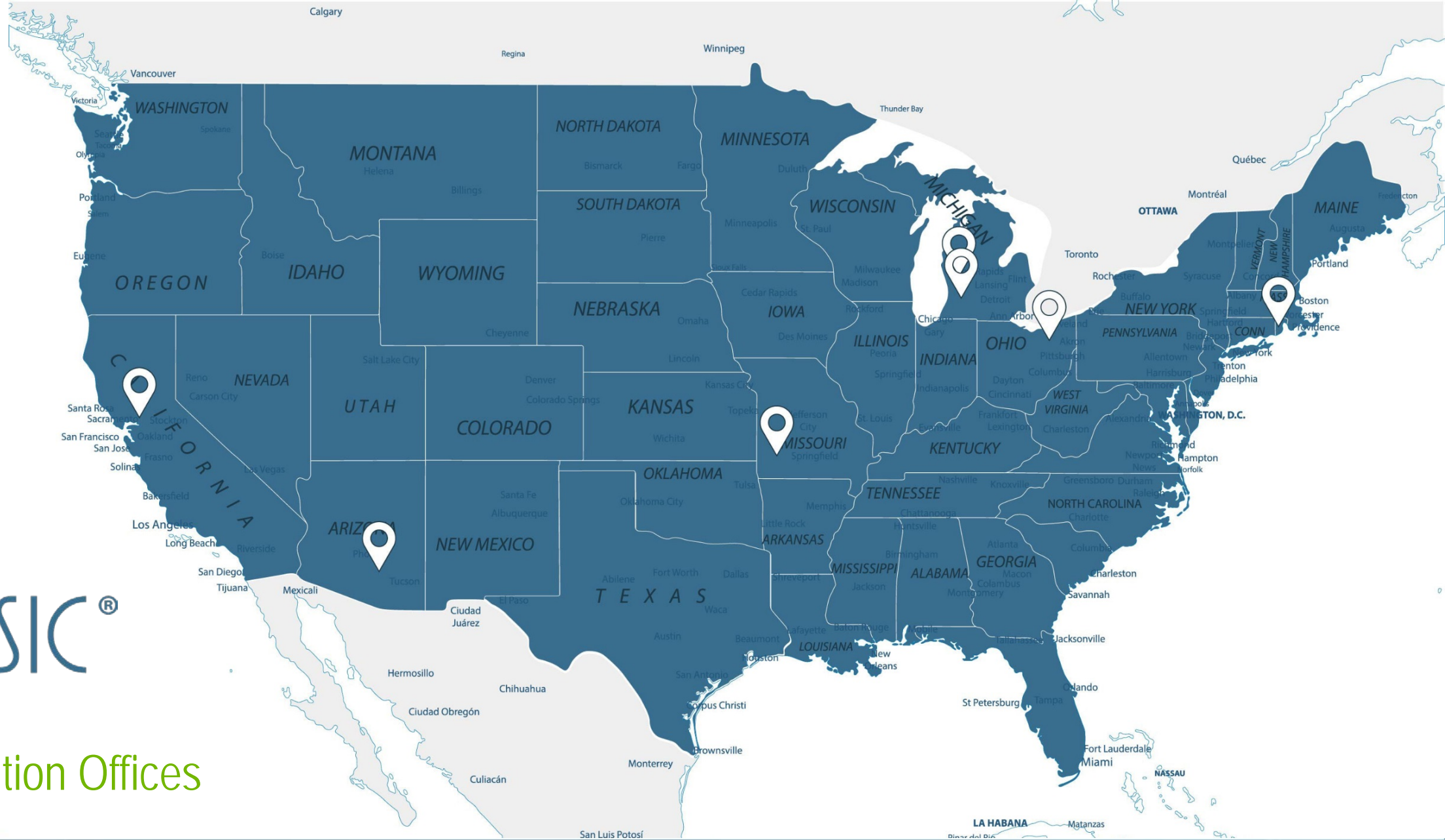




# Health and Welfare Plan Compliance



Presented By: Catherine Rische, JD, LLM  
Compliance Officer



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# ➤ Presented By:

## Catherine Rische

JD, LLM, Compliance Officer



Cat is the Compliance Officer here at BASIC. She has extensive experience working with employers and ERISA plan sponsors as an employee benefits attorney. Her umbrella of experience includes, but is not limited to, strategic benefit design, technical legal compliance under ERISA, COBRA, HIPAA, ACA, LMRA, FMLA and MHPAEA. She holds an L.L.M from the John Marshall Law School in employee benefits, a J.D. from the DePaul University College of Law and a B.A. from Aquinas College.

