Preparing your firm for **New Broker & Consultant Compensation Disclosures**

COMPLIANCE OUTLINE

BROUGHT TO YOU BY

Steptoe | THE COUNCIL
The Council of Insurance Agents & Brokers

Table of Contents

Introduction

The Council has long been a proponent of transparency within the commercial insurance market. We believe trust is the foundation of the broker/client relationship, and that disclosure and transparency are the best ways to set expectations, avoid conflict and ultimately deliver positive outcomes for employers and their employees.

In 1998, we adopted a policy position urging the disclosure of compensation arrangements with carriers upon request. More than two decades later—in December 2020—Congress enacted the Consolidated Appropriations Act of 2021. The statute prohibits ERISA group health plan fiduciaries from entering into, renewing, or extending service agreements with covered service providers unless the service providers comply with a new set of specified disclosure obligations. In anticipation of this new transparency regime, The Council and its members have spent countless hours discussing the details of these disclosure obligations, and how they will impact commercial insurance brokers.

The enclosed document is the result of that collaboration. This resource lays out what is required under the statute, clarifies questions around timing and methodology, and provides sample contracting language that firms may utilize as they prepare to comply with new compensation disclosures. We are grateful for the contributions of our members to this process.

New ERISA Section 408(b)(2) Group Health Plan Service Provider Disclosures

BACKGROUND

In December 2020, Congress enacted the Consolidated Appropriations Act of 2021[1] which included a new requirement that bars an ERISA group health plan fiduciary from entering into, renewing, or extending a services contract or arrangement with a "covered service provider" that is providing "brokerage services" or "consulting" to that plan unless specified disclosure obligations are satisfied by that service provider so that the fiduciary can ensure that the compensation that is being received in connection with the services being provided to the plan is "reasonable."[2]

Who Must Disclose?

Specifically, this disclosure obligation applies to service providers who:

- Enter into a contract or arrangement to provide services to a group health plan of any size;[3] and
- Reasonably expect to receive at least $1,000 in "direct" and/or "indirect" compensation (whether paid to the broker or consultant, an affiliate, or a subcontractor) related to:
  - "**Brokerage services** . . . with respect to selection of insurance products (including vision and dental), recordkeeping services, medical management vendor, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services." [4]
  - "**Consulting** . . . related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services."[5]

1 Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020) (hereinafter "CAA"), https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf.

2 See CAA, Division BB ("Private Health Insurance and Public Health Provisions"), Title II ("Transparency"), § 202(a) (amending the Employee Retirement Income Security Act of 1974 ("ERISA") § 408(b)(2)), codified at 29 U.S.C. § 1108(b)(2)(B).

3 There is a parallel provision that requires carriers to disclose the compensation being paid to agents in the individual markets to enrollees. See CAA, Division BB, Title II, § 202(c).

4 29 U.S.C. § 1108(b)(2)(B)(ii)(I)(bb)(AA).

5 29 U.S.C. § 1108(b)(2)(B)(ii)(I)(bb)(BB).

What Action is Required?

As of December 27, 2021, the covered service provider must disclose the required information to the responsible plan fiduciary "not later than the date that is reasonably in advance of the date on which the contract or arrangement [with the covered service provider] is entered into, and extended or renewed."[6] The purpose of the disclosure is to enable the plan fiduciary to ensure that the compensation that will be received in connection with the services provided to the plan is "reasonable."

These requirements extend to "group health plans" (including stand-alone vision and dental plans for product selection and benefit administration functions brokering services and consulting) but do not encompass any other "excepted benefits" such as hospital indemnity or disability products.[7]

How to Use this Document

This document outlines the disclosures required under the statute and provides (non-exhaustive) lists of the services you may be offering to your plan clients, and the potential revenue sources you might be receiving in connection with those services or that relate to those services in any way.

In addition, we have included the following list of non-statutorily-required contract provisions you may want to consider adding to your 408(b)(2) disclosures:

- Instructions to Sign and Return Letter
- Period of Engagement
- Arbitration
- Confidentiality
- Indemnification
- Applicable Law
- Entire Understanding

A firm can choose to have its disclosures cover the entire employee benefits portfolio with a client and many Council member firms already deploy agreements and disclosures in this space that do encompass all of the benefits included in the plan.[8]

6 29 U.S.C. § 1108(b)(2)(B)(v)(I).

7 29 U.S.C. § 1108(b)(2)(B)(ii)(I)(aa).

