Healthcare Plans – Fiduciary Responsibility

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Agenda

- ERISA and Fiduciary Liability
  - Overview
  - Who is a Plan Fiduciary?
  - What are the Duties of a Plan Fiduciary?
  - Prohibited Transactions

- Evolving Judicial Standards
  - Conflicts of Interest
  - Duty of Care

- Common and Emerging Issues
  - PPACA Internal and External Review Procedures
  - Handling of Distribution of Medical Loss Ratio Rebates
  - Fee Disclosures

- Questions & Answers
Who is subject to ERISA?

All employers who “sponsor” ERISA is designed to apply to specific types of benefit plans rather than employers

- E.g., a “pension benefit plan” provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond

- E.g., a “welfare benefit plan” provides medical, surgical, or hospital care or benefits; benefits in the event of sickness, accident, disability, death or unemployment; vacation benefits; apprenticeship or other training programs; day care centers; scholarship funds; prepaid legal services; or certain other benefits described in Labor Management Relations Act

ERISA applies to designated benefit plans established or maintained by:

- Employers engaged in commerce or whose industry or activity affects commerce

- Unions representing employees engaged in commerce or in any industry or activity affecting commerce
Overview

- Certain plans and arrangements are exempt from ERISA
  - Governmental plans (maintained by U.S., state, or local governmental entities)
  - Church plans (maintained by a church or association of churches exempt under section 501 of the Internal Revenue Code)
  - Plans maintained to comply with workers’ compensation or disability insurance laws
  - Top hat plans
  - Payroll practices
Fiduciary Duties and Obligations

- Response to perceived abuses in use and administration of pension plans
- Cornerstone is the “fiduciary concept”
Who is a Plan Fiduciary?

- ERISA § 3(21) defines a “fiduciary” with respect to an employee benefit plan as an individual who:
  - Exercises any discretionary authority or discretionary control over plan management, or exercises any authority or control over the management or the disposition of plan assets;
  - Renders advice for a fee or for any other compensation regarding the investment of plan assets, direct or indirect, or has authority or any responsibility to do so; or
  - Has discretionary authority or discretionary responsibility in the administration of the plan.
Who is a Fiduciary? (continued)

- Named fiduciary
  - A fiduciary named in the plan document or identified pursuant to a procedure specified in the plan

- Trustee (funded welfare plans holding plan assets in a trust)

- Plan Administrator
  - Not the same as a TPA
  - Can be internal or external
Who is a Fiduciary? (continued)

▪ Any person who acts as a plan fiduciary has the authority to establish policy for the plan, implement plan practices and procedures, interpret plan provisions and control plan assets

▪ Some common fiduciary functions for healthcare plans include:
  ▪ Selecting plan fiduciaries
  ▪ Selecting insurance companies or vendors including stop-loss (insured or self-insured welfare plans)
  ▪ Selecting the custodial for plan assets, or the investment manager or investment vehicles for plan assets
  ▪ Resolving appeals under a group health plan when plan terms are unclear or ambiguous (i.e., making final benefit determinations)
  ▪ Reviewing and setting rates for plans
Who is a Fiduciary? (continued)

Can be . . .

• Officer or director
  • But generally only to the extent that they are named as plan administrators or otherwise act as a fiduciary (e.g., exercise discretionary authority over plan assets or plan management)

• Human Resources Staff
  • If acting on behalf of plan as a fiduciary (e.g., inaccurately communicating plan terms to employees)

• Third Party Vendor (such as TPA, attorney or advisor)
  • If they act on behalf of plan as a fiduciary (e.g., exercise control over assets or exercise authority over plan)
ERISA § 404 does not require that the “fiduciary” be an expert on all plan matters, but requires the plan fiduciary to seek the assistance and guidance of experts with respect to the administration of the benefit plans. 

- A fiduciary can be personally liable for all phases of the management and administration of a plan except that the fiduciary may delegate certain functions of the plan to qualified persons.

- Third party administrators can be a fiduciary depending on the amount of discretion exercised over the plan.
  - Authority to investigate, process, grant, or deny claims
  - Control over plan funds (such as the management, investment, and disbursement of plan assets)
  - Defining scope of plan audits
  - Unilaterally updating the plan to comply with legislative developments (without consulting with plan administrator)
Who is NOT a Plan Fiduciary?

