Welcome! We will begin at 3 p.m. ET.

There will be no sound until we begin the webinar.

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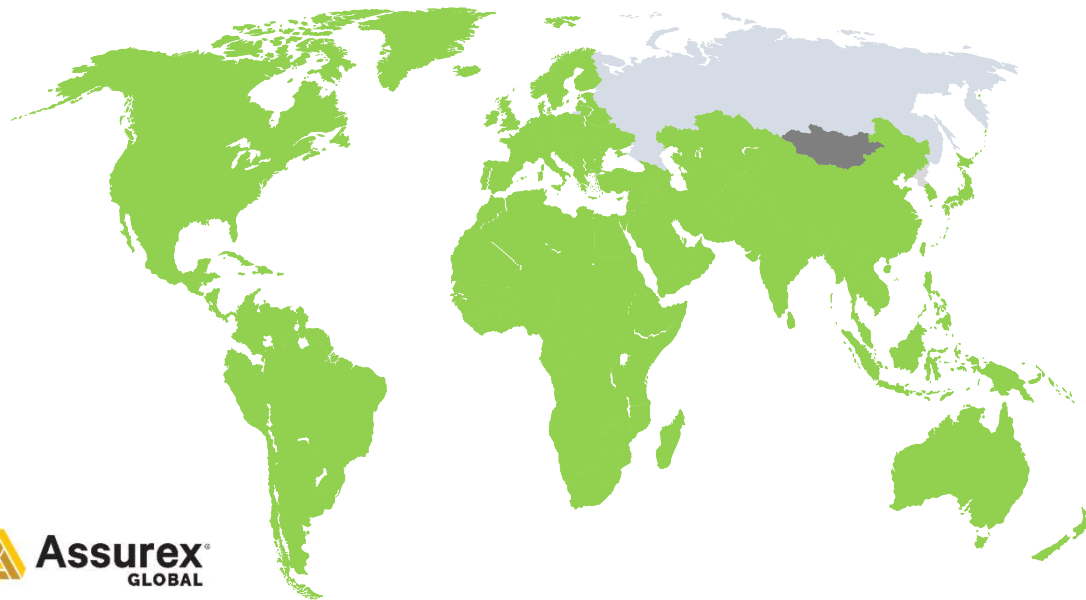
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ERISA Plan Documents

ERISA Covered Employers

- **All employers** are subject to ERISA, with a few exceptions
  - Government employers (counties, cities, school districts, etc.)
  - Churches
    - Some church affiliated entities (school, hospitals) can take advantage of this exception as well
  - Certain tribal-related employers
  - While non-ERISA employers do not have to follow ERISA document rules, as a practical matter such plans cannot be administered properly without plan documents

ERISA Covered Plans

- Many, but not all, health and welfare plans offered by an ERISA covered employer are subject to ERISA
  - Pension plans are also covered by ERISA but outside our scope
  - Other laws may require nonERISA plans be in writing, e.g. POP plans, qualified educational assistance programs, qualified adoption assistance program

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ERISA vs. Non- ERISA Plans

ERISA Plans

- Medical, Rx, Dental, Vision
- HRAs and Health FSAs
- Telemedicine Plans
- Life Insurance and AD&D
- STD / LTD (fully-insured or funded only)
- Business Travel Accident Plans
- Hospital Indemnity
- Critical Illness / Disease Specific Plans
- EAPs
- Prepaid legal
- Onsite medical clinics
- Onsite day care center
- Executive Reimbursement Plans
- Formal severance pay plans

Non-ERISA Plans

- §125 cafeteria/POP plans
- Dependent Care FSAs
- Qualified Transportation Plans
- HSAs
- Identity Theft
- Pet Insurance
- Adoption Assistance
- Paid Time Off (vacation, sick, PTO, holiday pay, parental leave, self-funded STD plans paid out of general assets)
- State mandated paid disability and family leave benefits
- Educational assistance and tuition reimbursement plans

ERISA Plan Documents

- All ERISA plans must be in writing.
- All ERISA plans must have a Summary Plan Description (SPD).
- The ERISA plan document determines eligibility, scope of benefits, and exclusions under the terms of the plan.
  - Plan document will control in the event of any dispute.
  - If plan document and SPD conflict SPD will typically control
  - Common for SPD and plan document to be the same to avoid any possible conflict.

