ERISA Compliance

Presented by:
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What is ERISA?

- Stands for “Employee Retirement Income Security Act of 1974”
- The federal law that regulates employee benefit “plans”
- ERISA is governed by the U.S Department of Labor and enforced by the Employee Benefits Security Administration (EBSA).
- Excludes government plans and church plans
- Preempts most state laws that regulate employee benefit plans
Origin of ERISA

- **Location:** Studebaker Corporation in South Bend, Indiana.
- **Date:** December 23, 1963
- **Event:** The company has announced the plant is closing....

Sources:

Origin of ERISA (cont’d)

... what happened next wasn’t so pretty

• 5,000 workers dismissed

• Pension plan terminated that covered 11,000 members of United Automobile Workers

• Underfunded plan: not enough funds to cover vested benefits

• Of the 11,000 workers:
  - 4,100 reaching age 60 received a full pension
  - 4,000 (59.5 years old, 43 years of service) received 15%
  - 2,900 received nothing at all
  - Some with 40+ years of service missed full pension (age 60) by a few months

And, just days before December holidays, 3,000 laid off with no pension

Source:
Why are So Many Employers out of Compliance?

- Overall Lack of Awareness in Marketplace
- Carrier Documents thought to be Compliant
- Confusion due to a Complexity of the Regulations
- Prior Limited Enforcement

However, Compliance is “Not An Option”...It’s the Law!
  - Statistics are that 90-95% of Employers have at least one violation of ERISA regulations.
What is a "Plan" under ERISA?

A Welfare Benefit Plan must be:

- A Plan, fund or program
- Established or maintained by an employer
- Established to provide welfare benefits to Participants and beneficiaries

Source: ERISA Section 3(1). See also 29 C.F.R. Sections 2510.3-1, 2510.3-1(a)(2)
ERISA Defined

**Employee Retirement Income Security Act (ERISA)**

- Federal Law Enacted in 1974
- Title 1 is part of U.S. labor laws; governs the structure of employee benefits Plans.
  - Requires detailed disclosure to covered individuals (applies to all Private Sector Employers regardless of size).
  - Requires detailed reporting to the government (generally Plans with 100 or more Participants).
  - Imposes strict fiduciary code of conduct on those who sponsor and administer ERISA Plans.
  - Imposes federal mechanism for enforcing rights and duties with respect to ERISA Plans and preempts a large body of state laws.
ERISA Titles

- “Title 1” Applies to H&W benefits
- 7 Parts (5 parts apply to H&W benefits)
  - Part 1: Reporting & Disclosure
  - Part 4: Fiduciary responsibility
  - Part 5: Administration & Enforcement
  - Part 6: COBRA and additional standards for group health Plans
  - Part 7: HIPAA, Newborn & Mothers Health Protection, Mental Health Parity Act, Women’s Health and Cancer Rights Act (WHCRA)

Sources:
- ERISA Section 3
- 29 C.F.R. Section 2510.3-1
Employers Subject to ERISA

- Private-Sector Employers
  - Corporations
  - Partnerships
  - Sole Proprietorships
  - Non-Profit Organizations

- Unless Exempt under 501a as Governmental entity
Safe Harbors of Statutory and Regulatory Exemptions

- Government, Church, and Other
  - Governmental and church Plans are exempt from ERISA
  - Programs maintained solely to comply with state-law requirements for
    - Workers compensation
    - Unemployment compensation
    - Disability insurance
    - Plans maintained outside the U.S. for non-alien
Benefits Subject to ERISA

- Health, Dental and/or Vision Insurance or Plans
- Health Flexible Spending Accounts (separate Plans)
- Health Reimbursement Arrangements (separate Plans)
- Accidental Death & Dismemberment Insurance
- Group Term Life Insurance
- Short Term and Long Term Disability
- Severance Insurance Policy
- Wellness providing medical care
- Employee Assistance Programs providing counseling
- Group Travel Accident Insurance benefits
- Voluntary Benefits
Voluntary Benefits

• Voluntary plans
  – Under a voluntary plan
    • The employee pays the entire premium—the employer does not contribute
    • Participation by the employees is completely voluntary
    • Employer has minimal involvement in plan operations and does not “endorse” the plan
Voluntary Benefits

- The following activities would be considered an endorsement of the plan:
  - The employer urges or encourages employee participation in the program
  - States in communications that the employer is “enthusiastic” about the program
  - States that the plan is part of the employer’s benefit package
Key ERISA Requirements

