

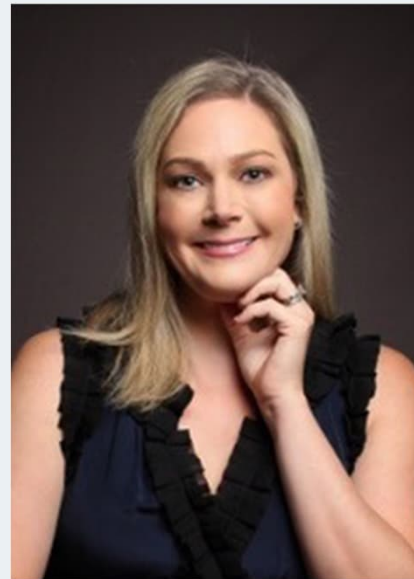


*Fiduciary Duties in Health Plans: Steady
Responsibilities, New Scrutiny
May 22, 2025*

Best in Class Brands. One Common Goal.



Today's Speaker



Lauren Fischer
General Counsel
Boon and GSA - Accretive Companies



Agenda

- Who is an ERISA Fiduciary and What does it mean to be one?
- Core Responsibilities of a Fiduciary
- Fiduciary Duties as Related to Health Plans
- Recent Trends of Enhanced Scrutiny
- What Can Fiduciaries Do to Proactively Prepare?
- Washington Update for Employer Health Benefits



Who is an ERISA Fiduciary and What does it mean to be one?

Who can be an ERISA Fiduciary

- Employee Retirement Income Security Act (ERISA) establishes the responsibilities of private-sector Plan Sponsors and sets conduct standards for those who manage employee benefit plans and plan assets
- ERISA broadly defines a “Fiduciary”. A fiduciary can be an individual and/or business entity, depending upon the duties performed in connection with the ERISA plan
- You are a fiduciary if you exercise discretionary authority or control as to the management of the plan or authority/control as to the management or disposition of plan assets
- Roles that are deemed to be a Fiduciary:
 - Named Fiduciaries
 - Plan Administrators*
 - Trustees
 - Investment Managers (retirement-side)



Designation as Fiduciary is Not Only Way

- Named fiduciary and plan administrator can be same person/entity
- Don't have to be a designated as a "fiduciary" to be deemed one. Fiduciary status is based on performing certain functions in connection with the ERISA plan
 - Anyone who assists with the administration: making eligibility determinations, claims decisions, interpret plan language, select vendors and other services providers.
- Fiduciaries can be "constructive" or "accidental fiduciaries". Plan Sponsor must be very careful about who is allowed to act as a fiduciary
- Fiduciary duties and functions can be outsourced or delegated, but cannot outsource the liability or ultimate responsibility for the operation of the plan



Is Everything A Plan Sponsor Does a Fiduciary Act?

- Not Everything...
- Employer “Settlor Functions” are not Fiduciary Duties.
 - the decision to establish a plan, to determine the benefit package, level of employer contributions, decision to include certain features in a plan, to amend a plan, and to terminate a plan are employer business decisions
 - When making these decisions, an employer is acting on behalf of its business, not the plan, and, therefore, is not a fiduciary. Furthermore, when an employer (or someone hired by the employer) takes steps to implement these decisions, that person is acting on behalf of its business, not the plan, and, therefore, is not acting as fiduciary.
- Rule of Thumb – Settlor Sets up the Plan. Fiduciaries Manage and Administer the Plan
- Employer typically serves both roles, so can be difficult to decipher
 - Settlor function – deciding on eligibility terms and employer/employee contribution levels
 - Fiduciary – serve on investment committee and determine how plan is to be funded



Now that we know Who...

What does it mean to be a fiduciary?

- ERISA fiduciaries have the highest standards of conduct to act on behalf of Plan participants and beneficiaries
 - Duty of care and integrity
 - Stricter than the morals of the marketplace
- Must Act:
 - Solely in the interests of participants and beneficiaries (undivided loyalty)
 - For the exclusive purpose of providing plan benefits and to ensure reasonable expenses of plan administration (exclusive benefit)
 - With the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims (prudent expert)
 - In accordance with the plan governing documents and consistent with ERISA
- Fiduciary duty also extends to handling of Plan participant/beneficiary data



With Responsibility Comes...Fiduciary Liability

- ERISA fiduciaries that breach their duties can be personally liable for damages to the ERISA plan and for DOL penalties imposed in connection with fiduciary breaches
 - Happens when a fiduciary doesn't follow the requisite standards of conduct
- A fiduciary can also be liable for co-fiduciaries' actions
- To limit potential liability, fiduciaries must focus on meeting the standard when performing core responsibilities
- Each fiduciary that handles plan funds or other plan property must obtain a fidelity bond to protect against loss due to fraud or dishonest acts



