



Who are Fiduciaries Under ERISA

Southwest Benefits Association

2019 Benefits Administration Workshop

March 1, 2019

Agenda

- Fiduciary Duties
- Tips for Avoiding Common Problems
- Help With Meeting Prudent Person Standard
- Administrative Service Agreements
- Questions

Fiduciary Duties

Fiduciary Duties

Two Types of Fiduciary Under ERISA

1. Named fiduciary

- ERISA plans are required to name one or more fiduciaries responsible for the administration of the plan
 - There are frequently similar requirements for non-ERISA plans under other federal or state law
- Plan administrator
 - Single employer plans → This will generally be the responsibility of the employer
 - Multiemployer plans → This will be the responsibility of the board of trustees or other designated entity
- Trustees of plan assets

2. Functional fiduciary (or fiduciary in fact)

- Entities that may exercise discretionary authority or control over the administration of the plan or plan assets are also fiduciaries
- Discretionary authority or control generally means final and binding decisions may be made without the plan sponsor or plan administrator's input

Fiduciary Duties

Following Plan Rules Versus Discretionary Authority

- A third party does not exercise discretion if it is merely following the terms of the plan or plan's procedures
 - Applying plan rules to determine who is eligible and administering enrollment
 - Processing claims based on plan rules
 - Preparing employee communication materials
 - Answering questions about whether certain benefits are covered
- But contrast with...
 - An entity with the authority to determine whether an employee is in an eligible class of employees
 - An entity with authority to make final benefit determinations
 - An entity with the authority to pursue subrogation

Fiduciary Duties

Delegation of Fiduciary Powers

- Authority and liability can be delegated
 - An employer will want contractual protection that the third party will follow applicable law
 - A third party that actually exercises discretionary authority over plan administration or assets is a fiduciary whether or not authority has been formally delegated
- And it can be inadvertently taken back...
 - Applying influence or pressure to a third party can negate the delegation
- A delegation does not mean the plan administrator has no liability
 - The plan administrator can't get rid of certain statutory responsibilities
 - Instead, the plan administrator can seek contractual damages (indemnification) from third parties that agree to delegation but fail to perform



Are you a fiduciary?

- Employer
- Insurance Company
- Contract Administrator or “TPA”
- Plan attorney or accountant
- Recordkeeper or utilization reviewer
- Insurance Broker

Know who is responsible for plan actions

- Benefit decisions
- Disclosures to participants
- Recordkeeping
- Reporting to government
- Custody of plan assets

Fiduciary Duties

Certain Fiduciary Responsibilities Under ERISA

- Exclusive benefit rule
 - Plan fiduciaries must administer plan solely to provide benefits to participants and beneficiaries
 - Plan assets and self-dealing
- Prudent person standard
 - Plan fiduciaries must administer plan using the care, skill, prudence, and diligence of a prudent person acting in a similar situation
 - This includes selecting third party vendors
 - Follow the terms of the plan
 - Plan exceptions...
 - Prohibited transaction rules
 - Plan assets and self-dealing

Tips for Avoiding Common Problems

Tips for Avoiding Common Problems

1. Carefully select and monitor service providers
2. Make required disclosures to participants and beneficiaries
3. Understand your plan and your responsibilities
4. Make timely contributions and monitor plan assets
5. File reports with the government and keep good records

Fiduciary Tip #1

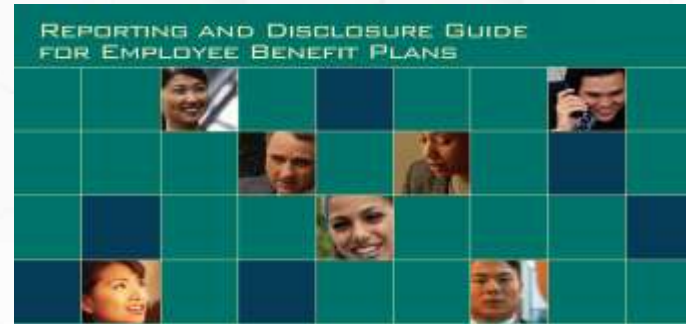
Carefully select and monitor service providers for the plan.

Tips for selecting service providers

- Get information from more than one provider.
- Make sure any required licenses are up to date (insurers, brokers, TPAs, etc.).
- Document process followed in selecting service providers.
- Ensure fees and expenses paid by the plan are **reasonable**.
- Obtain commitment from provider for regular updates on services. Plan fiduciaries must periodically monitor service providers.

