

Webinar Title Q&A – the following questions were asked during the two webinar sessions in February 2017

Do all group sizes have to have a Wrap Document or just 100+ life groups?

All Employers subject to ERISA, regardless of employee size will have a plan document and summary plan description requirement for ERISA plans that they sponsor. The Wrap plan can provide the supplemental ERISA language that can act as a companion document to the insurance contracts/certificates provided by the insurance carriers.

Are all employers subject to ERISA?

All private sector employers of all business types who maintain retirement and/or welfare benefit plans for their employees. This includes: Corporations, S Corporations, Partnerships, LLC, Sole proprietors, and nonprofit organizations.

We have the Wrap Plan in place. We have only 37 employees. I suppose we are not required to file 5500, correct?

For purposes of the health and welfare benefit plan, unless your plan is funded, you will not be required to file a Form 5500 until you have over 100 participants in an ERISA covered benefit plan as of the first day of the plan year. For purposes of the Wrap plan Form 5500, as soon as you have at least one plan that has over 100 participants you will need to file the Form 5500 for all benefits under the Wrap plan.

We are a small company - 13 full time employees - if we have document plans and SPD's for all benefits do we need a WRAP?

If you have ERISA compliant Plan documents and SPD's for your benefits, you would not need a Wrap Plan.

Does having a Wrap plan trigger a 5500 filing requirement even if we have well under 100 participants in our health plan?

The Wrap plan is helping the employer satisfy the plan document/SPD requirement under ERISA and does not automatically trigger the Form 5500 filing requirement. If all plans in the Wrap have less than 100 participants in each plan, there is no Form 5500 required. However, as soon as at least one of the plans in the Wrap exceeds 100 participants as of the first day of the plan year, that will trigger Form 5500 filing for the Wrap plan and you will need to provide participation details and Schedule A data for all of the benefits in the Wrap plan regardless of the participation in those plans.

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Can you cover again who needs to complete 5500?

For purposes of the health and welfare benefit plan, unless your plan is funded, you will not be required to file a Form 5500 until you have over 100 participants in an ERISA covered benefit plan as of the first day of the plan year.

Do the 100 participants include employees, spouses and children or just employees?

For purposes of determining whether or not you are subject to Form 5500 filing requirements you will count the employees that are participating in the plan and you disregard the number of family members they have. Once you have 100 employees participating in a plan subject to ERISA that will trigger the Form 5500 filing requirement.

Where do you find you plan #, i.e. Health & Welfare plans begin with the number 5?

The plan number should be assigned by the employer at the time that the plan is initiated. Each benefit offered should have a different plan number. Health and welfare benefit plans use the 500 series numbers. Retirement plans start with a zero (0) and will not overlap with health and welfare benefit plan numbers. Typically the health plan is 501, dental plan is 502, and ancillary benefits are higher. You should not reuse a number that had been previously assigned to a plan that is no longer active or no longer actively filing a Form 5500 (i.e. cafeteria plan filings were suspended in April 2002 but were required prior to that date). If an employer is not sure of the plan numbers that are in use, it would be best to skip ahead in the numbering to avoid reusing a number that had been previously assigned.

If the employer is able to use the carrier's benefit administration platform for free as a result of offering voluntary benefits, would that be considered "compensation?"

Compensation in this context generally would be financial compensation like a commission or percentage of the sale when employees enroll in a particular benefit for example.

Do you need to include the H.S.A. in the wrap if there is an ER contribution to the H.S.A. account?

The Health Savings Account (HSA) is viewed as a bank account and is not considered a plan subject to ERISA and you would not be required to include in a Wrap plan document. If you make employer contributions to the HSA however, that should be spelled out in the cafeteria plan documents.

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If we have a TPA, Who needs to complete form 5500?

Ultimately the responsibility to file the Form 5500 falls on the employer. You may delegate the preparation services by contracting with a third party like an accountant or a TPA.

Can you confirm that qualified small employer HRA's brought about in the 21st Century Cures Act is not subject to ERISA?

First and foremost, the Cures Act carves out QSEHRAs from most provisions of the Affordable Care Act, by specifically exempting it from the definition of a “group health plan” under the Internal Revenue Code, ERISA, and the Public Health Service Act. Not only does this allow QSEHRAs to avoid meeting market reform requirements, but it also means that in contrast to other HRAs, QSEHRAs are not subject to COBRA or HIPAA’s portability provisions. Since QSEHRAs reimburse individual insurance policies which are regulated at the state level, however, state insurance regulations will usually apply to the underlying coverage offered to the employee, and may place additional obligations or restrictions on employers who provide payment for those plans.

QSEHRAs are still subject to ERISA generally, so Plan Documents and Summary Plan Descriptions will be required for most employers offering QSEHRAs. However, heightened claims and appeals rules for group health plans will not apply to this coverage. Additionally, although the summary of benefits and coverage rules and market reforms do not apply to QSEHRAs, a QSEHRA is considered “applicable employer- sponsored coverage” for the purpose of the (currently delayed) “Cadillac Tax” on high-cost employer provided coverage.

