

**Webinar Title Q&A** – the following questions were asked during the two webinar sessions in February 2019

**Q: Can the slides be downloaded?**

**A:** You can get a copy of the slide handouts on the webinar page at:

<http://www.ebcflex.com/Education/Webinars.aspx>

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

**A:** 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.

### **Wrap Plan Questions**

**Q: Do all group sizes need a Wrap Document or just 100+ life groups?**

**A:** All Employers subject to ERISA, regardless of employee size and 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.

**Q: Are all employers subject to ERISA?**

**A:** 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.

**Q: If the group health plan is provided by the employer but it is under Section 125, did I understand correctly that it would not be included in the Wrap plan?**

**A:** The IRS requires that you have a written plan document that lists the benefits under a cafeteria plan for tax purposes, among other things the employer must define. The Department of Labor requires that the medical plan provide a summary plan description (SPD) related to the medical plan details. For that reason, the wrap plan can be used to satisfy the DOL's plan document and SPD requirement. So the medical plan would appear in both documents/SPD for different reasons. The wrap plan can be set up for one or more lines of coverage.

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**Q: Can you do a SMM to a Wrap Doc or just an SPD?**

**A:** You can use a Summary of Material Modifications (SMM) to communicate plan changes to participants. If you use a SMM to provide updates, you must distribute a new SPD that includes all of the SMMs at least once every 5 years.

**Q: What if an employer is out of compliance using the electronic distribution for example; their employees only have access to a central computer?**

**A:** If the employer distributes SPDs electronically and they are not eligible for electronic distribution under the safe harbor rules, it may be viewed as they did not distribute the SPDs because they cannot insure delivery unless the employee consents to receive benefit communications this way. In the event they are audited, they would not have evidence of distribution.

**Q: Is it enough to upload the Summary of Benefits and Coverage (SBCs) to the company intranet or do we need individual distribution?**

**A:** You can upload to the intranet if you qualify for electronic distribution under the safe harbor rules and notify employees where the SBC is located and offer to provide a paper copy at no charge upon request. Otherwise if you don't qualify for electronic distribution, the employer would need to get permission from the employees to distribute information this way.

**Q: Is it 90 days from the new participants hire date or effective date of coverage?**

**A:** 90 days from when they become a participant under the plan.

**Q: What is a named fiduciary?**

**A:** A plan must have at least one fiduciary (a person or entity) named in the written plan, or through a process described in the plan, as having control over the plan's operation. The named fiduciary can be identified by office or by name.

**Q: Do you know how some of this works when you are part of a "pool". We are a community bank and get a number of our insurance products by being part of Minnesota Bankers Association. If they are the overlying group then this applies to them and not me?**

**A:** Typically it will be the plan sponsor that will establish the plan document and SPD. That may be the MBA in this case.

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**Q: We just talked about electronic documents. If our health coverage offers a portal that contains all the information is this sufficient?**

**A:** If you qualify for electronic distribution (or you have employee's permission), you may notify employees where the information is located and offer to provide a paper copy at no charge upon request. If you don't qualify for electronic distribution, you would need to obtain permission from the employees to distribute the information in this manner.

**Q: If an employer contributes to an H.S.A., does that make it subject to ERISA?**

**A:** No. An employer can contribute to an employee's HSA without triggering ERISA. ERISA would only be triggered if the employer held the HSA funds in trust in the name of the employer and provided direction of investments, etc. This is not common.

**Q: I am new to my position at my current company. How can I tell if we have a wrap plan in place or not?**

**A:** If a Wrap plan was in place there should be plan document and a SPD on record with the employer. You can also look at the Form 5500 filing history on [www.EFAST.dol.gov](http://www.EFAST.dol.gov) to see if any Form 5500s have been filed with multiple lines of coverage under one Form 5500. However, note that not all employers that complete a Form 5500 with multiple benefits have an actual plan document to support the bundled benefits.

