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Employee Benefits Compliance

ERISA Litigation Check-In: Group Health Plans Remain a Target

Introduction

In recent years, there has been a surge in litigation targeting employer plan sponsors over the design and administration of their group health plans. Those cases put forth various theories of liability, but currently fall into three general categories: claims of fiduciary breach as it relates to pharmacy benefits, wellness programs and tobacco surcharges, and weight loss drug exclusions. The litigation landscape is likely to remain active and in flux for some time, which is a concern not only for employers but also for those individuals who function as fiduciaries of an employer's plan because those individuals are often named as individual defendants in this type of lawsuit. And while the alleged claims and named parties may differ based upon the particular facts and circumstances of each case, the underlying message for employer plan sponsors and plan fiduciaries is consistent: to help avoid risk, protect your plan with documented processes, adhere to written plan provisions, train your workforce, and monitor your service providers.

Pharmacy Benefits and Fiduciary Compliance

Recent ERISA class-action litigation filed against major employers, including Johnson & Johnson (J&J), Wells Fargo and JP Morgan have emphasized the importance of actively monitoring pharmacy benefit managers (PBMs) and documenting a prudent process for all plan-related decisions that are fiduciary in nature. In each of these matters, the plaintiffs allege that plan fiduciaries violated several of their ERISA fiduciary duties by essentially overpaying for prescription drugs to the detriment of plan participants and beneficiaries. While the J&J lawsuit was dismissed on procedural grounds, the plaintiff filed an amended complaint adding a second plaintiff and new allegations to demonstrate financial harm, including higher COBRA and retiree premiums and inflated drug costs. This amended complaint indicates this trend of fiduciary lawsuits will persist, emphasizing the importance of PBM oversight and documentation of fiduciary compliance. The Wells Fargo and JP Morgan cases remain pending, with both defendants moving to dismiss the amended complaints for lack of standing and failure to state a claim.

Wellness Program with Tobacco Surcharges

Over the last year, multiple lawsuits have been filed against employers challenging their wellness programs, which imposed tobacco surcharges without offering a compliant reasonable alternative standard (RAS) or "full reward" as required under HIPAA's nondiscrimination rules for wellness programs. In *Bokma v. Performance Food Group*, the court allowed ERISA claims to proceed where the employer allegedly failed to offer or clearly communicate any RAS, despite imposing substantial surcharges on employees and spouses who didn't certify tobacco-free status. Similar claims were asserted in *Mehlberg v. Compass Group*, with the added allegation that the employer failed to reimburse surcharges once employees completed the RAS. As a reminder, HIPAA's "full reward" rule requires participants who complete a RAS to earn the complete full reward that would have been available if they had met the initial standard. This includes providing additional premium

discounts (or other payout) for any months for which the surcharge was applied as opposed to simply removing the surcharge on a going forward basis. These cases are a good reminder that wellness programs that impose tobacco surcharges or tobacco-free incentives without following HIPAA's nondiscrimination rules – such as offering and clearly communicating a RAS or complying with the full reward rule – are at an increased risk for litigation. As a result, employers could be faced with multi-year surcharge refunds, legal fees, and forced wellness program plan design changes. For a more detailed discussion see [101 Wellness Plan Compliance Obligations](#).

Weight Loss Drug Exclusions: Challenges under the Affordable Care Act

As access to certain GLP-1 weight loss drugs, like Wegovy and Zepbound, continues to be a hot topic, we have seen challenges to exclusions of those drugs under employer group health plans. In *Holland v. Elevance Health* and *Whittemore v. Cigna*, plaintiffs argued the exclusion of GLP-1s were discriminatory under Section 1557 of the ACA. The courts rejected these claims, citing uniform application of exclusions, plan sponsor discretion, and alignment with existing Medicare Part D practices.

While employers have prevailed against these legal challenges to date, this litigation demonstrates that coverage decisions related to chronic conditions like obesity are under increased scrutiny. See our [Compliance Considerations with GLP-1 Cost Containment Strategies for](#) a detailed discussion of this emerging issue.

Weight Loss Drug Exclusions: Challenges under the Affordable Care Act

1. **Fiduciary Conversant Advisors.** Ensure your advisors are well versed in fiduciary compliance, provide timely fee disclosures, and facilitate compliant vendor relationships.
2. **Monitor PBM Relationships:** Review PBM contracts and work with advisors to ensure terms are reasonable and reflect fiduciary oversight. Maintain documentation of PBM selection process and fiduciary compliance.
3. **Evaluate Wellness Program Design:** Confirm that tobacco surcharges comply with the HIPAA requirements to offer a RAS and provide the full reward to participants who complete the RAS both in the written policies and also in operation.
4. **Review Exclusion Policies:** Ensure plan documents clearly explain any exclusions or limits on weight loss drugs, apply them consistently, and confirm compliance with ACA, ADA, and HIPAA rules.

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