- Third party vendor performing ministerial functions
  - TPA is not a fiduciary if it has no authority to make any decisions affecting plan policy, interpretations, practices, or procedures
  - In performance of its contractual duties it makes determinations based on policies and procedures established by plan administrator or plan trustee
    - Process and payment of claims
    - Benefit eligibility
    - Billing and enrollment services
    - Printing and distributing employee communications
  - Language in a TPA contract that disclaims fiduciary responsibilities will NOT be enough to limit liability in a court of law if they performed fiduciary activities
Who is NOT a Fiduciary? (continued)

- Professional advisors generally are NOT plan fiduciaries
  - DOL has stated that attorneys, accountants, actuaries, or consultants who provide legal, accounting, actuarial, or consulting services to a plan will not be considered fiduciaries solely by performing their usual professional functions... UNLESS
    - Investment advisory services will elevate to fiduciary role
    - Exercising discretionary authority or control will elevate to fiduciary role
  - Mere influence is not enough
Who is NOT a Fiduciary? (continued)

- Plan Sponsor/ Employer when performing traditional settlor functions:
  - Modifying plan terms
  - Terminating a plan
  - Distributing plan materials
  - Enrolling employees
  - Determining plan design
  - Processing payroll deductions as long as funds are disbursed as soon as practically possible and for the purpose they were intended for

- Remember: Plan assets cannot be used to pay for settlor activities
Why Do I Care?

- ERISA allows enforcement actions directly against fiduciaries and provides severe penalties for failure to comply
  - Personal liability for damages or losses to Plan
  - Personal liability for fines occasioned by missed deadlines or failure to file reports
  - No exculpatory clauses
  - Potential jail time
What are Fiduciary Duties?

- **“Exclusive Interest”** –
  - Fiduciaries must administer the plan with an “eye single” towards the interests of the participants and for the exclusive purpose of providing benefits or defraying costs

- **“Prudent Person”** –
  - Fiduciaries must administer the plan with the care, skill and diligence as would a prudent person with similar aims, knowledge and experience

- **“Diversity”** –
  - Fiduciaries must diversify the investments of a plan in order to minimize risk of loss

- **“In accordance with the terms of plan documents”**
Examples of Fiduciary Duties – Exclusive Interest

- Key is “Why?” -- Process Statute!!
- No Need to Maximize Benefit for an Individual Participant
- OK or Oh, No!:
  - Invest Plan assets in Son–in–Law’s business
  - Choose Brother–in–Law as Plan Investment Advisor
  - Invest Plan assets in parcel next door to Fiduciary’s house
  - Invest Plan assets in Fiduciary’s wife’s wedding ring
- Ends do not Justify the Means – e.g., Donovan v. Bierwirth
Examples of Fiduciary Duties – Prudent Person

- Should be Read as “Prudent Expert”
- Key is “Process”
- OK or Oh, No! – Invest Plan assets in:
  -- Internet Crank-o-BlasterFund.com Fund
  -- Undeveloped land
  -- Enron Corp. stock
- Determination does not always need to be right
Examples of Fiduciary Duties – Diversity

- Keys are “Asset Classification” and “Stability”
- OK or Oh, No! – Invest plan assets:
  -- 100% in wife’s wedding ring
  -- 100% in local real estate (what about national real estate)
  -- 100% equally divided among 10 different stock mutual funds
  -- 100% in investment offerings of Vanguard

- No Magic Numbers – Facts and circumstances determination
Examples of Fiduciary Duties – In Accordance with Plan Documents

- Possibly most dangerous duty when it comes to Health and Welfare plans.

- Concept of Discretion?

- OK or Oh, No!
What are Prohibited Transactions?

- A plan fiduciary must not cause the plan to engage in a transaction, if the fiduciary knows or should know that the transaction is either directly or indirectly between the Plan and a “party in interest”
  - “Parties in interest” are people or entities that are related to the plan (ERISA § 3(14) and IRC § 4975(e)(2)) such as:
    - Plan fiduciaries
    - Employees of a Plan
    - Sponsoring Employer or employee association
    - Service Providers- Accountants, attorneys, managers
    - Employees, officers and directors of the sponsoring employer
    - 50% or more owners of the employer
    - Relatives (spouses, ancestors, and lineal descendants) of a fiduciary
What are Prohibited Transactions?

