

# TECHNICAL ADVISORY

TA 352

Subject

Contents

January 7, 2022

**Health Insurance  
Compensation Disclosures for  
ERISA-Covered Health Plans**

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## EXECUTIVE SUMMARY

1. Newly in-force legislation adds additional compensation disclosure requirements for agents writing any health insurance plans covered by the Employee Retirement Income Security Act of 1974 (ERISA).
2. Agents are required to provide:
  - a. A written description of the services that they intend to provide to the policyholder
  - b. A written description of all compensation, both direct and indirect, that they expect to receive for writing a new or renewal policy BEFORE the contract or agreement is signed.
3. Compensation can be disclosed as an amount, a formula, or a per Capita charge. The disclosure should also include who is paying the agent: the plan, the plan sponsor, the carrier, etc.
4. The disclosure should include ALL compensation including any incentive or profit-sharing, finder's fees, or anything else of monetary value provided to the agent/broker in connection with the sale of the policy.

## Necessary Action

1. Ensure that all staff in your agency that work with Health plans are aware of the new disclosure requirements.
2. Create a standardized compensation disclosure to use on ERISA-covered health plans: [IIABA's template](#) is a good place to start.
3. On any Health plan covered by the ERISA, agents MUST provide a written description of compensation that they expect to receive for selling the contract before that contract is executed. Note that this document is NOT required to be signed by the customer, but it must be presented on all qualified plans.

# TECHNICAL ADVISORY

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## BACKGROUND

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The Consolidated Appropriations Act of 2021 (CAA) included new requirements for health agents to disclose compensation on plans covered by ERISA. These requirements match existing federal guidelines for ERISA-covered retirement plans, in an attempt to provide transparency and allow consumers to make an informed decision when buying coverage. This technical advisory will cover the important points of the changes, but for full details of the legislation, reference [Page 1713 of the CAA](#). The legislation states that any agent that reasonably expects to receive \$1,000 or more from brokering or consulting on a covered plan (new or renewal) must, before executing the contract, disclose in writing:

- A description of services to be provided under the contract
- If applicable, any fiduciary responsibility that the agent will take under the plan
- A description of all direct compensation the agent will receive
- A description of all indirect compensation the agent will receive
- A description of any compensation passed between the agent, an affiliate or a subcontractor (I.e. commissions or finders fees)
- A description of any compensation that the agent reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination

A few definitions to help characterize those rules:

1. **Compensation:** anything of monetary value
2. **Direct compensation:** compensation received from the covered plan
3. **Indirect compensation:** any compensation received from a source other than the covered plan. This includes commissions paid by carriers, incentive payments including profit-sharing, and finder's fees

The legislation states that the description of compensation may be expressed as a monetary amount, a formula, or a per capita charge for each enrollee. However, it also allows a couple of exceptions: If the compensation cannot be reasonably expressed in such terms, another reasonable method may be used including a disclosure that additional compensation MAY be earned but may not be calculated at the time of the contract. In that case, the disclosure should include a description of the circumstances under which the additional compensation may be earned and a good faith estimate of the expected compensation. This is important for contingencies, in which an agent may not know whether they will receive additional compensation in the form of profit-sharing at the time when they write the policy.

Enforcement of these new disclosure requirements falls under the regulation of the Department of Labor (DOL). DOL [has issued a bulletin](#) containing additional guidance on the application of the new law. They plan to enforce a "good faith" standard on the compensation disclosures: if an agent makes a reasonable effort to disclose their compensation including commissions, fees, contingencies, etc.

They will be considered in compliance with the law. It is not necessary to try to account for every promotional pen that a marketing representative for the carrier gives to the agency. Their bulletin also provides additional guidance on contingency income, recommending that agents may use a range rather than a specific number in an instance, like profit-sharing, where it is impossible to calculate the actual income that might result from the sale.

IIABL recommends that agents develop a standardized form for use on all ERISA-covered plans. [IIABA has created a template](#) for developing a disclosure in your agency. This disclosure, edited for the specifics of the individual plan, should be included on all ERISA-covered plans going forward to remain in compliance with the new laws. Agents should make a good faith effort to ensure that customers understand all direct and indirect compensation that they receive for writing such a policy, and any omissions should be corrected within 30 days of discovery.

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## PREPARED BY

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**Independent Insurance Agents & Broker of Louisiana**  
18153 East Petroleum Drive, Baton Rouge, LA 70809  
Phone: 225.819.8007 | Fax: 225.819.8027  
Email: [info@IIABL.com](mailto:info@IIABL.com) | Web: [www.IIABL.com](http://www.IIABL.com)