FIDUCIARY NEWS ALERT

February 2024

Class Action Lawsuit Triggers Need for Fiduciary Mindset!

For the past few weeks, a groundbreaking lawsuit (Lewandowski v. Johnson & Johnson) has made headlines throughout the legal and benefits communities. Experts have dissected the allegations, arguments, legal precedent, and the impact the lawsuit will have on the health benefits industry. Rather than rehashing those details, this article will answer a more practical and immediate concern: What can a plan sponsor (or other fiduciary of a health plan) do to prevent an ERISA Class Action Lawsuit or Department of Labor (DOL) enforcement action? The answer is simple: adopt a fiduciary mindset and implement best practices from the retirement industry. Doing so will improve outcomes for both your organization and your participants.

What You Need to Know: ERISA 101
The Employee Retirement Income Security Act (ERISA) establishes legal obligations for individuals handling investments or managing funds on behalf of others. It covers employer-sponsored retirement plans (like 401(k) and 403(b) plans) and health and welfare benefit plans (like health, vision, and dental insurance, and more). Employers are in the driver's seat, tasked with designing these benefits, determining what "reasonable" costs are, paying only "reasonable" fees to plan vendors, diligently monitoring vendor performance, enhancing plan performance over time, and ensuring participants receive adequate information to make informed decisions.

What Else You Need to Know: CAA 101
The Consolidated Appropriations Act of 2021 (CAA) expands ERISA (and other laws) and pushes for increased financial transparency in the health benefits industry. In doing so, it also increases the employer's risk of class action lawsuit and DOL enforcement action. For this reason, employers that sponsor ERISA covered health plans should immediately familiarize themselves with the CAA's requirements and take action to get into compliance. Here are some of the key requirements of the CAA:

Prohibition of Gag Clauses: Plan sponsors are prohibited from entering into or renewing any contract with any health care provider, service provider offering access to a network of providers, or third-party administrator (TPA), that contains a "gag clause." Broadly, gag clauses are defined as any contract language that would prevent the plan sponsor from accessing cost or quality of care information. That includes all data fields associated with "claims and encounter information." Let that sink in. Plan fiduciaries are now effectively required to get a hold of their claims data, or risk fines and lawsuits.

GCPCA: To ensure compliance with this new rule, sponsors of group health plans must submit annual Gag Clause Prohibition Compliance Attestations (GCPCA) to the DOL confirming their plan contracts are in compliance with this prohibition. The first attestation was due on December 31, 2023.

Compensation Disclosure: All plan service providers who expect to earn more than $1,000 per year, must disclose the services they will provide, and all direct and indirect compensation they will receive in association with the plan. Plan fiduciaries must collect these compensation disclosures in advance of entering into a contract or renewing an existing agreement. If you do not, the contract and compensation cannot be considered "reasonable." ERISA is clear here. If you pay an "unreasonable" fee, it's called a "prohibited transaction."

Mental Health and Substance Abuse Parity: Plans that provide both medical and mental health benefits must perform and document a comparative analysis that demonstrates that any quantitative treatment limitations (QTLs) or nonquantitative treatment limitations (NQTLs) are applied equally to both medical / surgical benefits and mental health / substance use disorder benefits.

NOTE: This is an area of particular focus for the DOL, as they are required to submit a report to Congress on the results of their investigations into mental health parity investigations each year.

RxDC Reporting: Plan sponsors must report extensive details concerning the prescription drug costs (RxDC) incurred by the plan throughout the year. Plans must now make annual disclosures to the DOL, the Department of Health and Human Services (HHS), and the Department of Treasury.

What You Should Do Next

As a plan fiduciary, you should formalize and document your decision-making processes. You should implement a prudent process for selecting and monitoring plan service providers. Here are some key actions you can take to ensure your ERISA benefit plans are designed and administered in the best interests of participants and beneficiaries:

Plan Governance:
Fiduciary Committee: Establish a health and welfare benefit plan fiduciary committee to review plan information, select and manage service providers, and make decisions for the plan.

Fiduciary Training Program: Implement a training program to train applicable personnel about their fiduciary duties and how to exercise the appropriate level of prudence and care when making plan related decisions.

Documentation: It's crucial to document the committee's efforts to improve plan performance, and the entire vendor selection process, including criteria used for evaluation, the rationale behind the selection decision, and any potential conflicts of interest identified and mitigated.

Insurance Policies: Review applicable fiduciary liability insurance to better protect all plan fiduciaries from liability surrounding fiduciary breaches.

Fiduciary Procurement:
Vendor Selection Process: Establish a thorough selection process for identifying and evaluating potential service providers, including Brokers, TPAs, Pharmacy Benefit Managers (PBMs), Stop Loss Carriers, and more . This process should include criteria such as the provider's experience, reputation, cost-effectiveness, quality of services, and ability to align with the best interests of participants and beneficiaries.

Negotiate: Add provisions to service provider contracts that include protections for the plan sponsor and plan fiduciaries, such as indemnification for liability caused by service provider errors.

Fiduciary Status: Determine whether the vendor should act as a fiduciary or not. Fiduciary status implies that the vendor is legally obligated to act in the best interests of the plan participants.

Monitoring and Oversight: After selecting any service provider, ongoing monitoring and oversight are necessary to ensure continued compliance with fiduciary standards and the best interests of participants and beneficiaries. This may involve regular performance reviews, audits, and assessments of services, fees, and contractual obligations.

Benchmarking: Periodically review and benchmark your plan's service providers against industry standards and best practices. This helps ensure that the plan remains competitive, cost-effective, and aligned with the best interests of participants and beneficiaries.

Conflict of Interest Assessment: Confirm that vendor relationships are free from conflicts of interest, or if conflicts exist, identify those conflicts, recognize they could influence the guidance provided by those vendors, and take that into consideration when making decisions in the best interests of plan participants. This may involve disclosing any relationships the vendor has with service providers or financial incentives they receive from recommending certain products or services.

Ongoing Monitoring: Once vendors are selected, plan fiduciaries should implement a system for ongoing monitoring of vendor performance and adherence to fiduciary standards. This may include regular reviews, audits, and assessments of the vendor's services and practices.
Transparency and Communication: Open communication between plan sponsors / fiduciaries and vendors is essential. Fiduciaries should clearly communicate their expectations regarding fiduciary responsibilities, service quality, conflicts of interest, cost transparency, and compliance. Vendors in turn should provide transparent information about their services, fees, rebate arrangements, and any potential conflicts of interest.

Why You Should Take This Seriously: Legal Alert
Lewandowski v. Johnson & Johnson marks the first of this type of lawsuit filed against a health benefit plan. It will not be the last. Just as the first lawsuit in the retirement space opened the floodgates for hundreds of similar lawsuits to follow, Lewandowski is a harbinger of litigation against health benefit plans, the employers who sponsor those plans, and the individual employees who have any discretionary authority over those plans.
Plan fiduciaries can no longer simply rely on plan vendors “to do the right thing.” You must uncover their conflict of interest, understand their total compensation, and make well informed decisions in the best interest of plan participants and beneficiaries. You cannot offload fiduciary responsibility by hiring an “expert.” But taking the reins of your health plan also provides access to huge opportunities to improve health outcomes and decrease cost. So, step up to the plate. Dig in and understand the requirements of ERISA and the CAA. Evaluate your plan vendors performance and compensation. Avoid unreasonable fees, analyze your plan data, and identify opportunities to provide the health benefits your participants and beneficiaries will benefit from. Doing so will not only reduce your liability, it will reduce costs and improve health outcomes!

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