# EFFECTIVE COMMUNICATION STRATEGIES FOR ERISA PLANS



Tonie Bitseff, JD LLM, Buchalter

Tonie will discuss the opportunities and the challenges in providing ERISA disclosures using electronic media.



Mary Jane Eadson JD, Principal, Eadson Compliance Center

Mary will outline ERISA's disclosure requirements, providing an inventory of "must have" documents and practical tips to ensure those documents are accessible and effective.



John Derrick, CEO Skywritter Systems Inc.

John will demonstrate White Hat's turn-key system for personalized document delivery and disclosure schedules that customize employee benefit disclosures and communication so they are targeted, timely, and tangible.



Douglas Lutkus, Principal White Hat LLC

Douglas will discuss the process of creating clear, concise, and compliant communications to help employees make informed benefit decisions.

# "[T]his pension field is an esoteric and abstruse one, bordering on the mysterious or the occult"

-Rhode Island Senator John Chafee

## ERISA Can Be Your Friend

- Exhaustion
- Deference
- Federal Court Jurisdiction
- Limited Discovery
- No Jury Trial
- Limitation on Damages
- Preemption
- Common Administration

## An Introduction to ERISA

- Employee Retirement Income Security Act of 1974
- ERISA is built on common law trust principles.
- ERISA has four main parts and two new ones.
  - Part 1. Reporting and Disclosure
  - Part 4. Fiduciary Responsibility
  - Part 5. Administration and Enforcement
  - Part 6. Continuation of Health Coverage
  - Part 7. Group Health Plan Portability, Access, and Renewability Requirements
- A person is a "fiduciary" to the extent that the person exercises any <u>discretionary</u> authority or discretionary control respecting the management of the plan **or** exercises <u>any</u> authority or control in the disposition of plan assets.
- Prudent man acting in a like capacity and familiar with such matters.
- This is known as the prudent expert rule.

# **Customized Communication**

Tailoring Training & Outreach to Make Your Message Meaningful

**Presented by, Douglas Lutkus** 



Custom Employee Communication Solutions

doug@whitehatllc.com I October 24th, 2018

DOL

**FIDUCIARY** 

DOL requires a fiduciary to act as a prudent expert

The fiduciary must decide what process is prudent

DOL requires plans to provide participants sufficient information to make informed decisions

The fiduciary must decide whether or not the information meets established requirements and is sufficient

DOL requires participant disclosures to be written in a manner calculated to be understood by the average plan participant

The fiduciary must interpret and translate technical and ensure that participant communications are both accurate and understandable



#### **Disclosure Improvement Process Overview**

**Phases** Plan - Document - Implement - Audit

**Practices** Law

Goals

Help protect the plan sponsor

Assist the administrator in performing their duties

Aid employees in making informed decisions



**Sufficient Information to Make Informed Decisions** 

Securities and Exchange Commission, Strategic Plan Fiscal Years 2014 - 2018

Strategic Goal 3:

"Facilitate Access to the Information Investors Need to Make Informed

Investment Decisions...

THE FEDERAL SECURITIES LAWS require that corporations, investment companies, and other entities provide investors with timely and meaningful information about, among other things, their operations and financial condition. Because an educated and informed investor ultimately provides the best defense against fraud and costly mistakes, these laws place great emphasis on providing material information to the investing public.



Written in a manner calculated to be understood by the average plan participant

#### **CALCULATION INCLUDES:**

- Education
- Familiarity
- "Average" for Plan
- Potential to Mislead

## ACCURACY IS CHALLENGING:

- Legal terms
- Industry terms
- Insurance terms
- Legal concepts
- Industry concepts

Health Leave Retirement

Explanation of Benefits Family and Medical A, B, C Shares

In / Out of Network Vacation 12b-1

Co-Pay
Co-Insurance
Sick
Cliff
Graded

#### **Unbiased Voluntary Benefit Training**

- Designed to educate not entice enrollment
- Highlights areas that can be costly to the employee
- Uniform messaging to employees
- Vetted materials helping protect the plan sponsor
- Evidence of prudent activities



#### **Communication Policy**

#### **Policy overview:**

- Mirrors the law
- Governs the process
- Demonstrates the intent to comply with ERISA
- Enables a third party to take over and follow



#### Audit

- Evaluate the Disclosure Improvement Process
- Evaluate Administrator Performance
- Evaluate Independent Third Party Performance



# Buchalter

Electronic Disclosure Methods Under ERISA

Presented by
Tonie Bitseff
Tbitseff@Buchalter.com

# Taming ERISA

- Document your prudent process.
- Follow the plan document.
- Communicate Clearly
  - Substance [SPD, SMM, SBC, HIPAA, COBRA, QMCSO, SARS]
     THE ALL POWERFUL DOCUMENTS
  - Form [Written Understandable Documentation]
     HOW TO USE ELECTRONIC COMMUNICATION
  - Recipients [Employees, Enrollees, Beneficiaries]
  - Time [Open Enrollment, Changes, Other Events]

## **Electronic Communication**

- The DOL in 2002 issued regulatory guidelines that expanded electronic delivery methods.
- IRS Regulations issued in November 2006 implement Electronic Signatures in Global and National Commerce Act.
  - Applies to IRS notices and participant elections.
  - Effective for communications made on or after January 1, 2007.

# General Requirements

#### Buchalter

#### **Delivery must:**

- provide opportunity for free paper copy on request. (DOL & IRS No Consent Rules)
- meet content and timing requirements applicable to paper notice. be reasonably designed to be as understandable as paper. (IRS)
- protect individual's account and benefit confidentiality. (DOL)
- Identify the subject matter and its significance. (IRS) provide notice electronically or non-electronically, notifying recipient of document's significance. (DOL)
- provide access instructions. (IRS)
- provide notice of undelivered mail, or provide an e-mail confirming
   receipt of transmitted information. (DOL)

# Requirements Simplified

**Buchalter** 

- How do you access it?
- Why is it important?
- Did you get it?

TWO TYPES: Integral to workplace access

Consent

# No Prior Consent

- If general disclosure requirements are met, no consent is required if employees have access to documents at any location they could perform work duties, and access to electronic information system is an integral part of their duties. (DOL)
- IRS elections require user authentication, an opportunity to confirm, modify or rescind the terms before they become effective, and written confirmation of the final election. (IRS)

# Requirements Simplified

**Buchalter** 

- How do you access it?
- Why is it important?
- Did you get it?

 Will you access the delivery everyday as part of your work duties?

# **Prior Consent Required**

- If there is no work-related computer access, consent is needed. (DOL)
- Must affirmatively consent (electronically or through hardcopy signature) and provide an electronic delivery address. (DOL and IRS)
- For electronic disclosures (other than CD or DVD) individual's consent must demonstrate ability to access information electronically. (DOL and IRS)

# Requirements Simplified

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?

# Required Notice

- Before obtaining consent, administrator must provide statement stating:
  - document type to which consent applies (and its significance).
  - that consent can be withdrawn anytime without charge.
  - procedures for withdrawing consent or updating contact information for document receipt.
  - right to request and obtain free paper version of electronically furnished document.
  - necessary electronic devices, software and hardware, needed to access information.
- DOL and IRS Rules use slightly different terms, but are essentially the same requirements. The IRS rules allow charges for paper copies and some limitations on withdrawal of consent.

# Requirements Simplified

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?
  - Was consent informed consent?

# Consent to Changes

- If software or hardware changes materially risk individual's ability to access or retain electronic documents, several steps are required under the DOL rules:
  - Prior to the system change, individual must receive change notification.
  - Upon notification, individual may withdraw consent.
  - If the individual does not withdraw consent, he or she must again consent to electronic document receipt.

# Requirements Simplified

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?
  - Was consent informed consent?
  - Is the consent still valid?

