

# ERISA Overview for Employers: Lessons Learned



Presented By  
Matthew Cannova  
Maynard, Cooper & Gale, P.C.  
March 2022



# DOL Jurisdiction and Enforcement

- ▶ **The DOL shares jurisdiction with the IRS over most benefit plans**
- ▶ **Statutory jurisdiction includes ERISA, ACA, COBRA, HIPAA Portability, FLSA**
- ▶ **DOL priorities include:**
  - ▶ **Group Health Plans**
  - ▶ **Plan Assets**
  - ▶ **Plan Administration, eligibility,**
  - ▶ **MHPAEA**

# Reasons for Initiating Investigations

- ▶ Participant complaints
- ▶ Referrals from other agencies (e.g., SEC, IRS)
- ▶ Enforcement initiatives (National Enforcement Projects)
- ▶ Form 5500 filings

# Procedure for DOL Investigation

- ▶ Initial Letter
  - ▶ Document Request or Appointment Letter
- ▶ Document Production and On-Site Interviews
- ▶ Closing Letter
  - ▶ No DOL action to be taken
  - ▶ “Voluntary Compliance” notice
  - ▶ Litigation letter
- ▶ Timeline



# Audit Best Practices

- ▶ Choose one point person to serve as liaison
- ▶ Inform DOL of your ERISA counsel
- ▶ Prepare personnel for on-site interviews
- ▶ Negotiate scope of document request (e.g., limit to sampling of client documents)
- ▶ Perform legal review of subpoenaed and any other requested materials before delivery to DOL
- ▶ What to do if any discrepancies are uncovered
- ▶ **Best Practice Before: Self-Audit**

# ERISA Coverage & Exemptions

## ▶ **Employee Welfare Benefit Plans**

- ▶ Plan, fund, or program established by Employer providing medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers scholarship funds, or prepaid legal services
- ▶ **Exempt: Governmental plans, church plans, Voluntary Plans Safe Harbor**
- ▶ **Cafeteria plans are a creature of the Internal Revenue Code**
  - ▶ **Not (automatically) ERISA plans**

# Health and Welfare Plans

- ▶ **Group Health Plans – An employee welfare benefit plan to the extent that the plan *provides medical care* (including items and services paid for as medical care) to employees (including both current and former employees) or their dependents directly or through insurance, reimbursement, or otherwise**
- ▶ **Generally includes**
  - ▶ **Major Medical**
  - ▶ **Vision**
  - ▶ **Dental**
  - ▶ **Most Wellness Programs**
  - ▶ **Employee Assistance Programs**
  - ▶ **Telemedicine Programs**

# ERISA Group Health Plans

- ▶ Integration
- ▶ “Excepted Benefits”
  - ▶ e.g., disability plans, on-site medical clinics, stand-alone dental and vision plans, certain limited benefit plans (cancer indemnity)
- ▶ Note - still subject to ERISA and most are still subject to HIPAA Privacy and Security requirements

# ERISA Documents

- ▶ ERISA Plan Documents
  - ▶ WHAT are they?
  - ▶ WHERE are they?
  - ▶ New MHPAEA assistance for employees to request documents
  - ▶ **Your Playbook**
- ▶ Summary Plan Descriptions
  - ▶ Summary of Material Modifications
- ▶ **Wrap Document?**
  - ▶ Plan document compliance for “bundled plans”
  - ▶ Filings and plan structure
  - ▶ Integration
- ▶ “Plan document” may include all instruments under which plan is administered



# ERISA Reporting & Related Disclosures

- ▼ Recordkeeping – general rule under ERISA is six years
- ▼ Form 5500 – Annual Report
  - ▼ Due the last day of the 7<sup>th</sup> month following the end of the plan year (July 31 of the following year for calendar year plans)
  - ▼ Up to 2½ month *automatic* extension available with Form 5558
- ▼ Summary Annual Report (SAR)
  - ▼ Summarizes the data in the 5500
  - ▼ Must be distributed to all participants by the later of (i) 9 months after the end of the plan year, or (ii) 2 months after the due date for filing the 5500 (including approved extensions)
- ▼ Are you required to file a Form 5500 for your welfare plan(s)?
  - ▼ Depends on **PLAN SIZE** and **FUNDING METHOD**
    - ▼ **Yes:** Large Plans (more than 100 participants as of the start of the plan year)
    - ▼ **Yes:** Funded Plans
    - ▼ **No:** Small AND fully-insured, unfunded, or combination fully-insured & unfunded

# ERISA Reporting & Related Disclosures

- ▼ Are you required to file a Form 5500 for your welfare plan(s)?
  - ▼ Depends on **PLAN SIZE** and **FUNDING METHOD**
    - ▼ **Yes:** Large Plans (more than 100 participants as of the start of the plan year)
    - ▼ **Yes:** Funded Plans
    - ▼ **No:** Small AND fully-insured, unfunded, or combination fully-insured & unfunded

## Required to File

**ALL FUNDED Plans**  
(regardless of size)

**ALL LARGE Plans**  
(regardless of funding)

# Form 5500 Requirements

| <b>Required to File</b>   | <b>Not Required</b>         |
|---|-----------------------------|
| Small, <u>FUNDED</u> plans  | Small <u>UNFUNDED</u> plans |
| ALL large plans with more than 100 participants as of the start of the plan year, including fully-insured, funded, and unfunded plans | Small fully-insured plans   |

