The Leapfrog Consolidated Appropriations Act Compliance Webinar Series

Session 4: Employers & Purchasers: It's Time to Refresh Your Contracts with Consultants and Brokers in Light of CAA

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COMMITTEE FOR FEE-ONLY BENEFITS ADVISORS

The Great Re-Evaluation

Broker/Consultant Compensation

Tuesday, June 21st, 2022 at 12:00pm | CAA Compliance Series

Darren Fogarty | Executive Director

Agenda

- Setting the Stage
- The Fiduciary Obligation of Plan Sponsors
- How the CAA Modifies ERISA Requirements
- What You – The Plan Sponsor – Must Do Now
- Re-Evaluating Your Broker/Consultant Contract
- What Employers Should Demand in a Benefits Professional

Setting the Stage

- Upfront disclosure
- 7 years at a non-profit DC thinktank analyzing & advocating fiduciary issues in financial services
- 4 years at fee-based & fee-only employee benefits consulting firms
- Culminated in founding a Committee advocating the importance of direct fee compensation and transparency in the broker/consultant relationship

INSTITUTE FOR THE FIDUCIARY STANDARD

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The Fiduciary Obligation of Plan Sponsors

- Managing commingled assets originates and necessitates fiduciary liability.
- The DOL enforces this liability through ERISA.

Requirements

- Act solely and exclusively in the best interest of benefit plan participants.
- Pay *only* reasonable plan expenses.
- Abide closely by plan documents.
- Carry out one's duties prudently, which means with expertise and a thoroughly-documented process.

Note: Selecting the lowest cost option is decidedly *not* a fiduciary's duty.

* The DOL provides a more detailed overview of plan sponsor fiduciary responsibilities in its own booklet, "Understanding Your Fiduciary Responsibilities Under a Group Health Plan."

How the CAA Modifies ERISA Requirements

- <u>CAA's Goals</u>
  - To inject compensation transparency into an historically opaque space
  - To assist plan sponsors in evaluating and verifying reasonable plan expenses

- §202 of the CAA amends ERISA at 408(b)(2)(B)

> *[Effective December 27, 2021,] the new disclosure requirements . . . apply to persons who provide "brokerage services" or "consulting" to ERISA-covered group health plans who reasonably expect to receive $1,000 or more in direct or indirect compensation in connection with providing those services.*

* Quote excerpted from Field Assistance Bulletin No. 2021-03. Actual CAA amendments are granular modifications to pre-existing ERISA statutory language, which is hard to quote.

What You – The Plan Sponsor – Must Do Now

1. Request broker/consultant disclosure of direct & indirect compensation

Provides within 30 days →

2. Review info for reasonable expenses & conflicts of interest

Reasonable →

3. Thoroughly document your vetting process and continue onward

Does not provide within 30 days ↓

ERISA requires you to notify the DOL and terminate your contract within 90 days

X

Unreasonable or unduly conflicted? ↓

Issue RFPs and notice of termination, citing ERISA liability

X

Re-Evaluating Your Broker/Consultant Contract

- Brokers/consultants must disclose to your health plan in writing descriptions of:

    1. The services to be provided to your health plan,
    2. Compensation that will be paid by the health plan for the services it receives,
    3. All direct and indirect compensation the broker/consultant reasonably expects to receive in association with your account in excess of $1,000,
    4. Identifying information about the nature and the payer of those services, and
    5. Any compensation that the broker/consultant expects to receive upon contract termination, and how any prepaid amounts will be calculated and refunded.

- Ask for the compensation disclosure in terms of actual dollars & cents. Although this is *not currently required*,* it is a best practice and allows you to make meaningful comparisons.

* Per the Department of Labor's December 30, 2021 Field Assistance Bulletin, No. 2021-03. See **Q5** on page 5.