# **Special Rules**

- Summaries of Benefits and Coverage
  - Electronic delivery in connection with online enrollment or online renewal of coverage.
    - For covered individuals, follow the DOL safe-harbor
    - Electronic disclosure those <u>not yet enrolled</u> can include an internet <u>posting</u> if a <u>postcard or email informs</u> employees that the documents are available at the web address or by paper free of charge
- Benefit Statements for Directed 401(k) Accounts
  - Continuous access to a <u>website</u> with proper notice.
  - Permitted use of voluntary e-mail address.
    - Paper notice or electronic interaction.

# ERISA Can Be Your Tricky

Buchalter

-Computer kiosk

-COBRA Notice

-Company website

# Computer Kiosk

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?
  - Was consent informed consent?
  - Is the consent still valid?

## **COBRA NOTICES**

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?
  - Was consent informed consent?
  - Is the consent still valid?

# **Company Website**

- How do you access it?
- Why is it important?
- Did you get it?

- Will you access the delivery everyday as part of your work duties? OR Did you consent?
  - Does consent demonstrate access?
  - Was consent informed consent?
  - Is the consent still valid?

# ERISA Can Be Your Tricky

## Buchalter

- Computer kiosk made available for participant use does not satisfy DOL requirements. (DOL)
  - Location where work duties are performed.
  - Use integral to work duties.

#### -COBRA Notice

- 1<sup>st</sup> class mail to home address where a covered spouse or dependents reside.
- -Company website made available does not satisfy the DOL requirements. (DOL)
  - Must provide notice of the posting.

# **Customized Communication**

Tailoring Training & Outreach to Make Your Message Meaningful

**Presented By: Douglas Lutkus** 



doug@whitehatllc.com | October 24th, 2018

**Benefit Administration Platform** 

Who system access / security

**Plan** Who recipient

**Do** Calendar clear, concise and compliant communications

**Check** E-mail confirming receipt

**Act** To continually improve process



#### **Benefit Administration Platform Planning**

- System access levels administration, auditor, broker, recipient...
- System security set-up to work with e-mail and provide optional VPN access.
- Recipients [Employees, Non-employees, Enrollees, Beneficiaries, Deskless]
- Deskless planning
- ➤ Electronic information system integral to work duties, time clock and other training and communication capabilities, any employee required to clock in, receive daily instruction, or use email? Qualifies for electronic disclosure without consent.
- ➤ Kiosks used correctly can not only help deliver documents but extend the open enrollment period......
- Non- employee planning
- Consent to personal e-mail address



#### **Benefit Administration Platform**

#### Do Calendar Clear, Concise and Compliant Communications

- Calendar [Open Enrollment, Changes, Other Events]
- What is important! Flag certain items using the "envelope" feature, for the recipient so that the significance of the communication is clear and concise on the fact of the transmission.
- Include any standard language or disclaimers appropriate to that type of disclosure



#### **Benefit Administration Platform Check**

- Did they get it? BAP confirms electronic receipt and allows user response and verification of receipt.
- Did they consent? BAP can generate a notice and with a reply so that consent can be collected in a way that we know there was access to informed consent that remains valid.



#### **MEANINGFUL COMMUNICATIONS**

Benefit Administration Platform Act to continually improve the process

Plan Do Check Act is a continual improvement process,

Adjustments to help attain the process goals:

- Help protect the plan sponsor
- Assist the administrator in performing their duties
- · Aid employees in making informed decisions



#### MEANINGFUL COMMUNICATIONS

#### **Benefit Administration Platform Summary**

- Based on a methodology accepted by organizations, companies and governments worldwide.
- Provides administrators with the tools needed to meet the DOL and IRS delivery requirements
- Library that supports personalized document integration
- Is flexible and scalable enough to reach the right people at the right time



# THE ALL-POWERFUL DOCUMENTS

"There are infinite shades of gray. Writing often appears so black and white."

Rebecca Solnit

#### SO, WHAT CAN HAPPEN?

EADSON COMPLIANCE CENTER, LLC

- NO PLAN DOCUMENT / SPD / PLAN AMENDMENT:
  - \$152 per day for failure to furnish information requested by DOL + \$110 per participant per day for failure to disclose.
- NO SUMMARY OF BENEFITS & COVERAGE:
  - \$1,128 per failure (participant) per day.
- MISSING ERISA-REQUIRED LANGUAGE:
  - Could void document depending on extent resulting in penalties for no document.
  - Civil penalties brought by participant.
  - Stop Loss carrier, carrier or third party administrator conflict with Plan Sponsor's intent.
  - Red flag to DOL auditor.
- LANGUAGE IS NOT CLEARLY WRITTEN or NOT WRITTEN TO BE UNDERSTOOD BY THE AVERAGE PARTICIPANT:
  - Ambiguity ruled in favor of the reader.
  - No reader can understand the Plan language!

<u>www.eadsoncompliance.com</u> – (760) 468-4082 – <u>mary@eadsoncompliance.com</u>

#### SPD: COMMON PROBLEMS

EADSON COMPLIANCE CENTER, LLC

- NOT SPECIFIC ENOUGH:
  - COBRA RATE DETERMINATION PERIOD
  - APPLICATION OF BENEFIT EXTENSION DURING A LEAVE OF ABSENCE
  - WHEN EMPLOYEE CLASSES BECOME ELIGIBLE
  - WAITING PERIODS
  - MEASUREMENT PERIOD
  - ORIENTATION PERIOD
  - NEWLY HIRED EMPLOYEE VS. RE-HIRED EMPLOYEE ELIGIBILITY

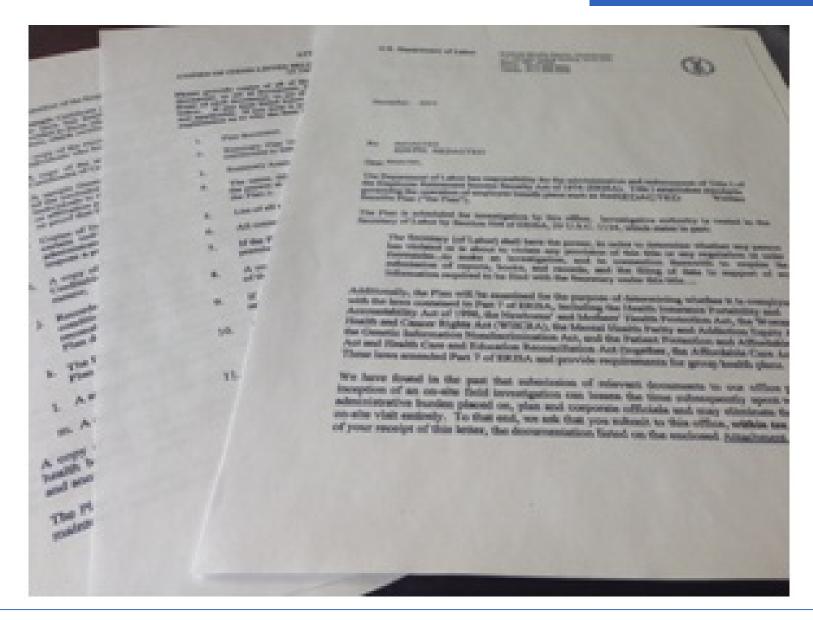
#### SPD: COMMON PROBLEMS

EADSON COMPLIANCE CENTER, LLC

- NOT REVIEWED OFTEN ENOUGH:
  - WHEN BENEFITS ARE REVISED
  - WHEN LAW DECIDED OR REGULATIONS ARE PUBLISHED
  - WHEN JOB CLASSES ARE CHANGED
  - WHEN EMPLOYEE POLICIES ARE CHANGED
  - o RENEWAL
  - EACH TIME THERE IS AN ISSUE OR QUESTION INVOLVING THE EMPLOYEE HEALTH AND WELFARE BENEFIT PLAN
  - COMPANY MERGER, SALE OR ACQUISITION

