Skill Building Session
Lose the “Compliance 15” – Avoiding Freshman Pitfalls to a Compliant Well-Being Program

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Program Overview & Section I: Introduction to Value-added Benefits

- Introduction to Value-added Benefits
- Application of PPACA to Value-added Benefits
- COBRA Continuation Coverage
- Coordination with Consumer-driven Health Plans
- ERISA Reporting & Disclosure Requirements
- HIPAA Privacy & Non-discrimination
- Hypothetical Exercises
- Appendix
Introduction to Value-added Benefits
Types of Value-added Benefits

Telemedicine Programs
- Remote Diagnosis and Treatment of Patients via Telephone or Computer

On-Site Clinics
- Varying Degrees of Medical Care Available to Employees on Employer’s Worksite

Employee Assistance Programs
- Counseling and Support for Personal Issues

Wellbeing Programs
- Promotion of Employee Health & Wellbeing Through Education, Programming & Rewards

Specified Disease or Illness
- Coverage for a Specified Disease or Illness Such as Cancer or Critical Illness

Gap Insurance
- Coverage to Fill the Gaps in Primary Coverage Such as Medicare/Tricare
Section II: Application of PPACA to Value-added Benefits

- **Group Health Plan Benefits**
  - *When PPACA Applies*
- **Excepted & Integrated**
  - *When PPACA Does Not Apply*
- **Which Value-added Benefits Must Comply with PPACA**

Application of PPACA to Value-added Benefits

Group Health Plan: When PPACA Applies

"Medical Care" includes:
- The diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body;
- Amounts paid for transportation primarily for and essential to medical care; and
- Amounts paid for insurance covering medical care.
Application of PPACA to Value-added Benefits

Excepted Benefits: When PPACA Does Not Apply

- **Non-Health/Limited Wraparound**
  - Benefits that are not for health or are limited wraparound coverage
  - Auto & liability insurance;
  - Workers comp;
  - AD&D;
  - On-site clinics;
  - Out-of-network
  - Rx out of formulary

- **Limited Scope Benefits**
  - May include limited scope dental or vision benefits and benefits for LTC or home-based care
  - Provided under a separate ins. contract from medical
  - Not an integral part of the GHP (optional at added cost)

- **Non-coordinated Benefits**
  - Includes coverage for specified disease / illness (e.g. cancer) and hospital or fixed indemnity insurance
  - Provided under a separate ins. contract
  - Does not coordinate with GHP
  - Benefits paid regardless of GHP

- **Supplemental Benefits**
  - Medicare or Tricare supplement or similar coverage designed to fill gaps
  - Provided by different issuer than primary
  - Costs no more than 16% of cost of primary
  - No health-factor discrimination
  - Does not provide EHBs

Application of PPACA to Value-added Benefits

Integrated Benefits: When PPACA Does Not Apply

**A benefit program is integrated if:**

1) The employer offers a group health plan to the employee that provides minimum value;
2) The employee receiving the benefit program is actually enrolled in a group health plan that provides minimum value;
3) The benefit program is available only to employees who are actually enrolled in MV group coverage; and
4) Under the terms of the benefit program, an employee (or former employee) is permitted to permanently opt out of and waive future coverage under the benefit program at least annually.
PPACA Applicability
Does PPACA Apply to Value-added Benefits?

Telemedicine
- **NOT EXCEPTED UNLESS:**
  - "Supplemental excepted benefit"
  - _But…_provides EHBs?
  - Enrollment is limited to GHP/MV participants

On-Site Clinic
- **EXCEPTED BECAUSE:**
  - Limited wraparound benefits
  - _Unless…_care limited to first-aid or
  - Church or governmental plan

EAP
- **NOT EXCEPTED UNLESS:**
  - No significant medical care & not required to exhaust EAP first
  - Enrollment not tied to GHP
  - No employee premium or contribution

Wellbeing Program
- **NOT EXCEPTED UNLESS:**
  - Wide range of fitness / educational services
  - Designed to improve health & prevent illness
  - Costs charged are separate from GHP

