

# Benefit Plan Compliance Checklist



# EMPLOYER BENEFIT COMPLIANCE

## Introduction

The checklist in this document is intended for use by employers as a guideline to consider compliance regulations and how each regulation may apply to an employer's specific situation. This document is not intended to be all-encompassing or binding in any way. Following are general guidelines for using this document and information every employer should know regarding ERISA.

## Checklist Column Description

The checklist displays columns for two types of plans:

- All ERISA plans
- Health plans

A health plan includes the following types of benefits: medical, dental, vision, prescription drug, etc. Note that limited scope dental and vision plans may not be subject to the requirements of a health plan below if certain conditions are met.<sup>1</sup>

## *What is an ERISA Plan?*

An ERISA plan is an employee pension benefit plan or employee welfare benefit plan that is subject to ERISA's reporting and disclosure requirements, and ERISA's standards imposed to protect the interests of plan participants and beneficiaries. An employee pension benefit plan, as defined by ERISA, includes any plan, fund or program established or maintained by an employer, an employee organization or both, that provides retirement income to employees, or results in the deferral of income by employees, for periods extending beyond the termination of their employment. Therefore, if the employer has any arrangement designed to make payments to an employee after the termination of employment, that arrangement is likely an employee pension benefit plan under ERISA.

Employee welfare benefit plans, as defined by ERISA, include any plan or program established by an employer to provide:

- medical, surgical or hospital care or benefits,
- benefits in the event of sickness, accident, disability, death or unemployment,
- vacation benefits,

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<sup>1</sup> Dental and vision plans are considered "limited scope," and, therefore, can be excluded from some of the requirements, if they are (1) provided under a separate policy, certificate, or contract of insurance; or (2) are otherwise not an integral part of a group health plan. Dental and vision plans are considered to not be an integral part of a group health plan if participants have the right to elect not to receive the coverage, and participants who elect to receive coverage must pay an additional premium or contribution for the coverage.

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- apprenticeship or other training programs,
- day care centers,
- scholarship funds,
- prepaid legal services,
- severance pay arrangements, or
- supplemental retirement income payments.

There are several important statutory exemptions and regulatory safe harbors that carve out plans that might otherwise fall within the ERISA plan definition. Some of the exemptions include:

- governmental and church plans;
- certain payments made as a normal “payroll practice” of the employer (i.e., vacation pay, sick-pay, holiday pay, etc.);
- certain group or group-type insurance programs, often referred to as “voluntary employee-pay-all” arrangements, provided:
  - no contributions are made by the employer or employee organization,
  - the employee’s participation in the program is completely voluntary and the employee pays 100% of the cost of the program;
  - the employer does not sponsor or endorse the program, nor receive any consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation for administrative services rendered in connection with payroll deductions; and
  - the employer’s only function with respect to the program is to permit the insurer to publicize the program, collect premiums through payroll deduction and remit those premiums to the insurer Note, that such arrangements may NOT be run through a Code Section 125 cafeteria plan);
- tuition and education expense reimbursement programs; and
- facilities on the premises of the employer for providing first-aid or treating minor injury or illness occurring during working ours.