#### DOL ENFORCEMENT

### EADSON COMPLIANCE CENTER, LLC



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#### DOL ENFORCEMENT

EADSON COMPLIANCE CENTER, LLC

- DOL AUDIT REQUEST FOR RECORDS ALWAYS BEGINS WITH:
  - 1. PLAN DOCUMENT
  - 2. CURRENT YEAR PLUS PAST 5 YEARS OF SUMMARY PLAN DESCRIPTIONS
  - 3. CURRENT YEAR PLUS PAST 5 YEARS OF SUMMARY OF MATERIAL MODIFICATIONS (IF SUCH MODIFICATIONS WERE NOT INCORPORATED INTO THE SUMMARY PLAN DESCRIPTION
  - 4. CURRENT YEAR PLUS PAST 5 YEARS OF SUMMARY OF BENEFITS AND COVERAGE

## DOL ENFORCEMENT PROCEDURE - NOTICES

EADSON COMPLIANCE CENTER, LLC

- 1. CURRENT YEAR PLUS PAST 5 YEARS OF PUBLISHED ERISA AND ERISA-RELATED NOTICES
  - a. COBRA GENERAL NOTICE
  - b. HIPAA PRIVACY NOTICE
  - c. MEDICAL CHILD SUPPORT ORDER NOTICE
  - d. CHIPRA NOTICE
  - e. NEWBORNS' ACT DESCRIPTION OF RIGHTS
  - f. WHCRA NOTICE
  - g. MHPAEA NOTICE
  - h. MICHELLE'S LAW NOTICE
  - i. GRANDFATHERED PLAN NOTICE
  - j. EMPLOYER NOTICE TO EMPLOYEES OF COVERAGE OPTIONS
  - k. EBSA FORM 700 (ACCOMODATION REQUEST FOR EXEMPTION OF CONTRACEPTIVE BENEFITS)
  - I. NOTICE OF PRIMARY CARE PHYSICIAN REQUIREMENT

#### EVERY CLIENT SHOULD ASK

EADSON COMPLIANCE
CENTER, LLC

- WHEN WAS THE LAST TIME THE PLAN DOCUMENT WAS REVIEWED TO ENSURE IT REFLECTS YOUR HEALTH PLAN BENEFIT INTENT?
- HAVE WE MADE ANY HEALTH BENEFIT CHANGES AND, IF SO, ARE THEY REFLECTED IN THE SUMMARY PLAN DESCRIPTION AND PUBLISHED TO PARTICIPANTS?
- HAVE WE HIRED, HAD ANY LAY-OFF, TERMINATED, RE-HIRED, PROMOTED, DEMOTED, LEAVE OF ABSENCE, OR CHANGED ANY POLICIES THAT ALSO RELATE TO HEALTH BENEFITS? IF SO,
  - DID WE VERIFY THAT ANY OF THESE LIFE EVENTS FOLLWED THE HEALTH BENEFIT PLAN LANGUAGE?
  - DID WE PROVIDE THE PROPER NOTICES FOR THESE HEALTH BENEFIT LIFE EVENTS?
  - DID WE CONFIRM THAT THE NOTICES ACCURATELY REFLECT CURRENT LAW?
  - DID WE PROVIDE NOTICES ON A TIMELY BASIS ACCORDING TO THE APPLICABLE LAW?

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EADSON COMPLIANCE CENTER, LLC

## "GIMME SHELTER" ROLLING STONES

EADSON COMPLIANCE CENTER, LLC SERVICES -

- ✓ REVIEW AND UPDATE OF ALL HEALTH PLAN DOCUMENTATION
- ✓ 'ERISATRAC' PARTNERS WITH COMPANY TO MONITOR HEALTH PLAN LIFE EVENTS

## Skywriter Systems, Inc.

John Derrick
CEO & Co-Founder

7<sup>th</sup> CEO Startup Role Also – IBM, Intel, MIPS, ...

# Plan, Create, Send, and Verify Digital Content

## Skywriter.com is..

An Enterprise platform built and used for...

- SMB/SME Customer Engagement
- University Education
- Corporate Training

Now in Partnership with White Hat LLC, we are adding a Benefit Administration Platform!

#### Our Benefit Administration Platform Methodology

#### Plan

- Who: Contacts (employees, participants, beneficiaries, etc..)
- What: Library (documents, disclosures, training)
- When: Calendar / Scheduling System

#### Do

Send

#### Check

Delivery Receipt / Delivery Logs

#### Act

Adjustments

#### The Who

- Add and manage employees, participants, and beneficiaries
  - Import from CSV (Comma-Separated-Values)
  - Integrate with Software Systems (SF, QB, ..)
  - Enter and Manage Directly in Skywriter
- Create and organize lists of contacts
  - Groups, Organizations, etc..
  - Again.. Import, Integrate, Enter Directly

### The What – Library

· Documents, disclosures, benefit training

- Add and manage pieces of content
  - Upload or Link to Existing Content
  - Create Rich Text Documents
  - Categorize and Tag

#### The When - Calendar

- Create and schedule delivery using available content
  - Create Emails and Other Communications
  - Include Attachments to Critical Disclosures and Information
  - Send to Employees and Beneficiaries
    - Immediately
    - Calendar on specific dates
- Track Delivery, Consumption, and Results
  - Logs Retained for Audit
  - Determine What was Delivered, Opened, and Consumed

