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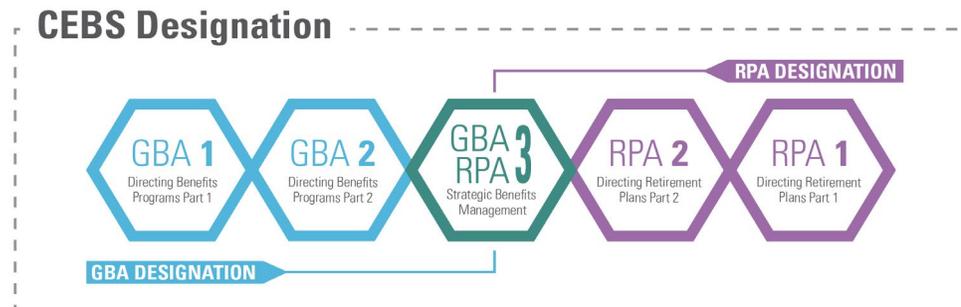


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Don't Forget to Renew your Membership!

- **Join the Society for \$150**
- **DFW Chapter Dues are \$50**
- **Member benefits include ISCEBS 360 and more!**



ISCEBS—Here to Support You

Join Today

International Society
of Certified Employee Benefit Specialists



Dallas/Fort Worth Chapter



Legislative Update

Scott C. Thompson, Counsel

Haynes Boone

Legislative Update

International Society of Certified Employee Benefits Specialists: DFW Chapter

Scott C. Thompson
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August 11, 2022

haynesboone

Retirement Plans

- IRS Extends Certain Amendment Deadlines
 - Was December 31, 2022 (calendar year plans)
 - Extended to December 31, 2025, as follows:
 - All SECURE Act related amendments
 - Waiver of 2020 RMDs under the CARES Act
 - Bipartisan American Miners Act, permitting plans to permit in-service distributions at age 59½
 - Did not affect amendments for things such as coronavirus-related distributions and plan loans
 - Doesn't change requirement to administer plans in accordance with the new statutes, to the extent applicable
 - Notice 2022-33

Retirement Plans

- New IRS Pre-Examination Compliance Pilot Program
 - Once notified of audit, 90 days to review plan documents and operations:
 - Notify IRS and correct issues under EPCRS:
 - SCP (no penalty) or
 - VCP (fixed penalties)
 - IRS then reviews and either agrees (closing letter) or disagrees (further limited or full-scope audit)
 - If no response to IRS during 90-day window:
 - Full-scope audit
 - Correct issues under EPCRS: Audit CAP only
 - Negotiate penalties that are typically much larger than under VCP
- Effective June 2022

Health and Welfare

- SCOTUS: Limited Dialysis Coverage Doesn't Violate Medicare Secondary Payer (MSP) Rules
 - Dialysis provider sued employer group health plan because it only paid limited benefits for dialysis treatment
 - MSP Rules: Group health plan can't:
 - Offer different benefit levels for individuals with end stage renal disease; or
 - Consider whether the individual is Medicare eligible for benefit purposes
 - SCOTUS: Practice not prohibited because it applies to dialysis treatments regardless of whether related to end stage renal disease or not (...but who else relies on dialysis?)
 - *Marietta Memorial Hosp. Employee Health Benefit Plan v. DaVita Inc.*

Dallas/Fort Worth Chapter



Today's Speaker & Topic

Christine Robbins, Senior Advisor for Health Investigations

U.S. Department of Labor, Employee Benefits Security Administration (EBSA)

"What to Expect During an EBSA Health Plan Investigation"

