

LEGAL UPDATES

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Services

Employee Benefits &
Executive
Compensation

Retirement, Health,
& Welfare Plans

Professionals

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New Fee Disclosures for Health Plan Consultants and Brokers

The Consolidated Appropriations Act, 2021, expands the service provider compensation disclosure rules to group health plans. Under Section 408(b)(2) of ERISA, any covered service provider that expects to receive at least \$1,000 in **direct or indirect compensation** for providing brokerage or consulting services to a group health plan will be subject to the new disclosure requirements. The service provider must provide the plan fiduciary with a description of the services to be provided and the type of compensation that it reasonably expects to receive before a service contract is entered into or renewed.

Below is a summary of the new rule.

Covered service provider

A “covered service provider” is defined to mean a service provider (or an affiliate) that expects to receive \$1,000 or more in direct or indirect compensation, to be received in connection with the following services:

1. Brokerage services, which includes:
 - selection of insurance products;
 - recordkeeping services;
 - medical management vendor;
 - benefits administration (including vision and dental);
 - stop-loss insurance;
 - pharmacy benefit management services;

wellness services;

transparency tools and vendors;

group purchasing organization preferred vendor panels;

disease management vendors and products; and

compliance services, employee assistance programs, or third-party administration services.

2. Consulting, which includes the brokerage services described above, plus any assistance with plan design.

Indirect compensation

The new rule defines “indirect compensation” to mean compensation received from any source other than group health plan, the plan sponsor, the covered service provider, or an affiliate. The definition further notes that compensation received from a subcontractor is indirect compensation, unless it is received in connection with services performed under a contract or arrangement between the subcontractor and health plan.

Enhanced disclosure requirements

The new disclosure rule will require the “covered service provider” to disclose to a responsible plan fiduciary, in writing, the following non-exhaustive list of items:

1. A description of the services to be provided to the group health plan;
2. Whether the service provider will provide services as a fiduciary;
3. A description of all compensation received directly from the health plan;
4. A description of all indirect compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive;
5. A description of the arrangement between the payer and the covered service provider, an affiliate, or a subcontractor, as applicable, pursuant to which such indirect compensation is paid;
6. A description of any compensation that will be paid among the covered service provider, an affiliate, or a subcontractor, in connection with the services to be provided if such compensation is set on a transaction basis (such as commissions, finder’s fees, or other similar incentive compensation based on business placed or retained);

7. Identification of the services for which such compensation will be paid and identification of the payers and recipients of such compensation (including the status of a payer or recipient as an affiliate or a subcontractor); and
8. A description of any compensation that the covered service provider, an affiliate, or a subcontractor reasonably expects to receive in connection with termination of the contract or arrangement, and how any prepaid amounts will be calculated and refunded upon such termination.

Impact on plan sponsors

Similar to the service provider disclosure rules applicable to 401(k), profit sharing, pension and other qualified retirement plans, if such disclosure does not satisfy these requirements, the compensation paid to the service provider will be, by definition, “unreasonable.” Accordingly, the payment of the compensation to the service provider will result *per se* prohibited transaction under ERISA giving rise to potential excise taxes and other fiduciary enforcement action.

In theory, a fiduciary may escape liability resulting from the service provider’s failure to provide the required disclosures. However, the fiduciary must first notify the service provider and request the information in writing. The fiduciary must also notify the Department of Labor.

The Department of Labor of course is expected to issue guidance on these new rules. At this point, we recommend health plan fiduciaries, who are employed at the plan sponsor, to begin to gather information that is required to be disclosed, and determine the potential universe of covered service providers. Ultimately, the fiduciaries will need to determine whether the compensation received by covered service providers is “reasonable,” which generally requires that fiduciaries compare and contrast services and fees among different service providers.

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.