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ERISA & Employee Benefits Law –
Finding Ways for Employers to Save & Prosper

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Employer ERISA Obligation to Manage the Health Benefit in Self-Insured Group Health Plans

I. Abstract. The fiduciary responsibility provisions of the Employee Retirement Income Security Act (ERISA) are familiar to employers particularly in the context of their 401(k) plans, as knowledge of the responsibility has been widely disseminated in recent years. In broad brush these provisions require employers to act with due care, to act for the exclusive benefit of plan participants and beneficiaries, and to pay only reasonable and necessary expenses. Significant components of these responsibilities are the duty to monitor and oversee plan activities and to take appropriate actions when warranted for the benefit of plan participants. Not so widely known is that the same responsibilities and duties apply to self-insured group health plans.

II. Purpose. This white paper explains why employers who sponsor self-insured group health plans have the obligation under ERISA to:

- Monitor payments to medical service providers, identify cost drivers, and take steps to encourage and assure the provision of reasonably priced medical provider services to their plans for the benefit of their employees
- Establish a prudent process that reasonably assures the satisfaction on a regular basis of the foregoing obligations
- Hire competent third party providers to assist them in their responsibilities if they do no have the capability to do so on their own.

III. Fiduciary Challenges Relating to the Payment of Medical Service Providers by Self-Insured Group Health Plans. In a self-insured group health plan the employer assumes the financial risk in providing health care benefits to employees.[1] Self-insured employers pay medical service providers out of-their own pockets[2] typically through a third party administrator (TPA). The medical providers are generally are part of a network that providers employees are authorized to use, although payments are also made to out of network providers. There are several significant challenges with respect to these payments. The first is the range of fees charged by providers within a single network and geographical area for the same medical service can vary widely. For example, the fees for a spinal lumbar MRI might range from a low of $500 to a high of $2500. It is estimated that as much as 90% of medical bills have mistakes.[3] Most hospitals send out bills having no detail at all, i.e., they

are un-itemized, other than the total amount billed. In other words, their bills are so opaque they cannot be understood. Also, the payment of fraudulent claims is estimated to be 10% of all healthcare spending in the U.S.[4] Another way to put it is if an employer's total annual health care spend is $2,000,000, roughly $200,000 is going down the drain in the payment of fraudulent claims. Each of these factors, individually and in the aggregate, represents a potentially significant waste of plan, employee, and employer resources, and exposure to liability for employers and their officers and employees.[5] By shifting the health benefit cost burden to the employee under such circumstances, liability is created by the employer, even if it is unintentional.

IV. Statutory Basis for Applicability of ERISA Fiduciary Responsibility Provisions to Group Health Plans. Self-funded group health insurance plans are "employee benefit plans" subject to the requirements of the fiduciary responsibility provisions of ERISA contained in Part 4 of Title II of ERISA, In particular Section 404 thereof.[6] This is because they are defined as "welfare benefit plans" included within the definition of an "employee benefit plan" covered by ERISA.[7]

V. Employer ERISA Fiduciary Responsibilities for Self Funded Group Health Plans. Employers[8] have important responsibilities and are subject to standards of conduct to act on behalf of participants and their beneficiaries in a group health plan. Among these responsibilities are: (i) acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them; (ii) carrying out their duties prudently; and (iii) paying only reasonable plan expenses. In the context of the challenges identified in Paragraph II, above, satisfying these standards, it is reasonable to conclude, employers have responsibility for:

- Seeking and receiving specific payment data from the plan TPA and using appropriate legal means obtain it if the TPA does not provide it
- Reviewing with regularity payments made by the plan TPA to medical service providers to identify low cost in-network providers and identify specific cost drivers, based on plan data that is current, accurate and complete, and by applying a methodology that results in actionable information and strategies going forward
- Facilitating employee selection of lower cost providers. This might include the provision of resources such as employee education, online or telephone cost billing experts; interfaces with the TPA to help facilitate provider selection, and cash incentives paid to employees for the use of lower cost medical service providers
- Seeking to prevent the payment of fraudulent claims by employing the services of a TPA that engages in more than pro forma review of claims and uses advanced techniques to prevent the payment of those claims in the first instance, and the regular performance of robust audits for the detection of fraudulent claims.

VI. Limiting Liability Through Use of Expert Service Providers. The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. The analysis and development of strategies relating to plan payments of medical service providers requires expertise and

capacities in a variety of areas that even the largest employers are not likely to have. "Lacking . . . expertise, a fiduciary will want to hire someone with that professional knowledge to carry out those functions."[9] An employer that has determined it needs help from a provider for their self-insured plan should consider, among other things, the provider's experience in the industry, familiarity with the legal requirements applicable to self-insured group health plans, the robustness of their database, processes, methodologies, and systems, and their ability to provide effective strategies and ongoing support.

Use of expert, third party professionals can limit fiduciary liability and improve plan performance for the benefit of employees, the sponsoring employer, and union plans.

VII. The discussion in this white paper has equal applicability to the trustees of union plans who have the same fiduciary responsibilities under ERISA.

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Note: This white paper is for general information purposes only and is not intended and should not be taken as legal advice.

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1 Many self-funded group health plans are combined with stop-loss insurance coverage to reduce the employer's exposure to catastrophic claims. Some are funded with trusts that hold employer and employee contributions.

2 Sometimes through separate plan trusts.

3 https://www.huffingtonpost.com/entry/nearly-90-percent-of-medical-bills-contain-mistakes_us_5902146be4b0af6d718c6e80

4 *The CEO's Guide to Restoring the American Dream – How to Deliver World Class Health Care to Your Employees*, Dave Chase (2017).

5 Fiduciaries who do not 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. A fiduciary's liability for a breach may also include a 20 percent penalty assessed by the Department of Labor), removal from his or her fiduciary position and, in extreme cases, criminal penalties.

6 29 U.S. Code § 1104

7 The statutory basis for this coverage is found in the following cross-referenced sections of the US. Code: 29 U.S. Code § 1101; 29 U.S. Code § 1002(3); 29 U.S. Code § 1002(1).

8 When a reference is made to the "employer" the reader should assume the employer is a fiduciary within the definition and that it may also refer officers, employees, and plan committees. Anyone who has discretionary authority over the administration of the plan is a fiduciary obligated under ERISA to the fiduciary obligations of Part 4. This includes an employer and its officers and employees, or committees acting in such a capacity. See ERISA section 3(21) (29 U.S. Code § 1002(21)) Most employers sponsoring self-funded group health plans exercise some discretionary authority and therefore are fiduciaries.

9 DOL Publication: Understanding Your Fiduciary Responsibilities Under a Group Health Plan, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-your-fiduciary-responsibilities-under-a-group-health-plan.pdf.

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