

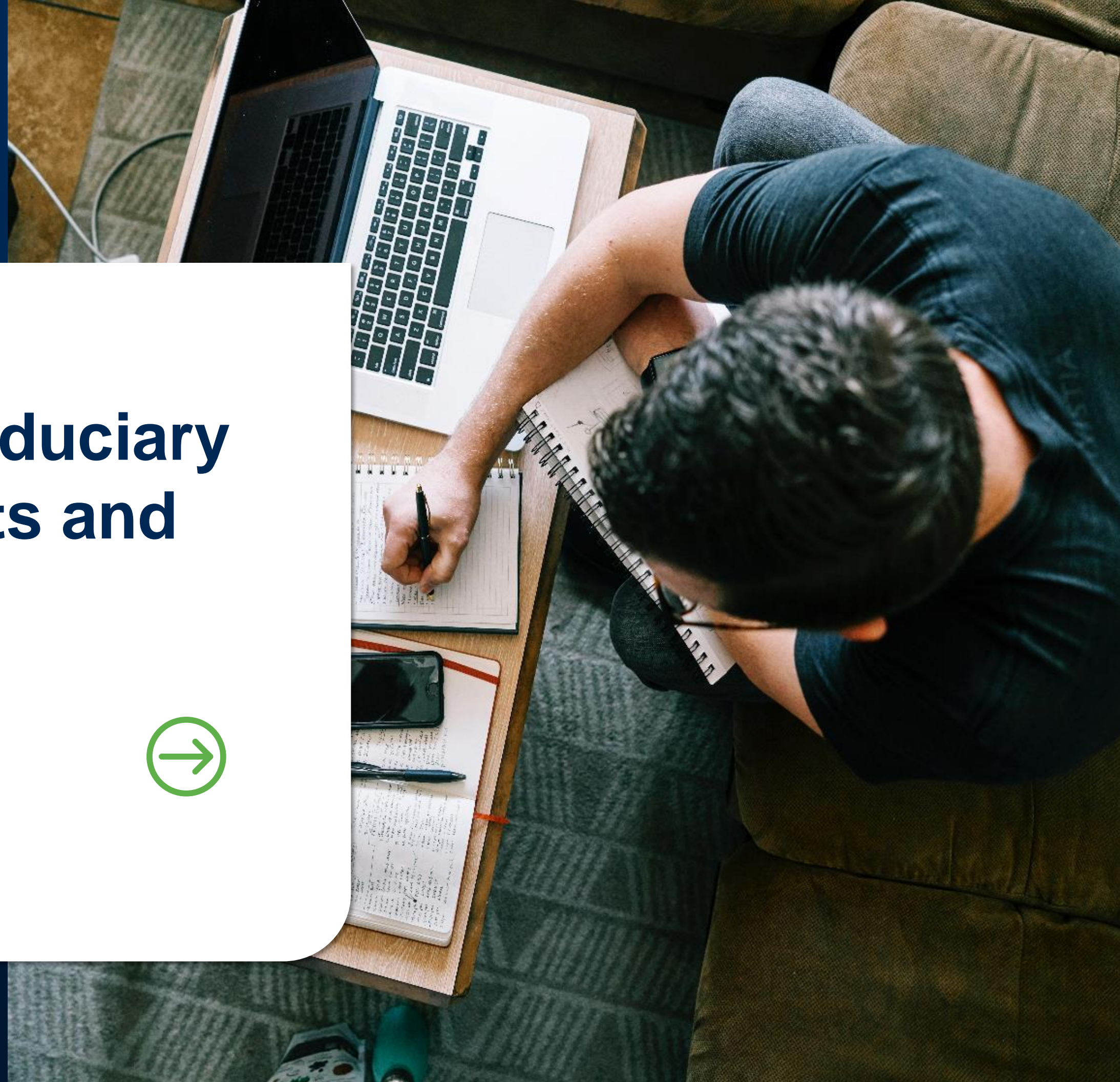
This Webinar Will Start Momentarily.
Thank you for joining us.

