

# COMPLIANCE OVERVIEW

## Group Health Plan Fiduciary Litigation on the Rise

Enforcement of the strict standards of fiduciary conduct set forth in the Employee Retirement Income Security Act (ERISA) has traditionally been reserved for retirement plan sponsors. However, a new class action lawsuit highlights the importance of employers' adherence to their fiduciary duties when managing their group health plans.

The lawsuit, filed against Johnson & Johnson (J&J), alleges the company violated its ERISA fiduciary duties by mismanaging its prescription drug benefit, which cost the health plan and participants millions of dollars. It serves as a reminder to employers that they must prudently select and monitor plan service providers, such as pharmacy benefit managers (PBMs).

Although it is the first case of its kind, **more fiduciary litigation involving the management of prescription drug benefits is expected** as the PBM industry faces increasing scrutiny and new transparency laws provide employees with more information regarding health care costs. This Compliance Overview includes tips to help employers understand the basic fiduciary responsibilities applicable to group health plans under ERISA to mitigate liability.

### LINKS AND RESOURCES

U.S. Department of Labor (DOL) resources:

- [Understanding Your Fiduciary Responsibilities Under a Group Health Plan](#) (an employer guide)
- [Fiduciary Education Campaign – Getting It Right – Know Your Fiduciary Responsibilities](#)
- [Voluntary Fiduciary Correction Program](#)

## Fiduciary Responsibilities

ERISA requires fiduciaries to discharge their duties regarding employee benefit plans:

- ☑ Solely in the interest of plan participants and beneficiaries;
- ☑ For the exclusive purpose of providing plan benefits or for defraying reasonable expenses of plan administration; and
- ☑ With the care, skill, prudence and diligence that a prudent person in similar circumstances would use.

The duty to act prudently is one of a fiduciary's central responsibilities.

## Health Plan Transparency

- Group health plans and issuers are subject to new requirements designed to increase health care price transparency, which come from [final rules issued in 2020](#) and the [Consolidated Appropriations Act of 2021](#).
- Most employers rely on their issuers, TPAs and other service providers to satisfy many of these requirements.
- Employers should confirm that written agreements with their issuers, TPAs or other service providers are updated to address this compliance responsibility.

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## Overview of Fiduciary Responsibilities

ERISA includes standards of conduct for those who manage employee benefit plans and their assets, who are called fiduciaries. Thus, understanding fiduciary responsibilities is essential for a group health plan's security and compliance with the law. ERISA requires fiduciaries to discharge their duties with respect to employee benefit plans:

- Solely in the interest of plan participants and their beneficiaries;
- For the exclusive purpose of providing plan benefits or for defraying reasonable expenses of plan administration;
- With the care, skill, prudence and diligence that a prudent person in similar circumstances would use;
- By diversifying the plan's investments to minimize the risk of large losses; and
- In accordance with the plan's documents (unless inconsistent with ERISA).

The duty to act prudently is one of a fiduciary's central responsibilities. As highlighted in the J&J lawsuit, ERISA requires fiduciaries to prudently select and monitor plan service providers while considering various factors, including the service provider's fees and expenses.

## Employer Compliance Tips

In light of health plan price transparency laws and increased scrutiny of the PBM industry, it is necessary for group health plan fiduciaries to reevaluate their fiduciary compliance to limit their liability. One way fiduciaries can demonstrate that they have carried out their responsibilities properly is by **documenting the processes** used to carry out their fiduciary responsibilities. The following tips can be used to ensure compliance:

- Identify plan fiduciaries and consider forming a fiduciary committee.** Have you identified your plan fiduciaries in the plan document, and are they clear about the extent of their responsibilities?
- Schedule routine training and meetings.** Have you established ongoing training to ensure plan fiduciaries understand their obligations? Do plan fiduciaries meet regularly? Is there a process for recording meeting minutes?
- Evaluate third-party service providers.** If you are hiring third-party service providers, have you looked at several providers, given each potential provider the same information, and examined whether the fees are reasonable for the services provided? Have you explored market alternatives?
- Revisit existing third-party agreements.** Have you documented the hiring process of third-party service providers and detailed the plan fees that may apply? Have you enumerated contractual obligations regarding compliance with health plan transparency provisions?
- Monitor service providers.** Are you prepared to monitor your plan's service providers?
- Establish and document claims procedures.** Does your plan have a reasonable claims procedure that plan fiduciaries follow? Are you prepared to support any decisions made regarding entitlement to plan benefits?
- Review plan documents.** Have you reviewed your plan document in light of current plan operations and made necessary updates? After amending the plan, have you provided participants with an updated summary plan description or summary of material modifications?
- Establish a process for participant contributions.** Are you aware of the schedule for depositing participant contributions and payments by participants to the plan and forwarding them to the insurance company? Have you made sure it complies with the law?

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- ☑ **Secure fiduciary liability insurance.** Have you purchased fiduciary liability insurance, and have you determined the scope of coverage? Does it extend to health plan activities? Is the policy carefully reviewed prior to renewal?
- ☑ **Ensure appropriate bonding arrangements.** Are plan fiduciaries and others handling plan funds properly bonded to protect the plan against loss due to fraud or dishonesty? ERISA requires every person, including fiduciaries and third-party service providers, who handles plan funds or other plan property to be covered by a fidelity bond with limited exceptions. This is different from fiduciary liability insurance because it is required by ERISA and protects the plan rather than the fiduciaries.
- ☑ **Satisfy disclosure requirements.** Have you filed required reports, such as Form 5500, with the government in a timely manner?
- ☑ **Consult with ERISA counsel.** Have you consulted with experienced ERISA counsel to ensure full compliance with your fiduciary obligations, considering new transparency laws?

## Possible Consequences of a Fiduciary Breach

A person who is an ERISA fiduciary can be liable for a breach of fiduciary duty. Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan or any profits made through improper use of the plan's assets resulting from their actions. A fiduciary's liability for a breach may also include a 20% penalty assessed by the DOL, removal from their fiduciary position, and in extreme cases, criminal penalties.

Note that the DOL maintains a voluntary correction program for fiduciary breaches. The [Voluntary Fiduciary Correction Program](#) allows plan officials who have identified certain violations of ERISA to take corrective action to remedy the breaches and voluntarily report the violations to the DOL without becoming the subject of an enforcement action.