Specified Illness
- **EXCEPTED BECAUSE:**
  - "Non-coordinated benefit"
  - _If all requirements are met_

Gap Insurance
- **EXCEPTED BECAUSE:**
  - "Supplemental Excepted Benefit"
  - _If all requirements met_
Section III: COBRA & Value-added Benefits

- Benefits Subject to COBRA
- Payment of COBRA Premiums
- Penalties for Non-Compliance
- COBRA Applicability to Value-added Benefits

COBRA Applicability
Benefits Subject to COBRA

- Any arrangement an employer establishes or maintains to provide employees or their families with *medical care*
- Compliance is not conditioned upon the methodology by which the employer funds plan liabilities

<table>
<thead>
<tr>
<th>Types of Medical Care Covered by COBRA</th>
</tr>
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<tbody>
<tr>
<td>Inpatient &amp; Outpatient Hospital Care</td>
</tr>
<tr>
<td>Physician Care</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Types of Medical Care NOT Covered by COBRA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life Insurance</td>
</tr>
<tr>
<td>Education Incentives &amp; Tuition Reimbursement</td>
</tr>
</tbody>
</table>
**COBRA Administration**

**Payment of Premiums**

- Employer must terminate coverage if beneficiary fails to pay any continuation coverage premium payment on or before the premium payment deadline.

- “Premium Payment Grace Period”
  - “timely” premium payment refers to any payment made within 30 days after the date upon which the payment is due

- May charge 100% of the applicable premium plus 2% for administrative expenses (102% of the applicable premium).

- Initial premium due on or before the 45th day following initial election.

- Thereafter, monthly payments constituting an equal 1/12th share of the applicable premium.

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**COBRA Enforcement**

**Penalties for Non-Compliance**

- Max. Daily Excise Penalty: $100/$200
- Max. Penalty During ER Exam: 10% of Prior Year Tax or $500,000

- Statutory Penalties of Up to $110/Day + Liability for Fiduciary Breach if Duty Involved

- Penalties Up to $50,000/Breach
- May Require Written Compliance Notice to EEs

- Covered EEs and Qualified Beneficiaries May Sue in Federal Court Based on ERISA

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COBRA Applicability

Does COBRA Apply to Value-added Benefits?

**Telemedicine**
- SUBJECT TO COBRA BECAUSE:
  - Provides medical care
  - Unless...church or governmental plan

**On-Site Clinic**
- SUBJECT TO COBRA BECAUSE:
  - Provides medical care
  - Unless...care limited to first-aid or
    - Church or governmental plan

**EAP**
- NOT SUBJECT TO COBRA UNLESS:
  - Provides services beyond referral
  - Offers counseling services

**Wellbeing Program**
- NOT SUBJECT TO COBRA UNLESS:
  - Provides medical care
  - Tied to or coordinated with medical plan

**Specified Illness**
- SUBJECT TO COBRA BECAUSE:
  - Provides medical care
  - Unless...voluntary benefit plan or
    - Church or governmental plan

**Gap Insurance**
- NOT SUBJECT TO COBRA BECAUSE:
  - "Supplemental Excepted Benefit"
  - If all requirements met
Section IV: Coordination with Consumer-Driven Health Plans

- Understanding High Deductible Health Plans
- HSA Requirements
- Non-disqualifying “Other Coverage”

Consumer Driven Health Plans
High Deductible vs. Traditional Health Plans

**HIGH DEDUCTIBLE HEALTH PLANS**
- Lower premiums/higher OOP costs
- EE pays until high deductible met
- HSA compatible
- Minimum deductible: $1,300/$2,600

**Pros & Cons**
- Manage your own health care costs
- Tax-free HSA funds; High OOP now
- Great if mostly preventive care

**TRADITIONAL HEALTH PLANS**
- Higher premiums/lower OOP costs
- Copays with lower deductible
- Not HSA compatible; FSA available
- Minimum deductible: None

**Pros & Cons**
- Less control over your health costs
- Use-or-lose FSA – limited rollover
- Better for non-preventive care
Consumer Driven Health Plans
Health Savings Account