- ▼ Questions to ask:
  - ▼ How many participants on the first day of the plan year?
  - ▼ If self-funded, are benefits paid out of general business assets or is there a separate fund?
- ▼ Must file by the end of the seventh month following the end of the plan year (e.g., July 31 for calendar year plans)
- ▼ How many plans and 5500s?
- ▼ DFVCP

# Plan Assets

- ▼ DOL enforcement priority
- ▼ *Ordinary notions of property rights*
- ▼ Participant Contributions
- ▼ MLR Rebates and similar rebates



# Plan Assets

## ▼ Exclusive Benefit Rule

- ▼ Plan assets may only be used for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan

## ▼ Plan Document provisions

## ▼ Reasonable Plan Administrative Expenses

- ▼ Settlor vs. Plan expenses
- ▼ Plan Expense Reimbursement Policy

## ▼ Prohibited Transactions

## ▼ Fiduciary Decisions

# Trust Requirements & Exemptions

- ▼ **Funded vs. Unfunded vs. Fully-Insured**
  - ▼ **General Assets**
  - ▼ **Trusts**
- ▼ **DOL Non-enforcement Policy (TR 92-01)**
  - ▼ **Employee contributions made through a cafeteria plan**
  - ▼ **Forwarded directly to carrier within three months (fully-insured)**
  - ▼ **Benefits paid directly from general assets (self-funded)**

# Fiduciary Roles

- ▶ **ERISA-covered benefit plans are required to have fiduciaries.**
- ▶ **There are various fiduciary roles under ERISA, including:**
  - ▶ **Named Fiduciary**
  - ▶ **Plan Administrator**
  - ▶ **Discretionary Fiduciaries**
  - ▶ **Trustees**

# Understanding Fiduciary Actions

- ▶ **Fiduciary duties apply to fiduciary actions**
  - ▶ **Discretionary decisions that involve an element of choice or judgment are typically fiduciary in nature**
- ▶ **Fiduciary duties do not apply to non-fiduciary actions, which are either:**
  - ▶ **Plan sponsor ("settlor") functions.**
  - ▶ **Non-discretionary, ministerial functions.**
- ▶ **Best Practice: Assume everything is a fiduciary action**
  - ▶ **Proper consideration**
  - ▶ **Documentation**

# Fiduciary Responsibilities & Duties

- ▶ **Duty to administer the plan in conformity with the plan document(s)**
  - ▶ Includes the plan document, trust document, investment policy statements, or other policies.
- ▶ **Duty of Loyalty / Exclusive Benefit Rule**
  - ▶ Duty of undivided loyalty to plan participants and beneficiaries
  - ▶ Act for the sole purpose of providing benefits to plan participants
  - ▶ Only pay reasonable plan expenses
- ▶ **Duty of Prudence**
  - ▶ Act with the care, skill, and diligence that a prudent person who is familiar with the matter would use under similar circumstances
- ▶ **Duty to Avoid Prohibited Transactions**
  - ▶ Conflicts of Interest, Self-Dealing, Reasonable Fees
  - ▶ Plan Administrative Expenses and “in-house” administration

# Fiduciary Best Practices

- ▶ **Establish Governance Structure**
  - ▶ Identify positions and responsibilities
  - ▶ Designate authority
  - ▶ Plan committee?
- ▶ **Understand delegation of responsibility under committee charters and plan documents.**
  - ▶ Ask: Is this within my responsibility?
  - ▶ **Should you ask?** Is this a fiduciary function?
- ▶ **Be willing to dedicate the time and effort required.**
- ▶ **Read meeting materials in advance and prepare questions.**

# Fiduciary Best Practices

- ▶ Understand what expenses can be paid from plan assets.
  - ▶ Begin with general assumption that paying anyone for plan services is a prohibited transaction.
- ▶ Maintain records of decisions to ensure consistency in applying plan terms to participants and beneficiaries
- ▶ Seek expert assistance when needed
  - ▶ **Brokers, Consultants**
  - ▶ Attorneys
  - ▶ Actuaries
- ▶ Generally understand plan terms and operation, including:
  - ▶ Eligibility for participation
  - ▶ Vesting, withdrawal, distributions, loans
  - ▶ Participant communications and disclosures

# Review Plan Documents & Materials

- ▶ ***Official* Plan Governance Documents:**
  - ▶ Plan Document
  - ▶ Trust agreement
  - ▶ Investment Policy Statement
- ▶ Other administrative policies (e.g., cybersecurity policy)
- ▶ Summary Plan Description (SPD)
- ▶ Fiduciary committee by-laws or charters
- ▶ Minutes from fiduciary committee meetings
- ▶ Forms 5500 Annual Reports
- ▶ Service provider agreements
- ▶ Employee Handbooks

# Mental Health Parity Comparative Analysis

- ▼ Effective February 10, 2021.
- ▼ Applicable to any group health plan that offers mental health or substance use disorder (MH/SUD) benefits.
- ▼ If group health plan imposes non-quantitative treatment limitations (NQTLs) on MH/SUD benefits, the plan must perform and document a comparative analysis of NQTLs on MH/SUD benefits vs. medical/surgical benefits.
- ▼ Analyses must be available to agencies upon request, and agencies must request at least 20 per year.
- ▼ DOL guidance:
  - ▼ [FAQs](#)
  - ▼ [Self-Compliance Tool](#)
  - ▼ [DOL's Webpage on MH/SUD Parity, which includes links to the regulations and additional guidance](#)

