WHAT TO EXPECT FROM A HEALTH PLAN INVESTIGATION



Disclaimer

This presentation may contain opinions of the presenter that may not comport with the official views of the U.S Department of Labor and is meant for educational purposes only.

Outline of Presentation

- Background on EBSA
- ERISA and fiduciary responsibility
- Types of investigations
- Health Enforcement Initiatives Project
- EBSA investigation process
- Correction & VFCP
- Compliance assistance and other resources

General Organization Overview

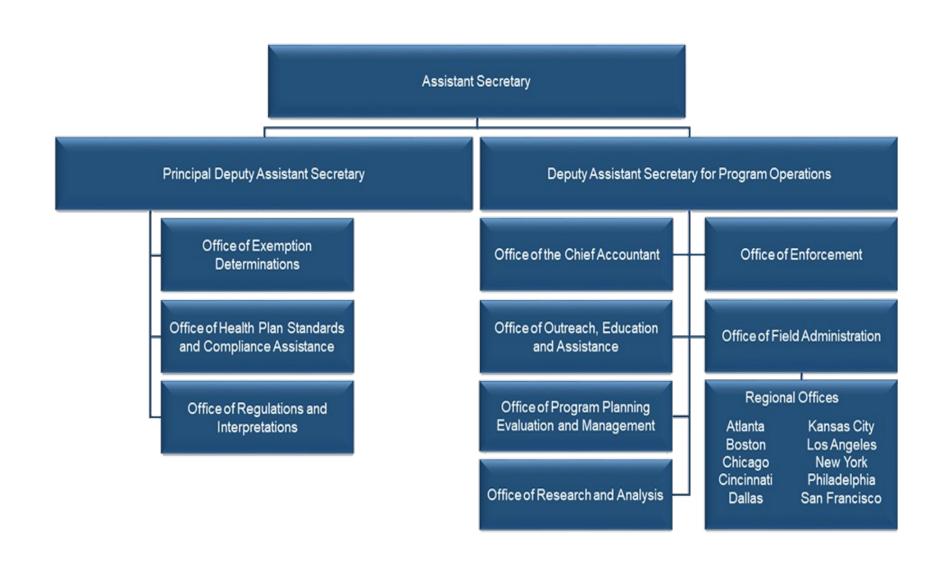
The Employee Benefits Security Administration (EBSA)

EBSA's Mission Statement

The mission of the Employee Benefits Security Administration is to assure the security of the retirement, health and other workplace related benefits of America's workers and their families. We will accomplish this mission by:

- developing effective regulations;
- assisting and educating workers, plan sponsors, fiduciaries and service providers; and
- vigorously enforcing the law.

Organization Chart



EBSA - Structure

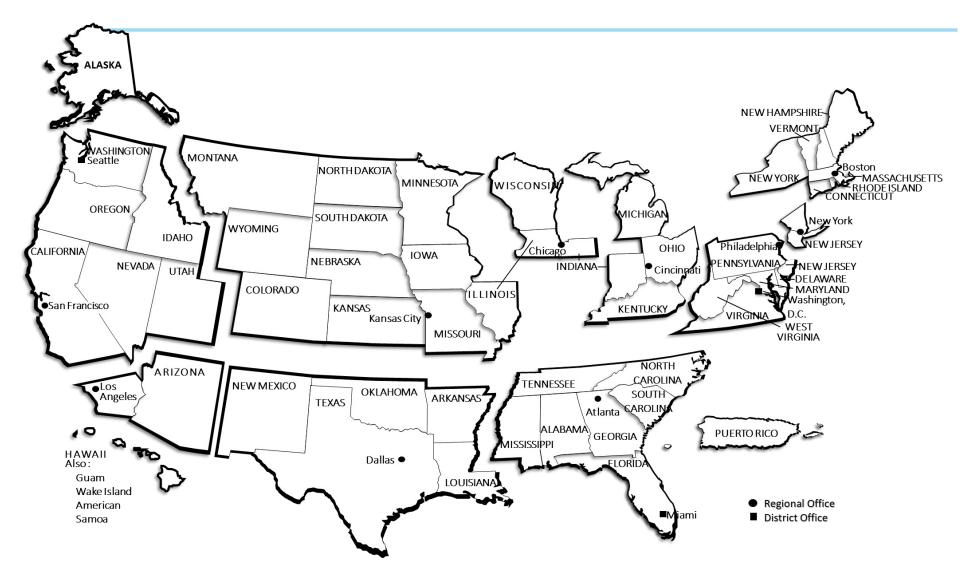
NATIONAL OFFICE

- Establishes policy and agency protocols
- Oversight of reporting and disclosure requirements
- Drafts regulations and interpretive guidance
- Conducts economic research to determine impact of policy and regulations on regulated community
- Conducts outreach such as the Health Benefits Education Campaign

