



Ivins Phillips Barker

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Health and Welfare Plan Fiduciary Training

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Potential legal exposure arising from health and welfare plan administration should be a major concern for plan sponsors. Health plan vendor selection and oversight are targets for fiduciary breach lawsuits under ERISA, and recent legislative changes requiring health plan pricing and vendor fee disclosures increase the data points that plan fiduciaries should consider. These new cost transparency requirements present both an opportunity for plan sponsors to reduce costs and a challenge for plan fiduciaries to ensure excess costs are not passed to participants. The prominent 401(k) class action firms now see health plans as an inviting target. Last summer, for example, the Schlichter law firm posted LinkedIn advertisements looking for potential health plan plaintiffs at dozens of companies. More recently, Johnson & Johnson was targeted with a suit focused on allegedly wasteful and abusive pharmacy benefits related activities.

To address these possible fiduciary concerns, employers should consider strengthening their health plan fiduciary processes. Many employers do not have robust fiduciary structures supporting their health plans, and many individuals currently involved in plan oversight may be unaware of their functional fiduciary status and the scope of their responsibilities and potential liabilities. To address these challenges, IPB has developed a fiduciary training module to educate welfare plan fiduciaries about their risks and responsibilities so they can address any potential areas of weakness.

The following is an outline of key topics IPB's health and welfare plan fiduciary training program addresses:

1. **Plan Governance Structure.**

- Who are the responsible fiduciaries? Should there be a health and welfare plan oversight committee?
- What monitoring should be done by those responsible for appointing fiduciaries?
- Who makes or should make the vendor selections?
- What is the appropriate background needed to assess vendor qualifications, service quality and fee and pricing structure?
- What outside consultants should be engaged? How should employers address any conflicts of interest that may arise in connection with the use of outside consultants?
- Are the functional plan fiduciaries aware of their fiduciary status and should they be covered by corporate indemnification and fiduciary liability coverage?

2. **Plan Terms/Documentation.**

- What is a fiduciary's responsibility for plan documentation including the adoption of plan documents, policies, and procedures?
- What issues arise when a Summary Plan Description simultaneously serves as the plan document?
- Are delegations of fiduciary and administrative authority adequately documented and consistent with the employer's intent?
- Do the correct plan fiduciaries have the discretionary authority needed to interpret plan provisions and administer the plan?
- Do plan terms address the treatment of plan assets and the use of amounts received by the plan (e.g., demutualization provisions, refunds, rebates, forfeitures from uncashed checks, subrogation recoveries, etc.)?
- Is the plan designed to meet non-discrimination rules?

3. **Key Plan Operational Issues for Fiduciary Review.**

- What are a fiduciary's obligations to review plan operations and ensure compliance with the plan documents?
- Are eligibility determinations made consistent with legal requirements and plan documents? Are there reasonable and consistent procedures for confirming dependent eligibility?
- How should vendor qualifications and service quality be assessed as part of the selection process?
- What benchmarks should be used to assess vendor selection and performance?
- What specific issues have arisen in connection with pharmacy benefit operation – including PBM fees (benchmarks and spread pricing, rebates), formulary evaluation and selection, claims administration, broker conflicts?
- How should vendor performance be monitored?
- How should a fiduciary ensure that required participant disclosures are sent (SPDs, SMMs, COBRA, Newborns' Act, Family Leave, QMCSO, WHCRA, Medicare Part D, surprise billing)?
- What specific responsibilities and potential exposure does a plan fiduciary have for compliance with mental health parity requirements?
- What issues commonly arise in administering Health Savings Accounts – including possible disqualifying coverage, comparability requirements, and ERISA status?

4. **Claims Management and Oversight.** Claims processing typically is handled by a third-party administrator or insurer, but the plan administrator is responsible for establishing a compliant process and monitoring claims and appeals administration including:

- ERISA required procedures and applicable deadlines.
- Explanations needed to ensure claims decisions are adequate.
- Potential penalties and other consequences that apply for failing to follow ERISA requirements.

- How a plan fiduciary ensures consistency of claims decisions.
 - What an adequate claims audit program looks like.
 - Subrogation procedures and practices that are reasonable and compliant with plan terms.
 - Payment mechanics including procedures for dealing with uncashed checks and recovery of overpayments.
 - Other procedures a plan fiduciary should consider given aggressive health provider activities (for example, plan provisions prohibiting assignment of claims, ensuring participants are knowingly and voluntarily naming authorized representatives, or imposing a reasonable limitations period for commencing litigation).
5. **Fees.** Any ERISA plan fiduciary should consider plan fees. What common fees should the fiduciary be familiar with?
- Broker fees – insurance brokers receive commissions as well as loyalty bonuses involving insurance products.
 - Consultants – insurers often pay longevity and loyalty fees to plan consultants even if plans are self-funded.
 - Health provider pricing – new provider price transparency requirements apply.
 - Vendor drug rebates, repricing revenue, savings fees, and other TPA and PBM fee markups.
 - Other indirect compensation arrangements that may arise such as, for example, from subrogation recovery or cross-plan offsetting arrangements.
6. **TPA and Vendor Agreements.** What should a prudent plan fiduciary consider in contracting with third-party vendors?
- Risk provisions including indemnification, liability limitation, and insurance commitment provisions.
 - Responsibility for design of services.
 - Fee disclosures and “reasonable compensation.”
 - Confidentiality, privacy, data security, offshoring, and fraud.
 - Other compliance issues such as prohibition on gag clauses, balance billing restrictions, cross-plan offsetting, fiduciary responsibility in private exchange context, etc.
 - Exclusivity, prohibited transactions, and other vendor template traps.
 - Performance standards and measurements.
 - Termination rights and transition obligations.
 - Responsibility for subcontractors.
 - Plan administrator audit rights.
7. **Privacy and Security.** Participant data including health information must be protected by plan terms and adequate safeguarding processes. Plan fiduciaries have a responsibility to establish and implement adequate privacy and data security protections including:

- Adherence to HIPAA privacy requirements.
- Cybersecurity protections consistent with HIPAA and DOL guidelines.
- Reasonable data breach notification protocols.
- Oversight of contractors and subcontractors managing participant data.
- Use of data collected by wellness programs or third-party apps contracted for plan services.