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# EMPLOYER DRIVEN HEALTHCARE

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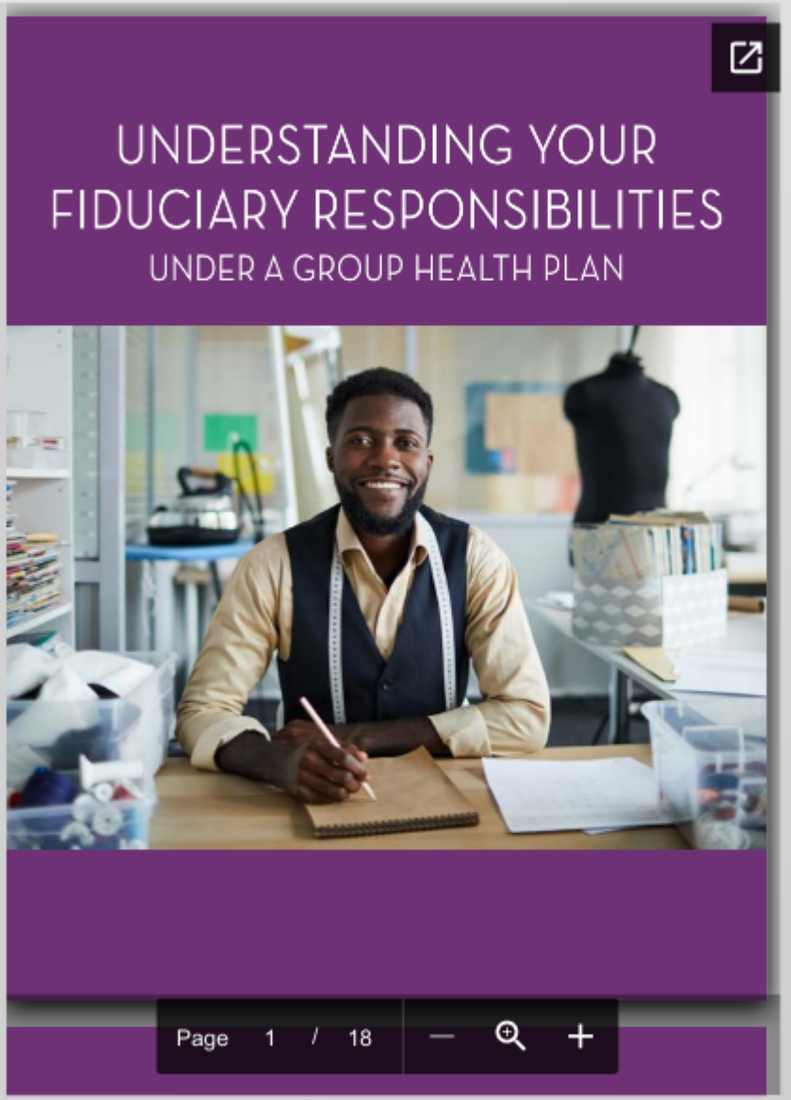
EMPLOYER DRIVEN HEALTHCARE SOLUTIONS

# The Fiduciary Framework

Am I a fiduciary?

What does it mean to be a fiduciary?

How do I execute on fiduciary decisions?




# Understanding the Who and What of Fiduciary Status

- Act in the Sole and Best Interest of Plan and Plan Participants
- Carry Out Duties Prudently
- Follow Plan Documents
- Hold Plan Assets in Trust
- Pay Only Reasonable Plan Expenses

# Resources to Help You Establish Who is a Fiduciary in Your Organization

August 16, 2022

## A CFO's Guide to Health Plan Fiduciary Leadership

How to Establish a Strategic Fiduciary Framework to Enhance the Value of Employee Health Benefits

**U.S. Department of Labor** Employee Benefits Security Administration Washington, D.C. 20210

**FIELD ASSISTANCE BULLETIN NO. 2021-03**

DATE: DECEMBER 30, 2021

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
AMY TURNER, DIRECTOR OF FIELD ADMINISTRATION
REGIONAL DIRECTORS

THROUGH: TIMOTHY D. HAUSER
DEPUTY ASSISTANT SECRETARY FOR PROGRAM OPERATIONS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: TEMPORARY ENFORCEMENT POLICY REGARDING GROUP HEALTH PLAN SERVICE PROVIDER DISCLOSURES UNDER ERISA SECTION 408(b)(2)(B)