Fiduciary Tip #2

Make required disclosures to plan participants (and beneficiaries).



[Reporting and Disclosure Guide](#)

Fiduciary Tip #3

Understand your plan and your responsibilities.

Follow the terms of the plan

- Check plan documents & SPD before acting
- Do not exercise personal discretion when terms of plan are clear

Fiduciary Tip #4

Make timely contributions, and monitor use of plan assets

Contributions

- **Participant contributions** – become “plan assets” as soon as reasonably segregable from employer’s general assets. **See Safe Harbor Regulation at 29 CFR 2510.3-102.**
 - As a general matter, these amounts must be sent to insurance company to pay premiums or put in trust promptly, never more than 90 days (DOL provides for a cafeteria plan exception in Technical Release 92-01.)
- **Employer contributions** – must contribute or pay premiums per plan documents.

Prohibited Transactions

- Plan may not engage in certain transactions with persons related to the plan.
- Plan officials cannot use plan assets for their own interest, to benefit a related party, or accept a kickback.
- There are exemptions for a number of prohibited transactions, generally based on the independence of the decision-maker, the nature of the services provided and the reasonableness of the compensation.

Fiduciary Tip #5

File reports with government and keep good records.

Which group health plans file Form 5500/Form 5500-SF?

- **No Filing Required** for “small plans” (covering fewer than 100 participants) that are unfunded, fully insured, or combination, except for those small plans required to file a Form M-1.
- **Exemption from Audit and Financial Reporting** for “large plans” (covering 100 or more participants) that are unfunded, fully insured, or combination.
- **Other Welfare Plans** generally must file 5500 report
 - Simplified report for small plans
 - Large plans generally must have accountant’s audit report and opinion.

Help With Meeting Prudent Person Standard

How do you know when you're prudent?

Best Practices:

- Monitor regularly and often
- Analyze 100% of claims
 - Advanced analytics and rules
- Utilize clinical and adjudication expertise
- Avoid inherent conflicts of interest
 - i.e. relying on the same entity to process your claims and provide oversight on the accuracy
- Track results for effectiveness



Claim-Level Errors

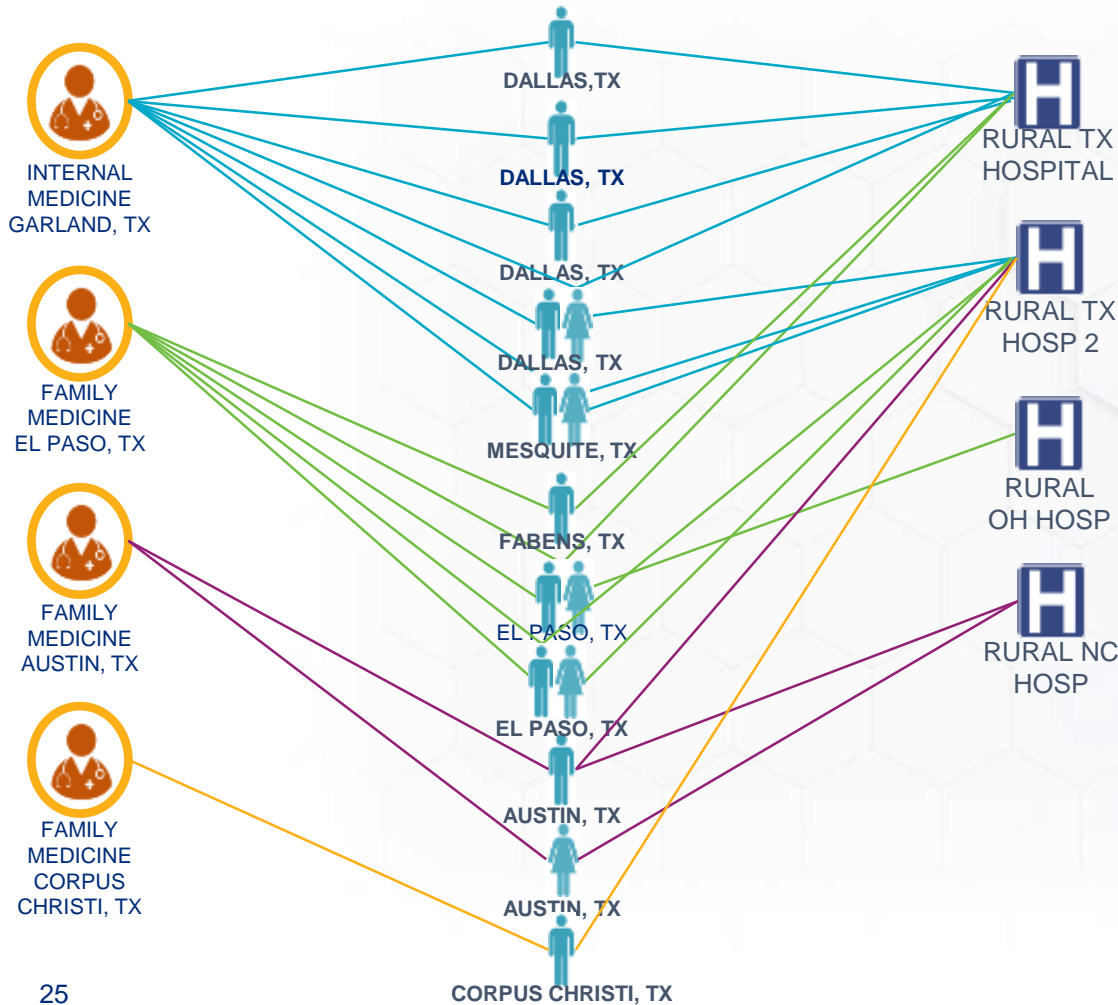
BILLING ERROR DESCRIPTION	SERVICE DATE	PAID DATE	PROCEDURE CODE	PROCEDURE DESCRIPTION	UNITS	BILLED AMT	PAID AMT
Double billing by different providers	13-Mar	30-Mar	59425	Antepartum care only; 4-6 visits	1	\$1,557	\$1,401
	17-Apr	12-Jun	59510	Routine obstetric care including antepartum care, cesarean delivery, and postpartum care	1	\$3,000	\$2,414