It is important to remember that the determination of whether a particular arrangement constitutes an ERISA plan always depends on the surrounding facts and circumstances.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
X		<b>Plan Document</b>	ERISA requires a written plan document. The type of document will vary depending on the nature of the benefits. It may include a Summary Plan Description (SPD), trust agreement, or an insurance contract.	Must be provided to participants within 30 days of request.	ERISA § 104 29 CFR § 2520.104b-1(b)	A participant may also bring a legal action and plan administrators could be subject to a penalty of up to \$110 per day per participant.
X		<b>Fidelity Bond</b>	Every fiduciary and every person who handles plan assets or other property is required to be bonded. Required to be an amount equal to at least 10% of the funds handled during the prior year, subject to a minimum of \$1,000 and a maximum of \$500,000.	Must be in place at the beginning of the plan year.	ERISA § 412(a)	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.
X		<b>Summary Plan Description (SPD)</b>	<p>Informs participants and beneficiaries of their rights and obligations under the plan. It must be written in a manner understandable to the average participant. Specific information that must be included:</p> <ul style="list-style-type: none"> <li>• Plan name</li> <li>• Employer/sponsor name</li> <li>• Employer/sponsor EIN</li> <li>• Type of plan</li> <li>• Type of administration</li> <li>• Plan administrator's name, address, telephone number</li> <li>• Name of person designated as agent for service of legal process</li> </ul>	Must be provided within 90 days after participant first becomes covered or within 120 days after the plan first becomes effective. An updated SPD must be furnished every 5 years (every 10 years if plan is not amended).	ERISA § 102 ERISA § 104(b) 29 CFR § 2520.102-2(a) 29 CFR § 2520.102-3 29 CFR § 2520.104b-2	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
		<b>Summary Plan Description (SPD)</b> <i>-continued-</i>	<ul style="list-style-type: none"> <li>• Plan year</li> <li>• Plan eligibility requirements</li> <li>• Description of benefits</li> <li>• Information regarding plan contributions and funding</li> <li>• Information regarding claims and procedures</li> <li>• Statement of ERISA rights</li> </ul>			
<b>x</b>		<b>Summary of Material Modification (SMM)</b>	Any modification in the terms of the plan that is “material” and any change in the information required to be in the SPD must be reported to plan participants.	Must be provided within 210 days after the end of the plan year in which a modification or change is adopted.	ERISA § 104(b) 29 CFR § 2520.104b-3	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.
	<b>x</b>	<b>Summary of Material Reduction (SMR)</b>	Any modification in the terms of the plan that is “material” and any change in the information required to be in the SPD must be reported to plan participants.	A material reduction in covered services or benefits must be furnished no later than 60 days after the date of adoption of the reduction.	ERISA § 104(b) 29 CFR § 2520.104b-3	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.
<b>x</b>		<b>Form 5500</b>	Plan administrator must report specified plan information to the Department of Labor each year. Fringe benefit plans and welfare plans with less than 100 participants at the beginning of the plan year that are unfunded, fully insured or a combination of both are not required to file the form.	Must be submitted to the Employee Benefits Security Administration (EBSA) by the last day of the 7 <sup>th</sup> month following the end of the plan year. Applicable schedules (i.e., Schedule A, C, H or I) may need to be attached.	ERISA § 104(a)(1) ERISA § 104(a)(3)	Penalties range from \$1 to \$1,100 per day, depending on the type of plan and type of violation.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
x		<b>Summary Annual Report (SAR)</b>	Summarizes the Form 5500 financial information.	Must be provided to participants and beneficiaries receiving benefits within 9 months after the end of the plan year.	ERISA § 104(b)(3) Model language - 29 CFR § 2520.104b-10	A participant may also bring a legal action and plan administrators could be subject to a penalty of up to \$110 per day per participant.
	x	<b>COBRA General Notice</b>	The Consolidated Omnibus Budget Reconciliation Act (COBRA) applies to group health plans sponsored by an employer with at least 20 employees. Must provide each covered employee and covered spouse and dependents (if any) with written notice of their individual COBRA continuation coverage rights under the plan. Must be written in plain language so that the average participant can understand.	Must be provided to new participants and covered spouses (if any) within 90 days of beginning coverage.	ERISA § 606(a)(1) 29 CFR § 2590.606-1 IRC § 4980B(f)(6)(A) Model notice - 29 CFR § 2590.606-1(g)	A participant may also bring a legal action and plan administrators could be subject to a penalty of up to \$110 per day per participant.
	x	<b>Qualified Medical Child Support Order Receipt and Determination Letters</b>	Group health plans are required to establish written procedures for determining the qualification of a Medical Child Support Order.	Plan administrators are required to respond to state authority within 40 days of receiving the order. Employers must forward the order to the plan administrator or respond directly to the state within 20 days.	ERISA § 609(a) 29 CFR § 2590.609-2	An alternative recipient or state authority may bring legal action.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
	x*	<b>HIPAA Certificate of Creditable Coverage</b>	A participant or beneficiary is entitled to demonstrate prior creditable coverage under an earlier plan, to reduce the amount of time for which a current health plan can impose exclusions based on a preexisting condition—i.e., the participant or beneficiary may obtain a certificate of creditable coverage from the plan sponsor or insurer that provided his benefits previously.	Must be provided to participant or beneficiary upon loss of coverage, loss of COBRA coverage, or upon request within 2 years of loss of coverage.	ERISA § 701(e) IRC § 9801(e)	Internal Revenue Service (IRS) may impose a penalty of up to \$100 per day per participant.
	x*	<b>Notice of Preexisting Condition Exclusion</b>	Participants must be notified if the plan imposes a preexisting exclusion. Notification must include the following: <ul style="list-style-type: none"> <li>• The existence and terms of any preexisting condition exclusion under the plan</li> <li>• Right to provide certificate of creditable coverage from prior plan or issuer</li> <li>• A person to contact (including an address or telephone number) for obtaining additional information or assistance regarding the preexisting condition exclusion.</li> </ul>	Must provide the general notice of preexisting condition exclusion as part of any written application materials distributed by the plan for enrollment. If the plan does not distribute such materials, the notice must be provided by the earliest date following a request	ERISA § 701 29 CFR § 2590.701-3(c)	The Department of Health and Human Services (HHS) may impose a penalty of \$100 per failure to comply. Penalties may not exceed \$25,000 per year.
	x*	<b>Notice of Special Enrollment Rights</b>	Notifies eligible participants of special enrollment rights. Notification should include a description of special enrollment events and enrollment procedures.	Must be provided to eligible participants when offered the opportunity to enroll in a group health plan.	ERISA § 701(f) 29 CFR § 2590.701-6(c) IRC § 9801(f)	HHS may impose a penalty of \$100 per failure to comply. Penalties may not exceed \$25,000 per year.