Employers must be aware that although QSEHRAs are not considered “group health plans” for many purposes, HIPAA administrative simplification rules use a broader definition of “health plan” when defining “covered entities” under HIPAA privacy and security. Therefore, unless the QSEHRA is administered solely by the employer, care should be taken to comply with all HIPAA privacy rules and regulations when implementing and operating a QSEHRA.

Are religious non-profit organizations subject to ERISA?

Non-profits are subject to ERISA however, church-controlled plans are not subject to ERISA. Church-controlled plans fall under specific tax codes that are different from the codes that apply to corporations.

A church plan is any employee benefit plan established or maintained by a church or by a convention or association of churches that is exempt from tax under IRC §501 (and has not made an election under §410(d) to be subject to ERISA).

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Who writes the SAR?

Typically the SAR is generated by the software used to prepare the Form 5500. If the preparer does not create a SAR, it would be up to the employer to compile the data necessary to create the SAR.

If the insurance carrier Schedule A includes dependents, then how does employer track actual enrolled employees? Do they use their own file records?

Yes. It will be up to the employer to calculate the participation counts for the beginning and ending plan dates required as part of the Form 5500 filing.

Are school districts subject to ERISA?

Governmental entities are not subject to ERISA. That would include city, town, state and federal government employers and public school districts.

For a controlled group, is there any issue with keeping the Wrap Plan and 5500s separate for each member of the group?

A control group may opt to maintain separate Wrap plans for each of the related employers or combine all under one Wrap plan. This will generally be determined by the differences or similarities in the benefit offerings to the related employers. Keep in mind however, that separate Wrap plans will have separate Form 5500 filing requirements.

Does the legal name used to file 5500 forms need to be EXACTLY as it is recorded for its corresponding FEIN? As an example, if the legal name is ABC WIDGETS, INC but they set up their Plan Documents as ABC INC (which is what the administrator will use to electronically file their 5500 will there be a problem? Should they re-draft their Plan Document using the EXACT legal name and file their 5500 as such?

To avoid any errors with the 5500 filing software and submissions, the legal name of the employer should match how the legal name is recorded under the Federal ID Number. The plan name commonly uses the same legal name reference, but would not be required.

Can/should you include a voluntary group benefit plan NOT currently to ERISA and note that so employee info is all in one place?

Typically you would not include benefits that are not subject to ERISA in the Wrap plan. Including the voluntary plans not subject to ERISA potentially causes the plans to become subject to ERISA.

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Does a Self-funded STD plan require an SPD?

Self-funded short term disability (STD) plans that pay claims from employer general assets are not subject to ERISA. A plan document, SPD and Form 5500 would not be required. Employers typically describe the eligibility rules and payment parameters in an employee handbook or separate written document so participants understand when they can file claim, for how much and for how long.

Why would a plan with less than 100 participants need to file a 5500?

Small funded plans must file. That would be plans that have plan assets held in trust, a VEBA or other special accounts (e.g. funds segregated into a bank account in the plan name). Small plans that are Multiple Employer Welfare Arrangements (MEWA) with less than 25% common ownership must also file.

I understand the distribution of the SPD. Is the wrap document required to be distributed as well?

The employer is only required to distribute the plan document upon request from the participant if they have a Summary Plan Description (SPD) that is provided to participants.

If you have less than 100 ee's and don't file 5500, do you need to send out a SAR?

No, the SAR is only required if you are required to file a Form 5500.

Is the over or less than 100 employer count reflective of those enrolled on the plan or actual W-2 employees? Do we include union, non-union, part-time, full-time?

You count employees enrolled in the benefits subject to ERISA.

What was the website to check prior 5500 history?

The EFAST Website <https://www.efast.dol.gov> has Form 5500 filing history available at the Department of Labor. Typically if an employer is unsure what numbers are in use and they do not have Form 5500 history readily available, it would be best to skip ahead in the numbering series to avoid the possibility of reusing a number. There is no issue with skipping numbers, just reusing retired numbers.

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How do employers know their ERISA plan number? How does an employer terminate an old ERISA plan number?

When you file your Form 5500 for the final time, you check the box “final return/report” and follow the rest of the directions for filing a final return. This notifies the DOL not to expect any future filings for the plan number.

If you have a wrap plan for medical, dental and vision (for example) under 501 and separate Health FSA (with over 100 participants) with vendor provided SPD... can the plan number still be 501 (Wrap plan and separate health FSA) and file under one 5500?

If you intend that the Health FSA file separate from the Wrap plan they should be assigned separate ERISA plan numbers. It is possible however, for all the ERISA benefits including the Health FSA to fall under one Plan number, Plan 501 for example. This will all tie back to how the plan documents are written.

So if an employer sponsors 4 plans and each have fewer than 100 participants, they do not need to file a 5500?

Correct. If each of the plans separately has less than 100 participants and you do not have a Wrap plan, you are not subject to Form 5500 filing requirements for each of the plans. You would however, be subject to the Plan Document and SPD requirement for each of the plans.

