.*¹¹ Group health plans must contain plan language protecting the medical privacy of plan participants and beneficiaries.
- *Qualified medical child support orders.*¹² Documents must specify the procedures for processing qualified medical child support orders.

The following language is not specifically required to be in the plan under ERISA, but is strongly recommended for welfare plan documents:

- *COBRA continuation of group health coverage.* While this is not specifically required in the plan document, it is required in the summary plan description (“SPD”), and it is advisable that information in the SPD should also be in the plan document.
- *Benefits during military leave.* While this is not specifically required in the plan document, it is required in the summary plan description (“SPD”), and it is advisable that information in the SPD should also be in the plan document.
- *Minimum hospital stays after childbirth.* While this is not specifically required in the plan document, it is required in the summary plan description (“SPD”), and it is advisable that information in the SPD should also be in the plan document.
- *Minimum requirements for women’s health.* The plan must comply with requirements for coverage of reconstructive surgery and other complications associated with a mastectomy.
- *Subrogation/reimbursement.* In the event that a participant or beneficiary receives payment from a third party for a benefit paid by the plan, then the plan may require the participant or beneficiary to reimburse the plan for such payment.

While ERISA clearly defines key provisions that must be in a plan document, it does not specify what constitutes a plan document. As a result, there has been a significant amount of confusion identifying written plan documents for ERISA-covered welfare plans. Many employers assume that insurance contracts for fully insured products are written plan documents. Insurance companies, however, draft the contracts to comply with state insurance laws, and as a result the contracts often do not contain required and/or recommended provisions that protect the plan, the employer and the fiduciaries. For example, an insurance contract may state that the insurance company has the right to amend or terminate the contract, but may not state that the employer has that right. As a result, a court may conclude that an employer may not be able to amend or terminate its welfare plan until it (i) adopts a formal written plan containing procedures for amending or terminating the plan, and (ii) identifies in the plan those individuals who have the authority to carry out such actions. Insurance contracts may make up part of the plan document, but they are rarely complete documents for ERISA purposes, often excluding such basic requirements as required claims procedures or providing a methodology which does not comply with ERISA.

¹¹ 45 CFR §164.514(f).

¹² ERISA §609(a).

Employers relying on insurance contracts to satisfy the written plan requirements should also keep in mind that such contracts often are not updated timely to comply with legislative changes. As a result, such contracts may not only be incomplete for ERISA purposes, but also out of date.

To address this problem, many employers, adopt wrap or umbrella plan documents that coordinate with already existing plan documents (*e.g.*, insurance contracts) to create a single plan document. Wrap plan documents create a single plan document by incorporating (or wrapping) other plan document(s) into the wrap plan which contains required as well as recommended language that may not be in the underlying document(s). Therefore, a formal welfare plan document that complies with ERISA should consist of a wrap plan and those documents incorporated into the wrap plan. Adoption of a wrap plan is appropriate even in those situations when an employer maintains a benefit under only one contract.

Issues similar to those with insurance contracts also exist when the plan is administered through a contract with a third party administrator (“TPA”). Reliance on a contract (*e.g.*, a self-insured agreement or servicing contract) could be problematic. While the agreement may describe the plan in detail, it is written to outline the responsibilities of the employer and the TPA. As a result, such documentation is not written as plan documents and often fails to comply with ERISA. For example, servicing contracts often do not include language describing procedures for qualified medical child support orders in accordance with DOL regulations. The servicing agreement, by itself, would not meet the requirements for a written plan document as described under ERISA. Also, contracts rarely describe claims language that complies with DOL regulations because TPAs do not want to be considered plan fiduciaries. Claims language should appear in the plan language not only for clarity and consistency, but also to make sure that the TPA understands that the plan fiduciaries will hold the TPA to those standards set by the DOL. Again, employers should consider using a wrap plan document if they have only one contract or servicing agreement in place or if they have several contracts and/or agreements in place.

To ease administration, an employer may wrap more than one kind of welfare plan into a single plan. In fact, an ERISA-covered welfare plan can include all of an employer’s welfare benefit programs. For example, with the adoption of a wrap plan, an employer’s welfare plan may consist of health, dental, life, long-term disability benefits, and medical reimbursement and dependent care reimbursement plans. In addition, although not required by ERISA, written documentation for the ability to pay for welfare benefits on a pre-tax basis is required by the Internal Revenue Code. This “premium-only-payment” feature is often included in a wrap document.

By wrapping all of their welfare plan benefits or programs into a single plan, the employer only needs to file one Form 5500 with the appropriate number of Schedules A for the wrap plan rather than a Form 5500 for each contract or program that it maintains. The DOL and IRS have often taken the position that each separate contract is a separate plan, and each contract or program must file a Form 5500 unless it is exempt as a small

welfare plan. Thus, wrapping plans can limit any potential liability associated with late or missing Form 5500 filings if this is an issue.

Summary Plan Descriptions

ERISA requires plan sponsors to provide summary plan descriptions (“SPDs”) to participants and beneficiaries. Such SPDs must describe the plan in non-technical terms that can be easily understood by the average participant. DOL regulations clearly describe the information that must be contained in an SPD.

Employers often assume that the materials provided by their insurance companies or third party administrators (“TPA”) qualify as SPDs. Unfortunately, these materials are often missing required and/or important language (*e.g.*, eligibility requirements, COBRA information, QMCSO information, claims procedures, the employer’s right to amend or terminate the plan, and an ERISA Rights Statement). Furthermore, insurance companies and TPAs often do not update their materials in a timely manner to comply with legislative changes. To avoid any potential compliance problems, employers that rely on materials provided by their insurance carriers or TPAs, should use “wrap SPDs.” Wrap SPDs enable employers to add required or recommended language to the often extensive benefit descriptions in a certificate of coverage or booklet (or other documents provided by an insurer or TPA) to create a complete SPD. Employers that use wrap SPDs can avoid the expense of drafting new SPDs by taking advantage of the materials prepared by the insurer or TPA. Wrap SPDs not only keep down the employer’s cost of preparing an SPD, but also minimize errors because the employer can use existing materials.

