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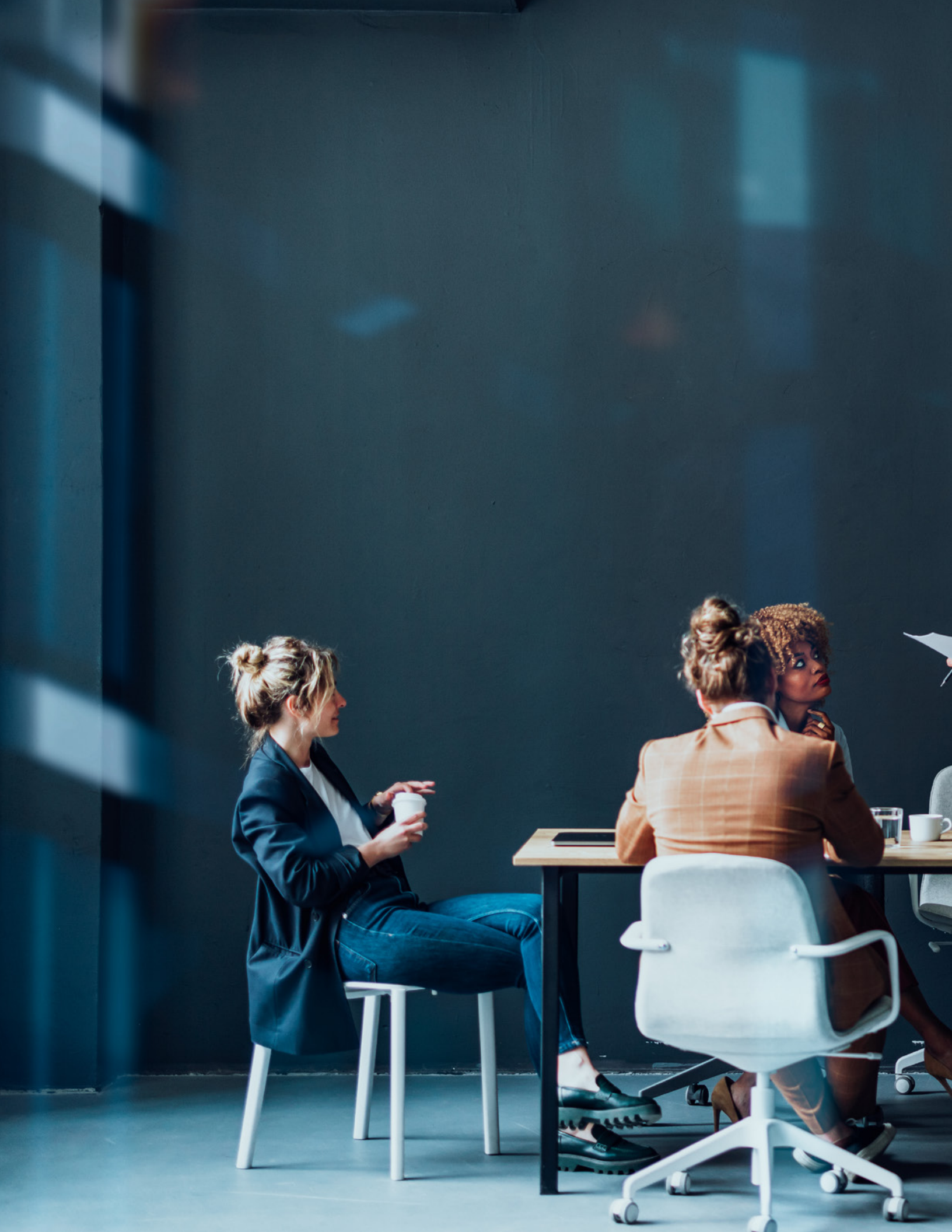
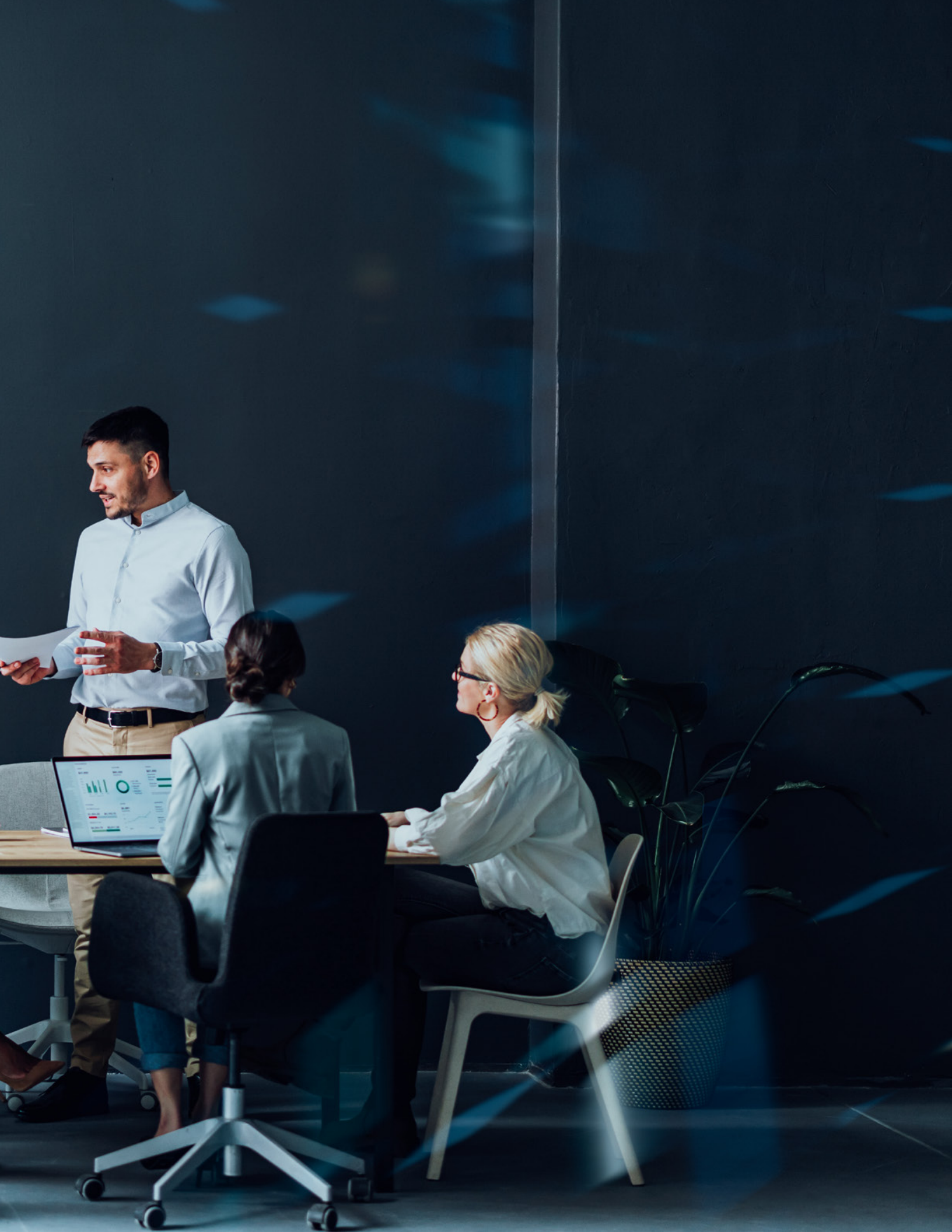
ERISA Fiduciary Governance:

