

CONTRACTING ISSUES FOR EMPLOYERS
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Topics of Discussion

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Overview

1. Managing Litigation Risk Through Benefit Plan Governance – “What Me Worry”
 - who is fiduciary
 - who is not fiduciary
 - who is the responsible fiduciary
 - managing the levels of risk/burden of proof
 - shifting the litigation obligation
 - dismissal of parties
 - minimize discovery
2. Implementing Financial Controls Through Vendor Contract Negotiation – “Where Has The Money Gone”
 - accountability
 - internal controls
 - indemnity/choice of law
 - banking controls
 - audit

Managing Litigation Risk Through Benefit Plan Governance



- "what me worry

Who is a Fiduciary?

- ERISA deems a person to be a fiduciary to the extent he or she:
 - exercises discretionary authority or control over plan management,
 - exercises any authority or control over management or disposition of plan assets,¹
 - renders investment advice for a fee, or
 - has any discretionary authority or responsibility in plan administration.
- The position test
 - “named fiduciaries”
 - investment manager – must acknowledge fiduciary status
 - trustees
- The functional test
 - any person who carries out any of the functions described in the definition, regardless of whether they have an official fiduciary designation
 - any person who exercises the power to select other fiduciaries

¹ Briscoe v. Fune, 6th Cir. No. 05-5097, 4/13/06, and IT Corp. v. General Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir. 1997).

Creating Plan Governance Structure

- Identify original administrative named fiduciary and investment named fiduciary in plan and trust documents
 - committee vs. individual
 - one vs. two
 - title or name
- If committee, cause original named fiduciary to add new members/replace members
- Empower, in plan and trust, original named fiduciary to select and contract with additional fiduciaries (who may later be identified as a named fiduciary by the plan sponsor).
- Empower named fiduciary to establish by-laws, if appropriate
- Allocation procedures
- Delegation procedures
- Identification procedures
- Prohibit allocation or delegation to other employees, unless through committee membership

Procedure for Identification of Named Fiduciary

1. Identify in document
 - officer or committee for administrative named fiduciary
 - officer or committee for investment named fiduciary
2. Procedure for identification in document
 - identify vendor through, or by reference to, administrative services agreement
3. Identification is not a fiduciary act
4. Selection is a fiduciary act

ERISA Procedure for Allocation/Delegation

- **Administration**

- Named Fiduciary can allocate to a named fiduciary
- Named Fiduciary can delegate to a fiduciary

- **Trustee Responsibility**

(“responsibility provided in the plan’s trust instrument (if any) to manage or control assets of the plan, other than the power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3))”²

- Named Fiduciary cannot allocate, except to Investment Manager
- Named Fiduciary cannot delegate, except to Investment Manager

Q – Is creation of a new named fiduciary an allocation?

Q – What is the effect of impermissible allocation or delegation of trustee responsibility?

Q - Implied exception for participant-directed investments?³

² ERISA Section 405(c)(3).

³ Jenkins v. Yager, 7th Cir., No. 04-4258, 4/14/06; Trustee delegation to participant implied.

Effect of Allocation/Delegation

- **No liability under ERISA for acts or omissions of allocatee or delegate if prudently.**
 - implement and
 - monitor
- **Compare to liability for acts of an agent.**
 - principal liable for acts of agent
 - general liability and fiduciary insurance may not cover liability for acts of an agent

Benefit Plan Governance to Manage Litigation Risk in Plan Administration

- Create plan governance structure (prior slide)
- Through plan and trust provisions and use of an administrative services agreement, allocate to vendor(s) as named fiduciary for final appeals.
- Use of a trust is helpful since it creates plan assets (otherwise, only employee contributions are plan assets) for purpose of allocating to vendor(s) as named fiduciary for:
 - settlements (within limits)
 - recovery of overpayment
 - litigation control
 - directing trustee to pay
 - other (use basket approach)

ADMINISTRATIVE SERVICES AGREEMENT

- Executed by Named Fiduciary, not by plan sponsor
- incorporate into plan document
- creates fiduciary by function
- Parties – Vendor/Plan/Trust
 - creates fiduciary duty over plan assets
 - state law coverage of plan
 - public policy/indemnification void
- Identify functions which make vendor a Named Fiduciary
 - discretion
 - direct trustee
 - network
 - claims and appeal
 - benefit management
 - Other
- Identify services to be provided (covenants)
 - administration manual written by vendor/vendor should be responsible for accuracy
- Confidentiality
- Trade secrets/software
- Prohibit assignment
- Use exhibits to set forth detail
- HIPAA/banking/performance fees/fees/network/administration manual/subrogation/fraud/MSP
- Fees/change of fees/run-out fee/due date
- Termination/termination services/data format/notice
- Performance fees
 - not liquidated damages

Implementing Financial Controls Through Vendor Contract Negotiation



Where has the money gone?

Financial/Banking Controls

Financial Controls

- allocation and identification of duties and standard of conduct
- strong indemnification for breach of duties or standard of conduct
- preclude ERISA preemption
- overpayments
 - report/establish threshold for vendor payment if recovery fails
- Representation and warranty
 - insurance
 - compliance with law
- Litigation control
 - Vendor pays for defense of claims if vendor is Named Fiduciary for appeals
- SAS 70
- Arbitration
- Settlements
- Survival clauses
 - MSP
 - indemnity
 - HIPAA
 - transition services
 - overpayments
- Audit

Financial/Banking Controls

Banking Limitations

- Stop payment on uncashed checks
- Do not escheat
- Funding disbursement account (float)
 - in name of trust/sweep
 - in name of vendor/presentment only
- Segregation of duties
- Timeliness of payment
- Record retention
- Check signatures
- Electronic payments
- Check stock controls/security
- Dollar limit
- Payee
- Banking system controls
- Reissue checks procedure

Selecting a Vendor

- Hire a consultant/establish roles
- Define services and search parameters
- Request for proposal/including Administrative Services Agreement
- Condition selection on finalization of the Administrative Services Agreement

Unique Issues for an HSA

- Provider issues
 - Account receivables will go up
 - How much should a provider collect from the patient at time of delivery of service
 - Can debit card issued by HSA bank authorize amounts to be charged to another account?
 - Prompt pay will not apply
 - Funding is not like an FSA or HSA
- HIPPA
 - Can enrollment data be given to the bank for the HSA?
- ERISA
 - Employers do not want HSA subject to ERISA/HIPAA
- Performance Metrics for an HSA Vendor
 - Activation of all HSA accounts by XX date (assuming timely delivery of eligibility file, payroll file and employee paper work)
 - Mailing or initial welcome kits to all employees as of XX date (in time for completion by the employee for the HSA account activation by XX date)
 - Mailing of debt card and checks by XX date (in time for activation and use on XX date)

Unique Issues for an HSA

- Reminder mailing for inactive HSA accounts sent no later than XXX
- Reconciliation of all employer or employee monies that are not accounted for (or aligned with an account) back to employer within X number of days
- Mailing of HSA account statements by XX (date)
- Accuracy of Employee HSA account statements on-line and by mail
- Quarterly reporting back to employer by XX timing each quarter
- Effective Implementation and communication support
- Ongoing Account Management support – completed by employer quarterly with a yearly penalty
- Average Speed of Answer – _____
- Call Center Availability – _____
- Website Availability – _____
- Transaction Accuracy – _____
- First Call Resolution – _____
- Call Backs completed within 2 days – _____
- Call Accuracy – _____
- Participant Satisfaction – _____
- What if employee transfers HSA to a bank which has no contact with the employer?