ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, and Carolyn Smith provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan and Carolyn Smith are senior members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

VENDOR CREDITS AND COMPLIANCE ISSUES

Over the last few years, it has become quite common for insurance carriers and service providers to offer employee benefit plans and their employer plan sponsors certain "credits" that can be used to pay for items such as employee benefit plan communications, benefit administration system improvements, or in certain instances unspecified future special administration projects. Terms used for these credits include innovation fees or credits, communication credits as well as technology credits. We will use the term innovation credits as a catch-all for purposes of this article.

In this article we will explore whether there are constraints on use of these innovation credits under ERISA including possible fiduciary and prohibited transaction implications. In a future article we will suggest planning mechanisms and plan designs to reduce possible ERISA liability or concerns.

Innovation credits can also raise state law issues such as commission splitting, insurance rebating, etc. but this article and our follow up are devoted to ERISA considerations.

WHAT ARE INNOVATION CREDITS?

These arrangements vary as to how the innovation credits "flow" back to the employer or plan.

- They can come directly to the employer sponsoring the plan as a "reimbursement" for third party expenses incurred.
- They can come to the plan itself in instances where the plan has a trust or other funding vehicle.
- They can be held by a third party administrator, broker or consultant to be disbursed or offset against future plan expenses as they are incurred.
- They can be paid directly by the carrier to a vendor such as for a benefit administration platform.

How these credits are calculated also varies. For example, a carrier for a voluntary benefit could pay a benefit administration platform vendor a per-employee-per-month (PEPM) credit of $0.60 for every employee enrolled in voluntary life and a $0.30 PEPM for any employee enrolled in vision etc.

Those credits would then reduce the cost of the platform to the employer. Or, the arrangement could be less transparent with different tiers of pricing based on the carriers selected. A benefits administration platform vendor could indicate that the cost of a benefits administration system can vary based on which "partner" carriers are selected and for which lines of coverage, with no disclosure on precisely how much the carrier is paying the benefit administration platform vendor so that vendor can provide preferred pricing to the employer.

As mentioned, these innovation credits are often generated by "voluntary benefit" carriers but may also be available from PBMs, life insurers, wellness vendors, communication vendors, etc. Voluntary benefits are typically offered on an employee/participant pay-all basis and can include dental, vision, supplemental short- and long-term disability, supplemental group life, critical illness, hospital indemnity, etc.

The employee funding arrangements can either be pre-tax through an employer sponsored cafeteria plan or post-tax for benefits such as short- or long-term disability. In some instances there are employer contributions/premiums in addition to employee contributions/premiums to these benefits.

INNOVATION CREDITS AS ERISA PLAN ASSETS

For ERISA purposes, we know that employee/participant contributions are considered to be "plan assets" as soon as they can reasonably be segregated from an employer's general assets. ERISA strictly regulates the use of plan assets and provides that plan assets may only be used to provide benefits under an employer's welfare benefit plan and/or to offset reasonable plan administration expenses.

While the United States Department of Labor (DOL) issued ERISA Tech Rel. 92-01 providing (as long as certain conditions are met) that participant contributions do not have to be held in trust, DOL emphasized that those participant contributions are still plan assets subject to ERISA fiduciary duties.

DOL cautioned that the technical release "in no way relieves plan sponsors and fiduciaries of their obligation to ensure that participant contributions are applied

only to the payment of benefits and reasonable administrative expenses of the plan." DOL also stated that: "Utilization of participant contributions for any other purpose may result not only in civil sanctions under Title I of ERISA but also criminal sanctions…"

Innovation credits, however, are not participant contributions or premiums. Although there is no specific ERISA statutory definition of plan assets, based on past guidance and anecdotal experience with DOL, we believe that innovation credits paid by insurance carriers or third parties who received premiums or fees from participant contributions (or other trust or plan assets) would be considered to be plan assets.

DOL has repeatedly stated that distributions from carriers including but not limited to refunds, dividends, demutualization payments, rebates, and excess surplus distributions may be plan assets. DOL has provided specific guidance on several types of carrier distributions, including demutualization proceeds, litigation settlement proceeds, and medical loss ratio (MLR) rebates required under the Affordable Care Act (ACA).

In this guidance, DOL stated that to the extent employees pay a portion of the carrier premiums, the appropriate plan fiduciary must treat as plan assets the portion of any proceeds or rebates attributable to employee contributions for those premiums.

