

Healthcare Compliance Checkup

Executive Member Benefit

Self-Funded Plan



example

Agenda



Background



What's your risk?



How to reduce
your risk?



Appendices

Agenda



Background



What's your risk?



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your risk?



Appendices

Background

Hospital Price Transparency Rule

- Effective: January 1, 2021
- Fines set to increase January 1, 2022

Consolidated Appropriations Act

- Effective: Immediate + phase in – January 1, 2022

Transparency in Coverage Rule

- Effective: January 1, 2022 + phase in – 2024

Background

Key Details

Firmly establishes the employer / plan sponsor as a Fiduciary of the health plan

Requires disclosure of direct & indirect vendor compensation (charged to the plan)

Requires removal of gag clauses from plan contracts

Requires detailed reporting of prescription drug metrics to HHS, DOL and IRS

Fiduciary Duties According to the DOL

- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carry out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Hold plan assets (if any) in trust; and
- Pay only “reasonable” plan expenses

UNDERSTANDING YOUR FIDUCIARY RESPONSIBILITIES UNDER A GROUP HEALTH PLAN



The Alternative

P&I Pensions & Investments

BlackRock to pay \$9.7 million settlement over ERISA allegations

BlackRock to pay \$9.7 million settlement over ERISA allegations ... agreed to settle a long-running class-action lawsuit alleging violations of the ... in the firm's employee 401(k) plan with a payout to participants of \$9.7 million.

Mar 25, 2021



National Association of Plan Advisors

Schlichter Strikes a \$40 Million Settlement

The amount of attorneys' fees for Class Counsel shall not exceed ... The settlement notes that "after over four years of litigation, a ... Retirement Services—as record keeper for the 401(k) plan, "rather than obtaining bids."

Oct 15, 2020



IN InvestmentNews

401(k) lawsuit costs Fidelity \$28.5 million

The settlement resolves a class-action case that alleged the firm breached its fiduciary responsibility to plan participants ... Fidelity Investments is ...

Jul 2, 2020



B Bloomberg Law

IBM 401(k) Lawsuit Settles for \$4.75 Million After SCOTUS Trip

IBM Corp.'s retirement plan committee signed a \$4.75 million class settlement in an ERISA lawsuit challenging a 7% drop in company stock price, ...

Apr 5, 2021



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Summary of Prohibited Language in Your Contracts

- “Gag clauses” seek to limit your access to and / or use of plan data
- These clauses often define plan data as proprietary, confidential, and owned by a third-party service provider
- This language is now prohibited and must be removed from all plan contracts in advance of signing or renewal

TILT reviewed five plan contracts on behalf of eXample and identified **seven** paragraphs containing prohibited language.

Appendix 1: Plan Contract Review



PLAN CONTRACT REVIEW

In association with our Fiduciary Procurement Process Implementation project, TILT reviewed the following contracts for language that may be prohibited under the Consolidated Appropriations Act of 2021 (CAA):

- Mercer Engagement Letter
- Regence Administrative Service Contract
- Regence 2021 ASC Amendment
- Select Health AS Agreement
- Select Health 2021 ASA Amendment

In doing so, we identified seven paragraphs for review, which may contain language that is not compliant with the CAA.

Mercer Engagement Letter, page 2, section 2, paragraph C:

You hereby grant us a perpetual, non-exclusive, royalty-free license to copy, modify and use any information and data supplied by you or on your behalf so that we may create analytical trend data (in anonymous form) and in order to improve the quality of our advice to our clients. We will not disclose any information in a manner that allows particular clients or individuals to be identified.

Regence Administrative Service Contract, page 5, section 1, paragraph 17:

Proprietary Materials specifically includes any data and information, including any data provided to Plan Sponsor or GHP in the form of a data extract or otherwise, related to the composition of the Regence network of Participating Providers, the contracted (or "allowed" amounts) paid to Participating Providers, the terms of the agreement between Regence and the Participating Providers, and the discounts to Regence offered by Participating Providers. Proprietary Materials also consist of any analyses, compilations, studies or other documents created on the basis of other Proprietary Materials.