- Plan document must exist for each Plan
- Plan terms must be followed and strict fiduciary standards adhered to
- Fidelity bond must be purchased to cover every person who handles Plan funds
- Summary Plan Description (SPD) must be furnished automatically to Plan Participants
- Summary of Material Modification (SMM) must be furnished automatically to Plan Participants when a Plan is amended within 210 days after end of plan year.
Summary Plan Description (SPD)

- Who Must be Provided an SPD?
  - Must be furnished to Participants covered under ERISA Welfare Plan, not required to furnish beneficiaries
  - Must be furnished to COBRA qualified beneficiaries, parent or guardian under a QMCSO, and to spouse or dependent of deceased retiree who remains entitled to benefits
• When and How to Furnish SPDs
  – Should generally be furnished within 90 days after Participant first becomes covered
  – NEW Plans – within 120 days after Plan becomes subject to ERISA
  – Updated SPDs must be furnished to all covered Participants every 5 years (every 10 years for a Plan that had no changes)
  – Must be furnished in a way “reasonably calculated to ensure actual receipt of the material,” using method “likely to result in full distribution”
What Kind of Document Satisfies SMM Requirement

- Updating the SPD (Summary of Plan Description)
  - Any modification in the terms of the plan that is “material” and any change in information required in the SPD must be reported to Plan Participants
  - ERISA allows Plan administrators to report such changes through a Summary of Material Modification (SMM)
    - SMM provided in same manner to same individuals as SPD
    - Must be furnished within 210 days after the end of the Plan Year in which the modification changed
    - However, an SMM relating to a material reduction in covered services or benefits under a group health Plan must be furnished no later than 60 days after the date of the adoption of the reduction
Disclosure: Disclose How?

SPDs, SMMs and SARs must be furnished in a way “reasonably calculated to ensure actual receipt by all participants covered under the plan.”

Approved methods include:

- First, second or third class mail
- Special insert into a company or union publication
- In hand delivery

SPDs, SMMs and SARs can be disclosed electronically to all recipients if:

- Notice of the significance of the document is provided to each recipient
- A paper version is made available on request at no charge
- Any confidential information is protected
- The participant has work related computer or consents

Responsibility for disclosure remains with the plan administrator.

Sources:
- ERISA Sections 104(b)
- DOL Reg. Sections 2520.104b-1(b)(1)
- 67 Fed Reg. 17263 (Apr. 9, 2002)
• Providing Copies of Documents on Written Request
  – Upon written request by a participant or beneficiary, the ERISA Plan administrator must furnish:
    • Copy of latest SPD and SMM,
    • Latest annual report,
    • Any terminated report,
    • Bargaining agreement,
    • Trust agreement,
    • Any contract,
    • Any other “instrument under which the Plan is established or operated”
Other Disclosures to Participants and Beneficiaries

• Providing Copies of Documents on Written Request
  – Upon written request by a participant or beneficiary, the ERISA Plan administrator must furnish:
    • within 30 days of request
    • Penalties of $112 per day may be assessed for each day after the deadline that a Plan administrator does not respond
    • May charge reasonable amount for furnishing documents, not to exceed .25 per page
Examples of penalties

• DOL (Department of Labor)

  – Failure to comply with ERISA’s requirements can be quite costly

• Through DOL enforcement actions

  – Government Penalties for Non-Compliance

1) $86,500 – Failure to File Complete and Accurate Form 5500
   
   *Airport Hospitality, LTD, King of Prussia, Penn., 2010*

2) $241,000 – Failure to Provide SPD to Participant
   

3) $10,780 - Failure to Provide SPD to Participant
   
   *Kasireddy v. Bank of America Corp. Benefits Committee,*
   

4) $13,750 - Failure to Provide SPD to Participant


5) $8,910- statutory penalties failure to and delay in providing SPD

   *Cultrona v. Nationwide Life Insurance Company (2014)*
Annual Form 5500 Reporting

- Filing Form 5500 with DOL
  - Unless exempted (small unfunded plans), Plan administrator of an ERISA Plan must report specified information each Plan Year using Form 5500
  - Reporting obligation applies to each ERISA Plan an employer sponsors
  - The DOL can assess a penalty of up to $2,097 per day for a late 5500 filing per plan per plan year
  - The DOL has a delinquent filer voluntary compliance program (DFVC program) which caps penalties
IRS Form 5500 Exemptions

- Small unfunded or insured plans are completely exempt.
  - To be considered a small Plan, you must have fewer than 100 covered Participants at the beginning of the Plan Year.
  - Only Participants actually covered under Plan are counted.
  - Includes COBRA qualified beneficiaries and retirees covered in the Plan, but does not include covered spouses and dependents.