This memorandum announces the Department of Labor's (Department) temporary enforcement policy for group health plan service provider disclosures under ERISA section 408(b)(2)(B). Section 202 of Title II of Division BB of the Consolidated Appropriations Act, 2021 (CAA) amended section 408(b)(2) of ERISA to require certain service providers to group health plans, as defined in section 733(a) of ERISA, to disclose specified information to a responsible plan fiduciary about the direct and indirect compensation that the service provider expects to receive in connection with its services to the plan. The new disclosure requirements in ERISA section 408(b)(2)(B) apply to persons who provide "brokerage services" or "consulting" to ERISA-covered group health plans who reasonably expect to receive $1,000 or more in direct or indirect compensation in connection with providing those services. The information required to be disclosed under ERISA section 408(b)(2)(B), which includes both direct and indirect compensation that is expected to be received in connection with a contract or arrangement between a covered service provider and a covered plan, generally must be disclosed reasonably in advance of the parties entering into such contract or arrangement. The required disclosures are intended to provide the responsible plan fiduciary with sufficient information to assess the reasonableness of the compensation to be received and potential conflicts of interest that may exist as a result of a covered service provider receiving indirect compensation from sources other than the plan or the plan sponsor. The CAA provides that the ERISA section 408(b)(2)(B) amendments apply beginning one year after the date of the CAA's December 27, 2020 enactment, *i.e.*, December 27, 2021.

*Any individual who exercises control or discretionary decision-making over their company's employee health benefit plan is a plan fiduciary.*

**Identifying Internal Fiduciary Roles and Actions**

An individual within a company can be found to be a health plan fiduciary based on the responsibility of their role, or the activities they engage in, regardless of their title. Any individual who exercises control or discretionary decision-making over their company's employee health benefit plan is a plan fiduciary. Following are fiduciary roles that officers and employees of self-insured health plans often oversee or perform:

- **Plan Oversight:** Selecting, monitoring, and benchmarking performance of expert advisors and service providers that accept fiduciary responsibility. The act of selecting a health plan administrator (TPA/ASO) for an employee health plan is a fiduciary act, similar to the selection of a recordkeeper for a 401(k) plan.
- **Asset Management:** Determining plan contributions, receiving and holding plan contributions, accounting and monitoring of contribution collection and recovery of overdue or delinquent payments, rebates, refunds, dividends, and medical loss ratio returns, with some exceptions.
- **Plan Operations:** Signing the annual employee benefit plan return/report, IRS Form 5500, educating employees, implementing vendors, communicating to employees and service providers, and retaining and managing an auditor.

While certain plan advisory or administrative functions may be outsourced to third-party service providers, the employer retains ultimate fiduciary responsibility - even with express acceptance of fiduciary responsibility by the third party. Business decisions relating to formation/design rather than the administration/management of a plan are not subject to ERISA's fiduciary rules. These are called "settlor" functions under ERISA. This includes decisions, for example, to establish a medical plan, amend a medical plan (e.g., to add a covered benefit) and to terminate a medical plan. Activities that follow a business decision (implementation activities) are subject to ERISA's fiduciary rules.

# *How does the Consolidated Appropriations Act Modify ERISA?*

## Section 201

- Amends ERISA, the Public Health Service Act (PHSA), and the Internal Revenue Code to require employer-sponsored health plans to ensure they have access to certain cost and quality of care information.

## Section 202

- Requires that any compensation paid to plan service providers be "reasonable and adds requirements that brokers and consultants for health plans are required to disclose compensation (direct and indirect) paid to any broker or consultant that receives $1,000 or more.

# TITLE II—TRANSPARENCY

**SEC. 201. INCREASING TRANSPARENCY BY REMOVING GAG CLAUSES ON PRICE AND QUALITY INFORMATION.**

(a) PHSA.—Part D of title XXVII of the Public Health Service Act (42 U.S.C. 300gg et seq.), as added and amended by title I, is further amended by adding at the end the following:

**"SEC. 2799A–9. INCREASING TRANSPARENCY BY REMOVING GAG CLAUSES ON PRICE AND QUALITY INFORMATION.**

"(a) INCREASING PRICE AND QUALITY TRANSPARENCY FOR PLAN SPONSORS AND GROUP AND INDIVIDUAL MARKET CONSUMERS.—

"(1) GROUP HEALTH PLANS.—A group health plan or health insurance issuer offering group health insurance coverage may not enter into an agreement with a health care 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 a group health plan or health insurance issuer offering such coverage from—

"(A) providing provider-specific cost or quality of care information or data, through a consumer engagement tool or any other means, to referring providers, the plan sponsor, enrollees, or individuals eligible to become enrollees of the plan or coverage;

