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Mitigating Exposure in ERISA Health and Welfare Fiduciary Litigation Trends

A New Era of Health and Welfare Fiduciary Litigation

In recent years there has been an uptick in litigation targeting fiduciaries of health and welfare employee benefit plans. As regulations promoting transparency and participant access to plan pricing data have expanded, plan sponsors and fiduciaries face heightened scrutiny with their vendor arrangements, plan expenses and compliance with fiduciary standards under the Employee Retirement Income Security Act of 1974 (“ERISA”).

ERISA’s Fiduciary Obligations

ERISA establishes fiduciary standards for those who manage and administer employee health and welfare plans. The core fiduciary obligations include (1) the duty of loyalty, which requires acting solely in the interest of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable plan expenses, and (2) the duty of prudence, which mandates that fiduciaries exercise care, skill, prudence and diligence in their decision-making, comparable to similarly situated fiduciaries. Plan fiduciaries must also follow plan documents, avoid prohibited transactions, and ensure that all agreements and expenses are reasonable. Breaches of these duties can result in personal liability for losses to the plan, restoration of profits made through improper use of plan assets, and other equitable or remedial relief, including removal from fiduciary roles. Courts have described ERISA’s fiduciary duties as “the highest known to the law,” underscoring the importance of procedural prudence, ongoing monitoring and independent judgment in all plan-related decisions.

Litigation Trends

Pharmacy Benefit Manager (“PBM”) Litigation

Lewandowski v. Johnson & Johnson: Participants allege that J&J and its plan fiduciaries breached their duties by failing to prudently manage the prescription drug plan, resulting in excessive costs and higher premiums. The claims allege that fiduciaries must compare service providers, seek the lowest reasonable costs, and monitor plan expenses. Plaintiffs seek to hold fiduciaries personally liable for unnecessary costs.

Navarro v. Wells Fargo: This class action alleges Wells Fargo’s plan fiduciaries engaged in prohibited transactions by paying excessive administrative fees to their PBM, resulting in millions of dollars in losses. Plaintiffs seek removal of fiduciaries and appointment of an independent fiduciary.

Stern v. JP Morgan Chase: Allegations include inflated drug costs, lack of formulary oversight, and failure to follow plan documents regarding manufacturer rebates. The complaint underscores the need for prudent vendor selection and ongoing monitoring.

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In each case, courts have either dismissed or are pending requests to dismiss claims because plan fiduciaries had met their obligations of prudently administering the plans, or because participants received the benefits promised under the plans and did not suffer any harm.

Other Health and Welfare Litigation

Cybersecurity and Wellness Program Litigation: A recent Change Healthcare cyberattack exposed participants' personal information to hackers, emphasizing plan fiduciary responsibility for robust vendor oversight and compliance with privacy, security, and nondiscrimination rules. Dozens of lawsuits by participants whose data was improperly shared and by providers whose billing was interrupted have been consolidated and are in early stages of litigation.

Use of Artificial Intelligence ("AI"): In *Kisting-Leung v. Cigna Corp.*, participants sued their health plan claims administrator, Cigna, for imprudently administering the plan's claims procedures by using AI to analyze participant claims for medical necessity without review by a medical director as required by the plan. The AI program wrongfully denied claims and data showed Cigna doctors denied over 300,000 claims while spending an average of 1.2 seconds per review. The court dismissed participants whose claims were not reviewed by AI but denied Cigna's motion to dismiss participants whose claims were denied by the AI program.

Why ERISA Fiduciary Committees Matter

ERISA imposes personal liability on fiduciaries for losses to the plan resulting from breaches of duty. Courts have consistently emphasized that the prudence standard is not about achieving the best possible outcome (hindsight), but about following a prudent process in decision-making. The formation of a fiduciary committee for health and welfare plans establishes this prudent process with best practices that:

- Clearly identify fiduciaries and their responsibilities.
- Enable regular, documented oversight of plan administration, vendor selection and compliance.
- Limit organizational and individual liability through insurance and indemnification.
- Ensure subject matter expertise in areas such as finance, human resources and benefits administration.
- Mirror successful governance structures long used in retirement plan administration.

How Kutak Rock Employee Benefits Attorneys Can Help

Kutak Rock's Employee Benefits group members offer comprehensive support for plan sponsors seeking to establish or enhance their health and welfare fiduciary committees by:

- Drafting executive summaries, charters and board resolutions.
- Advising on committee formation, member selection and fiduciary training.
- Establishing an annual process for accomplishing committee tasks and goals.
- Assisting with vendor RFPs, contract review, benchmarking, and compliance documentation.
- Providing ongoing legal updates, risk assessments, and best practices for committee governance.
- Offering expertise in ERISA fiduciary litigation, regulatory compliance, and plan administration.

If you have questions about fiduciary governance, committee formation or litigation risk mitigation, contact Kutak Rock's Employee Benefits and Executive Compensation practice group for tailored guidance and support.