WHAT TO EXPECT FROM A HEALTH PLAN INVESTIGATION



United States Department of Labor
Employee Benefits Security
Administration

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

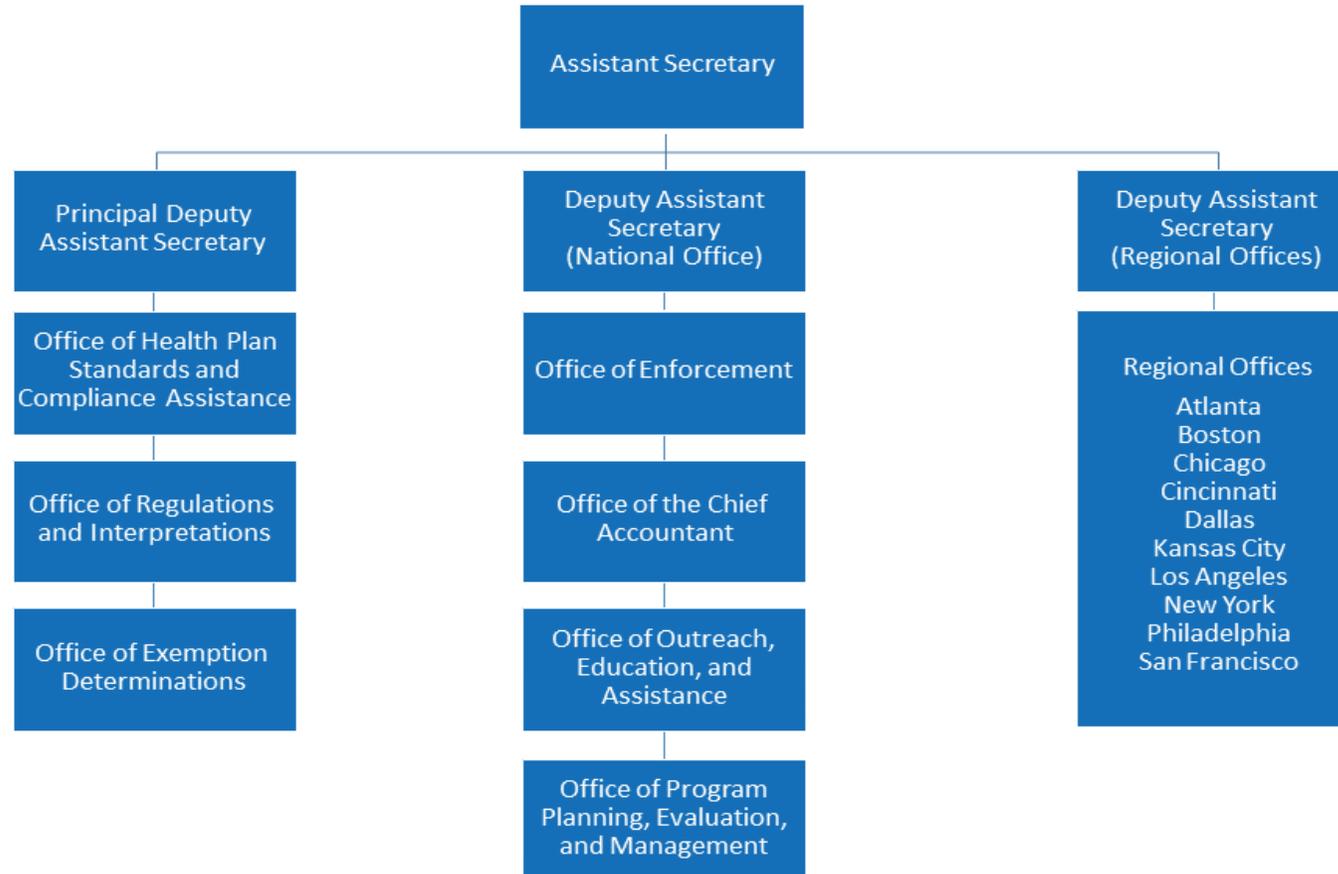
**The Employee Benefits
Security Administration
(EBSA)**

