



KEEPING UP WITH YOUR **HEALTH AND WELFARE PLAN** NOTICES:
LEGAL NOTICE REQUIREMENTS & WHAT HAPPENS IF YOU FORGET!

Presented by | Nikki Chriesman-Green
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Legal Notice Requirements for Health and Welfare Plans

- There are a number of Notice and Disclosure/Reporting requirements for Health and Welfare Plans under ERISA, COBRA, HIPAA, and Health Care Reform
- This presentation only addresses Notices and does not address Reporting or Disclosure requirements applicable to health and welfare plans.
- Key Considerations for Plan Administrators with respect to Notices
 - Content
 - Recipients
 - Timing
 - Method of Distribution

Summary Plan Description (SPD)

ERISA § 102, ERISA § 104(b), 29 CFR § 2520.102, 29 CFR § 2520.104(b)-2

Description:

- Primary source of plan information for participants and beneficiaries
- Written for average participant in a manner to sufficiently inform individuals of their benefits, rights, and obligations under the plan
- Includes some required notices (e.g., Newborn's notice, QMCSO procedures)
- Carrier contracts and booklets are not usually “enough” to create a sufficient SPD
- Contents include plan name, plan number (start with 501), statement of ERISA rights. DOL looks for these upon audit.
- A foreign language notice on the first page of the SPD must be included when there are at least 100 participants and the lesser of 500 or 10% are literate in the same non-English language

Timing:

- within 120 days after a plan first becomes subject to ERISA
- Automatically to participants (covered employees) within 90 days of initial enrollment
- Updated SPD should be furnished every five (5) years if changes made to information included in SPD or plan is amended, otherwise SPD must be furnished every ten (10) years

Summary Plan Description (SPD) cont.

- **Common Instances of SPD Non-Compliance**

- Compliant SPD does not exist or is missing
- SPD is incomplete, ambiguous, or inaccurate
 - In the event of a contradiction, courts generally side with employee
 - *DOL v. Macy's*
 - Failure to amend SPD for new out-of-network claims process
 - Breach of fiduciary duty
 - Requested relief includes adjudication of claims
- Failure to distribute to participants
- Failure to respond to requests for copies of the SPD

- **Penalties for non-compliance**

- There are no specific statutory penalties for failure to prepare a plan document
- ERISA § 502(c) (quoted in section I, *supra*), states that a penalty is due to be paid by any administrator who fails or refuses to comply with a request for information “which such administrator is required by this subchapter to furnish to a participant or beneficiary.”
 - Failure to furnish a copy within 30 days upon request may subject plan administrator to penalty of up to \$149/day
 - The five factors most commonly used by the courts in assessing § 502(c) penalties are: “(1) bad faith or intentional conduct of the plan administrator, (2) length of delay, (3) number of requests made, (4) documents withheld, and (5) prejudice to the participant.” *Gorini v. AMP Inc.*, 94 Fed. Appx. 913, 919-920 (3d Cir. 2004).

Summary of Benefits and Coverage (SBC)

PHSA § 2715

Description:

- Summary of the benefits and coverage provided under the major medical plans, prescription drug plans, and HRA plans
- Must be provided in a non-English language with additional assistance if the employee resides in a county where at least 10% of the population is literate in the same non-English language
- Carrier prepares for Insured; Employer (or TPA) prepares for self-funded plan
- Employer responsible for distribution (include in-hand or electronically, subject to DOL electronic delivery rules)

Timing:

- Upon initial enrollment on the plan along with distributed written application materials;
- Outside of initial enrollment, a SBC may be required as follows:
 - At renewal (1) provide no later than the date open enrollment materials are provided, or (2) if renewal is automatic, provide no later than 30 days prior to the first day of the new plan year;
 - To HIPAA special enrollees within 90 days of coverage commencing;
 - 60 days prior notice required of any material modification except renewal changes; or
 - within 7 business days of a request

Penalties:

- Failure to furnish a copy upon request from participant may subject plan administrator to penalty of up to \$1,105 per notice

COBRA General Notice (“Initial Notice”)

ERISA § 606(a)(1) 29 CFR § 2590.606-1

Description:

- Describes COBRA continuation of coverage rights upon occurrence of certain qualified events
- Must be provided to covered employees and spouses
- Recommended distribution is first class mail

Timing:

- Automatically to participants (covered employees and spouses) when coverage commences (generally within 90 days of enrollment on the plan)

Penalties:

- Failure to comply with COBRA can lead to significant financial consequences dependent upon the compliance failure including, but not limited to the below:
 - excise tax penalties may be assessed by the IRS (up to \$200 per day) for each day on which a plan fails to comply with COBRA;
 - statutory penalties of \$110 per day may be recovered by qualified beneficiaries for the plan administrator's failure to provide certain notices as required by COBRA;
 - qualified beneficiaries may sue to recover COBRA coverage (such suits carry the potential for large damages, which may not be covered by the plan's insurance, including stop loss insurance);
 - failure to provide adequate initial and election notices can create exposure to “other relief,” which might include damages for such things as a deterioration of a qualified beneficiary's medical condition due (indirectly) to failure to provide an adequate COBRA notice; and
 - in lawsuits under ERISA for COBRA coverage, the court is permitted to award attorneys' fees to the prevailing party.
- The amount of possible damages awarded will depend on the circumstances of the qualified beneficiary/beneficiaries

Other COBRA Notices

ERISA § 606(a)(4) 29 CFR § 2590.606-4, 29 CFR § 2590.606-4(c), 29 CFR § 2590.606-4(d), 29 CFR § 2590.606-4(d)(2)(iii)

- COBRA Election Notice
 - Provided within 44 days of loss health coverage or qualifying event
 - Notice must be provided to all qualified beneficiaries
- Early Termination Notice
 - As soon as possible following administrator's determination that coverage will terminate
- Unavailability of Continuation Notice
 - Provided within 14 days after being notified by the individual of the qualifying event
- Conversion Notice (if applicable)
 - Within 180 days of the end of the maximum COBRA coverage period
 - The option to convert need not be provided if continuation coverage is terminated before the end of the maximum period for which it was available

Compliance Considerations

- Do you know which benefits are subject to COBRA
- Who handles COBRA administration? COBRA vendor?
- If using a vendor, is the employer indemnified for a vendor's errors?
- Are the eligibility provisions being followed? Are employees being terminated at the correct time and offer the proper continuation coverage options?

HIPAA Notices

29 CFR § 2590.107-6(c)

HIPAA Notice of Special Enrollment Rights

Description:

- All group medical plans must provide a notice of special enrollment rights to eligible employees describing the opportunity to enroll in health plan coverage upon:
 - loss of other health plan coverage,
 - loss of Medicaid coverage or new eligibility for Medicaid/CHIP assistance, and
 - marriage, birth, adoption or placement for adoption
- Coverage effective first of the month following notification except for birth and/or adoption, coverage is retroactive to date of the birth or adoption
- Federal rules require individuals eligible for a special enrollment right to notify the plan within 30 days of the event (except 60 days for Medicaid/CHIP)

Timing:

- At or on before the time an employee is initially offered the opportunity to enroll in the group health plan; may be included in the open enrollment guide

Penalties:

- The IRS may impose an excise tax for a group health plan's failure to comply with HIPAA portability requirements. The excise tax is imposed on the plan sponsor in the amount of \$100 per day of noncompliance for each individual to whom the failure relates.
- Employer may be required to waive late enrollee consequences and permit retroactive enrollment for affected individuals

HIPAA Notices Cont.

45 CFR § 164.520, 45 CFR § 164.520(c)(1)(ii)

HIPAA Medical Privacy Notice

Description:

- Notice describing the privacy practices of the group health plan and the rights of the covered participant to access his or her health information.
- Self-funded plans must furnish the notice to participants. A fully-insured plan that receives PHI will need to maintain a privacy notice and furnish by request (insurer issues otherwise).
- Fully-insured plans where the sponsor does not receive PHI do not need to maintain this notice. Primary obligation for fully insured is on the insurer

Timing:

- At the time of enrollment in the plan
- Within 60 days after a material change to the notice
- Upon request by any person
- Reminder sent once every three years that the notice is available.

Penalties:

- HHS can impose civil monetary sanctions
- It is unclear whether failure to provide a Notice of Privacy Rights is subject to the general penalty under the HIPAA Administrative Simplification Regulations (\$112 to a maximum of \$55,910 per day per failure).