ERISA Plan Documents (cont.)

- SPD / Plan Document may consist of multiple documents. E.g.
  - Plan document may cross-reference employee handbook or other policies, making them part of the plan document.
  - Information required to be included in SPD may only appear in group master contract, group application, or set-up document.
- For fully-insured plans, certificate of coverage (CoC) often serves as the SPD
  - But will often be missing required elements

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Required SPD Elements
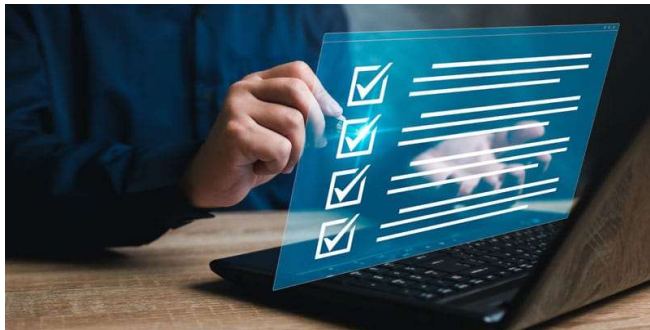
All Plans

- Plan name
- Name, address and EIN of plan sponsor
- Plan number
- Type of plan
- Type of administration (e.g., insured, self-funded, etc.)
- Name, address, and phone number of Plan Administrator
- Name, title, and address of each trustee, if any
- Agent for service of legal process
- Whether plan is maintained pursuant to a CBA
- Plan year
- Eligibility Provisions
- Description of Benefits
- Loss or Denial of Benefits
- Plan Amendment and Termination Provisions
- Subrogation and Reimbursement
- Plan Contributions and Funding
- Claims Procedures
- Statement of ERISA Rights
- Offer of Assistance in Non-English language

Health Plans

- Cost sharing requirements
- Annual or lifetime limits
- Preventive services
- Drug coverage
- Medical tests, devices and procedures
- Network information
- Conditions or limits on selection of primary or specialty care providers
- Conditions or limits on obtaining emergency medical care
- Provisions requiring preauthorization or utilization review
- Name and address of insurance company or TPA
- COBRA Rights
- NMHPA Disclosure
- QMCSO Procedures
- Grandfathered Status, if applicable

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Importance of Plan Documents

Distribution Required

ERISA requires SPD be distributed upon enrollment and upon request. $100 per day penalty for late delivery following a formal request.

Follow Plan Terms

Employers must administer plans according to written terms. Failing to follow the plan document is a breach of fiduciary duty.

Document Controls

Plan documents take precedence in disputes over benefit guides, handbooks, or HR communications. Employees can sue to enforce benefits as described.

What is the Employer's Role?

- Ensure proper documents are in place.
  - Employers are responsible for ensuring that all required plan documents are properly established and maintained for each benefit plan offered.
- Review documents as they are drafted.
  - This review process helps identify inconsistencies, errors, or compliance gaps before the document becomes binding.
- Distribute completed documents.
  - Employers should also maintain records of distribution as proof of compliance.
- Recognize when documents need to be amended / modified.

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Wrap Documents

- Wrap Documents are not required but serve three primary purposes.

