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Compliance Directions

Post Annual Enrollment Check-in: Plan Amendments and Participant Notifications

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Employers that have gone through annual enrollment now have the task to review and process elections, confirm contributions, ensure proper notices and communications have been sent, and so on. However, one item that may be overlooked is properly amending plan documents to account for changes made for the following plan year.

Written Plan Documents and SPDs

Employers subject to the Employee Retirement Income Security Act (ERISA) are required to maintain written plan documents and summary plan descriptions (SPDs) for its sponsored ERISA benefits.

With respect to cafeteria plans, Code Section 125 requires an employer that allows pre-tax deductions toward those benefits to have a written plan document in place. The cafeteria plan regulations have a separate set of content requirements, though some overlap with the ERISA requirements. Failure to have a written cafeteria plan document in place can disqualify the employer from taking any elections on a pretax basis prospectively and retroactively.

Gallagher Resource: Understand the functional difference between a cafeteria plan document and an ERISA plan document by reviewing this article.

Generally, the written plan document is for plan administrators to administer the plan. It will contain provisions that describe functions of the plan, such as plan administrator duties, funding, coordination of benefits, subrogation, claims administration, prohibition on assignments, and general compliance with applicable federal laws. Plans that use a wrap plan document will generally include a provision incorporating by reference the underlying carrier or TPA booklets.

Conversely, the SPD is a participant communication describing benefits offered under the plan, such as eligibility, enrollment information, funding, contact information, claims administration, and their rights and obligations under the plan, including any notice requirements for continuing coverage.

Gallagher Resource: Review That's a Wrap visual aid to see how wrap documents can assist with ERISA compliance.

Amendments

Amendments to plan documents are generally required anytime there is a change to the terms of the plan. This can include changes in benefits (e.g., adding or removing benefits, cost changes, carrier changes, etc.), changes in eligibility, new documentation requirements, or modifications to clauses (e.g., adding or modifying an anti-assignment clause). However, not all plan documents are created equal. While all ERISA plans and those that sponsor cafeteria plans are subject to same regulatory content requirements, the language used in the plan documents may not be the same. Plan details and language can vary from hyper-specific to ambiguous, and the determination of whether an amendment is required is dependent on how a plan document was drafted and how the plan operates.

For example, some plan documents include actual premium amounts for the various benefits offered under the plan. If premiums change year to year, the plan should be amended every year. On the other hand, a plan document that does not include premium amounts, an amendment may not be necessary. However, this could still trigger an SMM or SMR (discussed further below).

Properly amending the plan generally relies on a few key factors: 1) the plan sponsor has reserved the right to amend the plan (a provision written into the plan document), 2) the amendment is a written, formal action that follows plan procedures, which includes following corporate bylaws or business operating agreements, and 3) the amendment does not affect benefits that may be considered "vested." For example, retroactively amending the plan to exclude a certain treatment or treatment plan in which participants have already incurred medical costs. In this example, the plan may still be required to pay benefit costs for a participant mid-treatment or participants who incurred the cost of treatment but who claims had not yet been submitted to the plan.

Cafeteria plans amendments are generally required to be adopted before the effective date of the amendment. Thus, retroactive amendments are generally not permitted unless guidance is provided by the IRS.

Note: The person that signs the amendment must have the authority to do so. If it is signed by a person without proper authority, it can invalidate the amendment.

SMMs and SMRs

ERISA requires plan administrators to provide a summary of material modification (SMM) or summary of material reduction (SMR) when there is a material modification to the terms of the plan or change to the information in the SPD. The disclosure describes the change and must be delivered by certain deadlines. Whether a change is "material" is based on the facts and circumstances; however, plan administrators should err in favor of providing the SMM or SMR for any plan changes to ensure that participants are informed about their rights and obligations. An SMR is triggered when there has been a material reduction in benefits or a restriction put in place under the plan (e.g., prior authorization, increased coinsurance, increasing hours threshold for benefits eligibility). SMRs have a shorter delivery deadline from the date the plan adopts the change, so plan sponsors should be prepared to send out SMRs as soon as possible.

Gallagher Resources:

- Identify common plan changes that can trigger an SMM or SMR
- Revisit our Benefits Boost on Summarizing Delivery Deadlines

Action Steps

Plan changes generally occur every year in today's world, and those annual actions could trigger plan amendment procedures. Plan sponsors should review the changes taking place for the upcoming year and determine whether they need a plan amendment, SMM, or SMR. Some of these changes may also require distributing an updated Summary of Benefits and Coverage. Work with legal counsel specializing in ERISA to review plan documents and draft necessary amendments.

The intent of this article is to provide general information on employee benefit issues. It should not be construed as legal advice and, as with any interpretation of law, plan sponsors should seek proper legal advice for application of these rules to their plans.