Wellness Program Disclosures

29 CFR § 2590.702(f)(2)(v)

Description/Timing:

- HIPAA Health Contingent Notice
 - Notice that describes the availability of alternatives to achieve any reward
 - Must be included with information describing the wellness program
- ADA Notice
 - Required if employer incentivizes medical exams and/or disability-related inquiries (e.g., physicals, risk assessments, biometric screening)
 - Distributed before employees provide health information and give enough time to decide whether to participate in the program

Penalties:

- A possible penalty includes an excise tax of \$100 per day per failure.
- Wellness program will be deemed to be non- "voluntary," which means the program will be treated as violative of the Americans with Disabilities Act

Medicare Part D-Participant Notice

42 CFR § 423.56(c)

Description:

- Describes whether the prescription drug coverage is creditable (or non-creditable) for purposes of Medicare Part D
- Provided to all plan participants and covered spouses
- If providing electronically, include a statement directing the employee to provide the information to Medicare-covered spouses
- Make sure you know whether coverage is creditable (or non-creditable)

Timing:

Disclosure notices to Part D eligible individuals must be provided, at a minimum, upon the following five occasions:

- prior to Part D open enrollment beginning annually on October 15;
- prior to an individual's initial enrollment period for Part D (three months before the month of the person's 65th birthday);
- prior to the effective date of coverage for the employer's prescription drug coverage;
- whenever the employer no longer offers prescription drug coverage or changes it so that it is no longer creditable or becomes creditable; and
- upon request by the Part D eligible individual.

CMS will deem the first two bullet points satisfied if the creditable coverage disclosure notice is provided annually to all plan participants.

Best Practices

- **Send to all Plan Participants Annually**
- **Send by First Class Mail**
- **Employees with worksite access to employers email system, as part of daily job duties, notice may be sent electronically. Include statement directing employee to share with any medicare-eligible spouse and/or dependents**

Penalties:

- Late enrollment penalty for Medicare Part D enrollees
- No specific penalties for failure to comply with the Part D Creditable Coverage Notice to CMS

Children's Health Insurance Program Reauthorization Act (CHIPRA)- Participant's Disclosure

29 CFR § 2590.701-6

Description:

- Employers maintaining a group health plan in a state that provides premium assistance under Medicaid or Chip must notify all employees of potential opportunities in the state in which the employee resides
- Model Notice available <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/chipra/model-notice.pdf>

Timing:

- Provided the first day of the plan year; may be included in the open enrollment materials

Penalties:

- A possible penalty includes an excise tax of \$100 per day per failure.

Women's Health Cancer Rights Act (WHCRA)

ERISA § 713(a)

Description:

- Notice of mastectomy-related reconstructive surgery, prostheses, and treatment of physical complications of mastectomy.
- Model Notice available www.dol.gov/ebsa/pdf/CAGAppD.pdf

Timing:

- Provided annually upon enrollment in the plan; may be included in the open enrollment materials

Penalties:

- Falls under ERISA general civil enforcement for breach of fiduciary duty and damages for benefits claimed under WHCRA

Qualified Medical Child Support Orders (QMCSO)

29 CFR § 2520.103(j)(2)

Description:

- Should establish and follow QMCSO policies and procedures
- Must provide a QMCSO Participant Notice regarding receipt of and any qualification determination on a QMCSO
- National Medical Support Orders (generally issued by the state) – respond to the agency charged with enforcing a QMCSO in accordance with timeframes outlined in state correspondence
- In SPD

Timing:

- Provided annually upon enrollment in the plan; may be included in the open enrollment materials

Penalties:

- An affected person may use the ERISA Part 5 civil enforcement rules to enforce a QMCSO. Thus, participants may recover benefits, interest, and attorneys' fees in an action under ERISA §502.
- Also, states may sue to enforce a QMCSO.

Mental Health Parity Act (MHPA) and Mental Health Parity and Addiction Equity Act (MHPAEA)

ERISA § 712, 29 CFR § 2590.712

Description:

- Plan terms regarding MHPA/MHPAEA should be reflected in the plan document and SPD
- Under the MHPA/MHPAEA, cost-exemption notices notifying participants and beneficiaries of the plan's reliance on the increased cost exemption, including among other things, a statement regarding the availability upon request of a summary of the information on which the exemption was based (required only if plan claims the exemption).
- A self-funded non-federal governmental plan may opt out of MHPA/MHPAEA.
- Provided to participants, beneficiaries, CMS

Timing:

- Same as SPD
- Cost-exemption requires prompt notice to CMS, participants and beneficiaries.
- Opt-out election is an annual notice to CMS and participants.

Penalties:

- Participants, beneficiaries and DOL may use ERISA civil enforcement mechanisms to enforce requirements under MHPA and MHPAEA, including claims for breach of fiduciary duty and claims for payment of mental health benefits due under either statute. In addition, the affected party could see damages for unpaid benefits, interest and attorneys' fees under ERISA § 502.
- IRS may impose excise taxes for failure to comply of \$100 per day for each individual to whom a failure relates.

