



# The big deal about small employers

## What small employers need to know about compliance

**M**any small employers are surprised to learn they have compliance responsibilities when they sponsor a group health plan. Because these plans are often fully insured, they mistakenly believe the insurance carrier takes care of most, if not all, compliance responsibilities. While it's true that the carrier takes on certain obligations, **the employer remains both accountable and liable for many compliance duties**, even if the insurance carrier performs the compliance task.

### Erisa

All private sector employers that sponsor group health plans are subject to ERISA, except for government and church plans, which are typically exempt from ERISA. ERISA is all about protecting the rights and interests of plan participants. It requires plans to disclose information to participants and provide them federal protections and means for enforcing their rights. Employers should be especially aware of the strict fiduciary code of conduct ERISA imposes on plan sponsors (employers) and those who administer ERISA plans.

## Don't let the name fool you

The Employee Retirement and Income Securities Act (ERISA) applies not only to retirement plans, but also to most benefit plans offered by an employer, including: health, dental, vision, disability, health FSAs, HRAs and even certain wellness plans and EAPs.

## Who is an ERISA Fiduciary?

**An ERISA Fiduciary is held to the highest standard of conduct recognized by the law.**

A fiduciary is a person who exercises discretionary authority or control over the management or administration of a plan, or any authority, or control over the management or disposition of its assets. A fiduciary may also be an entity. To exercise discretion means, among other functions, to have the power to make choices regarding the administration and management of the plan, to control the plan's assets or to make a decision regarding a participant's eligibility for benefits.

Chief among an ERISA fiduciary's duties is to act solely in the best interest of plan participants and beneficiaries (even when that conflicts with the fiduciary's personal interests).

What does this mean? Among other things, the employer must consider the impact to plan participants when administering the plan and when selecting vendors, such as insurance carriers or COBRA administrators.

**In the end, ERISA fiduciaries may be personally liable for damages to the plan caused by a breach of duty.**

### CONSIDER THE IMPACT

Example: You shouldn't hire your brother-in-law to perform services for the plan if that's not in the best interests of the plan and its participants. Just as important, you can't hire vendors and forget about them; you must actively monitor all vendors to ensure they are meeting their obligations.

## Who or what Is a plan administrator?

**The plan administrator has the ultimate responsibility (and liability) for complying with ERISA’s requirements.** In large plans, the plan administrator will often be named in the plan document. However, in small, fully insured plans, the plan document may not identify the plan administrator. In this case, the responsibility falls to the plan sponsor (typically the employer).

### COMPLIANCE OBLIGATIONS

To help fully insured employers understand fiduciary obligations, we've listed various ERISA compliance requirements by the entity responsible for the obligation, or the one that typically performs the task.<sup>1</sup>

INSURANCE CARRIER	PLAN ADMINISTRATOR
Obligations	Obligations
<ul style="list-style-type: none"><li>• Claim determinations</li><li>• Claim payments</li><li>• Claim appeals</li><li>• ACA-mandated coverage requirements, for example:<ul style="list-style-type: none"><li>— Coverage of essential health benefits</li><li>— Coverage of Preventive care</li><li>— No annual/lifetime limits</li></ul></li><li>• Privacy notice</li><li>• Preparation of Summary of Benefits and Coverage (SBC)</li><li>• Coordination of benefits with Medicare and associated reporting</li></ul>	<ul style="list-style-type: none"><li>• Selection and oversight of vendors</li><li>• Preparation and distribution of Summary Plan Description (SPD) and Summary of Benefits and Coverage (SBC)</li><li>• COBRA obligations (if applicable)</li><li>• HIPAA nondiscrimination</li><li>• HIPAA privacy and security (if the plan receives PHI)</li><li>• Recordkeeping</li><li>• Obligations often performed by the insurance carrier<sup>2</sup><ul style="list-style-type: none"><li>— Distribution of SBC (joint obligation of insurer and plan administrator)</li><li>— Notices typically included with plan materials, for example:<ul style="list-style-type: none"><li>• Special enrollment rights</li><li>• Women’s Health and</li><li>• Cancer Rights Act</li><li>• Medicare Part D Creditable Coverage Notice</li></ul></li></ul></li></ul>

<sup>1</sup> ALL of these obligations fall on self-insured employers.  
<sup>2</sup> May be the employer if a fully insured plan.

## What is an SPD versus an SBC?

### SPD

**An SPD, or Summary Plan Description, is a document targeted to plan participants and conveys plan information in an easy-to-understand summary.**

SPDs must contain specified items. Therefore, the plan booklet or health certificate provided by the insurer is not necessarily an ERISA-compliant SPD.

Employers should verify compliance with their insurer or have the booklet reviewed by their own legal counsel. Often, required ERISA information may simply be added to the insurance booklet provided by the insurer to create the SPD.

### SPC

**An SBC, or Summary of Benefits and Coverage, is a document outlining standard information regarding medical plan(s) benefits and coverage.** This standardization permits participants to make decisions about their care.

Additionally, the SBC must be provided in a standard format as outlined by the Departments.<sup>3</sup> It's jointly the responsibility of the insurer and the plan. The SBC is no longer the employer's responsibility if it is distributed by the insurer, but the employer retains the obligation to monitor the insurer for timely and adequate compliance. If the employer uses more than one insurer to fund its benefits, the employer is responsible for synthesizing the information into a compliant SBC.