ERISA: General Fiduciary Duties, Plan Assets and MLR Rebates

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Presentation Agenda



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Overview



DOL's View

The Employee Retirement Income Security Act (ERISA) sets standards of conduct for those who manage employee benefit plans and their assets, called fiduciaries. Administering an ERISA plan and managing its assets requires certain actions and involves specific responsibilities. Fiduciaries, typically including plan sponsors, need to understand basic ERISA rules to meet their responsibilities.

The primary responsibility of a plan fiduciary is to manage the plan in a way that ensures plan assets are either directly used for the sole benefit of the plan's participants and beneficiaries, or those plan assets are used for the payment of plan expenses that solely benefit a plan's participants and beneficiaries.

Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. Plan fiduciaries must avoid conflicts of interest by avoiding transactions that may benefit parties that are ancillary to the plan, such as other fiduciaries, service providers, or the plan sponsor.

Fiduciaries who do not follow these principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Courts may take whatever action is appropriate against fiduciaries who breach their duties under ERISA including their removal. ~Sources: IRS & DOL

Why is This Important?



Increased agency focus on group health plans

- Historically, agencies have been focused on retirement plan fiduciaries
- Recent uptick in DOL focus on group health plans and fiduciary compliance



Transparency laws and increase in ERISA class action lawsuits

- Increase in transparency laws (e.g., TIC rules, PBM laws, etc.) has made data more publicly available
- Class action lawsuits against plan sponsors saying they have breached their fiduciary duties in:
 - » Managing their pharmacy benefit plans, including Rx costs being too high
 - » Failure to properly select, monitor or negotiate with TPAs or PBMs

Plans Subject to ERISA



ERISA Plans

All employee welfare benefit plans of private employers (both for-profit and not-for-profit) are subject to ERISA.

There are two kinds of welfare benefit plans **exempt** from ERISA:

1

Church Plans

2

Governmental Plans



ERISA Plan Fiduciaries



Who is an ERISA fiduciary?

AUTOMATIC, DELEGATED AND FUNCTIONAL FIDUCIARIES

Automatic Fiduciaries

- Plan administrator (ERISA § 3(16))
 - » the person/entity designated as the plan administrator in the plan document
 - » if a plan administrator is not so designated, the plan sponsor is the plan administrator by default
- Trustees
- Named fiduciaries
 - » ERISA requires the plan document to list at least one named fiduciary (person or entity) who jointly or severally have authority to control and manage the operation and administration of the plan (often is plan administrator)

Delegated Fiduciaries

- A named fiduciary may delegate fiduciary functions to another party
 - » provided the plan document permits such delegation
 - » e.g., the named plan administrator of a self-funded plan delegates discretionary claims and appeals decisions to a TPA, the TPA becomes a fiduciary for those delegated tasks
- The delegating fiduciary must act prudently when selecting the other party
- The delegating fiduciary cannot fully absolve themselves of their fiduciary responsibilities through a contract with the delegated party
- The delegating fiduciary remains responsible for monitoring the other party and ensuring they properly perform the delegated duties

Who is an ERISA fiduciary?

AUTOMATIC, DELEGATED AND FUNCTIONAL FIDUCIARIES

Functional fiduciaries (ERISA § 3(21))

- Person/entity that exercises any discretionary authority or discretionary control with respect to the management of the plan
- Person/entity that exercises any authority or control with respect to the management or disposition of plan assets (including any participant contributions)
 - » No discretion needed here
- Person/entity that renders investment advice for a fee or for any other direct or indirect compensation or has any authority or any responsibility to do so
- Person/entity that has discretionary authority or discretionary responsibility in the administration of the plan
- With respect to functional fiduciaries, an individual's personal belief that they are not a fiduciary is irrelevant.
 - » Likewise, statements in a contract or service agreement regarding their fiduciary status typically do not determine the matter.
 - » Rather, it is the actual discretion, authority or control they exercise that is decisive.

Identifying Plan Fiduciary

Plan sponsor may be a plan fiduciary?

- If it serves as plan administrator, trustee, or named fiduciary
- Could also be a functional fiduciary
- But see settlor and ministerial functions (subsequent slides)

Plan Sponsor's directors, officers, and employees may be functional fiduciaries

- Even if not serving as named fiduciary or plan administrator
- Depends on whether they exercise or have the types of authority, responsibility or control

Who is not a plan fiduciary?

