

Health and Welfare Plan Compliance Checklist

- **ERISA Disclosure Requirements**, including
 - Plan document
 - Summary plan description (SPD)
 - Summary of material modifications or reductions (SMM or SMR)
 - Summary of benefits and coverage (SBC) and glossary
 - Defining eligibility and contribution requirements
 - Establishing permissible distribution methods (mail, in-person, or electronic)
 - Foreign language requirements

- **ERISA Reporting Requirements**, including
 - Form 5500 filings
 - Summary annual report (SAR)
 - M-1 (for multiple employer welfare arrangements)

- **IRS Non-Discrimination Testing for Self-Funded Plans (IRC § 105(h))**

- **Annual and New Hire Notice Requirements**, including
 - Notice of Exchange
 - Updated COBRA notices
 - Women’s Health and Cancer Rights Act Notice
 - Newborns’ and Mothers’ Health Protection Act Notice
 - Notice of special enrollment rights under HIPAA
 - CHIP notice
 - Wellness program notice
 - Medicare Part D notice
 - Michelle’s Law Notice
 - Mental Health Parity & Addiction Equity Act Notice

- **ACA Reporting, Disclosure, and Compliance Obligations**, including
 - Notice of grandfather status
 - Notice regarding designation of primary care provider
 - Updated claims appeal language (including external review option)
 - Determining whether employer is an “applicable large employer” (ALE)
 - Application of IRS aggregation (control group) rules
 - Effective January 1, 2015, applicable large employer tracking and reporting begins (IRS Forms 1094-C and 1095-C)
 - Effective January 1, 2015, applicable large employer shared responsibility penalties may apply (play-or-pay or §4980H(a) and (b) penalties); employers must address:
 - Structuring benefits to avoid penalties (offer “minimum essential coverage” that is “affordable” and of “minimum value”)
 - Determining full-time employee status
 - Establishing measurement and stability periods and tracking certain employees; document process and eligibility terms
 - Employers must update plan document and SPD to include eligibility language explaining measurement periods, stability periods, and other eligibility terms

- Summary of benefits and coverage (SBC) and glossary
- Modification of waiting period
- Transitional Reinsurance Program fee payment and filing with CMS
- Patient-Centered Outcomes Research Trust Fund Fee (PCORI) and IRS Form 720
- W-2 reporting
- Medical loss ratio rebates and ERISA plan asset rules
- Updating health flexible spending account (FSA)
- Non-discrimination rules for fully insured plans (awaiting guidance)
- Cadillac tax (2020)

- **HIPAA Privacy, Security, and HITECH Requirements**, including
 - Notice of Privacy Practices
 - Updated business associate agreements
 - Staff training
 - Privacy and Security manuals
 - Safeguarding protected health information (PHI)
 - Data breach notification procedures
 - Regularly updating security procedures to protect e-PHI
 - Firewall between plan PHI and employment functions
 - Coordinating with state law
 - Health Plan Identifier (HPID) registration

- **Cafeteria Plan Compliance**, including
 - Plan document
 - Summary plan description (for health FSA)
 - Annual election process and documentation
 - IRS non-discrimination testing (including IRC § 125)
 - Mid-year election change restrictions

- **Additional Compliance Challenges**, including
 - Voluntary plans
 - Excepted benefits
 - Wellness programs
 - Employee assistance programs (EAP)
 - Fringe benefits
 - MEWAs
 - Coordinating plan terms with employee handbook, new hire packets, website, job descriptions, employment contracts and severance agreements, and open enrollment materials
 - Coordinating benefits with paid and unpaid leaves (including USERRA, FMLA, CFRA, and PDL)
 - Coordinating responsibilities with vendors
 - Preparing for DOL, IRS, and HHS audits

ERISA Resources: Statutes and Regulations

There are certain key sections of ERISA applicable to health and welfare plans it is helpful to know:

Topic	Act; USC	Related Regulations
Definitions	ERISA § 3; 29 U.S.C. § 1002	29 C.F.R. § 2510.3-1 et seq. ¹
ERISA Coverage & Exceptions	ERISA § 4; 29 U.S.C. § 1003	
Preemption	ERISA § 514; 29 U.S.C. § 1144	
Savings Clause	ERISA § 514; 29 U.S.C. § 1144	
Plan Document	ERISA § 402; 29 U.S.C. § 1102	
Summary Plan Description (SPD)	ERISA § 101; 29 U.S.C. § 1021 ERISA § 102; 29 U.S.C. § 1022	29 C.F.R. Part 2520
• Form & Content	ERISA § 101; 29 U.S.C. § 1021 ERISA § 102; 29 U.S.C. § 1022	29 C.F.R. § 2520.102-2 29 C.F.R. § 2520.102-3
• Foreign Language		29 C.F.R. § 2520.102-2
• Distribution	ERISA § 104; 29 U.S.C. § 1024	29 C.F.R. § 2520.104b-2
• Electronic Distribution		29 C.F.R. § 2520.104b-1
• SMM/SMR	ERISA § 104(b)(1); 29 U.S.C. § 1024	29 C.F.R. § 2520.104b-3(d)
Summary of Benefits & Coverage (SBC) and Glossary	PHSA § 2715; 42 U.S.C. § 300gg-15 ERISA § 715; 29 U.S.C. § 1185d	29 C.F.R. § 2590.715-2715
Record Retention	ERISA § 107; 29 U.S.C. § 1027	29 C.F.R. § 2520.107-1
Document Requests	ERISA § 104; 29 U.S.C. § 1024 ERISA § 502; 29 U.S.C. § 1132	29 C.F.R. § 2520.104b-1 29 C.F.R. § 2520.104b-30 See also claims & appeal procedure regulations
Form 5500	ERISA § 101; 29 U.S.C. § 1021 ERISA § 103; 29 U.S.C. § 1023 ERISA § 106; 29 U.S.C. § 1026	29 C.F.R. Part 2520 29 C.F.R. § 2520.103-1 et seq.
• Small Plan Exception		29 U.S.C. § 2520.104-20 ²
Fiduciary Obligations	ERISA § 402; 29 U.S.C. § 1102 ERISA § 404; 29 U.S.C. § 1104 ERISA § 405; 29 U.S.C. § 1105 ERISA § 409; 29 U.S.C. § 1109 ERISA § 410; 29 U.S.C. § 1110	
Claims Procedures	ERISA § 503; 29 U.S.C. § 1133	29 C.F.R. § 2560.503-1 29 C.F.R. § 2590.715-2719 (added by ACA)
Penalties	ERISA § 502; 29 U.S.C. § 1132	29 C.F.R. Part 2560

¹ See also 29 U.S.C. § 1191b and 29 C.F.R. § 2590.732 for definitions of “group health plan” and “excepted benefits.”

² See also 81 Fed. Reg. 149 (July 21, 2016) for Proposed Revision of Annual Information Return/Reports.

ERISA Resources: DOL Publications

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Reporting and Disclosure Guide for Employee Benefit Plans*** (September 2014).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Self-Compliance Tool for Part 7 of ERISA: HIPAA and Other Health Care-Related Provisions*** (March 2013).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Self-Compliance Tool for Part 7 of ERISA: Affordable Care Act Provisions*** (March 2013).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Understanding Your Fiduciary Responsibilities under A Group Health Plan*** (September 2015).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Compliance Assistance Group Health and Disability Plans: Benefit Claims Procedure Regulation*** (December 2012).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Fact Sheet: Voluntary Fiduciary Correction Program*** (May 2006).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Frequently Asked Questions about the Voluntary Fiduciary Correction Program*** (September 2013).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Fact Sheet: Delinquent Filer Voluntary Compliance Program*** (January 29, 2013).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Frequently Asked Questions about the Delinquent Filer Voluntary Correction Program*** (January 28, 2015).

U.S. Department of Labor, Employee Benefits Security Administration (EBSA), ***Multiple Employer Welfare Arrangements (MEWAs) under Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation*** (August 2013).