**Q: Can you please send us an electronic copy of the DOL Electronic Disclosure Regulations?**

**A:** The final rule on electronic disclosure can be found here:  
<https://www.gpo.gov/fdsys/pkg/FR-2002-04-09/pdf/02-8499.pdf>

**Q: An employer still needs to have SPD's even if the employer will have a wrap document?**

**A:** It is possible to combine the plan document and spd into one document. In that case the employer will need to distribute the entire document. The ERISA requirement can also be satisfied by creating a plan document and separate SPD that is shorter and geared towards employee communication. The employer will sign and retain the plan document for their records and distribute the SPD to the plan participants. Our wrap SPD is to be used in connection with the various benefit booklets, insurance certificates and summary plan descriptions for the underlying benefits. So in this context the Wrap SPD will not replace the requirement to maintain the details for the coverage, like a SPD for a self funded plan or the up-to-date insurance booklet for example and make this information available to plan participants.

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**Q: Where does an employer find their plan numbers?**

**A:** The DOL does not assign plan numbers. ERISA plan numbers can be assigned by the employer or a third party. 500 series numbers are assigned to health and welfare plans and the 000 series is assigned to retirement plans.

**Q: Explain how Employee Benefits Corporation handles gathering everything needed to create the wrap plan... Is the gathering of the needed data left up to the group/broker or does EBC have a specialist who helps direct that process?**

**A:** We have streamlined the data collection process into a data collection worksheet and many employers and/or brokers are able to complete this on their own to create the wrap plan and SPD. However, if someone needs assistance we have a compliance services team who can help the employer/broker complete the set up paperwork.

**Q: What do you tell a client who concludes that Wrap Documents aren't "necessary" so they aren't going to put one in place?**

**A:** All employers that are subject to ERISA, regardless of the number of employees, that sponsors employee benefits subject to ERISA have a plan document and SPD requirement. In the event of an audit, an employer can expose themselves to financial penalties if they are found out of compliance.

**Q: It is mentioned that the SPD must include information on contribution - is stating that specific benefits are either non-contributory or contributory enough or does the SPD have to specifically state the employee contribution dollar amounts? I wouldn't think so because that would mean it has to be updated annually and they are already providing the employee \$\$ contributions annually in the open enrollment communications....**

**A:** The contributions can be listed specifically or you can point to an outside source like "See Human Resources for Cost Information" for example. The details are stored elsewhere and the SPD provides the source.

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**Q: Silly question, can you tell us the difference between trust and company assets?**

**A:** An employee **trust** is a fund that an **employer** establishes on behalf of its employees. In an employee **trust** the company is the grantor **and** its employees are the beneficiaries.

Company assets would mean that the employer pays claims from their general operating account and does not establish a separate fund.

**Q: What is a VEBA?**

**A:** A voluntary employees' beneficiary association (**VEBA**) **plan** is a type of tax-exempt trust used by its members and eligible dependents to pay for eligible medical expenses.

**Q: If we post the SPD on our companies ERP system that employees go into each day to log in for payroll purposes, does that meet Safe Harbor Requirements?**

**A:** A common kiosk, would not qualify as use of a computer as a regular function of your job. If you plan to post a SPD electronically you would need written permission from employees to permit distribution in this format. You would also likely need to offer to provide a paper copy upon request at no charge.

**Q: What do you suggest when we reasonably cannot get employees to sign the document that they received their SPD? We send it to them through intercompany mail and their manager put it in their mailbox or hands it to them. There is no proof they get their SPD and ERISA Wrap document.**

**A:** You may ask employees to sign a roster when they receive paperwork that is handed to them or ask that they sign an actual acknowledgement form and return it to HR if you are looking for definitive proof they received the SPD when distributing information via paper. If that fails, I would keep a list of who you distributed the information to along with the method in which it was delivered for your records.

**Q: So should the Section 125 plan be included in your wrap document if you include the Medical deferral?**

**A:** The Section 125 plan itself is not subject to ERISA, but the component benefits under the Section 125 plan might be subject to ERISA and should be included in the Wrap plan. For example, an employer might have a Section 125 plan that includes the ability to pay your share of medical premiums pre-tax through payroll. The Section 125 plan is not subject to ERISA; however, the group medical plan is and should be included under a Wrap plan.