- **HSA**
  - Must Be Enrolled in QHDHP
  - Min. Deductible: $1,300/$2,600

- **Qualified Medical Expenses**
  - (Rollover & Portable)
  - Limits: $3,400/$6,750
  - 55+ Catch Up: $1,000

- **LTC / Medicare Premiums; Non-Qualified Medical Expenses 65+**

- **No Other Non-HDHP Coverage**
  - (Medicare, FSA, HRA, Clinic)

- **Comparable ER Contributions Required**
  - (Unless 125 Plan)

Health Savings Account
Other Non-HDHP Coverage

Individuals (or families) generally cannot have *any other health coverage* that is not an HDHP.

However, you can still be an HSA eligible individual if you have the following additional insurance or coverage:

- Retirement HRA
- Specified Illness
- Hospital Indemnity
- Accident & Disability
- Long Term Care
- Dental & Vision
- Limited Purpose FSA or HRA
- Suspended HRA
- Post-Deductible FSA or HRA
- Liabilities

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Section V: ERISA Reporting and Disclosure Requirements

- Three Regulatory Aspects of ERISA
- Non-disqualifying “Other Coverage”
- Understanding ERISA & “Medical Care”
- ERISA’s Voluntary Benefit Exemption
- Application of ERISA to Value-added Benefits

Scope of ERISA Mandates
ERISA Has Three Regulatory Aspects

ERISA

- Reporting Requirements
  - Filings for Non-exempt Entities
  - Form 5500
- Fiduciary Requirements
  - Exclusive Benefit / Prudent Person
  - Claims Determinations; Vendor Selection
  - Abide by Plan Docs
- Disclosure Requirements
  - Operational / Plan Doc Failures
  - SPD, SMM, SAR
  - Documents
# ERISA Exemptions

## General Exemptions

1. Government Plans
2. Church Plans
3. Workers’ Compensation
4. Non-resident plan maintained outside the US

## Also, Payroll Exemptions Apply in Certain Circumstances

1. Wages, overtime, shift premiums, holiday premiums, weekend premiums
2. Sick pay or income replacement benefits
3. Vacation, holiday, jury duty and similar pay

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# Voluntary Benefits

- Permit insurance company to sell voluntary policies
- Employees pay full cost of the coverage after tax
  - **NO EMPLOYER CONTRIBUTIONS**
- Employees pay through payroll deduction
- Employer duties limited to distributing payroll deductions to insurer
- No revenue to employer for permission to solicit employees
- **NO EMPLOYER ENDORSEMENT**
  - Be careful with logos, benefit guides and other publications
ERISA Applicability
Does ERISA Apply to Value-added Benefits?

Telemedicine
- SUBJECT TO ERISA BECAUSE:
  - Provides medical care
  - Unless…Voluntary Benefit Exemption or
  - Church or governmental plan

On-Site Clinic
- SUBJECT TO ERISA BECAUSE:
  - Provides medical care
  - Unless…care limited to first-aid or
  - Church or governmental plan

EAP
- NOT SUBJECT TO ERISA UNLESS:
  - Provides services beyond referral
  - Offers counseling services

Wellbeing Program
- NOT SUBJECT TO ERISA UNLESS:
  - Provides medical care
  - Tied to the medical plan

Specified Illness
- SUBJECT TO ERISA BECAUSE:
  - Provides medical care
  - Unless…Voluntary Benefit Exemption or
  - church or governmental plan

Gap Insurance
- NOT SUBJECT TO ERISA BECAUSE:
  - “Supplemental Excepted Benefits”
  - If all requirements met
Section VI: HIPAA Privacy & Non-discrimination Requirements

- Limited Review of HIPAA’s Privacy, Breach Notification, Security & Enforcement Rules
- HIPAA Non-discrimination for Health Plans
- Applicability of HIPAA Non-discrimination to Value-added Benefits