Control the Number of Plans
- Without a wrap document, each plan with more than 100 participants must file its own Form 5500
- Wrap document combines individual component plans into a single "megaplan" requiring only one 5500 filing

Supplement Component Plan Documents
- Add elements missing from component plan documents necessary for a compliant SPD
- Address plan features that may not be documented elsewhere (eligibility, maintenance of benefits during leave, etc.)
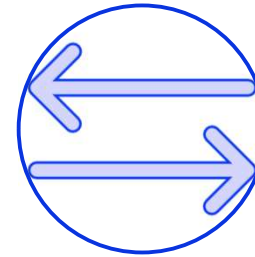
Modify Component Plan Documents
- Ensure consistency and align plan design with sponsor's preferences
- Can generally only restrict coverage described in component plan documents, not expand it
- Cannot typically modify plan features controlled by carrier or TPA (e.g., claims and exclusions)

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Wrap Documents: Control the Number of Plans

Creates New Plan

Wrap document creates a new ERISA plan from existing component plans. Needs its own SPD.

Not Standalone

Must be drafted and read in conjunction with governing plan documents of component plans.

Review Before Adoption

Ensure consistency with component plans or clarify if it overrides conflicts. Verify SPD compliance.
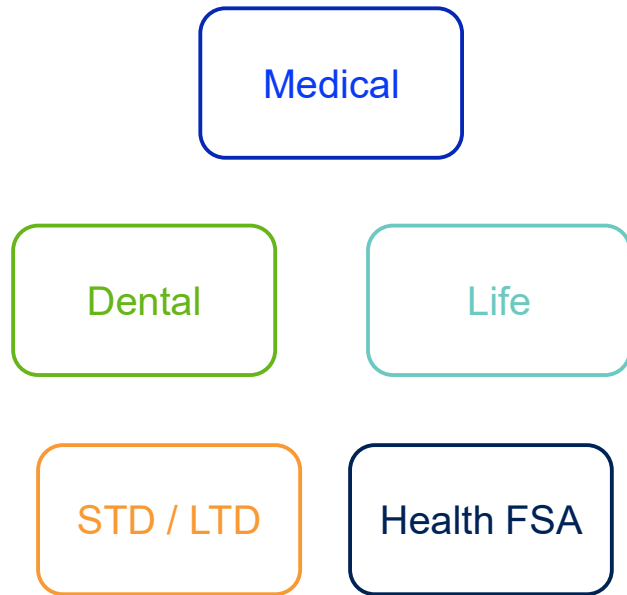
Strategic Decisions

Are all component plans included? Should they be? Should the employer have more than one wrap?