A Guide for Employers





ERISA Fiduciary Governance: A Guide for Employers

Several recent developments have highlighted ERISA fiduciary obligations in the context of health and welfare plans. First, transparency legislation has made group health plan data, such as network pricing and service provider compensation, more readily available to fiduciaries. Second, numerous class action lawsuits have been initiated against group health plan fiduciaries, alleging breaches of various ERISA fiduciary obligations (in many cases, for a failure to utilize the newly available data). Third, regulators have focused more on health and welfare plan compliance; previously, such attention was largely directed at retirement plans. These developments are explained further in the following section entitled, The Background: Recent Developments Impacting Group Health Plan Fiduciary Governance.

ERISA group health and welfare plan sponsors, administrators, and other plan fiduciaries have always been required to adhere to a fiduciary code of conduct that involves duties of loyalty, impartiality, and prudence. Recent events underscore that it is crucial for sponsors of group health and welfare plans to review their fiduciary governance structures and practices to ensure they are fulfilling their plan obligations and thus minimizing related risks and potential liabilities to their organizations.

This publication provides a refresher on ERISA fiduciary duties and outlines effective governance structures and prudent governance practices. Emphasis is placed on procedural prudence, which is central to the successful fulfillment of ERISA fiduciary responsibilities. The publication includes practical examples, self-check questions, and appendices with a high-level checklist and sample documents to assist fiduciaries in understanding and fulfilling their obligations in an increasingly complex and dynamic employee benefits environment.

Our Observation:	Overall, the focus on good fiduciary governance practices is a positive one that will improve plan administration and place fiduciaries in a better position to defend their actions in the event of a lawsuit or regulatory inquiry. This has certainly been the case in the retirement plan context, where similar developments occurred over a dozen years ago. In fact, measures adopted by retirement plan sponsors can help to provide a roadmap for health and welfare plan sponsors.

The Background: Recent Developments Impacting Group Health Plan Fiduciary Governance

Transparency Legislation

The transparency requirements under the CAA 2021 and Transparency in Coverage (TiC) final rule were designed to provide group health plan sponsors with access to information (e.g., network rates, costs, claims data, and service provider compensation) necessary to prudently administer their plans and plan assets and to prudently select and monitor plan service providers. The goals of these transparency laws are beginning to be achieved as data analytic tools have become available, allowing sponsors to better shop for and compare healthcare providers and pricing arrangements.