- Form 5500 exemption is available to:
  - Small unfunded Plans (benefits paid from the employer’s general assets).
  - Small insured Plans (paid through insurance policies other than stop-loss coverage); Stop Loss policies are not insurance for this purpose since they pay no benefits on behalf of employees.
  - Small combination Plans (combination of general assets(unfunded) and insurance).
• DOL Reg. §2520.104-20 also provides a complete Form 5500 reporting exemption for certain small insured welfare plans. Remaining requirements of the small insured plan exemption, specifically that:
  – benefits must be paid exclusively through insurance policies issued by qualified insurance companies or similar organizations or through qualified health maintenance organizations;
  – premiums must be paid directly by the employer from general assets or partly from Participant contributions, provided that the Participant contributions are forwarded to the insurer or HMO as soon as possible but no later than three months after being withheld or contributed; and
  – insurance refunds to which contributing Participants are entitled must be refunded within three months, and Participants must be informed, when they enter the plan, about the plan's provisions for allocating refunds.
    • Large plans need only reimburse any refunds to EE within three months to avoid filing Schedule H.
DOL Increased Fines & Penalties

- The Department of Labor published in the Federal Register on June 30, 2016 and January 18, 2017 an interim final rule to adjust for inflation the civil monetary penalties enforceable by the Department of Labor.

- The rule’s catch-up adjustments apply to penalties assessed after August 1, 2016 and 2017 adjustment on or after January 13, 2017, whose associated violations occurred after November 2, 2015, the enactment date of the 2015 Inflation Adjustment Act Text.

- Subject to change each January. Adjusted effective January 13, 2017.
## Highlights of DOL Penalty Adjustments

<table>
<thead>
<tr>
<th>ERISA Penalty Statute</th>
<th>Description of ERISA Violations Subject to Penalty</th>
<th>Penalty Amount effective August 1, 2016</th>
<th>Penalty Amount effective January 13, 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>ERISA § 502(c)(2)</td>
<td>Failure or refusal to file annual report (Form 5500)</td>
<td>Up to $2,063 per day</td>
<td>Up to $2,097 per day</td>
</tr>
<tr>
<td>ERISA § 502(c)(6)</td>
<td>Failure to furnish information requested: by employee by (DOL)</td>
<td>Up to $110 per day</td>
<td>Up to $112 per day</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$147 per day Up to $1,472 per day</td>
<td>$149 per day Up to $1,496 per request</td>
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<td>ERISA § 502(c)(9)(A)</td>
<td>Failure by an employer to inform employees of CHIP coverage opportunities each employee a separate violation.</td>
<td>Up to $110 per day</td>
<td>Up to $112 per day</td>
</tr>
<tr>
<td>ERISA § 715</td>
<td>Failure to provide Summary of Benefits Coverage under Public Health Services Act section 2715(f).</td>
<td>Up to $1,087 per failure</td>
<td>Up to $1,105 per failure</td>
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<td>Section 502(c)(4)</td>
<td>Per day for failure to disclose certain documents upon request under ERISA 101(k) and (l); failure to furnish notices under 101(j) and 514(e)(3)—each statutory recipient a separate violation.</td>
<td>$1632</td>
<td>$1659</td>
</tr>
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</table>
On July 21, 2016 the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) published in the Federal Register a Notice of Proposed Forms Revisions to the Form 5500 Annual Return/Report Series. A Notice of Proposed Rulemaking to propose updates to the DOL’s reporting regulations to implement the proposed forms revisions was published on July 21, 2016.

This includes eliminating for Group Health Plans the current exemption from Form 5500 reporting for small insured and self-insured welfare benefit plans. “There will probably be millions of employers that didn’t previously need to file that will now have to.”

This requirement will begin for Plan Years beginning in 2019.
Impact of DOL Penalty Adjustments

• “These rules have no impact upon regulated entities that operate in compliance with the laws that the Department enforces”.

• “For those entities that are not in compliance with the law, the Department projects the rules could result in up to $140ML in additional fines and penalties” (Source: DOL FAQ)

• DOL total fines collected by EBSA in 2015 were $696ML, $403ML of which went to employees.
  – Note: Most are pension plan enforcements, but not all.
  – Question: Why did DOL just raise the fines and penalties for H&W benefit plans if they do not intend to enforce?