REGIONAL OFFICES

- Conduct investigations of ERISA plans
- Provide compliance assistance through Benefit Advisors
- Conduct outreach to plan sponsors and other stakeholders

EBSA Field Offices



ERISA Basics for Group Health Plans

Employee Retirement Income Security Act (ERISA)

Applies to employee benefit plans sponsored by private sector employers and/or unions

NOT government plans

NOT church plans

Other exclusions may apply



Generally, ERISA allows the plan sponsor to decide whether to offer a plan and allows flexibility in the plan's benefit design.

A Few Basic Things a Group Health Plan Must Have:

Governing plan document(s) must comply with ERISA

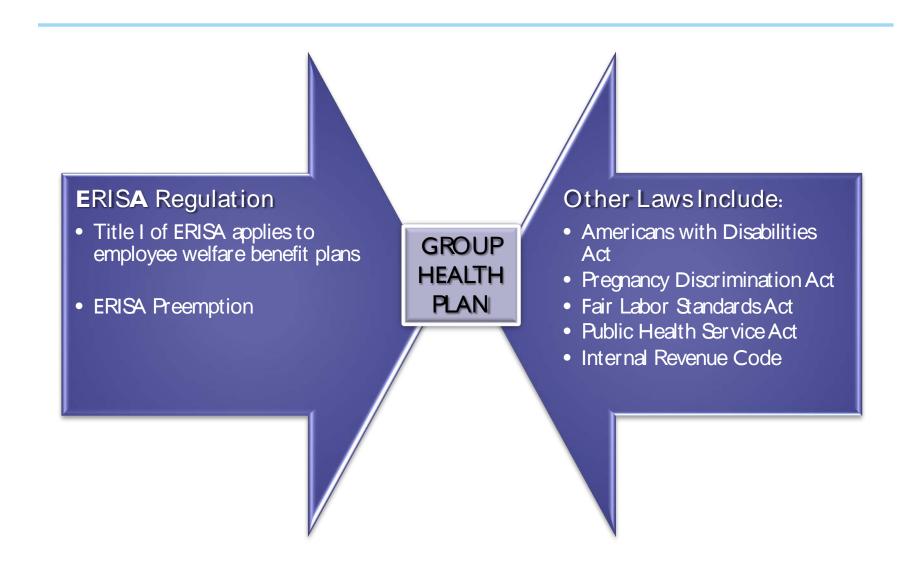
A Summary Plan Description (SPD) provided to participants and beneficiaries

Named Fiduciary

Reasonable claims & appeals procedure

Fidelity bond (to protect against dishonesty) unless the plan is funded solely by general assets of plan sponsor

Regulation of Group Health Plans



Health Laws Included in ERISA Part 7

Patient Protection and Affordable Care Act (Affordable Care Act)

Consolidated Omnibus Budget Reconciliation Act (COBRA)

Mental Health Parity and Addiction Equity Act (MHPAEA)

No Surprises Act

Health Insurance Portability and Accountability Act (HIPAA)

Newborns' and Mothers' Health Protection Act (Newborns' Act)

Women's Health and Cancer Rights Act (WHCRA)

Genetic Information Nondiscrimination Act (GINA)

Children's Health Insurance Program Reauthorization Act (CHIPRA)

Enforcement and Jurisdiction

Department of Labor • ERISA Department of Health • Public Health Service Act and Human Services Department of Internal Revenue Code Treasury • State Insurance Laws States Participants and Private litigation Beneficiaries

ERISA Reporting and Disclosure for Group Health Plans

Reporting Requirements

- Certain group health plans must file the Annual Report (Form 5500)
- Multiple Employer Welfare Arrangements (MEWAs) must file the Form M-1.