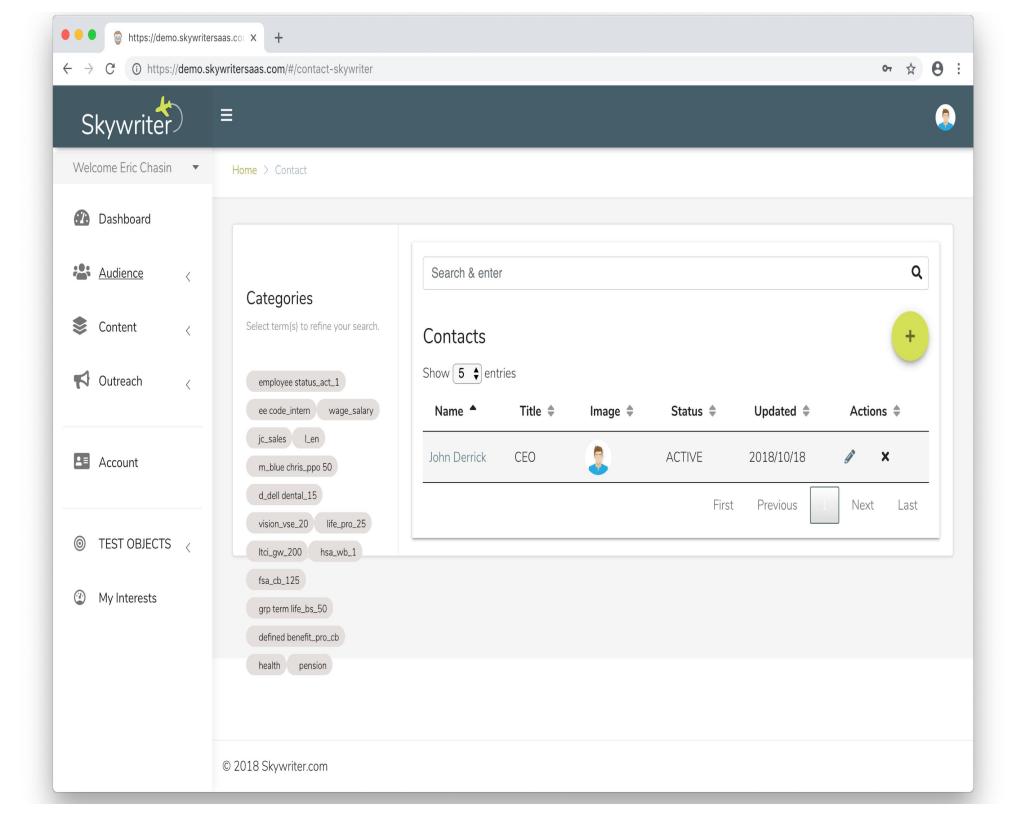


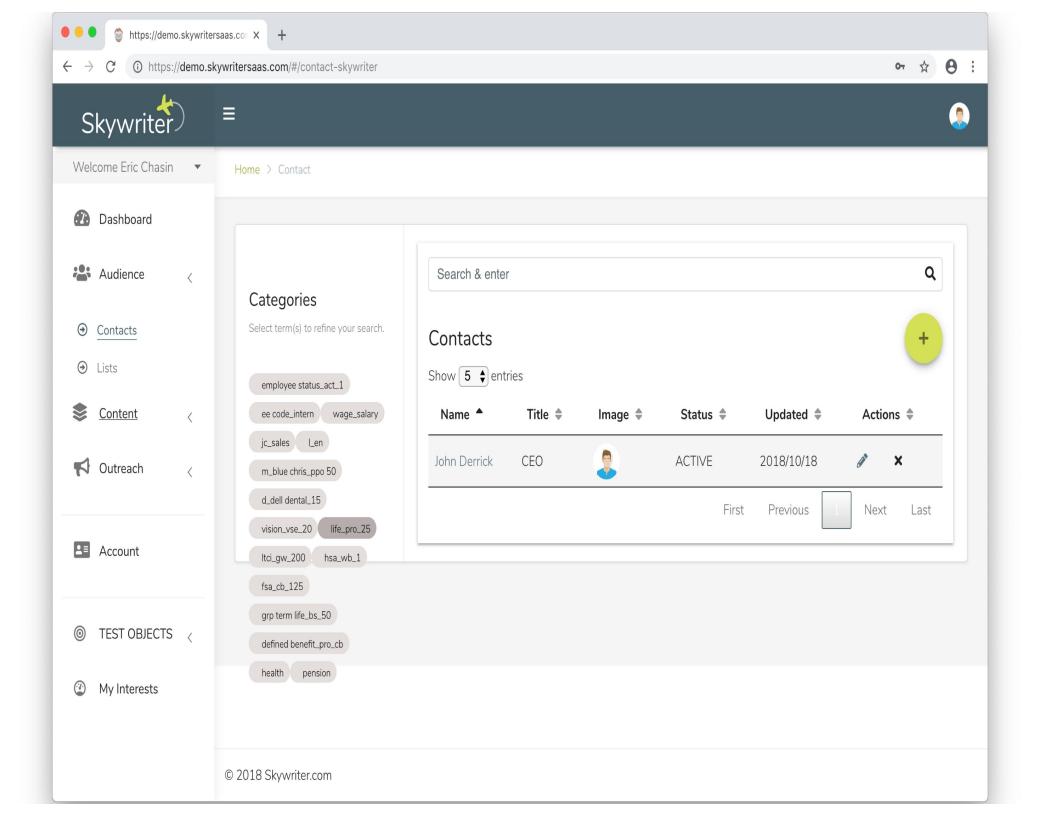


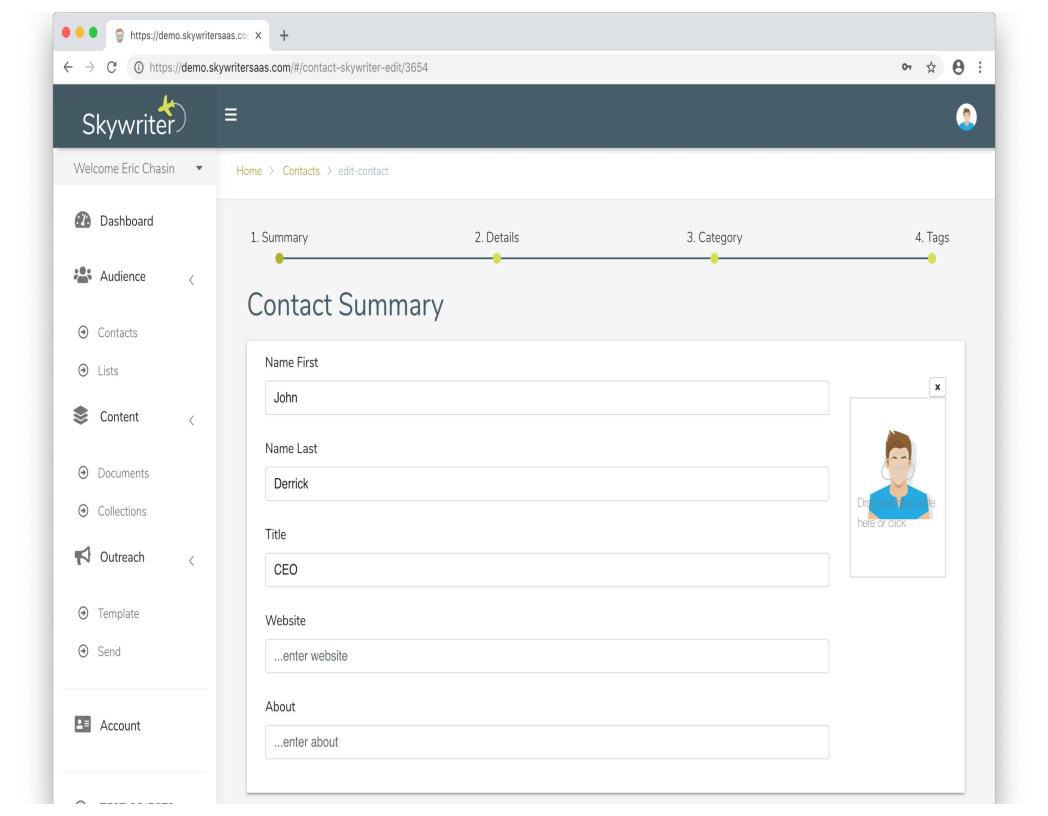
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Reme	ember me	
	LOG II	N
Don't have	an account? Sign U	■ Forgot password?

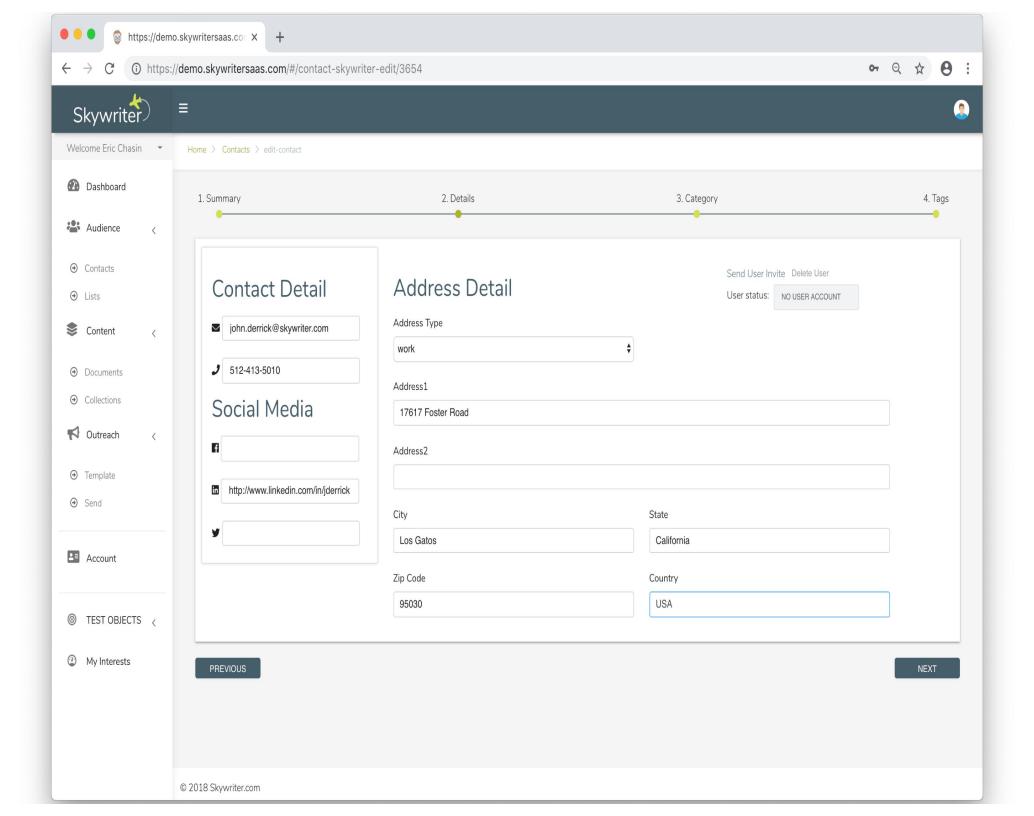
## The Who

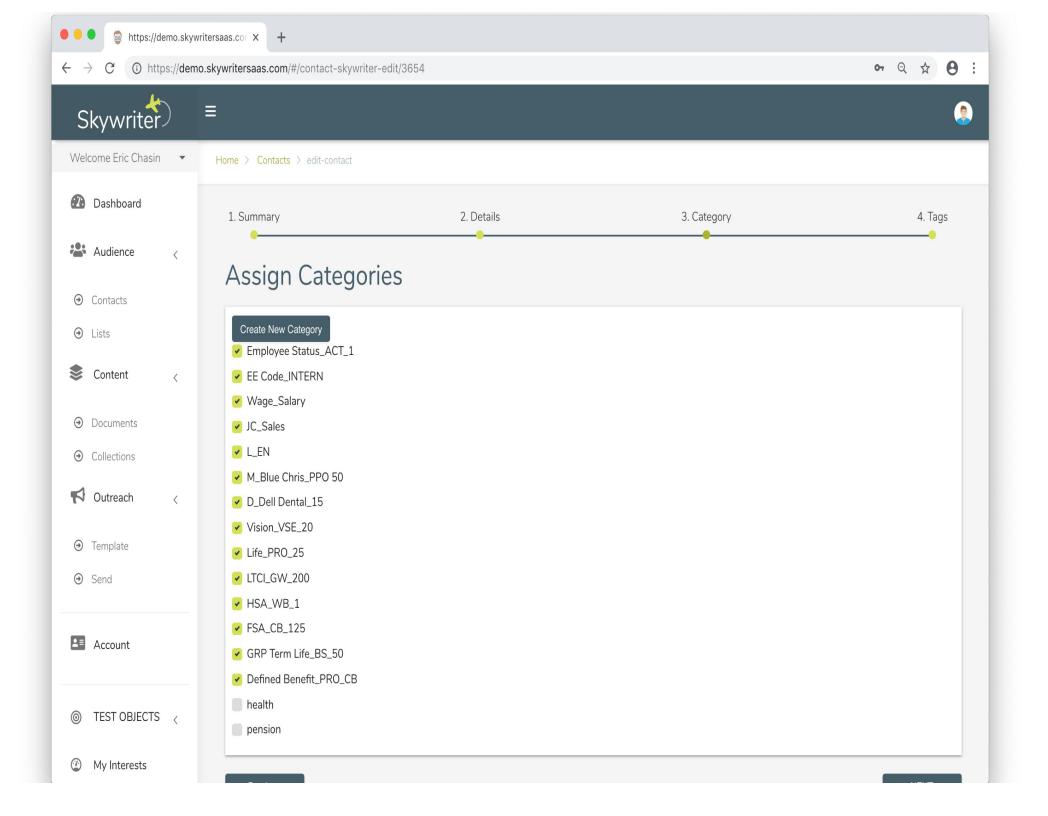
# Employees, Participants, & Beneficiaries





