The Fiduciary HOT POTATO

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The Employee Retirement Income Security Act ("ERISA"), enacted in 1974, provides the federal regulatory framework for private sector employee benefit plans. As one of the primary goals of ERISA is to establish a uniform statutory framework for employee benefit plans, a major feature of ERISA is the preemption of most state regulation which touches on employee benefit plans falling within its scope. It is because of this that a self funded employee benefit plan under ERISA is essentially immune to most forms of state regulation and must look primarily to ERISA (and of course, the Affordable Care Act in the case of health and welfare plans) for regulatory guidance.

ERISA establishes standards of conduct for plan fiduciaries, those exercising discretionary authority over plan assets, plan management, or both. ERISA holds these plan fiduciaries to a high standard; such fiduciaries have significant duties toward their respective benefit plans and their participants and must carry out these duties prudently, faithfully adhere to the applicable plan document (unless it conflicts with ERISA) and always act in the best interests of the plan and its participants. A significant aspect of this fiduciary status and the reason it is so important to know whether one is acting as a fiduciary, is the personal liability imposed on fiduciaries for breaches of their duties. In the context of a health plan, a breach of fiduciary duty can result in enormous damage to the plan, damages which can then be claimed from the responsible fiduciary's personal assets. So, what can one do ensure that they are not held to this fiduciary standard and subject to its corresponding liabilities?

Just about any contract between a plan and a TPA, a TPA and a vendor or indeed any agreement the subject of which touches on a plan's operation, will contain numerous disclaimers and indemnifications, purporting to evade any fiduciary liability and adamantly denying fiduciary status. These provisions, perhaps out of trust in their effectiveness or perhaps merely out of caution, are ubiquitous in just about any agreement within the self funded sphere.

However, many plans, TPAs and vendors focus far too much on contractual disclaimers and indemnifications and too little on the nature of their actual activities. While it is required that an ERISA plan have at least one "named" fiduciary pursuant to its plan document, this is by no means the only way to attain fiduciary status. "An entity's status as a fiduciary hinges not solely on whether it is named as such in a benefit plan, but also on whether it 'exercises discretionary control over the plan's management, administration, or assets.'" Hartsfield, Titus & Donnelly v. Loomis Co., 2010 WL 596466, 2 (Dist. N.J. 2010), *citing* Mertens v. Hewitt Assocs., 508 U.S. 248, 252 (1993). In *Hartsfield*, the plan's TPA, Loomis Co., was found to be a fiduciary despite expressly disclaiming fiduciary status in its contract with the plan. Loomis Co. was then found to have negligently made overpayments and was held liable to the plan for breaching its fiduciary duty in doing so. To make this case even more frightening for TPAs, the fact that Loomis made overpayments in contradiction to the terms of the plan was sufficient to establish negligence, with essentially no further evidentiary showing.

In addition to precluding any attemptto disclaim fiduciary status, ERISA also does not allow one to disclaim fiduciary liability. *See* 29 U.S. Code §1110(a),

> *"Any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part shall be void as against public policy."*

So, What Can a TPA or Vendor (which exercises some discretionary control over plan assets or management) Do to Avoid Fiduciary Status or Lliability?

Unfortunately (or fortunately for plans), the answer is not much. However, although this liability cannot be "extinguished", it can be allocated, by one who understands the nature of the fiduciary status and its corresponding duties and liabilities. Pursuant to 29 U.S. Code § 1105(c), the "instrument under which a plan is maintained" may expressly provide for an allocation of fiduciary responsibilities (other than those of a trustee) among named fiduciaries. Additionally, the instrument may allow such named fiduciaries to designate persons or entities other than named fiduciaries to carry out fiduciary responsibilities. More importantly, if a fiduciary allocates such a responsibility to another person, "...then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility..." 29 U.S. Code § 1105(c)(2). In other words, once a named fiduciary properly delegates away a fiduciary duty, they are released from liability to the extent of the scope of the duty delegated. They are not released from all liability, however. The original fiduciary still has fiduciary duties in prudently selecting a party to appoint as a fiduciary, as well as following the proper plan procedure for doing so and reasonably monitoring the actions of the appointed fiduciary. Once a fiduciary duty is properly allocated, the original fiduciary can be held liable for a breach of that duty only through ERISA's rules on liability between co-fiduciaries (or through his own breach in imprudently selecting or failing to monitor the designated fiduciary). Under these rules, one is liable for the actions of a co-fiduciary only if he knowingly participates in or conceals the co-fiduciary's breach, enables the co-fiduciary's breach through his own breach of fiduciary duties of prudence and diligence, or has knowledge of the co-fiduciary's breach and makes no effort to cure the breach. 29 U.S. Code § 1105(a).

What can a TPA or Vendor Do with This Knowledge?

A threshold question should be whether your company's activities render it a plan fiduciary, subjecting it to liability as such. Interpreting the plan document in order to approve or deny claims, without consulting the employer on each specific decision, conducting appeals, providing subrogation and reimbursement services for the plan, making amendments to the plan document or summary plan description... all of these are activities commonly undertaken by TPAs or contracted out to vendors which can subject one to fiduciary liability.

Once an examination of an entity's activities in relation to the plan is complete, the next question is of course what to do about this liability. An option, perhaps unwise but the most commonly utilized option nonetheless, is to continue business as usual and hope for the best. Fiduciary liability is of no concern so long as your organization never makes a mistake on a claim, botches an appeal or contracts with a vendor which may put its own interests before those of the plan. Another option is to identify activities which subject your company to fiduciary liability and manage this liability by delegating them out to another party as discussed above, making sure to follow proper plan procedure in doing so. A third option is to acknowledge this responsibility and ensure adequate protections are in place. Fiduciary liability insurance is available and can protect a company and its employees from damages resulting from fiduciary breaches, including the costs of defending against such claims. Other common forms of commercial insurance such as directors and officers liability, commercial general liability, or errors and omissions policies can also protect your company from fiduciary liability, although alteration to the policy is probably necessary, as most insurance policies not aimed specifically toward fiduciary liability will disclaim it. It is important to note that the "fidelity bond" required by ERISA will not protect a fiduciary from personal liability. This bond, required for any person who handles plan funds, is in place to protect the plan in the event of dishonest conduct which damages the plan. It will not help the responsible party in the event of a breach.

No matter which course of action is undertaken, a thorough understanding of one's responsibilities and liabilities in any given situation gives crucial insight into the true value of the services being provided. There is a good reason agreements which openly assume fiduciary status and liability come with higher fees than those which disclaim such status. If the activities to be performed under an agreement will subject one to fiduciary liability regardless of contract language, why not assume that liability in the agreement? If assuming additional liability in the agreement, this risk and its potential costs should be taken into account in calculating the TPA's fee. Additionally, an entity armed with this knowledge is better equipped to assess the extent of the liability it truly wishes to take on.

Andrew Silverio, Esq. joined The Phia Group, LLC as an attorney in the summer of 2014. In addition to conducting research into novel and developing areas of the industry, his primary focus is on subrogation and reimbursement and he handles many of the company's more challenging and complex recovery cases. Andrew is licensed to practice in the Commonwealth of Massachusetts and can be reached at asilverio@phiagroup.com.