Re-Evaluating Your Broker/Consultant Contract

As a reminder, here are the sources of compensation the CAA specifically outlines:

1. Development or implementation of health plan design, insurance, or insurance product selection (including vision and dental benefits)
2. Recordkeeping
3. Medical management
4. Benefits administration selection (including vision and dental benefits)
5. Stop-loss insurance
6. Pharmacy benefit management (PBM) services
7. Wellness design and management services
8. Transparency tools
9. Group purchasing organization (GPO) agreements and services
10. Participation in and services from preferred vendor panels
11. Disease management
12. Compliance services
13. Employee assistance programs (EAPs)
14. Third party administration (TPA) services

* CAA Final Text (H.R. 133), at §202(a)(2)(B)(ii)(I)(bb)(AA) and (BB) on page 1714. (Search text for “Brokerage Services” or “Consulting”)

Re-Evaluating Your Broker/Consultant Contract

DOL issued guidance on December 30, 2021:

> “*The Department will not treat [covered service providers] as having failed to make required disclosures to a responsible plan fiduciary . . . as long as the [CSP] made disclosures in accordance with a good faith, reasonable interpretation. Further, ERISA provides conditional relief for responsible plan fiduciaries in connection with disclosure failures by [CSPs].*

However, this safe harbor is not guaranteed to last, and the CAA has *still* heightened employer’s fiduciary liability.


U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

FIELD ASSISTANCE BULLETIN NO. 2021-03

DATE:	DECEMBER 30, 2021
MEMORANDUM FOR:	MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT AMY TURNER, DIRECTOR OF FIELD ADMINISTRATION REGIONAL DIRECTORS
THROUGH:	TIMOTHY D. HAUSER DEPUTY ASSISTANT SECRETARY FOR PROGRAM OPERATIONS
FROM:	JOHN J. CANARY DIRECTOR OF REGULATIONS AND INTERPRETATIONS
SUBJECT:	TEMPORARY ENFORCEMENT POLICY REGARDING GROUP HEALTH PLAN SERVICE PROVIDER DISCLOSURES UNDER ERISA SECTION 408(b)(2)(B)

This memorandum announces the Department of Labor’s (Department) temporary enforcement policy for group health plan service provider disclosures under ERISA section 408(b)(2)(B). Section 202 of Title II of Division BB of the Consolidated Appropriations Act, 2021 (CAA) amended section 408(b)(2) of ERISA to require certain service providers to group health plans, as defined in section 733(a) of ERISA, to disclose specified information to a responsible plan fiduciary about the direct and indirect compensation that the service provider expects to receive in connection with its services to the plan. The new disclosure requirements in ERISA section 408(b)(2)(B) apply to persons who provide “brokerage services” or “consulting” to ERISA-covered group health plans who reasonably expect to receive $1,000 or more in direct or indirect compensation in connection with providing those services. The information required to be disclosed under ERISA section 408(b)(2)(B), which includes both direct and indirect compensation that is expected to be received in connection with a contract or arrangement between a covered service provider and a covered plan, generally must be disclosed reasonably in advance of the parties entering into such contract or arrangement. The required disclosures are intended to provide the responsible plan fiduciary with sufficient information to assess the reasonableness of the compensation to be received and potential conflicts of interest that may exist as a result of a covered service provider receiving indirect compensation from sources other than the plan or the plan sponsor. The CAA provides that the ERISA section 408(b)(2)(B) amendments apply beginning one year after the date of the CAA’s December 27, 2020 enactment, *i.e., December 27, 2021.*

TEMPORARY ENFORCEMENT POLICY

The Department is not issuing regulatory guidance at this time. However, the Department is aware that service providers and group health plan fiduciaries have questions about certain provisions of the new law. The Department is providing the following guidance and temporary enforcement policy to address such questions.

* December 30, 2021, [Field Assistance Bulletin](), No. 2021-03. See Temporary Enforcement Policy on page 2.

