

Fiduciary Trends in Welfare Plans: How to Avoid Liability and Save Money



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Rich Theatre

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Meeting Your ERISA Fiduciary Responsibility for Group Health Plans

ERISA Basics

- Employee Retirement Income Security Act of 1974 (ERISA)
 - Plan Documents
 - Reporting & Disclosure
 - Fiduciary Duties
 - Claims and Appeals Procedures
- Enforcement of ERISA
 - Employee lawsuits – State law claims preempted
 - Claims for Benefits
 - 510 Interference claims
 - Fiduciary breach
 - EBSA – judicial enforcement and penalties

ERISA Basics

- ERISA Covers
 - Virtually all private sector employers – including nonprofits/tax-exempt
- ERISA Exempts
 - Government Plans - application not always straightforward
 - Church Plans – facts and circumstances

ERISA Basics

Settlor vs. Fiduciary Role

- Design decisions are made in a “settlor” capacity
- Settlor decisions are not subject to the fiduciary standards
 - A decision to terminate a plan is not subject to the fiduciary standards, but *implementation* of the decision to terminate the plan is subject to the fiduciary standards
 - A decision to amend a plan is not subject to the fiduciary standards, but *interpretation* of the amendment is subject to the fiduciary standards

Are you an ERISA Fiduciary at risk for personal liability?

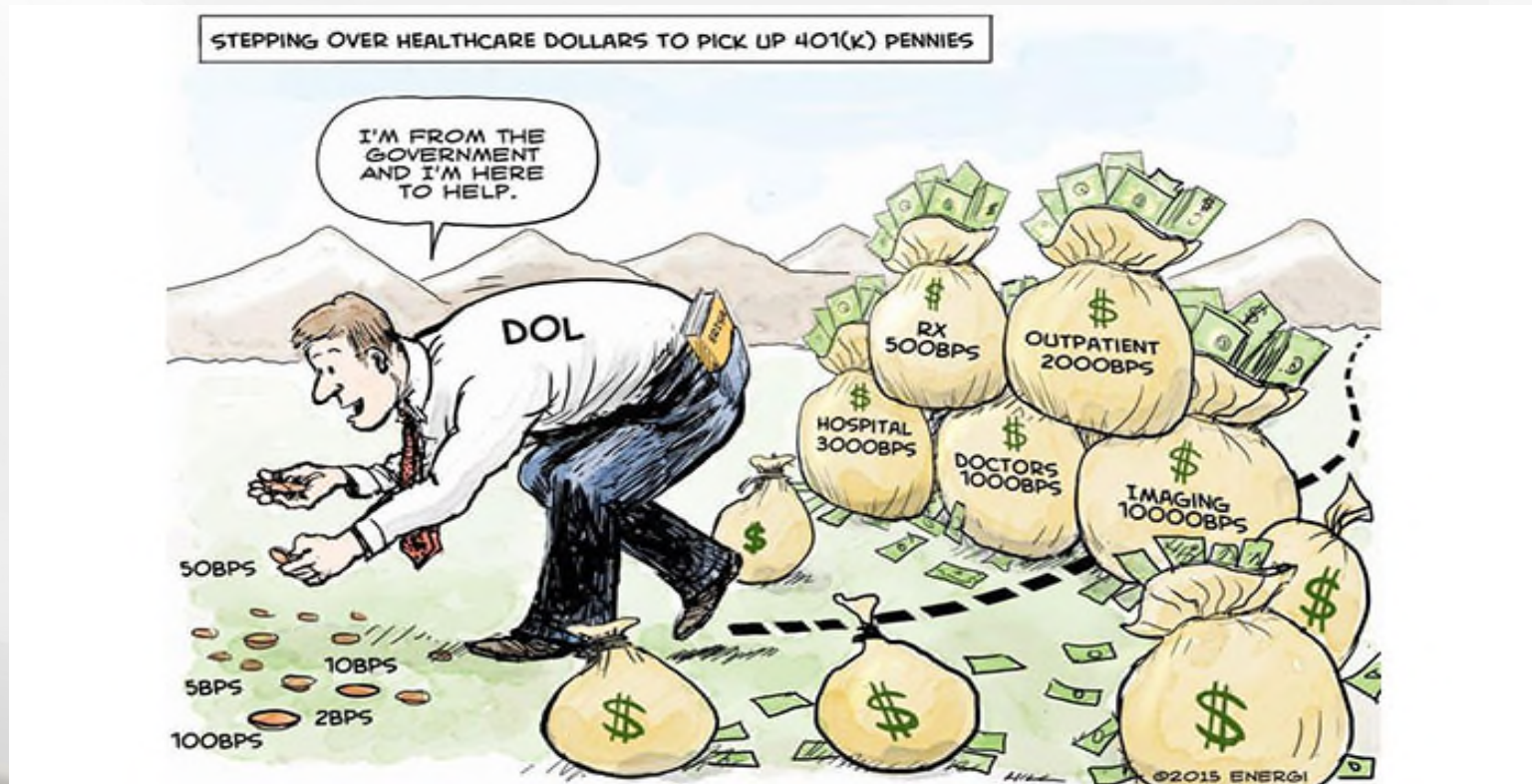
- Automatic Fiduciaries:
 - Named Fiduciaries
 - Plan Administrators
 - Trustees
- Functional Fiduciaries Under ERISA §3(21)
 - Any person who *exercises* discretionary control or authority over the plan's management, administration, or assets