Regence Administrative Service Contract, page 22, section 13, paragraph 2:

The Parties agree that records and documents that constitute "protected health information" as that term is defined in 45 CFR 160.103 and that



pertain to administration of the GHP will be and remain the joint property of the GHP and Regence. All Proprietary Materials are the sole property of Regence. Regence will have the right to protect the confidentiality of the Proprietary Materials and will not be required to make such Proprietary Materials available to anyone. Plan Sponsor agrees to maintain the confidentiality of any Proprietary Materials Regence provides, and Plan Sponsor will not provide any Proprietary Materials to any other person, including any data extracts or summary information, except to the extent such Proprietary Materials have been made available to the public without fault of the Plan Sponsor.

Regence Administrative Service Contract, page 23, section 13, paragraph 7:

At Regence's sole discretion, Regence will provide access to its contracts with Participating Providers only (i) for the purpose of ensuring that a claim was correctly paid by the claims processing system at the appropriately contracted rate, and (ii) only in a manner that Regence deems would protect the confidential and/or proprietary information contained therein. This reservation of right pertains not only to the actual contracts but also to any data, reports or other information generated from which the terms of the contracts could be determined, which are considered Proprietary Material under Section 1.17 of this Agreement.

Regence 2021 ASC Amendment, page 20, section B, paragraph 4:

Comingling. The GH P will comingle Proprietary Inter-Plan Materials with other non-Blue Cross and/or Blue Shield licensee information or data only for the following purposes or with Regence's prior written approval:

Select Health AS Agreement, page 11, section 6.2, paragraph C:

SelectHealth may aggregate protected health information and produce statistics to describe and/or analyze protected health information. SelectHealth may share such statistics with its affiliated companies, and SelectHealth and its affiliated companies may disclose such statistics, so long as they do not contain protected health information and do not identify the Health Plan or Employer.

Select Health AS Agreement, page 11, section 6.3, paragraph A:



As a result of this Agreement, the parties and their respective agents may have access to information of a proprietary nature owned or licensed by the other, such as information concerning the other's systems, technology, programs, computer programs, processes and methods (collectively, "Proprietary Information"). Proprietary Information excludes protected health information. SelectHealth and Employer both acknowledge that the Proprietary Information of each has great value and, if disclosed or used in violation of this Article VI would cause the other immediate and irreparable injury. SelectHealth, Employer, and their respective employees and agents, agree to not disclose or disseminate to anyone, or use for their own benefit, any Proprietary Information of the other except as contemplated by this Agreement.

The CAA specifically prohibits a group health plan from entering into any agreement with a service provider that would restrict the plan from:

- Providing provider-specific cost or quality of care information, and/or
- Accessing de-identified claims and encounter information

Furthermore, the CAA requires the plan to submit an annual attestation that that all contracts are in compliance with these requirements. We encourage you to review the above contracts and paragraphs, and negotiate any appropriate changes in advance of renewal.