ACA Notices

29 CFR § 2590.715-1251(a)(2), 29 CFR § 2590.715-2719A(a)(4)

Description/Timing/Penalties:

- Grandfathered Plan Notice
 - Notice that Plan is maintaining its status as a grandfathered health plan
 - Model Notice available <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/grandfathered-healthplans>
 - Provided to participants and beneficiaries in any plan materials received
 - No special provision to enforce
 - A plan may be unable to claim grandfathered status if it fails to include this notice in the appropriate plan communications. Noncompliant plans may face an excise tax of \$100 per day with respect to each individual to whom each failure relates.

- PPACA Patient Protection Disclosure
 - Applies to non-grandfathered plans
 - Notice that participants may designate any primary care provider, including pediatricians and Ob/Gyn as a PCP and that no prior authorization is needed for Ob/Gyn care.
 - Model Notice www.dol.gov/ebsa/healthreform
 - No later than the first day of the plan year; may be included in open enrollment materials
 - No special provision to enforce provision of notice.
 - Failure to comply with the mandate could trigger an excise tax of \$100 per day with respect to each individual to whom such failure relates.
 - ERISA's civil enforcement provisions may be available to participants, beneficiaries and the DOL to enforce notice and mandates.

Annual Enrollment Notices

All eligible individuals should receive the following notices, as applicable, each year in connection with open enrollment:

- SBC
- WHCRA, CHIPRA and Michelle's law (if applicable)
- Special enrollment notice
- CHIPRA
- Wellness programs
- HIPAA notice of privacy practices
- Medicare Part D participant notice
- ACA notices

Notice of Coverage Options

- All employers subject to the FLSA (nearly all employers) must comply
- Gives new hires information about insurance option in the Marketplace (the “Exchanges”)
- Provide to all new hires, regardless of benefit eligibility, within 14 days
- Provide in-hand or electronically
- No annual requirement

Summary Annual Report (SAR)

ERISA § 104(b)(3) 29 CFR § 2520.104(b)-10

- Narrative Summary of Form 5500
- Required if a Form 5500 is filed unless self-insured without a trust
- Due to plan participants (including COBRA participants) no later than 9 months following the close of the plan year to which the filing relates (**9/30 for calendar year plan**)
- If an extension is filed for Form 5500, SAR due date is also extended (up to 11/15 for a calendar year plan)
- Failure to furnish a copy of this document upon request from a participant might subject the administrator to a penalty of up to \$110 per day.
- Foreign language assistance may be required when a certain portion of plan participants are literate only in the same non-English language.

Notification Requirements-Benefit Changes

ERISA § 104(b)(3), 29 CFR § 2520.104(d), PHSA § 2715

- ERISA
 - Summary of Material Reduction
 - Triggered when there is a change that results in a reduction of benefits or employer contributions to the health plan
 - For health plans, a summary of material reduction (including an increase in premiums) should be distributed automatically to participants within 60 days of adoption of material reduction in services or benefits or at regular intervals of not more than 90 days. Although somewhat of a gray area, this should mean that employees hear about the change at least 60 days in advance.
 - Summary of Material Modification
 - Describes material modifications to the plan and reflects changes made to SPD
 - Should be provided within 210 days following end of plan year of the modification
 - Best Practice-provide as soon as possible
- SBC
 - If the group health plan or health insurance carrier makes a material modification to the SBC outside of renewal or reissuance (e.g., a mid-year plan design change) that would require a change in the SBC, the plan or carrier must provide notice of the modification to enrollees no later than 60 days prior to the date the modification will take effect

Best Practice Notices (These notices are not required but are considered to be best practices)

