

Health and Welfare Plan Documents

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ERISA provides that every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

Exactly what constitutes a “written plan instrument” can be debated. There are certain provisions that are required to be in a plan document and certain provisions that are wise to have in a plan document and others that have historically been included. The style of a health and welfare plan will vary according to the drafter.

You should have a written plan document for each ERISA welfare benefit plan (refer to Worksheet 1). Most self-insured plans have a plan document. Most plan sponsors with insured plans think they have a plan document. Arguably, insured plans have a written instrument, typically a combination of the insurance policy between the plan sponsor and the insurance company and a booklet/certificate issued to participants. In many cases, the combination policy and booklet/certificate do not technically satisfy the requirements of an ERISA plan document.

There is no specific dollar penalty for not having a plan document. However, you should keep in mind that it is an ERISA requirement and failure to comply can have serious consequences.

You should review your plan documentation (insurance policy and booklet/certificate) against the following ERISA requirements:

ERISA section	Provision
402(a)	<p>(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.</p> <p>(2) For purposes of the title, the term “named fiduciary” means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.</p>
402(b)	<p>Every employee benefit plan shall----</p> <p>(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of</p>

	<p>this title,</p> <p>(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1)),</p> <p>(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and</p> <p>(4) specify the basis on which payments are made to and from the plan.</p>
402(c)	<p>Any employee benefit plan may provide-----</p> <p>(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);</p> <p>(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1), may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or</p> <p>(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.</p>
403(d)(2)	<p>The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan.</p> <p><i>Note: a plan that is fully insured (benefits are provided through an insurance contract) or unfunded (benefits are paid directly from employer's general assets) or a combination of both has no "plan assets" as that term means in ERISA.</i></p>
405(c)(1)	<p>The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.</p>

Group Health Plans also should include the following language relating to:

- COBRA
- HIPAA
 - portability
 - special enrollment
 - nondiscrimination
 - privacy and security
- Minimum stay after childbirth

- WHCRA
- QMSCO- ([Qualified Medical Child Support Order](#))
- Health Care Reform (as required)

Other provisions that are often included in plan documents include:

- Use of plan assets to pay expenses
- No contract of employment
- No guarantee of tax consequences
- Subject to state law, preemption by federal
- Subrogation and COB (coordination of benefits)
- Plan Administrator has the discretionary right to interpret plan provisions. Determinations by the plan administrator are binding on all parties (this language should be in SPD too)
- Language reserving the right to amend or terminate plan provisions and benefits
- Claims procedures even if in SPD.

Plan documents must be furnished within 30 days after receipt of a written request. In addition, the plan administrator must make copies available at its principal office and other locations as prescribed in the regulations.

Compliance Tip: The insurance policy and certificate/booklet may contain some of this information but rarely contains all the information. Many plan sponsors supplement the insurance policy with a “wrap plan document” which contains the missing information. For plan sponsors with multiple benefit offerings, the use of a wrap plan document provides evidence that the plan sponsor views the benefit program as one plan with different components and supports one Form 5500 filing.

Other plans requiring written plan documents

Specific Code sections relating to health and welfare plans require written plan documents. We mentioned previously that all ERISA plans require a written plan document and that cafeteria plans and DCAPs were not considered ERISA plans. However, the Code requires a written plan document for both! The following are common plans for which the Code requires a written plan document:

- §125 Cafeteria plan
- §127 Educational Assistance Plan
- §129 Dependent Care Assistance Plan
- §137 Adoption Assistance Program
- HRAs