Key: Wrap SPD = Wrap Document + Component Plan Documents

Wrap Document: Control the Number of Plans

Medical

Dental

Life

STD / LTD

Health FSA

No wrap document
Five plans
Five 5500s

Wrap Plan Document

Medical

Dental
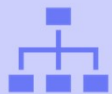
Life

STD / LTD

Health FSA
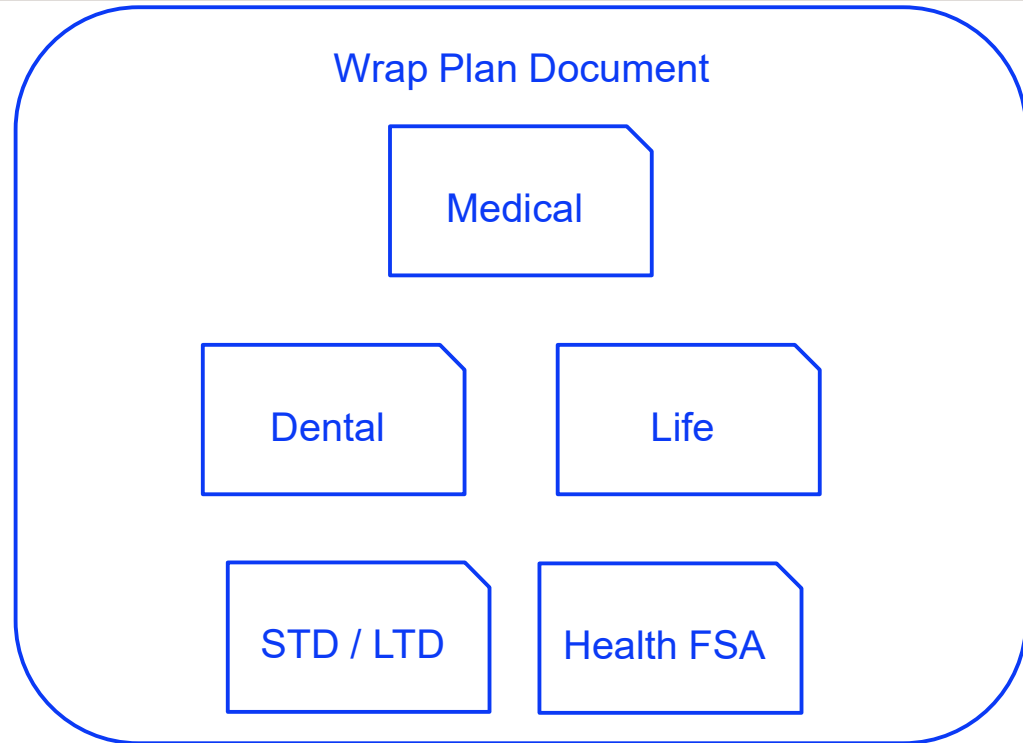
Wrap document
One plan, five components
One 5500

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Wrap Documents: Supplementing Component Plan Docs

Fills in ERISA Gaps

A wrap document supplements component plan docs by adding necessary ERISA language, such as fiduciary duties, plan administration rules, and participant rights.

Furnish details and answer questions

The wrap document can provide details and answer questions that are not addressed in component plan documents, e.g. details of waiting periods, benefit continuation during leaves of absence, eligibility methodology

Provides Consistency Across Plans

Different carriers may describe terms or procedures differently. The wrap supplements each component plan by standardizing language and procedures across all benefit programs.

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Wrap Documents: Modifying Component Plan Docs

- **Employer-Level Customization.**
  - Typically wrap document will incorporate details found in component plan documents as is but occasionally the employer may want to change some of those details.
  - Fully-insured carriers rarely agree to change boilerplate component plan documents to accommodate employer's requested change.
  - Wrap document can sometimes be used to accomplish the desired change.
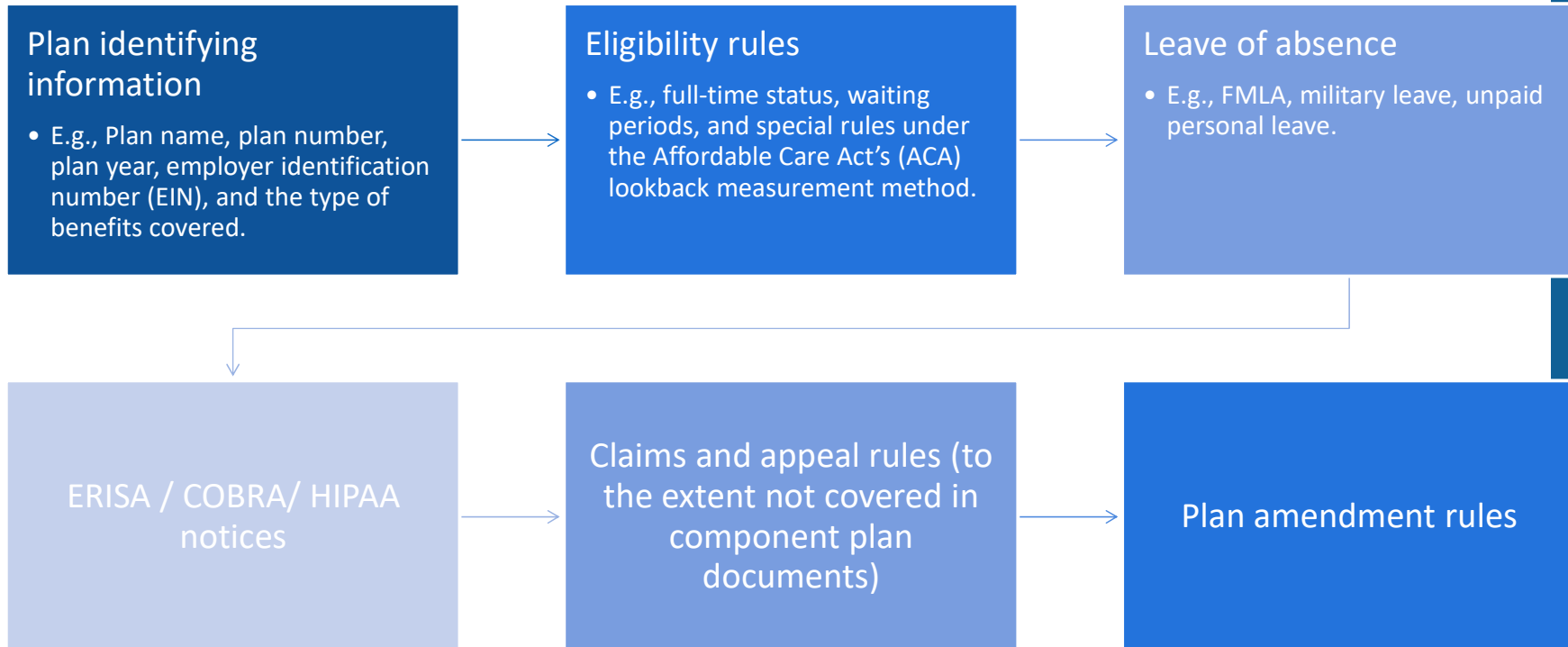
What Can Be Changed

