# Fiduciary Responsibilities for Health & Welfare Plan Sponsors

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# Overview: ERISA Fiduciaries

- **ERISA's fiduciary duties are the "highest duties known to the law."** ***See Johnson v. Couturier, 572 F.3d 1067, 1077 (9th Cir. 2009).***
- **ERISA must stand for "Every Ridiculous Idea Since Adam."**
  - **Judge Acker in *Florence Nightingale Nursing Service, Inc. v. Blue Cross and Blue Shield*, 832 F. Supp. 1456, 1457 (N.D. Ala. 1993), affirmed, 41 F.2d 1476 (11th Cir. 1995).**
- **Fiduciary Liability:**
  - **Fiduciaries who don't follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.**

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# Legal Developments for ERISA Fiduciaries

- Department of Labor files suit after investigation finds fringe benefit plan fiduciaries misused millions of dollars to pay employer expenses
  - "The Department of Labor will not hesitate to litigate against fiduciaries who misappropriate plan assets," said Acting Regional Solicitor Samantha Thomas. "Fiduciaries may not use ERISA plan assets to pay employers' expenses, and those who do so should expect to face enforcement actions."
- Significant DOL Audit Activity of Health & Welfare Plans
  - Review of plan operations/administration and compliance requirements
- Risk of Fiduciary Litigation Increasing

# *Lewandowski v. Johnson & Johnson*

- 2024 lawsuit alleging J&J breached its fiduciary duties by:
  - Not taking proper measures to ensure its plan costs were reasonable
  - Failing to exercise prudence in selecting its pharmacy benefit manager (PBM)
  - Agreeing to undesirable contract terms
- Essentially, the suit accuses J&J of mismanaging plan assets in connection with drug benefits, resulting in the plan and employees significantly overpaying for certain drugs.
- Class Action Complaint against:
  - Johnson & Johnson (J&J)
  - Pension & Benefits Committee of J&J
  - Members of the Pension & Benefits Committee

# *Lewandowski v. Johnson & Johnson*

- **Imprudence and Unreasonable Compensation – Alleges J&J mismanaged Plans' specialty drug program**
  - **Causing the Plan (and participants) to overpay for generic specialty drugs**
  - **J&J chose PBM without using an RFP process**
  - **J&J used conflicted broker**
    - **Alleged broker receives indirect compensation from certain PBMs, thus conflict of interest**
  - **Large markup on plan drugs compared to available alternatives, greatly exceeding what any prudent fiduciary would agree to pay**
    - **On average, 498% markup over what it costs a pharmacy to acquire the same generic specialty drug**
    - **Most of that markup is profit for the PBM, with no corresponding benefit to the Plan**
    - **J&J had significant bargaining power (>50k employees), but didn't use it effectively**

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# *Lewandowski v. Johnson & Johnson*

- **Disloyalty – Alleges J&J did not act solely in the interest of the participants and beneficiaries**
- **Failure to Monitor – Alleges J&J failed to supervise conflicted third parties**
- **Failure to Provide Plan Documents – Alleges J&J failure to comply with a request for "General/Administrative Information Plan Details"**
  - **$110 per day penalty with plan administrators personally liable**

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# *Lewandowski v. Johnson & Johnson*

- Case is pending, but what can we learn (now)..?
  - Risk of Fiduciary Litigation Increasing
    - Extending to Employer Group Health Plans
    - Active Plaintiffs Firms from Retirement Plan Litigation
    - Look out for ERISA Document Requests
    - Personal Fiduciary Liability
  - Complex Fee Structures
    - Review Fee Disclosures
    - Ask Service Providers for help understanding fees
  - Establish Fiduciary Processes

# Overview: ERISA Fiduciaries

- Fiduciary
  - Discretion with respect to management or administration of the plan or disposition of plan assets
- Plan Assets – Participant Contributions
- Fiduciary Duties
  - Act prudently
  - Comply with the provisions of the plan to the extent consistent with ERISA
  - Act solely in the interest of participants and beneficiaries and with the exclusive purpose of providing benefits to them
  - Pay only reasonable plan expenses
  - Do not engage in "prohibited transactions"

# Fiduciary Roles

- ERISA-covered benefit plans are required to have fiduciaries.
- There are various fiduciary roles under ERISA, including:
  - Named Fiduciary
  - Plan Administrator
  - Discretionary Fiduciaries
  - Trustees

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# Fiduciary Roles: Plan Administrator

- The "plan administrator" is a fiduciary under ERISA Section 3(16).
- The plan administrator can be:
  - An individual.
  - A committee, such as a plan administrative committee.
- The plan sponsor is the default administrator if the plan does not designate otherwise.
  - The plan sponsor is the employer.
- The plan administrator generally has discretion over the administration of the plan.