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

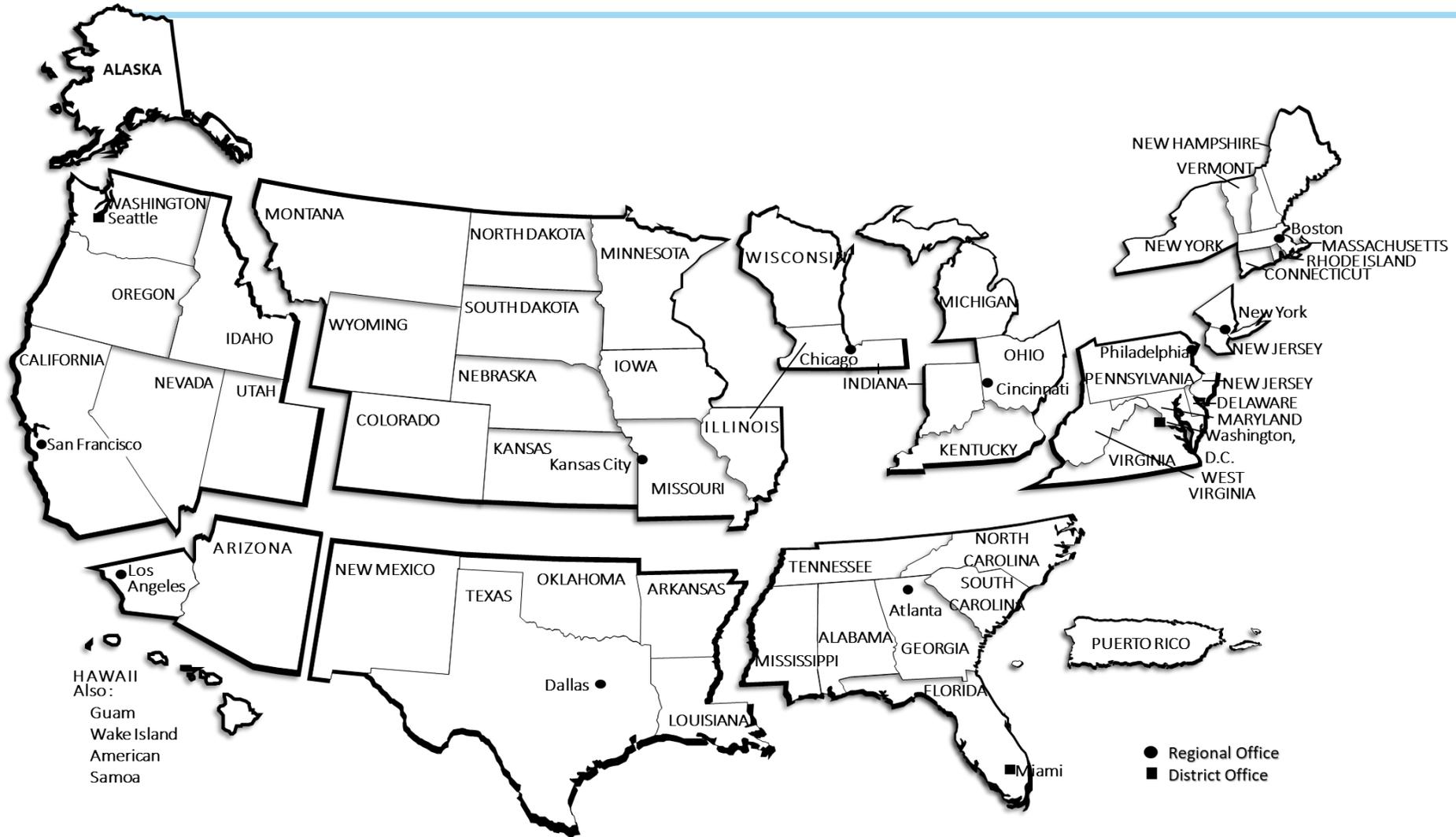
NATIONAL OFFICE

- 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



EBSA Enforcement Strategy

Department of Labor Strategic Plan 2018-2022

- This outlines the strategies the Department uses to guide the agency mission

EBSA Strategic Enforcement Plan

- Last published in 2000, the primary purpose is to establish a general framework through which EBSA's enforcement resources may be efficiently and effectively focused to achieve the agency's policy and operational objectives

National Enforcement Projects

- Published annually and publically available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement>

ERISA Basics for Group Health Plans

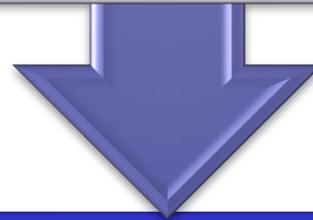
Employee Retirement Income Security Act (ERISA)

