

**Memorandum of Understanding Between
The United States Department of Labor, Employee Benefits Security Administration and
The New York State Office of the Attorney General, Health Care Bureau**

I. Introduction and Purpose

The U.S. Department of Labor, Employee Benefits Security Administration (represented by the Office of the Solicitor, and hereinafter "EBSA"), and the Health Care Bureau of the Office of the Attorney General (the "OAG") of the State of New York (the "OAG Health Care Bureau") (collectively, "the Parties," and either "a Party") share common legal interests in the investigation of possible or actual violations of employee benefit plan terms, ERISA, or other applicable New York state or federal law, and related investigations and enforcement actions. The Parties enter into this Memorandum of Understanding ("MOU") to facilitate the exchange of information on these matters of common legal interest, without causing the Parties to forfeit the right to maintain the confidentiality of such information as to other entities.

With the specific and mutual goals of sharing resources and enhancing enforcement by conducting coordinated investigations and sharing information whenever possible, consistent with applicable law, the Parties enter into this partnership.

THEREFORE, IT IS MUTUALLY AGREED:

II. Authority

Section 506 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1136(a), authorizes the Secretary of Labor to enter into cooperative and mutual assistance agreements with state government agencies in the performance of its functions under Title I of ERISA. Nothing in this agreement limits or restricts EBSA's enforcement of ERISA.

As head of the Department of Law, the Office of the Attorney General of the State of New York serves as the guardian of the legal rights of the citizens of New York and serves all New Yorkers in numerous matters affecting their daily lives. Among other duties, the OAG Health Care Bureau investigates and brings enforcement actions against insurers, providers, drug companies and other individuals and entities that engage in fraudulent, misleading, deceptive, or illegal practices in the health care market. Nothing in this agreement limits the OAG's enforcement of consumer protection, health care, and other laws.

III. Scope

The Parties intend to exchange information pursuant to this MOU without waiving any legal privileges or other legal protections against disclosure to any entities or persons that are not party to this MOU. These privileges and protections include, but are not limited to, attorney-client privileges, and the protections against disclosure of investigative files, confidential informants, attorney work product and deliberative process, and confidentiality agreements and orders that may apply to the shared information.

IV. Effect of Agreement

- A. This MOU does not authorize the expenditure or reimbursement of any funds. Nothing in the MOU obligates the Parties to expend appropriations or enter into any contract or other obligation.
- B. By entering into this MOU, the Parties do not imply an endorsement or promotion by either of the Parties of the policies, programs, or services of the other.
- C. Nothing in this MOU is intended to diminish or otherwise affect the authority of either of the Parties to implement its respective statutory functions.
- D. This MOU is not intended to create any legally enforceable rights, either upon the Parties or upon any private person or other third party.
- E. Nothing in this MOU will be interpreted as limiting, superseding, or otherwise affecting the Parties' normal operations. This MOU also does not limit or restrict the Parties from participating in similar activities or arrangements with other entities.
- F. This MOU will be executed in full compliance with the Privacy Act of 1974, the Trade Secrets Act, the Health Insurance Portability and Accountability Act ("HIPAA"), the New York Public Health Law, the New York Freedom of Information Law, and any other applicable federal and New York state laws.

V. General Information Sharing

- A. It is the policy of EBSA and the OAG to cooperate with other government agencies whenever possible, subject to the general limitation that any such cooperation must be consistent with the statutory obligations and enforcement efforts of EBSA and the OAG. It is Parties' view that an exchange of information in cases in which the federal and state entities are proceeding with a common legal interest is to our mutual benefit. The Parties to this MOU recognize the importance of being able to provide information to other law enforcement bodies without waiving the privilege of otherwise protected material.
- B. Exchange of information pursuant to this MOU is not a public disclosure under the Freedom of Information Act, 5 § U.S.C. 552 ("FOIA") and the New York Freedom of Information Law ("FOIL"). If a Party receives, pursuant to either FOIA or FOIL, a request for information exchanged pursuant to this MOU, it will informally discuss such request with the other Party before disclosing any such information. Subject to Paragraph VIII.D, following such discussion, the Party that received the request will make its own determination as to whether disclosure of the requested information is required and/or permitted under relevant laws in accordance with the provisions of Paragraph VIII.C. In any event, the Party receiving the disclosure request will permit the Party providing the information an opportunity to assert and preserve any applicable protection or privilege before disclosing the information.
- C. Confidential information means information that may be privileged or otherwise exempt from disclosure to the public of other unauthorized persons under state and federal law. Confidential information includes, but is not limited to: the identities of persons who have given information to the Parties in confidence or under circumstances in which confidentiality can be implied; internal opinions, policy statements, memoranda, and recommendations of federal or state personnel, including, but not limited to, any records that would otherwise not be subject to disclosure under federal or state law as non-final, intra- or inter-agency documents; information or records covered by the attorney-client

privilege and the attorney work product doctrine; personal information on living persons; individually identifiable health information, and confidential business information and trade secrets.

