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Recent Laws Heighten Risk of Lawsuits Against Health and Welfare Plan Fiduciaries

As discussed in our [January 2022](#), [November 2021](#), and [January 2021](#) Client Alerts, the Consolidated Appropriations Act, 2021 (CAA), Transparency in Coverage Rule, and related U.S. Department of Labor (“DOL”) guidance impose new fiduciary duties on health plan fiduciaries. This Client Alert briefly summarizes the CAA’s disclosure provisions and rules regarding prescription drug and health plan reporting requirements as well as outlining the Transparency in Coverage rule. It then discusses how these policies open the door for litigation and steps fiduciaries can take to help protect themselves.

Background

The CAA’s Disclosure Obligations for Broker and Consultant Services

As detailed in our [January 2022](#) Client Alert, among other things, the CAA amended ERISA to require that health plan brokers and consultants provide specific service and compensation disclosures for their contracts or arrangements to be considered “reasonable.” Those disclosures are intended to help ensure that a health plan does not pay more than reasonable compensation for broker and consultant services. Plan fiduciaries must review those disclosures prior to entering into, extending, or renewing the arrangement and concluding the compensation is reasonable.

The Prescription Drug and Health Cost Reporting Requirements

As explained in our [January 2021](#) Client Alert, the CAA requires group health plans to submit participation, claims, and other information regarding prescription drug and health plans. The submitted information is not publicly available. However, to increase transparency and increase price competition, regulators will release biennial public reports on prescription drug pricing trends and the impact of prescription drug costs on premiums and out-of-pocket costs starting in 2023.

The Transparency in Coverage Rule

As discussed in our [November 2021](#) and [June 2022](#) Client Alerts, group health plans must publicly post machine-readable files for in-network rates, out-of-network allowed amounts and billed charges, and prescription drug negotiated rates and historical prices. Because this information is publicly available, individuals can review the amount a plan pays for various services and compare that information to other plans.

Disclosure and Transparency Create Opportunities for Litigation

Background on 401(k) Litigation

Jerry Schlichter originally made a name for himself by successfully suing retirement plan fiduciaries in the aftermath of the Pension Protection Act of 2006 (“PPA”), which requires plan fiduciaries to review specific fee information from investment consultants and brokers. Schlichter’s lawsuits typically allege that, among other things, fiduciaries were paying unreasonable and excessive fees for retirement plan investment advice. Schlichter’s lawsuits have netted \$300 million in settlements relating to excessive fees. Before the PPA and the resulting litigation, many consultants and brokers were charging fees around 200 basis points for retirement plan investment advice; those fees now average around 50 basis points. Schlichter’s lawsuits helped create a market in which plaintiff lawsuits could expand, holding retirement plan fiduciaries personally accountable. We previously discussed this trend of lawsuits against retirement plan fiduciaries in our [February 2022](#), and [December 2022](#) Client Alerts.

Emerging Threat of Health and Welfare Plan Litigation

Now that federal regulators are focused on fee and pricing transparency for health plans, Schlichter and his law firm are preparing a new litigation push against health plan fiduciaries. Signaling his intentions, Mr. Schlichter has observed that “[t]he fiduciary duty for a healthcare plan sponsor is essentially the same duty as a retirement plan sponsor of a 401(k) or 403(b).” His law firm has begun posting advertisements on its LinkedIn page seeking potential employee plaintiffs regarding health plans sponsored by Target, State Farm, and PetSmart.



Health plan fiduciaries could be at risk from plaintiffs claiming that fiduciaries breached their fiduciary duties by not receiving and reviewing broker and consultant service fee disclosures and determining the compensation is reasonable, not having adequate procedures in place for hiring and monitoring third-party administrators and pharmacy benefit managers, or failing to determine that the health and prescription drug plan’s negotiated network discounts reflect market pricing and are comparable to the claims experience of similar plans. A 2021 case illustrates the importance of fee disclosures. In that case, a consultant working for Arthur J. Gallagher & Co. was sued for taking undisclosed commissions from Cigna. In this case, a school board alleged that the consultant accepted secret commissions from

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insurance carriers and breached his duties when he failed to act in the board's best interests and when he made various misrepresentations related to compensation and conflicts of interest. The case settled for \$585,000.

Next Steps

Health plan fiduciaries should take the following steps to reduce their exposure to litigation and personal liability:

- If an employer does not have a fiduciary committee in place for health and welfare benefits, it should consider forming such a committee, adopting a committee charter, and delegating fiduciary responsibilities to the committee.
- Request and review service and fee disclosures from health plan brokers and consultants.
- Consider whether the brokers' and consultants' direct and indirect compensation is reasonable and whether there are any conflicts of interest.
- For self-insured health plans, periodically benchmark the plan's fees and claims experience to confirm that the negotiated in-network rates are reasonable.
- Periodically subject third-party administrators, brokers, consultants, pharmacy benefit managers, and other vendors to requests for proposals.
- Review and negotiate administrative service agreements and pharmacy benefit management agreements.
- Document the process the fiduciaries used to obtain, review, and monitor broker and consultant disclosures, benchmarking information, vendor proposals, and vendor performance.

If you have questions about fiduciary matters, do not hesitate to reach out to a member of Kutak Rock's [Employee Benefits Practice Group](#).