Document	Description	Recipient	Timing	Penalties & Consequences
FMLA Leave Management Policies	<ul style="list-style-type: none"> Description of the employer's leave management policies. Consider the inclusion of policies regarding communication between the employee and the employer prior to returning from leave. 	<ul style="list-style-type: none"> Employee. HR Employees. 	<ul style="list-style-type: none"> Employee Handbook. Upon request. HR employee training. <u>Best Practice</u>: not specifically required by FMLA. 	<ul style="list-style-type: none"> No special provision to enforce distribution.
Uniformed Services Employment and Reemployment Rights Act (USERRA)	<ul style="list-style-type: none"> Individual notice of USERRA continuation coverage election. Consider including reasonable election and payment procedures in the notice. 	<ul style="list-style-type: none"> Persons entitled to rights and benefits under USERRA. 	<ul style="list-style-type: none"> At the beginning of any leave for uniformed service. <u>Best Practice</u>: not specifically required by USERRA. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.
Required Coverage of Pediatric Vaccines	<ul style="list-style-type: none"> No specific notice requirements affecting group health plans. 	<ul style="list-style-type: none"> Participants. 	<ul style="list-style-type: none"> <u>Best Practice</u>: follow SPD requirements. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.
Notice of Extension of COBRA Coverage Due to Second Qualifying Event	<ul style="list-style-type: none"> Notice that COBRA is being extended (and for how long) due to a second qualifying event. 	<ul style="list-style-type: none"> Affected covered individuals and/or qualified beneficiaries. 	<ul style="list-style-type: none"> Upon employer receipt of notice from covered individual of second qualifying event. <u>Best Practice</u>: not specifically required by COBRA. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.
Notice of Denial of COBRA Due to Gross Misconduct	<ul style="list-style-type: none"> Notice that the former employee is not eligible for COBRA due to termination for gross misconduct. USE CAUTION: The gross misconduct exception is rarely used. The term "gross misconduct" remains undefined. 	<ul style="list-style-type: none"> Employees who otherwise would be eligible for COBRA but for a termination for gross misconduct. 	<ul style="list-style-type: none"> Upon the triggering event that would otherwise qualify the individual for COBRA coverage. <u>Best Practice</u>: not specifically required by COBRA. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.
Notice of Change in COBRA Premium	<ul style="list-style-type: none"> Upon any change in the premium charged for COBRA coverage. 	<ul style="list-style-type: none"> Covered individuals and qualified beneficiaries. 	<ul style="list-style-type: none"> Reasonable advance notice of premium change. <u>Best Practice</u>: not specifically required by COBRA. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.
Notice of Termination of COBRA Due to Expiration of Maximum Coverage Period	<ul style="list-style-type: none"> Prior to the expiration of coverage due to the end of the maximum coverage period. 	<ul style="list-style-type: none"> Covered individuals and qualified beneficiaries. 	<ul style="list-style-type: none"> May be provided with the HIPAA notice of creditable coverage and notice of conversion rights. <u>Best Practice</u>: not specifically required by COBRA. 	<ul style="list-style-type: none"> No special provision to enforce notice distribution.

Keeping Up with Your Notices - What Notices Are Required for Qualified Retirement Plans and What Happens if You Forget!

Paul Hinderegger
Director, ERISA Consulting

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Disclosures to Participants and Beneficiaries

- Not intended to be a comprehensive list of IRS, DOL or PBGC disclosure requirements
- Manner of furnishing disclosures electronically differ between IRS and DOL
 - IRS – Treas. Reg. 1.401(a)-21
 - DOL – Reg. 2520.104b-1(c)
- Virtually all disclosures are the responsibility of the ERISA 3(16) Plan Administrator; not the service provider (i.e. – recordkeeper; advisor; TPA)
- Plans exempt from ERISA Title I not subject to DOL disclosure requirements
 - Governmental Plans
 - Non-Electing Church plans
 - Non-ERISA 403(b) plans
- ERISA Advisory Council received comments this summer on ways to streamline required notices
- Civil penalties under ERISA are subject to inflation adjustments

ADP/ACP Safe Harbor Notices (Traditional)

IRC 401(k)(12)(D); Treas. Reg. 1.401(k)-3(d)

- Defined contribution plans meeting Safe Harbor requirements
- Content
 - Safe Harbor contribution formula and plan to which it is made
 - Any other contributions under the plan
 - Type and amount of compensation that can be deferred
 - How to make deferral elections and periods available
 - Withdrawal and vesting provisions
 - How to obtain additional information
- Timing
 - Annual - Within a “reasonable” time before first day of plan Year; 30-90 days before plan year beginning is deemed reasonable (Treas. Reg. 1.401(k)-3(d)(3)(ii))
 - Initial – By the employee’s date of eligibility (but not earlier than 90 days prior to eligibility date)

ADP/ACP Safe Harbor Notices (Traditional) cont'd

- Consequences of Non-Compliance

- Performing ADP/ACP testing is not an option (Treas. Reg. 1.401(k)-1(e)(7))
- Operational error that can be fixed under Self-Correction Program (SCP) or Voluntary Correction Program (VCP). If not corrected, possible qualification defect.
- Safe harbor notice provided to participants less than 30 days before beginning of plan year may still be considered “reasonable” especially if using the safe harbor non-elective contribution.
- Missed Safe harbor notices after plan year started - IRS has informally stated that the correction is to furnish the notice late.
 - Safe Harbor Non-Elective Contribution - 2004 ASPPA Q&A
 - Safe Harbor Matching – Fall, 2008 Retirement News for Employers
- Missed Safe Harbor notices for newly hired employees may also include the exclusion of an eligible employee. As such, correction may also include corrective contributions (see Revenue Procedure 2016-51).
- All safe harbor notice failure corrections should include revising the plan’s administrative procedures to ensure the failure does not occur again.