- Employer-controlled elements like eligibility requirements
- Changes that reduce coverage (e.g., removing domestic partner coverage)

What Cannot Be Changed

- Carrier/TPA-controlled items: covered services, exclusions, claims procedures
- Changes that expand coverage (e.g., adding domestic partner coverage not in component plan)

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Wrap Documents: Common Content

Plan identifying information
- E.g., Plan name, plan number, plan year, employer identification number (EIN), and the type of benefits covered.

Eligibility rules
- E.g., full-time status, waiting periods, and special rules under the Affordable Care Act's (ACA) lookback measurement method.

Leave of absence
- E.g., FMLA, military leave, unpaid personal leave.

ERISA / COBRA/ HIPAA notices

Claims and appeal rules (to the extent not covered in component plan documents)

Plan amendment rules

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Wrap Documents: FAQs

- Should all component plans be automatically included in the wrap?
  - Not necessarily
- Can I include nonERISA plans in the wrap?
  - Yes but recommend an ERISA disclaimer
- Can I have more than one wrap?
  - Yes, e.g. where there are differences in benefits within a controlled group
- Can I file a single 5500 for all benefits without a wrap?
  - Technically no.
- Can I retroactively create a wrap to cover prior years?
  - Technically no.

Amending and Distributing SPDs and Wraps

- SPDs and Wrap Documents **must** be updated whenever there are material changes to the plan or its administration.
  - Can either furnish a new SPD or create a Summary of Material Modification (SMM) which describes what has been changed in the SPD
  - Under ERISA, an updated SPD incorporating all previous SMMs must be furnished every five years if the plan has been amended, or every ten years if no amendments have occurred.
  - When info in wrap documents change, either need a new wrap SPD or an SMM.

- What has to be distributed?
  - Employers are required to distribute the SPD, along with any SMMs following plan changes. Wrap SPD must be distributed the same as any other SPD

Amending and Distributing SPDs and Wraps

Time frames

– SPDs must be distributed to new participants within 90 days of becoming covered and to beneficiaries within 90 days of receiving benefits.