8 To the extent that any such disclosures are not legally mandated, however, you may want to ensure that they do not violate the terms of any contractual nondisclosure obligations that may be in place with carriers or other providers.

Outlined in this document are the new ERISA Section 408(b)(2) disclosure obligations along with examples of approaches that can be taken to satisfy the new requirements. This outline is not intended to suggest that any particular approach is correct—these types of determinations must be made on a firm-by-firm and even client-by-client basis.

We intend to modify these materials as circumstances warrant going forward, including adding sample disclosures to respond to any legislative developments which may occur.

It is important to remember that regardless of whether the disclosures are provided as part of an engagement letter, a formal contract, or a stand-alone notice type of document for which no acknowledgement or acceptance is required, it creates a contractual commitment – you must do what you say you will do or you may be held liable for your failure to do so. Any disclosure documents, therefore, must be developed based on your actual business practices (or the documents must dictate those practices going forward), and the principles articulated in any such documents should be indoctrinated in your firm through your ethics policies and training programs.

Disclosure Obligations

NATURE AND SCOPE OF SERVICES TO BE PROVIDED

As previously noted, covered service providers providing brokerage or consulting services to the plan are required to describe the **services that they will perform/provide to the plan pursuant to the contract or arrangement.**[9] Such services would include, but would not necessarily be limited to:

- Placement services (e.g., assessing/reviewing current plans, conducting renewal analysis, summarizing plans/policies, implementing client-directed coverage, negotiating with carriers/advising on opportunities for improvement, etc.).
- Enrollment services (e.g., supporting client in presentation/administration of annual enrollment process, providing resources to educate/engage plan members, implementing an online service platform to facilitate annual enrollment and managing access to it, etc.).
- Account management services (e.g., serving as a liaison between client and carrier; facilitating resolution of billing concerns, eligibility maintenance, plan questions, and claims-related issues; assisting employees in addressing general benefits questions; reviewing contracts for accuracy of plan provisions, etc.).
- Plan servicing (e.g., setting up premium deductions, servicing the plan, reviewing plan performance, etc.).
- Compliance services (e.g., providing regular legislative/regulatory updates, offering specialized guidance on existing and emerging compliance issues, conducting compliance reviews, preparing Form 5500s, etc.).
- Consulting services.
- Referral services.
- Other self-insured plan services (e.g., finding third-party administrators and other service providers, etc.).
- Value added services (e.g., providing access to HR services, analytic platforms, and wellness resources; offering support from a dedicated technology specialist, etc.).
- Additional out-of-scope services (e.g., providing access to COBRA administration, FMLA management, HSA/FSA/HRA administration, regulatory filing assistance, etc.).

We anticipate that the nature of the services may be different in each case (and will likely vary significantly between covered service providers). As such, we expect that these general categories of services will be supplemented to include marketing information/specific details of the services, at the covered service provider's discretion.[10]

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9 See 29 U.S.C. § 1108(b)(2)(B)(iii)(I). If the service provider (or an affiliate or subcontractor thereof) will provide – or reasonably expects to provide – services as a fiduciary pursuant to that contract or arrangement directly to the covered plan, that also must be disclosed. See 29 U.S.C. § 1108(b)(2)(B)(iii)(II).

10 It is important to note that, pursuant to pre-existing DoL regulations, only "necessary services" may be provided to the plan and services are "necessary" only "if the service is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 29 C.F.R. § 2550.408b-2(b).

COMPENSATION DISCLOSURE

How Should Expected Compensation be Described?

The new compensation disclosure provisions require covered service providers to disclose/describe specific compensation arrangements, including direct compensation, indirect compensation, and contingent compensation. For purposes of these disclosures, **compensation** is specifically defined to mean **anything of monetary value, though it excludes non-monetary compensation valued at $250 or less, in the aggregate, received during the term of the contract or arrangement**.[11]

In disclosing the various forms of compensation, the statute provides that the descriptions may be expressed as:

- A monetary amount,
- A formula, or
- A per capita charge for each enrollee.

If, however, the compensation or cost **cannot reasonably be expressed in such terms**, the statute allows it to be expressed **by any other reasonable method**, including a disclosure that **additional compensation may be earned but may not be calculated at the time of the contract**. In this instance, such disclosure must include:

- A description of the circumstances under which the additional compensation may be earned; and
- If the covered service provider cannot otherwise readily describe compensation, a good faith estimate, provided that an explanation of the methodology/assumptions used to prepare the estimate is provided. Any such description must contain sufficient information to permit evaluation of the reasonableness of the compensation or cost.

