

COMPLIANCE OVERVIEW

Provided by Cottingham & Butler

Summary Plan Descriptions (SPDs)

All group health plans subject to the Employee Retirement Income Security Act (ERISA) are required to provide participants with a summary plan description (SPD). An SPD must be written in a manner calculated to be understood by the average plan participant and must be sufficiently comprehensive to inform the participant of his or her rights and obligations under the plan.

The SPD must be automatically distributed to plan participants by certain deadlines. It also must be provided upon a participant's request. Because the main purpose of the SPD is to inform participants of their rights and obligations under the plan, the SPD must include specific types of information, such as the plan's eligibility rules.

There are serious legal consequences associated with not complying with ERISA's requirements for SPDs. For example, a plan sponsor can be charged up to \$110 per day if does not provide the SPD within 30 days after a participant's request.

This Compliance Overview addresses many of the commonly asked questions about SPDs. It also contains a checklist for the basic information that is required in an SPD.

LINKS AND RESOURCES

- Department of Labor (DOL) [final SPD regulations](#) from Nov. 21, 2000
- DOL's [Reporting and Disclosure Guide for Employee Benefit Plans](#)

HIGHLIGHTS

DELIVERY REQUIREMENTS

The SPD must be provided within 90 days after an employee first becomes covered by the plan.

Common distribution methods include hand delivery, mail and electronic delivery.

INSURED PLANS

The sponsor of an insured plan (not the issuer) is responsible for providing the SPD.

The insurance certificate typically does not meet all of ERISA's requirements for SPDs.

A compliance solution for insured plans is a "wrap document."

NONCOMPLIANCE

An employer that does not comply with the SPD requirement may be subject to serious legal consequences.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

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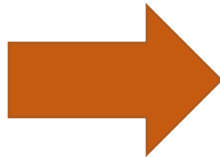


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WHAT IS A SUMMARY PLAN DESCRIPTION?

The SPD is a key compliance document for virtually every ERISA plan. According to the DOL, “the SPD is the primary vehicle for informing participants and beneficiaries about their rights and benefits under the employee benefit plans in which they participate.” Due to its importance, the SPD must be written in a manner calculated to be understood by the average plan participant. Also, ERISA and underlying Department of Labor (DOL) regulations include strict requirements for the content and delivery of SPDs.

ERISA includes standards for:



- The information that must be included in the SPD;
- When the SPD must be provided to plan participants; and
- How the SPD may be distributed.

ARE ALL GROUP HEALTH PLANS REQUIRED TO PROVIDE AN SPD?

Virtually all group health plans subject to ERISA must provide participants with an SPD, regardless of size. Both insured and self-funded group health plans must comply with ERISA’s SPD requirements. While ERISA contains an exception to the Form 5500 filing requirement for certain small employers, this exception does not apply to SPDs. Small employers that sponsor ERISA-covered group health plans must provide an SPD to employees participating in the plan.

DOES AN SPD NEED TO BE FILED WITH THE DOL?

No. While ERISA initially required plans with 100 or more participants to file an SPD with the DOL, the Taxpayer Relief Act of 1997 eliminated the automatic filing requirement. However, plans must file an SPD within 30 days of a request from the DOL. If the plan administrator fails to provide the SPD within 30 days, the DOL may impose a civil penalty of up to \$110 per day for each day the failure continues, up to a maximum penalty of \$1,100 per request. Multiple requests for the same or similar documents are considered separate requests.

WHO IS RESPONSIBLE FOR PROVIDING THE SPD?

Under ERISA, the plan administrator is legally responsible for making sure the SPD is provided, not the insurer or a third-party administrator (TPA). This is generally true even if another company is contractually obligated to help draft the SPD. The plan administrator is the entity designated under the terms of the plan. For single-employer ERISA plans, the plan administrator is the employer that sponsors the plan, unless the plan document designates a different entity.

DOES THE CERTIFICATE OR BOOKLET PREPARED BY AN INSURER QUALIFY AS AN SPD?

Some plan sponsors mistakenly believe that providing participants with the booklet (or certificate) issued by the insurance company fulfills their obligation to provide participants with an SPD. The insurance booklet will often contain detailed information regarding plan benefits and coverage. However, in many cases, the plan sponsor will need to provide additional information that is not contained within the insurance booklet in order to comply with the SPD content requirements.

COMPLIANCE TIP: As a solution, plan sponsors can create a separate document, often called a “**wrap document**” that includes the ERISA-required information that the booklet, prepared by the insurer or TPA, does not include. In this scenario, the wrap document and the booklet, together, make up the plan’s SPD.

