

# SPDs for Welfare Benefit Plans

Complying with Content and Distribution Rules

Nancy L. Farnam

(248) 530-6333

[nfarnam@clarkhill.com](mailto:nfarnam@clarkhill.com)

CLARK HILL

---

# AGENDA

- What is a SPD?
- Types of welfare plans required to have a SPD
- Required content of SPD
- Additional terms to consider
- “Wrap” SPDs
- Distribution requirements
- Drafting considerations
- Consequences of not having a proper SPD

# WHAT IS A SPD?

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# ERISA SUMMARY PLAN DESCRIPTION

- Employee Retirement Income Security Act (“ERISA”) requires that every welfare benefit plan must be in writing (“plan document”)
- The administrator of a welfare benefit plan is required to furnish to each participant and beneficiary a summary plan description (“SPD”)
  - Plan administrator responsible, not TPA or insurer
- The SPD is a summary of the plan
  - Apprises participant and beneficiaries of their rights and obligations under the plan
  - Written in manner understandable to the average plan participant
- Not having a SPD is the number 1 violation found on DOL audits!

---

## SUMMARY OF MATERIAL MODIFICATION

- A summary of material modifications (“SMM”) must be provided to participants when changes are made to the Plan that impact information reported in a prior SPD

# TYPES OF WELFARE PLANS REQUIRED TO HAVE SPD

CLARK HILL

---

# WELFARE BENEFIT PLANS

- ERISA applies to most “welfare benefit plans”
  - Any plan, fund or program
  - Established or maintained by an employer
  - To provide to participants and their beneficiaries medical, surgical or hospital care or benefits, 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

---

# EXCEPTIONS

- ERISA does not apply to
  - Plans maintained by governmental employers
  - Plans maintained by a church
    - A church may elect to be subject to ERISA



---

# WELFARE BENEFIT PLANS

- “Any plan, fund or program”
  - Intended benefits
  - Class of beneficiaries
  - Source of financing
  - A procedure to apply for and collect benefits

---

# TYPES OF WELFARE BENEFIT PLANS COVERED

- Medical, dental, vision plans
- Life, AD&D, and insured disability plans
- Business travel accident insurance
- Health flexible spending accounts
- Health reimbursement arrangements
- Some employee assistance plans
- Some wellness programs
- Some voluntary insurance products
- Prepaid legal plan

---

## WELFARE BENEFIT PLAN EXCEPTIONS

- Payment of normal compensation out of employer's general assets when person is physically or mentally unable to perform duties or is otherwise absent for medical reasons, such as self-insured disability
  - Creation of separate accounts to hold assets could create ERISA plan
- Group or group type insurance where
  - No contributions are made by employer
  - Participation is completely voluntary
  - Only function of employer is to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and remit them to the insurer
  - The employer may not "endorse" the program
  - The employer may not receive consideration

---

# WELFARE BENEFIT PLAN EXCEPTIONS

- Payment of compensation on account of work performed, such as overtime, shift premium
- Payment of compensation out of general assets when employee is not performing duties (vacation, holiday, military duty, jury duty, sabbatical leave)
- On premise facilities, such as recreation, dining, on site medical clinic to treat minor injuries or illness or render first aid
- Holiday gifts
- Sales of articles or commodities of items that employer offers in its regular course of business (store discounts)
- Payment of scholarships, tuition and education from employer's general assets
- Remembrance funds (flowers, small gifts)

# REQUIRED CONTENT OF SPD

CLARK HILL

---

# ERISA PLAN DOCUMENT

- Required features
  - Named fiduciary
  - Procedure for allocating responsibilities
  - Funding policy
  - How payments are made/claims procedure
  - Procedure for amending plan and for identifying who has authority to amend

---

## SPD CONTENT

- Name of plan
- Name and address of employer
- Employer's EIN
- Name, address and phone number of plan administrator
- Agent for service of process
- Plan number
- Plan Year
- Information about plan trustee
- Type of plan
- Source of contributions (employer/employee)
- Identity of funding medium (insurance company, trust)
- If insurer is responsible for financing or administration, name and address of insurer
- Type of administration (insurer, self-insured with TPA, self-administered)
- Extent to which benefits are guaranteed under insurance policy and nature of administrative services
- If plan is maintained pursuant to CBA, a statement that plan is so maintained and that copy of CBA available upon request, and relevant provisions of CBA
- Circumstances under which plan may be amended or terminated and what happens upon termination
- Statement of ERISA rights

---

# SPD CONTENT

- Eligibility requirements
  - May reference other documents
  - ACA
  - Independent contractor exclusion
  - Any adopting or participating employers
- Summary of benefits
  - May reference detailed schedules of benefits that are available without cost upon request



---

# SPD CONTENT

- Group health plans must include
  - Cost-sharing provisions (premiums, deductibles, co-insurance, copayment)
  - Annual or lifetime caps or other limits on benefits
  - Preventive services coverage
  - Coverage for prescription drugs, medical tests, devices, etc.
  - Provisions regarding the use of network providers and the composition of the network
  - Limitations on selection of primary care provider
  - Conditions or limits on obtaining emergency medical care
  - Preauthorization or utilization review requirements
- Cross-reference booklets

