AMWINS™

Broker Transparency No Surprises Act

November 2021

Introduction

Kam Emery

Hamilton “Kam” Emery provides primary legal support for the Group Benefits Division in Amwins Groups’ legal team. Prior to joining Amwins, Kam spent ten years with Cambia Health Solutions, Inc. (Regence BlueCross BlueShield), a healthcare and insurance conglomerate located in the Pacific Northwest. Kam ran the Healthcare Legal Services Team, Regulatory Affairs Team, and the Benefits Compliance Division.

Throughout his legal career, Kam also played an active role in regulatory advocacy. Continuing those efforts with Amwins, Kam is a member of several industry groups and committees, including the Transparency Workgroup with CIAB.

Broker Transparency Disclosures (No Surprises Act)

1 Disclosures Apply if:

1. Enter into agreement with group health plan; and
2. Reasonably expect to receive at least $1,000 in compensation

2 All Forms of Compensation

- Compensation from Group (Direct): Compensation received directly from the covered plan (PMPM, etc.)
- Compensation from any other Party (Indirect): Any source other than covered plan (commissions, etc.)
- Contingent: Unknown at the time of placement

3 How to Disclose

- Waterfall Approach
- Staged Enforcement

No Surprise Act - Amended ERISA Section 408

New ERISA Section 408(b)(2): Bars an ERISA group health plan fiduciary from entering into, renewing, or extending a services contract or arrangement with a **"covered service provider"** that is providing **"brokerage services"** or **"consulting"** to that plan unless specific disclosures are made.

- Applies to group benefit plans (medical, vision, and dental) of all size
  - Would exclude non-medical benefits (life, disability, etc.) – unless wrapped in a single plan (group's option)
- Goes into effect for plans with an effective date after December 27, 2021
  - NOTE: CIAB and others are working with DOL on a staged enforcement that may delay the start day for some/all of the requirements

Old ERISA Section 408(b): Fiduciary could contract with a service provider if the payment for the services was "reasonable"

Purpose Behind Change: Reflects overall efforts to increase transparency in health care space

What Plans and Who Must Comply

- "The term 'covered service provider' means a service provider that enters into a contract or arrangement with the covered plan and reasonably expects $1,000 [. . .] or more in compensation, direct or indirect, to be received in connecting with providing one or more of the following services, pursuant to the contract or arrangement, regardless of whether such services will be performed, or such compensation received, by the **covered service provider**, and **affiliate**, or a **subcontractor**[.]"

- Focus – applicability of the statute turns on relationship with the covered plan – or agents of the plan.
  - Agents: required to disclose
  - Affiliates: may pull in disclosures for those not otherwise subject
  - Subcontractor of Agent: would have to disclose
- ERISA Plans: this applies to fully insured and self-funded plans.

“Brokerage Services” and/or “Consulting”

- ERISA: defines “broker services” and “consulting” to be very broad – all services related to:
  - Selection of insurance products (including vision and dental)
  - Recordkeeping services
  - Medical management vendor
  - Benefits administration (including vision and dental)
  - Stop-loss insurance
  - PBM services
  - Wellness services
  - Transparency tools and vendors
  - Group purchasing organization preferred vendor panels
  - Disease management vendors and products
  - Compliance services
  - Employee assistance programs; or
  - Third party administration services

“Brokerage Services” and/or “Consulting” (cont.)

- Broad scope of services to be provided:
  - Placement services (assessing/reviewing current plans, renewal analysis, implementing client-directed coverage, negotiating with carriers, etc.)
  - Enrollment services (eligibility, onboarding, add/drops, etc.)
  - Account management services (serving as liaison between client and carrier, facilitating billing concerns, eligibility maintenance, plan questions, etc.)
  - Plan administration services (services plan, setting up premium deductions, etc.)
  - Compliance services (regulatory updates, guidance on plan design, preparing form 5500s, etc.)
  - Referral services
  - Other self-funded plan services (facilitating the retention of TPAs or other service providers – i.e. PAP)
  - Value added services (wellness resources, HR services, etc.)

Timing of Disclosures

01 “No later than the date that is reasonably in advance of the date on which the contract or arrangement is entered into, [or] extended or renewed.”