• “The fact that inflation adjustments are now being made “might be a signal that they will be paying more attention in the future,” Also, the government is under pressure to replace as much lost tax revenue as possible that was intended to help finance the Affordable Care Act.” (Source: EBN-Employee Benefits News)
DOL ERISA Investigations

- Reasons for initiating investigations
  - Participant complaints to Office of Participant Education
  - Referrals from other regulators (e.g., SEC, IRS)
  - Enforcement initiatives (National Enforcement Projects)
  - Form 5500 filings / Employers having 100 or more EE’s

- Procedure for DOL investigation
  - Initial Letter (Document Request or Appointment Letter)
  - Document Production and On-Site Interviews
  - Closing Letter: (1) No DOL action to be taken, (2) “Voluntary Compliance” notice, or (3) Litigation letter
Reporting and Excise Taxes for Health Plan Noncompliance

- Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code
  - Historically, the IRS has not been very active in examining health Plans for compliance
  - IRS final regulations require employers to self-report violations of these rules and pay related excise taxes
  - Must report health Plan compliance failures annually on IRS Form 8928
Reporting and Excise Taxes for Health Plan Noncompliance (cont’d.)

Violations of COBRA, HIPAA and the genetic anti-discrimination law (GINA) can result in excise taxes of $100 per day per individual affected.

- Federal healthcare continuation requirements (COBRA).
- Health Plan portability and nondiscrimination requirements (HIPAA).
- Mental health parity (Mental Health Parity & Addiction Equity Act, or MHPAEA).
- Minimum hospital stays for newborns and mothers (Newborns’ & Mothers’ Health Protection Act).
- Women’s Health & Cancer Right Act (WHCRA).
- ACA Mandates (includes required (Notices)
- Genetic nondiscrimination requirements (Genetic Information Nondiscrimination Act, or GINA).
- Coverage of dependent students on medically necessary leaves of absence (Michelle’s Law).
- Health savings account (HSA) and Archer medical savings account (Archer MSA) contribution comparability requirements.
Health Care Reform’s Impact on Benefits Plans
Medical Loss Ratio (MLR)

- **Patient Protection & Affordable Care Act (PPACA)** requires that insurers spend a certain percentage of premium dollars on healthcare-related costs
  - 85% for large group Plans and 80% for small and individual market
- If insurer does not meet MLR standard, they are required to provide an annual rebate to each enrollee
  - Payment of first rebates required on August 1, 2012
  - Under final rule adopted in December, 2011 insurers must provide the rebate to the policyholder (typically the employer)
- The Department of Labor (DOL) has determined the rebates are Plan assets
Medical Loss Ratio (MLR)

- If Plan Document/SPD is silent, 100% of the rebate falls under Plan assets
- By adding the terms via the ERISA Plan Document Amendment/Summary of Material Modification (SMM), the employer can retain a prorated portion of the rebate equal to the percent of premium the employer paid
- Only the percent of the rebate equal to the percent of premium the Participant paid is considered a Plan asset and must be used exclusively for the benefit of the Plan
The ACA document amendment applies to those employers who are deemed an **Applicable Large Employer (ALE)** under the Affordable Care Act.

- An employer is an ALE for any calendar year in which they employed (along with members of its controlled group) an average of at least 50 “full-time employees” (including full-time equivalent employees) on business days during the preceding calendar year. Rules for determining full time employee and full time employee equivalents are set forth in the regulations.

Employers determined to be ALEs are subject to the employer shared responsibility mandate (“Play or Pay”) under Internal Revenue Code (IRC) §4980H. Employers considered ALEs must provide “affordable” “minimum value” health coverage to all “full-time” employees (employees who perform 30 or more hours of service a week (130 or more hours of service a month)) during any calendar year in order to avoid penalties.
Health Care Reform and ERISA SPD

- In order to meet these reporting requirements, ALEs must track employee and health coverage information throughout the year and report to both the IRS and employees following the close of the plan year. Penalties apply to employers with 50+ employees.
- Hours are tracked either monthly or during a measurement period. The measurement period is period of time set by the employer (using the guidelines set forth in ACA) over which employees hours are tracked.
- Employers must advise employees of the tracking method being used (monthly or measurement) and tracking method must be included in ERISA SPD.
Compliance Solutions
Prepare the ERISA SPD for Clients

Additional ERISA Services:
- Mega-Wrap or Wrap Document
- Plan Document and SPD
- IRS Form 5500 and Schedules
- Full PCORI Services Included
- Summary Material Modification
- Summary Annual Report
- ERISA and Health Care Reform Notices
- Hold-Harmless Guarantee
Why TASC ERISA? (cont’d.)