# ➤ Overview of Topics Discussed

## ERISA Fundamentals for Health and Welfare Plans

- What plans are subject to ERISA?
- What are the implications of ERISA?

## Other Laws Governing Health and Welfare Plans

- Internal Revenue Code
- Taxability of Benefits
- Cafeteria Plans
- Other Applicable Federal Laws
- Various State Laws



# What is ERISA?

The Employee Retirement Income Security Act of 1974 is a federal law that sets minimum standards for most employer sponsored plans (pension and welfare)

# ➤ ERISA Policy Goals

- Primary focus at enactment of ERISA was protecting retirement savings from mismanagement and abuse
- Welfare benefit protection was a secondary purpose but the declaration of the policy to protect the interests of participants and beneficiaries applies
  - Requires transparency and accountability
  - Ensures participants have access to information about plans

# ➤ Application of ERISA

- ERISA applies to most employee benefit plans sponsored by employers
- ERISA does not apply to the following plans:
  - Government plans
  - Church plans
  - Plans that exist **solely** to comply with workers compensation, unemployment compensation, or state disability insurance plans



# ➤ Benefits Subject to ERISA

- Medical, Prescription Drug (Rx), Dental and Vision Benefits (self-funded or fully insured)
- Health Reimbursement Arrangements (HRA) (except some small employer QSEHRAs)
- Health Savings Accounts (HSA) generally not subject to ERISA
- Employee Assistance Plans (EAP) providing counseling benefits (referral-only EAPs are not subject to ERISA)
- Short-term disability (STD) benefits if provided through a trust or are fully insured
- Long-term disability (LTD) benefits

# ➤ Benefits Subject to ERISA, Continued

- Group term life insurance
- Accidental death and dismemberment (AD&D)
- Flexible Spending Arrangements (FSA)
  - The medical spending portion of the account is
  - Dependent care and pre-tax premium collection of a 125 cafeteria plan are not
- Most severance benefits (if they do not classify as an on-going administrative scheme)
- On-site medical clinics providing treatment more than for minor injuries and illnesses
- Telemedicine

## ➤ Benefits not subject to ERISA

- Plans sponsored by governments or churches... but be careful with church plans
- Voluntary Plans – Whether or not a plan is voluntary is subject to facts and circumstances

# ➤ Voluntary Plan Operation for ERISA Exemption

- NO EMPLOYER CONTRIBUTIONS ALLOWED
- Involvement must be limited to permit the insurer to publicize the program, collect premiums by after-tax payroll deduction, and remit premiums to the insurer

# ➤ Voluntary Plan Operation for ERISA Exemption

## Facts that may lead to a determination that the plan is subject to ERISA:

- The employer's name is used in communications with employees
- The benefit associated with other employer sponsored plans
- The employer selects and recommends the benefit to employees
- Benefit materials include a statement that the program is subject to ERISA
- The employer assists employees with claims or disputes
- The employer allows pre-tax deductions for benefits under a cafeteria plan

# ➤ Overview of ERISA Compliance Requirements

- A written plan document
- Disclosure Requirements
  - Summary Plan Document (SPD)
  - Summary of Material Modifications (SMM)
  - 104(b) Requests
  - Summary annual report (SAR) in some circumstances
- Reporting Requirements
  - Form 5500 must be filed unless exception applies

# ➤ Overview of ERISA Compliance Requirements, Continued

- Fiduciary Obligations
  - Must follow the terms of the plan document in a consistent and uniform manner
  - Must exercise prudence in selecting vendors
  - Employer may not mislead plan participants (lie or omit)
  - Bonding requirements (if funded through trust or special account)
  - Prohibited transactions with party in interest (disqualified persons)
  - Prohibition on self-dealing
- Claims and appeals
- ERISA requirements responsibility of plan administrator, not TPA or insurer