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\*Not applicable to limited scope dental and vision.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
	X	<b>Notice of Creditable Coverage under Medicare Part D</b>	Plans that provide prescription drug benefits to Medicare-eligible participants must provide a notice indicating the creditable coverage status of the prescription drug benefits provided under the plan.	Must be provided on the following occasions: 1) prior to the individual's initial enrollment period for Part D; 2) prior to the effective date of enrollment in the prescription drug coverage; 3) upon any change that affects the creditable coverage status of the coverage; 4) prior to the beginning of the Annual Coordinated Election Period that begins on November 15 of each year; and 5) upon request by the individual	SSA § 1860D-13 42 CFR § 423.56  Model disclosure notices are updated periodically and may be found on the CMS web site	The Medicare Modernization Act (MMA) and the enabling regulations do not provide any mechanism for CMS to enforce penalties or impose other sanctions against employers that fail to provide the required notice. Failure to comply may jeopardize an employer's retiree drug subsidy if the employer is receiving that subsidy payment. Penalties under ERISA may arise if the failure to provide the required notice is deemed to be a violation of fiduciary duty.
	X*	<b>Women's Health Act Notice</b>	Plans that provide medical and surgical mastectomy benefits are required to notify participants that such benefits are available.	Must be provided to participants upon enrollment and annually.	ERISA § 713(b)	A participant may also bring a legal action and plan administrators could be subject to a penalty of up to \$110 per day per participant.

\*Not applicable to limited scope dental and vision.

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty								
	<b>x</b>	<b>HIPAA Privacy Policies and Practices</b>	<p>Health Plans are required to establish written privacy policies and procedures regarding protected health information (PHI). Policies should include:</p> <ul style="list-style-type: none"> <li>• Permitted uses and disclosures</li> <li>• Authorization requirement for other uses and disclosures</li> <li>• Designation of privacy official and privacy contact</li> <li>• Sanctions for violations</li> <li>• Privacy safeguards</li> <li>• Complaints procedure</li> <li>• Prohibition of retaliation and waiver of rights</li> <li>• Documentation and record retention</li> <li>• Business Associates agreements</li> </ul>	<p>Notice must be provided to participants at time of enrollment. Notice must be provided to all participants within 60 days of a material change. Every three years a notice must be distributed notifying participants that a Notice is available and instructions for receiving a copy.</p>	<p>74 Fed. Reg. 56123; 68 Fed. Reg. 18896</p>	<p>Criminal penalties may apply if a person knowingly uses a unique health identifier or obtains and discloses individually identifiable health information in violation of HIPAA standards. Criminal penalties are based on level of knowledge and intent, and vary from less than one year in prison to up to ten years in prison. Criminal penalties may also be accompanied by a monetary penalty of up to \$250,000.</p> <p>HHS may impose a civil monetary penalty for each violation as follows, with a maximum of \$1.5 million imposed under each category:</p> <table border="1"> <tr> <td>No Knowledge</td> <td>\$100-\$50,000</td> </tr> <tr> <td>Reasonable Cause</td> <td>\$1,000 - \$50,000</td> </tr> <tr> <td>Willful Neglect (Corrected)</td> <td>\$10,000-\$50,000</td> </tr> <tr> <td>Willful Neglect (Not Corrected)</td> <td>\$10,000-\$50,000</td> </tr> </table>	No Knowledge	\$100-\$50,000	Reasonable Cause	\$1,000 - \$50,000	Willful Neglect (Corrected)	\$10,000-\$50,000	Willful Neglect (Not Corrected)	\$10,000-\$50,000
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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty	
	<b>x</b>	<b>HIPAA Security Policies and Practices</b>	Plans that store, receive or transmit PHI are required to establish written policies and procedures regarding the maintaining and transmission of PHI. Business Associates agreements may need to be amended. Fully insured plans are excluded.	Large plans (more than \$5 million in receipts) should have complied by 4/20/05; small plans by 4/20/06	74 Fed. Reg. 56123; 68 Fed. Reg. 18896	<p>Criminal penalties may apply if a person knowingly uses a unique health identifier or obtains and discloses individually identifiable health information in violation of HIPAA standards. Criminal penalties are based on level of knowledge and intent, and vary from less than one year in prison to up to ten years in prison. Criminal penalties may also be accompanied by a monetary penalty of up to \$250,000.</p> <p>HHS may impose a civil monetary penalty for each violation as follows, with a maximum of \$1.5 million imposed under each category:</p>	
						No Knowledge	\$100-\$50,000
						Reasonable Cause	\$1,000 - \$50,000
						Willful Neglect (Corrected)	\$10,000-\$50,000
						Willful Neglect (Not Corrected)	\$10,000-\$50,000