Current eXample Plan Design

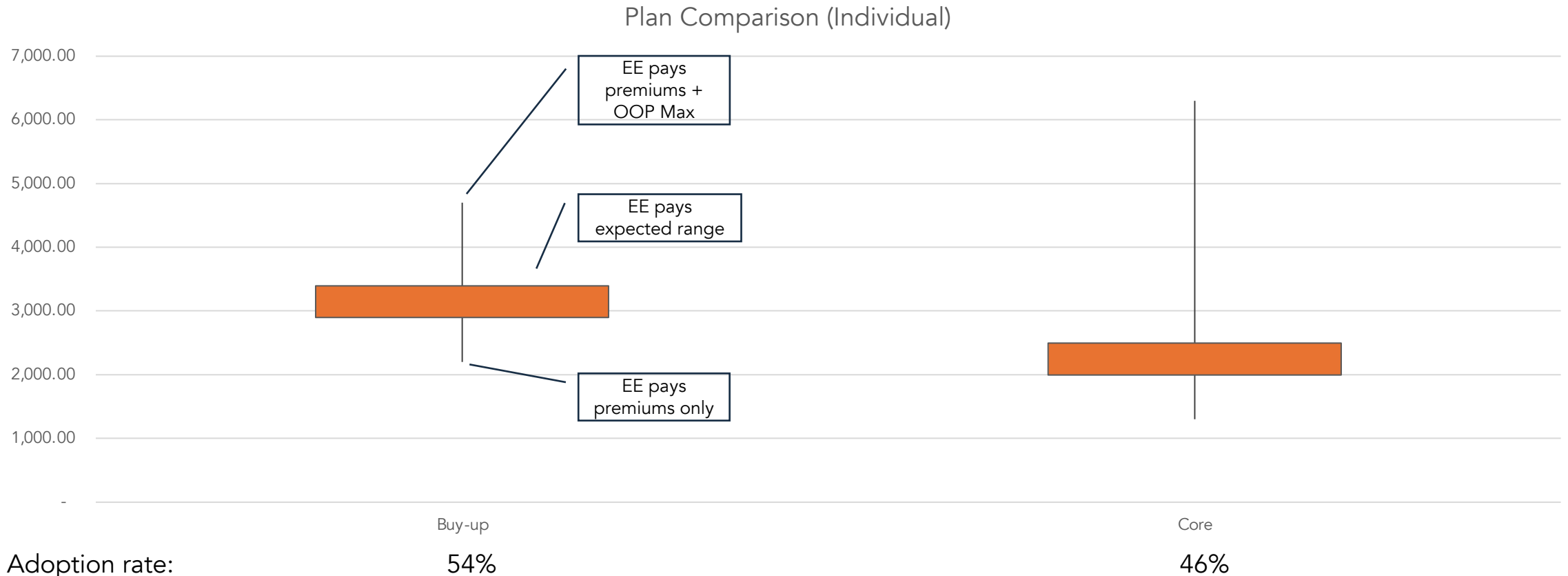
Buy-up plan

- Deductible: \$1,000 / \$3,000
- Max Out of Pocket: \$2,500 / \$5,000
- EE Premium: \$173.33 / \$507.00

Core plan

- Deductible: \$2,500 / \$7,500
- Max Out of Pocket: \$5,000 / \$10,000
- EE Premium: \$104.00 / \$312.00

Current eXample Plan Design Individual



Is the Buy-up Worth it?