Review of the HIPAA Privacy Rule

1. Safeguards
   Requires covered entities to maintain adequate safeguards

2. Exceptions
   Outlines the non-disclosure exceptions (general & individual)

3. Individual Rights
   Outlines individual rights of inspection, duplication and correction of PHI

4. BAs/Contractors
   Defines the business associate relationship and required agreements

5. Breach
   Outlines the requirements of the Breach Notification Rule
Review of the HIPAA Breach Notification Rule

1. Individual Notice
   Defines individual notice regarding scope, harm, responsibility and remedy

2. Filings
   Outlines agency (HHS) and media notifications (+500 victims) for breach

3. Annual Notices
   Outlines annual notice to HHS for breach of unsecured PHI/e-PHI

4. BAs/Contractors
   Defines individual, media and agency notifications by BAs and contractors

5. Burden of Proof
   Covered entities must retain records of breach corrections for 6 years

Review of the HIPAA Security Rule

1. Creation
   Outlines rules related to the creation of electronic form PHI

2. Receipt
   Outlines rules related to the receipt of electronic form PHI

3. Maintenance
   Outlines rules related to the maintenance of electronic form PHI

4. Transfer
   Outlines rules related to the transfer of electronic form PHI
Review of the HIPAA Enforcement Rule

1. Responsibilities
Defines compliance responsibilities for covered entities

2. Investigations
Details the conduct and scope of agency investigations

3. Penalties
Outlines the civil monetary penalty structure

4. Hearings & Appeals
Outlines administrative procedures for hearings & appeals

HIPAA NON-DISCRIMINATION BASICS
Prohibition Against Denial of Eligibility Because of any Health Factor

- Health Status
- Physical Medical Condition
- Mental Medical Condition
- Receipt of Health Care
- Medical History
- Genetic Information
- Claims Experience
- Evidence of Insurability
- Disability
HIPAA NONDISCRIMINATION

Defining Similarly Situated Employees

Distinctions prohibited if based on certain factors:
- Health factor-based
- Inconsistent with employer’s usual business practices
- Wage or income based

Distinctions must be based on bona-fide employment-based classifications:
- Part-time versus full-time employees
- Employees working in different geographic locations
- Employees with different dates of hire
- Employees with different lengths of service
- Employees versus beneficiaries

Allowable distinctions include:
- Different eligibility provisions
- Different benefit restrictions
- Different costs

HIPAA Applicability

Does HIPAA Apply to Value-added Benefits?

Telemedicine
- SUBJECT TO HIPAA BECAUSE:
  - Provides Medical Care
  - Unless…Voluntary Benefit Exemption or
  - Church or Governmental Plan

On-Site Clinic
- SUBJECT TO HIPAA BECAUSE:
  - Provides Medical Care
  - Unless…care limited to first-aid
  - Church or governmental plan

EAP
- NOT SUBJECT TO HIPAA UNLESS:
  - Provides services beyond referral
  - Offers Counseling Services
HIPAA Applicability

Does HIPAA Apply to Value-added Benefits?

**Wellbeing Program**

- **NOT SUBJECT TO HIPAA UNLESS:**
  - Provides Medical Care
  - Tied to the Medical Plan

**Specified Illness**

- **SUBJECT TO HIPAA BECAUSE:**
  - Provides Medical Care
  - Unless…Voluntary Benefit Exemption or Church or Governmental Plan

**Gap Insurance**

- **NOT SUBJECT TO HIPAA BECAUSE:**
  - “Supplemental Excepted Benefits”
  - If all requirements met

Hypothetical Exercises
Client Practice Examples – Hypothetical 1

- Client in the technical services industry with a large millennial workforce was looking to improve its total rewards platform, while
  a) Improving benefit satisfaction;
  b) Improving workforce health and wellness; and
  c) Decreasing workforce absenteeism and presenteeism.

- Client contracted with a concierge-type general medical provider, permitting the provider to set up a remote clinic in the employer’s cafeteria once per week for the purpose of providing limited medical care and acupuncture services to employees.

- All employees were eligible for the concierge provider’s services.

- After each visit, the provider “charged back” a flat fee to one of the employer’s health plans (PPO, HDHP), coded as an “office visit.”

Client Practice Examples – Solution 1

1. The clinic constituted a medical plan and was not an excepted benefit, so HDHP participants effectively held prohibited secondary insurance.

