Amwins Connect

Broker Compensation Disclosure
Updated March 20, 2024

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Overview

The Consolidated Appropriations Act of 2021 (CAA 2021) included a requirement that brokers and consultants supplying services to ERISA-covered group health plans disclose to plan fiduciaries (typically the employer plan sponsor), in writing, in advance of a new sale, renewal, or change to a contract, direct and indirect compensation they receive for providing services to such plans. The law, which took effect on December 27, 2021, applies in all cases where the insurance agent/agency or consultant reasonably expects to receive at least $1,000 in "direct" or "indirect" compensation.

On December 30, 2021, The Department of Labor (DOL), acknowledging there were many open questions and no real guidance when this requirement went into effect, issued a temporary enforcement policy related to broker compensation disclosure requirements for group health plans. The guidance refers to similar requirements applicable to brokers and consultants who transact employers' retirement/pension plans, which have existed since 2012. The DOL noted that "although group health plan compensation arrangements may differ from pension plan compensation, much of the terminology and many of the requirements in the CAA and the DOL's regulation on pension plan disclosure are identical." The guidance can be found in DOL Field Assistance Bulletin 2021-03

Covered Plans

The disclosure requirement applies broadly to all grandfathered and non-grandfathered group health plans (other than QSEHRAs) that are subject to ERISA, regardless of plan size, and regardless of whether the plans are self-insured or fully insured. The requirements apply to medical, dental, and vision plans, health reimbursement arrangements (HRAs), flexible spending accounts (FSAs) and other "excepted benefits" lines of coverage. While disclosures are not required for welfare plans that do not provide healthcare, such as life and disability plans, disclosures may be required for employee assistance plans (EAPs) included with such coverage.

Covered Service Providers

The scope of service providers subject to the compensation disclosure requirements is not limited to entities that are licensed as (or that market themselves as) brokers or consultants. The determination of whether a service provider meets the definition of a "covered service provider" depends on the facts of the situation.

Who is a Covered Service Provider?

A "covered service provider" is 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 connection with providing one or more of the following services:

- Brokerage services "to a covered plan with respect to selection of insurance products (including vision and dental), 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, compliance services, employee assistance programs, or third party administration services," or
- Consulting services "related to the development or implementation of plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and

management services, transparency tools and vendors, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third party administration services."

Compensation

The required description of compensation or cost "may be expressed as a monetary amount, formula, or a per capita charge for each enrollee or, if the compensation or cost cannot reasonably be expressed in such terms, by any other reasonable method, including a disclosure that additional compensation may be earned but may not be calculated at the time of contract if such a disclosure includes a description of the circumstances under which the additional compensation may be earned and a reasonable and good faith estimate if the covered service provider cannot otherwise readily describe compensation or cost and explains the methodology and assumptions used to prepare such estimate."

A generic disclosure referring to a standard approach or formula for the service provider's book of business is probably not adequate. In addition, where multiple lines of coverage are involved, it may be necessary to disclose any compensation specific to each line of coverage rather than on an aggregate basis. Sometimes exact provider compensation cannot be stated in advance because it varies based on things such as enrollment counts, usage rates, or changes during the plan year. When this is the case, disclosure of compensation in ranges may be reasonable to account for future events or variations. Whether a particular disclosure of compensation is adequate will depend on the facts and circumstances of the arrangement, but DOL guidance has made it clear that direct and indirect compensation must be disclosed.

Example of Indirect Compensation (from DOL Field Assistance Bulletin 2021-03)

The scope of indirect compensation is potentially broad and may require changes to existing disclosure practices. In the past, for example, service providers may not have disclosed compensation that they reasonably expected to receive from a third-party provider in exchange for referring group health plan clients to the provider. In the DOL's view, this compensation – which is not paid directly by the group health plan – is an example of indirect compensation under the CAA 2021 that must now be disclosed by covered service providers. In reviewing a service provider's efforts to comply with the CAA 2021 disclosure requirements, the DOL will consider whether the provider's information disclosures were reasonably designed and implemented to provide the required information and transparency.

Timing of Disclosure

Generally, the broker compensation disclosure will be required annually. It must be made "reasonably in advance" of entering into a contract for services so that the employer (plan fiduciary) may review it to determine if the fee structure is reasonable. For cases of a Broker of Record (BOR) change, compensation must be disclosed on the earlier of the date the BOR was submitted to the carrier, or the date on which a group application is signed for insurance for the following plan year.

In addition, a covered service provider must update or provide its disclosures:

- Within 60 days of learning of a change;
- Within 30 days after discovering any inadvertent errors; and
- Within 90 days of a written request.

Form of Disclosure

A covered service provider must disclose specified information in advance and in writing to a responsible plan fiduciary (generally a fiduciary with authority to cause the plan to enter into, extend, or renew the contract). Broadly, the disclosure must describe the services to be provided, indicate whether the service provider expects to be a plan fiduciary, and describe all forms of direct and indirect compensation the service provider expects to receive in connection with the arrangement, including the manner in which compensation will be received.

No matter the methodology used to disclose compensation, the adequacy of the disclosure should be measured against a principal objective of the statutory provision – which is to provide the responsible plan fiduciary with sufficient information about the compensation to be received by covered service providers to allow the fiduciary to evaluate the reasonableness of the compensation and the severity of any associated conflicts of interest.

Summary

The duties of prudence and loyalty in ERISA §404 apply to a responsible plan fiduciary's decision to hire service providers and to ongoing monitoring of service provider arrangements. What constitutes adequate disclosure for a specific compensation arrangement will depend on the facts and circumstances of the service contract or arrangement and ultimately, the law dictates that employers (plan sponsors) have a legal fiduciary responsibility to ensure receipt of this disclosure from their insurance brokers.

The DOL has said that until there is further guidance or clarification made available, using a good faith, reasonable interpretation of the law is acceptable. For now, a good faith and reasonable approach would be to consider the DOL's disclosure regulations for pension plans, keeping in mind that a key goal of these disclosure requirements is to increase direct and indirect compensation transparency.