Looking at Retirement Plans
The Department of Labor previously has opined in the retirement plan context that, for purposes of satisfying the ERISA Section 408(b)(2) disclosure obligations, "disclosure of expected compensation in the form of known ranges can be a 'reasonable' method for purposes of" satisfying the rule. "However, such ranges must be reasonable under the circumstances surrounding the service and compensation arrangement at issue."[12]

Ultimately, any such description must contain sufficient information to **permit evaluation of the reasonableness of the overall compensation** being received by the service provider that in any way relates to the service provider's plan services. It may be helpful to evaluate your disclosures through that lens—does the disclosure of all of your plan services related revenue provide the fiduciary a sufficient basis upon which to evaluate the reasonableness of that compensation?

11 See 29 U.S.C. § 1108(b)(2)(B)(ii)(dd)(AA). If the service provider, an affiliate, or a subcontractor reasonably expects to receive any special compensation in connection with the termination of the contract or arrangement, then that also must be disclosed along with a description of how any prepaid amounts will be calculated and refunded upon such termination. See 29 U.S.C. § 1108(b)(2)(B)(iii)(VI).

12 Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure, 77 Fed. Reg. 5631, 5645 (Feb. 3, 2012) (codified at 29 C.F.R. pt. 2550), https://www.govinfo.gov/content/pkg/FR-2012-02-03/pdf/2012-2262.pdf.

What if Disclosures Contain Mistakes or Require Updates?

Any disclosure errors or omissions made in good faith and with reasonable diligence must be corrected within 30 days of discovery,[13] and any plan-related compensation or cost changes must be reported to the plan within 60 days of the change.[14] With respect to the latter, it is worth noting that—at least with respect to Form 5500 reporting, which also allows reliance on formulas and estimates where warranted—the Department of Labor previously has opined that "[i]f a service provider provided the plan administrator with an estimate of its indirect compensation or a formula used to calculate its indirect compensation, but later determines a dollar amount for the compensation it received … **second disclosure with the actual dollar amount does not need to be obtained in order to rely on the alternative reporting option."**[15]

What if a Plan Fiduciary Requests Compensation Information?

In addition, "upon the written request of the responsible plan fiduciary or covered plan administrator" and within 90 days of such request, a covered service provider must furnish "any other information relating to the compensation received in connection with the contract or arrangement that is required for the covered plan to comply with the reporting and disclosure requirements under" ERISA (e.g., Form 5500 disclosures).[16]

13 29 U.S.C. § 1108(b)(2)(B)(vii).

14 29 U.S.C. § 1108(b)(2)(B)(v)(II).

15 Frequently Asked Questions about the 2009 Form 5500 Schedule C, Question 28 (July 2008) (emphasis added), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/2009-form-5500-schedule-c.pdf.

16 See 29 U.S.C. §§ 1108(b)(2)(B)(vi)(I), (B)(viii)(I)(cc). The provision also requires that, if a covered service provider fails to comply with a written request within 90 days of the request, the responsible plan fiduciary must notify the Department of Labor of that failure.

TYPES OF COMPENSATION

Direct Compensation

Direct compensation is defined to mean **compensation received directly from the covered plan**[17] and covered service providers must provide a description of **all direct compensation**, either in the aggregate or by service, that the covered service provider (or an affiliate or subcontractor thereof) reasonably expects to receive in connection with the services described in the contract,[18] including:

- Flat fee dollar amounts or related fee schedules;
- Per contract per month monetary amounts;
- Per services monetary amounts;
- Per employee per month monetary amounts;
- Percentage of monthly premiums payments; and/or
- Other formulas to determine plan fees (i.e., how it is calculated).

In describing any of these compensation arrangements, covered service providers must detail the manner in which the compensation will be received.[19] This would include fees to which the plan has agreed to but that are billed through a carrier in an insured plan arrangement.

State Fee/Commission Laws & Section 408(b)(2) Fee Disclosure. Many States already require that any client-paid fees be documented and agreed to in writing by the client. Compliance with the new federal requirements generally should satisfy those obligations (if the client acknowledges the disclosure in writing in the States that so require). In addition, although the vast majority of the States allow a producer to both collect a commission and charge a fee, many states prohibit the charging of a fee for placement-related services for which the producer also is receiving a commission. In describing specific fees being charged to the plan, it therefore is important to list the specific services for which the fees are being charged, especially in States that impose the fee bar on commission compensated placement-related services. The Council survey outlining the specific requirements of each State can be found at: Fees and Commission Survey.