<sup>3</sup> "Departments" refers collectively to the regulatory bodies governing employee benefit plans: Department of the Treasury, Department of Labor or the Department of Health and Human Services.

## Small employers and ERISA

Under ERISA, large plans must file a Form 5500 with the DOL. Small health plans that are fully insured, unfunded or a combination of fully insured and unfunded are exempt from this filing requirement.<sup>4</sup> **ERISA defines a small plan as one with fewer than 100 participants at the beginning of the plan year** (note that the count is based on employee plan participants rather than just employees).

## What is a controlled group?

**A group of small employers under “common control” constitutes a “controlled group.”** A single small employer may not reach an employee threshold to qualify the employer for regulatory oversight — unless the employer is part of a controlled group and that group reaches the employee threshold; then the small employer may likely be required to comply with certain regulations, such as filing the Form 5500.

The definition is further fleshed out in the Internal Revenue Code, so be sure to contact legal counsel and your CPA to learn more about what it means to be under “common control.”

## Small employers and the ACA

The ACA contains several provisions that impact both small and large employers. Let’s start by looking at the ACA’s small market reforms:

### Small market insurance reforms

Prior to the ACA, the small group insurance market generally considered “small employers” to be those with up to 50 employees. The ACA initially increased this number to 100 employees, although states had the option to lower it back to 50. In 2015, however, legislation restored the cutoff to 50 and permitted states to raise it to 100. For ACA small market reform purposes, the **number of employees is calculated by taking an average of the number of employees on business days during the preceding calendar year.**<sup>5</sup>

<sup>4</sup> A plan is fully insured if all of its benefits are guaranteed by insurance contracts. A plan is unfunded if all benefits are paid directly from the general assets of the employer without any employee contributions. However, if all employee contributions are paid through a Section 125 cafeteria plan, the Department of Labor will treat the plan as if it is unfunded. A full discussion of the scope of the DOL’s treatment of cafeteria plan contributions is outside the scope of this article.

<sup>5</sup> Although guidance has not been provided, HHS has indicated that the FTE method of counting used for determining ALE status should be used.

## What are the reforms?

The ACA sought to stabilize and standardize group health insurance offered in the small employer market by mandating certain requirements, such as:

- Limiting the factors an insurer can use to set premium rates
- Prohibiting underwriting based on any health status-related factor determined appropriate by the Secretary of HHS<sup>6</sup>
- Covering 10 essential health benefits:

1. **MATERNITY CARE**
2. **REHABILITATIVE AND HABILITATIVE SERVICES**
3. **PEDIATRIC SERVICES**
4. **MENTAL AND BEHAVIORAL HEALTH TREATMENT**
5. **PREVENTATIVE AND WELLNESS**
6. **HOSPITALIZATION**
7. **LABORATORY SERVICES**
8. **PRESCRIPTION DRUGS**
9. **AMBULATORY PATIENT SERVICES**
10. **EMERGENCY SERVICES**

<sup>6</sup> To date, the secretary has not added any factors to the list previously established under HIPAA; i.e., health status; medical condition (including both physical and mental illnesses); claims experience; receipt of healthcare; medical history; genetic information; evidence of insurability (EOI), (including conditions arising out of acts of domestic violence); and disability.





## Employer shared responsibility

An Applicable Large Employer (ALE) is an employer that employed, on average, at least 50 full-time employees (including full-time equivalent employees (FTEs)) on business days during the preceding calendar year. An ALE must file **annual reports with the IRS, indicating whether it offers minimum essential coverage (MEC) that is affordable and provides minimum value (MV) to all its full-time employees (and their dependents).**

ALE's that do not offer such coverage risk having a "shared responsibility" penalty. This is when small employers are thankful they are small!

## What if you're a small employer that sponsors a self-insured plan?

Any size employer may self-insure its health plan, and self-insuring is becoming more and more common among small employers. Remember: A small employer who offers a health FSA, HRA or wellness program that is, or relates to, a health plan IS sponsoring a self-insured health plan.

## The risks of self-insuring

Responsibility for or oversight of:

- Preparation/distribution of the SBC
- Claim Procedures
- PCORI Fee
- HIPAA Privacy & Security
  - Applies to all plans, but compliance is significantly greater for self-insured plans because they are likely to receive PHI

## Applicable laws depend on employer size

Additional laws regulating benefit plans apply based on an employer's size. The greater the employee number, the more laws apply. All laws that apply to small employers also apply to large employers — but not all laws that apply to large employers apply to small employers. Be sure to consult legal counsel when determining which laws apply in any given contest.

## Employee counting resources

If you'd like to learn more about employee counting rules, is significantly greater for self, ask for the Alera Group "Counting Employees for Federal Employee Benefit Law" guide.



### What now?

If you sponsor a group health plan, use this checklist to get started on the road to compliance success.

Determine your employer size and whether you are part of a "controlled group"

Research which laws govern the benefit programs you offer to employees.

Know your plan administrator; if you don't know, it's likely you!

Know your plan fiduciaries.

Know your plan vendors.

Know where you can turn for assistance. You Alera Group team is available to provide additional information and assistance.

Ensure you have trusted counsel to help you navigate regulatory waters.