2. The employer failed to adhere to HIPAA’s non-discrimination and privacy standards by setting up a clinic in a public space and by not verifying the provider’s HIPAA-compliance activities.

3. The employer violated its contract with the fully-insured carrier by setting up a suspect arrangement for the “bill back” administration arising from concierge visits.

4. Despite the fact the clinic constituted a “plan” and provided medical care, the employer failed to make the concierge service a COBRA-applicable benefit.

5. The employer violated the terms of its property lease by creating a sublease in favor of the concierge provider.
Client Practice Examples – Hypothetical 2

- Looking to provide a supplemental benefit to its part-time workers, client rolled out a telemedicine platform to:
  a) Increase part-time retention;
  b) Increase employer loyalty; and
  c) Improve employee health.

- All employees were eligible to participate in the telemedicine program

- Employees were not required to maintain other group health plan coverage to participate in the telemedicine plan

- On audit for collateral issues, the US DOL found several faults with the telemedicine program requirements

Client Practice Examples – Solution 2

1. Because employees were not required to maintain other group health plan insurance, the telemedicine program must comply with the PPACA GHP mandates regarding preventive care, etc. (for an unenrolled individual)

2. The telemedicine program was not deemed to be an excepted benefit, so HIPAA portability and other rights attached to the benefit

3. Despite the telemedicine’s coverage of medical care, the employer failed to administer the benefit program as a COBRA-eligible benefit

4. Because the benefit was not deemed excepted, as the provision of medical care, ERISA required the plan to maintain a plan document and summary plan description, and to perform the annual reporting requirements
**Client Practice Examples – Hypothetical 3**

- Seeking to address mental health concerns within its employee population, client diversified the job duties of an already employed mental health practitioner to perform “EAP like” services, including:
  a) Medical and mental health assessments;
  b) Inoculations & flu shots; and,
  c) Limited mental health counseling (6 visits free of charge).
- The mental health practitioner provided free counseling and related services for the benefit of all employees.
- Program participants were not required to be plan participants.
- Because the practitioner was already employed by the employer, the employer did not require a business associate agreement or any other privacy and security related documents.

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**Client Practice Examples – Solution 3**

1. Because employees were not required to maintain other group health plan insurance, the onsite clinic program must comply with the PPACA GHP mandates regarding preventive care, etc. (for an unenrolled individual).
2. The clinic program was not deemed to be an excepted benefit, so HIPAA portability and other rights attached to the benefit (privacy and security, as well).
3. Despite clinic program’s coverage of medical care, employer failed to administer the program as a COBRA-eligible benefit.
4. Because the benefit was not deemed excepted, ERISA required the plan to maintain a plan document and SPD, and to perform the annual reporting requirements.
5. The employer also sponsored a HDHP/HSA and allowed HDHP enrollees to receive cost-free benefits from the clinic, violating the HSA rules regarding other coverage.
Client Practice Examples – Hypothetical 4

- Client in the manufacturing industry with a composite workforce was seeking to improve participation in their wellbeing program while:
  a) Improving HDHP participation; and,
  b) Improving workforce health and wellbeing.
- Employer designed a wellbeing program and reward structure that was funded via employer contributions to the HSA account of participating employees
- All employees were eligible for the incentives offered for participating in the wellbeing program
- After verifying the completion of the wellness activities, deposits were contributed to participating employees’ HSA accounts

Client Practice Examples – Solution 4

1. The employers’ incentives were designed in a way such that employees participating with spouses or those enrolled in family plans received more HSA funding than employees participating on the single/individual plan
2. The employer failed to adhere to HIPAA’s non-discrimination standards by providing additional HSA funding to employees participating with spouses or enrolled in family plans, despite the fact that the plan imposed no obligation upon the spouse to participate in the wellbeing program
3. The employer provided HSA funds to employees who were enrolled in the health plan without verifying the existence of a qualified HSA plan
Appendix

- Summary of Applicable Laws & Regulations to Value-added Benefits
- Summary of Plan Coordination Issues for High Deductible Health Plans & HSAs
- Summary of COBRA Coverage Requirements
- Summary of ERISA Requirements