17 29 U.S.C. § 1108(b)(2)(B)(ii)(I)(dd)(BB). Any fees paid directly by the employer without using any plan assets (plan assets for these purposes include any contributions made by plan participants even if those funds are not put into a trust) are not encompassed by this requirement. Fees paid by an employer that are related to employer-purchased stop-loss insurance to insure its own self-funded plan obligations may be the best example of such an exclusion.

18 29 U.S.C. § 1108(b)(2)(B)(iii)(III).

19 29 U.S.C. § 1108(b)(2)(B)(iv).

Indirect Compensation

Indirect compensation is defined to mean **compensation received from any source other than the covered plan, the plan sponsor, the covered service provider (or an affiliate thereof)** in connection with the services described in the contract with the covered plan, **including** compensation from a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the plan.[20] This includes, but is not limited to, the following:

- Commissions (e.g., measured as a percentage of premium, a per contract or employee per month value, etc. and/or made available via commission tiers or schedules).
- Payments made to or received from any covered service provider subcontractors that are supporting plan-related services.
- Any compensation related to plan-related services provided by service provider affiliates.[21]
- Plan vendor referral fees or other payments of any type (e.g., TPAs and PBMs; wellness vendor referral fees; point solutions fees (e.g., advocacy or transparency applications, specialized applications for mental health, etc.)).
- Other administration fees (e.g., FSA, HSA, HRA, and COBRA administration fees, benefits administration, HRIS, etc.).
- Noncash compensation that exceeds $250 per year in the aggregate (including meals, travel, entertainment, training, sponsorships, and/or other events funded by entities providing products or services to the plan).

Disclosure of these indirect compensation arrangements must:

- Identify the payer of the indirect compensation;
- Describe the arrangement between the payer and the covered service provider (or affiliate or subcontractor thereof) for which such indirect compensation is paid;
- Identify the services for which that indirect compensation will be received, if applicable; and
- Describe the manner in which the indirect compensation will be received.[22]

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20 29 U.S.C. § 1108(b)(2)(B)(ii)(I)(dd)(CC). Compensation received from a subcontractor will be considered indirect compensation, unless it is received in connection with services performed under a contract/arrangement with a subcontractor that is unrelated to the plan services. Id. Employee payments from an employer to compensate for work performed by the employee are, however, specifically are excluded from the disclosure requirements. See 29 U.S.C. § 1108(b)(2)(B)(iii)(IV)(aa).

21 A variety of questions have been raised related to "General Agent" or "GA" services. If the GA is a service provider affiliate, the GA compensation is required to be disclosed. Otherwise, the question is whether the GA is a "subcontractor" to the broker service provider. That conclusion will vary by arrangement. We recommend, at a minimum when applicable, providing a general disclosure that a GA will be involved in the transaction and may receive a separate payment for those services from the carrier(s).

22 29 U.S.C. §§ 1108(b)(2)(B)(iii)(IV)(bb)-(dd), (B)(iv).

Indirect Compensation Arrangements

Compensation Among Affiliated Entities

If compensation will be paid **on a transaction basis** (e.g., commissions, finder's fees, or other similar incentive compensation based on business placed or retained) among the covered service provider, affiliate, and/or subcontractor, then the following must also be disclosed:

- Identification of the services for which such compensation will be paid.
- Identification of the payers and recipients of such compensation (including the status of the payer or recipient as an affiliate or subcontractor), regardless of whether such compensation is also disclosed as direct or indirect compensation.
- A description of the manner in which the compensation will be received.[23]

Formula Based Compensation Including Contingent Compensation & Overrides

A wide variety of formula-based compensation structures are utilized in our industry by both carriers and others providing products or services to ERISA health plans (including but not limited to carrier override/ contingent compensation programs). Examples include:

- Production bonus or override in recognition of high volumes of sales production based on either the carrier's bonus program qualifying criteria or the number of covered employees/amounts of premium sold by the producer within a certain time period.
- Retention/renewal and growth bonus or overrides (e.g., "persistency programs") based on the existing amount of business, the amount of new or renewed business, and the net growth percentage and/or renewal rate per member per year.
- Combined benefits bonus (e.g., based on retention and growth of medical and pharmacy group business with groups made up of a certain number of contracts).
- Preferred vendor bonus (e.g., an increase in commissions and/or bonuses when combining ancillary products from a carrier's preferred vendor with medical coverage).
- Specified quarterly bonus (e.g., for small and middle group insurance, a bonus paid on a sliding scale determined by the number of enrolled employees in eligible cases on the last day of the calendar quarter).
- Contingent commissions based on enrolled contracts and related fees (e.g., a percentage of paid premium commission for placed insurance with groups of a certain number of eligible employees).