If the 4 plans are part of a Wrap plan and you do not have unique participation that exceeds 100 participants on the 1st day of the plan year, you would not be subject to Form 5500 filing requirements. You are only required to count the employee once even if they participate in more than one line of coverage.

Please confirm that if all plans have fewer than 100 participants, the Employer does not need to file 5500s for the plans, but still would need to do a Wrap?

Correct. The plan document and summary plan description (SPD) requirement of ERISA does not have a small employer exception. The Wrap plan will help create the required supplemental language that is missing from the insured plan benefit booklets, insurance certificates or summary plans descriptions. The Form 5500 filing requirement does have a small employer exception and you would not be required to file a Form 5500 even though you are required to have a plan document and SPD.

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Also is there specific distribution requirements for SAR's and do same 5500 penalties apply is SAR not distributed?

There are no specific penalties for failure to distribute the SARs, however, as with any ERISA compliance failures, participants and beneficiaries may file a lawsuit to enforce any provision of ERISA. In addition, thousands of dollars in penalties and imprisonment may be imposed on any individual or company that willfully violates any ERISA disclosure requirement. The plan administrator may be subject to the \$149/day penalty for failure to provide a response to a participant or beneficiary request for a copy of the required SAR.

How do you go from these multiple plan #'s to one to simplify the 5500 form filing process?

The plans that previously existed under separate plans and plan numbers are now "wrapped" into one document file and one plan number. Employers will need to file one final Form 5500 for each of the old plan number(s) that had been in use and then the Wrap Plan is generally assigned a new plan number and going forward all of the plans are "wrapped" together and are filed under that Wrap Plan number following the effective date of the Wrap Plan. When an employer files a final return it means that they as part of the filing are checking the box "final return/report" on the Form 5500, which will notify the Employee Benefits Security Administration (EBSA) not to look for future filings for that plan number.

Can you use a wrap document if you have different plans with different renewal dates, eligibility and/or contribution levels?

Yes, however, it may be possible to have more than one wrap plan in consideration of differences. This is generally part of the discussion you will have as you design your Wrap plan.

We have a Section 125 POP in place so the share of the employee's premium for health, dental, vision and voluntary life are deducted tax free. Are we subject to ERISA?

The POP is a vehicle for the pre-tax benefits under Section 125 and is not an ERISA plan. However, the underlying benefits like the health, dental and vision plans are ERISA plans and require a plan document and SPD. The voluntary life plan may satisfy the exception from ERISA based on how involved the employer is in offering and maintaining that life plan. If it ends up being a group voluntary life plan, then it is subject to ERISA as well. This assumes of course that you are an employer that is subject to ERISA.

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Is it acceptable to send a link/website to employees to access the SPDs versus sending each individual a copy of the SPD?

There are Treasury Department and Department of Labor electronic distribution requirements that you can access by going to the DOL website and doing a search for those requirements. We included some of the safe harbor rules in the presentation (see below). Assuming you otherwise qualify for electronic distribution, if you are going to post information to a website or intranet, at minimum you must notify the employees about what has been posted and how they access the information, along with the statement that they have the right to request copy in paper format from the employer. See the safe harbor rules below:

DOL Electronic Disclosure Regulations, 67 Fed. Reg. 17264 (April 9, 2002) and Treas. Reg. Sec. 1.401(a)-(21)

1. Employees must have ready access to the employer's information system (a kiosk or central computer does NOT meet this requirement).
2. Employees' computer access must be in the same area where the employees are expected to perform their duties (could be at home).
3. Access to the employer's computer system must be an integral part of employees' duties.
4. The SPD may be distributed digitally to employees who do not meet the above criteria if:
 - a. Employees provide an e-mail address where the documents can be delivered
 - b. Employees must complete a consent form to agree that they will receive the documents digitally
 - c. Consent must occur AFTER employees have received a statement explaining the digital delivery system and what hardware and software will be required to receive it.
 - d. If system requirements change, the employees must receive notification of the change and complete a new consent (e.g., notice was first sent in Microsoft® Word, now being provided in Adobe® Acrobat®).
5. Digital delivery must be calculated to ensure actual receipt (e.g., return receipt, notification of undeliverable mail, etc.).
6. Employees must receive notice that the documents will be delivered digitally prior to distribution.
7. Employees must receive a notice that the documents can be requested and received in paper form at no charge.

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**Does the SPD need to be delivered to employees that are not eligible for the benefits?
To the employees that participate (are enrolled)?**

Generally you provide the SPD to new **participants** in the plan within 90 days of employment. For a new plan you have 120 days to provide the SPD to plan participants. Further you are required to provide an updated SPD if there are amendments and you are also required to provide a SPD within 30 days of written request.

Will this presentation be eligible for CE credits toward SHRM or HCRIS?

This webinar was not submitted for approval for outside association CE credits. We can however, upon request provide a certificate of attendance in order for you to pursue the CE credit on your own.

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