Look Before You Leap: Understanding Your Fiduciary Duties & Other Hot Topics in Benefits Law

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Executive Summary

Representatives from employers, providers, brokers, consultants and other stakeholders gathered on September 25th at Briggs & Stratton in Wauwatosa to attend the sixth and final symposium of BHCG's 2019 Delivering Value Series. The Series was created to impart in-depth knowledge about the best in class innovative employer solutions in BHCG's portfolio.

Recent lawsuits have caused many benefit professionals to reexamine their fiduciary duties under ERISA and take steps to minimize their risks. Attendees learned more about how to identify fiduciaries, what fiduciary duties apply under ERISA and ways to minimize the risks created by those duties. Other benefits law topics discussed included: prescription drug coupons; excluding specialty prescription drugs and gene therapy treatments; the new HRA regulations; and how to stay legally compliant with open enrollment communications.

Introduction

- **BHCG consulting resources available to member employers through:**
  - John Barlament, partner, employee benefits group, Quarles & Brady – BHCG legal resource, drafts BHCG Master Services Agreements and provides Administrative Services Agreements templates for all strategic partners negotiated on behalf of member employers
  - Chris Robbins, principal & CEO, Arxcel Consulting – PBM consultant instrumental in identifying current BHCG PBM partner Navitus Health Solutions; services are free of charge
  - Dave Osterndorf, partner & chief actuary, Health Exchange Resources – BHCG strategic adviser

John Barlament, Quarles & Brady

- **ERISA in general**
  - Came about in 1974, due to perceived abuses by employers with respect to their benefit plans
    - Meant to put constraints on employers
  - A lot of specific legal requirements – e.g., Form 5500, nondiscrimination codes, etc.
    - Federal government enforces through Department of Labor and the IRS – sometimes HHS and CMS (fairly rare)
    - For private employers – state laws apply for government or church plans (non-ERISA plans)
  - Many plans are subject to ERISA – medical, dental, vision, disability, life insurance, Rx
    - Voluntary plans are sometimes subject but not if it's 100% employee paid; sometimes EAP if visits are covered and it's not just a referral plan
    - Some sections of ERISA apply to certain non-qualified deferred compensation plans
    - Benefits not listed in ERISA don't apply (e.g., pet insurance)
  - When does ERISA apply?
    - Determine if it's a plan asset (e.g., a rebate) – if it's 100% employer paid, then it's usually 100% employer money
      - If not, look at what is employee paid (e.g., 70/30, then must find a way to distribute 30% back to employees) – ERISA limits what employers can do with a rebate
- **Fiduciaries are defined as those who are responsible to act in the best interest of a third party who is relying on the fiduciary**
  - Every ERISA plan must have a named fiduciary/plan administrator and "point person" who must oversee the plan and satisfy ERISA obligations
  - You are a fiduciary if you are named in the plan document as an administrator/trustee or have authority, control or responsibility over the management of plan assets or the plan itself – fiduciaries are subject to ERISA
    - Settlor exception (not subject to ERISA) – decisions made as an employee of, or on behalf of, the plan sponsor