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All ERISA Plans	Health Plans	Item	Description	Due Date	Citation	Penalty
	X*	<b>Newborns' and Mothers' Health Protection Act</b>	If the plan provides maternity or newborn infant coverage, a statement that a stay for a vaginal delivery must be no less than 48 hours and 96 hours for a cesarean section.	N/A	ERISA § 711 29 CFR § 2520.102-3(u) contains model statement	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.
	X*	<b>Mental Health Parity Act</b>	Prohibits a plan from placing annual or lifetime dollar limits on mental health benefits that are lower (less favorable) than annual or lifetime dollar limits for medical and surgical benefits offered under the plan. Does not mandate that a health plan must provide mental health benefits.	N/A	ERISA § 712 29 CFR § 2590.712	ERISA does not provide specific penalties, but willful ERISA violations can carry criminal penalties up to 10 years in prison and \$100,000 fine.
	X	<b>Children's Health Insurance Program (CHIP) Notice</b>	Notifies employees of potential opportunities currently available in the State in which the employee resides for premium assistance under Medicaid and CHIP for health coverage of the employee or the employee's dependents. Employers that maintain a group health plan in a state that provides medical assistance under a state Medicaid plan or CHIP must distribute the notice.	Must be provided to participants upon enrollment and annually.**	ERISA § 701(f)  Model disclosure notices are updated periodically and may be found on the DOL web site	DOL may impose a penalty of \$100 per day for failure to comply.

\*Not applicable to limited scope dental and vision.

\*\* If an employer's next plan year begins between February 4, 2010 and April 30, 2010, the notice must be provided by May 1, 2010. If an employer's next plan year begins on or after May 1, 2010, the notice must be provided by the first day of the that next plan year (January 1, 2011

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for calendar year plans).

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	New Enrollee	Newly Eligible	Upon Request	Upon Plan Changes	Annually	Every 3 years	Every 5-10 Years	As Required
Plan Document			X					
Fidelity Bond					X			
Summary Plan Description (SPD)	X						X	
Summary of Material Modification (SMM)	X			X				
Form 5500					X			
Summary Annual Report (SAR)					X			
COBRA General Notice	X							
Certificate of Creditable Coverage			X					
Notice of Preexisting Condition Exclusion		X						
Notice of Special Enrollment Rights		X						
Women's Health Act Notice	X				X			
HIPAA Privacy Policies and Practices	X			X		X		
Notice of Creditable Coverage under Medicare Part D	X	X	X	X				X
Children's Health Insurance Program (CHIP) Notice	X				X			

### ERISA Bonding Requirement

Generally, ERISA § 412 requires every fiduciary of an employee benefit plan and every person who “handles” plan “funds or other property” to be bonded. For this purpose, “benefit plans” include welfare benefit plans such as insured health plans. Nevertheless, and as discussed in more detail below, in many cases insured health plans are exempted from the bonding requirement.

