McGraw Wentworth

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In This Issue

In this second issue of the McGraw Wentworth Benefit Advisor for 2007, we will discuss Summary Plan Descriptions (SPDs). SPDs are important documents that describe plan benefits, eligibility and other key plan features. ERISA requires employers provide SPDs to plan participants for most employer-sponsored welfare plans.

For the most part, benefit professionals are very familiar with SPDs. However, the requirements of SPDs are expansive and your organization documents may not have all the information needed to meet the content required by ERISA. This Advisor will discuss a host of issues, including content requirements, delivery guidelines and penalties for not providing SPDs.

We welcome your comments and suggestions regarding this issue of our technical bulletin. For more information on this Benefit Advisor, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

"ERISA Requirements for Summary Plan Descriptions"

A new year has begun and it is a time for many organizations to attack projects that may not be urgent, but certainly need to get done. This may be a good time to review or finalize your Summary Plan Descriptions (SPDs). The Employee Retirement Income Security Act or ERISA requires almost every employee benefit plan to have an SPD describing the plan's terms and benefits, as well as, the participants' rights. To meet ERISA requirements, an SPD must include very specific information.

Some employers think the insurance carrier's plan coverage booklet is an SPD. While these booklets do describe the plan benefits, they often do not meet ERISA requirements. In addition, employers can include specific wording in the SPD to reserve certain rights under ERISA. Organizations need to make sure their SPDs are in order. It is not an insurance carrier's or third party administrator's responsibility to provide these documents.

SPDs are a very valuable resource if there is ever a dispute between your plan and a plan participant. It happens all too often that an organization is working through a dispute and the participant requests a copy of the SPD. If your SPD is not up-to-date and does not include all the information needed, it may be difficult to resolve a plan dispute successfully.

This Advisor explains the nuts and bolts of SPDs, including:

- Benefit Plans that Require SPDs
- Content Requirements for SPDs
- Other SPD Requirements
- Distribution Requirements
- Plan Amendments
- Penalties for Not Distributing an SPD

This Advisor can serve as a tool to help you draft or review your SPD to make sure it meets the current DOL requirements. It makes sense to review your SPDs every few years to be certain they explain your plan benefits and rules accurately.

Benefit Plans that Require SPDs

ERISA contains very few exemptions to the SPD requirement. Virtually all employee welfare benefit plans require SPDs, including medical, den-

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tal, vision, life, disability and so on. ERISA requires an "employee welfare benefit plan" to include four basic elements:

- There must be a plan, fund or program.
- An employer must establish or maintain it.
- The plan must describe the specific benefits it provides through the purchase of insurance or otherwise.
- Participants or their beneficiaries must receive those benefits.

Small plans are not exempt from the SPD requirement. Your organization must provide an SPD even if your plan covers only 10 employees. The very few exceptions include the following situations:

- If your organization offers a day care center, that benefit usually qualifies as an ERISA welfare benefit plan. However, employer-provided day care centers are exempt from the SPD requirement. On the other hand, if your organization helps pay for dependent care expenses through a Dependent Care Assistance Program, you must provide an SPD.
- ERISA also exempts an "unfunded or insured" welfare plan providing benefits to a select group of management or highly compensated employees. The specific definition of a "select group of management or highly compensated employees" appears to depend on the facts and circumstances.

For the exemption to apply the following must be met:

a) Benefits must be paid solely from the employer's general assets (no participant contributions).
b) Benefits must be provided exclusively through insurance; the premiums must be paid directly from the employer's general assets.

These plans are typically referred to as medical reimbursement plans available in some situations to an organization's executive staff.

There are very few exemptions under ERISA's SPD requirement. In fact, even EAPs and wellness plans are not necessarily exempt.

Although many organizations do not have SPDs for these programs, they really should. An EAP offering medical services should be viewed as an ERISA plan. Medical services are not limited just to counseling visits. A number of IRS Private Letter Rulings indicate an EAP offering telephone counseling from medical professionals should be considered an ERISA plan.

Wellness plans are another particularly gray area. A wellness plan offering a wide range of medical benefits, including physical exams, biometric screenings, flu shots, and so on, is considered an ERISA plan. This definition applies if an outside vendor conducts these services onsite. However, if you coordinate your wellness activities through your own onsite clinic, your plan may be exempt from ERISA.