As noted above, the statute prioritizes disclosure of the specific formulas but it also specifies that, "if the compensation or cost **cannot reasonably be expressed in such terms,**" it may be disclosed "**by any other reasonable method,** including a disclosure that **additional compensation may be earned but may not be calculated at the time of the contract.**"[24]

Therefore, to the extent that the specific formulas for such compensation structures can be reasonably expressed, **the statute requires the formula disclosure**.

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23 29 U.S.C. §§ 1108(b)(2)(B)(iii)(V), (B)(iv).

24 29 U.S.C. § 1108(b)(2)(B)(i)(II) (emphasis added).

Generic Disclosures

To the extent, however, that the details across your contracts do not create meaningful substantive differences in terms of how the formulas are calculated, more generic disclosure of the existence of these arrangements and their general parameters coupled with disclosure of the range of those payments historically may be a "reasonable method" for effectuating the requisite disclosure.

For example, the following may be a reasonable disclosure if it synchs with the contingent commission provisions in your carrier contracts:

> *We also may be paid additional commissions by the carriers normally calculated at the calendar year end that are contingent on a number of factors including the overall number of employer plans and/or employee participants in plans for which we have placed the insurance, plan retention rates, and premium growth. Historically, these contingent commissions have ranged between 0-3 percent of the premiums we have placed on behalf of the carrier.*

Noncash Compensation

As noted above, the new regime also requires disclosure of any plan-related noncash compensation that is received from a plan vendor or service provider and exceeds $250 in the aggregate over the term of your contract or agreement with the plan.[25] This appears to be a broad requirement that encompasses meals, entertainment, training, trips, sponsorships and other carrier or plan-vendor sponsored events, and such disclosure appears to be required—even if the benefits do not relate to a specific plan— if the noncash compensation is attributable to or provided based on, in whole or in part, the recipient's business with one or more ERISA plans.[26]

In the retirement plan context, the noncash compensation disclosures that actually are provided vary wildly. Some broker-dealers impose very stringent limits or bars on the noncash compensation that their registered representatives may receive (i.e. meals valued at $250 or less and a bar on outside reimbursement or payment for transportation, hotels and other travel-oriented benefits).

25 29 U.S.C. §§ 1108(b)(2)(B)(ii)(I)(dd)(AA).

26 See e.g., Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure, 77 Fed. Reg. 5631, 5646, n.32 (Feb. 3, 2012); see also Department of Labor Supplemental FAQs about the 2009 Schedule C (Oct. 2010), Questions 3, 4, 33 & 35, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/supplemental-2009-schedule-c.pdf.

Other firms instead tout the procedures they have in place to address potential conflict-of-interest issues associated with their advisors' receipt of such benefits. And still other firms have more generic disclosures related to the non-cash compensation that they and their advisors may receive, such as:

> *Non-Cash Compensation—[FIRM] and [FIRM associated persons] may receive compensation from Plan vendors and service providers that is not in connection with any particular customer. This compensation includes such items as gifts valued at less than $100 annually, an occasional dinner or ticket to a sporting event or other entertainment, or reimbursement in connection with educational meetings, client workshops or events, or marketing or advertising initiatives, including services for identifying prospective clients. Plan vendors and service providers may also pay for, or reimburse [FIRM] for the costs associated with, education or training events that may be attended by [FIRM associated persons] and for [FIRM]-sponsored conferences and events.*

To the extent that your firm has rules in place that address the receipt of such noncash compensation by your producers, we recommend outlining them in whatever noncash compensation disclosure you ultimately provide as part of your 408(b)(2) disclosure to plan fiduciaries.

Other Potential Contract Provisions

You also may want to consider including one or more of the following "stock" contract provisions.