IS IT POSSIBLE TO COMBINE THE PLAN DOCUMENT AND SPD INTO ONE DOCUMENT?

Many ERISA welfare benefit plans only have one document, which serves as the plan document and is also distributed to plan participants as the SPD. When one document is used, it must comply with ERISA's content requirements for plan documents and SPDs, and it must be written in a manner that is understandable to plan participants. Also, the document should prominently state that it is intended to serve as both the plan document and the SPD.

For insured plans, the combined plan document/SPD is typically a wrap plan document. The wrap plan document addresses the ERISA content requirements that are missing from the insurance certificate and booklet. The wrap plan document and the insurance certificate, together, comprise the plan document/SPD for the plan. Also, when an employer decides to bundle two or more welfare benefits under one plan, a "mega" wrap plan document/SPD can be used to describe the benefits.

WHO MUST BE PROVIDED WITH AN SPD AUTOMATICALLY?

ERISA requires that the SPD be provided automatically to participants under the plan. "Participants" include **employees and former employees who are eligible for benefits under the plan**. Former employees include, for example, COBRA beneficiaries, retirees and other former employees who may remain eligible under the plan. Plan sponsors are NOT required to automatically distribute the SPD to other individuals, such as an employee's spouse and children who are covered under the plan as dependents or employees who are not participating in the plan.

WHO HAS THE RIGHT TO RECEIVE A COPY OF THE SPD UPON REQUEST?

In addition to providing the SPD automatically to plan participants, plan administrators must provide copies of the SPD upon written request. Employees and former employees who are participating in the plan have the right to receive a copy of an SPD upon request, even if the SPD was recently distributed to them. Also, certain individuals who are not entitled to receive the SPD automatically have the right to receive a copy of the SPD upon written request. These individuals include employees who are eligible for the plan but not enrolled (for example, employees in a waiting period) and a plan participant's covered dependents (spouse and children).

In addition to providing the SPD on request, a plan administrator must make a copy of the SPD available for examination by any participant or beneficiary at the "principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants."

The plan administrator may impose a reasonable copying charge for the SPD. This charge may not to exceed 25 cents per page, and it must be less if the actual cost to the plan is less. Other than the copying cost, no other charge for providing the SPD, such as handling or postage charges, is permitted. Also, no charge may be imposed for examining documents at the administrator's principal office or other required locations.

WHAT ARE THE DEADLINES FOR PROVIDING AN SPD?

Participants must receive an SPD by the following deadlines:

EVENT	DEADLINE
Plan becomes subject to ERISA (for example, a new group health plan)	Within 120 days after plan becomes subject to ERISA
Employee becomes covered by the plan	Within 90 days of enrollment
Participant's written request	Within 30 days of participant's request

HOW OFTEN DOES THE SPD NEED TO BE UPDATED?

ERISA does not require plan administrators to provide a new SPD booklet every year. An updated SPD must be provided every **five years** if material modifications are made to the SPD's information during that time period. If no changes are made, then an updated SPD must be provided every **10 years**.

It is typical for plan design changes to be made each year, particularly for group health plans. Any material changes to plan design or operation must be communicated to participants. Since ERISA does not require a plan's SPD to be updated each year, these changes do not need to be communicated through an updated SPD booklet. Instead, they can be communicated through a **summary of material modification (or SMM)**. However, when the plan changes are significant, an employer may decide that it is best to update the SPD booklet, rather than use an SMM, to communicate those changes to participants.

WHEN MUST SPD CHANGES BE COMMUNICATED TO PLAN PARTICIPANTS?

An SMM (or an updated SPD booklet) must be provided within 210 days after the close of the plan year in which the change was adopted. If benefits or services are materially reduced, participants must be provided notice:

- Within 60 days from adoption; or
- Within 90 days from adoption, if participants receive such information from the plan administrator at regular intervals of not more than 90 days.

In addition to the SPD, the Affordable Care Act (ACA) requires plan administrators and issuers to provide participants with a summary of benefits and coverage (SBC). As a related requirement, under the ACA, plan administrators and issuers must provide 60 days' advance notice of any material modification to plan terms or coverage that takes effect mid-plan year and impacts the content of the SBC. The 60-day notice can be provided to participants through an updated SBC or by issuing an SMM.

A "material modification" is any change to a plan's coverage that (independently or in connection with other changes taking place at the same time) would be considered by the average plan participant to be an important change in covered benefits or other terms of coverage.

HOW CAN THE SPD BE DISTRIBUTED?