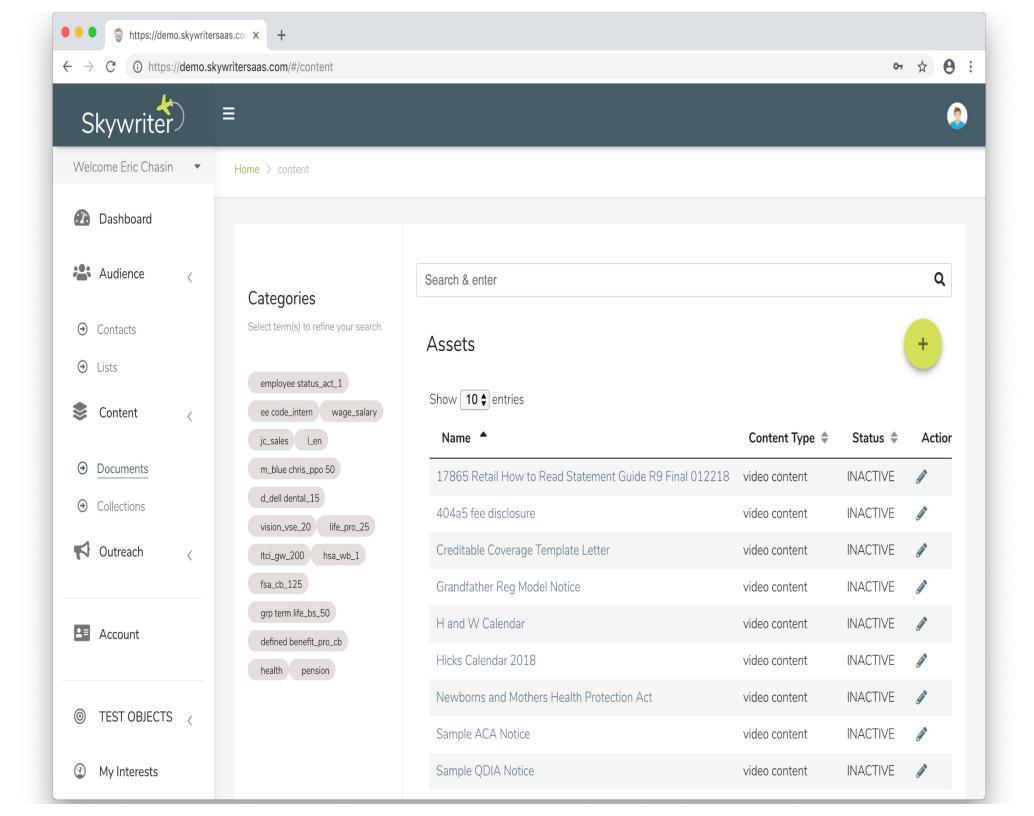


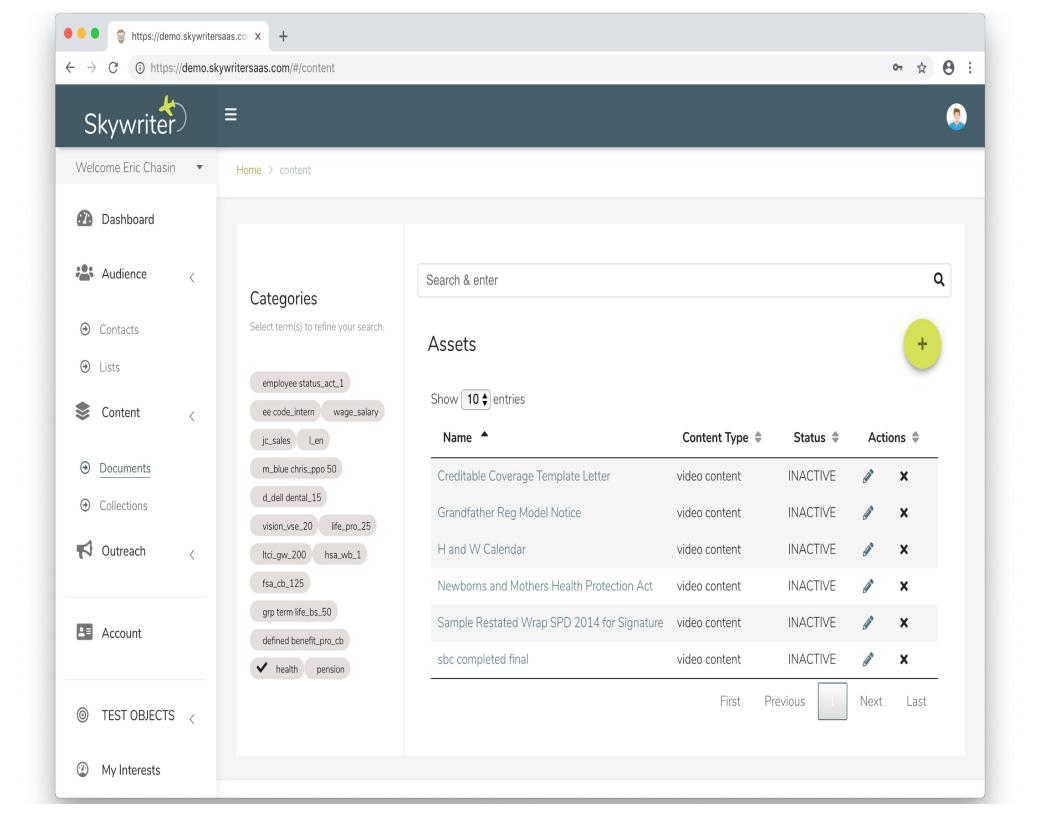


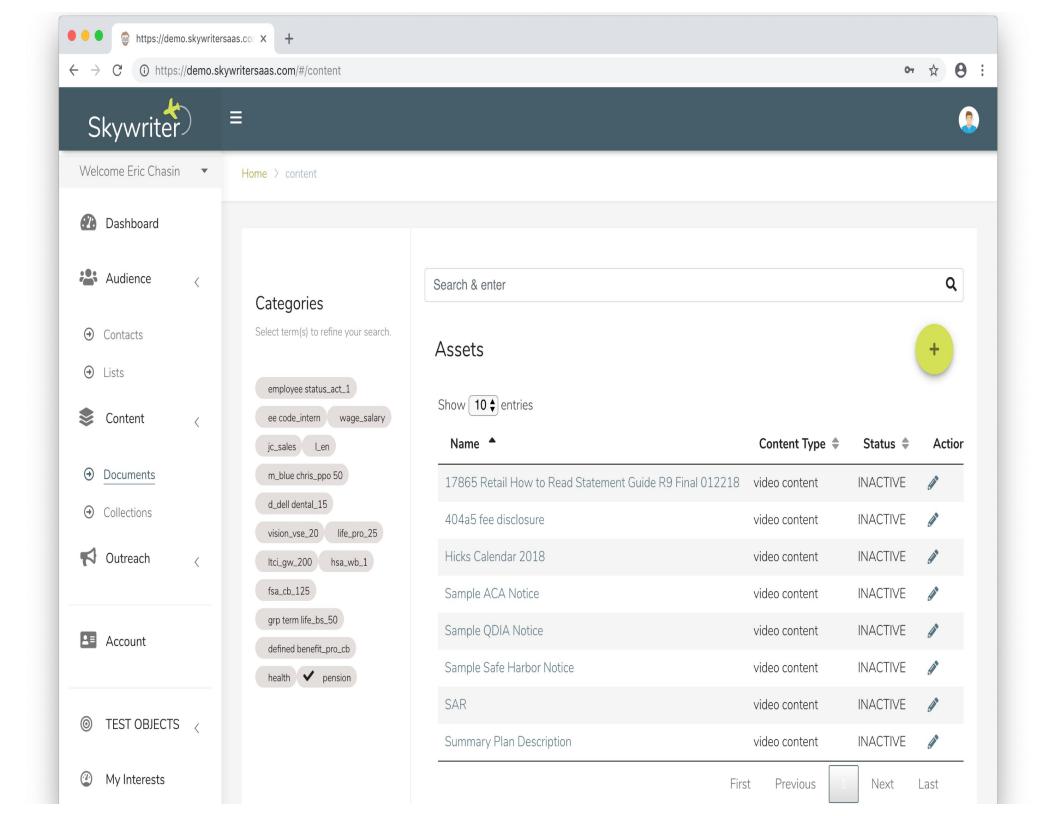


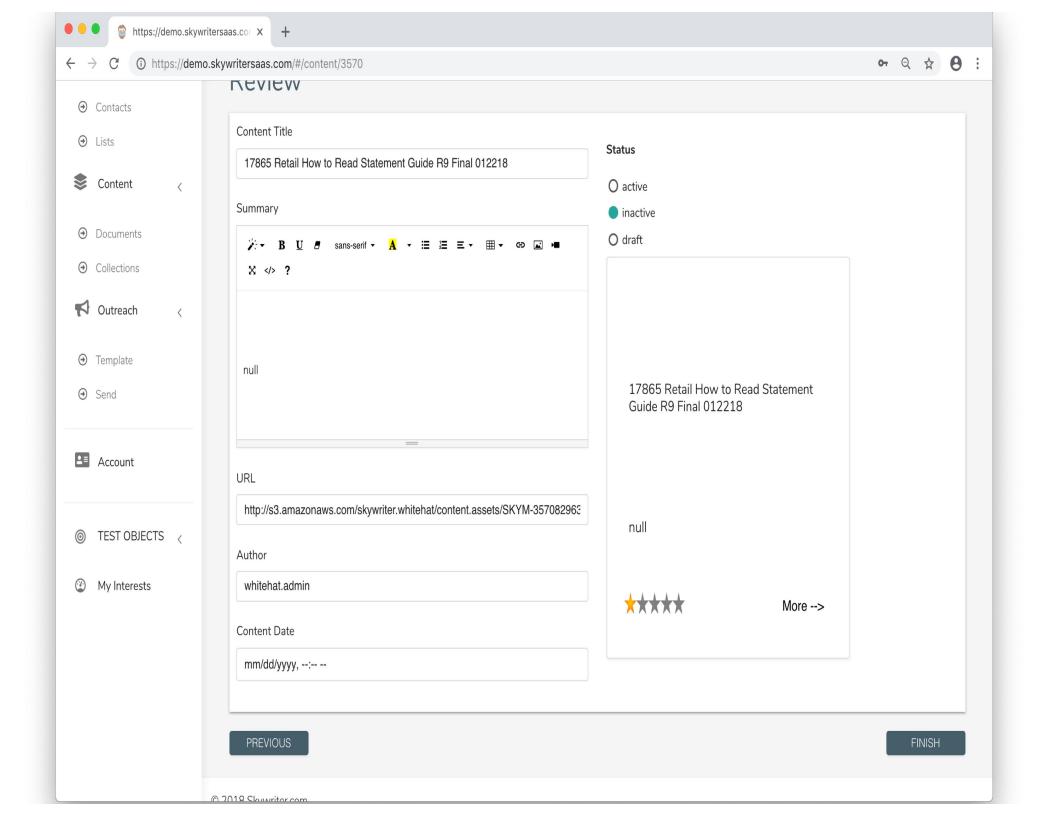
## The What

# Disclosure & Benefit Training Library









### Example

•401(k) Summary Plan Description

- Identify Important Content
- Explain Significance



#### 401(k) Plan Participants -

## **Summary Plan Description**

The Employee Retirement Income Security Act (ERISA) requires plan administrators to provide participants and beneficiaries a Summary Plan Description (SPD) describing their rights, benefits, and responsibilities under the plan in understandable language.