- Accountants, attorneys, consultants, and actuaries acting solely in their professional capacities
- Third-party administrators or recordkeepers not exercising discretion over the plan and who do not have control over any plan assets
- An employer acting on behalf of its business and not the plan is not a fiduciary

Non-Fiduciary Functions

MINISTERIAL AND SETTLOR FUNCTIONS

Performing ministerial or settlor functions does not render someone a fiduciary

Ministerial Functions

- Person who performs ministerial functions within a framework of policies, interpretations, rules, practices and procedures made by other persons ***is not*** a fiduciary
- Ministerial generally means clerical functions not requiring the exercise of discretion
 - » Employers often rely heavily on TPAs and insurers for administrative tasks, such as claims processing, which can put these entities at risk of crossing the line from performing ministerial duties to becoming functional fiduciaries if they exercise discretionary authority or control over the plan.
- Cannot have any power to make any decisions as to plan policy, interpretations, practices or procedures
- Examples of actions considered ministerial in nature
 - » Applying rules to determine if someone is eligible
 - » Calculating and transmitting contributions (e.g., payroll)
 - » Preparing employee communication materials

Ministerial and Settlor Functions

Examples of contrasting ministerial functions with functional fiduciary status

- A third-party administrator (TPA) tasked with processing enrollment for a group health plan might encounter a situation where an employee's status is unclear—such as a part-time worker asserting eligibility as a full-time employee. If the TPA follows established plan rules to determine eligibility, this would be a ministerial function. However, if the TPA independently decides to include or exclude the employee without specific instructions from the plan administrator, this involves the exercise of discretion, potentially rendering the TPA a functional fiduciary under ERISA.
- An insurance broker or claims administrator handling a disability plan claim may encounter a plan document with an ambiguous definition of “disability.” If they process the claim by applying clear plan policies (e.g., adhering to predefined criteria for physical conditions), the task remains ministerial. Conversely, if they interpret the term—such as determining whether mental health conditions qualify—and approve or deny the claim without seeking clarification from the plan administrator, this discretionary judgment could classify them as a fiduciary due to their authority over benefit determinations.
- A health plan TPA receiving an insurer refund (e.g., a medical loss ratio rebate under the Affordable Care Act) might be responsible for handling plan assets. If the TPA allocates the refund according to explicit plan directives—such as distributing it to participants as reduced premiums—this is a ministerial act. However, if the TPA independently decides how to use the refund (e.g., retaining it for future expenses or distributing it) without clear guidance from the plan administrator, this exercise of control over plan assets would constitute a fiduciary function.

Ministerial and Settlor Functions

Settlor Functions

- Actions that relate to the *formation* rather than management of the plan
- When making these decisions, an employer is acting on behalf of its business, not the plan; therefore, the employer is not a fiduciary
- Examples:
 - » Establishing a plan
 - » Choosing to amend or terminate a plan
 - » Requiring employee contributions to benefits
- **However**, when an employer (or someone hired by the employer) takes steps to implement these decisions, that person is acting on behalf of the plan and, in carrying out these actions, may be a fiduciary



ERISA Fiduciary Duties



Fiduciary Duties



Duty of undivided loyalty

- Manage the plan solely in the interest of participants and beneficiaries
 - » This duty should also guide the handling of participant/beneficiary data
 - This data has value, and fiduciaries should take steps to prevent its misuse
- Avoid conflicts of interest and self-dealing
 - » See prohibited transactions for more details



Exclusive benefit rule

- Plan assets must be used for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of administering the plan
- If the plan uses plan assets to pay plan expenses, the DOL requires plan sponsors and administrators to understand service costs paid with plan assets and diligently minimize them while maintaining desired service levels

Fiduciary Duties



Duty to administer plan in accordance with its terms

- ERISA requires that the plan be maintained pursuant to a written document (i.e., plan document)
- The plan document should include certain information (e.g., named fiduciary, eligibility, claims procedures, ability to amend and terminate the plan)
- This fiduciary duty requires fiduciaries to uniformly and consistently apply the plan's terms and procedures as specified in the plan document