Responsibilities of a Fiduciary

Core Responsibilities and Obligations

- Foundational obligation is to ensure plan documents align with plan operations and administration
 - Fiduciaries must be familiar with the plan document and periodically review to make sure it remains current and compliant with all ERISA plan document requirements
 - Discretionary authority should only be exercised when appropriate, such as when the plan is ambiguous or otherwise unclear. A plan fiduciary should not grant exceptions or apply the rules inconsistently where the plan's established rules are clear.
- Participant Disclosures
 - Plan documents, SPDs, SMMs, SBCs
- Information in Disclosures must be accurate
- Employers act as fiduciaries when communicate employee benefit programs to employees
- Duty to Inform & Duty not to Misinform



Additional Fiduciary Obligations & Duties

- Duty to act prudently
 - Requires expertise in a variety of areas.
 - A fiduciary that lacks the necessary expertise, should look to hiring experts with the requisite professional knowledge to carry out the necessary functions.
 - If hiring an expert, Plan Sponsor should document the process to find the expert and the reasons behind the selection
- Plan Governance
 - Fiduciary/committee selection
- Prudent selection and review of service providers
 - Know what questions to ask
- Plan Compliance
 - Awareness of ERISA obligations (federal mandates)
 - Oversight of plan service providers
 - Know your provider agreements