---

## SPD CONTENT

- Circumstances that may result in disqualification, ineligibility or denial, loss or recovery of benefits
  - Subrogation, reimbursement
  - Coordination of benefits
  - Leaves of absence

---

## SPD CONTENT

- QMCSO procedures or statement that procedures are available upon request
- COBRA
  - Qualifying events
  - Qualified beneficiaries
  - Premiums
  - Notice and election requirements and procedures
  - Duration of coverage

---

# SPD CONTENT

- Claims procedure
  - Preauthorization, approvals or utilization review
  - Filing claims
  - Notification of benefit determinations
  - Review of denied claims
  - Time limits
  - May be in a separate document

---

# SPD CONTENT

- HIPAA
- Newborns' and Mothers' Health Protection Act
- Mental health parity
- Women's Health and Cancer Rights Act
- USERRA
- ACA
  - Notice of grandfathered status
  - Rescission
- Review booklets to determine what can be cross-referenced and what should appear in SPD

---

## SPD CONTENT – OTHER CONSIDERATIONS

- Limitation periods
- Anti-assignment clauses
- Plan administrator's discretionary authority
- Claim procedure exhaustion
- SPD disclaimer
- Governing state law
- No contract of employment
- No guarantee of tax consequences

# WRAP SPD'S

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# ERISA “WRAP” DOCUMENTS

- Wrap document allows plan sponsor to “wrap” or bundle its various ERISA welfare plans into a single plan
- Wrap document fills in required and recommended provisions that insurers and third party administrator’s (“TPAs”) documents do not contain
- Distribute “wrap” SPD along with benefit booklets to make a complete SPD
- Incorporates provisions of insurers and TPA’s documents
- Advantages
  - Insurers/TPA’s documents often do NOT satisfy the ERISA requirements
  - Creates a single employer welfare benefit plan for ERISA purposes
  - Single plan document/SPD
  - Single Form 5500 filing/summary annual reports
  - Best practices and recommended provisions



# DISTRIBUTION REQUIREMENTS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# DISTRIBUTION REQUIREMENTS

- Provide to
  - Participants
  - COBRA qualified beneficiaries
  - QMCSO alternative recipients
  - Spouses and dependents of deceased participants still entitled to benefits

---

# DISTRIBUTION REQUIREMENTS

- SPD be given to participants and beneficiaries within
  - 120 days after the Plan is adopted
  - 90 days after the employee becomes a participant
  - Upon request
  - Reissue SPD every five years incorporating all amendments, or every 10 years if no amendments
- SMM must be given to participants and beneficiaries
  - 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 not later than 60 days after the adoption of the modification or change

---

# HOW TO FURNISH DOCUMENTS

- Must use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries
  - Hand delivery
  - By mail
  - Electronic delivery
    - Individual has the ability to effectively access documents furnished in electronic form at any location where participant is reasonably expected to perform his or her duties as an employee and access to the employer's electronic information system is an integral part of those duties
    - Must get consent from others
  - Posting in common areas not enough

# DRAFTING CONSIDERATIONS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# DRAFTING CONSIDERATIONS

- Carefully review underlying benefit program documents
  - Ensure provisions appear properly in underlying documents (e.g., eligibility)
  - Determine what provisions must be added/supplemented in wrap plan and wrap SPD
  - Determine what provisions can be cross-referenced (e.g., claims)
  - Do not (unintentionally) provide additional benefits in the wrap plan document and SPD

---

# DRAFTING CONSIDERATIONS

- Avoid creating conflicts between the documents
  - Be consistent in referencing plan names, number, etc.
  - May require updates and revisions to underlying benefit program documents
  - Watch for “General Information” in the booklets

---

# PLANNING CONSIDERATIONS & REMINDERS

- Do not forget to distribute the wrap SPD!
  - Establish and document procedures for distributions of all disclosures
- Keep the wrap plan and SPD up to date
  - Changes in carriers, benefit programs, claims administration, corporate entities, participating employers
  - And, of course, changes in law



# CONSEQUENCES

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# CONSEQUENCES

- Plan document and SPD - up to \$110 per day per participant for failure to provide within 30 days of request
- Participants, beneficiaries or fiduciaries can sue to enforce ERISA's written plan document requirement
- Gaps in plan documentation invite the courts to decide the plan terms for you
  - e.g., employer's authority to construe and interpret the plan terms, discretion to determine benefits and payments
- Various notice/disclosure/administration violations can lead to excise taxes/penalties
  - e.g., Form 8928 requires self-reporting of excises taxes for certain COBRA, HIPAA, Affordable Care Act violations

---

# QUESTIONS?



Nancy L. Farnam

(248) 530-6333

[nfarnam@clarkhill.com](mailto:nfarnam@clarkhill.com)

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL