

## **Employers' Fiduciary Responsibility and PPACA**

For most employers, fiduciary responsibilities have been difficult to manage, but with the addition of the Patient Protection and Affordable Care Act (PPACA), many employers may not be aware of what they do not know.

First, let's review the definition of a fiduciary. In general terms, a fiduciary is the person(s) who makes decisions regarding the administration of the health plan. The person(s) acts on behalf of the participants in the group health plan and their beneficiaries. Therefore, the fiduciary must carry out duties prudently, follow plan documents that meet the Employee Retirement Income Security Act of 1974 (ERISA) guidelines, pay reasonable expenses and hold plan assets in trust, if applicable. ERISA is in place to provide for the protection of the retirement assets of Americans by making sure the fiduciary does not misuse the funds.

The law requires full time employees or equivalent (30 hours or more per week) to be covered under PPACA.

Before moving forward with a discussion of fiduciary responsibilities, it is important to understand some terms and conditions included in the PPACA. First, a plan that is grandfathered is any health plan that was in force prior to March 23, 2010 and meets certain criteria. If a plan is grandfathered, there are certain PPACA mandates those plans are not required to meet. However, a plan will lose grandfathered status if it does any of the following:

- Significantly cuts benefits for a specific condition.
- Increases the copayments, deductible or out-of-pocket limits above medical inflation plus 15%.
- Decreases the employer portion of the premium payment or contribution by more than 5% of what it was on March 23, 2010.
- Decreases the limits or changes annual limits to lower than lifetime limits.

Note all plans, regardless of whether or not they are grandfathered, must comply with certain provisions of the PPACA. A few of these include:

- Allowing adult children to stay on or be added to the parents' policy until age 26.
- Not having waiting periods exceeding 90 days.
- Not imposing cost-sharing of more than a set limit (adjusted each year for inflation). The limits as of 2014 are \$5,000 for an individual and \$10,000 for a family.
- Not allowing exclusion of pre-existing conditions (changes in the rates or denying coverage for anyone who has a health condition).
- May offer up to a 30% discount in premium for those employees participating in a wellness program.

This brings us back to fiduciaries. Many fiduciaries hire someone with expertise to carry out certain functions. According to the U.S. Department of Labor's Employee Benefits Security Administration, the following are key considerations for employers and employees going forward as it relates to the PPACA:

- One of the nondiscrimination requirements currently is to tax benefits received by the highly compensated employees which the PPACA will extend to all insured plans (except grandfathered plans). This has not yet been made effective, but likely will be.
- Employers with 50 or more full-time employees or equivalent will be required to offer minimum essential health coverage or pay a fine of up to \$2,000 per year for each full time equivalent (FTE) in excess of 30 FTEs if any employee receives a premium tax credit on the exchange.

For example, if there are 70 FTEs and the employer has to pay the fine, it would be based on the remaining 40 employees (70-30). If an employer fails to pay at least 60% of its actuarial value (costs more than 9.5% of household income), then the employer must pay a penalty up to \$3,000 per year for each FTE who receives credit on the exchange. This applies to grandfathered plans. Individuals have separate tax penalties.

- At some point employers with 200 or more employees with a health plan will have to automatically enroll new full-time employees in a health plan and must have a procedure in place to do so. They must also give the employee the option to opt out.
- Large employers (with at least 40 FTE) must submit annual health returns to FTEs and the IRS. This document certifies coverage for the employer's employees, describes plan participation, waiting periods, and outlines the lowest cost premium option as well as other information.
- Unless a plan is grandfathered, it cannot discriminate against an individual who participates in a clinical trial and may not place conditions on a person in a clinical trial.
- Employers are responsible for proper and timely communication to employees of options or alternates regarding health plans. As a part of proper communication, the summary of benefits must be in plain language that all employees can understand and include (1) the employees' rights and responsibilities under the plan, (2) ERISA and HIPAA responsibilities, (3) any network procedures and/or providers, (4) cost-sharing and (5) any pre-authorization requirements.
- The plan must provide for timely review of benefit denials and appeals.

Some additional fiduciary responsibilities include making sure any salary reductions from employees' paychecks for contribution to the plan are put in trust in a timely manner and kept segregated from company assets. These funds must also be deposited no later than 90 days from date of contribution (per the May 2013 U.S. Department of Labor Employee Benefit Security Administration).

Due to the requirements placed on the employer under the PPACA, it is important to have appropriate fiduciary liability coverage. The fiduciary liability insurance needs to be as broad as possible to cover this new exposure. Some insurers have added language to provide a sublimit of coverage for payment of civil money penalties arising out of PPACA and a sublimit for IRS Section 4975 civil money penalties. For example, if the limit of liability is \$1,000,000, there may be a sublimit of \$50,000 for civil money penalties.

The limits, deductibles or retentions, terms, conditions and exclusions need to be reviewed. Potential claims are anticipated concerning the manner in which a plan implements or administers a coverage mandate, how the information is communicated to participants and coverage for essential health benefits. An example could be claims for realignment of the workforce. An employer cannot terminate an employee or reduce an employee's work hours solely to avoid providing health insurance. This could be interpreted as a violation of ERISA Section 510 and could include fines, penalties, lost wages, value of the benefit and attorney fees.

There are no standard coverages, terms, conditions or exclusions when it comes to fiduciary policies, so the following should be considered:

- Definition of insured - Does it include coverage for the plan, former and current trustees, employees?
- Definition of wrongful act - Does it include breach of fiduciary duty under COBRA, HIPAA and PPACA, errors and omissions in the administration of employee benefits?
- Coverage for fiduciary exposures - Does it include improper advice or disclosure, inappropriate selection of advisors, imprudent investors, breach of responsibilities, conflicts of interest with regard to investments, sublimit to cover increased civil penalties imposed by the PPACA, negligence in the administration of the plan, settlor exposures?
- Does the fiduciary liability policy provide coverage for voluntary compliance programs, regulatory correction programs through the IRS, employee plan compliance resolution system (EPCRS), self correction of retirement plan errors (SCP)?
- Other policy considerations include:
  - Who has the duty to defend?
  - Who has choice of counsel?
  - Is the policy non-cancellable except for nonpayment of premium?
  - Does it have coverage for full prior acts?
  - What are the extended reporting period parameters?
  - What are the notice conditions for a potential claim?
  - Is there a waiver of recourse provision?
  - Is there a severability of insureds provision?

At T.E. Brennan Company, we review our clients' policies with these concerns in mind. We offer an impartial, considered analysis so our clients can make an informed decision that is right for them.

## Resources

U.S. Department of Labor's Employee Benefits Security Administration & subsection  
"Understanding your fiduciary responsibilities under a group health plan."

Insurance Journal National, July 7, 2014

[www.healthcare.gov](http://www.healthcare.gov)

*Disclaimer: Nothing contained in this article is to be considered legal advice. We encourage you to discuss these issues with an attorney who specializes in employment law.*

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