Because the lines are not particularly clear for wellness benefits, it makes sense to have an attorney review your benefits to determine whether your wellness arrangements should be considered an ERISA plan.

Content Requirements for SPDs

To be considered official, an SPD must contain information on very specific issues. Generally, the carrier's coverage description will not contain all the necessary information. For that reason, many employers offer a "wrap" document to meet any ERISA requirements not included in that description.

The following is a summary of the information an SPD should include to meet ERISA requirements. Requirements meant specifically for health plans are indicated in the bullet:

- **ERISA Plan Identifying Information**:
  - Plan name.
  - Name and address of employer whose employees are covered by the plan.
  - Plan sponsor's IRS-assigned EIN (Employer Identification Number).
  - Plan number assigned by plan sponsor (for welfare plans, it will be a 500 series number).
  - Type of plan (health, disability, life and so on).
  - Type of plan administration (fully insured, self-funded

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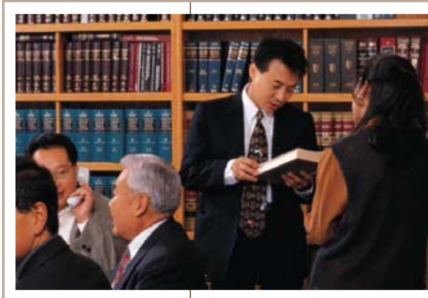
with TPA, employer administered).

- Name and business address of plan administrator.
- Name, title and principal place of business for each trustee if the plan has a trust.
- Entity designated as the agent for legal service.
- Statement on whether the plan is required by one or more collective bargaining agreements.
- Date considered the end of the plan year and a statement indicating whether plan records are based on a calendar or fiscal year.

- **<u>Plan Eligibility Provisions</u>**: ERISA requires a plan to describe the eligibility requirements and any conditions that employees must meet in order to receive benefits.
  - The SPD should define *employee*, specify the number of hours an employee needs to work to be considered eligible, state the new hire waiting period and rehire provisions, and so on.
  - The SPD should also define *dependent eligibility*, including a definition of eligible spouse and dependent children. If the plan covers domestic partners, adopted children, or any other dependent, they should be defined as well.



- The SPD should briefly describe the employee's responsibility to enroll in the plan if you require enrollment.
- The SPD must also include information on the Family Medical Leave Act, layoff and leave provisions, and any retiree or severance considerations.

- **<u>Description of Plan Benefits</u>**: The SPD must describe the plan benefits. The comprehensive description should include the following:
  - Detailed description of services the plan covers and the circumstances under which those services will be covered. For example, a plan may not cover a certain exam that is considered preventive care, but if the exam is needed to diagnose a medical condition when symptoms are present, that same exam would be covered.
  - Reservation of the plan's right to determine benefits payable.
  - All benefit exceptions and limitations.
  - A medical plan should include any emergency care conditions or limits, list network providers (if applicable) and how to locate them, and specify any pre-existing condition limitations or pre-authorization requirements.

- **<u>Description of Circumstances Causing Loss or Denial of Plan Benefits:</u>** This section should include information on the following:
  - Termination of benefits, for whatever reason including termination of employment, ending severance arrangement, and so on.
  - Coordination of benefits if more than one entity may be responsible for claims, this section discusses who pays first, second and so on.
  - Non-duplication of benefits. If another plan or organization pays the claim, the plan will not pay a duplicate benefit.

- **<u>Description of Plan Amendment and Plan Termination Provisions</u>**: Your organization should reserve the right to amend your plan and possibly terminate it. If your organization fails to reserve this important right, plan participants may challenge any plan changes. If a plan has assets, this section should discuss asset allocation and asset disposition should the plan be terminated.

- **<u>Disclosure of the Plan's Subrogation and Reimbursement Provisions:</u>** Most plans include subrogation and recovery provisions. These clauses allow plans to recover any funds they have paid for an accident or injury found to be the responsibility of a third party. If your plan is fully insured, the carrier is ultimately liable for any benefits the plan pays and will require your SPD to include a subrogation provision. However, if your plan is self-funded, you will need to make sure your

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SPD includes a clause allowing you the broadest opportunity to recover benefits paid.

