

Benefits Report

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Summary Plan Description Deadline Is Here

LISA N. BLEED

While the Department of Labor's ("DOL") regulations mandating the contents of summary plan descriptions ("SPDs") are not new, the final SPD regulations are now fully effective. Plans were required to comply with the new SPD content requirements no later than the first day of the second plan year beginning after January 20, 2001: January 1, 2003 for calendar year plans.

If you have not already done so, it is imperative that you review your SPDs to ensure that they contain all of the information now required under DOL Regulation § 2520.102-3. For your convenience, we are providing you with checklists of:

- The contents required in all SPDs;
- The contents specifically required in retirement plan SPDs; and
- The contents specifically required in welfare plan SPDs (including those contents that are specific to group health plans).

These checklists are provided to serve as a general guide to help you determine whether your SPDs comply with DOL Reg. § 2520.102-3, and are not intended to replace legal review of your SPDs.

The Basics

An SPD must be written in plain language that is "calculated to be understood by the average plan participant" (ERISA § 102(a)). Plan sponsors that maintain *one* document intended to serve as both the SPD *and* the plan document must make certain that the document is comprehensive enough to serve as the instrument governing the plan, while still being understandable to the

average participant (often a difficult balance to strike).

ERISA requires that the SPD be provided, without charge, to each participant covered by the plan and each beneficiary receiving benefits under the plan, generally within 90 days of becoming a participant or beneficiary. Whenever material modifications are made to the plan, the plan sponsor must provide either a revised SPD or a Summary of Material Modifications ("SMM"), within 210 days after the close of the plan year in which the changes were adopted. However, in the case of a group health plan in which there has been a "material reduction in covered services or benefits" an SMM must be provided within 60 days of the modification. Thereafter, an updated SPD must be furnished to plan participants and beneficiaries at least once every five years (ten years for plans that have not been amended).

If the lesser of 500 or 10% of the participants in a large plan (or 25% of the participants in a small plan covering less than 100 participants) are literate only in the same non-English language, the SPD must contain a notice in that non-English language offering language assistance with the contents of the SPD.

Contents Required in all SPDs

The following contents must appear in all SPDs, pursuant to DOL Reg. § 2520.102-3:

- The plan name, and the plan's common name, if different. For example, the formal plan name as filed on the Form 5500 may be "Company X Employee Health and Welfare Benefit Plan," though participants commonly refer to it as the "X Health Plan." In that case, both names must be included in the SPD.
- The name and address of the plan sponsor (the employer in the case of a single employer plan; a board of trustees, for example, in a collectively bargained plan).

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- The plan sponsor's employer identification number (EIN) and the plan number the sponsor has assigned to the plan (for example, 501).
- The date of the plan year end (the plan's fiscal year).
- The type of benefit plan (for example, cash balance plan or group health plan).
- How the plan is administered (for example, "contract administration" for a self-funded medical plan that is administered by a third party administrator ("TPA") pursuant to a contract between the TPA and plan sponsor, or "insurer administration" for a fully insured medical plan).
- The contact information for the plan administrator, including name, address, and telephone number. If no plan administrator is named in the plan documents, ERISA § 3(16)(A)(ii) deems the plan sponsor to be the plan administrator.
- Each plan trustee's contact information.
- The name and address for service of legal process on the plan, and a statement that "service of legal process may be made upon a plan trustee or the plan administrator" in addition to the agent for service of legal process.
- A description of any circumstances "which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. . . ."
- The terms by which the plan may be amended or terminated. The SPD must also describe any rights that plan participants or beneficiaries may have in the event of such amendment or termination.
- The source of contributions to the plan (for example, employer and employee contributions) and the "funding medium used for the accumulation of assets through which benefits are provided" (for example, the plan assets are maintained in a trust).
- The plan's procedures for making benefit claim determinations. Alternatively, the SPD may contain a statement that the claims procedures are furnished automatically, without charge, as a separate document.
- A statement of ERISA rights. A model statement is published in DOL Reg. § 2520.102-3(t)(2). When using the model, be sure to tailor it to your particular plan and delete the sections that do not apply.

Additional Contents Specifically Required in Retirement Plan SPDs

- Details regarding eligibility for plan participation and benefits.
- A description of the plan's normal retirement age.
- Either the plan's procedures for determining whether a domestic relations order is a qualified domestic relations order ("QDRO") or a statement that the plan's QDRO procedures are available, without charge, on request from the plan administrator.
- If the plan provides joint and survivor benefits, a description of those benefits.
- A statement that the benefits under the plan are (or are not) insured, and if they are insured, a statement that further information may be obtained from the Pension Benefit Guaranty Corporation ("PBGC"), along with the PBGC's address. A model statement for single-employer plans is provided in DOL Reg. § 2520.102-3(m)(3), and for multiemployer plans in DOL Reg. § 2520.102-3(m)(4).
- A description of any service required to participate, vest in and obtain benefits, and an explanation of any break in service rules under the plan.