The plan administrator is required to provide the SPD to participants in a manner reasonably calculated to ensure actual receipt of the material by the participant. The following are examples of acceptable methods of delivery:

- Hand delivery to employees at their worksite (merely posting information in a common area is not acceptable);

- Included within a periodical distributed to employees (for example, a union newsletter or company publication);
- U.S. mail; or
- Electronic media (DOL regulations include a safe harbor provision applicable to electronic delivery of SPDs).

MAY THE SPD BE DELIVERED ELECTRONICALLY TO ALL EMPLOYEES?

The DOL's safe harbor contains guidelines for providing disclosures to the following two groups of plan participants:

- Employees with work-related computer access; and
- Other plan participants and beneficiaries who consent to receive disclosures electronically.

Employees with work-related computer access

ERISA disclosures may be delivered electronically to employees who:

- Have the ability to effectively access documents furnished in electronic form at any location where the employees are reasonably expected to perform their duties; and
- Are expected to have access to the employer's electronic information system as an integral part of those duties.

Merely providing employees with access to a computer in a common area (for example, a computer kiosk) is not a permissible means to electronically furnish ERISA-required documents.

Participants who consent to receive disclosures electronically

A plan administrator must obtain written consent prior to electronically delivering ERISA disclosures to plan participants who do not have work-related access to a computer. The consent may be received in either electronic or paper form. Prior to consenting, an individual must be given a clear and conspicuous statement that explains:

- The types of documents to which the consent will apply;
- That consent can be withdrawn at any time without charge;
- The procedures for withdrawing consent and for updating the address used for receipt of electronically furnished documents;
- The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and
- Hardware or software needed to access and retain the documents delivered electronically.

Where the electronic distribution is made through the Internet, the individual must affirmatively consent in a manner that reasonably demonstrates his or her ability to access information in the electronic form that would be used. If the plan administrator changes its hardware or software requirements, it must provide a new notice and obtain consent again.

WHAT REQUIREMENTS APPLY TO ALL ELECTRONIC DISCLOSURES?

Plan administrators are required to use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. The DOL's rules provide some guidance on what measures are reasonably calculated to ensure actual receipt when electronic delivery is used.

Notices

A notice must be sent either electronically or in paper form to each plan participant or beneficiary at the time the document is provided electronically. The notice must indicate the significance of the document (when it is not otherwise reasonably evident) and explain the participant's right to request a paper copy.

Confirmation of Receipt

The plan administrator must make use of electronic mail features such as return-receipt or notice that the email was not delivered. The plan must also conduct periodic reviews to confirm receipt of the transmitted information.

Style, Format and Content Requirements

Documents delivered electronically must continue to be furnished in a manner consistent with the applicable style, format and content requirements contained within ERISA. For example, SPDs provided electronically must contain all the disclosures otherwise required by ERISA's disclosure requirements. The DOL has indicated that the appearance of paper and electronic versions need not be identical.

Paper Copy

Plan participants and beneficiaries are entitled to receive a paper copy of any ERISA disclosure provided electronically. Where a plan participant or beneficiary requests a paper copy of a document originally provided electronically, the general rules for charging for paper copies apply.

DOES ERISA REQUIRE EMPLOYERS TO TRANSLATE THE SPD INTO ANOTHER LANGUAGE?

No. While ERISA does not require that an SPD be provided in a non-English language, in some cases the SPD must include a prominently displayed notice that assistance in a non-English language common to the plan participants is available. Sample language is provided within the attached SPD Checklist.

A plan is required to include this notice in the following cases:

Plan Size* (number of plan participants)	Number of Participants who are literate only in the same non-English language
Less than 100	25% or more
Greater than 100	Lesser of: ✓ 500 or more; or ✓ 10% or more.

*At the beginning of the plan year.

Example: An employer maintains a group health plan that covers 1,000 plan participants. At the beginning of the plan year, 500 participants are literate only in Spanish, 101 are literate only in Vietnamese, and the remaining are literate in English. Each of the 1,000 plan participants must receive an SPD that contains a notice in both Spanish and Vietnamese explaining the ability to obtain assistance with understanding the SPD.

WHAT ARE THE PENALTIES FOR NOT HAVING A WRITTEN PLAN DOCUMENT/SPD?