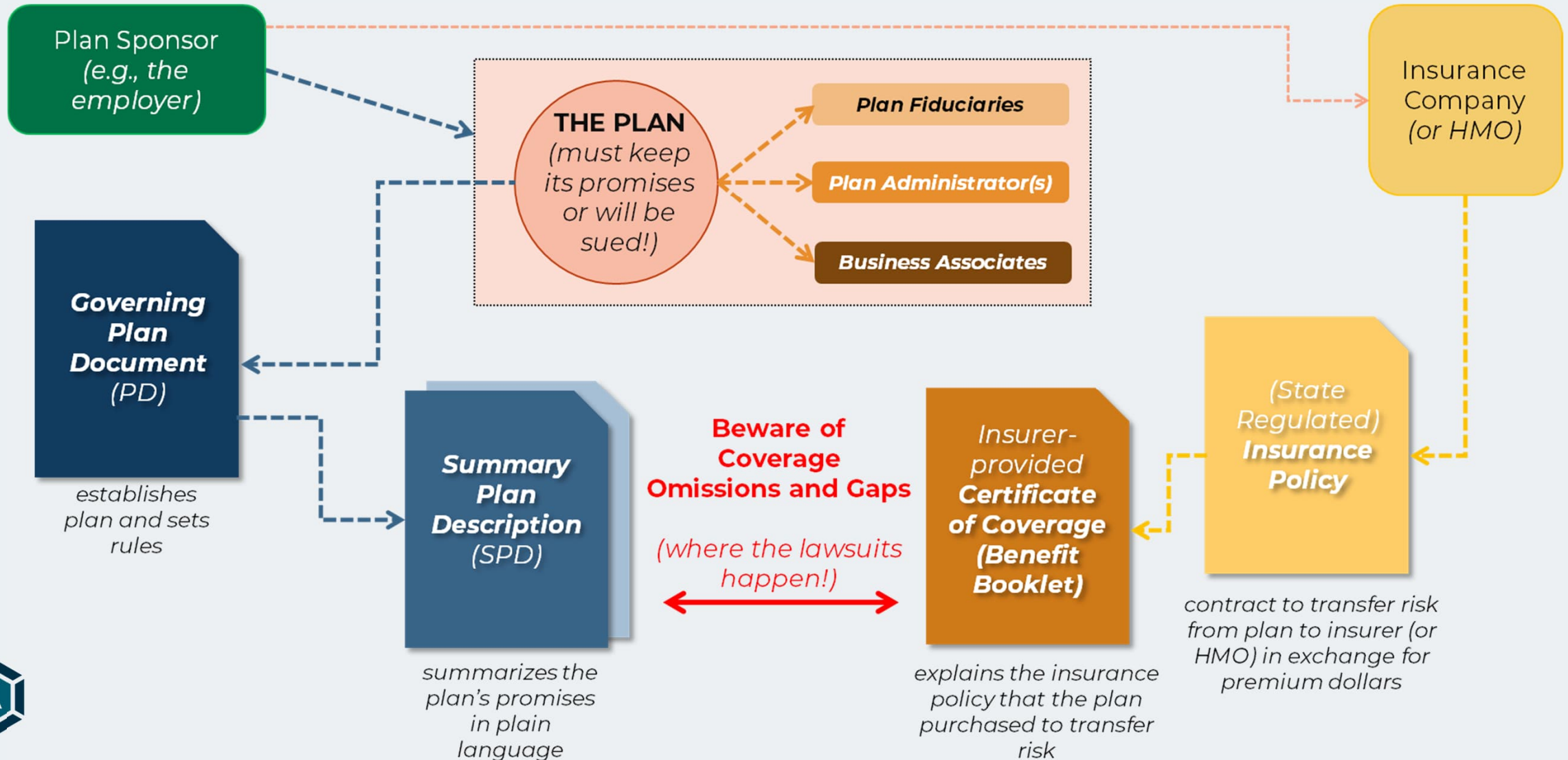


Fiduciary Duties as Related to Health Plans

Relationship Between ERISA Plans and Insurance

Federal Jurisdiction (ERISA)

State Jurisdiction (State Insurance Laws)



Group Health Plan Mandated Compliance

- HIPAA Privacy & Security
- COBRA
- Mental Health Parity
- Wellness Rules
- Newborns and Mothers
- FMLA
- Preventive Health Services
- Telehealth & EAP Compliance
- Electronic delivery
- Nondiscrimination Testing
- ADA...the list goes on and on and on



Recent Trends of Enhanced Scrutiny

Mandates Aren't New, but New Interest by Plaintiffs' Bar

- Health and welfare Plan fiduciaries have recently become subject to the same fate of retirement plans
 - Class actions claims of excessive fee concept within retirement plan litigation
- Background -
 - In early 2000s, allegations that corporate 401(k) retirement plans paid administrative and investment management fees that were too high and Plan Sponsor's were negligent in their fiduciary duties
 - Plaintiff's counsel started with very large 401(k) plans (deep pockets for damages or settlements)
 - Broadened to smaller 401(k) plans and 403(b) plans
- Transitioning in recent years to excessive fees against health plans and related entities. Participants argue:
 - Plan costs too high
 - Unreasonable prices for prescription drugs
 - Inaccurate information about out-of-network costs
- Potentially fueled by increased access to cost information due to CAA



Recent Health Plan Litigation

- Class Actions alleging breach of fiduciary duty in management and design of prescription drug benefits: Lewandowski v. Johnson & Johnson; Navarro v. Wells Fargo; Stern v. JPMorgan Chase & Co.
 - Overpaying for drugs and/or PBM Services
 - Failing to engage in a prudent process for selecting PBM
 - Failing to carve out specialty drug benefit from PBM
 - Steering members to PBM pharmacies with higher prices
- Courts have held plaintiff(s) lacked standing “speculative at best”
 - Example of court finding: Increased drug prices could not have raised plaintiff’s out-of-pocket costs, because Plaintiff met out of pocket maximum – capping the amount plaintiff would pay out-of-pocket
- Plaintiff counsel is fine-tuning arguments that will resonate with judges. Fiduciaries should monitor and adjust processes accordingly
- Issues yet to be addressed: Whether employer acting in “settlor” capacity? What is benchmark in the context of health plans?



What Can Fiduciaries Do to Proactively Prepare?

Get Back to the Basics

- Ensure each fiduciary understands fiduciary responsibilities and is familiar with the rules governing the plan.
- Differentiate clearly between settlor functions and fiduciary functions, and between employer roles and fiduciary roles.
- Foster an atmosphere of compliance and openness to discuss gray areas.
- Adopt strict accounting procedures for the handling of participant contributions and plan assets (if applicable).
- Thoroughly document all actions and decisions, including the rationale.
- Consider establishing procedures for routine audits.
- Purchase adequate fiduciary liability insurance coverage and, if applicable, obtain an ERISA fidelity bond.



When Selecting Service Providers...