We Are Moving Into the "Less Formal" Guidance Section

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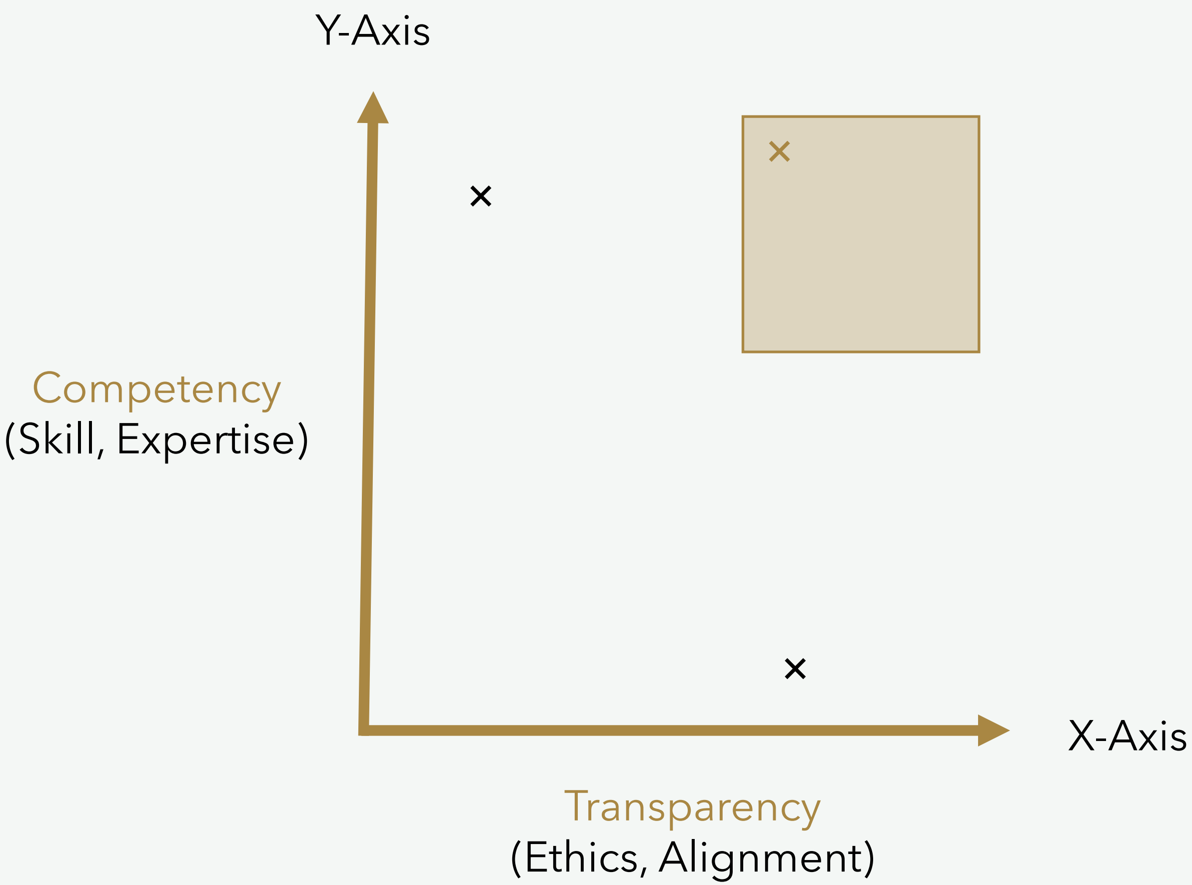
What Employers Should Demand in a Benefits Professional

- Compensation disclosure is the bar that must now be met, but it should be understood as the minimum threshold for compliance.

- The CAA presents a unique opportunity for plan sponsors to scrutinize broker/consultant business practices for transparency in other ways, too.

- Doing so not only demonstrates prudence and process, thereby inoculating one's company against future DOL audits; it is also consistent with the spirit of ERISA's new CAA amendments.