Additional Plan Information

Often employers distribute additional informational materials or letters to participants and beneficiaries describing their plans (*e.g.*, open enrollment information, retiree health programs, early retirement packages, and severance packages). In some cases, these documents could be considered part of the plan document. In fact, some courts have concluded that certain documents are included in the plan document even though the employer did not consider such documents as part of the plan document.¹³ The determination of what constitutes a plan document has been left to the courts. *Employers need to carefully review **all** plan related materials distributed to participants and beneficiaries.*

Problems with additional plan information occur most commonly with retiree health plans. In recent years there have been a number of cases involving employers who wanted to amend or terminate their retiree health plans and the retirees have filed suit arguing that the employer cannot amend or terminate the program because the retirees were promised lifetime benefits (*i.e.*, their benefits became vested).

¹³ Wilson v. Moog Automotive Inc. Pension Plan, 193 F3d 1004, 23 EBC 1989 (8th Cir. 1999).

Generally, if an employer reserves the right to amend its welfare benefit plan in the plan document, then the employer has the right to alter any of the terms of the welfare benefit plan at any time and such amended terms will be applicable to current employees as well as former employees already receiving benefits under such plan. Also, the stringent vesting requirements applicable to pension plans do not apply to welfare plans. However, under a legal theory known as equitable estoppel, if an employer misrepresents the terms of a benefit plan to an employee and the employee relies to his or her detriment on the misrepresentation, the employer may be held to the terms of the misrepresentation.

With respect to ERISA-covered plans, the Federal circuits have similar but different criteria which must be satisfied to support a claim for equitable estoppel.¹⁴ Generally, an employee must prove that: (1) the employer made a knowing misrepresentation; (2) the misrepresentation was in writing; (3) the employee reasonably relied on the employer's misrepresentation; (4) such reliance was to the employee's detriment; and (5) the misrepresentation relates to an interpretation of an ambiguous plan term.¹⁵

Therefore, an employee may hold an employer to the terms of a misrepresentation if the employer's misrepresentation is a plausible interpretation of the plan but not a modification of the plan.¹⁶ For example, if an employee receives from the employer a letter describing the retiree health program that explains his or her rights to continued benefit plan participation after retirement, the letter interpreted an ambiguous plan provision, and the individual relied on the letter to his or her detriment, the individual may be able to support an equitable estoppel claim preventing the employer from terminating the individual's continued participation. However, it should be noted that an ERISA plan cannot be modified by the doctrine of equitable estoppel.¹⁷

In order to maintain an equitable estoppel claim, the employee generally must at least show that: (1) the plan is ambiguous, and (2) the employee's challenge is to an interpretation of the ambiguous plan provision.¹⁸ Without ambiguity there can be no equitable estoppel claim and mere silence will not support the claim.¹⁹

¹⁴ One circuit has ruled ERISA does not permit equitable estoppel claims. Averhart v. U.S. West Management Pension Plan, 46F.3d 1480 (10th Cir. 1994). Two others appear to be hostile to these claims. Law v. Ernst & Young, 956 F.2d 364 (1st Cir. 1992); Weir v. Federal Asset Deposit Ass'n., 123F.3d 281 (5th Cir. 1997).

¹⁵ Coleman v. Nationwide Life Ins. Co., 969 F.2d 54 (4th Cir., 1992); Coker v. TWA, 165 F.3d 579 (7th Cir. 1999).

¹⁶ Kane v. Aetna Life Insurance, 893 F.2d 1283 (11th Cir. 1990).

¹⁷ Id.

¹⁸ In Re Unisys Corp. Retirement Medical Benefit "ERISA" Litigation, 58F. 3d 896 (3rd Cir. 1995); Tregoning v. American Community Mut. Ins. Co., 12 F.3d 79 (6th Cir. 1993); Miller v. Taylor Insulation Co., 39 F.3d 755 (7th Cir. 1994).

¹⁹ Algren v. Pirelli Armstrong Tire Corp., 197 F.3d 915 (8th Cir. 1994); Houghton v. Sipco, Inc., 38 F.3d 953 (8th Cir. 1994); Pisciotta v. Teledyne, 91 F.3d 1326 (9th Cir. 1996).

To avoid any potential problems, employers not only need to be careful about the information contained in plan documents and SPDs, but ***employers must also pay very close attention to any additional materials provided to plan participants and beneficiaries***. It is essential that any additional information available to plan participants and beneficiaries describing the plan or provisions of the plan are (i) consistent with the plan documents and the SPDs, (ii) state that the plan documents are controlling, and (iii) remind participants and beneficiaries that the employer may amend or terminate the plan at any time without advance notice.

Conclusion

In order to ensure compliance with ERISA and to avoid costly litigation, employers need to examine their plan documents for compliance with ERISA and to ensure that the plan documents and the SPDs contain recommended language that protects the plan, the plan sponsor and the fiduciaries. It is important that the plan documents and SPDs are clear and consistent. Wrap plans and wrap SPDs can be used to fill omissions in existing plan documents and materials. Plans that use insurance contracts or servicing agreements as their plan documents should use a wrap plan document and a wrap SPD to ensure compliance with ERISA. To avoid any potential lawsuit, any supplementary materials provided to employees should also be carefully reviewed to ensure that they are consistent with the plan documents and cannot be construed as a misrepresentation of an ambiguous plan provision.