The DOL requires your plan to reserve the right for subrogation in your plan document. This is a tricky area that you would want to have your attorney review. Court cases over the last several years (the Knudsen case, in particular) have provided insight into the best way to structure your subrogation provisions and also the most effective way to manage the subrogation process. For more information on subrogation, read our *Benefit Advisor* at http://www.mcwent.com/Benefit_Advisor/2003/Issue%20Nine.pdf.

- **<u>Information Disclosing Plan Contributions and Funding</u>**: This information includes the following:
  - ➢ Any employee contribution requirement and the method the plan uses to determine employee contributions. These statements can be general. For example, the plan can provide a base level of funding for one plan option and employees can pay additional contributions for other plan options. The contributions will be disclosed annually during open enrollment.
  - ➢ A statement of how a self-funded plan will pay for benefits. Typically, this will include a statement that the employer's general assets fund the plan. If a trust funds the plan, the trust information must be disclosed.
  - ➢ All cost-sharing requirements, such as the deductible, coinsurance, copays, any generic enforcement programs, and so on.
- **<u>Information on Claims Procedures</u>**: The SPD must fully describe the process and procedures participants need to follow when they submit a claim or appeal a benefit decision. The claim procedures may be outlined in a separate document only if that document is referenced in and distributed with the SPD. The description must include the following information:
  - ➢ The procedures and time limits for submitting a claim.
  - ➢ The procedures and time limits for processing a claim; the DOL has set time limits for claims reviews and these limits need to be outlined in this section.
  - ➢ The procedure and time limits for appealing claim decisions. This section should also include the DOL procedures and rules for the appeal process.
  - ➢ The location of the nearest Department of Labor's Employee Benefits Security Administration office where plan participants can obtain information about ERISA rights.
  - ➢ The plan should also reserve discretionary authority; that is, the plan administrator's right to operate and maintain control of the plan according to the plan terms. The SPD should also reserve the right for deferential judicial review of its decisions (Firestone language).
  - ➢ For medical plans, the SPD must designate the plan's claim fiduciary. The claims fiduciary is the party charged with the responsibility of making the final determination on claim appeals.
- **<u>Statement of ERISA Rights</u>**: ERISA grants specific rights to all plan participants. These rights include:
  - ➢ The right to review all documents governing the plan.
  - ➢ The right to request copies of the documents, including contracts, SPDs, latest Form 5500, and so on; the employer can charge a reasonable fee for copying.
  - ➢ The right to receive a Summary Annual Report summarizing the information in the Form 5500.
- **<u>Offer of Assistance for Non-English Speaking Participants</u>**: ERISA does not require all plans to translate plan materials for non-English speaking participants. If a plan covers 100 or more participants at the beginning of the plan year and 10% or more of the participants are literate **only in the same** non-English language, the plan administrator must provide the

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SPD in English, along with a notice in the non-English language offering assistance in the non-English language. If a plan has fewer than 100 participants at the beginning of the year, 25% of the participants need to speak the same non-English language for this notice requirement to apply.

Sample notice wording would be "This booklet contains a summary in English of your plan rights and benefits under the ABC Company health and welfare plan. If you have any difficulty understanding any part of this booklet, please contact, ***contact name*** at ***contact number***, at the following times ***(insert times to best take the questions)***.

While the summary plan description itself does not need to be translated, the plan contact must be able to explain the participant's rights and obligations under the plan in the non-English language.

- **Explanation of Plan's Procedures to Recover Overpaid Benefits**: ERISA plans are entitled to recover benefit overpayments made for plan participants or beneficiaries. The SPD should describe the recovery practice.
- **Additional Requirements for Group Health Plans:** The health plan must:
  - Automatically furnish a list of network providers. This can be done by allowing access to the carrier's or PPO network's search engine.
  - Discuss the role of the insurer in managing benefits, if a plan is fully insured.
  - Discuss the impact of health plan provider discount arrangements on benefit calculations and employee copayments, coinsurance, and so on.
  - Disclose COBRA rights.
  - Disclose USERRA rights.
  - State HIPAA portability requirements.
  - Communicate minimum hospital stay requirements following the birth of a child.
  - Advise that Qualified Medical Child Support Order (QMCSO) procedures are available upon request.
  - Reserve the discretionary authority as granted by the "Firestone" case to determine whether a support order is qualified.
  - Inform participants of their right to continue coverage in certain circumstances if COBRA applies.
  - Inform participants of their right to offset any pre-existing condition limitation with creditable coverage according to HIPAA's portability requirements.
- **Additional Recommended Inclusions**: Your SPD should also include the following:
  - A waiver provision stating that if the plan fails to comply with a plan provision in one situation that will in no way waive the plan's ability to enforce that provision in the future.
  - A clause on errors stating a plan participant cannot receive a benefit that would not have been covered had an error not occurred.
  - A statement that the SPD along with any supplements represents the plan as a whole and the current version supersedes any previous versions of the document.
  - A statement about participant cooperation, informing participants that when they accept benefits payable by the plan, they agree to perform any act the plan requires or sign any documents the plan needs for administrative purposes.
  - Finally, the document should refer to any applicable federal or state laws.