The SPD includes such information as:

ERISA.

As there may be features and benefits that you may not be familiar with, the video attached is designed to help you interpret the information that is typically found in most Summary Plan Descriptions.

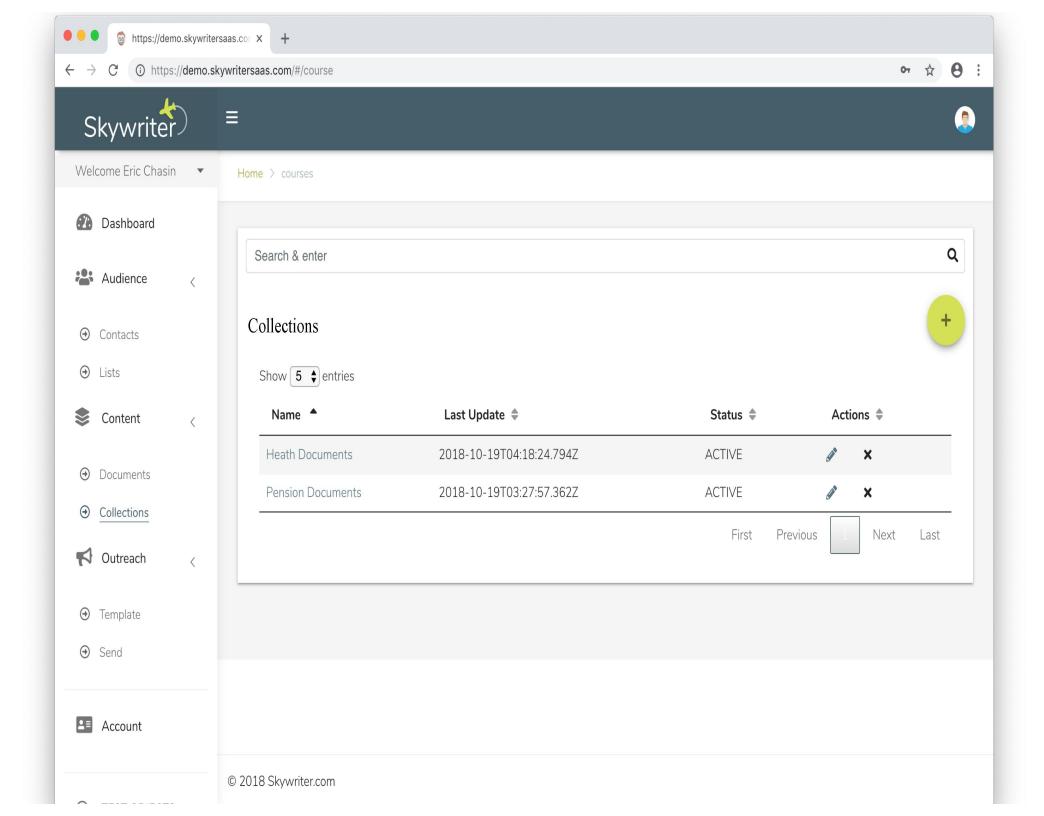
In addition, we have indexed your Summary Plan

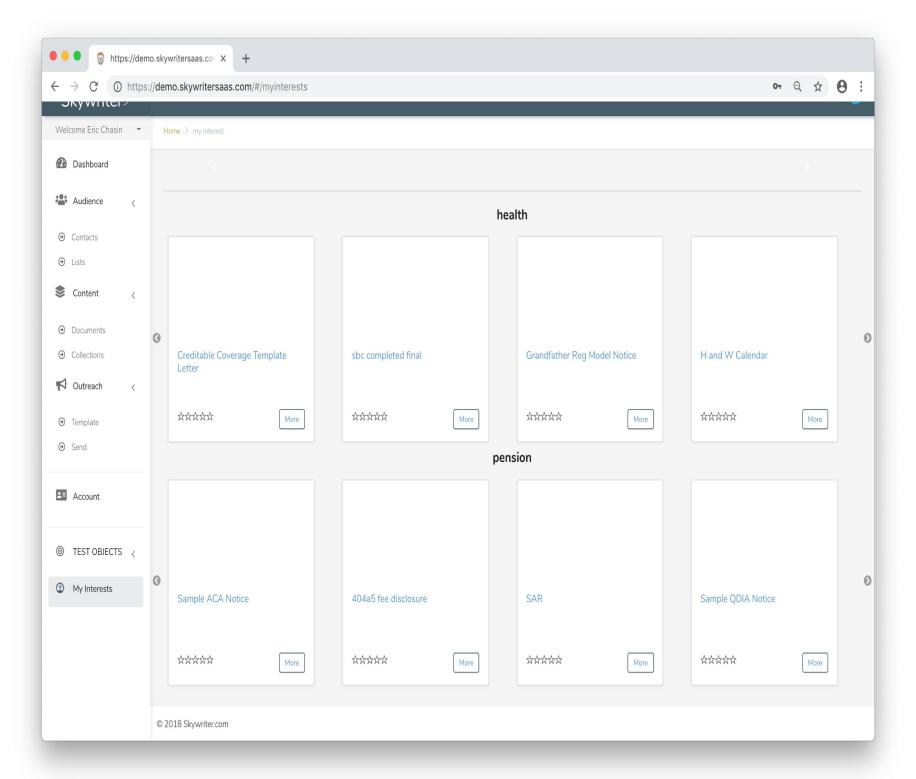
Description to help you quickly find your plan's operation
information.

Please see attached.

VIDEO URL: https://www.youtube.com/watch?