Individual

Deductible savings

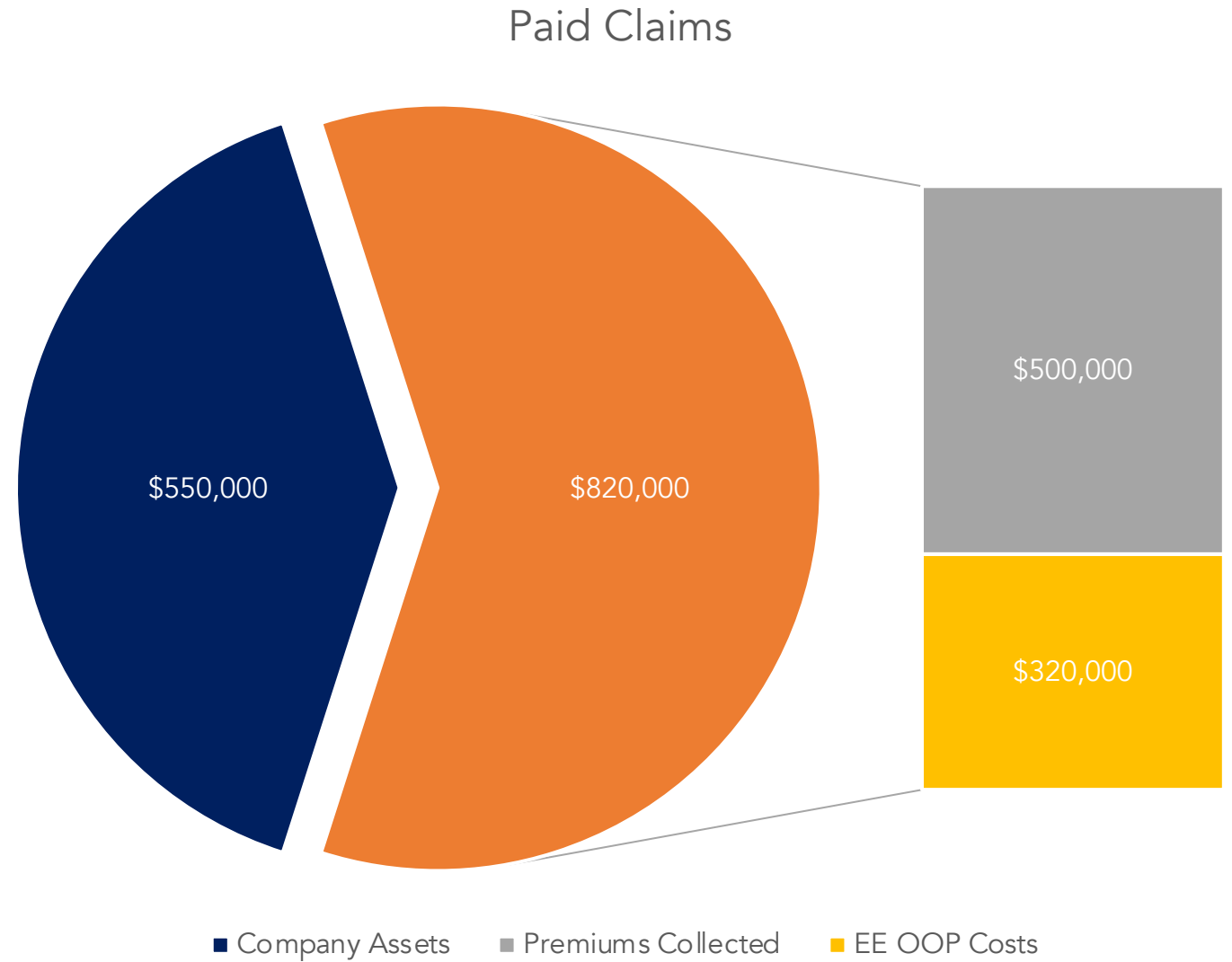
- Deductible difference: \$1,500
- Annual premium difference: \$832
- Deductible reached: 1 x 3 years
- Additional cost: $\$832 * 3 = \$2,496$
- Savings: $\$1,500 - \$2,496 = -\$994$

Max Out of Pocket savings

- MOOP difference: \$2,500
- Annual premium difference: \$832
- MOOP reached: 1 x 10 years
- Additional cost: $\$832 * 10 = \$8,320$
- Savings: $\$8,320 - \$2,500 = -\$5,820$

example

Medical Claims Review



Your Estimated Risk: $\$820,000 \text{ per year} \times 7 \text{ years} = \$5,740,000$

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Frist Steps: What eXample should do now



Establish & document a fiduciary process

- Fiduciary process
- Fiduciary committee
- Conflict free



Remove "gag clauses"

- Review contracts
- Negotiate removal of prohibited language



Benchmark broker compensation data

- Gather compensation information
- Compare costs & services to determine "reasonableness"

Fiduciary Process

1. Engage

- Acknowledge your new role
- Secure agreements

2. Explore

- Collect information
- Identify risks

3. Envision

- Review existing plan
- Develop strategy

4. Execute

- Document decisions
- Audit process

5. Examine

- Reporting
- Review outcomes

Appendix 3: Committee Charter

Charter and Responsibilities of the [COMPANY] Health Committee

Purpose:

To provide oversight of ERISA Health & Welfare Plans and Non-ERISA Plans sponsored by [COMPANY] or its subsidiaries and/or affiliates (collectively referred to as the "Company"). Such plans and arrangements are set forth on Attachment A, and are categorized as "ERISA Plans" or "Non-ERISA Plans" and are collectively referred to as the "Plans."

Composition:

The [COMPANY] Health Committee (the "Committee") will consist of at least three, but no more than five, voting members. Initial members of the Committee shall be appointed by the Board of Directors of the Company (the "Board"). Members may be removed by, and future members may be appointed and removed by, the Board.

