

Welfare Wraps - Why and How to Wrap ERISA Welfare Plans Webcast Q&As

December 5, 2013

Housekeeping:

Q: Where can I print the slides? Was the webcast recorded?

The recording, the slides and this Q&A can be found at <https://www.ftwilliam.com/webinar.html> under "Past Webinars".

Q: Is there any way to see how a document is actually created in the system? Like to see how questions should be answered and what the final document looks like.

Yes, please go to ftwilliam.com and click on "Demo" (top of page) or contact sales@ftwilliam.com.

Q: You mentioned providing a link to the ERISA SPD requirements?

SPD contents can be found @: <http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol9/pdf/CFR-2011-title29-vol9-sec2520-102-3.pdf>

Wrap Set-up In General

Q: If you don't have a Wrap Doc, how can the Plan Sponsor prove that to the DOL in the case of an audit?

The sponsor would be left trying to prove the welfare plan arrangements are one ERISA welfare plan according to the facts and circumstances. Obviously, it is much easier to point out a written document that establishes this.

Q: [A]ny issue with creating a wrap plan mid year for a calendar year plan i.e. what if you create the wrap plan on April 1 or July 1[?]

There is no guidance on point here. Qualified plans can be created mid-year and be effective the first of that same year but contributions to the plan cannot occur until after the document is established.

Q: Does [a]wrap plan need to be signed by a certain time - ie before the plan year starts, or before the 5500 filed, or when?

No guidance on point. The most conservative approach is to sign the wrap before the plan year starts.

Q: If we have already filed 5500s for some of the wrapped plans, but now want to retroactively wrap the plans for those years (and prior years), should we amend the prior filings or just file?

It is not clear that you can retroactively wrap a plan - particularly if 5500s have already been filed for those prior years.

Q: Can a Cafeteria plan SPD simply state "the employer also intends, for purposes of the annual report requirement (Form 5500), this document is considered a "wrap" plan and the terms of the underlying plans are incorporated by reference"?

I think it would be better to have the cafeteria *plan document and SPD* state this (the 5500 instructions reference a plan document). This is perfectly acceptable assuming you do not want/need the other potential benefits of having a larger wrap document that defines rules applying to all the wrapped parts.

Q: In the wrap document, do you recommend that we refer to the employer by name or as Plan Sponsor/Plan Administrator?

Our checklist simply has an option of "Plan Sponsor" to define the plan administrator.

Q: [W]hy would FMLA language need to be in the wrap plan when it is a law and not a benefit offered by the employer?

I am not saying FMLA language is required in the wrap plan document. The FMLA language in our wrap is quite general and broad and simply states that if FMLA applies, it will apply.

Q: Would there be additional requirements in a wrap that is being used for a MEWA plan?

I am not aware of anything in particular that is specific to MEWAs that would be required in the wrap document. Our document does have language that allows other employers to adopt the plans. If the plan is funded, then the disclosures for trust agreements would apply. There are some specific SPD disclosures for multiple employer plans, however.

Q: Is it possible to create a wrap plan that more than one employer participate in/adopt? Pros/Cons?

A major disadvantage of wrapping multiple employer welfare arrangement is the Department of Labor's generally unfavorable view due to past abuses.

Q: If one plan is an ASO[Administrative Services Only] and was erroneously included in wrap plan, would you include it in the 5500 [?]

You should only include in the 5500 what is required under the filing requirements for the plan as a whole. The 5500 instructions state in part "**Note.** Do not file Schedule A for Administrative Services Only (ASO) contracts. Do not file Schedule A if a Schedule A is filed for the contract as part of the Form 5500 filed directly by a master trust investment account (MTIA) or 103-12 IE."

Q: If you don't amend the wrap document for GINA,HITECH, etc.,then do you amend the underlying documents to comply with the new applicable laws?

The underlying contracts may or may not need amendments. Do the underlying contracts have provisions that conflict with GINA or HITECH? I was trying to point out in the webcast that a broad statement that GINA/HITECH apply is not required under either GINA or HITECH.

Q: If wrap plan was drafted over 5 years ago and never amended, do you recommend drafting a new wrap?

It's hard to say. It would require looking at the wrap to see if it conflicts with current laws. It may be simpler to restate.

Subsidiary Contracts

Q: How do you wrap in a wellness plan?

You could mention the plan by name or, assuming it is an ERISA welfare arrangement of the employer, it will be wrapped if you select to wrap all ERISA welfare arrangements of the employer.

Q: Would we want to include a retiree only plan in the wrap, or would that make it NOT an excepted benefit?

Wrapping an excepted benefit will not make that benefit subject to HIPAA Portability. The benefit is very likely already subject to ERISA so I would generally recommend including it in the wrap.

Q: What is your recommendation regarding wrapping "voluntary" plans (that may not be welfare plans under the exception to ERISA)?