"(B) electronically accessing de-identified claims and encounter information or data for each enrollee in the plan or coverage, upon request and consistent with the privacy regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996, the amendments made by the Genetic Information Nondiscrimination Act of 2008, and the Americans with Disabilities Act of 1990, including, on a per claim basis—

"(i) financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;

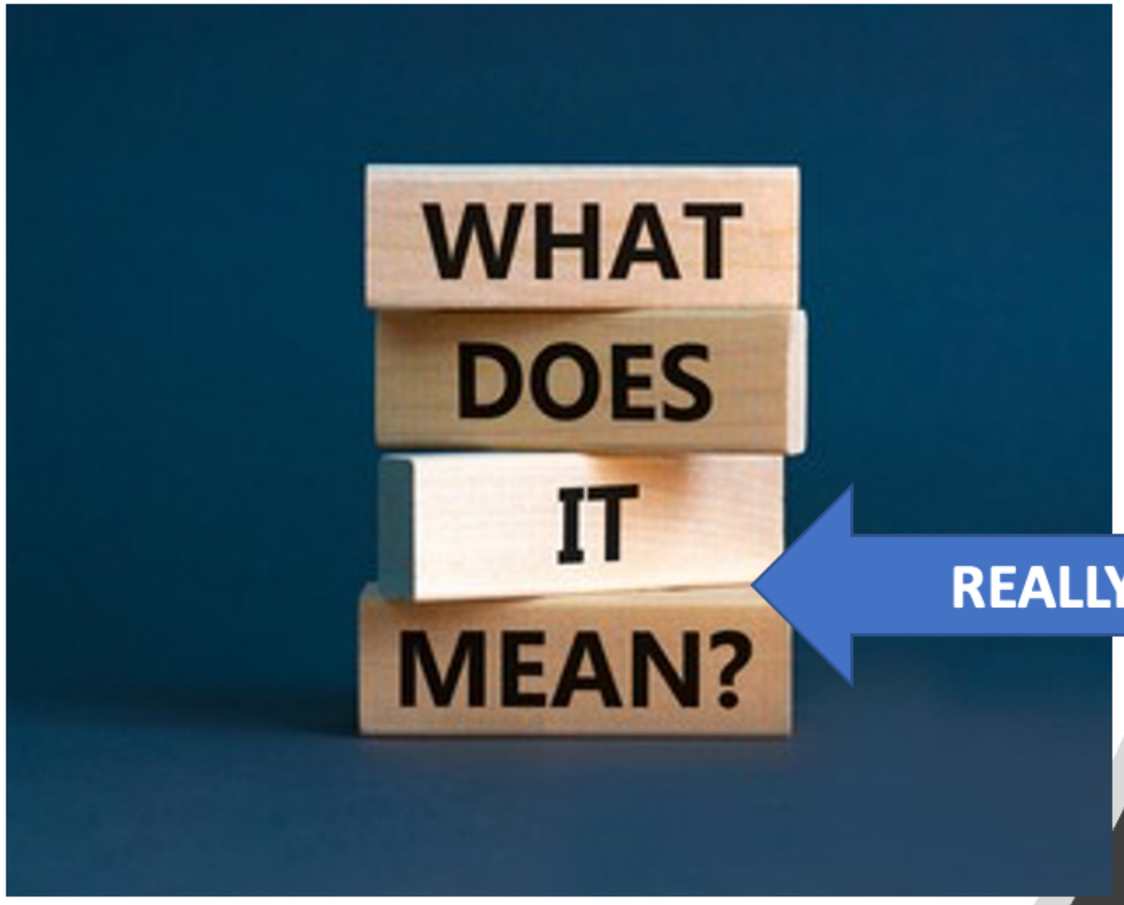
"(ii) provider information, including name and clinical designation;

"(iii) service codes; or

"(iv) any other data element included in claim or encounter transactions; or

"(C) sharing information or data described in subparagraph (A) or (B), or directing that such data be shared, with a business associate as defined in section 160.103 of title 45, Code of Federal Regulations (or successor regulations), consistent with the privacy regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996, the amendments made by the Genetic Information Nondiscrimination Act of 2008, and the Americans with Disabilities Act of 1990.


- Ensure all gag clauses have been removed from plan contracts
- Collect compensation disclosures from all brokers/consultants servicing the plan
- Determine if the compensation earned by those vendors is “reasonable”
- Submit annual attestations to the DOL to that effect
- Prepare for detailed reporting on prescription drug usage and coverage equality for mental health vs. medical conditions.