ACA Compliance Checklist for IRS Forms 1094-C and 1095-C Reporting

The Information Employers Will Need for Form 1094-C (Transmittal)

- Identifying information for your organization (such as name, address, EIN, contact person)
- Information about whether you offered coverage to 95% of your full-time employees and their dependents
- For the authoritative transmittal:
 - Total number of Forms 1095-C you issued to employees
 - Whether you are part of an aggregated applicable large employer group, and identifying information about members of the aggregated applicable large employer group, if any
 - Full-time employee counts *by month*
 - Total employee counts *by month*
 - Whether you are eligible for certain transition relief

The Information Employers Will Need for Form 1095-C (Employee Statement)

- Who is a full-time employee for each month
- Identifying information for employer and employee (such as name and address)
- Information about the type of health coverage (MEC, MV) offered to each individual by month, if any
- The employee's share of the monthly premium for lowest-cost self-only minimum value coverage
- Months the employee was enrolled in your coverage
- Months the employer met an affordability safe harbor with respect to an employee and whether other relief applies for an employee for a month (such as LNP)
- If the employer offers a self-insured plan, information about the covered individuals enrolled in the plan, by month

Employer Action Plan for 4980H Penalties and IRS Reporting

- Determine if employer is a member of an aggregated (control) ALE group
- Determine if employer is an ALE member
- Determine effective date for §4980H penalties
- Determine who qualifies as a "common law" employee
- Determine who will be offered coverage and eligibility requirements
- Determine whether employer will use monthly or look-back measurement methodology
- Determine initial and standard look-back measurement, stability, and administrative periods
 - Document methodology
 - Document coverage eligibility requirements (plan document, SPD)
 - Determine tracking method (in-house, vendor software)
- Determine what coverage will be offered (minimum essential coverage (MEC), minimum value (MV), and "affordable") and employee contribution levels
 - Consider offer of coverage requirement for §4980H(a) (70% for 2015, 95% for 2016)
 - Determine if plan meets MV requirement (both fully insured & self-funded)
 - Select (and document) affordability safe harbor

- Based on offer of coverage and affordability, determine whether any adjustments to eligibility and contribution levels must be made to avoid §4980H penalties
- Determine whether systems used in 2015 need adjustments:
 - Determine what data you need for IRS reporting and where it is housed (in-house, payroll provider, HRIS system)
 - Determine whether system changes or upgrades needed
 - Determine whether contracts with vendors need to be adjusted
 - Run tests
 - Determine who will sign IRS forms
 - Engage in-house staff: HR, payroll, tax, legal
 - Engage upper management: This will take time and cost money
 - Work with vendors: Payroll provider, HRIS provider, broker
- Prepare communication plan

HIPAA Privacy and Security Rules Compliance Checklist for Employer Health Plans Creating or Receiving PHI

- Identify all benefit plans subject to the HIPAA Privacy and Security Rules (the “Rules”)
 - Benefit plans subject to the Rules include health, dental, vision, long-term care, health FSAs, health reimbursement accounts (HRAs), mental health plans, some EAPs, some wellness programs
- Appoint a Privacy and Security Official(s)
- Privacy Rule: Assess whether and how PHI is created or received by the employer’s health plan
- Identify all Business Associates
 - Business associates are persons or entities that create, receive, maintain, or transmit PHI on behalf of the plan. Business associates could include, among others, third party administrators, utilization review companies, brokers, actuaries, accountants, lawyers, and IT professionals
 - Confirm that the employer’s plan has a signed business associate agreement with each business associate, and that the agreement has been updated to include HITECH provisions
- Notice of Privacy Practices
 - For self-funded health plans (including health FSAs and HRAs), draft a Notice of Privacy Practices (update for HITECH)
 - Timely distribute the notice
 - If distributing notice electronically, must obtain consent
 - May be required to post on website
- Identify all individuals who have access to PHI
 - Establish firewalls: Identify who must have access to PHI to perform his/her job, and how much access is needed
 - Train all individuals who have access to PHI
- Security Rule: E-PHI:
 - Risk analysis: Conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information
 - Risk management: Implement security measures sufficient to reduce risks and vulnerabilities to a reasonable and appropriate level to comply with the general rules
- Privacy Rule: Draft, adopt, and implement a written policies and procedures manual, including forms and safeguard policy
- Data Breach: Draft, adopt, and implement a written policies and procedures manual
- Security Rule: Draft, adopt, and implement a written policies and procedures manual
- Amend plan document and SPD, as necessary (wraps)
- Update pre-existing policies and procedures for HITECH
- Document each step
- Review periodically and update as necessary

