Fiduciary Check In: Rights & Responsibilities Related to Service Provider Disclosure

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The Consolidated Appropriations Act (CAA) and Fiduciary Responsibilities

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Health plan sponsors have a fiduciary obligation to disperse plan assets in a prudent manner for the exclusive benefit of plan participants and beneficiaries.
The standard to carry out such obligation for a health plan is simply a “good faith compliance effort”.
Unfortunately, there are not hard and fast “safe harbors” as to what constitutes a “good faith compliance effort” for health plans so plan sponsors are left to exercise their responsibilities in a “prudent” manner.
Peters vs Aetna Inc

- Fourth Circuit revived ERISA breach of fiduciary duty and prohibited transaction claims against Aetna.
- Significance is that a plan participant brought a Class Action suit alleging violations of the exclusive benefit rule.
- This is a sneak peak and what plan sponsors risk if they do not follow a plan fiduciary compliance process!!
The Consolidated Appropriations Act (CAA)

- The CAA, passed in December of 2020, lays out extensive rules and responsibilities that plan sponsors, as Fiduciaries, must comply with.
- The goal of the CAA is to improve transparency by:
  - Removing gag clauses from service provider contracts
  - Establishing reporting requirements for pharmacy and prescription drug prices
  - Requiring disclosure of direct and indirect compensation from All Service Providers
  - Requiring parity in substance abuse and Mental Health Benefits
- As Fiduciaries, plan sponsors are required to demonstrate a prudent decision-making and oversight process.
- Plan sponsors must document their processes in order to demonstrate that they have met their Fiduciary responsibilities.
The Consolidated Appropriations Act (CAA)

Compensation Disclosure Requirements

It creates significant compensation disclosure requirements for health insurance brokers and other benefit plan service providers, effective for contracts issued after December 27, 2021.

This requirement only applies to contracts where the service provider reasonably expects to receive $1,000 or more in compensation (direct or indirect) in connection with providing the services.
Compensation Disclosure Requirements

**Who is a “covered service provider”**

- Any involvement in insurance or insurance product selection (including vision and dental)
- Development or implementation of plan design
- 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
- Third-party administration services

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What Information to Disclose?

- 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

Compensation Disclosure Requirements

- Transactional fees
  - A description of all transaction-based compensation.
  - A description of any compensation payable in connection with termination and, if applicable, how any prepaid amounts may be refunded and calculated.
- Written description of all the services they provide
- Fiduciary Status
Compensation Disclosure Requirements

**How Compensation Information Needs to be Disclosed**
- Monetary Amount
- A Formula
- Per Capita charge per enrollee (PEPM)

**When Information Needs to be Disclosed**
- “reasonably in advance of the date on which the contract or arrangement is entered into, extended, or renewed.”
- No longer than 60 days from change
Compensation Disclosure Requirements

Why?

• Determine “reasonableness” of fees
• ERISA section 408(b)(2) permits plans to enter into reasonable plan service arrangements for reasonable compensation
• The CAA amends ERISA section 408(b)(2) (“Amendment”) to ERISA-covered group health plans to provide written information about their fees and services to a “responsible plan fiduciary”
• The “responsible plan fiduciary” is a plan fiduciary with authority to cause a plan to enter into, extend, or renew a contract or arrangement for plan services. Any involvement in insurance or insurance product selection (including vision and dental)
Liability of Complacency

• If the covered service provider does not meet its obligation to disclose, then the plan fiduciary needs to ask for the information in writing.

• Notify the DOL and consider termination of the contract

• Prohibited transaction - The DOL could enforce civil monetary penalties under ERISA Section 502(i). There is the potential for triggering a 15% excise tax under Internal Revenue Code Section 4975 too, which could become 100% if the plan fiduciary does not correct their actions on a timely basis.

• Class Action law suites
Compensation Disclosure Requirements

Take Action NOW!

- Identify **ALL** Covered Service Providers (CSP)
- Gather **ALL** required fee and service disclosures from CSP’s
- Compile **ALL** Contracts and Conflict of Interests statements
- Establish a process to evaluate & determine “reasonableness” of fees & services
- Perform independent benchmarking of **CORE** broker services
- Document your process

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Compensation Disclosure Requirements

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