- Establish a committee responsible for selecting and monitoring health plan contracting costs and fees
 - Document committee activities, decisions and meetings
- Develop and implement a prudent process for selecting and monitoring health plan service providers
 - Document processes and compliance with processes and steps taken to select and monitor service providers
- Retain experts to assist committee if needed in selection process
- Benchmark plan costs, fees, and services
 - Administrative fees, cost savings, qualitative benefits to plan participants and beneficiaries
 - Ask questions and find experts
- Ask for service provider fee disclosures
- Ask service providers about all revenue received in connection with providing services to plan
- Ensure those involved in service provider selection and monitoring do not have conflicts



Importance of Documentation

- Making sound decisions is essential. Also just as important to document the rationale behind each decision.
 - Document the activities, decisions and meetings
 - Document processes and compliance with processes and steps taken to monitor service providers
- Keeping a record of actions taken and decisions made isn't enough
 - Need to ask the right questions and peel back the onion
- Need to document the underlying reasons
- Document and maintain the committee's thought process and rationale.



Washington Update For Employer Health Benefits

DOGE Impact

- Smaller DOL
 - Trump Administration's focus to eliminate 'unnecessary administrative expenses' and reduce size of federal workforce
 - Fewer resources for employer plan audits
 - Potential difficulty to meet all expectations of Federal guidelines/rules with reduced staff
- 10-1 Regulatory Rule
 - Executive Order 14192 "Unleashing Prosperity Through Deregulation"
 - Any agency that promulgates a new rule, regulation or guidance must identify at least 10 existing rules, regulations or guidance documents to be repealed
 - Trump 1.0 imposed a 2-1 Rule and was successful



The One Big Beautiful Bill (BBB)

- Final Deadline is September 30th – likely to be July/Early August
- Current Version:
 - 2017 Trump Tax Cuts made permanent
 - Medicaid Reforms – work requirements on childless adults aged 19-64; shortens open enrollment period for the ACA
 - Tighten eligibility for SNAP benefits & requires states to cover portion of costs
 - Cuts to renewable energy incentives
 - Cuts to Biden-era tax credits for climate-friendly energy sources (eliminates tax credits for EV within 2 years)
 - Phases out credits for low-carbon electricity through 2032 & adds new requirements to reduce the businesses that qualify for the credits through to 2032
 - Increases SALT deduction cap to \$30,000 for filers making less than \$400,000, with a phasedown for higher incomes
 - No tax on tips and no taxes on car loan interest and overtime pay
 - Cuts to international tax enforcement



Health-Focused Trump Administration Priorities

- PBM Reform
- Transparency
- MHPAEA
- Data Privacy
- Fertility Benefits



PBM Legislation – Likely in 2025 with Transparency Focus

- H.R. 10455 (2024)
 - Amends ERISA 408(b)(2) broker disclosure obligation targeting PBM services and rebate pass-through
 - Requires entities providing PBM services to remit 100% of rebates and imposes specific remittance, disclosure and audit requirements for these rebates
 - Similar to previous PBM Reform Act (S. 1339)
 - Broaden disclosure obligations for TPAs and other health plan service providers
 - Potential to be retroactive
- Executive Order on Drug Prices
 - April 15, 2025: White House issued EO 14273 with the stated purpose to lower drug prices
 - Directs the DOL to propose regulations under ERISA 408(b)(2)(B) by October 12th to increase health plan fiduciary transparency regarding direct and indirect compensation received by PBMs.
 - Intended to bring big pharm and PBMs to the table and voluntarily make changes to Medicare/Medicaid.
 - Will have impact on private industry
- Clue for legislative path: December 2024 Continuing Resolution bill initially included PBM language. Pulled at last minute, but was bi-partisan



Mental Health Parity Lives On

- Biden Final Rule (2024) Subject to Challenge
- Final Parity Rule – ON HOLD – Not Being Enforced
 - Created 2-part test: Design & application requirements AND data evaluation requirements
 - “Meaningful Benefits” test
 - Content requirements including Fiduciary Certification
- Litigation Challenge – ERISA Industry Committee v HHS (filed January 17, 2025)
 - Standards are vague; Challenged agency’s authority, final rules violated due process and were contrary to statute. Also, fiduciary certification requirement issued without proper notice and comment



HIPAA Data Privacy & Cybersecurity

- HIPAA Reproductive Health Care Rule
 - Applicable as of 12/23/2024
 - Broad-based requests for claims data – is investigation required?
 - Attestation require if/when a disclosure request (i) health care oversight (ii) judicial process/subpoena, (iii) law enforcement, (iv) to coroner/medical examiner
 - HIPAA Privacy Notice Update due 2/16/2026 – Uncertain whether must be included in policy materials for 1/1/2026 renewals
- Cybersecurity
 - Proposed HIPAA Security Rule issued January 2025 (Biden Administration)
 - Builds on existing framework but much tighter timeframes and detailed requirements
 - Unknown whether Trump Administration will do, but Security is focus of Administration



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Thank you!