Qualified Automatic Contribution Arrangement (QACA)

IRC 401(k)(13)(E); Treas. Reg. 1.401(k)-3(k); ERISA 514(e)(3)

- Automatic enrollment safe harbor plans
- Content
 - Same as Traditional Safe Harbor Notice; plus
 - Level of elective contributions made in absence of affirmative election
 - Employee's right to elect not to have elective contributions made
 - How elective contributions will be invested in the absence of affirmative election
 - IRS model notice in 2007
- Timing
 - Annual - Within a "reasonable" time before first day of plan Year; 30-90 days before plan year beginning is deemed reasonable (Treas. Reg. 1.401(k)-3(d)(3)(ii))
 - Initial
 - By the employee's date of eligibility (but not earlier than 90 days prior to eligibility date)
 - For plans with immediate eligibility, soon as practicable after the employee's date of eligibility if it is not practicable for the notice to be provided prior to eligibility date (Treas. Reg. 1.401(k)-3(k)(4)(iii))

Qualified Automatic Contribution Arrangement (QACA)

- Consequences of Non-Compliance

- Generally, the same correction options that apply to Traditional Safe Harbor plans would apply to QACA safe harbor with the following notes:
 - Failure to provide the QACA notice for newly hired employees may also involve the failure to automatically enroll the participant at the default rate (see EPCRS for automatic enrollment failures, as added by Revenue Procedure 2015-28)
 - Failure to provide the Automatic Contribution Arrangement notice under ERISA 514(e)(3) may subject the plan administrator to a civil penalty of \$1,659 per day per participant (see civil penalty under ERISA 502(c)(4))

Automatic Contribution Arrangement (ACA/EACA)

ERISA 514(e)(3); DOL Reg. 2550-404c-5(f); IRC 414(w)(4); Treas. Reg. 1.414(w)-1(b)(3)

- Defined contribution plans with automatic enrollment
- Content
 - Level of elective contributions that will be made if an affirmative deferral election is not made by the employee
 - Employee's right not to have default elective contributions made
 - How contributions made under the arrangement will be invested in absence of investment election by participant
 - IRS Model notice in 2007
- Timing
 - Annual - Within a "reasonable" time before first day of plan Year; 30-90 days before plan year beginning is deemed reasonable (Treas. Reg. 1.414(w)-1(b)(3)(iii)(B))
 - Initial
 - Within a "reasonable" period before the employee becomes a covered employee
 - Must be provided sufficiently early so that employee has a reasonable period of time after receipt of the notice in order to make an affirmative election (Treas. Reg. 1.414(w)-1(b)(3)(iii)(B))

Automatic Contribution Arrangement (cont'd)

- Consequences of Non-Compliance
 - Failure to provide the Automatic Contribution Arrangement notice under ERISA 514(e)(3) may subject the plan administrator to a civil penalty of \$1,659 per day per participant (see civil penalty under ERISA 502(c)(4))
 - Penalty applies if the DOL brings action
 - Possible tax disqualification

Fee and Investment Disclosure Notice

DOL Regulation 2550.404a-5

- Participant-directed defined contribution plans
- Content
 - General plan related information
 - General information on administrative expenses
 - General information about individual expenses that may be charge to participants
 - Specific information about administrative and individual expenses actually charged (quarterly)
 - Investment related information for each designated investment alternative
 - Comparative chart
 - Internet website address

Fee and Investment Disclosure Notice (cont'd)

- **Timing**
 - Initial – On or before the date on which participants can direct investments
 - Quarterly (expenses incurred information)– Once in a 3-month period
 - Annually - Once in a 14-month period
 - Change in fee or investment related information – 30 to 90 days in advance of the effective date of such change
- **Consequences of Non-Compliance**
 - Fiduciary breach – Participants can bring suit under ERISA 502(a)(2) to recover losses to account from fiduciary breach (*La Rue v. DeWolff*)
 - Fiduciary generally retains responsibility for prudent investment of participant's accounts
 - Change notices may be able to invoke “unforeseeable events or circumstances beyond the control of the plan administrator”

Qualified Default Investment Notice (QDIA)

ERISA 404(c)(5)(B); DOL Regulation 2550.404c-5(c) and (d)

