Are You Prepared for a Department of Labor Audit of Your Health and Welfare Benefit Plans?

Arizona Employment Law Conference

Kristi R. Gauthier
(480) 684-1300
kgauthier@clarkhill.com

April 23, 2015

CLARK HILL

AGENDA

- Department of Labor ("DOL") Audits
  - DOL Enforcement Authority
  - Process – what to expect if your plan is audited
  - Current "hot" compliance issues
  - Potential Penalties
- Proactive measures your organization can take

DOL WELFARE PLAN AUDITS

- The DOL is responsible for enforcement of ERISA compliance
  - 10 regional offices (CA, GA, IL, MA, MO, NY, OH, PA and TX)

- ERISA enforcement includes:
  - Consolidated Omnibus Budget Reconciliation Act (COBRA)
  - Health Insurance Portability and Accountability Act (HIPAA)
  - Mental Health Parity Act (MHPA)
  - Newborns' and Mothers' Health Protection Act (Newborn's Act)
  - Women's Health and Cancer Rights Act (WHCRA)
  - Genetic Information Nondiscrimination Act (GINA)
  - Mental Health Parity and Addiction Equity Act (MHPAEA)
  - Children's Health Insurance Program Reauthorization Act (CHIPRA)
  - Michelle's Law
  - Patient Protection and Affordable Care Act (ACA)

DOL WELFARE PLAN AUDITS

Types of DOL Audits:

1. Criminal Investigations/Audits
2. Civil Investigations/Audits
3. Random Audits

DOL WELFARE PLAN AUDITS

- Employers of any size who sponsor an ERISA welfare benefit plan can be subject to DOL audit
- DOL audits on the rise – especially small to mid-size employers
- Audits can be random, but the following are common sources:
  - Participant complaints
  - Form 5500 reviews
  - Referrals from other agencies, state insurance departments, and advocacy groups
  - Media
  - Private litigation
- ACA compliance random audits

DOL WELFARE PLAN AUDITS

- Health Benefits Security Project was established in 2012
- Includes broad range of investigative issues such as:
  - Compliance with ERISA
  - Unpaid or improperly processed benefit claims
  - Excessive service provider fees
  - Systemic denial of promised benefits
  - Criminal misconduct by plan fiduciaries or medical providers
- Most common violations:
  - Failure to maintain required documentation
  - Failure to provide required notices
  - Failure to provide benefits in accordance with plan terms
  - Improper claims adjudication
  - Failure to follow DOL claims procedures
  - Failure to forward employee premiums to providers

DOL WELFARE PLAN AUDITS

How does it work?

Step 1: DOL audit letter arrives in the mail

Step 2: Document request and/or onsite audit

Step 3: Onsite interviews with fiduciaries and other persons with plan decision making authorities

Step 4: Voluntary Compliance Letter

Step 5: Correction Period

Step 6: Closing letter

INITIAL STEPS UPON RECEIVING THE DOL NOTICE

DO…

- Notify your legal counsel immediately
- Work with legal counsel to timely produce the requested documentation
- Provide documentation in a complete and organized fashion
- Be comprehensive – explain any missing information or documentation
- Identify any known compliance problems in advance
- Treat the auditor with respect and be non-confrontational

DON'T…

- Ask questions about what prompted the audit
- Volunteer documents or information that is not requested
- Ignore the notice

ON-SITE AUDIT PROTOCOLS

- Determine who will be interviewed
  - Familiar with plan documents and plan operation
  - Prepared to address compliance issues and/or corrective measures
- Arrange to have legal counsel present
- Designate an appropriate location
  - Provide comfortable, usable workspace
  - Avoid high traffic areas
  - Have all documents produced readily accessible
- Informal interview (not recorded or videotaped)
- DOL will ask series of questions until he has covered his agenda

POSSIBLE AUDIT OUTCOMES

- No action – Closing Letter
  - No ERISA violations found
  - Violations cited, however, DOL does not deem the case fit for further action
  - Violations cited, however no damages or de minimis damages
  - Violations cited and corrected (following receipt of a Voluntary Compliance Letter)
- Corrective Measures Required
  - Voluntary Compliance Letter issued
  - 10 days to respond
  - Proof of correction must be submitted
  - Can take up to a couple months for processing
- Litigation

DOCUMENT REQUEST INCLUDES….

- Plan documents, adoption agreements, wrap documents and amendments
- Summary Plan Description and any Summaries of Material Modification
- Signed Form 5500s for past three years
- All contracts, policies or arrangements with all providers of service to the Plan
- If self-funded, all contracts for claims processing, administrative services and reinsurance
- Copies of all required notices, including lists and logs of issued notices and a description of procedures for distribution
- Plans rules regarding pre-authorization for hospital stays in connection with childbirth
- Sample written description of benefits mandated by WHCRA required to be provided upon enrollment and annually
- Materials describing any wellness program including disclosure statement regarding the availability of a reasonable alternative
- If claiming grandfathered status, copy of disclosure statement and records documenting terms of plan on March 23, 2010 and documents necessary to verify grandfathered state of health plan

DOCUMENT REQUEST INCLUDES….

- Written notice describing enrollment opportunities of dependent children to age 26
- If coverage has rescinded any participant or beneficiary coverage, a list of individuals whose coverage has been rescinded, reason for rescission, copy of required rescission notice
- Documents showing lifetime limits for each plan year after September 23, 2010
- Documents showing annual limits for each plan year after September 23, 2010
- Documents relating to provision of preventive services for each plan year on or after September 23, 2010
- Copies of Plan's claims and appeals procedures
- Related collective bargaining agreements
- Plan's accounting records
- Log reports for participant claims
- Summary Annual reports for past three years
- Fiduciary liability insurance policy
- Fidelity bond
- Names and contact information for plan actuary, attorney, accountants, insurance agents, committee members, etc.