Fiduciary Duties



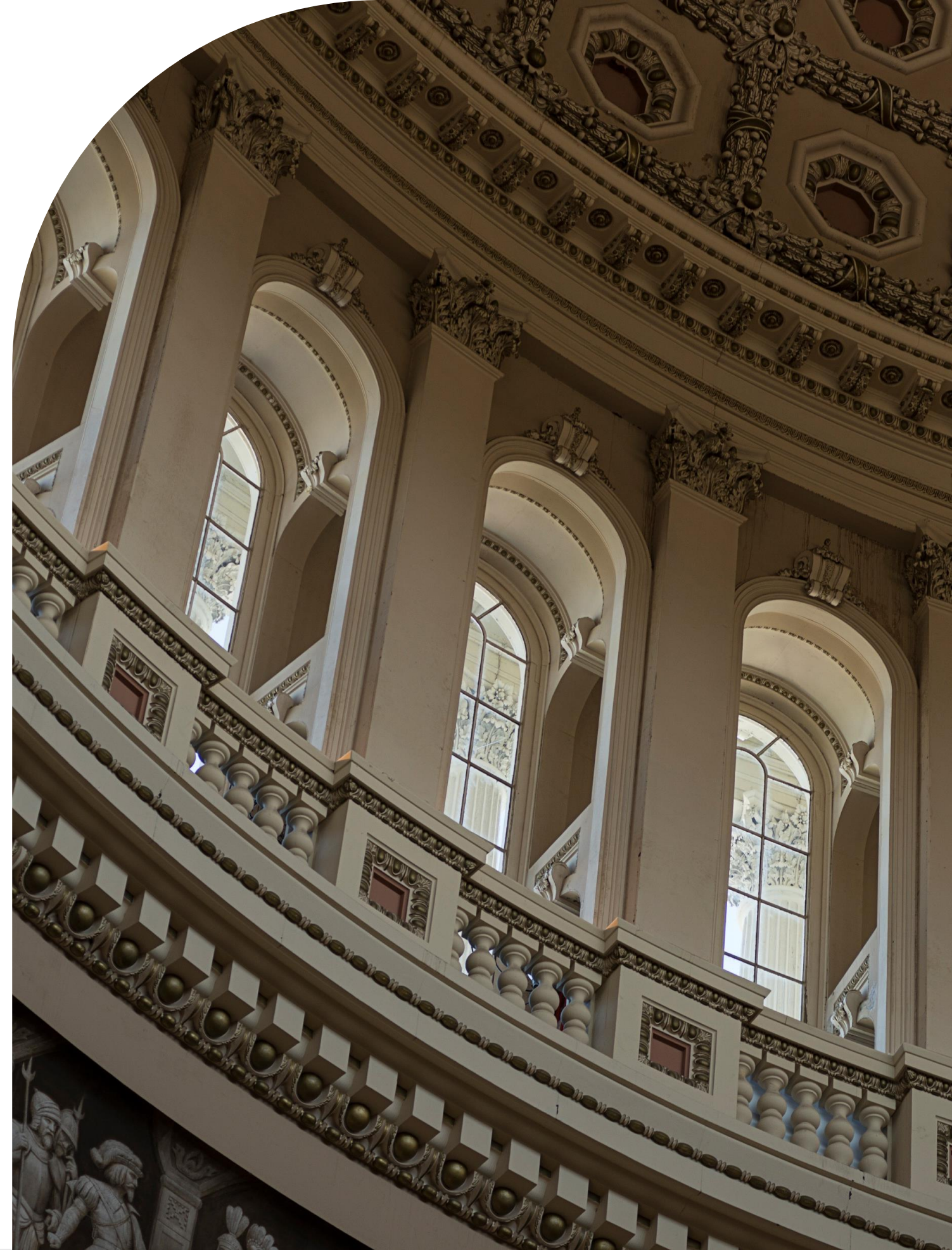
Duty to act prudently

- Act with care, skill, prudence and diligence
- Use external resources if needed to supplement expertise
 - » Caution if external resource has conflict of interest
- Procedural prudence is key
- Ex: Selecting and monitoring service providers/TPAs



