

ERISA and the CAA: Best Practices for Contracting with Service Providers to Meet Your Fiduciary Responsibility

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Topics for Today

- Historical references: What laws got us here?
- Need for written contract
- Typical vendor contracts (health and welfare space)
- Other steps to minimize risk

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History of ERISA

- Boom of defined benefit retirement plans in the 1950s and 1960s
- Use of assets for things other than retirement benefits occurred more often
- 1963 Studebaker plan termination
 - Before ERISA, employers could terminate unfunded pension plans without being liable for additional pension contributions
 - No legal recourse to force funding by the company if assets insufficient for benefits
- Now have variety of federal regulators: Department of Labor ("DOL"); IRS; CMS; EEOC; state regulators (usually for non-ERISA plans); participant lawsuits possible

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What Plans are Subject to ERISA?

ERISA Plans = Extremely broad

- Even if a plan does not qualify for certain tax benefits available for retirement or welfare plans, likely still subject to Title I of ERISA

Employee Welfare Benefit Plan

- Any plan, fund or program established or maintained by an employer, an employee organization, or both, to the extent established or maintained to provide medical, surgical, hospital, sickness, accident, disability, death, unemployment, vacation, apprenticeship (or other training) program, day care, scholarship or prepaid legal service benefits to participants and beneficiaries

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What Plans are Subject to ERISA?

Plans Excluded From Coverage under Title I

- Certain plans sponsored by churches
- Plans maintained by certain government entities
- "Top hat" plans (Part 1 applies partially and Part 5 applies)
- Excess benefit plans

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Title I, Part 1: Reporting and Disclosure

- Apply to all ERISA plans (i.e., retirement and welfare plans).
- Reporting to DOL
 - ERISA § 103: annual report summarizing activities from the prior year
 - Form 5500
- Disclosure to participants
 - ERISA § 101: notice of freedom to divest employer securities
 - ERISA § 102: summary plan description ("SPD")
 - ERISA § 102: summary annual report ("SAR")
 - ERISA § 102: summary of material modifications ("SMM")

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Title I, Part 1: Reporting and Disclosure

- From a contractual perspective, consider which of these legal requirements will be performed by your health plan vendors
- For example, will the vendor create SPDs? SMMs? SARs?
- Will the vendor distribute them?
- What about Form 5500 filings?
- Summaries of benefits and coverage (“SBCs”)?
- One way of contracting is to identify the various “to-do” items required by law, then verify who will “do” the “to-do” items

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Title I, Part 4: Fiduciary Responsibility

- Applicable to all ERISA plans (except Top Hat plans)
- Based upon common law trust principles
- Obligations imposed on fiduciaries:
 - ERISA § 402: Plans must be maintained pursuant to a written instrument
 - ERISA § 403: Plan assets must be held in trust and cannot inure to the benefit of the employer
 - ERISA § 404: Fiduciary duties
 - ERISA § 406: Avoid prohibited transactions

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Title I, Part 4: Fiduciary Responsibility – Fiduciary Duties

- Prudent person standard applies
- ERISA § 404(a)(1)(A): duty of loyalty
- ERISA § 404(a)(1)(B): duty of prudence
- ERISA § 404(a)(1)(C): duty to diversify investments (note: health and welfare plans often do not have investments)
- ERISA § 404(a)(1)(D): duty to act in accordance with plan documents

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Title I, Part 4: Fiduciary Responsibility – Prohibited Transactions

- ERISA § 406: prohibited transactions
 - 406(a): Transactions between the plan and a party in interest
 - 406(b): Transactions between the plan and a fiduciary
 - 406(c): Transfer of real or personal property to plan from a party in interest
- “Party in interest” is very broad – captures nearly any individual/vendor that is connected to the plan
 - Fiduciaries
 - Sponsoring employer(s)
 - Employees, officers, directors or 10% or more owners of the sponsoring employer(s)
 - Service providers
 - Union(s)
 - Relatives or 10% or more owners of any other party in interest

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Title I, Part 4: Fiduciary Responsibility – Prohibited Transactions

- ERISA § 408: exemptions (class or individual)
 - 408(b)(2): contracting
- Statutory exemptions for the standard transactions a plan must engage in to operate
- This is a big reason why having a written contract with vendors is important. Without a good contract, any use of plan assets could be a “prohibited transaction” with no “exemption”
- And, “plan assets” is broadly defined to include participant contributions
 - Most plans require participant contributions

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Title I, Part 4: Fiduciary Responsibility – Prohibited Transactions

- Under ERISA § 408, contract is reasonable only if required fee and other information is disclosed to a responsible plan fiduciary
- Fiduciary can have liability if contract is deficient (i.e., it's not just the vendor's issue)
- Fiduciary not liable if demands that disclosures be made and, if not, reports vendor to DOL within 90 days
- New ERISA Section 408(b)(2) disclosure rules for “brokerage services” and “consulting services”

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Title I, Part 4: Fiduciary Responsibility – Prohibited Transactions

- Brokerage services: “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”
- Has your broker started providing additional disclosures? Do you have a contract with your broker?