- Participant-directed defined contribution plans
- Content
 - Description of circumstances under which account is invested in the default fund
 - Automatic Enrollment provisions (default rate; right to elect out; etc.)
 - Explanation of right to direct investments
 - Description of the QDIA, including risk & return characteristics; fees; investment objective
 - Right to direct investment of the assets held in QDIA into other investment alternatives
 - IRS Model notice in Field Assistance Bulletin 2008-3
- Timing
 - Annual - 30 days before the beginning of each plan year
 - Initial
 - 30 days in advance of plan eligibility date
 - 30 days in advance of first investment in QDIA for automatically enrolled participants
 - Date of plan eligibility for an EACA plan with permissible withdrawals

Qualified Default Investment Notice (QDIA) cont'd

- Consequences of Non-Compliance

- Fiduciary generally retains responsibility for prudent investment of participant's accounts
- Neither the preamble nor regulation addresses whether the failure to give a notice can be corrected by a late notice.
 - It may be possible that fiduciaries lose protection only for time periods in which notice was not provided. For example, if a participant has received QDIA notices for the 2014, 2015 and 2016 plan years, but the 2017 QDIA notice is not provided timely, the prior time years protection (2014, 2015 and 2016) should not be lost.
 - Further, it may be possible that fiduciaries could receive protection for the missed 2017 year after they have distributed the notice. As a result, if an annual notice is not delivered timely, the better practice would be to give the notice late rather than not at all

Summary Plan Description

ERISA 102 and 104(a); DOL Reg. 2520.102-2 and 3

- Summary of provisions of plan in language understandable to average participant
- Content
 - List found in DOL Regulation 2520.102-3
 - Details on contribution, distribution and vesting provisions
 - ERISA-protected rights
 - Foreign language assistance may be required
- Timing
 - New Participants – Within 90 days after becoming a participant
 - Updated SPD – Every 5 years for plans that have been amended (10 years otherwise)
 - Rehired Employee – Depends on whether the individual's status as a participant has changed
 - Rehired employee that had not taken a distribution – No SPD required
 - Rehired employee that had taken a distribution – SPD required
 - ABA Joint Committee of Employee Benefits Meeting with DOL (Q&A-12; April 26, 2004)

Summary Plan Description (cont'd)

- Consequences of Non-Compliance

- DOL Audit - May require SPD to be furnished; \$149 per day penalty for failure to provide SPD after request by DOL (ERISA 502(c)(6) penalty)
- Court Enforcement – DOL may seek injunction in which court orders plan administrator to prepare SPD
- Criminal Penalties – Willfully violates disclosure requirements (\$5,000 or 1 year imprisonment per individual; \$100,000 per corporation; ERISA 501)
- Participant enforcement of SPD for failure to provide the SPD or failure to meet required content disclosures (ERISA 502(a)(3))
 - Court cases dealing with inadequately explained provisions in SPD (i.e. – distribution provisions; offset provisions; forfeiture provisions; vesting; etc.)
- Conflicting language between plan and SPD
 - Terms of plan document control; *CIGNA v. Amara* (2011)

Summary of Material Modifications

ERISA 104(a)(6); DOL Reg. 2520.104b-3

- Description of any material modifications to the plan and any change in information required to be included in the SPD
- Content
 - Amendment or change in a manner that can be reasonably understood by the average participant
- Timing
 - Within 210 days after the close of plan year in which the modification was adopted (unless modifications are described in a timely distributed SPD)
 - SMM's do not have to be furnished to retirees if modification does not impact rights under the plan
- Consequences of Non-Compliance
 - Same enforcement requirements of SPD

Summary Annual Report (SAR)

ERISA 104(b)(3); DOL Reg. 2520.104b-1

- Defined contribution plans and non-PBGC defined benefit plans
- Content
 - Sample SAR provided by DOL for both pension and welfare plans (DOL Reg. 2510.104b-10)
 - Administrative expenses; benefits paid to participants; total value of plan assets; right to receive a copy of Form 5500
- Timing
 - 9 Months after close of plan year
 - If Form 5500 is extended, due date for SAR is due 2 months after the extended Form 5500 due date (i.e. – December 15th for calendar year plans)
- Consequences of Non-Compliance
 - Same enforcement requirements of SPD

