



EMPOWERING PLANS



EMPOWERING PLANS SINCE 2000



Ethical Administration

Ethics in Employee Benefits



Agenda

- I. Ethics as a Plan Administrator
- II. Legal/Consulting Perspective
- III. Fiduciary Duties
- IV. Developments in the Landscape
- V. Questions

I. Ethics as a Plan Administrator

Ethics as a Plan Administrator



Ethics for a TPA

- “A TPA is a trusted advisor, who develops strong, closely-involved, ongoing relationships with the clients they serve.”

Ethics for a TPA

- “A TPA is a trusted advisor, who develops strong, closely-involved, ongoing relationships with the clients they serve.”
- “In sum, TPAs ensure that our benefits packages are carefully, thoughtfully and respectfully cared for.”

Ethics as a Professional

- Being a TPA is not just another job, it is a profession
- Professionals subordinate their interests to those of their clients
- Competing tensions can arise

Key Topics and Regulations

- Privacy requirements
- State regulation (e.g., licensing requirements, contract law)
- Federal regulation (e.g., ERISA)

II. Legal/Consulting Perspective

ERISA Compliance

- ERISA vs. Non-ERISA plans
- And ERISA group health plan providing coverage for medical care
- Fully funded vs. Self-insured

ERISA Fiduciary

- What is an ERISA fiduciary?
- Broadly speaking, anyone who exercises control or discretionary authority over plan assets, or who gives investment advice

Major Compliance Areas

- Mental Health Parity and Addiction Equity Act (MHPAEA)
 - Major focus area for DOL/EBSA enforcement
 - NQTL Comparative Analysis requirement throwing administrative duties into sharp relief
- Employee Leave Laws
 - State and local laws can factor in heavily – even for ERISA plans
 - Many states implementing PFL laws that will add to administrative complexity
- Continuation of Coverage Laws
 - COBRA administration
 - Must be clear on who is administering COBRA coverage
 - Must coordinate on behalf of plan
 - ARPA leave; no longer applicable, but an interesting example

III. Fiduciary Duties

ERISA Fiduciary

- Common fiduciaries:
 - Employer
 - Plan administrator and/or administrative committee
 - Trustees
 - Insurance Carrier
 - Insurance Broker
- Non-fiduciaries:
 - Attorney, Accountant, Actuary acting solely in professional capacity
 - TPA, recordkeeper, or utilization reviewer performing solely ministerial tasks
- Except where:
 - The individual/entity exercises discretion or control over the plan.

ERISA Fiduciary

- Fiduciaries have important responsibilities and act on behalf of participants and their beneficiaries, and are therefore subject to strict standards of conduct.
- Fiduciaries must:
 - Act *solely* in the interest of plan participants
 - Follow terms of the plan documents
 - Hold plan assets in trust
 - Paying only *reasonably necessary* plan expenses
 - Carry out duties *prudently*

ERISA Fiduciary

- The duty to act prudently is central to a fiduciary's responsibilities under ERISA
 - Fiduciaries must act with the care, skill, prudence and diligence that a prudent person acting in a like capacity *and familiar with such matters* would use
 - Demands expertise in variety of areas, or that fiduciary delegates to an entity with the necessary expertise
- Equally important is following the terms of the plan documents
 - Plans often rely on their TPAs to draft, update, interpret and apply their plan language
 - Common hiccup: administering the plan *as written vs. in practice*.

Breach of Fiduciary Duties

- Consequences for breaching fiduciary duties include:
 - Personal liability – restore any losses to the plan, or restore profits made through improper use of plan's assets
 - Civil penalties from DOL
 - ERISA causes of action
- Claims of breach against TPAs include
 - Depositing plan amounts into its own account and otherwise mishandling plan funds
 - TPA failure to inform plan sponsor that vendor is failing to pay claims

Limiting Liability

- Document the processes used to carry out fiduciary responsibilities
- Liabilities can be delegated – to an extent – through carefully worded agreements
- Liability can *never* be fully disclaimed.
 - *Any* exercise of discretion over plan assets can render an entity a fiduciary, regardless of their contract language to the contrary

Duties Assigned

- Key Point: Know who is responsible for plan actions
 - Benefit decisions
 - Participant disclosures
 - Recordkeeping
 - Reporting
 - Custody of plan assets
- These duties should all be spelled out and assigned in the ASA
 - Carefully documenting responsibilities and their delegation is a key protection for TPA

Duties Assigned

- Key Areas to Review in ASA
 - Scope of agreement should:
 - Clearly state up front that TPA is *not* the fiduciary
 - Outline purpose of the ASA and establish the administrative services to be provided
 - Articulate that TPA is not a legal or tax advisor, nor providing insurance
 - Ensure definitions are clear and unambiguous

Duties Assigned

- Responsibilities and duties of the TPA and the Plan Sponsor
 - Eligibility/enrollment
 - PD/SPD compliance
 - Claims decisions and appeals
 - Paying TPA's fees
 - Maintaining proper licenses
 - Coordination of benefits
 - COBRA administration
- Reporting
 - Providing necessary data

Duties Assigned

- Miscellaneous provisions:
 - Audit rights
 - Proprietary Information/Confidentiality
 - Term
 - Governing Law
 - Severability
 - Dispute resolution
 - Indemnification – Don't get it twisted!

IV. Developments in the Landscape

Major Recent Rules & Legislation

- Consolidated Appropriations Act, 2021 (CAA)
- No Surprises Act (NSA)
- Transparency in Coverage (TiC)

CAA

- Expanded reporting obligation under MHPAEA
 - Ultimate responsibility is on self-funded plans themselves, but will generally need to heavily rely on their TPAs to comply
- Pharmacy Benefits and Drug Costs Reporting
 - Here too, responsibility falls directly on self-funded plans
 - Will require coordinating with PBMs to ensure compliance
- Price Comparison Tool
 - Compliance falls on self-funded plans, except where they contract responsibility out to their TPA
 - Regardless, TPA assistance will be essential
 - Must provide plan participants with personalized OOP cost info allowing them to estimate their medical costs prior to receiving care

NSA

- Provider Fee Disclosure rules
- Provider directory must be provided
- Independent Dispute Resolution (IDR)
- Qualified Payment Amount (QPA)
- Expanded definition of “emergency services”
- Participant cost-sharing requirements for non-network claims subject to NSA (e.g., limiting “surprise” bills)

Transparency in Coverage (TiC) Rule

- Price comparison tool (required under CAA and TiC) – Some plans likely to contract this responsibility out to their TPA
- Machine-Readable Files – Here too, responsibility is on plans except to the extent they contract out to their TPA
 - See DOL [model notice](#)
 - See CMS' Machine-Readable File [example](#)

V. Questions?

THANK YOU!



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