This is an area where I would use more caution. In general, keeping a voluntary plan outside of ERISA's grasp is not all that simple. I would suggest specifically excluding these plans and possibly working with an attorney to ensure the voluntary plans are actually not covered by ERISA.

Q: When all plans but one are over 100, do you recommend including a medical plan w/6 participants?

It's really up to you/the employer. If you don't mind reporting that medical plan on the 5500, then include it. If you don't want to then I would suggest excluding it.

Q: If you mark All ERISA Welfare Plans are in the wrap, if a subsidiary contract has under 100 participants, then do you have to include a schedule A in the 5500 for that contract?

Yes, assuming a schedule A applies to that plan.

SPDs

Q: So, do we draft a totally new/separate SPD of our now ONE wrapped employee benefit plan or do we just provide the SPDs provided by the insurance companies?

You do both. The insurance certificates are still provided since they include important information about copays, etc. The wrap SPD will wrap around that certificate and provide the remaining ERISA disclosures. You could provide them all at the same time together in one paperclip or separately.

Q: What if insurance certificates provide SPD info and you want to override that in the Wrap document and the SPD; how does your plan handle this?

It would really depend upon the specifics. If you want to override the insurer's copays, I would assume the insurer would not be amenable to this, for example. If there is something specific you want to override I would suggest specifically noting this in the custom language section we provide.

Q: If individual SPDs are provided for the subsidiary plan (that do include all ERISA required information) information) must/should we provide an additional SPD for the wrap? If we provide a wrap SPD would we still need to provide certificates of coverage?

If there are no additional disclosures required by the ERISA SPD regulations or desired by the employer (to disclose the third party reimbursement policies for example) then there is no need for a wrap SPD. If you provide a wrap SPD that gives all the disclosures required under ERISA, I would still recommend providing the certificates of coverage.

Q: Is the carrier required to issue the SPD and do they; or is the employer responsible?

Each plan can set this up its own way. Many insurance companies provide the certificates to the employer who then provides them to the employees.

5500s

Q: So if self-insured and above 100 employees, is a 5500 filing required?

In general, yes. As long as paid out of the general assets of the employer and/or funded by insurance contracts.

Other

Q: Is there a requirement to distribute the claims notices periodically/annually or is this a conservative approach?

I'm not sure which claims notice you are referring to - most claims notices would actually apply if/when the plan is denying a claim. The claims procedure can be disclosed in the SPD which does not need to be provided every year - it is generally provided every five years or sooner if amended.

Q: Does using a wrap have any impact on head count numbers for PCORI fees?

In general, a wrap would not influence the PCORI fees - although it will depend on the facts. For example, if you are including a plan in your wrap that does not require a 5500 by itself and it includes a participant that is eligible for any other ERISA welfare plans of the sponsor and you are using the 5500

method to calculate your PCORI fees then including that plan in your wrap could increase the fees that plan will need to pay.

Q: Who is responsible for creating/providing the SPD.

The employer/plan sponsor. The employer is subject to ERISA.

Q: Can you address foreign language requirements?

Foreign language requirements in general need to be addressed according to each notice/disclosure's rules. The SBC, for example, has very specific foreign language requirements that are specific to that notice. The rule for SPDs is found at DOL Reg. Sec. 2520.102-2(c):

(c) Foreign languages.—In the case of either—

(1) A plan that covers fewer than 100 participants at the beginning of a plan year, and in which 25 percent or more of all plan participants are literate only in the same non-English language, or

(2) A plan which covers 100 or more participants at the beginning of the plan year, and in which the lesser of: (i) 500 or more participants, or (ii) 10% or more of all plan participants are literate only in the same non-English language, so that a summary plan description in English would fail to inform these participants adequately of their rights and obligations under the plan, the plan administrator for such plan shall provide these participants with an English-language summary plan description which prominently displays a notice, in the non-English language common to these participants, offering them assistance. The assistance provided need not involve written materials, but shall be given in the non-English language common to these participants and shall be calculated to provide them with a reasonable opportunity to become informed as to their rights and obligations under the plan. The notice offering assistance contained in the summary plan description shall clearly set forth in the non-English language common to such participants the procedures they must follow in order to obtain such assistance.

Example. Employer A maintains a pension plan which covers 1000 participants. At the beginning of a plan year five hundred of Employer A's covered employees are literate only in Spanish, 101 are literate only in Vietnamese, and the remaining 399 are literate in English. Each of the 1000 employees receives a summary plan description in English, containing an assistance notice in both Spanish and Vietnamese stating the following:

This booklet contains a summary in English of your plan rights and benefits under Employer A Pension Plan. If you have difficulty understanding any part of this booklet, contact Mr. John Doe, the plan administrator, at his office in Room 123, 456 Main St., Anywhere City, State 20001. Office hours are from 8:30 A.M. to 5:00 P.M. Monday

through Friday. You may also call the plan administrator's office at 202 555-2345 for assistance. [Added by 42 FR 14266, effective March 15, 1977.]