Duty to diversify investment of plan assets

- Typically, only an issue for trust-funded health/welfare plans



Prohibited Transactions



ERISA Prohibited Transactions

ERISA §406(a) – Transactions between plan and party in interest

- Plan fiduciary cannot cause the plan to engage in certain transactions with a party in interest
- Parties in interest include the employer, plan fiduciaries, service providers, the union, and statutorily defined owners, officers, and relatives of parties in interest
- **Examples:**
 - » Furnishing of goods or services between a plan and party in interest (e.g., TPAs, brokers, consultants, etc.), but see exemption below
 - » Loans from a party in interest (e.g., plan sponsor or service provider) to a plan or vice versa
 - » Sale or leasing of property between the plan and a party in interest
 - » Transfer to or use by a party in interest of any plan assets
- Many prohibited transaction exemptions available for Section 406(a) transactions
 - » E.g., furnishing of services to plan by party in interest allowed if the fees charged by the party in interest are reasonable
 - » The CAA amended ERISA section 408(b)(2)(B) to require group health plan service providers (e.g., brokers, consultants) expecting \$1,000+ in compensation to disclose direct and indirect pay to plan fiduciaries

ERISA Prohibited Transactions

ERISA §406(b) – Transactions between plan and fiduciary

- Plan fiduciary cannot deal with the assets of the plan for its own interest (self-dealing)
- In any transaction involving the plan, plan fiduciary cannot act on behalf of a party whose interests are adverse to the interests of the plan or the plan's participants or beneficiaries (conflict of interest)
- Plan fiduciary cannot receive any consideration for its own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan (kickbacks)
- **Examples:**
 - » Plan sponsor uses plan assets to pay corporate expenses
 - » Fiduciary of plan makes decision to retain a company owned by the fiduciary's child to provide various administrative services to the plan for a fee
 - » Fiduciary causes plan to enter into a contract with a service provider where service provider has agreed to pay the fiduciary a finder's fee related to the contract
 - » Fiduciary causes plan assets to be used to pay itself for services provided to the plan

Examples of Fiduciary Duties as they Relate to Health Plans Subject to ERISA



Managing ERISA Plan Assets

WHAT ARE PLAN ASSETS?

Plan assets can exist in three ways:

1 Employee Contributions

2 Funded Arrangements

- 1) Segregated account where plan has beneficial interest
- 2) Account in the name of the health plan
- 3) Trust

3 Amounts Attributable to Plan Assets

General assets

Employer dollars that are not segregated into a separate account for the payment of benefits

Managing ERISA Plan Assets

DUTY OF LOYALTY & EXCLUSIVE BENEFIT RULE

ERISA plan sponsors must use plan assets for the exclusive benefit of plan participants.

- ➔ Providing benefits to plan participants; or
- ➔ Used to defray reasonable administrative expenses directly “benefitting the plan participants”

Prohibited Uses

- ➔ Employer cannot use these funds to offset expenses of non-plan participants (e.g., health FSA used to defray costs of the dental plan)
- ➔ Employer cannot keep plan assets for the company’s benefit

Managing ERISA Plan Assets

EXAMPLES OF MANAGING ERISA PLAN ASSETS

Medical Loss Ratio (MLR) Rebates

- If any portion of the MLR rebate constitutes plan assets (e.g., participant premiums), ERISA's fiduciary rules will apply.
- Amounts must be used for the exclusive benefit of the plan participants and beneficiaries. The DOL includes two allocation methods available to employers:
 - » Distribution to participants using a reasonable, fair and objective allocation method. *Fiduciary decision*
 - » Make prudent decision on whether the cost of including former participants in rebate allocation approximates the rebate amount. *Fiduciary decision*
 - » If fiduciary determines distribution to participants is not cost-effective, plan participants may receive future premium cost reductions or benefit enhancements

Participant Forfeitures and Experience Gains

- **Health FSA: *Use-or-Lose Rule***
 - » Any health FSA contributions or salary reduction amounts not used that remain in health FSA account at the end of the plan year (or grace period) are forfeited.
Forfeited amount = experience gains
 - » To the extent the experience gains are attributable to participant contributions, they will be considered plan assets
 - » Plan assets must be used to pay reasonable administrative expenses or allocated to participants

Selecting & Monitoring Service Providers - Examples

DUTY OF LOYALTY & DUTY TO ACT PRUDENTLY

Selecting Service Provider/TPA

- Selecting plan service providers/TPAs is a **fiduciary function** when the third-party performs services that are fiduciary in nature (e.g., claims adjudication or medical necessity determinations)
- Fiduciary must avoid conflict of interest and self-dealing
- **Considerations when selecting TPAs:**
 - » Investigating and evaluating
 - » Compare multiple providers based on qualifications, experience, costs, financial condition, litigation history, etc.



