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Federal Government Issues New ERISA Disclosure Requirements

DOL GUIDANCE TRIGGERS IMPORTANT RESPONSIBILITIES FOR BOTH SERVICE PROVIDERS AND FIDUCIARIES

On December 30, 2021, the Department of Labor (DOL) issued a temporary enforcement policy and new guidance regarding group health plan service provider disclosures under section 408(b)(2) of the Employee Retirement Income Security Act (ERISA). The new guidance applies to contracts that are entered into, renewed, or extended after December 27, 2021.

Background

The Consolidated Appropriations Act 2021 (CCA 2021) requires group health plan brokers and consultants to disclose to group health plan fiduciaries all direct and indirect compensation they expect to receive, unless such expected compensation is less than \$1,000 per year. The new fee disclosures apply to both fully insured plans and self-insured plans and will apply regardless of the number of plan participants. The new fee disclosures do not apply to qualified small employer health reimbursement arrangements (QSEHRAs).

The disclosure must:

include both direct and indirect compensation expected to be received,

be disclosed before the parties enter into an arrangement, and

provide a description of the services to be provided.

In the event the new disclosure rules are not followed, a “prohibited transaction” under ERISA and the Internal Revenue Code may occur. In such case, fiduciaries and service providers could be subject to civil penalties of up

to 5% of the amount involved for each year and additional excise taxes. Criminal penalties are also statutorily available, and any profits obtained in connection with the prohibited transaction could be forfeited.

Field Assistance Bulletin No. 2021-23

Field Assistance Bulletin No. 2021-23 (the Guidance) provides that the new fee disclosures must be provided with respect to contracts that are entered into, renewed, or extended, after December 27, 2021.

The Guidance states that the DOL will not issue any additional regulations with respect to the disclosures. Rather, the Guidance directs stakeholders to look to existing DOL guidance with respect to pension and 401(k) plan disclosures under ERISA section 408(b)(2).

The Guidance does address some important preliminary issues that have been raised. For example, the Guidance explains that indirect compensation exists where a service provider receives a referral fee when it refers group health plan participants to a third-party service provider.

While the Guidance does not specifically define what constitutes “brokerage” and “consulting” services, it provides a list of services that could fall under those categories of services. Thus, a service provider will need to review its services and make a good-faith determination whether it is required to make a disclosure. If it does not—and the service provider receives fees for advice, referrals, or recommendations—the service provider will have the burden of demonstrating to the DOL why it did not believe it was subject to the disclosure rules.

Typically, the fee disclosures can take the form of a monetary amount, a formula, or a per capita charge; however, sometimes the compensation may not be known in advance of entering into an arrangement with a group health plan. In that case, the Guidance states that the disclosure could provide a description of the circumstances under which the compensation may be earned, and should include a reasonable, good-faith estimate of the fees. Disclosure of a range may be acceptable, depending on the facts and circumstances.

The Guidance states that the DOL will look at a service provider’s good-faith efforts to comply with the disclosure requirements. Ultimately, it will come down to a facts-and-circumstances analysis as to whether a service provider was subject to the disclosure rule and whether the service provider was compliant with the rules.

What this means for service providers

As indicated by the Guidance, whether a service provider will be subject to the ERISA section 408(b)(2) disclosure rules depends on the facts and circumstances. A service provider should

document the services it will provide and categorize and describe all the compensation that it will receive with respect to its services. If a service provider concludes that it is not required to make the disclosure, it should document that analysis and be prepared to defend its decision in the event the DOL examines the service provider.

For those service providers that are subject to the ERISA section 408(b)(2) disclosures, service providers will need to fully describe their services and disclose the fees. Typically, the fees will be disclosed as a monetary amount. If there are some uncertainties to the amount, then a careful description of the potential fees, and a good-faith estimate, should be disclosed.

Lastly, service providers should become familiar with the rules as they apply to pension plans. For example, under the pension plan rules, if a provider's compensation changes, a new ERISA section 408(b)(2) disclosure is required.

What this means for employers and plan fiduciaries

Group health plan sponsors and fiduciaries should become familiar with these disclosures. The intent is for such fiduciaries to determine whether compensation paid to brokers and consultants is reasonable. Thus, fiduciaries will need to discern the description of services and be able to understand the fee structures. If the disclosures are not adequate, or a service provider does not provide a disclosure, then the fiduciary has an obligation to request an adequate disclosure or notify the DOL.

Husch Blackwell Employee Benefits attorneys are able to assist service providers, and fiduciaries of group health plans, with compliance with these rules.

Contact us

If you have any further questions or require more information regarding this alert, please contact David Eckhardt, Craig Kovarik or your Husch Blackwell attorney.