

What Are the Disclosure Requirements for Group Health Plan Service Provider Agreements?

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QUESTION: As an employer that sponsors an ERISA group health plan, what are our disclosure requirements for the plan's service provider agreements?

ANSWER: Specific disclosure requirements must be met for compensation paid to covered service providers of group health plans to be considered reasonable under ERISA, placing significant responsibilities on plan sponsors to evaluate and act on the disclosed information. As background, the prohibited transaction rules broadly prohibit “the furnishing of goods, services, or facilities” between an ERISA plan and a party in interest—which includes any plan service provider. A statutory exemption allows for reasonable arrangements between a plan and a party in interest for certain necessary services so long as no more than reasonable compensation is paid for the services. In general, whether service provider compensation is reasonable is determined on a case-by-case basis, depending on facts and circumstances. However, compensation for certain types of services is considered reasonable only if specified disclosure requirements are met.

These disclosure requirements apply to any contract between a group health plan and a “covered service provider.” (Arrangements that do not involve group health plans and “covered service providers” remain subject to the facts-and-circumstances standard.) A covered service provider is a service provider that reasonably expects to receive at least \$1,000 in direct or indirect compensation for providing “brokerage services” or “consulting” under the contract or arrangement. Brokerage services include services related to selecting insurance products or plan-related services or vendors—including services or vendors for benefits administration, third-party administration, recordkeeping, compliance, medical management, pharmacy benefit management, transparency tools, wellness, or EAPs. Consulting includes development or implementation of plan design, and insurance (or insurance product) and benefits administration selection. It also includes consulting relating to recordkeeping, compliance, and other TPA services; medical management, disease management, and pharmacy benefit management services; and participation in group purchasing organizations and preferred vendor panels.

For a covered service provider's compensation to be considered reasonable, the service provider must disclose specified information in advance and in writing to a responsible plan fiduciary (generally a fiduciary with authority to cause the plan to enter into, extend, or renew the contract). Broadly, the disclosure must describe the services to be provided, indicate whether the service provider expects to be a plan fiduciary, and describe all forms of direct and indirect compensation the service provider expects to receive in connection with the arrangement, including the manner in which compensation will be received.

As the employer plan sponsor, your company will need to evaluate the reasonableness of compensation payable to a covered service provider, using the disclosed information to inform that analysis. A plan fiduciary will not be considered to have engaged in a prohibited transaction due to a covered service provider's failure to disclose the required items if the fiduciary reasonably believed the service provider would make the disclosures, requests the information in writing, and notifies the DOL if no response is received within 90 days. In addition, the fiduciary must determine whether to terminate or continue the contract, acting in accordance with the general fiduciary duty

of prudence. If the agreement relates to future services, the fiduciary must terminate the contract or arrangement “as expeditiously as possible, consistent with such duty of prudence.”

Keep in mind that DOL guidance provides a temporary enforcement policy for these disclosure requirements under which the DOL will not treat a covered service provider as having failed to make the required disclosures so long as the service provider made disclosures in accordance with a good faith, reasonable interpretation of the requirements. Plan fiduciaries are also expected to implement the requirements using a good faith, reasonable interpretation.

For more information, see EBIA’s ERISA Compliance manual at Section XXVIII.D.7 (“Reasonable Arrangements With Third-Party Service Providers”) and EBIA’s Self-Insured Health Plans manual at Section XXIII.C.5 (“Service Provider Compensation Must Be Reasonable”).

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