Committee Responsibilities and Authority:

- Act as a "Named Fiduciary" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), with respect to the oversight, control and management of (a) the objectives of such ERISA Plans, (b) the assets of the ERISA Plans, (c) the investments and funding policies of such ERISA Plans.
- Operate the ERISA Plans for the sole benefit of the participants.
- Approve the health plans offered under the Plans.
- Approve the appointment of vendors for the Plans, and the policies and operating procedures governing service providers.
- Appoint and retain service providers to assist in the administration of the Committee's duties under this charter and under the Plans, including such legal, clerical, accounting, consulting and actuarial services as it may require or as may be required by any applicable laws or regulations.
- Establish and periodically review the policies and/or guidelines of the Plans.
- Periodically review the performance Plan vendors and service providers to determine the effectiveness of services provided and "reasonableness" of fees.
- Receive, review and keep on file reports of ERISA Plan performance, financial condition, receipts and disbursements of assets of the ERISA Plans.
- Review and approve expenses charged to the ERISA Plans.

- Vote proxies on behalf of the Plans to the extent responsibility to vote such proxies has not been allocated to investment managers.
- Hold regular meetings, prepare reports (or require Company officers, employees, and/or service providers to prepare reports), and be available to report to the Board on matters as the Board deems appropriate.
- Act by a vote of the majority of Committee members present at a meeting, or by unanimous written consent. A majority of the Committee members shall be present to constitute a quorum for a meeting.
- Prepare an annual report regarding the ERISA Plans for the Board.
- Appoint and remove the trustee for the Plans and the Plans' trust, and enter into a written trust agreement with the trustee and provide direction to the trustee, which may involve but need not be limited to direction of investment of all or part of the Plan assets and the establishment of investment criteria.
- Enter into such contracts and agreements as it deems desirable or necessary for carrying out the duties of the Committee, as set forth in this charter or in the Plans.
- Appoint such subcommittees as it deems necessary or desirable. Members of any subcommittee serve at the pleasure of the Committee and may resign at any time by giving written notice to the Committee. Subcommittees shall have such responsibilities as determined by the Committee and shall report to the Committee at such times as determined by the Committee.
- Delegate to one or more persons, subcommittees, or committees such powers and duties as it determines. A delegate may (but need not) be an employee of the Company or an affiliate.
- Delegate, in writing and in accordance with Plan documents, day-to-day management of the Plans investments. Any such delegate shall serve at the pleasure of the Committee and may resign his or its duties by giving written notice to the Committee (unless the Committee and a delegate have agreed that a different procedure is applicable to such delegate). A delegate shall report to the Committee at such times as determined by the Committee. The Committee shall monitor the performance of any delegates.

Indemnification:

- To the maximum extent permitted by applicable law, the Company shall indemnify and hold harmless each member of the Committee against any and all claims, demands, lawsuits, losses, liabilities, damages, costs and expenses, including counsel fees, incurred by such person and any liability, including any amount paid in settlement with the Committee's approval, arising from the person's action or failure to act relating to the Plans. To the maximum extent

permitted by applicable law, no member of the Committee shall be liable for any act or omission of any other member of the Committee or other director, officer, or employee of the Company. The rights of indemnification provided hereunder shall be in addition to and without limiting any right to which any person concerned may otherwise be entitled to by contract or through the Company's certificate of organization or operating agreement, including, without limitation, the right to receive advances in respect of indemnification rights, or as a matter of law, and shall inure to the benefit of the heirs, executors, and administrators of any such person. The Board, at the Company's or any affiliated employer's expense, may settle any such claim or demand asserted, or suit or proceeding brought, against any member of the Committee (or its delegate) when such settlement appears to be in the best interest of the Company. The foregoing indemnification shall also extend to any individual (or the members of any committee) who is delegated any fiduciary responsibility under this Plan by the Committee. Nothing in this Section shall be deemed an admission or construed as evidence that the Committee or any member thereof is a Plan fiduciary for any particular circumstance or purpose.