Selecting & Monitoring Service Providers - Examples

DUTY OF LOYALTY & DUTY TO ACT PRUDENTLY

Monitoring Service Provider/TPA

- Ongoing fiduciary duty to proactively monitor TPA
- Plan fiduciaries should establish a formal review process and follow it at reasonable intervals to decide if they want to continue using the current service providers or look for replacements
- **Considerations when monitoring TPAs:**
 - » Periodic review/evaluation of plan operations, monitoring deadlines, auditing TPA functions
 - » Ask about policies and procedures (e.g., TPA's claims processing procedures)
 - » Review actual fees charged
 - » If issues discovered, prompt action should be taken depending on situation; follow up on participant complaints

MHPAEA

- Duty to select and monitor third-party vendor completing NQTL Comparative Analysis; provide fiduciary certification in Findings and Conclusion section of NQTL Comparative Analysis

Recent Case Law



Johnson & Johnson ERISA Class Action Lawsuit

Lawsuit

On February 5, 2024, a class action lawsuit was filed by and on behalf of participants of a group health plan sponsored by Johnson & Johnson alleging mismanagement of the prescription drug benefit program (J&J uses a VEBA trust to fund benefits)

Among other allegations, the complaint alleged that Johnson & Johnson (as the plan sponsor and their pension and benefits committee) violated ERISA by failing to act as prudent experts would have when selecting the plan's PBM and negotiating pricing for prescription drugs covered by the plan.

Case Dismissed

On January 24, 2025, the district court dismissed the case stating that the plaintiff did not have standing because the plaintiff failed to allege sufficient facts to demonstrate a redressable injury.

The court “expressed no opinion” as to whether other litigants suffering injury would have standing to bring a similar case to the courts.

Amended Complaint

On March 10, 2025, plaintiff filed an amended complaint alleging she suffered harm due to higher COBRA premiums caused by the higher drug costs

Plan fiduciaries should still take this opportunity to reexamine their compliance with ERISA's fiduciary and plan asset requirements, including whether they are engaging in a prudent process in selecting and continually monitoring their service providers.

JP Morgan ERISA Class Action Lawsuit

Lawsuit

On March 13, 2025, the same plaintiffs' firm that filed the J&J case filed another class action lawsuit against JPMorgan (and personally sued executives on the comp & management committee) claiming it mismanaged the prescription benefits program offered under the employee health plan, causing current and former employees to overpay for their premiums and out-of-pocket costs (JPMorgan uses a VEBA trust to fund benefits).

Fiduciary breach allegations include:

- Failure to engage in prudent process of selecting CVS to administer Rx benefits
- Overcharging employees for generic prescriptions that were available at substantially lower prices
- Limiting Rx options to a single prescription (e.g., Caremark only listing its own Rx Humira on the formulary)

Also alleged that JPMorgan executives acted in their own business interests by abandoned efforts to “reign in” high healthcare costs due to pressure from high-profile clients in the health industry.

Case is currently pending

Wells Fargo ERISA Class Action Lawsuit

Lawsuit

On July 30, 2024, a class action lawsuit was filed by and on behalf of participants of a group health plan sponsored by Wells Fargo & Company (and other parties) alleging that mismanagement of the prescription drug benefit program led to excessively high premiums and out-of-pocket costs for participants.

Along with an allegation of engaging in prohibited transactions, the complaint alleged that Wells Fargo (as the plan sponsor) and other individuals and entities designated as plan administrators violated ERISA by failing to act prudently and in the best interest of plan participants by agreeing to pay excessively high prices for prescription drugs to their Pharmacy Benefits Manager (PBM), Express Scripts, and failing to use their bargaining power to negotiate better rates, monitor prices, address conflicts of interest, and explore cost-effective alternatives, resulting in higher costs, premiums, and out-of-pocket expenses for plan participants.