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## Employee Benefits Corporation | ERISA Compliance: Wrap Plans/Form 5500 Filing

**Q: If an employer offers voluntary critical illness at group rates in their EBD does it need to be included in the wrap?**

**A:** If this is a group contract, it likely is subject to ERISA and should be included in the Wrap plan.

**Q: Based on the voluntary plan criteria, virtually no voluntary plan would not be subject to ERISA. The employer almost always chooses the vendor, they almost always allow pre tax deductions etc.**

**A:** The employer will need to sort out whether or not they feel they have met the safe harbor rules or not.

**Q: When naming the fiduciary does it have to be a person or a position. If a person would it usually be the biz owner in a small business**

**A:** You can name the fiduciary by position or name.

**Q: Can you talk a little about the fiduciary liability for the named fiduciary and if the ERISA doc doesn't name a fiduciary what happens?**

**A: Fiduciary responsibility** refers to the obligation that one party has in relationship with another one to act entirely on the other party's behalf and best interest. Naming a fiduciary is one of the DOL definitions necessary to satisfy the document/SPD requirements. Breach of fiduciary duty can result in financial penalties.

**Q: With small groups we often see plan numbers being duplicated for retirement, flex, wrap doc, HRA....meaning two plans might have the same number because the docs were provided by two diff vendors and they didn't communicate...how big a problem is that. Can you simply change the number going forward if we discover this?**

**A:** An ERISA plan number should only be assigned to one plan unless the plan is amended and restated. Plans can be amended to change the plan number, but usually cannot be done retroactively. The DOL site is a helpful tool to identify plan numbers in use that are large enough to include Form 5500 filing. The website is [www.EFAST2.dol.gov](http://www.EFAST2.dol.gov)

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**Q: Does this mean that the examples NOT subject to ERISA would never go into the SPD? I was told the HSA always go into the SPD.**

**A:** The HSA would be included in a Section 125 plan if the employer is making contributions tax free and/or the employee is making pre-tax payroll deductions for deposit to the HSA. This is an IRS written plan document requirement which is different from the DOL ERISA plan document and SPD requirement. An employer would not want to include benefits not subject to ERISA in a Wrap plan because that may inadvertently make those benefits subject to ERISA.

**Q: If an employer recommends an H.S.A. bank, does that make the H.S.A. subject to ERISA?**

**A: According to DOL Field Assistance Bulletin 2006-02—Health Savings Accounts see the following:**

**Q-2. If an employer maintains a high deductible health plan (HDHP) for its employees, can the employer limit the HSA providers that it allows to market their HSA products in the workplace or select a single HSA provider to which it will forward contributions without making the HSA part of the employer's ERISA-covered group health plan?**

**A-2.** Yes. As stated in FAB 2004-01, an employer may offer an HSA to its employees without establishing an ERISA-covered plan in one of two ways. The employer may rely on the group-type insurance safe harbor in [29 C.F.R. § 2510.3-1\(j\)](#), in which case the employer cannot make contributions to the HSA, or it may rely on the separate conditions outlined in FAB 2004-01, in which case the employer may or may not elect to make employer contributions to the HSA.

If the employer relies on the group-type insurance safe harbor in 29 C.F.R. § 2510-3-1(j), it cannot “endorse” the HSA provider. In the Department's view, an employer would not be considered to “endorse” an HSA within the meaning of the regulation merely by limiting the HSA providers that it allows to market their HSA products in the workplace or selecting a single HSA provider to which it will forward contributions. Employers may also provide employees general information on the advisability of using an HSA in conjunction with the HDHP without “endorsing” the program. See generally Interpretive Bulletin 99-1, 29 C.F.R. §2509.99-1.

The separate conditions in FAB 2004-01, though including completely voluntary employee participation and employer neutrality in not representing that the HSA is an employee welfare benefit plan established or maintained by the employer, do not include the group-type insurance safe harbor's prohibition on employer “endorsement.” As explained in FAB 2004-01, an employer could limit the HSA providers that it allows to market their HSA products in the workplace or select a single HSA provider to which it will forward contributions and still satisfy the conditions outlined in the FAB without converting the HSA into an ERISA-covered plan.

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**Q: Are Affordable Care Act (ACA) measurement periods required to be included in ERISA plan document? I have been told that ACA requires employer to amend their plan document with measurement period information.**

**A:** ERISA does not require that a Wrap plan include ACA measurement methods and time periods. This is a requirement of the Employer Shared Responsibility rules under the Affordable Care Act (ACA). The wrap plan however, is a convenient place to define and then make available to health plan participants, since the carriers will not include this detail in policy booklets.