Based on this DOL guidance, if the innovation credits are generated by insurance premiums or contributions paid entirely by employees, the entire innovation credit would likely be considered a plan asset. In instances where both the employer and the employees pay the premiums or contributions then at least the employee pro-rata share of the innovation credit would likely be a plan asset.

While this past guidance provides insight into how DOL views refunds and rebates from carriers—especially the MLR rebate and the demutualization guidance—there is no specific guidance on innovation credits.

And, DOL has repeatedly emphasized that plan assets are generally "to be identified on the basis of ordinary notions of property rights". This is a fact specific analysis based on each particular arrangement. For welfare plans, this concept becomes even murkier where this is frequently no trust to hold plan assets.

So if, for example, the employee benefit plan itself never takes possession of the innovation credit and sits unsegregated with a third party is it a plan asset? If the credit goes directly from the carrier to the vendor as part of the vendor's compensation is it a plan asset?

Cloud Based Compliance Software

Affordable Care Act
- Eligibility Determination & Offer Creation
- Reporting & e-Filing (1094/95 B & C)
- e-Filing Only Options Available
- Dedicated Customer Support Agent

Dependent Verification
- Full Audit Service or Software Only
- User Friendly Interface
- Secure, Direct Document Upload

ACAGPS.com 470.239.5524

Connect in New Ways through HCAA

As an association leader in transforming the self-funding industry, and one that focuses heavily on ***The Value of Connection***, HCAA education, advocacy and networking has not stopped. We've just found new and creative ways to connect, engage and educate during this time. The HCAA Experience is unlike any other, and we challenge you to discover the value it brings to your self-funding career.

Learn more about the many benefits HCAA membership offers to the self-funding industry at hcaa.org/page/membership.

Contact us

(888) 637-1605

hcaainfo@hcaa.org

If the carrier makes the payment to a benefit administration platform vendor because that platform makes it easier for the carrier to receive premiums from that particular employer/plan is that a use of plan assets or just a solid business decision by the carrier? These arrangements vary so greatly as to the parties to the arrangement; the calculation of the innovation credit; who holds the innovation credit before it is applied and how the innovation credit is ultimately applied.

As a result, legal counsel should be consulted on each arrangement to determine if there are "plan assets" involved.

ERISA FIDUCIARY BREACH AND PROHIBITED TRANSACTIONS

Assuming that innovation credits are (at least partially) plan assets, then whoever controls the allocation and payment over those innovation credits would be a plan fiduciary. Under ERISA, a fiduciary includes a person who exercises any authority or control respecting management or disposition of plan assets.

And, if those plan assets are used for anything other than providing benefits or defraying reasonable expenses of administering the plan then there is a fiduciary breach. Also ERISA has prohibited transaction provisions that, in many ways, mirror these fiduciary obligations. It is a prohibited transaction for a plan fiduciary to:

- Deal with plan assets for the fiduciary's own interest or account;
- Act on behalf of a party whose interests are adverse to the plan; or
- Receive any consideration for the fiduciary's own personal account from any party dealing with such plan in connection with a transaction involving plan assets.

Innovation credits raise significant questions under ERISA's fiduciary and prohibited transaction provisions.

For example, retention and use of an innovation credit by an employer for its own purposes unrelated to plan administration would be a fiduciary breach and a prohibited transaction. A fiduciary decision to take the innovation credits generated by the assets of one plan and apply them to the administrative expenses of another ERISA plan would also be a fiduciary breach and a prohibited transaction.

The next step in the analysis, explored in a future article, is to determine what is the "plan" and what is a legitimate plan expense.

For example, if an innovation credit is generated by a long-term disability carrier can that credit be used to pay for communications that also include a self-insured medical benefit or a fully insured dental benefit?

Similarly, if the innovation credit goes toward a benefit administration platform does an employer need to ascertain the proportional cost of the use of that platform for the benefit that generated the innovation credit?

Also, does the innovation credit benefit the employer outside of the plan administration context? If the innovation credit pays for communications is it permissible for that communication to include non-ERISA employer-based benefits such as vacation, paid time off, office holiday parties etc?

ACA reporting is an employer and not a plan related expense so if the innovation credit also goes toward a benefit administration platform that also assists in ACA reporting has there been a fiduciary breach or a prohibited transaction?

Our next article will suggest some "guardrail" and plan design considerations that might minimize any ERISA risk presented by innovation credits as well as further exploring what are appropriate plan expenses. ■