

## **Here's A Term Employers Should Remember, "Fiduciary Duties"**

Last week, an event occurred that many members of the compliance and benefits world have been waiting for: a major corporation, Johnson and Johnson (J&J), had a complaint filed against them. The fact that a complaint was filed against such a large organization is not unusual. What was startling was that the complaint was not filed against J&J in their role as a manufacturer; instead, it was filed against them as a purchaser of prescription drugs for their workforce. More startling—and a HUGE wake up call to the benefits community, the complaint wasn't just against J&J—it was filed against individual employees of J&J, including its Executive Vice President and Chief Human Resources Officer, two Vice Presidents of Human Resources, and TWENTY individual members of the Pension and Benefits Committee, all of whom were fiduciaries to the health plan.

The complaint was lodged by a current employee who has alleged that J&J breached their fiduciary responsibility under ERISA. The complaint alleges that J&J had a fiduciary duty to oversee, monitor, and control the costs associated with the company's prescription drug plan. Accusations of mismanagement, failure to exercise prudence, and conflicts of interest have propelled the role of plan sponsors into a brighter and much hotter spotlight.

While the case itself is interesting and, in some respects, groundbreaking, let's back away from the specifics for a moment and focus on what employers and plan sponsors really need to understand: fiduciary duties.

### **Fiduciaries and their Fiduciary Duties**

To understand the concept of fiduciary duty, we need to briefly identify who is a fiduciary. A person using discretion in administering and managing a plan or controlling the plan's assets is a fiduciary to the extent of that discretion or control. Fiduciary status is based on the functions the individual performs for the plan, not necessarily just a person's title. In other words, any person who can make decisions and judgements about how a plan operates is a fiduciary, regardless of their title.

Employers that sponsor self-insured or level-funded group health plans exercise some discretionary authority and therefore are fiduciaries. If the employer sponsors a fully insured plan, their fiduciary status will depend on whether they exercise discretion over (i.e. make decisions about) the plan. That said, all plans must have at least one fiduciary (a person or entity) named in the written plan document with control over the plan's operation. The plan can identify the fiduciary by office or by name.

ERISA takes very seriously the concept of fiduciary duties, to the extent that this duty has been named **"the highest known to the law."** ERISA was enacted to protect the interests of employees who participate in employee benefit plans. So, naturally, when someone is given authority over how those employee benefit plans operate, ERISA subjects them to certain fiduciary duties that are designed to protect participants. One obligation ERISA imposes on fiduciaries is the duty of prudence, which requires



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such individuals to apply care, skill, prudence, and diligence when acting on behalf of participants. In exercising these traits, fiduciaries are specifically mandated to conduct themselves in the same manner as other individuals of “alike capacity and familiar with such matters” would under similar circumstances. Fiduciaries also have a duty of loyalty, in which they are required to act in the sole interest of the plan’s participants and beneficiaries.

The J&J case provides a valuable glimpse into the potential liabilities of being a fiduciary when these duties are not upheld. Fiduciaries that do not adhere to the basic standards of conduct (aka, their fiduciary duties) can very easily find themselves personally liable for restoring any losses to the plan, or for restoring any profits made through improper use of the plan’s assets that result from their actions.

Being a plan sponsor comes with an enormous amount of responsibility, and many employers are unaware of what those responsibilities are and how to properly carry them out. So, what should a plan sponsor do to correctly comply with their fiduciary duties? Below are a few suggestions to help employers fulfill these obligations:

- It would behoove all fiduciaries to document all the processes they use to carry out their responsibilities.
- A fiduciary can hire service providers to handle fiduciary functions, setting up the agreement so that the provider assumes liability for the selected functions. However, the employer would be wise to vigilantly monitor the service provider to assure that the duty of prudence is not violated. Frequent audits of those service providers (PBMs, brokers, TPAs) can help uncover problematic practices, such as spread pricing, rebate manipulation, incorrect categorization of generic drugs, etc.
- A fiduciary must be cognizant of other fiduciaries to the same plan because they could be liable for their co-fiduciaries’ actions.
- For additional protection for plans, every person, including a fiduciary, who handles plan funds or other plan property generally must be covered by a fidelity bond. There are exemptions in some cases, but the bond is added protection.
- Select an objective and unbiased broker. Plan sponsors, when contracting with benefits brokers, must demand disclosures of all direct and indirect compensation. Ensure that the brokers do not have any undisclosed relationships with other vendors that could inadvertently lead to allegations of a breach of fiduciary duty.

### Concluding Thoughts

Back to J&J for a minute—the primary allegation in this case is that the Pension and Benefits Committee violated their fiduciary duties by allowing the plan to pay over \$10,000 for a generic drug that retailed for less than \$80. The complaint also includes a claim for failure to provide plan documents. These types of activities and oversights frequently occur in the benefits world, and this case may well be a bellwether for more litigation to come. Regardless, the allegation serves as a stark reminder that plan fiduciaries are held to high standards and that the potential liability for failing to meet those standards is real.



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Many think that this allegation is just the beginning, and regulatory agencies are doubtless paying strict attention to potential violators. We strongly encourage all plan sponsors to incorporate fiduciary duties into their vocabulary. ERISA's fiduciary requirements are serious matters, and even more serious when they are breached.