Department of Labor (DOL) regulations specifically refer to plan administrators, officers, employees, and other persons covered as the categories of individuals or entities that must be bonded if they handle plan funds or other property. It is unlawful for a person who should be bonded to receive, handle, disburse, or otherwise exercise custody or control of funds or property without being bonded. In addition, it is unlawful for a person who should be bonded to permit any other person who should be bonded to receive, handle, disburse, or otherwise exercise custody or control of funds or property without being bonded.

It should be noted that the type of bond required is commonly referred to as a fidelity bond, not fiduciary liability insurance. A fidelity bond provides coverage for plan assets from fraudulent acts of employees that could arise in the course of handling money or other securities, whereas fiduciary liability insurance protects personal assets of plan fiduciaries.

Whenever the Employee Benefit Security Agency (EBSA) audits a benefit plan, it requests a copy of the plan’s ERISA bond. ERISA bonds in a format required by EBSA are routinely provided as additional riders to general fidelity insurance policies maintained by employers.

### ***What Constitutes “Funds or Other Property” of the Plan?***

Under Department of Labor (DOL) regulations, the term “funds or other property of a plan” is broadly defined as “all property which is used or may be used as a source for the payment of benefits to plan participants.”<sup>2</sup>

Under DOL bonding regulations, employee contributions that are withheld from employees’ salaries and received by the employer are **not** considered “funds or other property” of the plan for purposes of the bonding rules, so long as they are retained in and are not segregated in any way from the general assets of the withholding employer. Salary withholding amounts become plan funds subject to bonding when:<sup>3</sup>

- They are taken from general assets and are placed in a special bank account or investment account;
- They are identified on a separate set of books and records;
- They are paid over to a corporate trustee; or

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<sup>2</sup> DOL Reg. § 2580.412-4.

<sup>3</sup> DOL Reg. § 2580.412-5(b)(2).

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- They are used to purchase benefits from an insurance carrier or other organization.

*Employers with insured plans usually are not subject to the bonding requirements for those plans. No bonding is required when premiums or other payments made to purchase benefits – including health benefits -- are paid directly from the employer's general assets to an insurance carrier.<sup>4</sup>*

### **What Constitutes “Handling” Funds?**

Bonding is required if and when plan funds are “handled,” regardless of the amount or value of the funds or property handled. “Handling” funds is defined broadly and may occur whenever a person has the ability to affect disposition of plan funds or property because of the person’s duties or activities. The duty or activity has to create a risk that the funds or property could be lost due to fraud or dishonesty on the part of the person acting either alone or in collusion with others. Such “risk of loss” duties and activities include receipt of funds and their safekeeping, signing checks, and authorizing or directing disbursements. Where no risk of loss exists or if the risk or loss is small because of the nature of the funds or property (e.g., checks or title papers that cannot be negotiated), or where financial controls, such as close supervision, are such that loss by fraud or dishonesty is unlikely, then the funds are not considered handled and bonding is not required.

In addition to the basic risk of loss standard, DOL regulations set out the following general criteria for determining when there is “handling” of funds so as to trigger the bonding requirement:<sup>5</sup>

- Physical contact with cash, checks, or similar property, except if clerical duties pose only negligible risk because of close supervision or due to the nature of the property;
- Power to secure physical possession of cash, checks, or similar property, including access to a safe deposit box or depository, access to cash or negotiable assets, powers of custody, safekeeping, or withdrawal;
- Power to transfer property such as mortgages, titles, or securities to oneself or a third party, or to negotiate such items for value;
- Power to disburse funds or other property by signing checks or other instruments and making cash disbursements, and, depending on an individual’s duties, the power to influence, authorize, or direct disbursements or the signing or endorsing of checks;
- Power to sign or endorse checks or similar instruments, including co-signers; and
- Exercise poses the risk of fraud or dishonesty.

### **Failure to Comply with Bond Requirements**

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<sup>4</sup> DOL Reg. § 2580.412-6(b)(7).

<sup>5</sup> DOL Reg. § 2580.412-6(b).

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The civil enforcement rules of ERISA may be invoked by a plan participant, a beneficiary, or the DOL to require bonding. In addition, if the failure to be bonded causes a loss to the plan, fiduciaries could be liable for the damages to the plan.