CURRENT “HOT” COMPLIANCE ISSUES

CLARK HILL

ERISA PLAN DOCUMENT

- Every health and welfare benefit plan must be in writing
  - Welfare benefits include health, dental, vision, life, disability, health flexible spending accounts, health reimbursement arrangements, some EAPs, some wellness programs and some “voluntary” benefits
- Governing body / Board of Directors must adopt resolutions to authorize initial adoption of the plan
  - Approve amendments unless the plan document delegates the authority to amend the plan to someone else
  - Generally must be adopted by last day of plan year in which plan/amendment is effective

ERISA PLAN DOCUMENT

- Required features:
  - Named fiduciary
  - Procedure for allocating responsibilities
  - Funding policy
  - How payments are made
  - Claims and appeals procedures
  - Procedure for amending the plan and identifying who has the authority to amend the plan
- For insured benefits, can sometimes use the insurance contract as the plan document
- Recommend a wrap plan document to ensure compliance

ERISA SUMMARY PLAN DESCRIPTION ("SPD")

- Every welfare benefit plan must be described in an SPD which is intended to provide an explanation of the plan and participant's rights in easy to understand language
- Must be given to participants and beneficiaries within:
  - 120 days after the Plan is initially adopted; or
  - Within 90 days after the employee becomes a participant in the plan
  - An updated SPD must be furnished every five (5) years (10 years if no plans amendments made)
- Most of the time insurance carriers and TPAs do not provide you with an SPD – you must secure this on your own
- If you are provided with an SPD by a third party (TPA, consultant, etc.) it should be reviewed by legal counsel for compliance with applicable laws

ERISA SUMMARY PLAN DESCRIPTION

- Plan identifying information
- Plan eligibility
- Plan benefits (cost-sharing, co-insurance, networks, etc.)
- Circumstances causing loss or denial
- Amendment/termination provisions
- Source of contributions
- Funding
- Claims and appeals procedures
- Statement of ERISA rights
- Offer of assistance in non-English language
- Role of health insurers or claims administrators
- Procedures for obtaining pre-authorization, approvals, utilization review
- COBRA notice
- Newborns and Mothers Health Protection Act notice
- Mental Health Parity rights
- Women's Health and Cancer Rights Act
- QMCSO procedures
- FMLA leave procedures as relate to benefits
- Grandfathered Notice (if applicable)

SUMMARY OF MATERIAL MODIFICATION ("SMM")

- An SMM must be provided to participants when changes are made to the plan that impact information reported in a prior SPD

- Due Date:

  - If the plan is amended, SMMs must be furnished to plan participants within 210 days after the end of the plan year in which the change occurs

  - An SMM that involves a "material reduction in covered services or benefits" must be furnished to participants and beneficiaries no later than 60 days after the adoption of the modification or change

ERISA CLAIMS AND APPEAL PROCEDURES

- ERISA contains detailed requirements on benefit claims and appeal procedures, including timing and content requirements
- Claim and appeal procedures must be in a plan document and SPD
- Adverse benefit determinations must include required disclosures (e.g. the specific reason(s) for the denial of the claim, reference to the specific plan provisions on which the benefit determination is based, and a description of the plan's appeals procedures)
- ACA adds additional requirements for certain plans
- Plan sponsors are ultimately responsible unless delegated to third party (e.g. insurer, claims administrator, etc.)

REQUIRED NOTICES

- Newborns and Mother's Health Protection Act
- Women's Health and Cancer Rights Act
- HIPAA Special Enrollment Rights
- QMCSO Procedures
- Notice Grandfathered Status (if applicable)
- Adult Dependent Notice (ACA)
- Choice of Provider Notice (ACA)
- Lifetime and Annual Limit Notice (ACA)
- Summary of Benefits and Coverage (ACA)
- CHIPRA Notice
- Wellness Program Notice
- COBRA Notices

PENALTIES FOR NONCOMPLIANCE

- DOL penalties of up to $100 per day per violation
- IRS excise taxes
- Participant lawsuits
- Criminal penalties

TIPS FOR BEING “AUDIT READY”

- Identify an individual to coordinate compliance efforts
- Identify all group plans subject to compliance concerns
- Routinely conduct self-audits and correct failures
- Retain documentation and procedures that support compliance measures
- Maintain compliance documents in a central location
- Respond to participant questions and requests on a timely basis
- File Form 5500s timely and accurately
- Distribute required participant notices timely and keep records of distribution

TIPS FOR BEING "AUDIT READY"

- Make timely updates to plan document and SPDs to reflect legal and design changes
- Confirm that vendors are following contract terms and administering plans in compliance with federal and other requirements
- Require vendors to immediately report instances of potential noncompliance to plan
- Train applicable staff on compliance obligations and procedures to address violations
- Work with legal counsel to minimize or correct any potential violations
- Respond promptly and thoroughly to any governmental inquiry related to health and welfare plans
- If receive an audit letter, secure legal counsel for assistance in preparing for the audit and negotiating the scope of the audit and corrective measures

PREPARATION IS KEY –

PROACTIVE COMPLIANCE REQUIRES TIME AND EFFORT, BUT WILL CERTAINLY PAY OFF IN THE END!

CLARK HILL

QUESTIONS?

CLARK HILL

Thank You

Kristi R. Gauthier

(480) 684-1300

kgauthier@clarkhill.com

LEGAL DISCLAIMER

Note: This presentation/document is not a substitute for or intended to give legal advice. It is compromised of general information. Employees facing specific issues should seek the assistance of an attorney.