- D. When confidential information is exchanged it shall be accessed and used by the recipient Party solely for the limited purposes of carrying out specific enforcement activities within the common legal interest identified by this MOU, and in no event shall such information be disclosed by the recipient Party without the written authority of the Party providing the information or pursuant to a court order.
- E. The Parties will notify one another upon commencement of litigation, a hearing, or other proceeding that may involve the release, through subpoena, introduction of written evidence, or testimony, of information exchanged under this MOU subject to the limitations in the preceding paragraph.
- F. For information security purposes, information exchanged pursuant to this MOU remains the responsibility of the Party providing the information while it is in transit. The Parties agree to establish a communication protocol for notifying each Party's designated contact person when information is sent or received from that Party, including information on the form of the transfer and the media type and quantity. The Party expecting to receive information will notify the other Party if the information is not received as of the next business date following the agreed upon delivery date.
- G. The transmission of information that originates from the Department of Labor will comply with the Department of Labor Computer Security Handbook and EBSA's policies and procedures governing the transmission of secure and confidential information. The transmission of information that originates from the OAG will be consistent with the standards described in the New York State Information Security Policy.
- H. For information security purposes, after a Party receives information from the other Party, the Party providing the information retains no responsibility for any security incidents, inadvertent disclosure, or the physical and information technology safeguards in place for protecting that information by the Party that received it.
- I. However, in the event that the Party receiving the information experiences a security incident or disaster that results in the suspected or confirmed inadvertent disclosure of the data exchanged pursuant to this MOU, the Party experiencing the incident or disaster will send formal written notification to the other Party's contact person within 3 days, or as soon thereafter as is practical, after detection of the incident or disaster. The written notification will describe the security incident or disaster in detail including what data exchanged pursuant to this MOU may have been inadvertently disclosed.

VI. Types of Information Sharing

The Parties agree that it is in their common legal interest to share certain information on a continuing basis regarding particular insurers, fiduciaries, service providers, and other entities and individuals involved with employee benefit plans covered by ERISA, or other applicable federal or state law. The Parties have a common legal interest because information EBSA obtains in the course of its duties under ERISA may indicate potential violations of NY state law. Conversely, information obtained by the OAG in the course of its duties may indicate potential violations of ERISA. Sharing this information will help the Parties to allocate investigative and

litigation resources in carrying out their respective statutory responsibilities. Information that may be shared includes, but is not limited to:

- A. Complaints from any source concerning an employee benefit plan as defined by ERISA, 29 U.S.C. § 1002(3), including complaints regarding insurers or other service providers to such plans;
- B. Complaints regarding violation of ERISA, state law, or other applicable federal law including complaints of non-compliance with statutory provisions, regulatory guidance, and sub-regulatory guidance;
- C. Information regarding claims administration, including information on claims review procedures and external review, types of claims, and claims outcomes;
- D. Proposed corrective actions, including amendments to group insurance products and plan prototypes and re-adjudication of claims, identified as a result of an investigation, survey, or audit.

VII. Enforcement

Where appropriate and the extent allowable by law,

- A. The Parties may conduct joint investigations periodically involving potential violations within the State of New York, if the opportunity arises.
- B. The Parties may assist each other with enforcement.
- C. The Parties may make referrals of potential violations of each other's statutes.

VIII. Common Interest Agreements

In addition to information described in Paragraph VI above, the Parties agree that from time to time, it may be in the common legal interest of EBSA and the OAG to share information obtained from a specific investigation or enforcement action by either Party. Before exchanging information from an investigative or litigation file, the Parties will execute a Common Interest Agreement in a form similar to Attachment A for each case. Each Common Interest Agreement will identify the subjects of the investigation, the Parties to the agreement, and the nature of the common legal interest with respect to the shared information. An agreement will include, or incorporate by reference to this MOU, the following terms and conditions:

- A. A Party providing information will clearly identify any documentation or other physical material it regards as privileged or protected against further disclosure.
- B. A Party receiving information identified as privileged or protected will use it solely in connection with its investigation of possible or actual violations of employee benefit plan terms, ERISA, or other applicable New York state or federal law, and related investigations and enforcement actions.
- C. A Party receiving information identified as privileged or protected will take all measures reasonably necessary in accordance with applicable law to preserve, protect and maintain all privileges and protections unless:
 - 1. The Party providing the information agrees in writing that it need not be so treated;
 - 2. The information becomes public knowledge without violation of this agreement;