Other SPD Requirements

An SPD is intended to make benefits and plan rules understandable to the average plan participant. For anyone who has read a health plan's SPD recently, the concept of using language an average plan participant can understand is almost laughable. As health plans become more and more complex, the idea

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the plan can be described in straightforward terms may be a pipe dream.

The Employee Benefit Research Institute (EBRI) recently released a report titled "How Readable Are Summary Plan Descriptions for Health Care Plans?" and the findings are somewhat disturbing.

EBRI reviewers found many SPDs more difficult to understand than graduate school or technical material. Some SPDs were written at first year college level and a lucky few were written at only the ninth grade reading level.

Unfortunately, the Department of Education reports that 43% of adults read on or below the basic level of literacy for sentences and paragraphs and 34% are either at or below the basic level of literacy to understand information about medicines and medical care.

This readability issue should alarm employers who produce SPDs that the average plan participant cannot understand. SPDs should explain the plan in simple declarative sentences. Given the complexity of today's health plans, making these documents readable will be extremely difficult.

However, it is the employer's responsibility to make sure their employees understand the SPD. Since most plan participants are not acutely aware of the health plan workings, you must proofread your document as if you were not well versed in the plan benefits and rules.

Distribution Requirements

A participant covered by an ERISA plan must receive an SPD. The term *participant* refers to any employee or former employee still covered by the ERISA plan. Thus a COBRA participant or any potential retiree the plan covers should be considered a plan participant. The plan covers a participant at the earliest of any of the following:

- The date the plan indicates participation begins.
- The date a participant becomes eligible to receive a benefit according to the terms of the plan.
- The date an employee makes a voluntary or mandatory plan contribution.

Years ago, the Department of Labor required the plan to file a copy of the SPD with the DOL. The DOL discontinued the practice; however, plans must provide plan documents to the DOL upon request.

In general, participants must be given an SPD when they first become eligible under the plan and then periodically as the law requires. The general guidelines are as follows:

- A newly covered participant under an existing plan must receive the SPD within 90 days after coverage begins. Organizations really should supply the SPD sooner, if possible. Many of the ERISA requirements do not become effective until the participant is notified. For example, the claim review and appeals procedures are not enforceable until the plan participant is notified. It makes sense to deliver the SPD as soon as reasonably possible.
- If a plan is new, the plan administrator must furnish the SPD within 120 days after the plan becomes subject to ERISA. Again, it is in your best interest to furnish the SPDs as soon as reasonably possible. Plans offering a new benefit are generally considered new plans. Plans merely making a change in a vendor are not considered new under ERISA; it is just a change in vendor.
- If you make any material plan changes in benefits, you must update your SPD every five years. An organization needs to describe these changes in a Summary of Material Modifications (SMMs). SMMs are discussed in the next section on Plan Amendments.
- If you do not make any plan changes, you must furnish the SPD once every ten years.

SPDs and SMMs must be delivered in a way that is "reasonably calculated to ensure actual receipt of the material." The DOL has approved certain delivery methods, as safe harbors:

- First class mail is acceptable if your organization keeps a comprehensive, up-to-date address list. This means that you need to ensure the mailing list contains addresses for everyone the plan covers and also that you must try to determine whether your employees last known address is on the list.
- Second and even third class mail is acceptable if you use a return/forwarding option and request an address correction.