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Title I, Part 4: Fiduciary Responsibility – Prohibited Transactions

- Consulting: “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, 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”
- Are TPAs covered by this? Likely not, unless they do “consulting”

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Typical Vendor Contracts (Health and Welfare Plans)

- Again, focus on what the plan “does”. Are those activities internally performed (using employees of plan sponsor) or done by outside entities?
 - If internal, usually done at no charge to plan. Sometimes plan sponsor may want to charge plan for services. But that is difficult to do and raises prohibited transaction issues
 - No HIPAA business associate agreement needed for actions of employees of plan sponsor. However, need to amend plan to allow plan sponsor to obtain protected health information (“PHI”)
 - Plan amendment functions, in essence, as a “contract”
- Many common functions of plan administration are outsourced

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Typical Vendor Contracts (Health and Welfare Plans)

- Claims processing, appeals, utilization review: often done by third party administrator ("TPA")
- Medical review expert
 - Helpful if employer or a committee will decide appeals. If TPA and PBM do that, medical review expert likely not needed
- Prescription drug claims processing: often done by separate pharmacy benefit manager ("PBM")
- Benefit consultant / broker
- Telehealth vendor
- Wellness vendor
- Enrollment vendor
- Cafeteria plan administrator



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Typical Vendor Contracts (Health and Welfare Plans)

- Employee assistance program vendor
- Health reimbursement arrangement vendor
- Health flexible spending account ("Health FSA") vendor
- Dental vendor
- Vision vendor
- Short-term disability vendor
- Long-term disability vendor
- Auditor



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Typical Vendor Contracts (Health and Welfare Plans)

- COBRA vendor
- Accountant
- On-site / near-site clinic provider
- Direct contracting with health care provider
- Actuary
- Stop-loss insurer
- Specialty network vendor (e.g., for organ transplants)
- Attorney



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How to Hire a Vendor

- Not as easy as it sounds
- Generally want to establish a “prudent process”
- Good idea to send out RFP request to 3-6 vendors
- Pull together the results in a spreadsheet or other summary
- Have an established committee or similar group review the summary
 - Great idea to have a formal Benefits Committee which can act as a fiduciary – rather than an “ad hoc” process where no one really understands who makes decisions

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How to Hire a Vendor

- Consider including “must have” terms in the RFP
- For example, limits on liability; access to plan data; indemnification; ability to easily terminate the contract (perhaps easier after the first year)
 - What else is important for your organization?
- Including “must have” terms in the RFP gives you a stronger negotiating position, as vendor may provide its “best terms” up-front, rather than trying to negotiate to those terms
 - Once the vendor knows it “won” the RFP, employer loses much leverage
- Consider asking for the template contracts (or other template documents) up-front. Then reviewing those for the finalists and flagging items of concern

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How to Hire a Vendor

- How important is cost? Must you choose the least-expensive vendor?
- Cost is certainly important. But plan fiduciaries are not required to always select the least-expensive vendor
- Can certainly take into account other factors, like experience, number of clients, reputation, prior results, network coverage, disruption to provider relationships, recommendations, technology, service levels, contract terms, business stability, cybersecurity, etc.
- Good idea to document why you selected one vendor over another
- Also a good idea to do periodic RFPs
 - No set time period. Every 3-6 years maybe? 10 years seems rather long. Anything beyond 10 years seems very long

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General Terms to Include in Contracts

- Effective date
- Length of agreement
- Termination provisions
 - Does ERISA require an "termination for convenience" provision, where plan sponsor can terminate upon, say, 90 days notice?
 - Some DOL strongly suggests "yes", unless plan sponsor can prove that no vendor offered that term
 - Any penalty for early termination?
- Scope of services
 - Try to be as specific as possible. For example, if TPA says it will perform "claims processing", try to drill down into what that entails. Appeals? What third party vendors do they use? Notices provided in accordance with applicable law (ERISA, HIPAA, etc.)? Subrogation?

