



## FIDUCIARY LAWSUITS INVOLVING VOLUNTARY BENEFIT PLANS: WHAT'S ALL THE HUBBUB?

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By Chris Condeluci, Esq.

**S**ome industry experts are sounding the alarm over lawsuits that were filed on December 23rd, claiming that employers sponsoring “voluntary benefit plans” breached their ERISA fiduciary duties. These lawsuits included similar fiduciary breach claims lodged against the brokers and consultants providing services to these employer-sponsors related to these voluntary benefit plans.

While these lawsuits are indeed concerning for employers that sponsor ERISA-covered benefit plans, employers sponsoring a “major medical self-insured group health plan” should not freak out.

Why?

Because, as stated, these lawsuits focus on voluntary benefit plans.

AND voluntary benefit plans are NOT the same thing as major medical self-insured group health plans.

Here's what I mean:

- **Voluntary Benefit Plans:** A voluntary benefit plan is almost always a fully insured arrangement. Here, the employer-sponsor transfers all of the financial risk of the plan's coverage to an insurance company. The employer-sponsor also leaves all of the claims administration and benefit payout decisions to the insurance company, and sometimes even the broker.

- **Major Medical Self-Insured Plans:** In the case of a major medical self-insured group health plan, on the other hand, the employer-sponsor retains the financial risk of its own employees' health risks (i.e., the employer-sponsor does NOT shift health and financial risks to an insurance company). The employer-sponsor also retains discretion when it comes to paying benefits for incurred claims.
- **Voluntary Benefit Plans:** Related to the first point, employer-sponsors of a voluntary benefit plan typically do NOT manage the benefits and cost of coverage of the plan.
- **Major Medical Self-Insured Plans:** In the case of a major medical self-insured group health plan, on the other hand, traditionally, the employer-sponsor manages the operations of the plan, along with the benefits covered under the plan, as well as the costs of covered benefits for plan participants.
- **Voluntary Benefit Plans:** Employer-sponsors of a voluntary benefit plan often operate under the mistaken belief that voluntary benefit plans are exempt from ERISA.
- **Major Medical Self-Insured Plans:** Employer sponsors of a major medical self-insured group health plan, on the other hand, know that the plan is subject to ERISA's requirements, along with a series of other Federal laws specifically applicable to "group health plans," and therefore, these employer-sponsors traditionally take the necessary steps to comply with ERISA and these Federal laws.
- **Voluntary Benefit Plans:** Employers sponsoring a voluntary benefit plan rely heavily – if not exclusively – on their brokers and consultants to recommend – and even develop – the plan's design, the plan's benefit payouts, and the plan's commissions and other fees payable to the brokers/consultants.



- **Major Medical Self-Insured Plans:** Employer-sponsors of a major medical self-insured group health plan also engage consultants, brokers, and other plan service providers, and the employer-sponsor may rely on their consultants and brokers for advice on plan design and also rely on their service providers to help administer the plan. HOWEVER, these employer-sponsors traditionally have an active voice in the types of benefits covered under the plan, along with an understanding of the cost of covered benefits, and these employer-sponsors actively hire and monitor the plan's service providers that assist in administering the plan.

Having said all of that, although I suggested that employer-sponsors of a major medical self-insured group health plan should not freak out over these lawsuits, employer-sponsors need to heed the advice of George Costanza in Seinfeld and “do the opposite” of what these plan sponsors of voluntary benefit plans did to warrant the filing of these lawsuits.

Here's what I mean:

- **Don't Pay Excessive Fees:** The employer-sponsors of these voluntary benefit plans allegedly allowed their employees to pay excessive fees to the brokers and consultants who were advising the employer-sponsor and administering these plans.
- This violates ERISA's fiduciary obligation to act prudently. Why? Because no prudent fiduciary would allow their employees to pay excessive fees to plan service providers, especially when these fees equaled – or even exceeded – the value of the benefits provided through the plan.
- This also violates ERISA's fiduciary obligations to keep plan costs low and monitor plan service providers. Why? Because employer-sponsors have a fiduciary duty to understand, negotiate, and monitor the amount of broker and consultant fees and commissions that the plan and/or plan participants pay for coverage to ensure that these fees and commissions are reasonable.
- Note, when we are talking about a major medical self-insured group health plan, these plans typically do not have broker and consultant fees embedded in the plan's premiums, but sometimes they do. In either case, employer-sponsors must make sure that they know whether or not broker and consultant fees are indeed embedded in the plan premiums, and if they are, these employer-sponsors must make sure that the fees are reasonable. The same goes for paying fees to plan service providers like TPAs and related service providers (i.e., fees paid to these service providers must be reasonable).
- **Establish a Process for Selecting Service Providers:** In these voluntary benefit plan lawsuits, it appears that the employer-sponsors gave all of the discretion to their brokers and consultants to find an insurance company to underwrite the plans, and also, all of the discretion to brokers/consultants to determine which voluntary benefit plans to make available to the sponsors' employees.

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- The employer-sponsor of a major medical self-insured group health plan should never give away or fully delegate its decision-making responsibilities when it comes to selecting the plan's service providers. Instead, the employer-sponsor must be actively involved in hiring, among others, an enrollment TPA, a claims adjudicator TPA, a COBRA administrator, or the owner of the provider network that "rents" its provider network to the plan. Here, the employer-sponsor must send out RFPs to multiple service providers, evaluate the RFP responses, and put time and effort into determining which service providers the plan should hire. As noted above, fees paid to these service providers must be reasonable.
- **Make Sure You Get the 408(b)(2)(B) Compensation Disclosure:** Brokers and consultants are required to disclose to the fiduciary of an ERISA-covered plan (e.g., the employer-sponsor) the "direct" compensation that the broker/consultant receives from the plan, as well as any "indirect" compensation the broker/consultant receives from other third parties that provide services to the plan. According to these voluntary benefit plan lawsuits, the Plaintiffs claim that the employer-sponsors failed to obtain the required Compensation Disclosures, which is a violation of ERISA.
- This required 408(b)(2)(B) Compensation Disclosure is intended to help a plan fiduciary identify if the broker/consultant has a conflict of interest with a service provider that the broker/consultant recommends that the plan should hire. According to these voluntary benefit plan lawsuits, the Plaintiffs claim that the brokers/consultants had such a conflict of interest with the insurance company that was underwriting the voluntary benefit plans. And the Plaintiffs further claim that if the employer-sponsors received the required Compensation Disclosures, the employer-sponsors would have been able to identify the conflict of interest.

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- This is a reminder that employer-sponsors of a major medical self-insured group health plan must make sure that they receive the required 408(b)(2)(B) Compensation Disclosure from their brokers and consultants (if any), along with any service providers that may otherwise be subject to this Compensation Disclosure requirement (e.g., a PBM, and in some cases, a TPA).
- **Compliance With ERISA's Fiduciary Duties:** The main thrust of these voluntary benefit plan lawsuits claims that the voluntary benefit plans are subject to ERISA. And, as an ERISA-covered plan, the employer-sponsors were required to adhere to ERISA's fiduciary duties (which they allegedly did not), and also, to obtain a 408(b)(2)(B) Compensation Disclosure (which, as stated, they also allegedly did not).
- As stated above, virtually every employer-sponsor of a major medical self-insured group health plan knows that the plan is subject to ERISA. They also know that the plan is subject to other Federal laws, and as a result, virtually all employer-sponsors of these plans take steps to comply with ERISA and these other Federal laws.
- However, for many employer-sponsors of a major medical self-insured group health plan, it's not entirely clear to them how to satisfy all of ERISA's fiduciary duties. And – at least to me – this is what all of the hubbub is about here.
- That is, these lawsuits (like the Johnson & Johnson and Wells Fargo employee-participant fiduciary breach lawsuits) are yet another reminder that employer-sponsors of a major medical self-insured group health plan need to not only “do the opposite” of the employer-sponsors of these voluntary benefit plans, but you need to step up your game and fully understand what you need to do to satisfy your ERISA fiduciary duties. Otherwise, you will be a target of a lawsuit too... ■

#### *About the Author*

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