What Employers Should Demand in a Benefits Professional



- Transparency, by itself, is no guarantee a broker/consultant will be adept at helping you ensure reasonable health plan expenses from other vendors.
- Plan sponsors need someone who is skilled *and* ethical. The "Gold Box" is not too much to ask for – or to aim at.
- Who are you currently working with?

What Employers Should Demand in a Benefits Professional

Here are open-ended questions to ascertain broker/consultant competency & transparency:

1. How do you assist me in meeting my fiduciary obligation to my health plan members to pay only fair and reasonable expenses – to you, to our insurance carrier, and to all our third-party vendors?
2. Are you and your firm financially rewarded or penalized when our company's health plan's net expenses decrease? Why is that?
3. What specific experience does your firm have in reducing (not just "managing") healthcare costs while expanding or improving benefit offerings.
4. How do you ensure that you – and all our third-party vendors – fully and meaningfully disclose compensation to my company, so that I may comply with the Consolidated Appropriations Act?
5. What does "transparency" in this business relationship look like to you?
6. Can you give me a past example where you or your firm recognized and mitigated/eliminated a client conflict of interest?

Let's Open the Discussion Up

CAA has cracked wide open the discussion on broker/consultant compensation.

Employers – especially self-funded ones – have the responsibility & opportunity to re-evaluate how their service providers are bringing them value, and at what cost.

This is consistent with the greater healthcare price transparency movement.

We can't let this opportunity go to waste. Let's get these conversations started.

* For more information or to have further discussion on these issues, or others, reach out to Darren Fogarty at Darren@TheFiduciaryInstitute.org or on LinkedIn.

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Employee Benefits Broker, Consultant, or Advisor Checklist for Employers

Background

Employers who provide group health insurance to their employees owe those employees and dependents (collectively "members") a fiduciary obligation of loyalty, care, and prudence. This is because, much like employer sponsored 401(k) retirement and pension plans, health plans involve "commingled" funds. This means employee dollars are mixed with employer dollars, which in turn creates a trust.[*] Thus, the employer – and particularly the designated "plan sponsor" at the company (typically an HR executive or the CFO) – are "plan fiduciaries" and must act as such whenever they exercise discretion over health plan dollars.

How is an employer with relatively little expertise in managing healthcare dollars supposed to be a prudent fiduciary to health plan members? Traditionally, employers have relied on an employee benefits broker, consultant, or advisor to assist them in fulfilling these fiduciary obligations. When employers select a benefits professional, here is a list of questions they can use to help determine if the professional is competent, ethical and can therefore truly help the employer meet its fiduciary obligations.

Questions

- How do you assist me in meeting my fiduciary obligation to my health plan members to pay only fair and reasonable expenses – to you, to our insurance carrier, and to all our third-party vendors?
- Are you and your firm financially rewarded or penalized when our company's health plan's net expenses decrease? Why is that?
- What specific experience does your firm have in reducing (not just "managing") healthcare costs while expanding or improving benefit offerings?
- How do you ensure that you – and all our third-party vendors – fully and meaningfully disclose compensation to my company, so that I may comply with the Consolidated Appropriations Act?
- What does "transparency" in this business relationship look like to you?
- Can you give me a past example where you or your firm recognized and mitigated/eliminated a client conflict of interest?

The answers you receive to these questions will be your best guide in determining whether a benefits broker, consultant, or advisor will be a good partner for your business. Your chosen benefits professional will guide you through the important decisions you make for your company health plan. You want to work with someone who is competent, ethical, and whose incentives are aligned with your plan's success.

* * *

The Committee for Fee-Only Benefits Advisors is a voluntary effort to make transparent, fee-only compensation the benefits industry gold-standard. It aims to advance this mission through research and education to practitioners, policymakers, and the healthcare industry overall. For more information, please contact Darren Fogarty at Darren@TheFiduciaryInstitute.org.

[*] AICPA (February, 2017) "Master Trusts in Employee Benefit Plans," *Employee Benefit Plan Audit Quality Center*, at p. 1 [Link]