Appendix 5: Compensation Disclosure Worksheet



Covered Service Provider Disclosure Information

The Consolidated Appropriations Act of 2021 (CAA) amends ERISA Section 408(b)(2) and requires service providers to disclose specific information to group health plan fiduciaries.

Who is covered by these disclosure requirements?

A Covered Service Provider (CSP) is a service provider that enters into a contract with a group health plan and reasonably expects to receive \$1,000 or more in direct or indirect compensation in connection with services provided to the plan.

What information must be disclosed?

All CSP must disclose the following information, in writing, to a responsible plan fiduciary:

- Description of services provided to the plan
- Fiduciary status disclosure (will the services be provided in a fiduciary capacity?)
- Description of all direct compensation
- Description of all indirect compensation
- Description of all transactional compensation
- Description of all termination compensation

Which kinds of plans subject to this disclosure?

The disclosure requirements apply to all ERISA-covered group health plans including:

- Medical / prescription drug plans
- Dental plans
- Vision plans
- Health Flexible Spending Account (FSA) plans
- Health Reimbursement Arrangement (HRA) plans

When is disclosure required?

All CSP must disclose this information in advance of the date the contract is expected to be signed or renewed.

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Covered Service Provider Disclosure Worksheet

As a Covered Service Provider, please complete the following disclosure worksheet and return it to your plan contact as soon as possible.

Covered Service Provider:

Employer / Plan Sponsor:

Description of Services:

(Please note if each service will be provided in a fiduciary capacity)

- 1.
- 2.
- 3.

Description of Direct Compensation:

- May be expressed as amount, formula, per capita charge, or any other reasonable method
- If additional compensation may be earned, also include a good faith estimate and a description of the circumstances under which the additional compensation will be earned

Description of Indirect Compensation:

- Identify the payer of the indirect compensation
- Identify the service(s) provided in association with the indirect compensation
- May be expressed as amount, formula, per capita charge, or any other reasonable method
- If additional compensation may be earned, also include a good faith estimate and a description of the circumstances under which the additional compensation will be earned

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Description of Transactional Compensation:

(Compensation based on business placed or retained, ex. commissions, finder's fees)

- Identify the payer of the indirect compensation
- Identify the service(s) provided in association with the indirect compensation
- May be expressed as amount, formula, per capita charge, or any other reasonable method
- If additional compensation may be earned, also include a good faith estimate and a description of the circumstances under which the additional compensation will be earned

Description of Termination Compensation:

(Any compensation associated with termination of the contract)

- Identify the payer of the indirect compensation
- Identify the service(s) provided in association with the termination compensation
- May be expressed as amount, formula, per capita charge, or any other reasonable method
- If additional compensation may be earned, also include a good faith estimate and a description of the circumstances under which the additional compensation will be earned

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What ERISA attorneys are saying

Determination of the appropriate medical plan to select is a different type of investment decision than investing in a 401(k) plan, but the same fiduciary principles are applicable.
- Marcia Wagner, Wagner Law Group

We believe that these rules will have a *significant impact* on health plan coverage — *more than anything else we have seen since the passing of the ACA*. It is a heavy lift for plans for the next few years. Plan sponsors should be sure that they have a basic understanding of the rules so that they can *create workstreams and budgets as soon as possible* in 2021.
- Mary E. Powell & Sarah Kanter, Trucker Huss



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What's your risk?



How to reduce
your risk?



Appendices

List of Appendices

1. Plan Contract Review
2. Establishing a Fiduciary Process for a Health Plan
3. Sample – Health Plan Committee Charter
4. Sample – Health Committee Conflict of Interest Policy & Disclosure Form
5. Broker Compensation Disclosure Worksheet
6. A Call to Action – Ballard Spahr LLP
7. Continuity of Care – Ballard Spahr LLP
8. Health Plan Fiduciaries – Ballard Spahr LLP
9. Prohibition Against Gag Clauses – Ballard Spahr LLP
10. Transparency Requirements – Ballard Spahr LLP
11. Understanding Your Fiduciary Responsibilities Under a Group Health Plan – US Department of Labor