BILLING ERROR DESCRIPTION	SERVICE DATE	PAID DATE	PROCEDURE CODE	PROCEDURE DESCRIPTION	UNITS	BILLED AMT	PAID AMT
Medically Unlikely	9-Sep	22-Nov	J1071	Injection testosterone cypionate, up to 100mg	260	\$26	\$1,401
	9-Sep	22-Nov	96372	Therapeutic, or diagnostic injection, specify drug; subcutaneous or intramuscular	260	\$10,500	\$9,549

BILLING ERROR DESCRIPTION	TPA	SERVICE DATE RANGE	PAID DATE	PROCEDURE CODE	PROCEDURE DESCRIPTION	UNITS	BILLED AMT	PAID AMT
Duplicate Payment Same Provider, Same Member; Separate TPAs	Behavioral Health	Aug-2018	21-Sep	G0299	Skilled nursing in home/hospice RN ea 15 min	15	\$2,400	\$2,169
	Behavioral Health	Aug-2018	21-Sep	G0300	Skilled nursing in home/hospice LPN ea 15 min	3	\$480	\$480
	Medical	Aug-2018	12-Oct	G0299	Skilled nursing in home/hospice RN ea 15 min	15	\$2,400	\$2,169
	Medical	Aug-2018	12-Oct	G0300	Skilled nursing in home/hospice LPN ea 15 min	3	\$480	\$480