- Basic definition set forth in IRC § 4975 (substantially similar definition also set forth in ERISA § 406)
  - Sale or exchange, or leasing, of any property between a plan and a interested (disqualified) person;
  - Lending of money or other extension of credit between a plan and an interested person;
  - Furnishing of goods, services, or facilities between a plan and a disqualified person;
  - Transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;
  - Act by a disqualified person who is a fiduciary dealing with the income or assets of a plan in his own interests or for his own account or on behalf of anyone who has adverse interests to the interests of the Plan; or
  - Receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.
How to Avoid Prohibited Transactions?

- Keep in mind that in order to have a prohibited transaction there must be a combination of a:
  - Prescribed transaction or activity;
  - Party in interest; and
  - Plan assets

- Thus, always identify the parties of interest involved in any plan activities

- Refrain from using assets for the benefit of a fiduciary or a party of interest

- Develop protocols on how certain decisions regarding the plan, its administration and assets should be used
  - Claims processes- develop protocols for benefits determinations
  - Seek legal counsel in the events not clearly identified as exempted under the regulations
What Happens if a Fiduciary Breaches its Duties?

- Fiduciaries are personally liable for failures to comply with their fiduciary duties.
- A fiduciary may be liable for the breach of fiduciary duties of another fiduciary if the fiduciary:
  - Participates in or acts to conceal a violation
  - Permits the other fiduciary to commit a violation
  - Has knowledge of the other fiduciary’s violation and fails to take reasonable measure to remedy the situation
What Happens if a Fiduciary Breaches its Duties?

- Penalties for violation of fiduciary duties include:
  - Restitution (restore lost assets)
  - Return profits
  - Assessment of civil penalties and excise taxes
  - Fiduciary may be removed or barred from acting in the capacity of a fiduciary
  - Any other equitable or remedial relief deemed appropriate by the court
  - Injunctions, rescission of illegal transactions and forfeiture
Fiduciary duties for welfare plans - Claims payment activities

- Fully insured group health plans usually delegate fiduciary duties to insurance carriers
  - Payment of claims, benefit eligibility, premium setting, etc.
- Some states have enacted legislation to further control an insurance company’s discretionary authority to pay claims (Moran)
- Self-funded plans retain fiduciary duties unless they delegate them to a third party
- If plan document properly grants discretion to fiduciary, courts will overrule a plan’s claim decision unless the decision is deemed to be an abuse of discretion (arbitrary and capricious); otherwise, court will grant full review of claim
- Fiduciary duties may arise if a claim for benefit coverage is denied contrary to plan terms
Evolving Judicial Standards

- Fiduciary duties for welfare plans - Claims payment activities (continued)
  - **Firestone** conflict of interest case
    - Plan administrator acting in a dual capacity as plan administrator and employer (as is usually the case in self-funded plans), then claim denial subject to greater judicial scrutiny due to inherent conflict of interest
      - Evaluates the claims to be paid under the Plan
      - Pays claims under the Plan
Evolving Judicial Standards

- Fiduciary duties for welfare plans- Claims payment activities (continued)

  - **Metlife v. Glenn** potential expansion of conflict of interest analysis
    - Court extended potential conflict of interest analysis to insured plans where employer contracts with insurance carrier to act as plan administrator
    - Inherent conflict of interest must be weighed by courts in making a determination if a plan administrator abused its discretion
      - May be able to reduce exposure if benefit determinations and payment of claim functions are “walled” off
      - Need for full review of records, elimination of financial incentives for claims payments, and procedures to eliminate bias
Fiduciary duties for welfare plans- Claims payment activities (continued)

