

PROTECTING THE CONSUMER'S FUTURE



National Association  
of Health Underwriters

AMERICA'S BENEFITS SPECIALISTS

# MYTHBUSTERS, ERISA EDITION – SEPARATING COMPLIANCE FACT FROM FICTION

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THE SLIDES WILL BE ARCHIVED ON [WWW.NAHU.ORG](http://WWW.NAHU.ORG)  
COMPLIANCE CORNER

# COMPLIANCE CORNER WEBINARS

- Slides will be archived on [nahu.org](http://nahu.org) under the Compliance Corner tab
- The session is being recorded and will be archived in Compliance Corner
- ***\*Compliance discussions and responses offer NAHU's interpretation and research regarding application of the provisions of the Patient Protection and Affordable Care Act (PPACA). NAHU is providing this guidance as an informational resource for NAHU members. This general information is not a substitute for legal or tax advice.***

# ABOUT YOUR PRESENTERS



**Elizabeth Allen –**

**Assistant Vice President, Benefits Compliance and Counsel, NFP**

Elizabeth provides compliance and regulatory support to employers and brokers regarding all aspects of employee benefits compliance. In this role, she answers day-to-day compliance questions, serves as a contributing author of biweekly and quarterly newsletters, and presents on various employee benefit matters. Prior to joining NFP, Elizabeth spent five years as an investigator for the U.S. Department of Labor's Employee Benefits Security Administration (EBSA), where she reviewed health and welfare and pension plans for compliance with ERISA, and worked with employers, service providers and other regulatory agencies to bring employee benefit plans into compliance. She also served as the Voluntary Fiduciary Correction Program (VFCP) coordinator from 2012–2014. Elizabeth holds a Bachelor of Arts from the University of Texas at Austin and a Juris Doctorate from Southern Methodist University Dedman School of Law. She also recently earned her Certified Employee Benefit Specialist (CEBS) designation.

# ABOUT YOUR PRESENTERS



**Ross Carmichael –**

**Director of Compliance and Operations for Higginbotham**

Prior to joining Higginbotham Carmichael was an investigator with the Department of Labor's Employee Benefits Security Administration, leading its Dallas Regional Oil & Gas Project and its HIPAA and Affordable Care Act Compliance Project. In his time at the DOL, Carmichael received the Secretary of Labor's Exceptional Achievement Award for his work on the Health Disclosure and Claims Issues Project. Since joining Higginbotham, Carmichael has presented before hundreds of employers and participated in numerous panels for various business organizations throughout Texas. He has been interviewed by CBS News and the New York Times, and he also helps represent Higginbotham on the National Association of Health Underwriter's Principal Council. He is a graduate of the University of California, Santa Barbara and Texas A&M University School of Law.

# **THE MYTHS**

FACT OR FICTION?

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COMPLIANCE CORNER

# **MYTH 1: THE DOL PICKS COMPANIES TO AUDIT AT RANDOM**

**(Mostly) Fiction:  
Very few audits are selected at 'random'**

How DOL offices select plans to audit:

- Complaints
- Regional & National Projects (HDCI I & II, HBSP)
- Form 5500 review
- Simultaneous pension plan audit
- Referrals from other governmental agencies
- Small amount of 'random' investigations based on companion case needs and one group of 'random' selections made by the national office (e.g. – HDCI I & II)

## **MYTH 2: SMALL PLANS DON'T HAVE TO WORRY ABOUT BEING SELECTED FOR A DOL AUDIT**

### **Fiction: Small plans are not completely off the hook**

- DOL is beginning to show a propensity towards smaller plans, however it is generally easier to target a large health plan than smaller health plan.
- Complaints will always spur an investigation, regardless of plan size
- Companion plan/pension plan audits may pull in small health plans

# MYTH 3: DOL INTENDS TO AUDIT ALL GROUP HEALTH PLANS IN THE NEXT FEW YEARS

**Fiction: This would be mathematically impossible**

- Only 10 DOL Regional offices in the country, with an average of 40 investigators/auditors per office
- There are 2.4M group health plans in the country
- It usually takes an investigator one day in the field (or office) to conduct an ACA/Part 7 review, plus another 3-4 days to review all results and compose no action or Voluntary Compliance letters
- At 4 total days per investigation, it would take approximately 65 years to audit all group health plans
- Additionally, there are close to 700k retirement plans, which still have priority in the eyes of most EBSA Investigators/Auditors, and their investigations are much more time consuming



## **MYTH 4: THERE ARE AUTOMATIC, STEEP FINES** **IF A PLAN IS NONCOMPLIANT**

**Fact and Fiction: Some audits will result in 'fines,' others will just seek compliance**

- DOL Audit process is one of “Voluntary Compliance”
- Differences between DOL penalties being levied, making the plan whole, and IRS excise taxes.
- Remember DOL vs. IRS perspective.