Why is this important?

ERISA fiduciary responsibility is the gold standard in fiduciary conduct and liability



Fiduciary Liability Trends – It's not just 401(k) Plans You Need to Worry About



What Fiduciary Duties are Owed?

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them
- Paying only reasonable plan expenses
- Prudently managing plan assets (*amounts “set aside”*)
 - *Trust assets/Employee premiums - always*
 - *Rebates/OOP expenses/employer contributions – maybe*
- Monitoring service providers
- Following plan documents (unless inconsistent with ERISA)

Fiduciary Liability Case Studies

For self-insured health plans, hidden costs may involve overpayment recoupment, fee forgiveness protocols, and undisclosed fees

- *Hi-Lex vs. BCBS Michigan*
 - *BCBS Michigan* ordered to refund \$6.1 million after court found BCBSM breached its fiduciary duty to self-insured GHP by inflating hospital claims with hidden surcharges
 - According to BCBSM's own survey - 83% of its self-insured customers did not know that the disputed fees were being charged.

Fiduciary Liability Case Studies

- *True Valley Surgery Center One*
 - OON Provider sued Cigna administered self-insured ERISA plan, Employer (CB&I) and its Director of Comp and Benefits individually for allegedly agreeing to unlawful compensation structure that financially rewarded Cigna for wrongfully denying and underpaying benefits claims
- *United Teamster Fund, et al v. Magnacare Administrative Services*
 - Separate, but similar case
 - Brought by the Plan against TPA

Fiduciary Liability Case Studies

- *Redoak Hospital v. Gap Inc – v. AT&T*
 - OON Provider sued the United HealthCare administered self-insured ERISA plans, GAP/AT&T. and its individual PAs for alleged "self-dealing and embezzlement," deceptively concealed through an "illegitimate recoupment scheme that financially rewards United"
 - DOL intervened – raised fiduciary and Form 5500 issues for failing to disclose indirect income paid to United Health
 - Fed Appeals Court Sides with OON Providers to halt United's cross-plan offsets

Good Fiduciary Practices are a Defense to Liability

- *Acosta v. Chimes District of Columbia, Inc.* no fiduciary liability for failing to monitor excessive health plan fees and expenses
 - Regularly reviewed the prudence of selection of TPA
 - Monitored service providers at conferences and periodically spoke with peer organizations to gauge their fees
 - Renegotiated fees to the plan's benefit
 - Held annual meetings with their TPA and the trustee
 - Reviewed annual reports
 - Required outside auditing of the plan
 - Monitored the administrative and claims processes
 - Were prudent in relying on advisors and external sources, such as industry materials and informal information, to assess the TPA

Fiduciary Liability & Best Practices

- Identify plan fiduciaries and ensure that they understand their duties
- Establish a Welfare Plan Committee and meet regularly
- Establish a process for monitoring TPAs and controlling plan costs and fees
- Engage with independent advisors – (outsource claims appeals, bill review, RFPs, plan document review)
- Insist on transparency in fees/terms in service agreements with TPAs/advisers

Fiduciary Liability & Best Practices

- A few best practices:
 - Distribute SPDs to employees and don't deviate from its terms
 - Have your SPD reviewed and keep it current
 - Know what's in your plan documents and follow plan terms in operation
 - Failing to follow the terms of the plan is a fiduciary violation
 - Ensure your plan has done what it has promised and that TPA is following terms
 - Document, document, document – ERISA protection hinges on being able to establish a reasonable process

Understanding Your Fiduciary Responsibilities Under a Group Health Plan

- Fiduciary Responsibilities <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/fiduciary-responsibilities>
- Health Plan Fiduciary Responsibilities <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans>
- Health Plans & Benefits: Fiduciary Responsibilities <https://www.dol.gov/general/topic/health-plans/fiduciaryresp>
- Understanding Your Fiduciary Responsibilities Under a Group Health Plan <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-your-fiduciary-responsibilities-under-a-group-health-plan.pdf>

Questions



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Thank You



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