ERISA Compliance
for Health & Welfare Plans

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Deirdre C. Thomas, Esq., Contributing Author and Editor
Darcy L. Hitesman, Esq., Contributing Author
Beth D. Alcalde, Esq., Contributing Author
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What's New in the 2nd Qtr. 2017 Edition

This What's New section highlights the changes made in the last quarter to *ERISA Compliance for Health & Welfare Plans*—the authoritative ERISA resource for employers, administrators, and advisors.

Also see the 2nd Qtr. 2017 *Current Developments* newsletter, which can be accessed under the Bookmarks tab. The *Current Developments* newsletter summarizes important legal developments that occurred during the quarter.

Below are some highlights of the substantive changes that we made to the Outline and Appendix.

Substantive Changes to the Outline:

- **Section VI—*What Workplace Fringe Benefits Are Subject to ERISA?***
  - VI.A—*Overview of Arrangements Subject to ERISA.* We note a recent DOL Advisory Opinion explaining that an arrangement that relates to the provision of benefits but does not directly provide benefits to employees and their dependents is not subject to ERISA.
  - VI.G—*"Payroll Practice" Regulatory Safe Harbors.* A case from the D.C. Circuit addressing a short-term disability arrangement, finding it a "tri-fold match" to the requirements for the payroll practice exemption from ERISA, has been noted here.
  - VI.K—*Other Special Issues for Particular Types of Plans or Benefits.* Clarifications have been made to the discussion of prepaid legal services.
- **Section IX—*Eligibility: Key Design Choices and Legal Constraints.***
  - IX.J—*Spouse and Dependent Child Eligibility.* Two circuit court cases have been added to this discussion: One from the Seventh Circuit holding that Title VII's prohibition on discrimination based on sex includes discrimination based on sexual orientation, and one from the Fourth Circuit supporting the plan's marriage documentation requirements (rejecting the employee's claim that obtaining a marriage license would be contrary to his religious beliefs).
- **Section XI—*Other Important Design Choices and Legal Constraints.***
  - XI.A—*Specifying How Many Welfare Benefit Plans Are Maintained.* The discussion of compliance considerations when deciding whether to bundle benefits, particularly Form 5500 issues, has been revised and streamlined.
  - XI.B—*Discretionary Authority to Interpret Plan and Determine Facts.* In this discussion, we have added several new cases on the enforceability of discretionary language, including cases addressing state-law restrictions on discretionary clauses.
  - XI.C—*Subrogation & Reimbursement: Legal Rules and Design Considerations.* We note recent cases reflecting the impact of the U.S. Supreme Court's 2016 *Montanile* decision, which heightened the challenge for plans seeking to enforce their reimbursement rights by emphasizing the importance of traceability of assets. These cases have held that a plan's claim was not for equitable relief (and thus could not move forward) if it did not seek specifically identifiable funds or traceable items.
  - XI.E—*Assignment of Benefits.* We reflect recent case law holding that an assignment does not confer standing on a provider challenging certain insurer actions, particularly those relating to recoupment of overpayments.