Disclosure Requirements include:

- Summary Plan Description (SPD)
- Summary of material modifications (SMM)
- Summary of Benefits and Coverage (SBC)
- Adverse Benefit Determinations and other disclosures as required by ERISA 503 claims procedure rules
- Various notices to comply with the health laws of ERISA part 7
- COBRA notices

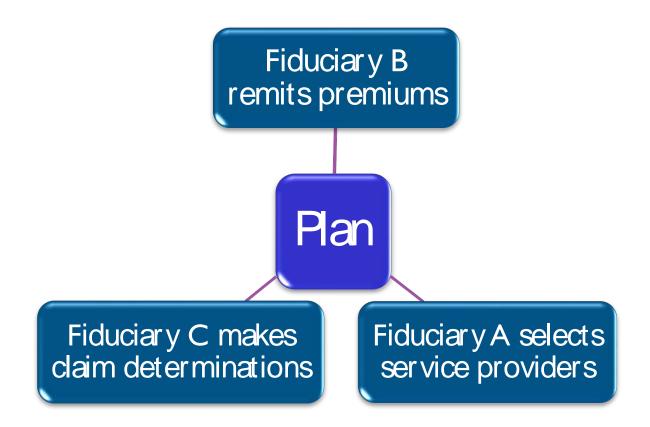
A Fiduciary is any person

Named as a plan fiduciary in plan documents – or who:

- Exercises discretionary authority or control over plan management or -
- Exercises authority or control over plan assets
 or -
- Provides investment advice for compensation (direct or indirect)

Plan Fiduciaries

- Plans can have multiple fiduciaries
- Fiduciaries can be named or functional



A Fiduciary must:

- Act "solely in interest" of participants & beneficiaries
- Discharge duties prudently with care, skill and diligence
- Diversify plan investments
- Follow terms of governing documents (to the extent they are consistent with ERISA)
- Follow governing provisions of ERISA under Part 7.

A Fiduciary must NOT:

- Act in own self interest
- Act on behalf of a party with adverse interests
- Accept "anything of value" from those doing business w/ the Plan (e.g. kickbacks)

Fiduciaries must NOT cause the Plan to engage in a prohibited transaction such as:

- Sale or exchange of plan assets with <u>party in interest</u> (PII)
- Extension of loan or credit to PII
- Contract for goods, services or facilities with PII
- Transfer plan assets to a PII for their use or benefit

^{*} Note that if a Plan/fiduciary/party in interest satisfies the requirements of a prohibited transaction exemption, the above transactions could be permissible

Fiduciaries can be held personally liable for losses resulting from a fiduciary breach

For example: Fiduciary A can also be held personally liable for losses resulting from a breach by Fiduciary B

if A's failure(s) allowed B to breach

if A knowingly participated in or knowingly concealed B's breach

if A knows about B's breach and fails to make reasonable efforts to correct B's breach

Penalties may be imposed for a breach of fiduciary duty

- ERISA Sec. 502(I) imposes 20% penalty on the amount paid pursuant to a court order or settlement agreement
- IRS can impose excise tax on prohibited transactions
- IRS can impose excise tax under IRC Sec.
 4980D for failure to meet certain group health plan requirements
- Numerous other penalties for R&D failures

Some fiduciary breaches may also constitute criminal violations of ERISA, other federal law, or state law.

Examples include:

- Accepting kickbacks
- Filing fraudulent claims
- Stealing premiums or contributions

Types of investigations

Investigations may be civil or criminal in nature and may focus on:

The Plan

A Service provider

The Plan Sponsor

An Individual

Sources for Targeted Investigations

- Participant complaints
- Form 5500/Form M-I Reviews
- Referrals from:
 - Other agencies
 - State insurance departments
 - Advocacy groups
- Media
- Private litigation