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

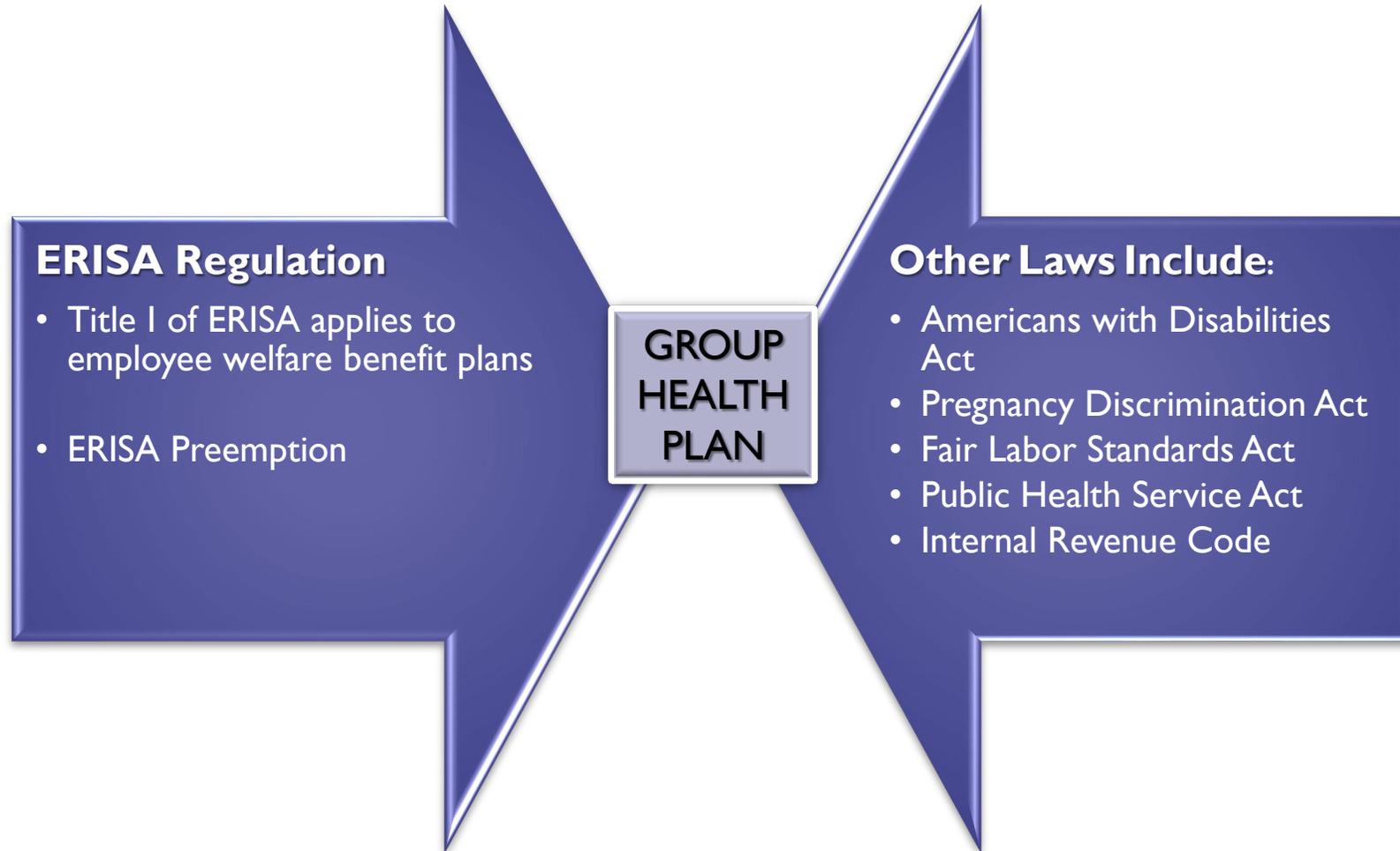
A Summary Plan Description (SPD) provided to participants and beneficiaries

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

Consolidated Omnibus Budget Reconciliation Act (COBRA)

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)