There are no specific penalties under ERISA for failing to have an SPD. However, not having an SPD can have serious consequences for an employer, including the following:

- **Inability to Respond to Participant Requests:** The SPD must be furnished in response to a participant's or beneficiary's written request. The plan administrator may be charged up to \$110 per day if it does not provide the SPD within 30 days after an individual's request. These penalties may apply even where an SPD does not exist.
- **Benefit Lawsuits:** Not having a plan document or SPD may put an employer at a disadvantage in the event a participant brings a lawsuit for benefits under the plan. Without these documents, it will be difficult for a plan administrator to prove that the plan's terms support benefit decisions. Also, without an SPD, plan participants can use past practice or other evidence outside of the actual plan's terms to support their claims. Additionally, courts will likely apply a standard of review that is less favorable to the employer (and more favorable to participants) when reviewing benefit claims under an unwritten plan.
- **DOL Audits:** The DOL has broad authority to investigate or audit an employee benefit plan's compliance with the ERISA. Traditionally, DOL audits of employee benefit plans have focused primarily on retirement plans, such as 401(k) plans. However, now that the DOL has started enforcing compliance with the ACA, health plan audits are on the rise. When the DOL selects an employer's health plan for audit, it will almost always ask to see a copy of the plan document and SPD, in addition to other plan-related documents. If an employer cannot respond to the DOL's document requests, it may trigger additional document requests, interviews, on-site visits or even DOL enforcement actions.

Summary Plan Description Checklist (For Group Health Plans)

Plan

- Name
- Type (for example, group health plan)
- Plan Number (three digits)
- Type of Plan Administration (insured/sponsor/third-party administrator)
- Plan Year

Plan Sponsor

- Name
- Address
- Employer Identification Number (EIN)
- A statement that a complete list of employers, employee organizations and unions sponsoring the plan is available
- Where a plan is established pursuant to a collective-bargaining agreement, a statement that a copy of that agreement is available upon request to the plan administrator

Financing & Administration

- Funding medium (insurance company, trust fund)
- Source of contributions and how contributions are calculated

Plan Administrator

- Name
- Address
- Telephone Number

Agent for Service of Legal Process

- Name
- Address
- Statement that legal process can be served on the plan administrator or plan trustee

Trustees (if the plan has a trust)

- Names
- Titles
- Addresses

Eligibility & Benefits

- Statement of the conditions pertaining to eligibility to receive benefits (such as enrollment periods, measurement methods, waiting periods and other eligibility criteria)
- Statement that the plan administrator has discretionary authority to interpret and/or administer the plan (for insured plans, a statement that the insurer will make benefit determinations)
- A summary of benefits that includes a description of:*
 - Cost-sharing provisions (premiums, deductibles, coinsurance, copayment amounts for which the beneficiary will be responsible)
 - Annual or lifetime maximums or other limits on benefits under the plan
 - Preventive services coverage
 - Prescription drug coverage

- Medical test, device and procedure coverage
- Requirements to use network providers
- List of network providers**
- Coverage for services provided by non-network providers
- Limits on selection of primary care providers or providers of specialty medical care
- Conditions or limits applicable to obtaining emergency medical care
- Pre-authorization or utilization review requirements
- Benefits provided pursuant to the Women's Health & Cancer Rights Act and Newborn's and Mother's Health Protection Act (Model Statement for NMHPA)
- COBRA Rights/USERRA Rights
- Claims and appeals procedures
- Statement that a copy of QMSCO procedures is available upon request
- Coverage for adopted children
- Continued coverage of costs of pediatric vaccines
- Mental health parity disclosures
- ACA disclosures, including notice of grandfathered status and notice of patient protections (as applicable to the plan)
- HIPAA special enrollment disclosures

**Some of these content requirements are affected by ACA mandates, such as the ACA's ban on lifetime and annual dollar limits for essential health benefits.*

***The provider listing may be furnished as a separate document, provided that the SPD contains a general description of the provider network and states that provider lists are furnished automatically, without charge, as a separate document.*

Loss of Benefits Statement

- A statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (subrogation)
- A summary of plan provisions governing the authority of the plan sponsor or others to terminate, amend or eliminate benefits under the plan, including a description of participants' and beneficiaries' benefits, rights and obligations on plan termination and a description of any plan provisions governing the allocation and disposition of plan assets upon termination

ERISA Rights

Model statement of ERISA rights

Foreign Language Statement (if applicable)

Sample Statement:

This booklet contains a summary in English of your rights and benefits under this employer's group health plan. If you have difficulty understanding any part of this booklet, contact the plan administrator, at [insert address] from 8:30 a.m. to 5 p.m. Monday through Friday. You may also call the plan administrator's office at 202-555-5555 for assistance.

This notice must be prominently displayed within the SPD and must appear in the non-English language common to plan participants.

Disclaimer

- A statement warning that, in the event of a conflict between the SPD and the plan document, the plan document controls