4C Digital Health

# All You Need to Know About the Consolidated Appropriations Act, 2021:

## Includes a Compliance Checklist

Are you a CHRO of a company with a self-insured health plan? If yes, is your company in compliance with federal law and the expanded fiduciary responsibilities that your company owes to its employees? Well, the clock is ticking. This article will provide you with an overview of these expanding fiduciary obligations along with specific steps that you can take to ensure that your company is compliant. If you follow these steps, you can not only avoid costly penalties for noncompliance, but also position your health plan to deliver the value that your employees and your company deserve.

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA), which imposes a fiduciary obligation on self-insured employers to ensure that health benefit plans are managed in the best interest of the plan participants. This means that employers have a fiduciary responsibility to ensure that health plan administrators are properly paying health benefit claims and charging reasonable fees and expenses. This is the company's fiduciary obligation under ERISA. The legal liability for failing to engage in proper oversight of plan administration can result in substantial penalties that include civil liability as well as fines and imprisonment.

In 2020, Congress adopted the Consolidated Appropriations Act of 2021 (CAA), which amended ERISA with the goal of "[limiting] growth in health care spending through increased transparency." This new federal law affects self-insured employers and their health plans in two very important ways.

First, the CAA specifically prohibits third party plan administrators (carriers/BUCAs) from in any way restricting self-insured employers' access to their health plan claims data as long as the data is deidentified. The purpose of this provision is to make it clear that specific claims data belong to the employer and to provide the increased transparency that the employer must have in order to maximize the value of its health plan. Once an employer has access to the claims data from the plan administrator, only then can the employer properly fulfill its fiduciary obligation to its employees pursuant to ERISA. By reviewing the plan claims data from the plan administrator, the employer is finally able to ensure claims payment accuracy, proper payment responsibility, and overall plan invoice reconciliation on behalf of its health plan.

In addition to requiring self-insured employees be given full access to its plan claims data, the regulations require companies to conduct an annual audit of their plan to ensure compliance. The CAA furthermore requires that the plan annually submits to the Secretary of Health and Human Services, an attestation that such plan follows the transparency provisions set forth above, also known as the Gag Clause Prohibition. In March of 2023, the DOL issued further guidance surrounding gag clauses, stating that the 250 claim audit limitation provision is a gag clause. Given this information, it's clear that the 250 claim audit, which has limitations, will not satisfy the annual audit requirement.

Second, the CAA requires that "brokers" and "consultants" expecting $1,000 or more in direct and indirect compensation in connection with providing services to the self-insured health plan provide advanced compensation disclosures on contracts extended or renewed on or after December 27, 2021. Relying on the same rationale as the disclosure requirements that have been in place relating to retirement benefit plans since 2012, this provision's purpose is twofold. First, it allows the self-insured employer to see exactly how its "brokers" and "consultants" are receiving direct and indirect compensation related to the company's health plan and to identify potential conflicts of interest that may exist. Second, it allows the self-insured employer to verify whether the fees of its "brokers" and "consultants" are reasonable. Once an employer receives such compensation disclosures, only then can the employer properly fulfill its fiduciary obligation to its employees under ERISA to ensure that "no more than reasonable compensation" is paid for services on behalf of its health plan.

In determining whether a "broker" or "consultant" is considered a "covered service provider" for the purpose of the compensation disclosure provision, the CAA identifies those services related to the "implementation of … pharmacy benefit management (PBM) services … or third party administration (TPA) services," which makes it clear that the disclosure requirements apply to both TPAs and PBMs.

# Compliance Checklist

Here is the ultimate checklist to protect you and your company from employee class action, representational harm, and violation of ERISA:

| Compliance | Requirement Description |
|---|---|
| ☐ | Get a clear understanding of your fiduciary and legal requirements under all the applicable programs such as ERISA, Consolidated Appropriations Act of 2021, and Sarbanes-Oxley. |
| ☐ | Ensure your consultants are fully independent.<br>• Doing so will be difficult in the healthcare space since all the consulting firms derive almost 80% of their revenue from commissions, which guarantees a conflict of interest. |
| ☐ | Prepare a letter to send to your consulting firm, carrier, and other third parties that service your health plans. In this letter, ask for disclosure of all fee and commission arrangements over $1,000 per year. |
| ☐ | Get disclosure of all relevant information, service contracts, third party fees, and a year-end reconciliation of those fees. If you fail to do so, you have a duty to notify the Department of Labor. |
| ☐ | Develop an Annual Audit Plan for your healthcare plan.<br>• Sample size must be statistically valid.<br>• Determine how the sampling will be conducted.<br>• Create a remediation plan for findings. |
| ☐ | Review all your contracts to ensure gag clauses have been removed.<br>• Remove the Annual Audit of claims with limits.<br>• Certify this has happened at yearend to the DOL. |
| ☐ | Provide a detailed assessment of vendors and TPAs that you evaluated in the marketplace to prove you have done your due diligence. |
| ☐ | Ensure your fees are reasonable. |
| ☐ | Rethink your approach to benefits design and approvals. Look at how you run your pension plans and build out a process that removes both the Board of Directors and the C-Suite from fiduciary liability.<br>• This will require a thoughtful approach since many management teams have directly made these decisions in the past. |

If you have questions or difficulties in completing the checklist above, please feel free to reach out to the 4C team for assistance.