NOT RESPONSIBLE FOR OTHER PARTY'S DISCLOSURES

Concerns have been expressed that plan fiduciaries may expect their brokers to include in their 408(b)(2) disclosures the disclosures of other service providers that they introduced to the plan that are subject to the 408(b)(2) disclosure obligations and that are not broker affiliates or subcontractors. You might consider including a provision along the lines of the following to address that concern (note that this may need to be adjusted to address affiliate and subcontractor compensation):

> *This disclosure document includes the disclosures [FIRM] is required to make in accordance with ERISA Section 408(b)(2) and applicable State laws. Any other plan service provider that is subject to the 408(b)(2) disclosure requirements is required to make its own independent 408(b)(2) disclosure and any such disclosures are not included in this [FIRM] disclosure.*

SIGN/RETURN INSTRUCTIONS

As noted above, many states require that a producer charging a fee obtain a signature from the insured agreeing to the fees they are being charged for the producer's services. The NAIC model producer disclosure provision also requires that the core compensation disclosure be acknowledged in writing by the client.

In addition, in other States, a producer also may want the insured to countersign the engagement letter even if they are not subject to a legal requirement to have an insured's signature. They can ask the insured to agree that he/she has read the engagement letter, agreed to its terms and to send back a written acknowledgement of such agreement. While an executed engagement letter is not a shield from liability, it can still form the basis for a defense should such a need ever arise. For example:

> *Please confirm that you have read, understood, and agreed to the terms set forth above by signing and returning a copy of this letter with your original signature.*

PERIOD OF ENGAGEMENT

Specifying the duration of the relationship may further help to clarify expectations.[27] This may be particularly useful if the producer changes its relationship with an insurer (i.e., becomes an agent of an insurer). The producer can specify a date on which all legal obligations to act on behalf of the insured (to the extent that he/she has any) ends. For example:

> *This engagement will commence on _____ and will terminate on _____. As of the termination date, I will not be providing you with services and, therefore, will not have any further obligations to you in any capacity.*

ARBITRATION

Arbitration is oftentimes seen as a more efficient, faster, and cheaper solution to resolve disputes. The parties can decide on the mechanism or applicable rules that will be used to select the arbitrator(s) and whether the arbitration be binding or non-binding. If arbitration is binding, then the decision of the arbitrator(s) is not appealable. If it is not binding, then the decision may be appealed to a court of law. Some jurisdictions dictate that an arbitration clause is enforceable only if it has been affirmatively agreed to (through signatures) by both parties. For example:

> *Any dispute arising between the parties hereunder will be resolved by arbitration in accordance with the rules then in effect of the American Arbitration Association, and by the laws of the State of [insert your state], which must be commenced by the written notice of intention to arbitrate. Judgment upon an arbitration award may be rendered in any court of competent jurisdiction. The parties agree to following facts about the arbitration procedures:*
>
> *Arbitration is final and binding on the parties. [Do not insert if you do not want binding arbitration].*
>
> *The parties are waiving their right to seek remedies including the right to jury trial.*

CONFIDENTIALITY

The producer may not want the fees, other specific terms of the engagement letter, or the producer's advice to be disclosed to third parties, other than as required by law. For example:

> *This engagement letter and its contents, including the fees arrangement we have reached, is confidential, as is any advice that I provide to you. To that end, by signing below, you agree not to disclose the contents of this letter to third parties unless you are required to do so by law.*

27 DoL rules, however, dictate that a plan must be able to terminate the contract on reasonably short notice without penalties. 29 C.F.R. § 2550.408b02(c)(3).

INDEMNIFICATION CLAUSE

This provision requires the insured to reimburse the producer for any losses that he/she sustains as a result of any false information provided by the producer. For example:

> *By signing below, you agree to release, indemnify and hold me harmless from any and all liabilities and costs (including attorneys' fees) that result if you knowingly provide me with false information.*

APPLICABLE LAW

This provision sets forth the law of the state that will govern the engagement letter. We recommend that you use the law of the state in which you are located. For example:

> *This engagement letter will be governed by and construed and enforced in accordance with the laws of the state of _____, without regard to principles of conflicts of laws.*

ENTIRE UNDERSTANDING

This provision ensures that both parties agree that there are no other agreements, oral or written that supersede the agreement reached in this letter. For example:

> *This engagement letter constitutes the entire understanding among the parties and supersedes, in their entirety, any and all understandings, agreements contracts, arrangements, communications, discussions, representations, warranties, whether oral or written, among the parties respecting the engagement.*

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