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- Special inserts with any company publication are acceptable if the publication mailing list is up to date and you use a cover sheet clearly indicating the importance of enclosed SPD or SMM included with the publication. Finally, the employer must make reasonable efforts to deliver an SPD to any plan participant not on the publication's mailing list. For example, COBRA participants may not be included on the mailing list for a company publication but still need to receive a copy of the SPD.
- Hand delivery is acceptable. However, it is not acceptable to merely place copies of the SPD or SMM in places frequented by plan participants. Although the DOL does not clearly define "hand delivery," courts have ruled it acceptable to distribute SPDs during new hire benefit meetings or through interoffice mail.
- Electronic delivery is also acceptable providing it meets a number of conditions. Our *Benefit Advisor* on electronic communication outlines these delivery requirements. You can access this *Advisor* at http://www.mcwent.com/Benefit_Advisor/2005/BA_Issue10.pdf.

Plans must document and follow their procedures for distributing SPDs. The SPD delivery method frequently becomes an issue during benefits litigation. Plans do not necessarily need to prove the SPD or SMM was delivered to a specific person as much as they will need to demonstrate they regularly follow their documented procedure when they distribute SPDs and SMMs.

Plan Amendments

Any time an organization makes a material change in benefits, eligibility or information in an SPD, the organization must formally amend the document. This amendment is called a Summary of Material Modification or an SMM. Unfortunately, ERISA does not define the scope of "material" change, so it falls on the organization to determine what changes should be considered material based on the facts and circumstances of each change. When in doubt, the plan should err in favor of the plan participants and issue an SMM.

The time frame for supplying a participant with an SMM is very generous. An SMM must be issued within 210 days after the end of the plan year in which the change was made. Employers will generally notify participants before a change in benefits through the normal employee communication process. The plan has additional time to formally amend the SPD.

This time frame is shortened significantly if the change is considered a "material reduction in group health plan covered services." Again, the DOL does not define what is meant by a "material reduction in benefits," but informal guidance suggests the following changes would be considered material reductions:

- Eliminating or reducing specific benefits.
- Increasing premiums, deductibles, co-insurance, co-payments or any amounts the participant is required to pay.
- Reducing the service area a network plan covers.
- Imposing new requirements or conditions in order to receive benefits.

An SMM must be delivered within 60 days after an organization *adopts* any change considered a material reduction in group health plan benefits. Adoption does not necessarily mean the effective date of the change but rather it is the date the plan officially makes any material change in benefits.

Any SMM your plan issues becomes part of the SPD. A new plan participant should receive an updated SPD including any SMMs.

Penalties for Not Distributing a SPD

ERISA does not have any specific penalties for failing to provide the SPD or an SMM. However, there is a sizable penalty if a participant or beneficiary makes a written request for an SPD and the organization fails to provide it. When a participant makes a written request for an SPD, the plan sponsor must provide it within 30 days. If the plan sponsor fails to provide the document within this 30-day window, the DOL can assess up to a $110 a day penalty.

While the ERISA's financial penalty applies to failure to provide a document upon request, failure to provide any SPD can have other alarming consequences. Under ERISA, plan participants can sue a plan sponsor for failing to enforce the requirement. If a plan cannot provide an SPD during a DOL audit, it

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will be required to produce one for plan participants.

If your plan fails to provide an SPD, your plan is open to a court enforcing the provisions of documents that were provided to plan participants. Since those documents usually consist of abbreviated summaries and plan descriptions, the plan will have difficulty fighting any legal disputes. Failure to issue a Summary of Material Modifications for any plan amendment may invalidate the amendment.

ERISA does establish criminal penalties for anyone willfully violating a Title I ERISA requirement. The potential penalties could be up to $100,000 in fines and up to 10 years in prison. The fine can be increased to as much as $500,000 depending on the severity of the violation.

Concluding Thoughts

Although the thought of providing SPDs can be daunting, organizations need to make these documents available to employees.

An effective method fro SPD development, is to start with the insurance carrier or administrator's certificate of coverage and add a "wrap around" document that meets any other ERISA requirements.

Everyone's plate is usually pretty full and unfortunately, SPDs do get pushed back on work plans quite frequently. However, organizations subject to ERISA must distribute SPDs. Once the SPD is developed, it is equally important to keep it current. If benefits or legal requirements change, the SPD must be amended accordingly.

While SPDs may not be the most exciting project to tackle, these documents need to be prepared, reviewed and distributed to plan participants. These documents ensure everyone is on the same page regarding benefits paid and benefit plan rules.

If you have any questions regarding SPDs, please contact your McGraw Wentworth Account Manager. MW

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