# Fiduciary Responsibilities & Duties

- Duty to administer the plan in conformity with the plan document(s)
  - Includes the plan document, trust document, investment policy statements, or other policies
- Duty of Prudence
  - Act with the care, skill, and diligence that a prudent person who is familiar with the matter would use under similar circumstances
- Duty to Avoid Prohibited Transactions
  - Conflicts of Interest, Self-Dealing, Reasonable Fees
  - Plan Administrative Expenses and “in-house” administration
- Duty of Loyalty / *Exclusive Benefit Rule*
  - Duty of undivided loyalty to plan participants and beneficiaries
  - Act for the sole purpose of providing benefits to plan participants
  - Only pay reasonable plan expenses

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# Plan Assets

- DOL enforcement priority
- *Ordinary notions of property rights*
- Participant Contributions
- MLR Rebates and similar rebates

# Plan Assets

- Exclusive Benefit Rule
  - Plan assets may only be used for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan
- Plan Document Provisions
- Can employer/plan sponsor receive plan assets?
- Reasonable Plan Administrative Expenses
  - Settlor vs. Plan Expenses
  - Plan Expense Reimbursement Policy
- Prohibited Transactions
- Fiduciary Decisions

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# Trust Requirements & Exemptions

- Do we need a trust?
- Funded vs. Unfunded vs. Fully-Insured
  - General Assets
  - *Reasonably Segregated*
  - Trusts
- DOL Non-enforcement Policy (TR 92-01)
  - Participant contributions are the *only* reason the plan has plan assets
  - Employee contributions made through a cafeteria plan
  - Forwarded directly to carrier within three months (fully-insured)
  - Benefits paid directly from general assets (self-funded)

# Prohibited Transactions

- Fiduciary duty to avoid prohibited transactions
- Certain transactions between a plan and a "disqualified person" or “party in interest” are specifically prohibited by law.
- Prohibited transactions include, for example:
  - The sale, exchange, or lease of property between a plan and a disqualified person.
  - An act of self-dealing by a plan fiduciary by which plan income or assets are used for his or her own interest.
  - Lending money or extending credit between a plan and a disqualified person.
  - Furnishing goods, services, or facilities between a plan and a disqualified person.

# Potential Penalties

- Fiduciaries can be held personally liable for violations of ERISA's fiduciary duties.
- Other potential penalties include:
  - Civil penalties
  - Excise taxes
  - Equitable remedies
  - Criminal penalties
- ERISA fiduciary class action suits are on the rise in several types of cases including:
  - Fee disclosure and transparency issues
  - Conflicts of interest among fiduciary advisers

# Fiduciary Best Practices

- The process is often more important than the decision
  - Crucial to establish processes and documentation to show compliance with fiduciary responsibilities
- Fiduciary Training and Periodic Updates
- Establish Governance Structure
  - Consider a Benefits/Plan Committee
  - Create charter for governing committee
  - Set annual review agenda
  - Identify positions and responsibilities
  - Designate authority
  - Ensure authority is consistent with actual practice

# Fiduciary Best Practices

- Understand what expenses can be paid from plan assets.
- Maintain records of decisions to ensure consistency in applying plan terms to participants and beneficiaries
- Seek expert assistance when needed
  - Attorneys
  - Brokers, Consultants
  - Actuaries
- Understand plan terms and operation, including:
  - Eligibility for participation
  - Vesting, withdrawal, distributions, loans
  - Participant communications and disclosures

# Fiduciary Best Practices

- Begin with general assumption that paying anyone for plan services is a prohibited transaction – compensation must be *reasonable.*
- Fee Disclosures
  - Identify all "covered service providers"
  - Develop process for securing required disclosures from new covered service providers
  - Include annual fee review of covered service providers by plan fiduciaries and document reasonableness determinations
- Monitor Service Provider Performance
- Review and Negotiate Contract Terms
  - Including access to information
- Periodic Requests for Proposal

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# Document Diligence

- Exercise Document Diligence
  - Review Key Documents
  - Ask Questions to Understand Documents
  - Document Compliance
  - Understand Plan Structure
- *Official* Plan Governance Documents:
  - Plan Document
  - Trust Agreement
  - Investment Policy Statement
  - Committee Charters
- Other administrative policies (e.g., cybersecurity policy)
- Summary Plan Description (SPD)

# Document Diligence

- Minutes from fiduciary committee meetings
- Forms 5500 Annual Reports
- Employee Handbooks
- Fiduciary liability insurance documents
- Service provider agreements

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