Case Dismissed

On March 24, 2025, the district court granted the defendant's motion to dismiss the case on the basis that the plaintiff did not have standing because the harm claimed by the plaintiffs (high out-of-pocket costs and increased monthly premiums) was speculative and the requested relief (including recovery of losses, disgorgement of profits, and equitable relief like removing fiduciaries and replacing the PBM) would not resolve the alleged harm.

The court agreed that these alleged actions could theoretically cause harm sufficient for standing purposes, however the plaintiff failed to plead sufficient facts for standing in the complaint

Case dismissed without prejudice, so plaintiffs can amend their complaint to address the lack of standing issue and refile if they choose.

What do these cases mean for fiduciaries?

- Transparency laws increase data available to plan participants and fiduciaries, contributing to more class action lawsuits alleging ERISA fiduciary breaches by plan sponsors and administrators
- This data availability heightens expectations for fiduciaries to demonstrate they fulfilled their ERISA duties
 - » Greater proactivity in documenting cost reasonableness and vendor oversight
- While several plaintiffs' complaints have yet to be successful (e.g., dismissal of complaints in Wells Fargo and Johnson & Johnson cases), similar lawsuits are likely to persist, posing potential liabilities for plan fiduciaries
 - » Time, cost and effort defending lawsuits
 - » Increased costs for documenting plan/service provider cost reviews, vendor selection and vendor oversight
 - » Potential settlements costs

Enforcement



Fiduciary Liability

ERISA § 409

- **Personal liability for fiduciary breach**
 - » Person who is a fiduciary with respect to a plan can be personally liable for losses caused to the plan and liable to restore to the plan any profits the fiduciary made through use of plan assets

ERISA § 502

- **Civil enforcement**
 - » Gives power to participants, beneficiaries, fiduciaries, and the Secretary of Labor to bring civil action against plans and plan fiduciaries
 - » **Participant/Beneficiary Right to Request and Examine Documents**
 - Any documents under which the plan was established or is operated (e.g., SPD, TPA contracts, MHPAEA comparative analysis, etc.)
 - Deadline to furnish information: within 30 days of receipt of written request
 - Penalty: \$110 per day from date of failure

Fiduciary Liability

ERISA § 502

- **DOL Enforcement**
 - » Any breach of fiduciary responsibility by a fiduciary or
 - » Any knowing participation in such a breach or violation by any other person, the DOL may assess a civil penalty against the fiduciary or other person in an amount equal to 20% of the amount recovered by the DOL under a settlement agreement
 - » For prohibited transactions, penalty of 5% of the “amount involved” in a prohibited transaction (100% of amount involved if the transaction is not corrected within 90 days following notice from DOL)
- **DOL Voluntary Fiduciary Correction Program (VFCP) -**
 - » For eligible plan officials who identify and fully correct certain ERISA violations, and who document the correction process and satisfy all requirements, the DOL will issue no-action letters

Plan fiduciaries may be protected by fiduciary liability insurance, a type of policy that covers losses resulting from a fiduciary's acts or omissions, subject to its terms.

Plan Governance and Best Practices



Plan Governance

PEOPLE, PLAN DOCUMENTS, PROCESSES

- Who should be appointed named fiduciary and plan administrator?
 - » Three basic approaches
 - Plan sponsor
 - Common approach historically for health and welfare plans
 - Responsibilities typically delegated to employees or a committee to act on behalf of plan sponsor
 - Benefits committee
 - Common approach for retirement plans
 - Specific employees (sometimes based on title/position)
 - » Variety of considerations for determining the best approach for a particular employer
 - Plan administrator is personally liable for statutory penalties
 - Personal liability for fiduciary breaches
 - Need for diverse expertise
 - Attractiveness as a target for litigation
 - Conflict of interest and prohibited transaction risks