Additional Contents Specifically Required in Welfare Benefit Plan SPDs

- Details regarding eligibility for plan participation and benefits.
- A description of the plan's benefits, or, if the schedule of benefits is extensive, a summary of the benefits and a statement that more details are available, without charge, upon request.
- Either the plan's procedures for determining whether a medical child support order is a qualified medical child support order ("QMSCO") or a statement that the QMSCO procedures are available from the plan administrator, without charge, upon request.

CONTINUED

Additional Contents Specifically Required in Group Health Plan SPDs

Group health plans are welfare benefit plans that provide “medical care,” as defined in ERISA § 733(a)(2); for example, medical, dental or vision plans. In addition to the content requirements described above for welfare benefit plans, group health plan SPDs must also contain the following:

- Any cost sharing provisions under the plan; for example, the participant’s share of the monthly premium, plan deductibles and copayments.
- Any benefit limits under the plan; for example, lifetime and annual benefit maximums, or a maximum number of visits for a particular service (e.g., two cleanings per calendar year in a dental plan).
- Any limits on preventive services.
- The circumstances under which new or existing prescription drugs and medical tests or procedures may be covered.
- A description of any coverage limitations for emergency services.
- For a plan that has a network of providers, a description of any limitations on the use of out-of-network providers or specialists, a description of the provider network, and a statement that a provider list is automatically furnished without charge as a separate document.
- If the plan is subject to COBRA, a description of the COBRA continuation coverage rights.
- If the plan is insured, the name and address of the health insurance issuer, and “the nature of any administrative services (e.g., payment of claims) provided by the issuer.”

A Final Consideration

Finally, and perhaps most crucially, while the SPD is intended only as a summary of the plan’s terms, the provisions of the SPD and the provisions of the plan document must be consistent. Courts have long held that the terms of the SPD will control when the SPD conflicts with the terms of the plan and is more favorable, since the SPD is the document provided to the participant, and is therefore the document on which the participant relies (see, e.g., *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985)).

More recently, a court held that where the terms of the plan are unambiguous and are more favorable to the employee than the SPD, the plan terms will control (*Bergt v. Retirement Plan for Pilots Employed by Markair, Inc.*, 293 F.3d 1139 (9th Cir. 2002)).

Department of Labor Issues Final Rules for Written Notice of Blackout Periods, Civil Penalties

EDWARD A. FRUEH

The Pension and Welfare Benefits Administration (renamed the Employee Benefits Security Administration as of February 3, 2003) of the Department of Labor has issued final rules requiring administrators of individual account plans to provide participants and beneficiaries 30-day advance written notice of blackout periods. Separate final rules were also released establishing procedures relating to the assessment of civil penalties for failure or refusal to provide a required blackout notice. The final rules were published in the January 24, 2003 Federal Register (68 Fed. Reg. 3715, 3728) and supersede the previously published interim final rules. The blackout period final rules modify the interim final rules in several key respects, but the civil penalties final rules adopt the interim final rules without significant changes. Both final rules were effective as of January 26, 2003.

Blackout periods generally occur when plans change recordkeepers, investment managers, or investment options or add new participants due to corporate transactions such as mergers or acquisitions. During a blackout period, participants typically are unable to direct or change assets credited to their account, take loans from the plan or obtain distributions from the plan. Section 306(b)(1) of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”) amended Section 101 of the Employee Retirement Income Security Act of 1974 (“ERISA”) to require that the administrators of individual account plans provide written notice to affected participants and beneficiaries in advance of the commencement of any blackout period. The blackout period final regulations implement this requirement. Section 306(b)(3) of the Sarbanes-Oxley Act amended Section 502 of ERISA to establish a new civil penalty for failure or refusal to provide the required blackout notice; the new civil penalties final regulations implement this provision of the Sarbanes-Oxley Act.

“Blackout Period” Final Rules

The blackout period final rules specify the required content of the written notice, which must include:

- an explanation of the reasons for the blackout period;
- the description of the rights affected and identification of the investments subject to the blackout period; (e.g., investment selection, loan requests, distributions);
- information setting forth the length of the blackout period; and
- a statement that participants should evaluate their current investment choices in light of their inability to make investment changes during the blackout period.