02 Applies to Producer contracts or arrangements entered into on or after December 27, 2021

03 Does not apply to pre-December 27, 2021, contracts

Examples on the Timing of Disclosures

Example 1

An employer group comes to broker on December 15, 2021, looking for a fully insured group medical plan to begin on February 1, 2022

Disclosure is not required, because the contract/arrangement between the broker and group occurred prior to December 27, 2021

Example 2

An employer group comes to broker on December 28, 2021, looking for a fully insured group medical plan to begin on February 1, 2022.

Disclosure is required, because the contract/arrangement between the broker and group occurred after December 27, 2021.

Example 3

An existing client that already has a contract/arrangement with the broker, looks to renew their fully insured group medical plan on July 1, 2022.

Disclosure requirements are unknown, there is a gap in the requirements.

What Must Be Disclosed

Disclosure: "must contain sufficient information to permit the evaluation of the reasonableness of the overall compensation being received by the service provider"

Services: A description of the services to be provided to the plan pursuant to the consulting or brokerage services agreement

If broker/consultant is a fiduciary – must disclose that fact

Compensation: requirements are very broad - assume that all forms of compensation should be disclosed; "anything of monetary value"

Excluded: non-monetary compensation valued at $250 or less, in the aggregate, received during the term of the contract or arrangement

Three Types of Compensation

Compensation from Group

Compensation received directly from the covered plan

- Examples: (1) flat fee; (2), per contract; (3) PEPM; (4) per services; and (5) percentage of premium.
- Must disclose the manner in which the fees will be received

Compensation from any Other Source

Compensation received from any source other than the covered plan, the plan sponsor, the covered service provider (or affiliate)

- Examples: (1) commissions; (2) affiliate payments; (3) referral fees and other payments; (4) wellness vendor referral fees; (5) admin fees
- Must identify the payer of the fees and the services provided
- Excluded: non-monetary compensation valued at $250 or less, in the aggregate, received during the term of the contract or arrangement

Contingent Compensation

Compensation that cannot be identified at the time of contracting or renewal

- Examples: (1) production bonus; (2) retention/renewal bonuses; (3) preferred vendor bonus; and (4) quarterly bonuses
- May require true up at renewal even if general explanation given on initial contract

Form of Disclosure

- Broker Disclosures vs. Form 5500
  - Forward looking vs. backward looking
- Possible Forms of Disclosure:
  - “A monetary amount”
  - “A Formula”
    - Must a group be able to reverse engineer to the penny???
  - “A per capita charge for each enrollee”
  - “Any other reasonable method”
    - Will be rare occurrence – when one of the above is not possible
- Errors: Must be corrected within 30 days of discovery

Disclosure Examples

- Contingent Based Compensation
  - *We also may be paid additional commissions by the carriers normally calculated at the calendar year end that are contingent on a number of factors including the overall number of employer plans and/or employee participants in plans for which we have placed the insurance, plan retention rates, and premium growth. Historically, these contingent commissions have ranged between 0-3 percent of the premiums we have placed on behalf of the carrier.*

- Noncash Compensation
  - *Non-Cash Compensation—[FIRM] and [FIRM associated persons] may receive compensation from Plan vendors and service providers that is not in connection with any particular customer. This compensation includes such items as gifts valued at less than $100 annually, an occasional dinner or ticket to a sporting event or other entertainment, or reimbursement in connection with educational meetings, client workshops or events, or marketing or advertising initiatives, including services for identifying prospective clients. Plan vendors and service providers may also pay for, or reimburse [FIRM] for the costs associated with, education or training events that may be attended by [FIRM associated persons] and for [FIRM]-sponsored conferences and events.*

Formal Contract or Written Disclosure

Statute does not require brokers and consultants to enter into formalized contracts

- To Contract, or Not to Contract . . .
  - Easy to fold disclosure requirements into agreement
  - Clarification of roles and responsibilities between each party
  - Helpful stock provisions:
    - Not responsible for others' actions
    - Sign/return instruction
    - Period of engagement
    - Confidentiality
    - Indemnity

Next Steps

- Inform Your Clients
- Leverage Carrier Compensation Schedules
- NAHU's Compensation Disclosure Form "Template"
- Recordkeeping
- Make a Reasonable Good Faith Effort
- Amwins Connect Broker Compensation Transparency Toolkit


Thanks for Listening
Any Questions?