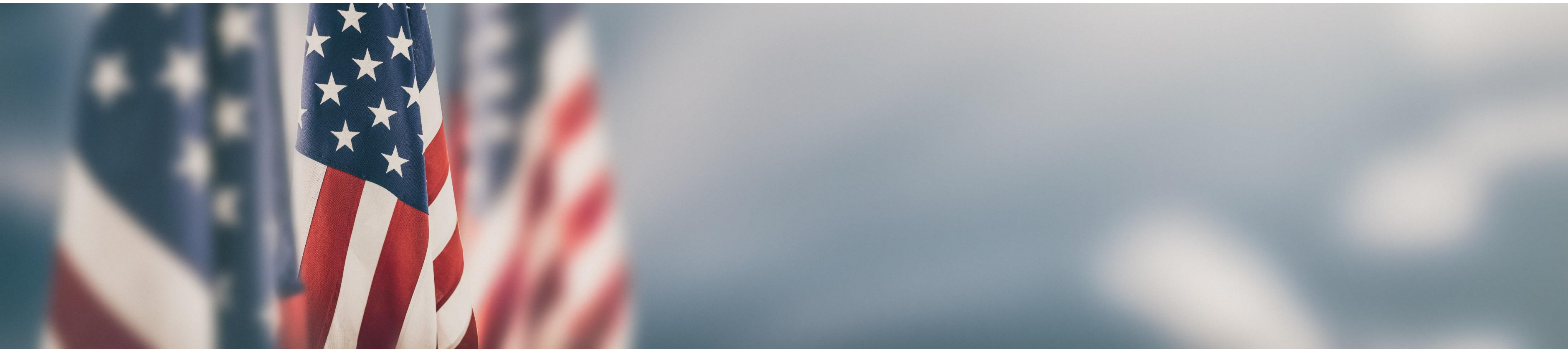
Plan Governance

- Appointment of named fiduciary and plan administrator
 - » Named fiduciary and plan administrator must be identified in the plan document
 - Should also be identified in SPD
 - » Document where there are delegated fiduciaries
- Establish governance structure (e.g., committee)
 - » Additional documentation generally needed when using a committee
 - Typically created via a charter that outlines committee procedures and responsibilities
- Distinguish settlor functions of plan sponsor
 - » Plan adoption, amendment and termination
 - » Employer is plan sponsor and it generally acts through its governing body unless authority delegated
 - » Some employers delegate plan sponsor authority to specific officer or a committee
 - If committee used, can be same as or separate from any fiduciary committee

Plan Governance

Training for plan fiduciaries

- Plan fiduciaries should be aware of the fiduciary duties, their roles and what functions can trigger fiduciary duties, their responsibilities, potential liability as a fiduciary, etc.
- Plan fiduciaries should be familiar with the plan document and SPD so they can administer plan decisions in accordance with these documents and treat employees uniformly
- Training on new regulations that can affect the administration of the plan and their fiduciary obligations



Plan Governance

- Ensure plan documents are in place and they are followed in the administration of the plan
 - 🕒 Plan document should contain certain information (e.g., named fiduciary, eligibility, funding, claims procedures, ability to amend and terminate the plan)
 - 🕒 Decisions should be made in accordance with the terms of the plan document
- Maintain other documentation where helpful
 - » E.g., committee meeting minutes, due diligence reviews on service provider/TPA
- Establish and follow policies and procedures
 - » E.g., decision making, committee meeting minutes, claims administration, etc.
- Implement risk management plans
 - » E.g., internal audits, financial reviews, communication with participants

Additional Tips for Employers

Understanding fiduciary responsibilities is important for a group health plan's security and compliance with the law. The following tips may help as a starting point:

- Employers should identify plan fiduciaries, and be clear about the extent of their fiduciary responsibilities
- If hiring third-party service providers, consider looking at number of providers, giving each potential provider the same information, and considering whether the fees are reasonable for the services provided. Consider documenting the hiring process
- Create a plan to monitor service providers
- Review schedule to deposit participant contributions and payments by participants to the plan and forward them to the insurance company. Ensure it is compliant with the law
- Review plan document to ensure they are updated with current plan operations. After amending the plan, provide participants with an updated summary plan description or summary of material modifications
- Ensure the plan has reasonable claims procedure that plan fiduciaries follow
- Ensure plan has a procedure for handling QMCSOs
- Identify parties in interest to the plan and take steps to monitor transactions with them
- File required reports, such as the Form 5500, with the government in a timely manner

Source: *Understanding Your Fiduciary Responsibilities Under a Group Health Plan*

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