- Record-Keeping Assistance
  - Assistance with document retention requirements
  - Guidance on document access and employee rights
- Technical and Customer Service Support
- Guaranteed Compliance
  - Monitor legislative and regulatory changes related to ERISA
  - Establish a Hold Harmless Agreement
Service Features

- No ties to any insurance or other employee benefits Plan.
- ERISA Administrative Manual.
- Dedicated ERISA Representative.
- Hold Harmless Agreement
Stand-Alone Compliance Service Options

- **PCORI Compliance Services**
  - User-friendly paper and online tools guarantee that employees are counted correctly
  - Assists with timely and accurate tax filings, and PCORI fee calculations

- **Form 5500 Preparation**
  - For employers with 100+ employees participating in any health and welfare benefit Plan

- **Non-Discrimination Testing**
  - Applies to Cafeteria Plans, FSA, HRA, Group Term Life Insurance, and Self-Insured Medical Plans
  - More than fifteen tests offered
  - Guidance on how to correct test failures
  - Fast and understandable result notification
CCD Overview

- Gain visibility into company’s state of compliance
- Simple approach:
  1. Answer series of questions (takes five to ten minutes)
  2. Review results
  3. Receive a list of recommended solutions to help avoid fines and penalties
- A free compliance tool.

The information in this presentation is confidential and may be used by the authorized recipient only, for its intended purpose only. Any other use or disclosure is prohibited.
Dashboards will be personalized

Questions will vary depending on the services the client is using / needs.
Completing Assessment

Blue info icons help define common terms and questions.

Private Sector Employer:
For our purposes, this includes non-federal controlled employers that are either for-profit/private sector employers or not-for-profit employers.

Questions regarding your client's company and benefits:

- How many employees do you currently have?
- Are you a private sector employer?
- Are you a member of a Controlled group, Group of business or trade under common control or an affiliated services group?
- If so, is that plan Fully-insured (FI) or Self-insured (SI)?
- Are you an Applicable large employer (ALE) under the Affordable Care Act (ACA)?
- Do you sponsor a Dental Plan (separate from your group) health coverage?

* Once you complete these questions and press 'NEXT' you will be asked a series of compliance-related questions based on Federal Government Regulations that are applicable to your benefits.
Dashboards can be printed, saved as a PDF.

Generated results will show level of compliance and potential liability.

Low (or red) scores will highlight recommended services TASC can provide to make client compliant.
Learn more about your personalized solutions

**HIPAA**

The Health Insurance Portability and Accountability Act (HIPAA) requires protection for individually identifiable health information (otherwise known as Protected Health Information (PHI)). Under the Privacy Rule, individuals are entitled to certain rights with respect to their PHI and covered entities must comply with certain administrative requirements to protect the privacy of PHI. While employers generally are not covered entities, their health plans are, and employers who sponsor a self-insured health plan, Flexible Spending Account plan, and/or a Health Reimbursement Arrangement plan administered by a third party must comply with these privacy and security requirements.

To satisfy the Privacy Rule, employers/plan sponsors accepting PHI must, among other things: (a) specify that disclosure of PHI is permitted only upon receipt of written certification, (b) establish an adequate “Firewall” around employee PHI, (c) provide certification that the Plan Document includes necessary restrictions, and (d) provide a HIPAA Privacy Notice to their employees. In addition, to satisfy the HIPAA Security Rule, the employer must have in place certain safeguards, policies, and procedures to protect the security of electronically transmitted and electronically stored PHI.

**HIPAA Compliance**

TASC’s HIPAA Compliance Services addresses HIPAA requirements by providing customers with various required documents, including an Overview Manual, a HIPAA Policy document, a Privacy Notice: Business Associate Agreement, Plan Amendment, and a Plan Sponsor Certification. Finally, vital information regarding employer responsibilities and training for staff that handle PHI are provided via pre-recorded PowerPoint presentations.

**Employer Benefits**

- Assists in compliance with HIPAA requirements.
- Provides an effective compliance solution.
- Removes burden in researching compliance need, creating documentation, and more.
- Fosters peace of mind that comes with ensured compliance with CMS regulations.
- Helps employers avoid fines and penalties.
- Provides easy-to-understand materials and directions for maintaining compliance with HIPAA Privacy and Security rules.
- Stays abreast of changing regulations.
- Provides toll-free customer service.
Thank You!