Mental Health Parity and Addiction Equity Act (MHPAEA)

Children's Health Insurance Program Reauthorization Act (CHIPRA)

Michelle's Law

Patient Protection and Affordable Care Act (Affordable Care Act)

Enforcement and Jurisdiction

Department of Labor

- ERISA

**Department of Health
and Human Services**

- Public Health Service Act

**Department of
Treasury**

- Internal Revenue Code

States

- State Insurance Laws

**Participants and
Beneficiaries**

- Private litigation

Enforcement and Jurisdiction

Department of Labor's Enforcement Role

- DOL is responsible for enforcing the requirements of Title I of ERISA with respect to employment-based group health plans

Enforcement and Jurisdiction

Role of the States

- States have direct jurisdiction over health insurance issuers that sell products in their state.
- Group health plans frequently purchase health insurance products from licensed health insurance issuers. Generally, these products are reviewed for compliance by the state insurance department; however, not all issuer's products undergo market conduct exams.

Enforcement and Jurisdiction

Department of Health and Human Service's Role

- Generally, the states enforce state laws that place requirements on issuers. These provisions of these state laws must be at least as protective as ERISA part 7 and the Public Health Service Act (PHSA).
- However, if HHS determines that a state has failed to “substantially enforce” its parallel laws, HHS can directly enforce the PHSA with respect to health issuers in that state.
- HHS may also be invited in by the state to enforce in that state

Enforcement and Jurisdiction

Department of Treasury's Enforcement Role

- Treasury enforces most of the requirements of the ERISA health laws through parallel Internal Revenue Code provisions.
- Treasury may impose an excise tax on plans or employers that fail to comply with these health laws

Enforcement and Jurisdiction

Participants and Beneficiaries

- ERISA 502(a) - Participants and beneficiaries also have a private right of action to enforce their rights against plans and issuers

ERISA Reporting and Disclosure for Group Health Plans

Reporting Requirements

- Certain group health plans must file the Annual Report (Form 5500)
- 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

COBRA Premium Assistance under the American Rescue Plan(ARP)

- §9501 of the ARP provides for COBRA premium assistance to help “Assistance Eligible Individuals” continue their health benefits.
- These individuals are not required to pay their COBRA continuation coverage premiums.
- This assistance applies to periods of health coverage on or after April 1, 2021 through September 30, 2021.
- An employer or plan to whom COBRA premiums are payable is entitled to a tax credit for the amount of the premium assistance.
- FAQs and Model Notices for Employers can be found on the Department’s website:
<https://www.dol.gov/cobra-subsidy>

