EMPLOYER COALITION OF LOUISIANA ERISA FIDUCIARY COMPLIANCE For Health Plan Sponsors

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Fiduciary Obligations

- The Employee Retirement Income Security Act of 1974, as amended ("ERISA") imposes the highest standard of conduct on "fiduciaries."

- While historically ERISA focused on retirement plans, the spotlight is now on healthcare plans.

Standard of Conduct

- "Prudent person rule" or "prudent *expert*"?
  - ERISA § 404(a)(1): A fiduciary must discharge his duties: *With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and* ***familiar with such matters*** *would use*
  - "*Procedural prudence*": Courts focus on the fiduciary's conduct in arriving at a decision, not its results

Fiduciary Responsibilities

- Execute responsibilities with care, skill and due diligence of a prudent expert
- Make decisions in the sole interest of participants and beneficiaries
- Monitor prohibited transactions
- Respond to inquiries
- Follow the plan document

Definition of "Fiduciary"

- ERISA § 3(21)(A): A person is a fiduciary with respect to a plan to the extent he/she:
  - Exercises any discretionary authority or control over the management of the plan, or the management or disposition of plan assets;
  - Has any discretionary authority or responsibility in the administration of the plan; or
  - Renders investment advice for a fee or other compensation, with respect to plan assets.
- Fiduciary status is based on the functions performed for, or on behalf of, the plan, and include committees or individuals that oversee employee benefits and administer the group health plan.

Does a Health Plan Have Assets?

- Yes! Employee contributions toward the cost of coverage ARE plan assets, but unlike retirement plans, the U.S. Department of Labor ("DOL") does not impose a trust requirement. See DOL Letter 92-01.
- The "prohibited transaction" rules do apply to Health Plans.
- Employers must properly and timely use employee contributions toward premiums, whether self-funded or fully-insured.

Group Health Provisions of the Consolidated Appropriations Act (CAA)

- Designated the Plan Sponsor as the ERISA/PHSA Fiduciary for the group health plan
- Imposed specific Fiduciary responsibilities on Plan Sponsors
  1. Removes gag clauses from service provider contracts on price and quality information
  2. Establishes reporting requirements (i.e. Rx)
  3. Requires the disclosure of direct and indirect compensation from all service providers
  4. Requires parity in substance abuse and mental health benefits

1. Prohibition of Gag Clauses

Plan Sponsor agreements with service providers must provide access to provider-specific cost or quality information for the Fiduciary to:

- Show that employee costs related to claims are expended in an efficient manner
- Provide enrollees with access to information to make informed, cost-effective healthcare decisions
- Share information with the Plan Sponsor to identify waste through comparative analytics

The CAA requires an annual Gag Clause Prohibition Compliance Attestation (GCPCA). Attestations are required by **12/31/23**.

2. Rx Disclosures

Plan Sponsors must report to HHS, DOL, and Treasury, the following information:

- Top 50 brand drugs most frequently dispensed
- Annual amount spent by top 50 most costly Rx drugs by total plan/coverage spend
- Amount spent for the top 50 Rx drugs with the greatest prior year plan spend
- Total healthcare spend
- Premiums and rebates

RxDC Reporting Deadline: 6/1/23 for 2022 pan year and 6/1 for each subsequent year.

3. Compensation Disclosure

For providers that reasonably expect to receive $1000 or more in direct or indirect compensation. Requirements apply to contracts executed on/after 12/27/21. The following information must be disclosed for any contract renewed, extended, or newly executed, on or after 12/27/21:

- Direct compensation
  - Finder fees
  - Contracted fees
  - Commissions
- Indirect compensation
  - Compensation based on a structure not solely related to the contract with the covered plan
  - Reasonable estimate of any indirect compensation they or any affiliates or subcontractors reasonably expect to receive
- Transactional fees
- Written description of all the services they provide
- Fiduciary Status

4. Mental Health & Substance Abuse Benefits Parity

Plan sponsors are required to analyze non-quantitative treatment limitations ("NQTLs") on MH/SA benefits to show parity with medical and surgical care:

- Quantitative treatment limitations include copay or a restriction on the number of treatments
- NQTLs refer to pre-certifications, network admission criteria, medical management programs, and coverage policies (i.e. access to substance abuse facilities)
- NQTL analysis is due upon request.
  - Failure to provide the required analysis is likely to trigger the $100 a day penalty per plan participant.
  - If the plan is not in compliance, it must detail remedial action within 45 days. If unable to bring the plan into compliance, plan sponsor will have 7 days to notify participants that coverage is non-compliant and federal regulators will report the plan to the state where the employer is located or licensed to do business.

Delegation of Duties

- While many of these new transparency obligations can be delegated to third parties, group health plan fiduciaries remain ULTIMATELY responsible for monitoring fiduciary compliance and determining that group health plan fees are reasonable.

- The CAA establishes a timeline in which Plan Sponsors must immediately terminate service contracts that fail to disclose compensation.

Fiduciary Liabilities and Penalties

- Fiduciary Liability penalties:
  - Lost profits plus 20% penalty (negligence)
  - Criminal penalties for willful violation
  - Civil actions by participants
  - Can lose personal assets, home and business
- DOL Health Plan audit activity increasing:

  The DOL reviewed over 200 mental health parity analyses. NONE of the analyses reviewed were found to meet the requirements.
- Increased Class Action Litigation:
  - See next slide

Class Action Lawsuits

In 2006, *Tussey v. ABB*, the first "excessive fees" case, changed views of fiduciary duties regarding fees. The retirement plan industry moved in a unified way to press for reductions in service provider fees, opt for lower-cost share classes, and insist upon greater transparency of all service providers. The information uncovered triggered a wave of class action lawsuits filed against providers and plan sponsors, alleging excessive plan fees lack of process for monitoring and negotiations with service providers.

ERISA fee litigation settlements:

Citigroup (2018) $6.9M Allianz (2018) $12M

American Airlines (2017) - $22M Northrop Grumman (2017) - $16.75M

Mass Mutual (2016) - $30.9M Novant Health (2016) - $32M

Boeing (2015) - $57M Ameriprise (2015) - $27.5M

Lockheed (2015) - $62 University of Chicago - $6.5M

Duke University – $10.5M

How to Minimize Fiduciary Liability

- **“Procedural Prudence”**
- Fiduciary Liability Insurance

Procedural Prudence

Establish a Benefit Plan Committee to oversee the plan. Identify specific titles or roles within the employer (not Board members) to serve on the committee and have Committee report to the Board at least annually.

Approve Benefit Plan Committee Charter. Benefit Plan Committee members' rules and responsibilities are set out by a committee charter. When the Committee meets, members make sure the plan is managed in a way that is consistent with the culture of the organization and existing laws and regulations, in a way that meets the plan sponsor's fiduciary responsibilities.

Follow the Law. Stay up to date on developments in statutory and regulatory guidance. Get professional help!

Benefit Plan Committee -- Membership

- Select officers and managers who have expertise regarding benefits and insurance, such as:
  - CFO
  - Controller
  - Vice President, Human Resources
  - Benefit Manager
- Avoid naming the following as Committee members:
  - Rank & file employees (non-management)
  - CEO
  - General Counsel
  - Board Members

How Much Fiduciary Insurance is Needed?

- Individual plan decision
- Coverage depends on:
  - Budget
  - Accounting controls
- Standard D&O policy generally excludes ERISA fiduciary coverage unless it is specifically asked for and included (often as an "ERISA rider")

Questions?