



Johnson & Johnson Litigation Highlights Significant Risks for Health and Welfare Plan Fiduciaries

Feb. 22, 2024

The passage of the Consolidated Appropriations Act, 2021 (CAA), and the implementation of the Transparency in Coverage Rule creates a heightened risk. Health plan fiduciaries could fail to determine that a prescription drug plan's negotiated network discounts reflect market pricing comparable to other plans.

Unfortunately, that risk has materialized, as a federal lawsuit was recently filed against Johnson & Johnson (JNJ) and its plan fiduciaries alleging its prescription drug plan overpaid for prescription drugs.

The JNJ Litigation

The class action complaint alleges that the Employee Retirement Income Security Act of 1974 (ERISA) requires JNJ's plan fiduciaries to make a diligent effort to compare alternative service providers for its prescription drug plan, seek the lowest level of costs for the services provided, and monitor plan expenses to ensure they remain reasonable. The complaint alleges that JNJ's fiduciaries failed to act prudently by entering into an agreement with a pharmacy benefit manager (PBM) that allowed the PBM to charge the plan "extraordinary" costs for dozens of drugs as compared to other market options, thereby unnecessarily costing the plan millions of dollars. The plaintiffs seek various remedies for the alleged breaches. In essence, the plaintiffs are seeking to hold the fiduciaries personally liable for not paying the lowest possible cost for every drug offered by the plan.

Cost Transparency Facilitates Comparisons

Group health plans must publicly post machine-readable files of prescription drug prices. Because this information is publicly available, individuals (e.g., class action plaintiff attorneys) can review the amount a plan pays for various prescription drugs and compare that information to other plans or pharmacies. The JNJ lawsuit highlights that plan participants not only scrutinize the reasonability of their own out-of-pocket costs, but how much the plan is paying for a drug as compared to other plans or pharmacies in the market.

The plan sponsor (for a self-insured group health plan) bears the financial risk—and responsibility—if the PBM’s fees and drug prices are excessive. For example, if an employer sponsors a self-insured plan and the PBM charges excessive amounts for covered drugs, the claims for those excessively priced drugs are paid by the plan sponsor. The participant pays only the applicable cost-sharing amounts, which are subject to annual limits. Even though the claims are paid by the plan sponsor, plaintiffs will allege that a participant’s premiums, copays, and deductible will all be higher if the fiduciary is not ensuring the lowest cost drugs possible. If the plaintiffs are successful, this will turn the health and welfare plan industry upside down. There are thousands of drugs and health care services. It would be seemingly impossible for employers to ensure the amount the plan pays for every item is the lowest possible cost.

Important Action Items

Health plan fiduciaries should strongly consider these steps to reduce their litigation exposure:

- Establish a fiduciary committee for health and welfare benefits, adopt a committee charter, and delegate fiduciary responsibility to the committee.
- Engage qualified prescription drug plan consultants to assist in comparing PBMs and prescription drug arrangements.
- Ensure consultants do not have conflicts of interest.
- Request and review PBM agreements, fee and rebate arrangements, and formularies and negotiate reasonable terms.
- Collect and review benchmark information from other plans and pharmacies and compare it to current and prospective vendor agreements or proposals.
- Consider whether any direct or indirect compensation arrangements are reasonable or whether there are any conflicts of interest.
- Periodically subject PBMs and other vendors to requests for proposals.
- Document the policies and procedures used to obtain, review, and monitor proposals, agreements, benchmarking information, and vendor performance.

It is critical that health plan fiduciaries document their procedural prudence.

This information has been prepared for UBA by Kutak Rock LLP. It is general information and provided for educational purposes only. It is not intended to provide legal advice. You should not act on this information without consulting legal counsel or other knowledgeable advisors.