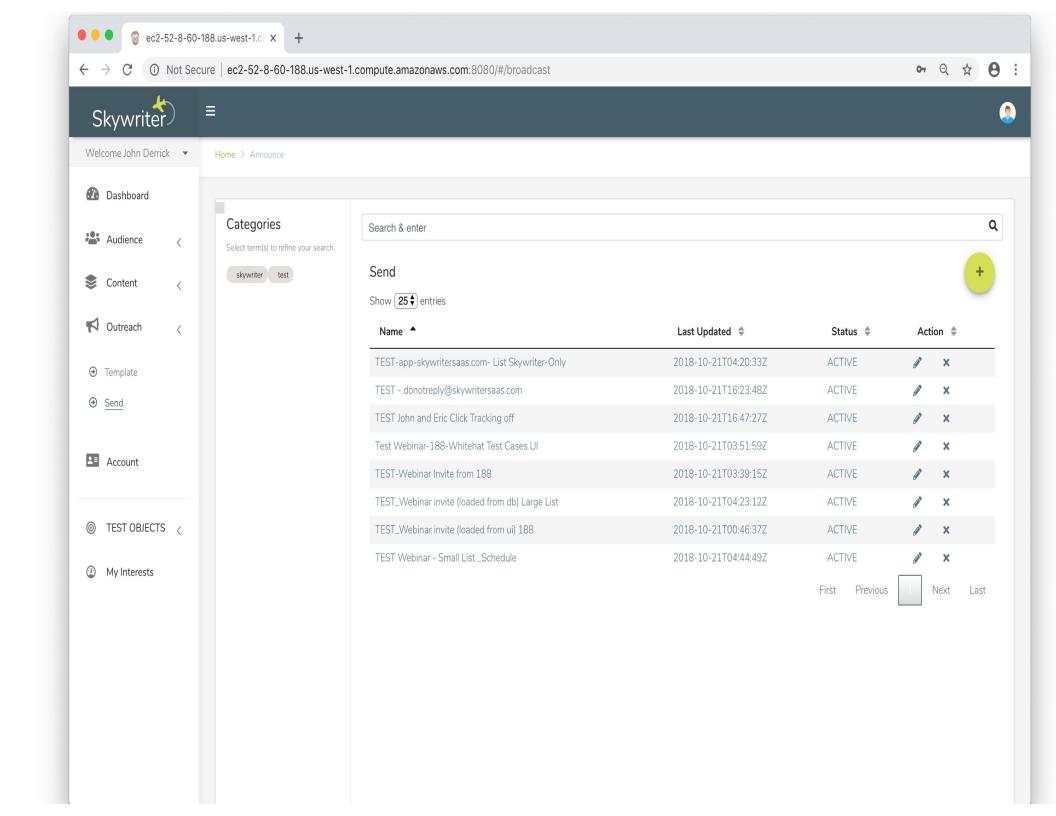
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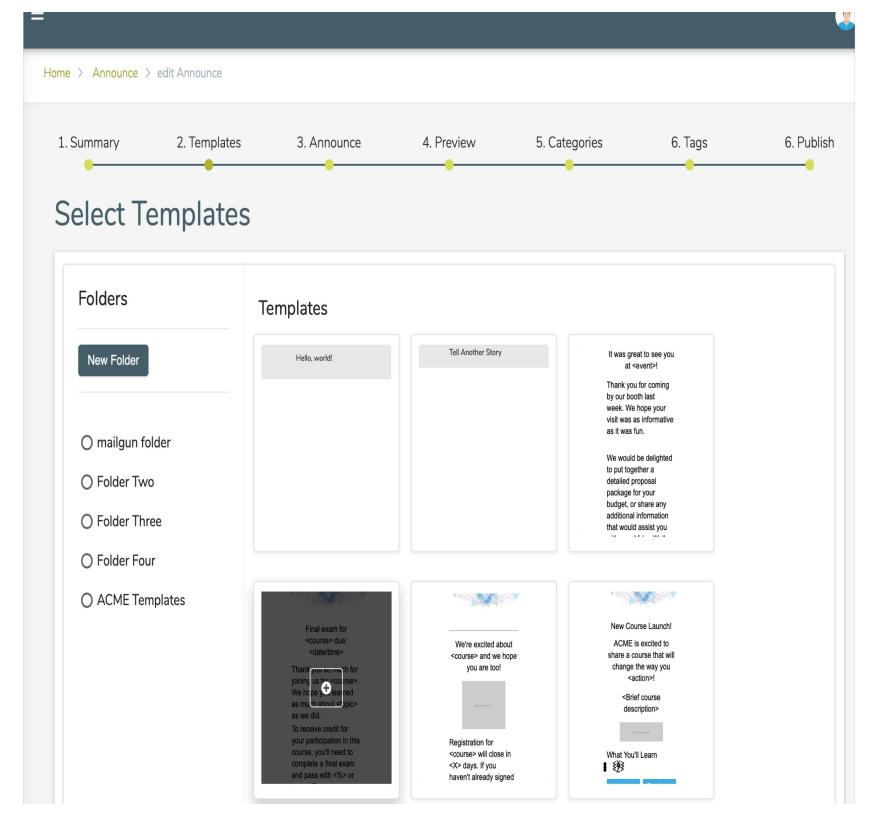




## The When

Calendaring





#### **Edit Announce**

#### PLEASE JOIN US, WHILE WE EXPLAIN

## Effective Communication Strategies for ERISA Plans

How to Get the Biggest Bang from your Benefits Budget



Tonie Bitseff, JD

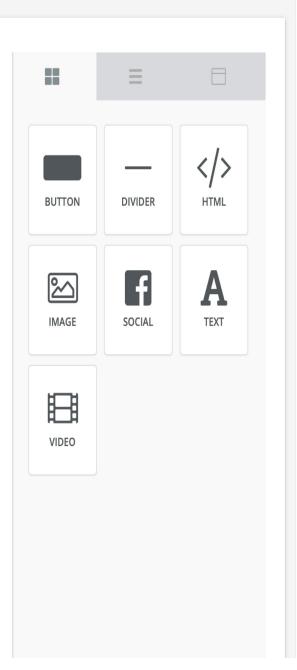
LLM, Buchalter

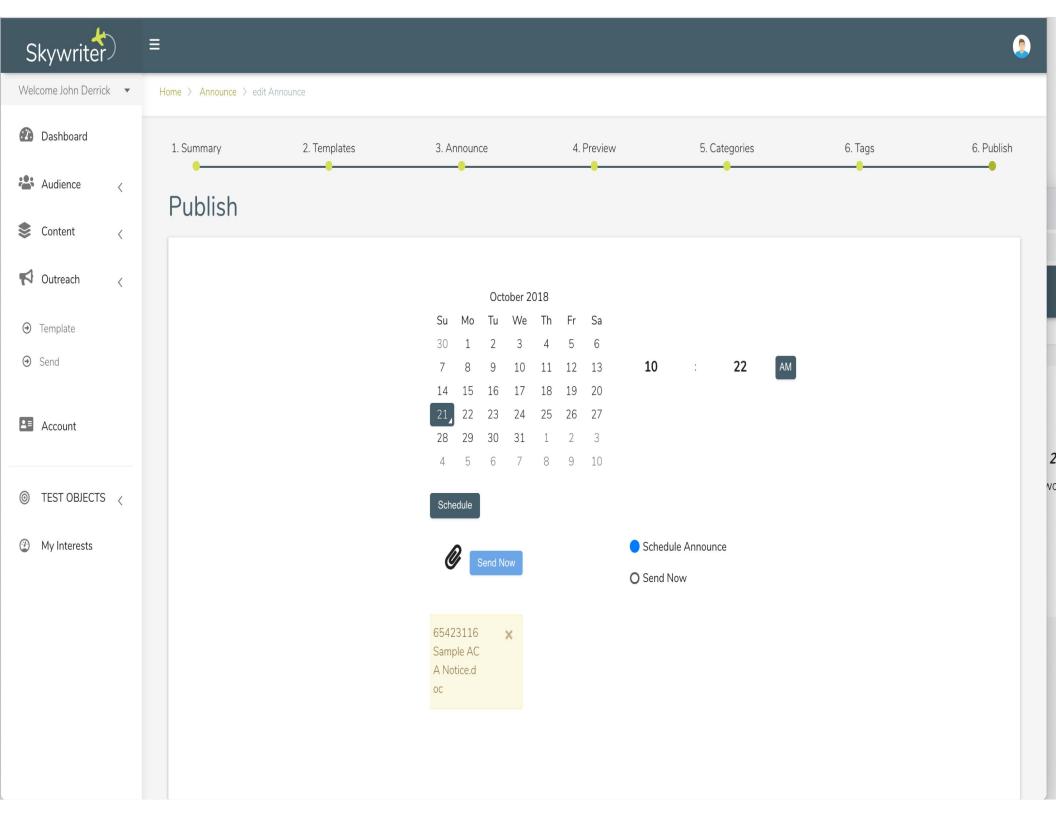
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Mary Jane Eadson JD,
Principal, Eadson
Compliance Center

Mary will outline ERISA's disclosure requirements, providing an inventory of "must have" documents and practical tips to ensure those documents are accessible and effective.





## Check

The "For Sure"

## Tracking Options

- Delivered / Not Delivered
  - Confirms that email was delivered to the user's server
- Opened
  - Confirms that email was opened if show images=true
- Confirm Link
  - The most reliable and through method
- All available on the platform reports are configurable

## Additional Key Points

- Security
  - User id / Password / Encryption

- Logs / Audits
  - Records of emails, ability to track usage, etc..

- SLA (Service Level Agreement)
  - Hosted by AWS World's largest Cloud Supplier
  - Support response time depends on contract level

## www.WhiteHatLLC.com www.Skywriter.com

Thank You!

John Derrick
CEO & Co-Founder

John.Derrick@Skywriter.com

M 512-413-5010

Doug Lutkus
Principal

Doug@WhiteHatLLC.com

M 831-262-6773