National Health Enforcement Initiatives Project

Health Enforcement Initiatives

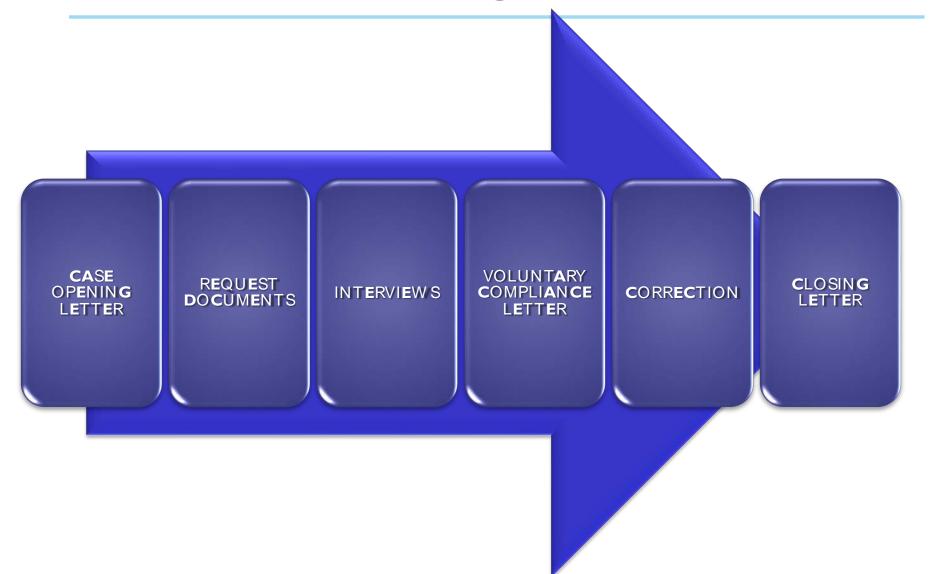
- The national initiatives for health enforcement for FY 2023 remain unchanged from FY 2022, and include MEWA financial solvency/fraud investigations, emergency services, and health service provider self-dealing MHPAEA enforcement is now a national project and there will be a continued increased focus on MHPAEA in FY 2023. Enforcement of the group health plan requirements related to COVID-19 and COBRA under FFCRA and the CARESAct, and the American Rescue Plan will also be areas of focus in FY 2023, as will implementation and enforcement of the surprise billing and transparency provisions of the Consolidated Appropriations Act of 2020. The Equity Enforcement Focus will also continue from FY 2022, which focuses on the enforcement program's impact on equity issues and having positive impact on underserved communities.
- Includes a broad range of investigative issues such as:
 - Proper plan administration
 - Proper claims payment
 - Service provider fees
 - Compliance with claims procedure rules
 - Compliance with health care laws under Part 7 of ERISA in stated plan terms and operations
 - Insolvency/unpaid claims

Examples of Group Health Plan Violations

- Failure to provide benefits in accordance with plan terms
- Improper or arbitrary claims adjudication
- Failure to follow the DOL claims procedure rules
- Failure to forward employee premiums to the insurance provider
- Failure to provide mental health benefits in parity with medical/surgical benefits in accordance with mental health parity rules
- Failure to provide required notices

Investigative Process

General Process for Civil Plan Investigations



Correction & Voluntary Fiduciary Compliance Program

Corrections Pre-Investigation

- EBSA encourages self-correction
- Fiduciaries should regularly review operations
- Health Law Self-Compliance Tool
- Upon detection, take corrective action(s)
- Correction guidance is in VFCP documentation
- Call EBSA for compliance assistance

Correction During Investigation

- Often, potential problems become clear during the investigation
- If problem is identified, work with EBSA to make corrections
- Correction guidance may be available
- Proof of correction and number of participants and plans affected is required

Depending on the circumstances, appropriate corrective action may include:

- Settlement agreement
- Notification to Participants and Beneficiaries of the correction
- Implementation of new internal controls
- Re-adjudication of claims
- Paying unpaid claims
- Payment of Plan's administrative costs and expenses
- Interest
- Disgorgement of profits or surcharge
- Penalties
- Removal of fiduciaries
- Removal of service providers
- Appointment of independent fiduciary

Criminal Referrals

- Theft or embezzlement
- Health care fraud
- Kickbacks or bribes
- False statements to investigators
- Willful failures to file or false filings

Voluntary Fiduciary Correction Program (VFCP)

- "Self-help" program
- Correction methods specified in regulations
- Submit complete applications to Regional Office
- EBSA issues "No Action" letter
- Some transactions eligible for excise tax relief

Compliance Resources

Health Plan Compliance Resources

EBSA website (health plans):

https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans

Health Benefits Laws Self Compliance Tools:

https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans/hbec/checksheets

Health and Human Services www.hhs.gov/healthcare

Compliance Assistance

EBSA main site: www.dol.gov/agencies/ebsa

EBSA Affordable Care Act page: www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers

EFAST2 website: www.efast.dol.gov

Technical Assistance and Publications: askebsa.dol.gov or 1-866-444-3272

EFAST2 Hotline (Toll-free): I-866-GO EFAST (I-866-463-3278)

Form M-I Filings: http://www.askebsa.dol.gov/mewa/ or call the Form M-I Help Desk at 202-693-8360

Publications

- Understanding Your Fiduciary Responsibilities under a Group Health Plan
- Reporting and Disclosure Guide for Employee Benefit Plans
- An Employer's Guide to Health Benefits under COBRA
- Health Benefits Coverage Under Federal Law

Outreach Events

- Health Benefit Education Campaign two-day seminar
- Webcasts
- Regional workshops

www.dol.gov/agencies/ebsa

Subscribe to the EBSA website to receive alerts on new guidance and events