- McCauley v. UNUM clarification of expansion of conflict of interest case
  - In assessing if the inherent conflict of interest impacts the decision of a plan administrator in paying a claim, court must follow the arbitrary and capricious standard but if the participant can show that the conflict of interest influence’s the plan administrator (payer’s) decision to deny a claim, the court can adopt a more lenient standard of review
  - Plan administrator is required to review all pertinent and updated information on a denied claim prior to making a final benefit determination, as failing to review the information is indicative of an abuse in discretion, which is arbitrary and capricious.
Common and Emerging Issues

- PPACA Internal and External Review Procedures (non-grandfathered, for plan years beginning on or after 9/23/10)
  - New internal claims procedures applicable for all welfare benefit plans (ERISA or non-ERISA plans, insured or self-funded)
  - Expands “adverse benefit determination” to include rescission of coverage
  - Clarifies and expands concept of “full and fair review” (plan must provide to a claimant free of charge any new information or additional evidence considered by the plan in connection with the claim in addition to the rationale supporting the Plan’s benefit determination)
  - Restates conflict of interest standard (plan or plan administrator must ensure that all claims and appeals are adjudicated in an impartial and independent manner)
    - Looks to promotions, hiring, terminations, compensation, etc.
Common and Emerging Issues

- PPACA Internal and External Review Procedures (non-grandfathered, for plan years beginning on or after 9/23/10) – Continued
  - Notices must be provided to participants of internal and external claims review processes in an “culturally and linguistically appropriate manner”
  - Failure to adhere to internal claims and appeals processes will be deemed to exhaust the internal claims and appeal process, allowing the claimant to initiate external appeals process and pursue available remedies
### Common and Emerging Issues

- **PPACA Internal and External Review Procedures**
  - For external review procedures
    - Fiduciary of insured plans generally will follow state external review processes (if given state’s processes were sufficient), otherwise they must follow federal external review process.
    - Fiduciary for self-insured plans should make sure that TPA has sufficient number of independent review organizations (IROs) engaged and following appropriate rotation process.
  - Binding decisions on external review
    - New guidance reiterated that external review decisions are binding.
    - Thus, if ruling is in favor of claimant, plan (and insurer, if applicable) must continue to provide benefits and pay claims, without delay, until plan (or insurer) receives a judicial decision otherwise.
Handling of MLR Rebate Distributions

- Distribution and use of MLR rebates received by insured plans is a fiduciary decision that should be handled consistent with fiduciary duties
  - DOL and IRS have issued some limited guidance applicable to plans subject to ERISA, and separate but similar for governmental and church plans

- Employers who receive MRL rebate checks should:
  1) Review plan documentation (including policy) for any language addressing ownership of division of premium rebates or refunds
  2) Determine what portion of rebate is allocable to participants (i.e., plan assets that must be used for the exclusive purpose of participants)
  3) Decide exactly how to pass on participants’ position to them (e.g., premium holiday, refund payment, benefit enhancement)
  4) Understand potential income tax implications (for both employer and employer, it is generally the reverse of tax treatment when premium was originally paid)
  5) Document and communicate decisions made (keeping in mind expectations of participants who receive required MLR rebate notices from the carrier)
Key is to make determinations in a fair, reasonable, and objective manner

- Then, contemporaneously document the fiduciary’s rationale in a file memo in case its decision is ever challenged

Note, however, do not take the flexibility of “reasonableness” too far

- It is not as difficult as it might seem to calculate the applicable percentage owned to all participants who were covered under the plan in the year in which the MLR rebate arose, and to add their portion to their current year’s paycheck (or issue a check to former participants)

- Also, do not try to use the portion of the MLR rebate allocable to participants to benefit participants in another plan or arrangement (e.g., use the participants’ share to fund current year HSA contributions)
  - However, the employer can use its share of the MLR rebate whatever way it wants to
2012 Regulations governing ERISA §408(b)(2) expressly reserve fee disclosure regarding Health and Welfare Plans

- 408(b)(2) provides a statutory exemption from for contracts or arrangements for services to an ERISA-governed plan, provided that the costs and fees are “reasonable”
  - Regulations issued by the DOL in February, 2012 set forth specific information that must be provided to plan fiduciaries, along with frequency guidance

What should we expect?

- Insurance company disclosures
- Plan service provider disclosures
  - Administrators
  - Brokers and other third party service providers
Questions and Answers
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