Fiduciary Responsibilities for Group Health Plan Sponsors

ERISA applies to all employer-sponsored welfare benefit plans unless an exemption applies (such as being a church or a governmental plan). There is no small-employer exception to ERISA.

The Employee Retirement Income Security Act (ERISA) and related legislation impose a myriad of requirements on employers pertaining to any health and welfare plan that they may offer. One of those requirements is that the plan have "fiduciaries" who operate the plan in the sole interest of the participants and beneficiaries, and ERISA holds all plan fiduciaries to a higher standard of care than non-fiduciaries.

As a reminder: ERISA applies to all employer-sponsored welfare benefit plans unless an exemption applies (such as being a church or a governmental plan). There is no small-employer exception to ERISA.

What is an ERISA plan fiduciary?

ERISA recognizes two types of plan fiduciaries: named fiduciaries and implied fiduciaries. Named fiduciaries include any person or entity named in the plan documents; these can include the plan sponsor (usually the employer), plan administrators or third-party administrators (TPAs).

Fiduciaries can also be implied based on the types of activities they perform for the plan. Implied plan fiduciaries include any person or entity with discretion in administering, managing or controlling the plan (or the plan assets). Implied fiduciaries can include individuals giving the plan investment advice, individuals with discretion in interpreting plan provisions, and individuals with discretion approving or denying a claim for benefits.

> ERISA imposes heightened requirements on fiduciaries.
>
> Fiduciaries have duties of prudence, diligence and loyalty to the plan.

What are the ERISA fiduciary duties?

ERISA imposes heightened requirements on fiduciaries over individuals such as administrators, HR professionals and others who may work with the plan.

Fiduciaries have duties of prudence, diligence and loyalty to the plan. The duty of prudence examines the decision-making process of fiduciary decisions. It requires a fiduciary to have expertise in relevant areas when making fiduciary decisions, such as investment decisions or choosing service providers. If a fiduciary does not have that expertise, the fiduciary needs to hire someone who does.

The duty of diligence to the plan means that the fiduciary needs to follow the terms of the plan or follow ERISA requirements if they conflict with plan terms.

The duty of loyalty requires plan fiduciaries to operate the plan solely in the interest of the plan participants and beneficiaries, and for the exclusive purpose of providing benefits and paying plan expenses.

Fiduciary duties also require fiduciaries to avoid prohibited transactions and conflicts of interest. Fiduciaries must also avoid and/or disclose any conflicts of interest, which can include disclosing compensation information regarding service providers that may impact service provider performance.

When do ERISA fiduciary duties apply?

Even if an employer or an individual is considered an ERISA fiduciary due to their named or implied discretionary authority, not every act by one of these individuals is considered a fiduciary act. In fact, these individuals can often wear more than one hat. Fiduciary responsibilities apply to fiduciaries only when they are wearing their "fiduciary hat." For example, if the employer is performing administrative duties for the plan that do not invoke discretionary control (such as applying rules to determine eligibility, routine processing of claims or maintaining plan records), the employer is not performing fiduciary duties but rather is wearing an "administrative hat" instead of a "fiduciary hat."

Example: Paper Company has a self-funded health and welfare plan offering medical benefits. Toby in HR is not a named fiduciary in the plan, but when new employees are onboarded, Toby administers plan onboarding. This includes determining when new employees become eligible for the plan, determining whether or not an employee has experienced a qualifying life event and handling termination and COBRA notices when an employee leaves. Toby is not an implied fiduciary in these circumstances because he has not exercised any discretionary authority over the plan. He is wearing only an administrative hat and is held to a reasonable person standard of care.

One day, Toby is asked to choose a new TPA for the medical benefits. Toby does not have any expertise in this area, and so he chooses a new TPA based on a couple of Google searches. Choosing a TPA is a fiduciary function for an ERISA plan, and Toby wears a fiduciary hat when choosing a TPA. The duty of prudence now applies to Toby in this function.

Because Toby does not have any expertise in choosing a TPA, and Toby did not consult any experts or professionals when choosing a TPA, Toby has not met the ERISA fiduciary standards and has opened himself up to the potential of liability to the plan and the participants for any losses that arise from his TPA choice.

Example: Toby, again, as part of his HR responsibilities, manages the administration of Paper Company's medical plan. The written plan documents state that there is a 30-day waiting period for new hires to be eligible to participate in the plan, and new hires become eligible the first of the month following 30 days after hire. Michael, the manager of Paper Company, hires a new employee, Dwight, to start on April 15. Michael likes Dwight and wants to make the job offer more appealing, so he tells Dwight that he will be eligible for medical benefits immediately on his first day of work. Michael has Toby add Dwight to the plan on April 15.

Even though Toby is not a named fiduciary to the plan, he has become an implied fiduciary and abused his discretion in adding Dwight to the plan early. Consequently, Toby can now be held liable by the plan, the medical carrier and potentially Dwight for any expenses improperly incurred by the plan or Dwight before he became eligible under the terms of the plan on June 1.

Fiduciary requirements under the CAA

Under the Consolidated Appropriations Act ("CAA"), plan sponsors are also held to fiduciary standards. The CAA also expanded the scope of the fiduciary duties of plan sponsors on the following topics:

1. Removing of gag clauses from plan contracts with providers, TPAs or plan service providers;
2. Providing cost-sharing information;
3. Reporting pharmacy benefit and drug costs;
4. Preventing surprise billing for medical and air ambulance bills;
5. Performing nonquantitative treatment limitations analyses for mental health and substance use disorders. (See **CAA provision status update**.)

Under the CAA, a plan sponsor must now fulfill the foregoing responsibilities under the ERISA fiduciary standards, which include the duty of care and the duty of prudence. If a plan sponsor does not have the expertise to fulfill these obligations, the sponsor must seek outside advice or counsel.

If a plan sponsor does not have the expertise to fulfill these obligations, the sponsor must seek outside advice or counsel.

Example: Toby at Paper Company is asked to complete the Gag Clause Attestation for the plan year 2023. Toby forgets; therefore the Gag Clause Attestation for Paper Company's self-funded plan was never filed. Paper Company could be liable for up to $100 per day until the Gag Clause Attestation is filed. In 2024, on a completely separate matter, Jim decides to sue Paper Company's plan and the medical carrier for failure to pay his medical claims. During litigation, Jim and his attorneys notice that there are impermissible gag clauses in the plan's contracts with the medical carrier, and in deposition, Toby admits that he never filed the 2023 Gag Clause Attestation. Jim then decides to bring additional claims against the plan for breach of fiduciary duty related to the gag clause and seeks additional damages on top of the improperly paid medical claims.

ERISA Fiduciaries – Practical Impact

In February 2024, an employee of Johnson and Johnson (*Lewandowski v. Johnson and Johnson*, Case No. 1:24-cv-00671 (D.N.J.) brought suit in federal court in New Jersey against the company in its capacity as the fiduciary of the