– When a plan is newly established, the SPD must be distributed within 120 days of the plan's effective date.

– An SMM must be provided within 210 days after the end of the plan year in which the change was adopted.

- Within 60 days of the change if there is a material reduction in benefits.

- Court may not allow plan to enforce amendments that were not communicated before the claims were incurred, even if SMM is timely.

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Amending and Distributing SPDs and Wraps

Electronic distribution / other distribution methods
- Employees must either:
    - Have regular work-related computer access; or
    - Give consent for electronic delivery
- Acceptable electronic distribution methods:
    - Email, secure intranet posting, or web-based portals with notification.
    - Must provide a paper copy upon request.

Responding to ERISA document requests
- Must respond to written participant requests for plan documents, SPDs, or other related materials within 30 days.

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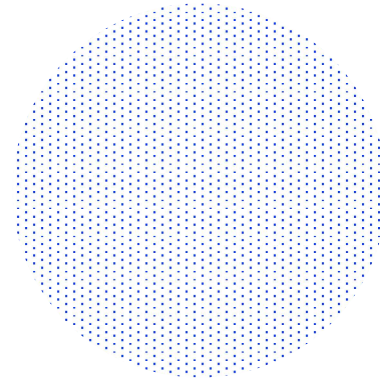
Cafeteria Plan Documents

POP Document

- To offer pretax premiums, pretax HSA contributions and other pretax benefits employer must have a §125 / cafeteria plan.

- Cafeteria plans must be in writing.
  - POP document is the written cafeteria plan
  - POP = Premium Only Plan
  - That portion of the cafeteria plan that allows for pretax premiums, pretax HSA deductions, flex credit (when offered), cash in lieu benefits (when offered), etc.
  - No POP document, no pretax premiums

- Common for POP document to consist of boilerplate main document plus set-up sheet / adoption agreement which addresses plan specific details

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Other Pretax Benefits

- Health FSAs and DCAPs also need plan documents
  - Health FSA is an ERISA plan so needs an ERISA SPD
  - IRC §129 requires DCAP be in writing
  - May be included in POP document or have stand alone documents
  - But stand alone Health FSA / DCAP document is NOT a POP document
- Wrap plan document is NOT a POP document
  - Possible to incorporate POP plan into wrap document but usually separate

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POP Document Content

- Plan design elements documented in POP Document
  - Maximum annual election amounts
  - Plan year
  - Eligible employees (e.g. COBRA participants, terminated employees)
  - Eligible benefits (e.g. can employees pretax STD/LTD?)
  - Cash in lieu options (optional)
  - Employer flex credits (optional)
  - Election changes
    - Eligible events
    - Restrictions on permitted election changes (e.g. can't reduce Health FSA election below amount already spent at the time of the event)
    - Time frame to request an election change
  - Runout periods (plan year end and/or terminated participants)
  - Expenses not eligible for reimbursement from Health FSA
  - Grace period / carryover (existence and design) for Health FSA/DCAP
  - Pay and chase rules if Health FSA / DCAP offers a debit card
  - Options for addressing HSA disqualification from general purpose Health FSA
  - Dealing with nondiscrimination testing violations

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Distributing POP Document

- There is no formal requirement to distribute the POP Document
  - But Health FSA SPD is subject to normal ERISA SPD distribution rules
- Nevertheless can't expect employees to understand or be aware of rules applicable to POP if not distributed
  - Especially with respect to midyear election change rules
- Recommend making POP document available in same manner as SPD and other plan docs, e.g. email, intranet, etc.
  - But do not have to follow formal ERISA electronic distribution rules

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Takeaways

1 Be aware of which documents make up the plan document / SPD for each plan and where to access them.

2 Check the plan documents first – the answer to many compliance questions is often "What does the plan document say?"

3 Consider using a wrap document to plug gaps even when the plan is not subject to 5500 reporting (less than 100 participants).

Questions

Webinar Wrap-Up

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