HIPAA Privacy and Security Rules: Preparing for a Phase II Desk Audit

Phase II Desk Audit Electronic Document Requests from OCR

Timeliness of Notification	Using sampling methodologies, upload documentation of five breach incidents for the previous calendar [year] affecting fewer than 500 individuals, documenting the date individuals were notified, the date the covered entity discovered the breach, and the reason, if any, for a delay in notification.
Content of Notification	<p>If the entity used a standard template or form letter, upload the document.</p> <p>Using sampling methodologies, upload documentation of five breach incidents affecting 500 or more individuals for the previous calendar year.</p> <p>Upload a copy of a single written notice sent to affected individuals for each breach incident.</p>
Notice of Privacy Practices Content Requirements	Upload a copy of all notices posted on website and within the facility, as well as the notice distributed to individuals, in place as of the end of the previous calendar year.
Provision of Notice – Electronic Notice	<p>Upload the URL for the entity web site and URL for the posting of the entity notice, if any.</p> <p>If the entity provides electronic notice, upload policies and procedures regarding provision of the notice electronically.</p> <p>Upload documentation of an agreement with the individual to receive the notice via e-mail or other electronic form.</p>
Right to Access	<p>Upload all documentation related to the first five access requests which were granted, and evidence of fulfillment, in the previous calendar year.</p> <p>Upload all documentation related to the last five access requests for which the entity extended the time for response to the request.</p> <p>Upload any standard template or form letter required or used by the covered entity to document access requests.</p> <p>Upload the notice of privacy practices.</p> <p>Upload policies and procedures for individuals to request and upload access to protected health information (PHI).</p>
Security Management	Update documentation of current risk analysis results.

**Process – Risk
Analysis**

Consistent with 164.316(b)(2)(ii)-(iii)³, upload documentation from the previous calendar year demonstrating that documentation related to the implementation of this implementation specification is available to the persons responsible for implementing this implementation specification and that such documentation is periodically reviewed and, if needed, updated.

Upload policies and procedures regarding the entity’s risk analysis process.

Upload documentation of the current risk analysis and the most recently conducted prior risk analysis.

**Security Management
Process – Risk
Management**

Upload the documentation demonstrating the security measures implemented to reduce risks as a result of the current risk analysis or assessment.

Consistent with 164.316(b)(2)(i), upload documentation demonstrating that policies and procedures related to the implementation of this implementation specification were in place and in force six (6) years prior to the date of receipt of notification.

Upload documentation demonstrating the efforts used to manage risks from the previous calendar year.

Upload policies and procedures related to the risk management process.

Upload documentation demonstrating that current and ongoing risks reviewed and updated.

Consistent with 164.316(b)(2)(ii)-(iii), upload documentation from the previous calendar year demonstrating that documentation related to the implementation of this implementation specification is available to the persons responsible for implementing this implementation specification and that such documentation is periodically reviewed and, if needed, updated.

³ 164.316(b)(2)(i)-(iii) reads as follows: “(2) Implementation specifications: (i) Time limit (Required). Retain the documentation required by paragraph (b)(1) of this section [policies and procedures] for 6 years from the date of its creation or the date when it last was in effect, whichever is later. (ii) Availability (Required). Make documentation available to those persons responsible for implementing the procedures to which the documentation pertains. (iii) Updates (Required). Review documentation periodically, and update as needed, in response to environmental or operational changes affecting the security of the electronic protected health information.

HIPAA Privacy and Security Resources: HHS/OCR Publications

HIPAA for Professionals: <http://www.hhs.gov/hipaa/for-professionals/>

- This site includes links to the combined text of all Rules, sample business associate contract language (which must be edited and supplemented by the employer), sample Notice of Privacy Practices, summaries of the Rules, guidance documents, and a link to helpful FAQs (sorted by category).

HIPAA Privacy, Security, and Breach Notification Audit Program: <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/>

Notice: This is only a brief synopsis of certain provisions of federal law and does not purport to cover every aspect of applicable law. In addition, the information provided is subject to change. This summary does not constitute legal advice. Employers should consult their own legal counsel concerning implementation of the provisions discussed in this synopsis, and whether there are other labor and employee benefit legal standards that need to be put into place or updated. © 2016 Marilyn A. Monahan. All rights reserved.