# Plan Document Requirements

- Must be written
- May include one benefit or multiple benefits
- Must contain the following information:
  - Named fiduciaries
  - Source of funding
  - Amendment procedures
  - HIPAA privacy (if subject to HIPAA)
- Optional provisions
  - Discretionary language for review purposes, statute of limitations, and venue identification
  - Identification of benefits for Form 5500 purposes





## ➤ Summary Plan Description (SPD)

- Explains benefits to participants in an easily understood manner, it is meant to summarize the terms of the written plan document
- Very different feel depending on whether it is meant to be a “wrapped document” of fully insured benefits or includes self-funded benefits.

# ➤ SPD Requirements

## Who is entitled to a copy of the SPD?

- Enrolled employees, COBRA beneficiaries, custodial parent under QMSCO, spouses, and enrolled dependents of deceased employees that remain covered under the plan

# ➤ SPD Requirements

## What Must be Included in SPD?

- Plan Name
- Name, address, telephone number, and EIN of employer sponsoring plan/plan administrator
- Names of participating employers
- Type of plan (benefits provided)
- Type of administration (self-funded or insured)
- Plan fiscal year and plan ID number for Form 5500 purposes
- Agent for the service of process (cannot be employer) and a statement that process may be made upon plan administrator or trustee

# ➤ SPD Requirements, Continued

- Statement of collective bargaining rights, if applicable
- Eligibility and participation rules
- QMSCO procedures – court order providing coverage by non-custodial parent (can be in SPD or separate policy, but SPD should refer to policy and make available free of charge)
- Subrogation/overpayments/reimbursements/coordination of benefits
- Cost-sharing provisions, including deductibles
- Description of plan benefits
- Description of annual, lifetime, or other limits
- Rules regarding provider networks
- Listing of providers must be offered without charge

# ➤ SPD Requirements, Continued

- Any pre-authorization requirements/utilization review
- Summary of plan exclusions
- Description of the plan's claim and appeals procedures
- Authority of plan sponsor to amend or terminate the plan
- COBRA rules
- Source of contributions (employer, employees, trust fund, etc.)
- Identification of insurer
- ERISA rights
- NMHPA rights (mother and newborn inpatient stays in hospital after delivery)

# ➤ SPD Requirements, Continued

## When:

- Within 120 days of plan establishment, 90 days after becoming a plan participant, once every five years if material changes and 10 years otherwise
- Failure to provide SPD to participants could result in a penalty of \$110 per day per participant or beneficiary for each violation

## How:

- Written in a manner designed to be understood by average participant, must be distributed via first-class mail, second or third-class mail, hand delivered, electronic (if requirements are met) and records maintained of distribution

# ➤ Other SPD Notes

- Optional Provisions
  - USERRA provisions
  - HIPAA privacy notice
  - Medicare Part D notice of creditable/non-creditable coverage
- Can do combo plan/SPD
  - Eliminates inconsistency
  - Thorough explanations
  - Not really a summary because it is lengthy
  - Evidence of plan amendments – procedures needed
- Booklet from insurer probably not enough
- Wrap document should fill all the gaps – intended to supplement the booklet/certificate with all required information

# ➤ SMMs

## Is a summary of plan change (amends the SPD)

- Generally, must be provided to each participant within 210 days after the end of the plan year in which a material change is made
- If the change is a material reduction, then within 60 days after the date the plan amendment is adopted
  - Material reduction = elimination or reduction of benefit, increase in deductibles or copays, addition of pre-authorization
- And, if the change affects the information in a summary of benefits and coverage (SBC), then 60 days prior to the effective date of the change



# ➤ SAR

## Is a summary of information in Form 5500

- If exempted from Form 5500, no SAR required
- DOL has model form
- Must be provided to participants annually
- Must be provided within 9 months after the end of the plan year, or 2 months after the extended due date if later
- Unclear what 5500 changes will do to SAR requirement
- No penalty for failure to send – but if a participant requests, one must be sent within 30 days of the request (104(b)) of penalty of \$110 per day could apply

