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ERISA Safe Harbor Checklist

A checklist for Employer-Sponsored Health Plan Fiduciaries to protect against ERISA liability and ensure full ERISA compliance

Section 201 of the CAA amends the Employee Retirement Income Security Act (ERISA) to require employer-sponsored health plans ("plans") to have access to certain cost and quality of care information, including specific claims data that shows costs related to claims, and also precludes restrictions in provider network contracts that prevent plans from accessing provider-specific cost and quality of care data.

Updated DOL regulations make clear that Section 408(b)(2) of ERISA, otherwise known as the "reasonable fee rule" now applies to health plans, not just retirement plans. The rule requires that any compensation paid to third party providers (brokers, consultants, third party administrators, etc.) must be disclosed to the plan and by the plan, and disclosures to the plan must include, among other things, a description of services to the plan fiduciary, including a description of services and all compensation (direct and indirect). Failure to engage in meaningful review of Fee Disclosures will result in a "Prohibited Transaction" which carries serious consequences including civil penalties, personal liability, loss of qualified status under the IRC and exposure to class actions the size of which will rival or surpass the 401k class action litigation wave of late.

4C looks at ERISA protection as a tool to progress, not simply as a barrier to risk. Our team of experts and best-in-class innovative technology offer our clients the freedom to create a healthy business, increase profitability, recruit and retain happy employees, and support your brand for a brighter tomorrow. To mitigate risk, complete the checklist below:

Checklist for Data Access and Ownership (ERISA)

- ☐ Request and Review all Administrative Services Agreements (ASA).
- ☐ Ensure that ASA provides that Plan with non-conflicted and unbiased access to cost and quality of care information, including specific claims data (amend ASA if not in compliance).
- ☐ Mandate required format* in which all specific claims data shall be delivered to Plan.

  * Uniform format should include robust data fields that will disclose all costs of plan, including claims, value based payments, capitated fees, subcontractor fees, etc.
- ☐ Prepare and file annual certification of compliance confirming that the claims data will not be publicly disclosed outside of the Plan.

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Checklist for Fee Disclosure Processes (DOL, ERISA and IRC)

- ☐ Confirm all service providers whose fees must be disclosed pursuant to Rule 408(b)(2):

• Point Solution Vendor • Transparency Tool Vendor • Disease Management Vendor	• Pharmacy Benefit Manager • Third Party Administrator • Consultant/Broker

- ☐ For each service provider, confirm that a Fee Disclosure has been made available annually by each such service provider, which shall include:
  - Description of the services to be provided
  - Statement of the entity's fiduciary status'
  - Detailed description of "compensation" received by the CSP for services, including direct and indirect compensation (very broadly defined)
- ☐ Ensure that Fee Disclosures are on file in advance of the date the contract is "entered into, extended or renewed".
- ☐ Maintain a process to ensure that Fee Disclosures are Updated or Re-Certified Annually.
- ☐ Engage in a Reasonableness Evaluation of all Fees (Direct and Indirect) on an Annual Basis and document all findings in a consistent and comprehensive way.
- ☐ Notice all service providers that they have an affirmative duty to provide any updates to Fee Disclosures on or within 60 days of notice (no materiality threshold).
- ☐ Engage in Routine (no less than annual) Audit of all Fee Disclosure Processes.

1201 Sycamore Square Drive, Suite 623 | Midlothian, Virginia 23113 | (804) 601-2628

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Fee Disclosure Safe Harbor for Plan Fiduciaries

A responsible plan fiduciary will not be deemed to have engaged in a prohibited transaction if (1) they reasonably, but mistakenly, believed that the Fee Disclosure had been made and (2) subsequently took the following steps to remedy the breach:

- Request in writing that the covered service provider furnish the Fee Disclosures and engage in the steps as outlined in the "Checklist for Fee Disclosure Processes (DOL, ERISA, and IRC)".
- If the covered service provider refuses or fails to furnish the Fee Disclosures as set forth above within 90 days of the request, notification to Department of Labor of failure.
- If contract is already ongoing, Plan fiduciary must perform a meaningful evaluation of whether to terminate the contract, consistent with duty of prudence (*Note that without Fee Disclosure, burden of proof will fall on Plan Fiduciary will be difficult because they will be unable to engage in a reasonableness analysis without the information required in the Fee Disclosure.
- If contract relates to future services and Fee Disclosures are not provided consistent with first bullet above, then contract must be terminated expeditiously.

Reference:

For more information, see H.R. 133 - Consolidated Appropriations Act, 2021
https://www.congress.gov/bill/116th-congress/house-bill/133/text

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Newsflash

A. Covered Service Providers (CSPs), for purposes of group health plans, are limited to providers of certain brokerage and consulting services. Brokerage services provided to a covered plan are those with respect to selection of insurance products (including vision and dental), record keeping services, medical management vendors, benefits administration (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness services, transparency tools and vendors, group purchasing organization preferred vendor panels, disease management vendors and products, compliance services, employee assistance programs, or third party administration services. Consulting services are those related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), record keeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or **third party administration services.**

B. Disclosure Contents: The Amendment states that the disclosure must contain a description of the services to be provided, a statement of the entity's fiduciary status, and a description of "compensation" received by the CSP for services. The term "compensation" is defined broadly to include anything of monetary value except for non-monetary compensation valued at $250 or less throughout the term of the arrangement. For indirect compensation, the disclosure must describe: the payer of the indirect compensation; the amount (or formula or estimate) of the indirect compensation; the services for which the indirect compensation will be paid; and the arrangement between the CSP (or its affiliate or subcontractor), who receives the fees and the payer of the indirect compensation. Importantly, indirect compensation is defined as including compensation paid by a vendor to a brokerage firm based on a structure of incentives not solely related to the contract with the covered plan. Additionally, the disclosure must contain a description of compensation paid among the CSP, its affiliates and subcontractors if it is set on a transaction basis. Transaction-based compensation would include commissions, finder's fees or other incentive-based compensation related to the contract for services. The disclosure must describe the services for which such "shared compensation" is paid, and identify each payer and recipient (including status of recipient as an affiliate or subcontractor). In addition, the disclosure must describe any compensation expected to be received in connection with the termination of the contract or arrangement as well as the manner in which compensation will be received.

C. Disclosure Timing: The disclosure must be made reasonably in advance of the date that the contract or arrangement for brokerage or consulting services is "entered into, extended or renewed." Additionally, if the information contained in the disclosure changes over time, an update must be provided within sixty days unless extraordinary circumstances beyond the CSP's control apply, in which case the disclosure must be provided as soon as reasonably possible.