- Fiduciaries can be personally liable for losses from breach of duties or if they become aware of wrongdoing of another fiduciary and are passive
    - DOL usually goes after companies, not individuals – but, it's a good idea to have fiduciary liability insurance
- **Fiduciary duties**
    - Exclusive benefit and prudent expert rules – "acting in the best interest with the same level of care as a prudent person knowledgeable about such matters would use"
        - Substantive prudence makes up about 20% of the risk – coming up with the right answer is not as important as a good process; procedural prudence is about 80% of the risk
        - Look at all factors of the decision-making process, identify fact-finding steps/background, use experts, and document everything
        - The BHCG agreement templates represent a diligent process
- **Plan Adherence/disclosure duties**
    - Actions must be in accordance with plan document, SPD and any other relevant documents that are relevant unless they are contrary to ERISA
- **Duty to monitor other activities and processes of other fiduciaries**
    - If responsibilities are not formally delegated down and are not monitored, all responsibilities go to the plan sponsor
    - Plan sponsor could be viewed as board of directors – who generally would not want this day-to-day responsibility (so best advice is to delegate it down)
    - Depth and frequency of monitoring must be consistent with the complexity of the operations and foreseeable risks
- **Prohibited transaction rules**
    - Prohibits use of plan assets to pay a "party in interest (plan sponsor)"
        - Prevents an employer from hiring itself to run the plan
        - Exemptions – e.g., can pay vendors reasonable fees and can seek a specific exemption
- **Fee monitoring – usually applies to retirement plans, but sometimes health plans**
    - Can apply if charging for an administrative fee above provider charges or paying kickbacks
    - A lot of PBMs operate on a spread basis but are probably protected because it's in the contract (Navitus only charges an administrative fee)
    - Deciding what to pay third parties can be viewed as a fiduciary determination if plan assets are used
- **Reducing fiduciary risk**
    - Perform periodic reviews, have best in class language
    - More courts are upholding anti-assignment language (can't assign rights to a hospital)
    - Make sure you have a plan document and SPD – can combine
    - Arbitration agreement waivers are a now a more viable concept to consider – not necessarily a "silver bullet"
    - Can consider a venue selection clause (ability to have lawsuits locally on employer's turf)
- **Questions**

- **Full disclosure of data – is there any way to enforce confidentiality clauses?**
  - Can force as a fiduciary issue, however, can be damaged if you signed away your right to data – question still out there if data is a plan asset
- **Is a consultant doing forecasting a fiduciary?**
  - Advice doesn't constitute discretionary control, but client has to say yes (if client "rubber stamps" advice, small risk it could turn the consultant into a fiduciary – should document decisions)
- **Appeal committee – if an appeal goes to a second level and they reverse a denial, is someone at risk?**
  - It's not an automatic breach, room for interpretation, but need to follow plan document

- **Legislative update**
  - Health care is a major issue in early presidential campaign (Medicare for all, improve current system, etc.)
    - Private insurance elimination is contentious issue
  - Significant House bipartisan support for eliminating Cadillac tax (may not be repealed) and surprise medical bills (limit surprise medical bills like out of network emergency providers)
  - 2017 presidential executive orders – changes to HRAs, association health plans and short-term insurance
    - HRAs – final regulations allow for individual coverage HRAs (ICHRAs) and standalone HRAs so employees can pay for out of pocket medical expenses and certain premiums
    - ICHRAs are not popular yet (brand-new) and may never become widely adopted, but a good idea if you don't offer other coverage and think it will help meet the 95% rule – must allow an opt out
    - Excepted benefit HRAs (dental, vision, etc.) – not subject to ACA rules, allowed if other medical coverage (non-account based) is offered
  - 2019 presidential order – directed action on hospitals posting standard charges, payers and providers providing expected out of pocket costs before care, expanded definition of preventive care for HSAs
    - IRS added a narrow set of chronic care preventive treatments
- **High cost drugs and coupons**
  - Huge expansion in drugs with coupons (over 700)
  - Typical plan position is coupon does not count towards the deductible and out of pocket maximum, but some variation for certain situations; IRS will issue new guidance in a couple of months
  - CMS issued regulations earlier this year, but can't regulate ERISA – IRS guidance requires only amounts enrollee pays count (put a pause on CMS regulations, expect more guidance by January 2020)
  - A lot of high cost drugs are in the pipeline (could foresee a time when coverage will be common) – if employers haven't excluded drugs, they must follow plan document (do not be ad hoc, must show procedure was followed)
    - Possible if plan denies coverage, manufacturer will provide a "charity care" cost

- **Wellness rules / Mental Health**
  - Law remains jumbled
  - Mental health parity updated in 2013 – half of all DOL audits are mental health related; strictly enforced – employers are advised to work with their TPA and PBM to ensure compliance, but third-party guidelines for parity may not be enough to pass the test
- **Cross-plan offsetting**
  - Used to recoup overpayments to out-of-network providers – earlier ruling (UHC case) deemed it in violation of ERISA
  - Some insurers/TPAs have stopped it (UHC has not but does allow clients to opt out)
- **Open Enrollment Communication**
  - Focus on clear and careful communications
  - Go through list of required notices (check 2018 language for communication); verify how to distribute

Slides from John Barlament's presentation are available for review.