# ➤ Form 5500

## What:

- Annual report filed with the federal government for ERISA plans

## Who:

- All plans (insured and self-insured through employer's general assets) with 100+ employees and/or retirees enrolled at the beginning of the plan year
- Self-insured funded through a trust; no minimum employee requirement
- Cafeteria plan that includes medical FSAs with 100+ employees enrolled in medical FSA portion at the beginning of the plan year

# ➤ Form 5500

## How:

- Must be filed for each plan; can file one for all plans if plan document indicates one filing is intended
- Fully insured benefits need a Schedule A for each insurer
- Self-insured benefits need a Schedule C for each service provider paid more than \$5,000; however, if the service provider is for an unfunded benefit where employee contributions are paid pre-tax under 125 plan, no Schedule C is needed

# ➤ Form 5500

## When:

- Last day of the 7th month after the plan year ends
- Plan may file for automatic extension of 2½ months

## Penalties:

- \$2,194 per day for late filings, per plan, per plan year – no cap
- Reduced if file under Delinquent Filer Voluntary Compliance Program (DFVCP); \$10 per day up to maximum of \$2,000 per plan per year with a maximum of \$4,000 per plan

# ➤ Form 5500

**In 2016, the DOL and IRS proposed significant changes to 5500**

- No exceptions – everyone files
- New Schedule J with detailed information about operation of health and welfare plans (COBRA offers and elections, eligibility and benefits, funding, rebates, refunds and reimbursements, stop-loss, claims payment data, compliance reporting about SPDs, SMMs, SBCs, GINA, HIPAA, MHPAEA, NMHPA, WHCRA, ACA)
- Currently the Trump administration has a freeze order

# Wrapping ERISA benefits

- Insurance documents or third party contracts (like an EAP provider) may not contain all ERISA required provisions
- Wrapping the underlying policies or documents will fill the ERISA gaps



# ➤ Mega-Wraps of ERISA Benefits

- The ERISA requirements apply to each plan sponsored by an employer
- If an employer sponsors more than one welfare plan it may be useful to wrap the benefits together
  - Can limit the number of Form 5500s plan sponsors are required to file
  - Can incorporate all the various insurance policies into one master document – employers can distribute all documents as one packet
  - Fills in the gaps in the insurance and other plan documents

# ➤ Claims Procedures

- Plan sponsor must adopt claims procedures that comply with DOL regulations
- Group health plans and disability plans have expanded requirements
- Important to follow the claims procedures for litigation purposes for any self-insured benefits
- Clients should familiarize themselves with claims and appeals language in insurer booklets/certificates or ask insurer to verify in writing that their claims and appeals procedures are compliant





# Internal Revenue Code

- IRC contains the rules about the tax treatment of employee benefits
- General rule under the IRC is that all income is taxable unless it is specifically permitted as a deduction
- Two sides to tax favored status; the employer deduction and the employee deduction
- Besides the inherent positives to offering employees benefits (recruitment, retention, market competitiveness), employers receive tax deduction for most benefits provided to employees

# ➤ Internal Revenue Code, Continued

- Main IRC sections that apply to welfare benefits are:
- §79 - Group-term life insurance
- §104 - Compensation for injuries or sickness funded by employee after-tax contributions
- §105/106 - Amounts received under accident and health plans from employer and employee pre-tax contributions (FSAs, HRAs, medical plan)
- §125 - Cafeteria plans
- §132 - Transportation benefits
- §213 - Qualified medical expenses
- §223 - HSAs

# ➤ Nondiscrimination Rules - Health Plans 105(h)

**Prohibit group health plans from discrimination in favor of HCEs in terms of eligibility and benefits**

- Fully insured group health plans are not subject to any IRC nondiscrimination requirements
- ACA added rules for non-grandfathered fully-insured plans but are under the Trump freeze
- Self-funded group health plans are subject to the rules

# ➤ Nondiscrimination Rules – Health Plans 105(h)

- If a self-funded group health plan has different eligibility rules, contribution rates or benefit structures for various groups of employees, there may be a concern
- Can “disaggregate” the plans into sub-plans for testing purposes so that if each sub-plan covers a nondiscriminatory group, the testing may still be satisfied
  - Hourly vs. salary may work if enough non-highly compensated salaried employees
  - Senior management vs. all other employees, probably won't work
- If plan fails, the value of discriminatory coverage is considered “imputed income” to the HCEs