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- **Section XIII—*Mergers & Acquisitions for Health & Welfare Plans.*** This Section has been completely revised to provide new insights and issues to focus on when engaging in an M&A transaction. Among the additions are new text boxes, more pointers on due diligence, and additional items to consider addressing in the purchase agreement.
- **Section XV—*How Plans Pay Benefits: Insured Versus Self-Insured Plans.*** This Section has also been updated in its entirety with revised explanations of the key differences between insured and self-insured plans, and updated information throughout the subsections summarizing the different ways in which insured and self-insured plans approach ERISA compliance issues such as plan documentation, claims procedures, and Form 5500 filings.
- **Section XIX—*MEWAs—Multiple Employer Welfare Arrangements.***
  - XIX.C—*ERISA Definition of MEWA.* The DOL Advisory Opinion analyzing an arrangement that relates to the provision of benefits but does not directly provide benefits to employees also addressed MEWA status, concluding that the arrangement is not a MEWA; this Advisory Opinion has been covered here.
- **Section XXIV—*Summary Plan Descriptions & Summaries of Material Modifications.***
  - XXIV.L—*Conflicts Between SPD/SMM and Plan Document or Insurance Contract.* We note a case concluding that "de novo" (rather than deferential) review applied where discretionary authority language was found only in the SPD and not the formal plan document.
- **Section XXVIII—*Fiduciary Duties Under ERISA.***
  - XXVIII.C—*Fiduciary Responsibilities Imposed by ERISA.* In the discussion of the fiduciary responsibility to follow the terms of plan, we note a case concluding that the use of a retained asset account to pay benefits did not satisfy the plan's requirement that benefits be paid in a lump sum, and so the administrator's actions constituted breach of fiduciary duty.
  - XXVIII.D—*Prohibited Transactions Under ERISA § 406.* The latest ruling in the *Fidelity* "float" litigation has been added to the discussion of retention of float income as a prohibited transaction. In this latest ruling, the First Circuit held (in the context of 401(k) plan investments) that float on participants' mutual fund redemptions was not a plan asset.
  - XXVIII.E—*Delegating Fiduciary Responsibility.* A new text box highlights the importance of delegating discretionary authority to interpret and administer the plan and make factual determinations (to the extent the plan provides for such discretionary authority) when delegating responsibility for making claims decisions.
  - XXVIII.I—*Fiduciary Liability and Litigation.* We have added a recent case addressing whether a debt relating to a fiduciary breach may be discharged in bankruptcy. In this case, the fiduciary was found to have misappropriated trust funds while acting in a fiduciary capacity, and thus the debt was not dischargeable under the applicable bankruptcy rule.
- **Section XXXII—*Mistakes Happen: Correcting ERISA Compliance Problems.***
  - XXXII.B—*Correcting Late and Unfiled Form 5500s: Delinquent Filer Voluntary Compliance Program.* The text box regarding penalty exposure outside the delinquent filer voluntary compliance program has been updated to reflect the most recent increase to the maximum permissible penalty amount for Form 5500 failures.
- **Section XXXIV—*Claims Procedures for Group Health Plans.***
  - XXXIV.C—*Group Health Claims: Effective Dates and Consequences of Noncompliance.* The disability claims regulations issued in final form in late 2016 moved the effective date provisions in the regulations to a new subsection. Citations in this subsection have been updated to reflect that change.
  - XXXIV.M—*External Review Requirements.* This discussion has been updated to reflect that a new contractor now operates the HHS-administered federal external review process.
- **Section XXXVI—*ERISA Litigation.***
  - XXXVI.B—*Exhaustion of Plan Administrative Claims Procedures.* We have added a recent Third Circuit case addressing the requirement to exhaust the plan's claims process before bringing a lawsuit.
  - XXXVI.G—*Who Can File ERISA Benefits Litigation?* Discussion of cases concluding that a provider acting under an assignment does not have standing under ERISA to challenge a plan's attempt to recoup payments from the provider has been added to this subsection.

- **Section XXXIX—*ERISA Preemption of State Laws.***
  - XXXIX.C—*State Laws That "Relate to" ERISA Plans Are Generally Preempted.* We have added discussion of an Eighth Circuit case addressing the "relate to" element of ERISA preemption. The case concluded that the applicable statute included ERISA references and was thus preempted.
  - XXXIX.H—*Preemption Analysis Applied to Specific State Laws.* Updates for case-law developments have been made throughout this subsection. In the discussion of state laws prohibiting discretionary language in insurance policies, we have added cases addressing whether such a prohibition might apply to self-insured plans. The discussion of state external review laws has been updated to reflect an Eleventh Circuit case holding that New York's external review law is saved from ERISA preemption as a law regulating insurance, and that it does not conflict with ERISA's exclusive remedies. We discuss an Eighth Circuit case holding that an Iowa law governing pharmacy benefit managers is preempted because the law's requirements would apply to the administration of benefits provided by ERISA plans. And we note a case holding that a state law regarding confidentiality of medical records could not be read to prevent a claimant from accessing her medical records in connection with a claim under an ERISA plan.

Substantive Changes to the Appendix:

- **Tab 1—ERISA Title I**
  - Updated TOC
  - Minor correction

Lots More to Come! From the feedback we've received, we know that our manuals are the premier group health plans resources in the country. But here at EBIA we're not satisfied. We are constantly striving to make the manual even better. In upcoming editions, look forward to complete coverage of all legal developments affecting ERISA compliance, and to our further analysis of existing law, with more examples and Q/As, etc.

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