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Pharmacy Costs Under Scrutiny in Recent Litigation

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A class action lawsuit was filed in federal court by participants, alleging that their employer, Johnson & Johnson ("J&J"), and group health plan fiduciaries breached their fiduciary duties under ERISA.

Briefly, the plaintiffs allege that J&J mismanaged its group prescription drug benefits program, costing its employees millions of dollars in the form of higher payments for prescription drugs, higher premiums, higher deductibles, higher coinsurance, higher copays, and lower wages or limited wage growth. The plaintiffs challenge the plan and its fiduciaries' processes for evaluating, selecting, and monitoring the pharmacy benefit manager ("PBM"). This is supposedly most evident in the prices it agreed to with its PBM for generic-specialty drugs.

The complaint includes multiple examples of alleged overpayment for prescription drugs in the J&J plan. One such example shows that someone with a 90-pill prescription could fill that prescription, without even using their insurance, at multiple pharmacies for prices that ranged from $28.00 – $77.00. Defendants, however, agreed to make their ERISA plans and their beneficiaries pay over $10,000 for each 90-pill prescription of the same drug.

This case has garnered a significant amount of attention in the benefits community. The following summarizes the complaint and provides some high-level considerations for group health plan fiduciaries.

Background

An ERISA fiduciary is held to a very high standard of behavior, which requires more careful decision-making and more disclosure to plan participants and beneficiaries than would be required in a normal business relationship. The relevant principal duties of ERISA fiduciaries are:

- to act solely in the best interest of plan participants and beneficiaries (the duty of undivided loyalty);

- to use plan assets for the exclusive purpose of paying plan benefits or reasonable expenses of plan administration (the exclusive benefit rule);
- to act with the care, skill, prudence and diligence that a prudent person in similar circumstances would use; and
- to act in accordance with the documents and instruments governing the plan so long as those documents are consistent with ERISA.

Selection of service providers is an important fiduciary responsibility because service providers work on behalf of plan participants and beneficiaries and often are paid with plan funds. Fiduciaries should periodically monitor their selected providers' performance.

Specific Allegations in the Lawsuit

The detailed complaint alleges various breaches by the group health plan fiduciaries regarding the pharmacy benefits in the group health plan. Below are highlights of some of the core issues of the plaintiff's arguments.

Plan Design

- The classification of a generic drug as a "specialty" drug can have a major impact on the price the plan will be required to pay. Because there is no definitive set of objective factors to determine whether any given drug is a specialty drug, the classification of a drug as "specialty" should have been the subject of negotiations between plan fiduciaries and PBMs.
- Prudent fiduciaries will replace brand-name drugs on the formulary when lower-cost, FDA-approved generics become available. Alternatively, prudent fiduciaries will add the generics to the formulary at lower prices and then incentivize plan beneficiaries to obtain these lower-cost generics instead of the more expensive brand-name drugs.
- Prudent fiduciaries are aware of the conflicts of interest that PBMs have in making formulary decisions.
- J&J should not have steered beneficiaries toward the PBM's mail-order pharmacy as the prices are routinely higher than amounts retail pharmacies charge for the same drugs.
- An arrangement in which a plan's members are incentivized or required to obtain "specialty" drugs only from the PBM's own "specialty" pharmacy provides powerful incentives for PBMs to designate generic drugs as "specialty" drugs and/or to inflate the prices of specialty drugs.

Choosing and Monitoring Service Providers

- J&J should have used its bargaining power to obtain better rates from their own PBM or another traditional PBM; could have moved all or parts of their prescription-drug plan to a "pass-through" PBM that bases its prices on actual pharmacy acquisition costs rather than inflated and manipulable benchmarks, etc.
- Prudent fiduciaries conduct open RFP processes to obtain competitive bids for PBM services at regular intervals and ensure that the rates and terms to which they agree continue to reflect the best rates and terms available in light of the plan's size, bargaining power, and other characteristics. The plaintiffs allege J&J did not have an open RFP process and did not consider the full range of available options for PBM services.
- Prudent fiduciaries should evaluate service providers, like consultants, for potential conflicts of interest including whether the service provider may have a financial interest in steering a plan toward certain PBMs or including certain provisions in PBM contracts that do not correlate to the financial or other interests of plan participants and beneficiaries.

Failure to Provide Plan Documents

- The plaintiff alleges the fiduciaries of the group health plan failed to comply with a request for plan documents. Under ERISA, fiduciaries must furnish participants and beneficiaries with plan documents upon request. Penalties of up to $110/day may apply to these failures.

Requested Relief

The plaintiff's request:

- Recovery of any losses of plan assets and any profits (or disgorgement of profits) as a result of the breaches.
- Injunctive and equitable relief including removal of the current fiduciary and appointment of an independent fiduciary.
- $110/day in penalties beginning on January 19, 2024, for failure to provide plan documents upon request.

J&J Response

J&J has not responded to the complaint filed against the group health plan. J&J is expected to file a response that will likely counter the multiple claims filed by the plaintiff and offer potential defenses.

Employer Action

This appears to be the first case by plan participants alleging a fiduciary breach tied to pharmacy costs under the plan. Employers offering group health plans should monitor developments in this case.

In addition, employers may take this opportunity to review fiduciary best practices as it relates to group health plans, including:

- Who are the ERISA group health plan fiduciaries?
- Are plan documents in place and provided upon request to participants and beneficiaries?
- How are service providers monitored and are conflicts of interest identified?
- How are fees and plan expenses evaluated for reasonableness?
- Has the ERISA group health plan obtained the required compensation disclosure under ERISA 408(b)(2) from service providers who are providing brokerage and consulting services? This is a recent requirement that was part of the Consolidated Appropriations Act of 2021 ("CAA-21").
- Is the group health and welfare plan (and its fiduciaries) covered by a fiduciary liability insurance policy?

We will continue to follow this litigation and will monitor developments.