- No more contracts that don't give you access to your claims data
- No more sticking your head in the sand when it comes to your "trusted broker" (and golf or tennis buddy you've known for years)
- No more standard RFPs or rate renewal processes – you actually have to assess for reasonableness
- Document! Document! Document! And more documenting of fiduciary processes, policies and procedures!
- Leverage data and transparency for the benefit of your plan and plan participants.

# What's Happening in the Courts?

## *Mass Laborers' vs. BCBS of Mass*

DOL Filed an Amicus Brief Asserting BCBS exercises fiduciary roles when they are solely responsible for setting price and when they pay claims out of plan assets.

## *Bricklayers, et al. vs. Anthem, et al*

Recent complaint filed by labor union against Elevance/Anthem for breach of fiduciary duty by failing to pay claims correctly and failing to give client access to data.

# How to Turn Legal Obligations into Opportunities & Risk into Reward

Data Ownership and Leverage

Purchase Healthcare Smarter

Continue to Monitor Performance of Purchase

Radical Focus on Transparency and Accountability

# Examples of Fiduciary Undertaking

- Identify Various Ways in Which Fiduciary Operates
- ASA Agreement Review and Analysis
- Utilize Data to Undertake New Purchasing Methods

| Principal Fiduciary Duty | Action Required | Examples for Health Plans |
|---|---|---|
| **Act Solely in the Best Interests of Plan Participants and Beneficiaries** | Actions must be for the exclusive purpose of providing benefits.<br><br>You must disclose and avoid all conflicts of interest. | Employer Requires Compensation Disclosure (direct and indirect) from all vendors and has means to discover and enforce conflicts of interest restriction.<br><br>**Example of Breach:** Employer Contracts with Benefits Consultant that Derives Income from Insurance Company as a Result of Employer Business. |
| **Carry out Duties With Prudence** | Exercise skill, care and diligence in responsibilities.<br><br>Document process for all decisions.<br><br>Ensure adequate expertise for plan decisions, or hire competent professional. | Ensure there is a documented process for selection of service provider (TPA, e.g.,) as well as documented process for ongoing monitoring and enforcement of contractual performance and financial guarantees.<br><br>**Example of Breach:** Failure to Conduct Comprehensive Audit of all Third-Party Service Vendors. |
| **Follow Plan Documents** | Plan documents serve as basis for plan operational and management decisions and should not be deviated from. | Medical Necessity Requirement for all covered services is applied by third-party administrator/carrier.<br><br>**Example of Breach:** Failure to audit member eligibility conducted by third-party service provider. |
| **Hold Plan Assets in Trust** | Anything defined as a plan asset must be held in trust. Plan assets include all participant and beneficiary contributions paid to the employer or withheld from employee, as well as rebates, refunds, dividends, and medical loss ratio rebates in most cases. | Clearly identify plan assets held in trust and ensure, through well documented policies and procedures, that only reasonable plan expenses are paid from the trust account.<br><br>**Example of Breach:** Giving third-party administrator/carrier carte blanche authority over account with member premium contributions with no regular and robust accounting or audit oversight to ensure no prohibited transactions or self-dealing. |
| **Ensure That Plan Expenses are Reasonable** | Investigate, analyze, hire and monitor plan service providers for reasonableness of fees.<br><br>**THIS IS THE SINGLE LARGEST AREA OF WEAKNESS FOR HEALTH PLAN FIDUCIARIES | Employer engages in regular analysis of health plan data and financials in order to ensure that healthcare claims are reasonable (i.e., engage in payment integrity, outlier analyses, appropriate benchmarking, etc.).<br><br>Employer regularly engages in evaluation of third-party point solution value to ensure efficacy, engagement, and overall value to health plan members. |

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## EXAMPLE OF FIDUCIARY ANALYSIS

Translating the fiduciary framework to everyday decisions and more strategic purchasing decisions is a vital process which must be diligently performed and documented by healthcare fiduciaries.

