COMPLIANCE **ALERT**

Class Action Lawsuit Filed Against Johnson & Johnson Alleges ERISA Fiduciary Breach

February 16, 2024

Action Required:

- Plan sponsors and plan fiduciaries should ensure that all employee benefit plans that are subject to ERISA are designed and administered in their participants' and beneficiaries' best interests.
- All contracts with plan service providers, including PBMs, should be reviewed to ensure that such service providers are not overcharging for their services or receiving unreasonably high compensation.

On February 5, 2024, a group of employees participating in the Johnson & Johnson ("J&J") employee and retiree medical plans filed a class action lawsuit in federal court in Camden, NJ, against J&J and its plan fiduciaries alleging ERISA fiduciary breach violations related to the management and administration of prescription drug benefits offered through these plans.

What Happened in this Case?

The complaint alleges that the plans drastically overpaid for drugs through the plans' pharmacy benefit manager (PBM). Among other allegations, it is alleged that the company paid over $10,000 for a 90-day supply of a generic multiple sclerosis drug that would have cost just $28 if the person paid for it out of pocket at a pharmacy. The complaint argues that these breaches cost J&J's plans and employees millions of dollars in the form of higher payments for prescription drugs, higher premiums, higher deductibles, higher coinsurance, higher copays and lower wages.

What Should Employers and Plan Sponsors Do Next?

Plan sponsors and their fiduciaries need to engage in a prudent, and preferably well-documented, process for selecting and monitoring their plans' service providers, including PBMs. Specifically, plan sponsors and their fiduciaries need to ensure that all benefit plans subject to ERISA are designed and administered in their participants' and beneficiaries' best interests. ■

↓ Full Explanation Follows ↓

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How Does this Case Change the Law?

As of the time of this writing, only a complaint has been filed, and thus, the court has not reached any decision. Accordingly, this case does not change the law in any way now, but the complaint is unique in that while there have been a growing number of ERISA lawsuits challenging the costs and fees paid by health plans, this case is the first to directly take aim at a plan sponsor's plan fiduciaries for PBM contracting allegedly resulting in increased costs to plan participants and beneficiaries.

We have been expecting a case like this to happen (and are expecting more cases like this to happen) in light of the increased scrutiny placed on plan fiduciaries under the Consolidated Appropriations Act, 2021 ("CAA"), which amended ERISA to require that sponsors of health and welfare plans designate a plan fiduciary or fiduciary committee to ensure that plan vendors are not charging excessively high fees or receiving unreasonably high levels of direct or indirect compensation.

What are Employers and Plan Sponsors Required to Do under ERISA, as amended by the CAA?

As background, ERISA plan sponsors and their named fiduciaries have a responsibility to, among other things, ensure that plan costs are reasonable as well as to exercise prudence in the selection and monitoring of their plans' service providers, including PBMs and other plan vendors. While this has been the law under ERISA for many years, what is new here is that ERISA was amended by the CAA, which now requires "health and welfare" plans to establish and designate a plan fiduciary who must assess the reasonableness of prescription drug and other health plan costs, including the reasonableness of plan service provider compensation.

Prior to the CAA, these rules only applied to sponsors of retirement and pension plans. This is why many employers and plan sponsors have had retirement plan fiduciary committees in place for many years now but still have yet to establish any such committee for their health and welfare plans. The *J&J* case, and in particular, its potential to possibly result in millions of dollars of liability, is a good reason for why plan sponsors should now seriously consider implementing a fiduciary committee to assess costs on the "health and welfare" side of their benefits program as well.

What Should Plan Sponsors and their Fiduciaries Do Next?

Plan sponsors and their fiduciaries need to engage in a prudent, and preferably well-documented, process for selecting and monitoring their plans' service providers, including PBMs. Specifically, plan sponsors and their fiduciaries need to ensure that all benefit plans subject to ERISA are designed and administered in their participants' and beneficiaries' best interests.

While standards and protocols can vary from employer to employer, it's important that there be specific action steps taken (and written documentation of which action steps were actually taken) to ensure that these service providers are not charging excessive fees or receiving unreasonably high levels of compensation, and accordingly, to better insulate your organization from such liability.

What follows are some key action steps that employers and their fiduciaries can take to ensure compliance with ERISA's fiduciary obligations in light of the *J&J* case and the requirements of the CAA:

- Review PBM and other plan service provider contracts, and with a focus on the level of (or value of) services received for the applicable cost. If necessary, consider implementing a "request for proposal" (RFP) or other type of formal bidding process for selecting plan service providers.
- Negotiate provisions in service provider contracts that include protections for the plan sponsor and plan fiduciaries, such as provisions that indemnify the plan sponsor or plan fiduciaries and/or require that the service provider compensate the plan if such liability is caused by the service provider's errors.
- Work with legal counsel and/or other trusted advisors to properly form a health and welfare-focused benefit plan fiduciary committee.
- Implement a fiduciary training program to train applicable personnel on compliance with fiduciary duties and on how to exercise the appropriate level of prudence and care in making plan-related decisions.
- Review applicable insurance policies, and if necessary, procure fiduciary liability insurance to better protect the plan sponsor and their fiduciaries from liability for fiduciary breaches.

It should be noted that the list above is not exhaustive, as there are many steps that can be taken to reduce exposure to this kind of liability.

Your organization's trusted advisors at Corporate Synergies, including the Compliance Team at Corporate Synergies, can assist with developing a roadmap for ensuring fiduciary compliance and avoiding liability. Among other services, the Compliance Team at Corporate Synergies can help your organization with reviewing and drafting organization-specific plan document policies to reduce exposure to such liability and can provide a comprehensive compliance assessment of your organization's health and welfare plans, which includes an analysis of the plans' CAA and ERISA compliance. ■

If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.