# MYTH 5: A HEALTH PLAN'S SERVICE PROVIDER IS GENERALLY RESPONSIBLE FOR COMPLIANCE

## **Fiction: Employer is ultimately responsible for compliance with most requirements**

- Plan sponsor (employer) is always a plan fiduciary, even if certain responsibilities are delegated
- Fiduciary duty of prudence includes duty to monitor
- Third parties (brokers/attorneys/insurers) are almost NEVER fiduciaries

# KEY AREAS TO FOCUS ON

AUDIT-PROOFING YOUR HEALTH PLAN FROM AN ERISA STANDPOINT

- Plan Documents
- Reporting and Disclosure
- Fiduciary Responsibility

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# **HEALTH PLAN DOCUMENTS:** **SPDs, CARRIER CERTIFICATES, SBCs, OH MY**

## **The Plan Document**

- Written instrument under which a benefit plan is established or operated.
- Required under ERISA Section 402
- Must include certain content
- Written document also required under IRC Section 125

## **The Plan Document - In the context of an audit**

- Employer should know what a plan document is/isn't
- May or may not be a point of contention

# **HEALTH PLAN DOCUMENTS:** **SPDs, CARRIER CERTIFICATES, SBCs, OH MY**

## **The Summary Plan Description (SPD)**

- Plain language document that advises plan participants of their rights and obligations under the plan.
- Mandate and content requirements found in ERISA Sections 102 & 104
- Must be given to all participants within 90 days of becoming covered under the plan
- Must be redistributed every 5 years if amended, every 10 years if not
- Amendments to SPD – Summary of Material Modifications (SMM)
  - Must be given to employees 60 days prior to change if resulting change would affect contents of the SBC. If not, must be given within 210 days after the plan year in which the change was made

## **The SPD - In the context of an audit**

- Employees should've received one
- Employers who don't have one will have to obtain one before audit is closed

# **HEALTH PLAN DOCUMENTS:** **SPDs, CARRIER CERTIFICATES, SBCs, OH MY**

## **The Carrier Certificate**

- Generally includes insurance policy/carrier contract
- Will include many plan terms, but does not include all ERISA-required content
- Is not a plan document or SPD

## **The Carrier Certificate - In the context of an audit**

- Not enough for compliance under ERISA, but the investigator/auditor will know how to use it to determine compliance with health plan laws
- Wrap documents are generally necessary to include ERISA-required content

# **HEALTH PLAN DOCUMENTS:** **SPDs, CARRIER CERTIFICATES, SBCs, OH MY**

## **Summary of Benefits and Coverage (SBC)**

- PPACA mandated document that describes the benefits and coverage under the plan
- Government template
- Should be distributed any time a participant is considering enrollment

## **The SBC - In the context of an audit**

- Low-hanging fruit for investigators, especially “culturally and linguistically appropriate” requirement
- Content matters now
- Wrap documents are generally necessary to include ERISA-required content

# **HEALTH PLAN DOCUMENTS:** **SPDs, CARRIER CERTIFICATES, SBCs, OH MY**

## **Plan Document Failure Risks**

- For DOL, you will have to comply before case is closed
- For IRS, plan disqualification or penalties possible, but will likely opt for compliance



# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Form 5500 Requirement**

- Annual reporting requirement under ERISA Section 101
- Applies to large health plans and small unfunded health plans
- Due by the last day of the seventh month after plan year

## **Form 5500 - In the context of an audit**

- Form inaccuracies can cause an audit
- Willful failure to file could cause penalties, especially in the case of fraud
- Delinquent Filer Voluntary Correction Program for failures

# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Employee Notices**

- COBRA Notices
- CHIP Notices
- Notice of special enrollment rights
- Medicare Part D Creditable-Non-creditable Disclosure Notice
- Notice of availability of Reasonable Alternative Standards for Wellness Programs
- Exchange Notice
- Women's Health and Cancer Rights Act Annual Notice
- Rescission of Coverage Notice

## **“Notices” that can be placed in SPD**

- Grandfathered Health Plan Notice
- Internal Appeals and External Review Procedures
- Newborns and Mothers Health Protection Act
- Patient Protections Notice
- Women's Health and Cancer Rights Act Enrollment Notice

# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Electronic Disclosure Safe Harbor**

### ***Employees with Work-related Computer Access***

**ERISA disclosures may be delivered electronically to employees that:**

- Have the ability to effectively access documents furnished in electronic form at any location where the employees are reasonably expected to perform their duties; and**
- Are expected to have access to the employer's electronic information system as an integral part of those duties.**

# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Electronic Disclosure Safe Harbor**

### ***Participants Who Consent to Receive Disclosures Electronically***

A plan administrator must obtain written consent prior to electronically delivering ERISA disclosures to plan participants who do not have work-related access to a computer. The consent may be received in either electronic or paper form. Prior to consenting, an individual must be given a clear and conspicuous statement that explains:

- The types of documents to which the consent will apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the address used for receipt of electronically

furnished documents;

- The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Hardware or software needed to access and retain the documents delivered electronically.

# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Electronic Distribution of Plan Documents and Notices**

- Clearly the trend
- Compliance rules for providing documents electronically
- Use of 'portal' requires additional steps

## **Electronic Distribution- In the context of an audit**

- Will come up if someone “did not receive notice” but really received it electronically

# **REPORTING AND DISCLOSURE:** **THE ELEPHANT IN THE ROOM**

## **Consequences of Failure to Distribute Notices**

- DOL “penalties”
- IRS excise taxes
- Plan sponsor being liable for compensation and benefits

## **Notices - In the context of an audit**

- Often comes into play when employees call the DOL
- When in doubt, disclose

# **FIDUCIARY RESPONSIBILITY:** **THERE'S NO PUNTING IT**

## **Fiduciary Responsibility**

- Delegated tasks still largely the responsibility of the employer
- Fiduciary duty not as easily identified in health plans
- Plan sponsor general awareness/knowledge of plan functions goes a long way
- It's best for employers to prepare like they could be subject to an audit at any time

**THANK YOU FOR ATTENDING!**

**Questions? Check out NAHU's *Compliance Corner* premier member benefit.**

<http://www.nahu.org/education/programs/compliance.cfm>