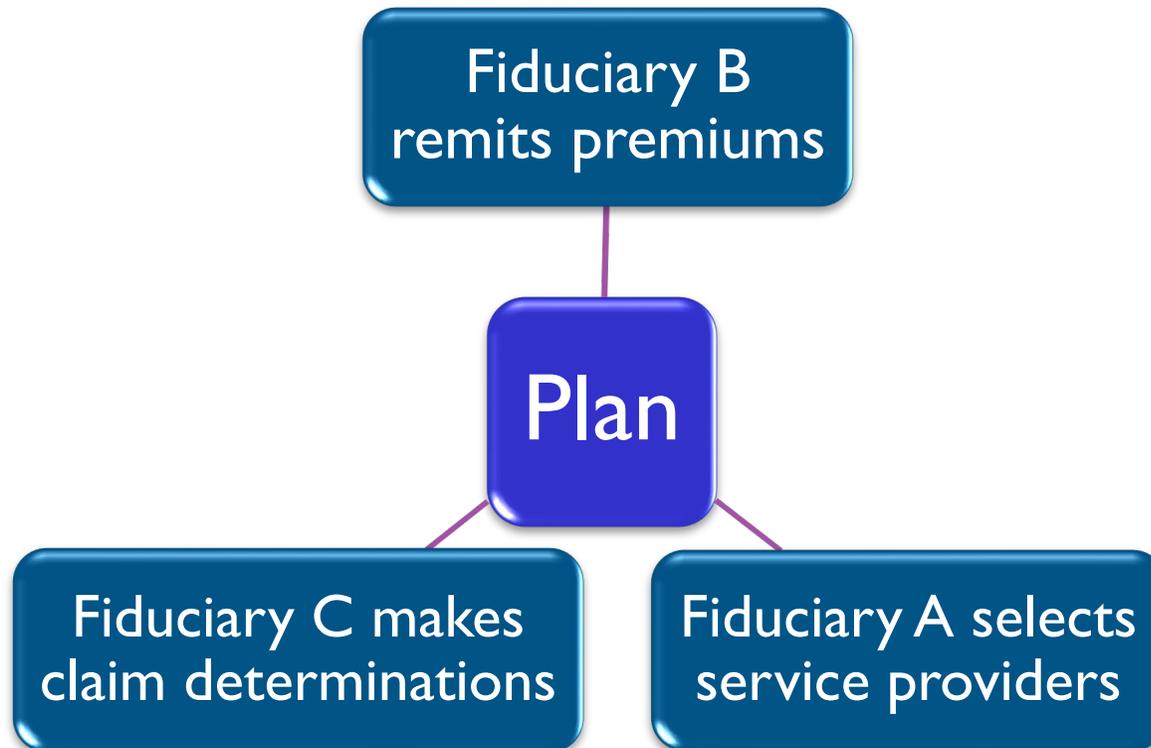
A Fiduciary is any person

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.

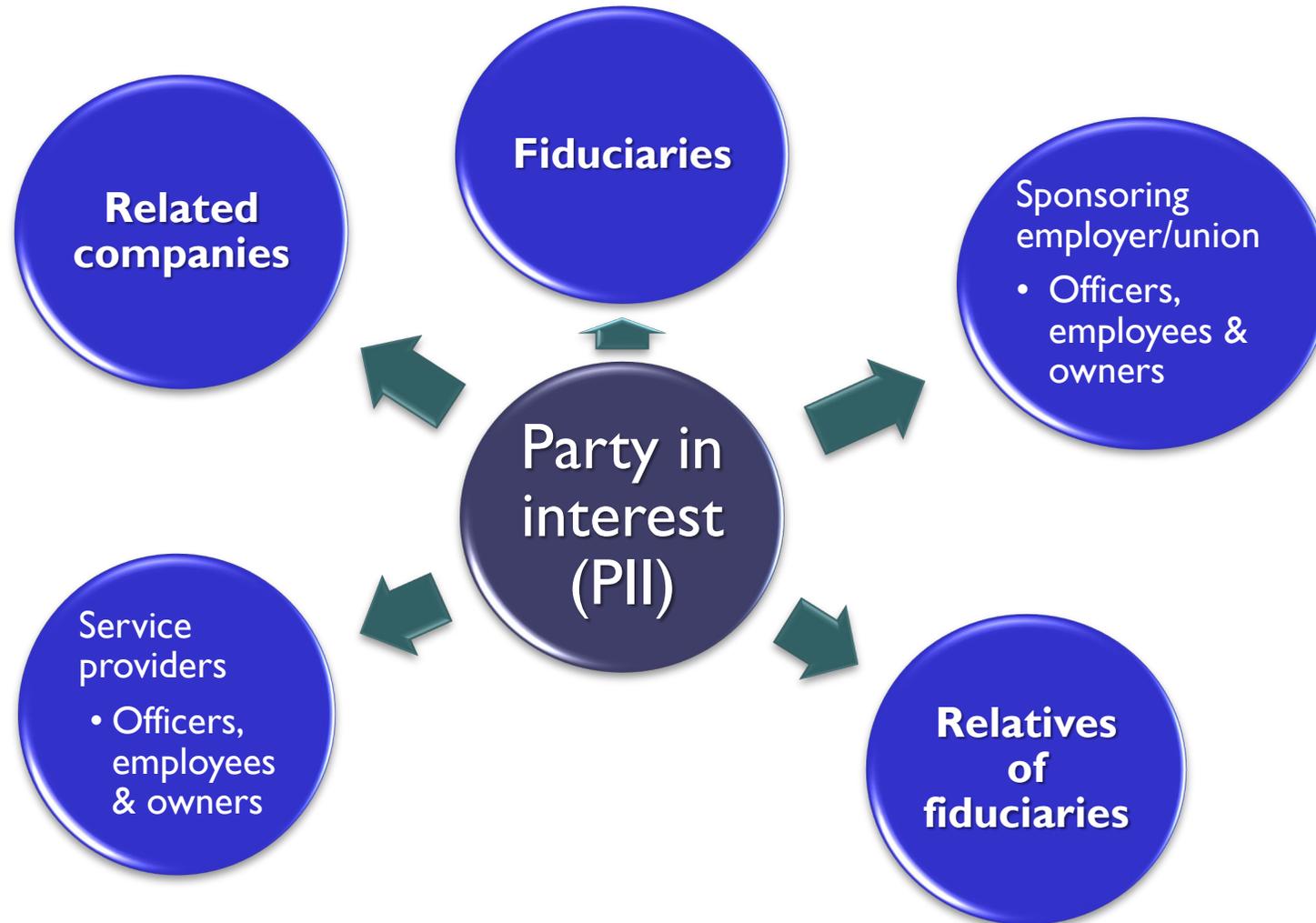
A Fiduciary must NOT:

