

Health Plans, Court Cases, and Reducing Risk

Brandon Long, McAfee & Taft

Are you a
current **State
Farm** employee
who has
participated in
the company's
healthcare plan?

You may have a legal
claim—and we'd like to
speak with you.

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for a no-obligation,
confidential consultation.



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The Gift that Keeps on Giving

Internal
Revenue Code

ERISA

HIPAA

COBRA

Mental Health
Parity

GINA

Affordable Care
Act

More and more
and more and
more

Transparency in Coverage (TiC)

- Machine-readable files (MRFs) – internet website/standardized format/updated monthly/no firewall/available to anyone
 - In-network provider negotiated rates (July 1, 2022 enforcement)
 - Historical out-of-network allowed amounts for providers (July 1, 2022 enforcement)
 - In-network negotiated rates and historical net prices for prescription drugs (enforcement deferred indefinitely)
 - MRF ≠ Member Reasonably Fathoms
- Consumer price transparency (aka cost estimator) tools
 - 500 shoppable service – January 1, 2023
 - All covered services – January 1, 2024

Consolidated Appropriation Act, 2021 (CAA) – Price Comparison Tool

- Requires plans to offer price comparison guidance by telephone and make available on the plan’s website a “price comparison tool”
 - Largely duplicative of the internet-based self-service tool component of the TiC Final Rules
 - Add a requirement that was not imposed under the TiC Final Rules: that price information also must be provided over the telephone upon request
 - Enforcement deferred until January 1, 2023

CAA – Gag Clause Prohibition

- Prohibit plans from entering into an agreement with a provider, network or association of providers, third-party administrator, or other service provider offering access to a network of providers that would directly or indirectly restrict the plan from:
 - providing provider-specific cost or quality of care information or data to referring providers, the plan sponsor, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan or coverage;
 - electronically accessing de-identified claims and encounter data for each participant, beneficiary, or enrollee; and
 - sharing such information, consistent with applicable privacy regulations.
- In addition, plans and issuers must annually submit to the Departments an attestation of compliance with these requirements (first required December 31, 2023 – and annually thereafter)

CAA – No Surprises Act

- Balance billing protections – disclosures required on website and EOBs
- Establishing federal standards to resolve surprise bills for the fully insured markets and for self-insured group plans
- Applies to emergency services at out-of-network (OON) hospitals and free-standing emergency facilities, OON providers at in-network facilities, and OON air ambulance carriers
- Caps patient cost-sharing for OON items and services at in-network levels
- Establishes an Independent Dispute Resolution (IDR) process to resolve reimbursement disputes between OON provider and health plans

CAA – Other

- Provider directory requirements – intended to protect individuals from surprise billing
- Pharmacy reporting, including:
 - 50 most frequently dispensed brand prescription drugs and total number of paid claims for each such drug
 - 50 most costly prescription drugs by total annual spending and the amount spent
 - 50 prescription drugs with the greatest increase in plan expenditures over the plan year preceding the plan year, and, for each such drug, the change in amounts expended by the plan in each plan year

CAA - Service Provider Compensation

- Prohibited transaction exemption = compensation must be reasonable (based on facts and circumstances)
- New requirements – first effective December 2021
- Applies to any service provider that expects to receive at least \$1,000 in direct or indirect compensation for brokerage (e.g., selection of TPAs, recordkeeping, etc.) or consulting services (e.g., development of plan design, stop loss, etc.)

Service Provider Compensation (*cont'd*)

Written disclosure before a contract is entered into, extended, or renewed:

- 1) services to be provided;
- 2) statement that the service provider will be a fiduciary, if applicable;
- 3) direct compensation;
- 4) indirect compensation;
- 5) transaction-based compensation;
- 6) terminated-based compensation; and
- 7) manner in which compensation will be received.

ERISA Fiduciaries

1. Exercising any discretionary authority or discretionary control regarding the management of the plan (Who appoints the financial managers and trustees?)
2. Exercising any authority or control regarding management or disposition of plan assets (Who controls the plan's money?)
3. Rendering investment advice for a fee (e.g., ERISA 3(21) fiduciary)
4. Has any discretionary authority or discretionary responsibility regarding plan administration (e.g., plan administrator, payroll?) (Who makes decisions regarding the interpretation of the plan?)

"A person's actions determine if they are a fiduciary, not their job title"

ERISA Fiduciary Duties

- **Exclusive Purpose Rule** (“Duty of Loyalty”) – only interest is providing benefits to the plan’s participants and beneficiaries
- **Prudent Person Standard** (“Duty of Care”) – discharge your duties in the manner of a prudent person with the care, skill, prudence and diligence of a person acting in a like capacity and familiar with such matters (Prudent Expert Rule)
- **Diversify the Plan’s Investments** – to minimize the risk of large investment losses
- **Follow the Plan’s Written Rules** – act in accordance with the provisions of the plan documents that govern the plan (i.e. the master plan, adoption and trust agreements, investment policy statement, loan policy, etc.)

Likely Future Litigation

- Retirement plan fee disclosure rules – and the litigation that followed
- Health plan fee disclosure rules – and the determination of whether compensation is “reasonable”
 - Impact on participant premiums
 - Impact on participant cost
- Typical service provider contracts – including footnotes regarding “supplemental compensation”
- Recent lawsuit in Florida provides a good example

Florida Lawsuit



School Board sued consultant in November 2021



For more than seven years, consultant helped the School Board select and administer its health plan



Consultant's fees were paid via insurance commissions



School Board capped the consultant's fees at a range between \$184,500 - \$195,650



Florida Lawsuit (*cont'd*)

- Allegation was that the consultant accepted more than \$2 million in “secret commissions” from insurance carriers that were recommended to the School Board

Peters v. Aetna

- June 5, 2023 opinion
- W.D. N.C.
- Class action against the Defendants Aetna, Inc., Aetna Life Insurance Company (collectively, “Aetna”), and OptumHealth Care Solutions, Inc. (“Optum”), asserting claims pursuant to the Employee Retirement Income Security Act of 1974.
- In her Complaint, the Plaintiff alleges that Aetna engaged in a fraudulent scheme with its subcontractor Optum, whereby insureds were caused to pay Optum's administrative fees because the Defendants misrepresented such fees as medical expenses.
- Class certified

Who typically selects and monitors vendors?

Retirement Plans

- Board of Directors – delegates authority to a committee
- Committee selects and monitors investment consultant as a co-fiduciary
- Committee and investment consultant (as co-fiduciary) monitor investment providers
- Committee and investment consultant (as non-fiduciary) monitor recordkeeper, auditor, etc.

Health and Welfare Plans

- Board of Directors – does not formally delegate to anyone
- Informal committee of one or two people select and monitor consultant
- Informal committee and consultant (as non-fiduciary) monitor network, TPA, PBM, etc.

Tips and Traps in the RFP Process



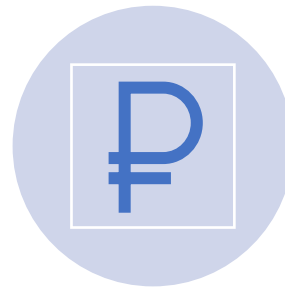
Be better – pay more attention to this side



Know who is responsible for what



Think about how much all of these vendors make and think about whether what they are doing for you is worth it - seriously



Beware of conflicts of interest – e.g., bonus retention payments on the back end that you never see –align their interests with yours

Other Litigation

- ACA Section 1557 and Title VII
- PCMA v. Mulready
 - Rutledge
 - 2019 law
 - US DOL