| Principal Fiduciary Duty | Action Required | Examples for Health Plans |
|---|---|---|
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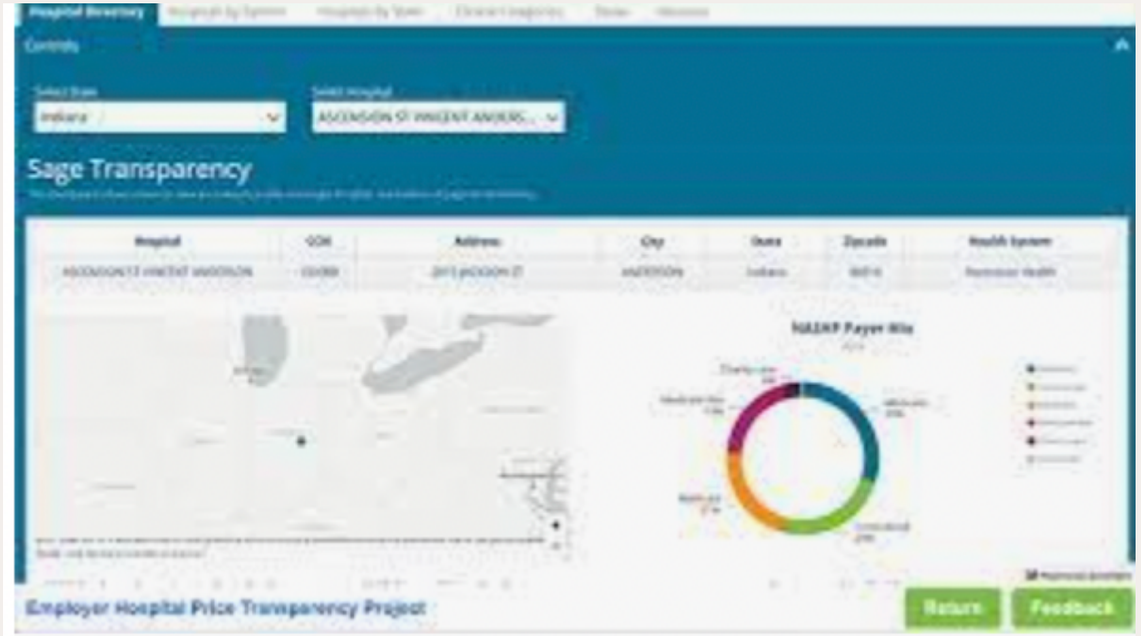
| [redacted] Contract Provision | Acting Solely in Interest of Plan (Exclusive Benefit Rule) | Carry out duties prudently | Follow Plan Documents | Hold Plan Assets in Trust | Pay Only Reasonable Plan Expenses |
|---|---|---|---|---|---|
| Restrictive Language on Proprietary Information (Rates Provider Contract Rates, Price, etc.) | No – no ability to determine whether [redacted] is following exclusive benefit rule without restricted data | No – lack of data limits ability to engaged in prudent and informed decision making | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | No- lack of data and financial transparency precludes [redacted] ability to assess reasonableness |
| Ownership interests in providers, solutions, etc. | No – undisclosed financial interests of [redacted] in providers precludes [redacted] from monitoring conflicts | No – undisclosed financial interest limits ability to engage in prudent purchasing | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | Neutral |
| Audit Restriction Provisions | No – limited ability to monitor exclusive benefit rule | No – no audit discretion limits prudent purchasing | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | No- lack of data and financial transparency precludes [redacted] ability to assess reasonableness |
| Discretionary authority to determine ALL reimbursement | No – failure to ensure plan assets utilized only for plan beneficiaries | Neutral | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | No- lack of data and financial transparency precludes [redacted] ability to assess reasonableness |
| Medical Rebate Retention | No – conflict of interest in undisclosed provider and Rx arrangements | Neutral | Neutral | Neutral | No- Reasonableness of Rx and Medical Rx [redacted] hould be determined net of rebate |
| Recovery Discretion | No – no ability to recover plan assets when appropriate | Neutral | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | No- discretion over recovery amounts precludes [redacted] assessment and reasonableness of plan exp. |
| Interplan Arrangements | No – plan assets leveraged for benefit of other non-[redacted] health plans | No – undisclosed Interplan discretion limits prudent purchasing and oversight | Neutral | No – lack of data and financial transparency precludes confirmation that assets are held in trust | No – lack of data and financial transparency precludes [redacted] assessment of reasonableness on Interplan financial TRXs |

- Evaluate Price on Unit Cost
- Tie Performance Guarantees to Unit Price Trend
- Evaluate Quality of Network, not just size
- Prioritize Primary Care Directly to Engage in Supply Chain Management (reduce variability in cost and quality)


# There are new tools available to employers to achieve these goals

# Identify Allies

High Quality Providers Are Ready to Direct Contract, Primary Care Partners, Accountable Tech Enablement

Employee Champions, Labor, and Trusted Water Cooler Leaders

Organizational Leadership - C-Suite, Procurement Experts, Fellow Purchasers

# Prepare for Foes

Legacy Carriers

Low Value Provider Organizations

Conflicted Consultants and Brokers

Internal Politics of Change Management

# Thank You

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