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General Terms to Include in Contracts

- Software / artificial intelligence ("AI")
 - ERISA requires that claims be consistently decided. So, if Ed has a claim in 2024 and Sally has a similar claim in 2025, will the TPA's software decide, say, Alice's 2026 claim the same way?
 - Hopefully yes. Appropriate to ask about this, as software may not be as consistent as desired. And AI may "hallucinate"
 - Some regulations beginning to "creep in" (e.g., new California law on AI)
 - Should appeals or medical necessity decisions be done by a human being?
- Compliance with applicable law
 - Make sure it's the law that applies to not just them (as most Benefit laws don't directly apply to vendors - they apply to your plan / the plan sponsor), but also you (the employer / plan administrator) and your plan

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General Terms to Include in Contracts

- What if vendor says it's not an ERISA "fiduciary"?
- Pretty typical term to include in a health or welfare plan contract
- BUT, if the vendor hears the final internal appeal of a denied claim, that generally makes the vendor a fiduciary
- Should modify the contract to have it reflect reality
- Duties of employer should be spelled out
- How claims are paid
 - E.g., will employer set up a checking account that TPA can pull from? A formal trust?

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General Terms to Include in Contracts

- Who drafts various documents, like SPDs, SBCs, etc.?
 - Who distributes them? When?
- HIPAA – and consider additional privacy and security terms beyond HIPAA
 - Proposed HIPAA Security Rule regulations would significantly update the rules. Perhaps build in some of them now?
 - Breach rules too – e.g., indemnification and timing of reporting
- Customer service personnel – time phone lines are open and where staffed
- Upon termination of relationship, guarantee that documents will be sent to new vendor
 - Hopefully at no charge, but vendors often do charge for this

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General Terms to Include in Contracts

- Bonding and insurance terms
 - No “set” dollar amount for insurance terms. But pretty normal to ask for insurance in the millions of dollars
- Standard of care – e.g., that they will provide similar service as a national, experienced vendor
- If errors occur, the vendor will fix them (or try to; if fixing them is not possible, perhaps they report them to you)
- No “Gag Clauses”. Basically, employer should be able to get access to claims data
 - January 2025: New FAQs provide significant – and worse – change for “downstream entities”

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General Terms to Include in Contracts

- Subcontractors / delegation of duties
 - Will you allow them with no limits? Perhaps with notice to you? Note that in some situations (e.g., certain PBMs) they may outsource the vast majority of activities
- Audit rights
 - May be less important if you obtain good “Gag Clause” language
- Disclosure of additional fees or revenue, beyond what employer directly pays?
 - Was an effort in mid-2010s to require this type of disclosure. Ultimately did not succeed. But still a risk under general ERISA rules
 - For example, is your vendor receiving payments from third parties? Then does that vendor recommend those other vendors to you? Should you require disclosure of those “hidden conflicts”?

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General Terms to Include in Contracts

- Arbitration – mandatory or voluntary? Or not allowed at all?
- Litigation provisions
 - Very normal for a TPA or PBM to ask the employer to pay litigation costs if the TPA / PBM is just “doing its job” and following your plan document
 - Pretty reasonable to agree to that
 - But consider carve-outs and exceptions. For example, if the lawsuit is really caused by the errors or bad processes of the TPA or PBM, perhaps no indemnification for litigation
- Venue for litigation
- Some terms should consider post-termination
 - E.g., recent DOL MHPAEA lawsuit in Wisconsin

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General Terms to Include in Contracts

- Consider going through various Benefit laws and adding terms to contract
- E.g., Consolidated Appropriations Act (“CAA”) imposed significant new requirements
- Mental Health Parity and Addiction Equity Act (“MHPAEA”) and its nonquantitative treatment limitation (“NQL”) rules
- New prescription drug reporting
- New air ambulance reporting
- Increased transparency rules (similar to relatively new “Transparency in Coverage” rules)
- No Surprises Act protections

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Other Steps to Minimize Risk

- Consider a self-audit
- Review what others have done well – and done not-so-well. What lessons can be learned?
- Establish clear actions of fiduciaries (e.g., Benefits Committee). But also who makes “settlor”, non-fiduciary decisions
 - Did your Board (or other “top level”) formally delegate responsibility?
- Hire and consult professionals (e.g., actuary, attorney, consultant)
- Monitor vendors and changes in the law

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Questions?

THANK YOU!

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