Annual Funding Notice

ERISA 101(f); Field Assistance Bulletin 2009-01; Prop DOL Reg. 252.101-5

- Defined Benefit plans covered by PBGC
- Content
 - Plan's funding status including the plan's funding percentage
 - Statement of assets and liabilities
 - Demographic information
 - Plan's funding policy and asset allocation
 - Model notice provided in FAB 2009-01
- Timing
 - 120 days after close of plan year (i.e. – April 30th)
 - If plan has 100 or fewer participants, then the earlier of 1) due date (including extensions) of Form 5500; or 2) the date on which the Form 5500 is actually filed
- Consequences of Non-Compliance
 - Civil penalty of \$110 per day per participant (ERISA 502(c)(1)(A) penalty)
 - Penalty imposed by a court if plan administrator fails to comply within 30 days
 - Penalties may be paid to the affected participant or beneficiary (at the discretion of court)

Employee Benefit Statements

ERISA 105(a) and 209; DOL Field Assistance Bulletin 2006-03 and 2007-03

- Statement of benefits under the plan
- Content
 - Total benefits accrued (account balance) and vested percentage
 - Explanation of permitted disparity or floor-offset arrangement
 - Defined contribution plans
 - Value of each investment to which assets are allocated
 - Participant directed DC plans
 - Explanation of any limitation or restriction on right to direct investments
 - Explanation of importance of a well-balanced and diversified portfolio, including risk of holding more than 20% in any security (FAB 2006-03 provides sample)
 - Notice directing participant to DOL's website www.dol.gov/investing.html

Employee Benefit Statements (cont'd)

- **Timing**
 - Participant-directed DC plans – quarterly (45 days following end of calendar quarter)
 - Non-Participant directed DC Plans – Annually (by the due date of filing the Form 5500)
 - Defined Benefit Plans – Once every 3 years and upon request of the participant
 - Upon termination (ERISA 209)

- **Consequences of Non-Compliance**
 - Civil penalty of \$110 per day per participant (ERISA 502(c)(1)(A) penalty)
 - Penalty imposed by a court if plan administrator fails to comply within 30 days
 - Penalties may be paid to the affected participant or beneficiary (at the discretion of court)
 - Civil penalty of \$28 per participant (ERISA 209(b) penalty)

Notice of Deferred Vested Benefits

IRC 6057(e)

- Separated participants that have a deferred vested benefit (DB and DC)
- Content
 - Name of Plan
 - Name and address of the Plan Administrator
 - Participant's Name
 - Nature, amount and form of the deferred vested benefit
- Timing
 - Due date of the Form 8955-SSA (i.e. - July 31st for calendar plan year)
- Consequences of Non-Compliance
 - Form 8955-SSA is signed under penalty of perjury
 - IRC 6690 imposes a penalty of \$50 per participant if the Plan Administrator willfully provides false or fraudulent information on Form 8955-SSA

Qualified Change in Investment Options

ERISA 404(c)(4)(C)

- Participant-directed DC plans that have a change in investment options that involve “like funds”
 - The risk and rate of return characteristics of the new investment option are reasonably similar to those of the existing investment option
- Content
 - Information comparing the existing and new investment options
 - An explanation that in the absence of affirmative investment instructions from the participant to the contrary the account will be mapped to reasonably similar investments under the new investment option
- Timing
 - At least 30 days and no more than 60 days before the effective date of investment change
- Consequences of Non-Compliance
 - No ERISA 404(c) protection for mapped investments
 - Fiduciary generally becomes responsible for prudent investment of participant accounts

Blackout Notices

ERISA 101(i); DOL Reg. 2520.101-3

- Blackout period with respect to a defined contribution plan in excess of 3 consecutive business days
- Content
 - Reasons for the blackout period
 - Investment and other rights impacted
 - Expected beginning date and length of blackout period
 - A statement that participants should evaluate the appropriateness of current investment decisions
 - Name, address and telephone number of contact responsible for answering questions
- Timing
 - 30 to 60 days before the blackout starts
 - 30 day advance notice does not apply if inability to provide notice is due to events that were unforeseeable or circumstances beyond the reasonable control of the plan administrator
- Consequences of Non-Compliance
 - \$133 penalty per participant per day for failure to provide blackout notice (ERISA 502(c)(7) civil penalty)

Employer Security Diversification Notice

IRC 401(a)(35); ERISA 101(m)

- Participant-directed defined contribution plans with publicly traded employer securities
- Content
 - Right to diversify out of publicly-held employer securities
 - Importance of diversifying the investment of retirement account assets
 - IRS Model notice in Notice 2006-107
- Timing
 - 30 days before the first date on which participants are eligible to exercise their right to diversify employer securities
- Consequences of Non-Compliance
 - \$133 penalty per participant per day for failure to provide blackout notice (ERISA 502(c)(7) civil penalty)