Bodman PLC | Employee Benefits and Executive Compensation Practice | www.bodmanlaw.com

HERE'S WHAT YOU NEED TO KNOW IN THE WORLD OF EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

April 21, 2017

By: Rebecca D'Arcy O'Reilly, Co-chair, Employee Benefits and Executive Compensation Practice Group

David B. Walters, Co-chair, Employee Benefits and Executive Compensation Practice Group

Charles M. Russman, Member, Employee Benefits and Executive Compensation Practice Group

Department of Labor Delays Fiduciary Rule Applicability Date to June 9, 2017 and IRS Announces Corresponding Excise Tax Relief

The Department of Labor is continuing its review of the Fiduciary Rule. It has indicated that the core protections of the Fiduciary Rule will now become applicable on June 9, 2017. These core provisions include the definition of fiduciary, the obligation to act in the best interest of the customer, making no misleading statements, and accepting only reasonable compensation. Parts of the Best Interest Contract Exemption also become applicable on June 9, 2017. However, most of the changes to the prohibited transaction rules and recordkeeping requirements are delayed until January 1, 2018.

The Department of Labor and Internal Revenue Service have indicated there will be no penalties assessed before the new effective dates. In unofficial comments, the Department of Labor indicated that many or all of the portions of the law that will be effective June 9, 2017 will remain as they are, although some other provisions are still being considered. Many of the most prominent players in the industry have provided support for those parts of the Fiduciary Rule going into effect on June 9, 2017 (such as acting in the customer's best interest), even if they are

more concerned about the enforcement aspects of the rule, which are more likely to be changed when the Fiduciary Rule is actually finalized.

AHCA is Killed in the House and GOP Attempts to Revive Discussion of ACA Replacement Legislation Have Stalled

On March 24, 2017, GOP leadership in the House pulled President Trump's American Health Care Act ("AHCA") from consideration just before a planned House voted that had been highly publicized by the White House. House Speaker Paul Ryan pulled the bill when it was clear hours before the vote was scheduled that there was not enough GOP support for it to pass. Several attempts over the last few weeks to revise the AHCA or introduce a new bill aimed at repealing and replacing the Affordable Care Act ("ACA") have ended without GOP consensus. President Trump has indicated he would like to tackle healthcare reform before moving on to tax reform, but GOP plans remain unclear.

Department of Labor Releases Annual Report to Congress on Self-Insured Health Plans

The Department of Labor has released its Annual Report to Congress on Self-Insured Group Health Plans. The report provides a useful perspective on the market. It indicates a decline in the number of self-insured health plans, but a slight increase (around 3%) of the percentage of all healthcare plan participants covered by self-funded plans.

Newly-Introduced Preserving Employee Wellness Programs Act (PEWPA) Seeks to Resolve Long-Standing Public Policy Issues Regarding Workplace Wellness Programs

On March 2, 2017, Rep. Virginia Foxx (R-NC), chairwoman of the House committee on Education and the Workforce, introduced the **Preserving Employee Wellness Programs Act** ("PEWPA") (H.R. 1313), If passed, PEWPA would provide important and much desired clarity on how wellness plans work with the Americans with Disabilities Act ("ADA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and the Affordable Care Act ("ACA"). Recently the Equal Employment Opportunity Commission ("EEOC") has been investigating and bringing claims against wellness plans and their sponsors when the plan design violates the ADA. PEWPA would essentially deem wellness plans that are compliant with HIPAA and the ACA to be compliant with the ADA and the Genetic Information Nondiscrimination Act, which would ease the concerns of many in the industry. Plans would still need to meet the requirements of HIPAA and ACA, but a clear standard would be created under the proposed bill.

Ninth Circuit Court of Appeals Rules that Health Care Providers Cannot Sue Blues Plans Under ERISA for Practices Used to Recoup Allegedly Erroneous Payments to Providers

On March 22, 2017, the U.S. Court of Appeals for the Ninth Circuit ruled in DB Healthcare, LLC v. Blue Cross Blue Shield of Arizona, Inc., that two in-network health care providers could not sue under ERISA related to how two Blue Cross Blue Shield plans ("Blues Plans") attempted to recoup alleged overpayments to the providers. The providers asserted claims as the assignees of Blues Plan members who had received the health care services that resulted in the alleged overpayments.