- 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)

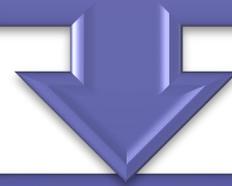
Fiduciaries must NOT cause the Plan to engage in a prohibited transaction such as:

- Sale or exchange of plan assets with party in interest (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

Parties in Interest



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(l) 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

**The Plan
Sponsor**

**A Service
provider**

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

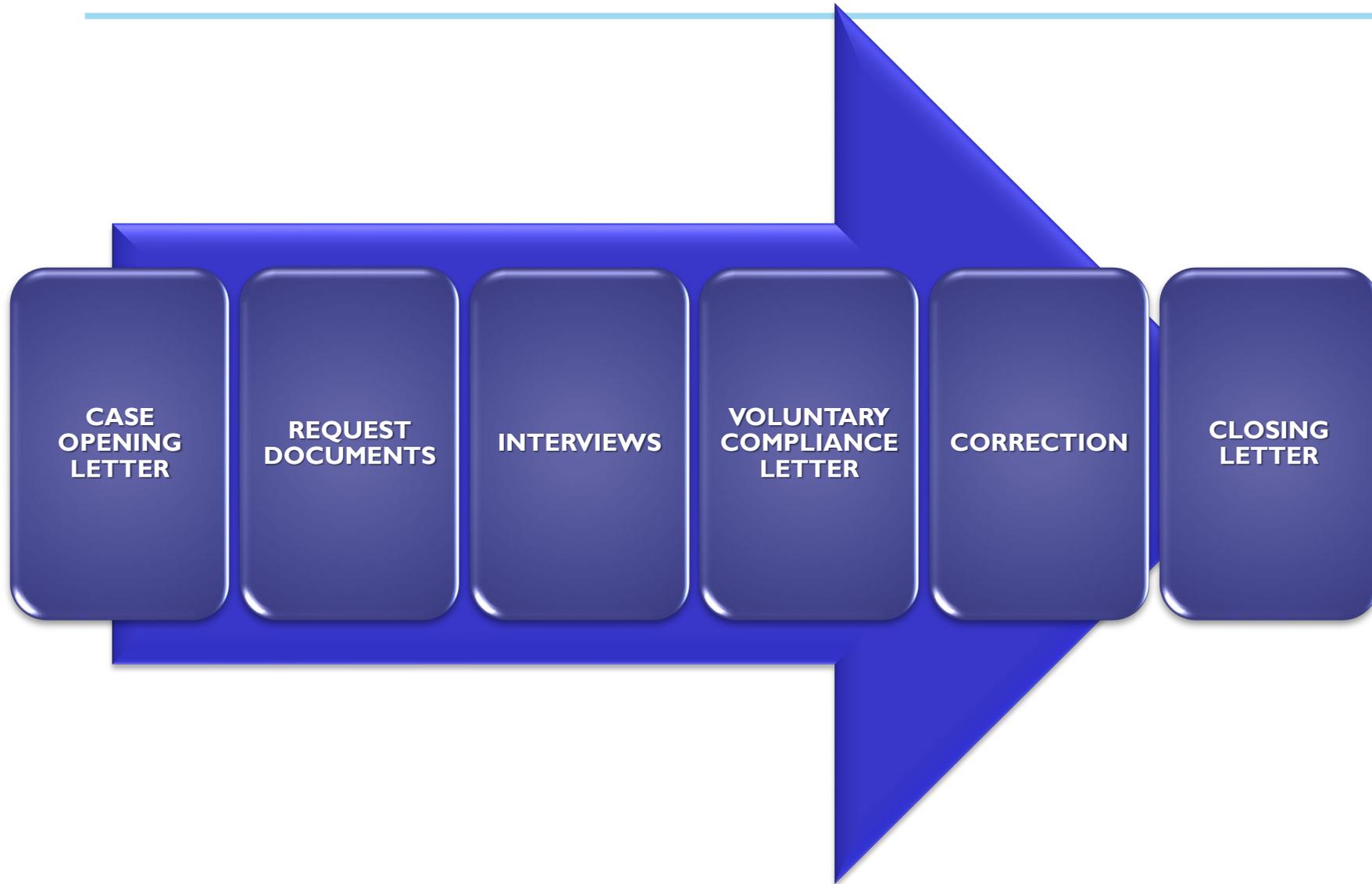
- Comprehensive national initiatives which focus on areas of harm identified in previous investigations. The areas of focus for Fiscal Year 2021 include four categories: mental health parity, emergency services, service provider self-dealing, and MEWA financial solvency.
- Includes a broad range of investigative 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