# ➤ Cafeteria Plans

- A cafeteria plan is simply a program that employers can use to help employees pay for certain expenses, like health insurance and dependent care, with pre-tax dollars.
- If employees must pay for benefits with pre-tax contributions, then the employer must adopt a cafeteria plan
- Solely governed by the Internal Revenue Code – which is always focused on the taxability of benefits
- Choice is between pre-tax benefits and unreduced salary
- Not subject to any of ERISA's requirements unless there is a health FSA component
- There are completely separate requirements from ERISA, can include requirements in wrap, mega-wrap documents, or in a stand-alone document

# ➤ Nondiscrimination Rules – Non-Health Plans

- Disability plans are not subject to nondiscrimination rules
- Group term life is subject to nondiscrimination rules for coverage under \$50,000
- §125 plans are subject to nondiscrimination rules for the plan overall + component parts
  - Health FSA also subject to rules
  - Dependent FSA also subject to rules

# Applicable Laws - ACA



## Applies to group health plans

- New notice requirements:
  - Grandfathered plan status
  - Summary of Benefits and coverage (SBC)
  - Notice of exchange eligibility – one time notice for new hires
- W-2 reporting of health benefit costs
- Play or pay penalties
- Dependent children covered under end of the month in which they turn 26
- PCORI Fees - Fee for plan years ending after January 1, 2018 and before October 1, 2019 is \$2.39+ inflation and is due July 31, 2020

# Applicable Laws

## **Health Insurance Portability and Accountability Act (HIPAA)**

- Focus is on portability and privacy
- Office charged with oversight is HHS

## **Consolidated Omnibus Budget Reconciliation Act (COBRA)**

- Focus is on right to continue benefits after certain events
- Office charged with oversight is EBSA





# ➤ Applicable Laws, Continued

## **Family Medical Leave Act (FMLA)**

- Focus is providing job rights and benefits for employees who take approved leave
- Office charged with oversight is Wage and Hour Division (WHD) of DOL

## **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

- Focus is on providing job rights and benefits for employees in active military duty
- Office charged with oversight is the Veterans' Employment & Training Service (VETS) of the DOL

# ➤ Applicable Laws, Continued

## **Age Discrimination in Employment Act (ADEA)**

- Focus is on ensuring nondiscriminatory practices for older employees (at least 40)
- Office charged with oversight is the Equal Employment Opportunity Commission (EEOC)

## **Americans with Disability Act (ADA)**

- Focus is on ensuring nondiscriminatory practices for disabled employees
- Office charged with oversight is the Civil Rights Division of the DOJ

# ➤ Applicable Laws, Continued

## **Pregnancy Discrimination Act (PDA)**

- Focus is ensuring nondiscriminatory practices for pregnant individuals
- Office charged with oversight is the EEOC

## **Genetic Information Nondiscrimination Act (GINA)**

- Focus is on ensuring nondiscriminatory practices based on genetic information
- Office charged with oversight is the Equal Employment Opportunity Commission (EEOC)

## **Mental Health Parity and Addiction Equity Act (MHPAEA)**

- Focus is on ensuring nondiscriminatory practices for mental health treatment
- Office charged with oversight is the Centers for Medicare & Medicaid (CMS)

# ➤ Applicable Laws, Continued

## **Women's Health and Cancer Rights Act (WHCRA)**

- Focus is ensuring reconstructive benefits for women after breast cancer
- Office charged with oversight is the EBSA

## **Newborns' and Mothers' Health Protection Act (NMHPA)**

- Focus is on providing minimum stays for mothers and newborns after childbirth
- Office charged with oversight is EBSA

## **Medicare**

- Focus is on providing medical coverage for seniors and disabled Americans
- Office charged with oversight is CMS & Various State Laws



# Various State Laws

- Many states have mini-COBRA laws that impose COBRA-like requirements on small employers
- Many states have FMLA type laws that impose requirements on small employers
- State insurance laws may apply to insurers that provide policies
- No-fault insurance laws can affect coordination of benefits provisions

# QUESTIONS



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