3. A court or other legal authority of competent jurisdiction requires disclosure of the information; or
 4. The Party providing information is doing so following informal consultation with the other Party and in response to a FOIL or FOIA request, but only if the information is not exempt from FOIL or FOIA disclosure under applicable laws.
- D. A Party receiving a request, subpoena, order, or other legal process for the production of information identified as privileged or protected received from the other Party will:
1. Immediately notify in writing the Party who has provided such information;
 2. Take reasonable and timely measures including, but not limited to, asserting the common interest privilege, to preserve, protect, and maintain all privileges and claims of confidentiality; and
 3. Consent to any request by the Party who provided the information to intervene in any action for the purpose of asserting and preserving any privileges and protections with respect to the shared information.
- E. The common interest agreement does not:
1. Establish any attorney-client relationship among the Parties;
 2. Disqualify any counsel from representing any Party in any proceeding;
 3. Establish any agency or similar relationship between the Parties; or
 4. Authorize the Parties to disclose or share the information in violation of the Trade Secrets Act, 18 U.S.C. §§ 1905 *et. seq.*, or the Privacy Act, 5 U.S.C. § 552a.
- F. The requirements of the common interest agreement as to information shared while the agreement is in effect will survive the withdrawal by any Party from the agreement, termination of the agreement, and final disposition of claims or actions, whether by judgment, settlement, or other means of disposition.
- G. A Party to the common interest agreement may terminate the common interest agreement after thirty (30) days written notice.
- H. The common interest agreement is effective on the latest date on which the Parties have signed the agreement.
- I. The common interest agreement:
1. Embodies the entire agreement and understanding between the Parties and supersedes any prior agreements and understandings whether written or oral, relating to the subject matter of the agreement;
 2. May not be modified or amended except by written agreement signed by each of the Parties;
 3. May be executed in separate counterparts, which together shall constitute the full agreement. Further, electronic transmission of signatures will be treated as original signatures; and
 4. Does not permit a Party to assign its rights and obligations under the agreement without the prior written consent of the other Party to the agreement.

IX. No Obligation to Enter into Common Interest Agreements

Although the Parties intend to share information of mutual interest, nothing in this MOU requires either Party to share information or enter into a common interest agreement with the other Party.

X. Contacts

The Parties will designate a contact person responsible for coordinating the partnership activities. The Parties will designate a representative to meet as needed to review areas of mutual concern and the terms and conditions of this MOU.

XI. Resolution of Disagreements

Disputes arising under the MOU will be resolved informally by discussion between the contact persons designated by Paragraph X of this MOU or other officials designated by each of the Parties.

XII. Duration and Amendment of MOU

This MOU is effective upon execution by EBSA and the OAG and shall remain in effect for a **five-year period** unless terminated beforehand in accordance with Paragraph XIII. This MOU may be renewed for subsequent five-year periods upon mutual written agreement of each Party. This MOU or any subsequent renewal period is effective after this MOU is executed or renewed by EBSA and the OAG. This MOU shall remain in effect until either of the Parties terminates its participation in accordance with Paragraph XIII. Any amendment or modification of this MOU requires the mutual written agreement of EBSA and the NYAG.

Provisions related to the confidentiality and handling of information exchanged pursuant to the MOU shall survive the withdrawal of any Party from this MOU or the termination of this MOU.

XIII. Termination

EBSA and the OAG may terminate this MOU upon thirty (30) days written notice to the Parties.

XIV. Officials Responsible for MOU

The parties signing below agree to this memorandum:

By: Phyllis C. Borzi Dated: 8/11/15
Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Washington DC 20210

By: Jonathan Kay Dated: 8/11/15
Jonathan Kay
Regional Director, New York Regional Office
Employee Benefits Security Administration
U.S. Department of Labor
33 Whitehall St., Ste 1200, New York, NY 1200

By: Lisa Landau Dated: 8/31/15
Lisa Landau
Bureau Chief
New York State Office of the Attorney General,
Health Care Bureau
120 Broadway, New York, NY 10271

Attachment A

COMMON INTEREST AGREEMENT

The U.S. Department of Labor, Employee Benefits Security Administration and the New York State Office of the Attorney General, Health Care Bureau (collectively, "the Parties", and each, "a Party") enter into this Common Interest Agreement ("Agreement") to share certain information without waiving any legal privileges or protections.

Each Party will clearly identify any documentation or other physical material it regards as privileged or protected against further disclosure. Each Party receiving information identified as privileged or protected will use it solely in connection with its investigation of possible or actual violations of employee benefit plan terms, ERISA, or applicable state or federal law and related investigations and enforcement actions. Further terms and conditions governing information shared under this Agreement are set forth in the Memorandum of Understanding between the Parties entered into on [ENTER MOU EFFECTIVE DATE] and incorporated herein by reference.

This Agreement applies to information shared by the Parties pertaining to the following plan(s), entity(ies), or individual(s):

The Common Legal Interest in sharing this information is:

The United States Department of Labor

By: _____ Dated: _____
[INSERT NAME]
Regional Director, Employee Benefits Security Administration
U.S. Department of Labor
[ADDRESS]

The New York State Office of the Attorney General, Health Care Bureau

By: _____ Dated: _____
[INSERT NAME, TITLE, AND ADDRESS]