The final rules allow greater flexibility than the interim final rules did with respect to the requirement to provide information concerning the length of the blackout period. The interim final rules required that the written notice set forth the beginning and ending dates of the blackout period. As amended, the final rules allow the notice to specify the length of the blackout period by providing either the expected starting and ending dates of the blackout period or the expected calendar week during which the blackout period will begin and end, provided that during such weeks affected participants and beneficiaries have information that is readily available without charge as to whether the blackout period has begun or ended. Commentators, including ASPA, provided crucial analyses and comments to the Department of Labor, which led to the more flexible position in the final rules.

With respect to the timing of the required notice, the final rules provide that the notice must be furnished at least 30 days but not more than 60 days before the last date immediately before the blackout period on which affected participants and beneficiaries could take those actions which will be suspended during the blackout period. However, the final rules provide a useful clarification as to the meaning of the date on which a participant or beneficiary could take action: the 30 to 60 period is based on the last date on which affected participants and beneficiaries are able to act *and have their instructions implemented* prior to the beginning of the blackout period. Additionally, in view of the more flexible manner in which information concerning the length of the blackout period may be provided, the final rules specify that the timing of the notice must be calculated back from the earliest possible beginning date provided in the notice. Thus, if the blackout period is described as beginning during the calendar week of

March 30, March 30 will be the beginning of the blackout period for purposes of the 30 to 60 day timing requirement.

The final rules clarify that the notice is considered furnished on the date it is mailed if the notice is sent by first class mail, certified mail or express. If the notice is delivered by a private delivery service, it will be considered to have been furnished on the date of delivery. If the notice is sent by electronic means, the notice will be considered furnished on the date of transmission. The final rules also implement a suggestion made by ASPA that furnishing the notice to the last known address of a participant or beneficiary will be considered sufficient provided that the notice is delivered in one of the methods set forth in the final rules and the plan fiduciaries have taken reasonable steps to maintain records and locate missing participants and beneficiaries.

Other significant features of the final rules include a clarification of the interim rules to allow plan administrators to use a single notice to describe different blackout periods. This is a potentially significant change since different participant and beneficiary rights may be suspended for different periods of time during a blackout. A plan administrator may, for example, use a single notice for a 20-day blackout period for investment changes and a 15-day blackout period for loans, provided that the timing and all other requirements of the regulations are satisfied. Additionally, the Department of Labor provided in the final rules that the notice may contain other information not directly related to the blackout period. Both of these aspects of the final rules were suggested by ASPA.

The final rules also provide clarification of what constitutes a blackout. As under the interim final rules, a limitation, restriction, suspension or change that is regularly scheduled under the plan is not a blackout, provided that the limitation, restriction, suspension or change is disclosed to affected participants and beneficiaries in the summary plan description, summary of material modifications or other plan materials. However, the final rules and the preamble to the final rules clarify that a blackout period excludes limitations, restrictions or suspensions caused by a participant's action or by a third party's action affecting an individual participant's account. Accordingly, if a participant's account is frozen because of a qualified domestic relations order or a tax levy, the resulting suspension of certain rights does not constitute a blackout under the regulations. Moreover, the blackout rules do not apply to a plan change which eliminates certain rights. If additional rights are temporarily suspended during the process of implementing the elimination of other rights, however, the temporary suspension of the additional

rights does constitute a blackout. Accordingly, if an amendment to a plan eliminates a specific investment option, the elimination itself does not result in a blackout. If in the course of eliminating the specific investment option, however, the right of participants to change any of their other investment options is temporarily suspended, the temporary suspension is a blackout and the plan administrator must give appropriate notice.

Under the final rules, restrictions on trading employer securities do not result in a blackout provided the restrictions are regularly scheduled, described in appropriate plan materials and disclosed to affected participants and beneficiaries.

A plan administrator must give notice to the issuer of any publicly traded employer securities held by the plan and subject to the blackout period. The administrator may satisfy this obligation by using the same notice furnished to affected participants and beneficiaries. The final rules changed the interim rule to provide that the special notice to the issuer is not required if the issuer of the employer securities is the same as the plan administrator. This change was suggested by ASPA in order to relieve the plan administrator of the duty of notifying itself.

Civil Penalties Final Rules

The civil penalties final rules adopted the interim final rules essentially without any change except for certain technical modifications necessary to comply with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

The final rules impose civil penalties for failure or refusal to provide the required blackout notice. The maximum amount assessed will be \$100 (as adjusted for inflation) per day for *each* affected participant or beneficiary (or issuer of employer securities) to whom the required notice is not provided. The penalty is computed from the date of the administrator's failure or refusal to supply the notice up to and including the final day of the blackout period.