Summary of Applicable Laws & Regulations to Value-added Benefits

PPACA
- If the plan is not excepted or integrated, it must comply with the health care reform mandates
- To be integrated, the plan must not cover non-GHP participants

COBRA
- If the plan provides medical care, the employer must offer COBRA continuation coverage
- Provide General and Election Notice

CDHP
- If the plan is not deemed permissible other non-HDHP coverage by the IRS, it will result in HSA ineligibility
- Exercise caution with EAPs, On-Site Clinics, and Telemedicine

ERISA
- If the plan provides medical care (unless excepted), the employer must adhere to ERISA fiduciary, reporting, and disclosure requirements
- Include in Plan Documents and 5500

HIPAA
- If the plan provides medical care (unless excepted), the employer must adhere to HIPAA privacy and non-discrimination requirements
- Protect PHI and No Discrimination Amongst Similarly Situated Individuals
### Summary of Plan Coordination Issues for HDHPs & HSAs

<table>
<thead>
<tr>
<th>High Deductible</th>
<th>HSA</th>
<th>Other Coverage</th>
<th>Compliant Design?</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enrolled</td>
<td>Enrolled</td>
<td>Enrolled: Wellness Program</td>
<td>✓</td>
<td>Permissible as long as the wellness program does not provide significant medical benefits.</td>
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<tr>
<td>Enrolled</td>
<td>Enrolled</td>
<td>Enrolled: Employee Assistance Program</td>
<td>!</td>
<td>EAPs that provide medical care in the form of counseling could result in HSA ineligibility.</td>
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<tr>
<td>Enrolled</td>
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<td>Enrolled: Pre-Deductible On-Site Clinic</td>
<td>✗</td>
<td>On-site clinics providing other non-HDHP coverage (pre-deductible) would result in HSA ineligibility.</td>
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<tr>
<td>Enrolled</td>
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<td>Enrolled: Post-Deductible On-Site Clinic</td>
<td>✓</td>
<td>On-site clinics providing other non-HDHP coverage (post-deductible) would NOT result in HSA ineligibility.</td>
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<tr>
<td>Enrolled</td>
<td>Enrolled</td>
<td>Enrolled: Gap Insurance</td>
<td>!</td>
<td>Individuals enrolled in Medicare and Tricare are HSA ineligible.</td>
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<tr>
<td>Enrolled</td>
<td>Enrolled</td>
<td>Enrolled: Telemedicine</td>
<td>✓</td>
<td>Teledicine programs that provide significant medical benefits could result in HSA ineligibility.</td>
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<tr>
<td>Enrolled</td>
<td>Enrolled</td>
<td>Enrolled: Specified Illness</td>
<td>✓</td>
<td>Specified Illness is permissible other coverage.</td>
</tr>
</tbody>
</table>

### Summary of COBRA Coverage Requirements

- Continuation coverage mandated in certain instances by the Consolidated Omnibus Reconciliation Act of 1986, also known as “COBRA.”

- Applies to all private-sector group health plans maintained by employers with at least 20 employees on more than 50 percent of typical business days (previous calendar year)

- All full-time and part-time employees are counted (part-time employee counts as a fraction of a full-time employee)

- Does not apply, however, to plans sponsored by the Federal Government or by churches and certain church-related organizations
The Employee Retirement Income Security Act ("ERISA") was enacted into law in 1974.

ERISA outlines guidelines for the administration of tax-advantaged retirement and welfare benefit plans.

ERISA does not require employers to provide benefits; instead, provides standards for the plans employers voluntarily adopt.

ERISA contains three types of employer obligations: (1) reporting requirements; (2) disclosure obligations; and (3) fiduciary guidelines.

Some plans are exempt from ERISA requirements: (1) government and church; (2) maintained for state law; and (3) maintained outside the U.S.

Unlike civil actions, ERISA actions are limited to certain equitable remedies such as restorations and injunctions.

ERISA fiduciaries carry the highest known legal duties permitted by law.