**Q: When distributing the wrap SPD, the assumption is you also have to distribute all of the certificate booklets that go with it, even if employee isn't enrolled in all of the benefits?**

**A:** This would be true if they have not yet gotten the benefit booklets or insurance certificates. However, you may also take the approach that you distribute the Wrap SPD, which names the carriers and coverages, along with an explanation that indicates the participant should refer to the benefit booklet or insurance certificate for the specifics about each plan they are enrolled in and if they don't have a current copy they can request that the employer help them get a copy. That way you avoid distributing or redistributing benefit booklets/insurance certificates to those that already have a copy or don't need one. We have also seen employer create one large file that includes the Wrap SPD and the benefit booklet/insurance certificates for all the benefits under the wrap. Our approach is the first option described above. The Wrap SPD plus the benefit booklet/insurance certificates/SPDs will satisfy the DOL SPD requirement.

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

**A:** 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.

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

**A:** 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.

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**Q: We have a Section 125 Premium Only Plan (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?**

**A:** 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.

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

**A:** 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.

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## Employee Benefits Corporation | ERISA Compliance: Wrap Plans/Form 5500 Filing

- 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.

### **Form 5500 Filing Questions**

#### **Q: What is the difference between small and large plan and the late 5500 filing fees?**

**A:** Small plans would be for any filings required for participation less than 100 on the first day of the plan year (usually funded plans). Large plans are more common and would be for plans that have 100 or more participants on the first day of the plan year.

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

**A:** 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.

#### **Q: Do the 100 participants include employees, spouses and children or just employees?**

**A:** 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.

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**Q: What if you have plans that are under 100 lives but you put them into the wrap plan, are you required to have them filed in the 5500?**

**A:** If you bundle benefits together and at least one of the plans has over 100 participants on the first day of the plan year, the employer must include all of the plans regardless of participation on the Form 5500 filing.

**Q: Is there a cap on the \$2,194 penalty?**

**A:** There is no cap mentioned in the inflation adjustments for this penalty for failure to file a Form 5500. However, employers can take advantage of the delinquent filer voluntary correction program, which reduces and caps the penalties.

**Q: Does Employee Benefits Corporation provides services to file Form 5500?**

**A:** Yes, we provide Form 5500 preparation services. You can contact our Sales team at [sales@ebcflex.com](mailto:sales@ebcflex.com) for more information.

**Q: If you use a wrap plan do you HAVE to submit all plans under one 5500, especially if you did not indicate an ending on previous years filing.**

**A:** Any benefits set up under the same Wrap plan will be part of one ERISA plan number. So regardless of participation counts, if even 1 plan has 100 or more participants on the 1<sup>st</sup> day of the plan year, the employer will need to file a Form 5500 that includes information for all plans.

Benefits outside of the wrap plan are looked at individually and a Form 5500 is only required when participation is 100 or more on the first day of the plan year. It is possible going to forward to combine multiple lines of coverage under one plan number, even if you did not need to file a Form 5500 for those lines of coverage in the past.

If you previously had filed a Form 5500 for a line of coverage individually and plan to move the coverage under a Wrap plan, you should report the 5500 as a final return/report to retire any plan numbers that will no longer be in use.

**Q: Can a client file one 5500 filing for all benefits if they do not have a Wrap Document?**

**A:** No. If an employer is filing a combination of benefits under one ERISA plan number, there should be a Wrap plan document and SPD to support the combining/bundling of benefits.

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## Employee Benefits Corporation | ERISA Compliance: Wrap Plans/Form 5500 Filing

**Q: For the 5500 filing, is the requirement for 100 covered participants or 100 eligible participants**

**A:** 100 or more participants in at least one line of coverage under the Wrap plan. You look at unique participants where you count an employee who participates in at least one line of coverage.

**Q: Can you give the website again for finding the documents?**

**A:** The website where you can locate the Form 5500 history is [www.EFAST.dol.gov](http://www.EFAST.dol.gov)

**Q: As a local government employer are we exempt from both the SPD distribution and Form 5500 filing requirement?**

**A:** Correct, governmental entities are exempt from ERISA and are not required to create or distribute a SPD or file a Form 5500.

**Q: Is there a template for the SAR for employers that want to do their own 5500**

**A:** Details on what is required in a Summary Annual Report (SAR) can be found at DOL Reg. 2520.104b-10(d)(4). <https://www.govinfo.gov/app/details/CFR-2005-title29-vol9/CFR-2005-title29-vol9-sec2520-104b-10>

**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.

**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.

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