>1% spent on unintentional errors

Provider-Level Fraud / Waste

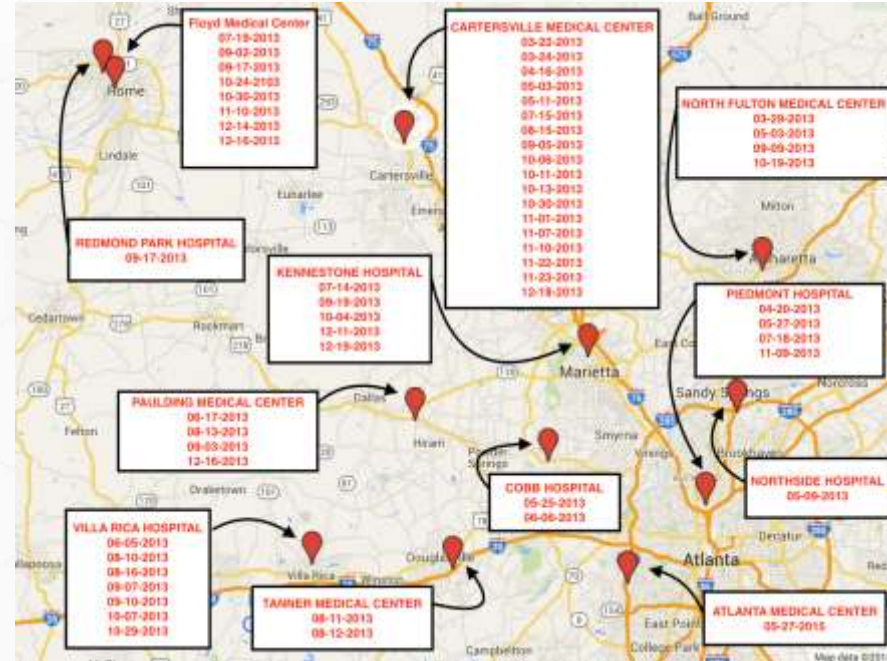


CPT	CPT DESC	UNITS	BILLED
80050	General health panel	1	\$156
84681	Assay of c-peptide	1	\$193
84270	Assay of sex hormone globul	1	\$202
82533	Total cortisol	1	\$151
82627	Dehydroepiandrosterone	1	\$201
84466	Assay of transferrin	1	\$148
82746	Assay of folic acid serum	1	\$137
80061	Lipid panel	1	\$170
83519	Ria nonantibody	1	\$126
83090	Assay of homocystine	1	\$114
80050	General health panel	1	\$98
82248	Bilirubin direct	1	\$47
84479	Assay of thyroid (T3 or T4)	1	\$60
83036	Glycosylated hemoglobin test	1	\$90
84146	Assay of prolactin	1	\$180
82150	Assay of amylase	1	\$60
82977	Assay of ggt	1	\$116
84100	Assay of phosphorus	1	\$44
83735	Assay of magnesium	1	\$62
82728	Assay of ferritin	1	\$127
83525	Assay of insulin	1	\$114
84153	Assay of psa total	1	\$213
83970	Assay of parathormone	1	\$383
84403	Assay of total testosterone	1	\$129
84402	Assay of free testosterone	1	\$197
83002	Assay of gonadotropin (LH)	1	\$211
83001	Assay of gonadotropin (FSH)	1	\$173
82985	Assay of glycated protein	1	\$140
84378	Sugars single quant	1	\$153
83615	Lactate (LDH) enzyme	1	\$148
83550	Iron binding test	1	\$81
82607	Vitamin B-12	1	\$77
83540	Assay of iron	1	\$60
82906	Vitamin d 25 hydroxy	1	\$252
86141	C-reactive protein hs	1	\$115
83876	Assay myeloperoxidase	1	\$222
Totals:			\$5,223

Member-Level Waste

A single patient with 137 ER visits in 18 months

- 19 ER facilities utilized within 65 miles of patient's home
- Discharged on the same day 95% of the time
- Patient had 126 CT scans performed during the ER visits



>\$650k ER claims paid for a single patient

Conclusion

Healthcare dollars are:

- Not unlimited
- Vulnerable to waste from billing errors, ER abuse, testing for medically unlikely scenarios, or even intentional fraud

The **good news** for employers is that effective, prudent oversight can:

- Lower cost for both employee and employer
- Improve employee health outcomes
- Allow executives to focus on business



Administrative Services Agreement

Administrative Services Agreements (ASA)

Overview

- An employer will usually engage one or more third parties (often referred to as “third party administrators” or “TPAs”) to assist with plan administration
 - Common examples include maintaining a network of providers and claims processing
 - Insurance carriers also often act as TPAs for self-insured plans
- The ASA is a contract specifying the parties’ rights and responsibilities toward each other (also known as an ASO agreement), including:
 - The services the TPA will perform
 - The parties’ liabilities to each other (remember, a TPA’s actions may still make it a fiduciary)
 - The fees for those services
 - The duration of the contract
 - How the contract can be amended or terminated



Administrative Services Agreements (ASA)

Overview

- When reviewing the ASA, watch out for:
 - Limitations on the employer’s ability to access and use data; TPAs often attempt to restrict clients to a “company store” model
 - Severe limitations on the TPA’s liability, including:
 - “gross negligence” and “willful misconduct” standards
 - A dollar cap limitation well below the plan’s possible financial exposure for a TPA’s error
 - Whether the ASA allows for a no-fault termination by the employer (i.e. without cause) and how long the contract must run before it can be exercised
- The TPA’s ASA will usually indicate the laws of the state where the ASA is incorporated control in the event of a dispute
 - Larger employers have more leverage to change this



Questions?

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