FIRM NEWS

Brad Huss will speak at the 2003 Spring Seminar being held by the Portland Chapter of the Western Pension & Benefits Conference on April 16 at the Oregon Convention Center. His topic will be *Recent ERISA Class Action Litigation—Why Should You Worry and What Should You Do*.

Nicole Diller will be a Reporter at the ABA Joint Committee on Employee Benefits 2003 Government Invitational Conference for the session on *Claims Procedure Regulations—Implementation Issues and Impact on Benefits*. The conference will be held on April 11 at the Harbor Court Hotel in Baltimore.

Karen Ng will speak on *Basic Administration* on the opening day of the 2003 ESOP Association Annual Conference, which will be held from April 30 through May 2 at the Omni Shoreham Hotel in Washington D.C.

Tiffany Santos will speak at a one-day seminar on *Fundamentals of Health and Welfare Benefits* sponsored by the Northern California Chapter of the International Society of Certified Employee Benefit Specialists on April 3 at the Marines' Memorial Club in San Francisco. The topic of Tiffany's session is *Flexible Compensation*.

Ronald Triche was a member of a panel at a free workshop entitled *Your Retirement Plan...What to Do Now?*, sponsored by UBS PaineWebber in San Francisco on March 20. Ronald was responsible for the portion of the workshop relating to the new retirement plan legislation before Congress.

Many of you will by now have met our new receptionist, **Lisa Adams**, who came to us through the Legal Employment Action Program, a program jointly sponsored by Jewish Vocational Service and the San Francisco Bar Association. Lisa has been named as the JVS Employee of the Year. She will accept her award and address the gathering at the *JVS Strictly Business 2003 Awards luncheon* on April 8 at the San Francisco Hilton in San Francisco.

The **Trucker ♦ Huss Benefits Report** is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ♦ Huss web site (www.truckerhuss.com). *Editor: Jim (Telk) Elkus email: jelkus@truckerhuss.com*

TRUCKER ♦ HUSS

A PROFESSIONAL CORPORATION

ERISA AND EMPLOYEE BENEFITS ATTORNEYS

120 Montgomery Street, 23rd Floor San Francisco, California 94104-4326
Telephone: (415) 788-3111 Facsimile: (415) 421-2017 Email: info@truckerhuss.com www.truckerhuss.com

TRUCKER ♦ HUSS

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Lisa N. Bleed

lbleed@truckerhuss.com
(415) 277-8056

Elizabeth L. Groenewegen

egroenewegen@truckerhuss.com
(415) 277-8038

Tiffany N. Santos

tsantos@truckerhuss.com
(415) 277-8039

Julie Burbank Coleman

jburbank@truckerhuss.com
(415) 277-8046

R. Bradford Huss

bhuss@truckerhuss.com
(415) 277-8013

Benjamin F. Spater

bspater@truckerhuss.com
(415) 277-8011

Barbara B. Creed

bcreed@truckerhuss.com
(415) 277-8036

Yana S. Johnson

yjohnson@truckerhuss.com
(415) 277-8014

Charles A. Storke

cstorke@truckerhuss.com
(415) 277-8018

Nicole A. Diller

ndiller@truckerhuss.com
(415) 277-8015

Becky Kukuk

bkukuk@truckerhuss.com
(415) 277-8019

Ronald J. Triche

rtriche@truckerhuss.com
(415) 277-8016

Keith A. Dropkin

kdropkin@truckerhuss.com
(415) 277-8017

Karen D. Ng

kng@truckerhuss.com
(415) 277-8012

Lee A. Trucker

ltrucker@truckerhuss.com
(415) 277-8020

Edward A. Frueh

efrueh@truckerhuss.com
(415) 277-8053

Mary E. Powell

mpowell@truckerhuss.com
(415) 277-8045

Deborah Judith Wiener

dwiener@truckerhuss.com
(415) 277-8037

LEGAL ASSISTANTS

Jim (Telk) Elkus

jelukus@truckerhuss.com
(415) 277-8044

Susan M. Quintanar

squintanar@truckerhuss.com
(415) 277-8048

TRUCKER ♦ HUSS

A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS

120 Montgomery Street, 23rd Floor
San Francisco, California 94104-4326
Telephone: (415) 788-3111 Facsimile: (415) 421-2017
Email: info@truckerhuss.com
www.truckerhuss.com
