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COMMON ERISA MISTAKES TO AVOID

Periodically, we have elected to utilize The Lingenfelter Letter to remind plan sponsors of common compliance mistakes associated with the Employee Retirement Income Security Act (ERISA). ERISA applicability extends beyond retirement plans to impose obligations on health and welfare benefits as well. The following provides a sampling of some common mistakes and ways to avoid these in the future.

1. **Failure to recognize the existence of an ERISA plan.** Most employers recognize that benefits such as health insurance, dental insurance, and life insurance are ERISA plans, but do overlook the potential that their flu shot program (for example) may be an ERISA plan as well. Upon request, we can provide a list of fringe benefit programs that may be classified as an ERISA plan.
2. **Failure to file Form 5500.** Turnover among personnel who are responsible for filing Form 5500 is a commonly cited cause for this oversight. This document must be filed, via the ERISA Filing Acceptance Systems (EFAST), by the last day of the seventh month after the close of the plan year (unless an extension is obtained). This applies to plans with 100 or more participants at the beginning of the plan year.
3. **Failure to file a Schedule A with Form 5500.** At times, insurers may provide the Schedule A information too late to be included in a Form 5500 filing. A missing Schedule A will cause the Department of Labor (DOL) to treat the filing as incomplete. An incomplete filing is treated as a failure to file until it is completed. The DOL has indicated that when an employer is unable to obtain the information from a carrier by the Form 5500 deadline, the employer should file an incomplete Schedule A with a notation that the information has not been provided.
4. **Failure to hold plan assets in trust.** An employer that has an ERISA plan with plan assets must hold those assets in a trust unless an exemption applies. Many plans are

not considered to have plan assets and therefore will not be subject to the trust requirements.

5. **Mishandling participant contributions.** Failure to treat and manage participant contributions appropriately and with the care required can violate the following: ERISA's trust requirements, ERISA's plan asset rules, general fiduciary rules, and state criminal laws. As an example, cafeteria plan contributions must remain part of the employer's general assets in order to avoid ERISA trust requirements.
6. **Failure to maintain adequate Plan Documents.** Insurance companies are not directly subject to ERISA. As a result, insurance contracts will likely not contain all necessary provisions required of an ERISA document. However, plan sponsors are subject to ERISA. To ensure all ERISA requirements are met, insured plans should maintain a 'wrap document'.
7. **Failure to maintain adequate Summary Plan Descriptions.** Similar to bullet number 6 above, employers sponsoring an insured plan often rely on the insurance carrier to provide them with a booklet summarizing the plan. These booklets typically satisfy state law requirements, but rarely satisfy ERISA's SPD requirements.
8. **Failure to follow required procedures and Plan Documents.** It is very common for plan administrators to make plan exceptions and to pay benefits in a fashion that is inconsistent with the Plan Document. Such payments violate the administrator's fiduciary duty under ERISA.

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