Initial Investigative Steps

Determine basic operations of health plan

- Insured/self-insured?
- Service providers
- Contributions/premiums
- Claims process and benefit payments
- Compliance with Part 7 of ERISA



Document review

- Ensure all requested documents have been made available
- Arrange for access to any additional documents required
- Arrange for additional interviews

Basic Health Plan Documents

- Plan document / SPD / Certificate of Coverage
- Summary of Benefits and Coverage (SBC)
- Service provider contracts
- Premium or contribution schedules
- Documents related to plan finances
- Claims Data and Claims Files
- Claims Adjudication Policies and Guidelines
- Participant notices required by ERISA
- Other documents related to ERISA compliance

Subpoenas

- ERISA grants DOL (EBSA) the power to “enter such places, inspect such books and records and question such persons ... as deemed necessary”
- DOL (EBSA) has the authority to issue subpoenas requiring the production of documents or testimony

Findings and Follow-Up

- Speak with plan sponsor and service providers to clarify plan terms to determine if violations of the health laws or other systemic problems exist
- Determine the extent and impact of harm to participants and beneficiaries due to violations
- Determine the most appropriate action to take to correct the problem
- Work with service provider (if applicable) to make global corrections for all affected plan clients

Voluntary Compliance Letter

- Identifies problems
- Offers chance to discuss corrective action
- If corrective action is not taken, potential referral to the Solicitor's Office

Closing Letter

- Identifies problems & corrective actions taken
- Indicates the case is closed

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 P's and B's 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):
1-866-GO EFAST (1-866-463-3278)

Form M-1 Filings:

<http://www.askebsa.dol.gov/mewa/> or call the
Form M-1 Help Desk at 202-693-8360

Compliance Assistance

Office of Health Plan Standards & Compliance
Assistance
(202) 693-8335

Office of the Chief Accountant
(202) 693-8360

Office of Regulations & Interpretations
(202) 693-8500

Office of Exemption Determinations
(202) 693-8540

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
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guidance and events

Dallas/Fort Worth Chapter



Reminders

➤ Like and Follow our new LinkedIn Page

<https://www.linkedin.com/company/dfw-iscebs-chapter/>

➤ Join us next month for our webinar: *Structuring Non-Qualified Deferred Compensation (NQDC) Plans* with speaker Traci Clements

Thursday, September 8, 2022 12pm – 1pm

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Be recognized for the professional education you complete
to stay up-to-date

30 credits over two calendar years to be compliant

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