According to the providers, the processes used by the Blues Plans to attempt to recoup the alleged overpayments violated ERISA's claims appeal procedures and constituted retaliation for asserting a right under ERISA. In upholding the district court decisions to dismiss the two cases (consolidated for appellate ruling), the Ninth Circuit made several key rulings on ERISA issues:

1. The court held that whether or not a plaintiff has statutory standing to sue under ERISA is not a jurisdictional issue, but rather a merits issue that should be considered under the Federal Rule 12(b)(6) standard;
2. The court joined a number of other Circuits (including the Sixth and Seventh Circuits) in holding that health care providers are not "beneficiaries" under ERISA's civil enforcement mechanism and so cannot bring suit in their own right;
3. The court held that although a participant or beneficiary with standing to sue under ERISA may assign his/her right to a health care provider and thereby confer statutory standing to sue, anti-assignment provisions in plan documents are enforceable and prevent a provider from suing as an assignee;
4. The court held that even where there is a valid assignment, the right to sue is limited to the scope of the assignment. An assignment of a right to payment of benefits does not allow a provider to assert an ERISA breach of fiduciary duty claim. The typical provider assignment would only allow a provider to sue for denied benefits under ERISA 502(a)(1)(B);
5. The court also held that even a valid assignment is limited to the rights that the assignor could assert. If the participant could not bring the claim asserted, then neither can the provider as assignee. The court found that this limitation prohibited the assertion of claims based on how the Blues plans recouped overpayments because a participant could not bring this suit under ERISA; and
6. The court observed at the end of its decision that ERISA would not preempt claims that the participant assignor would not be able to assert under ERISA, so the providers could sue for breach of their participating provider agreements in state court.

This and similar cases remind plan administrators and carriers how important it is to include clear anti-assignment language in plan documents, and remind providers to carefully consider the scope of assigned rights in their patient assignments.

Case: *DB Healthcare, LLC v. Blue Cross Blue Shield of Arizona, Inc.*, No. 14-16518 (9th Cir. Mar. 22, 2013).

About the Author. Rebecca D'Arcy O'Reilly *is co-chair of Bodman's Employee Benefits and Executive Compensation Practice Group. She advises on matters concerning fiduciary obligations, the handling of plan assets, ERISA disclosure requirements, and service provider compensation arrangements. Rebecca also assists organizations with internal ERISA compliance audits.*

About the Author. Charles M. Russman *is a member of Bodman's Employee Benefits and Executive Compensation Practice Group . He has extensive experience with virtually every type of employee benefit and executive compensation structure, and he is able to provide efficient, effective and innovative counsel when it comes to designing, maintaining, and correcting executive compensation, retirement plans, and welfare benefit plans.*

About the Author. David B. Walters *is co-chair of Bodman's Employee Benefits and Executive Compensation Practice Group. He has more than 25 years of experience counseling employers on all aspects of employee benefits plan formation, administration, and taxation. He has been listed in* The Best Lawyers in America® *since 2007 under Employee Benefits Law, in* Chambers USA: America's Leading Lawyers for Business *under Employee Benefits & Executive Compensation - Michigan, and in* Michigan Super Lawyers® *since 2006.*

Bodman's Employee Benefits and Executive Compensation Practice Group:

David B. Walters
Co-chair
248.743.6052
dwalters@bodmanlaw.com

Rebecca D'Arcy O'Reilly
Co-chair
313.392.1050
roreilly@bodmanlaw.com

Celeste E. Arduino
313.393.7593
carduino@bodmanlaw.com

G. Christopher Bernard
734.930.2482
cbernard@bodmanlaw.com

Barbara A. Bowman
248.743.7598
bbowman@bodmanlaw.com

Sarah L. Cylkowski
313.392.1077
scylkowski@bodmanlaw.com

Michelle Thurber Czapski
248.743.6056
mczapski@bodmanlaw.com

Andrea M. DeFrain
248.743.6041
adefrain@bodmanlaw.com

Christopher J. Dine
313.393.7574
cdine@bodmanlaw.com

Bridget M. Hathaway
313.393.7594
bhathaway@bodmanlaw.com

David P. Larsen
313.393.7575
dlarsen@bodmanlaw.com

Dennis J. Levasseur
313.393.7596
dlevasseur@bodmanlaw.com

Maria L. Martinez
313.393.7561
mmartinez@bodmanlaw.com

Charles M. Russman
248.743.6039
crussman@bodmanlaw.com

Matthew R. Rechtien
734.930.2499
mrechtien@bodmanlaw.com

Thomas Van Dusen
248.743.6076
tvandusen@bodmanlaw.com

James J. Vlasic
248.743.6016
jvlasic@bodmanlaw.com