Significantly, a recent Trump executive order has called for greater enforcement of the TiC requirements; please see our related article. Hopefully, this will result in even more usable and accurate pricing data becoming accessible to plan sponsors.

Fiduciary Breach Litigation

However, transparency has proven to be a two-sided coin, because the availability of data raises the bar for plan sponsors in fulfilling their fiduciary obligations. Since more data is now publicly available, class action law firms (on behalf of participants) have used it to sue plan sponsors for alleged breaches of their ERISA fiduciary duties, particularly with respect to pharmacy benefit plans. In several high-profile cases, participants have claimed that plan fiduciaries failed to prudently manage their pharmacy benefit plans, select their PBM, and monitor their PBM (and the PBM's compensation).

Although plaintiffs in these cases face significant legal hurdles (please see our article on one recent ruling), the lawsuits are expected to continue and present numerous legal risk and potential liabilities for group health plan sponsors.

Increased Regulatory Attention

The DOL has increased their focus on group health plan fiduciary compliance and recently published a guide, Understanding Your Fiduciary Responsibilities Under A Group Health Plan, to ensure employers recognize ERISA's basic rules and fulfill their roles as group health plan sponsors. Additionally, the DOL has made clear in Compliance Assistance Release No. 2024-01 that their cybersecurity guidance applies to ERISA health and welfare plans and not just retirement plans.

The DOL is also considering reforms to group health plan claim and appeal procedures to reduce claim denials and better monitor artificial intelligence claim determinations. Since plan fiduciaries are responsible for maintaining the plan's claim procedures, these potential reforms are another development for plan fiduciaries to monitor.

ERISA Fiduciary Governance – Employer Action Plan

Plan sponsors faced with transparency obligations, potential litigation, and increased regulatory attention should take a proactive approach to addressing their fiduciary compliance responsibilities. ERISA's application is not one-size-fits-all, so each organization's governance structure, policies, and procedures should be tailored to their size, needs, and the complexity of their benefit plans. (Consulting with experienced ERISA counsel is always advisable to help ensure compliance with applicable laws and ongoing adherence to fiduciary obligations.)

At a high level and as a practical approach, employer plan sponsors should consider taking the following basic steps in establishing a fiduciary governance program:

1. Identify plan fiduciaries.
2. Ensure plan fiduciaries understand the basic ERISA standards for fiduciary conduct.
3. Review the fiduciary governance structure and consider establishing a committee.
4. Adopt prudent processes for making and documenting fiduciary decisions.
5. Recognize that selecting and monitoring service providers is a fiduciary function.
6. Consider fiduciary liability insurance and other measures to protect plan fiduciaries from potential liability.

Each basic step is described below in a separate subsection that concludes with a Fiduciary Self-Check/Review Item section to assist employers with assessing their compliance. For a high-level simplified view of the steps and review questions, please see **Fiduciary Governance Overview and Checklist** (Appendix A).

Step 1: Identify ERISA Plan Fiduciaries

Under ERISA, parties that have or exercise discretionary authority or control over the management of the plan or plan assets are fiduciaries.

As indicated below, there are several types of ERISA plan fiduciaries: Named fiduciaries, fiduciaries via delegation, and functional fiduciaries.

Named Fiduciaries

ERISA requires that a "named fiduciary" be specified in the written plan document. The plan administrator, who is responsible for the plan's overall administration and compliance, is presumed the named fiduciary unless this role is otherwise assigned. Furthermore, the employer that establishes and maintains the plan is the default plan administrator in the absence of a designation.

Thus, by default, the sponsoring employer (i.e., the board of directors of a corporation, the managers of a limited liability company, or the partners in a partnership) assumes the plan administrator and named fiduciary role with significant plan fiduciary obligations (and related liability exposure). Accordingly, as explained in Step 3 below, it is crucial for the employer to carefully consider if and how that fiduciary role will be allocated (e.g., to individuals or a committee) within the organization.

Fiduciaries via Delegation

Additionally, as permitted by and in accordance with the ERISA plan document terms, a named fiduciary can (and typically does) delegate certain fiduciary functions to third parties. As a result, the party accepting the delegation of fiduciary responsibilities becomes a fiduciary and is accountable for properly discharging the assigned tasks. As a common example, a self-insured group health plan administrator may contractually delegate fiduciary authority to a TPA to review and decide the plan claims and appeals, making the TPA a plan fiduciary to the extent of such adjudication authority.* With a fully insured plan, the insurer typically fulfills the fiduciary role with respect to claim decisions.

The delegating fiduciary must act prudently in selecting the third party and cannot contract away its own fiduciary status by virtue of the delegation. Rather, the delegating fiduciary remains responsible for monitoring the third party and assessing whether they are properly performing the delegated duties.

Functional Fiduciaries

Since ERISA fiduciary status is based on the actual functions a party performs, a party that exercises discretionary authority over the plan or assets (e.g., a TPA) can be a fiduciary, even without a formal designation in a contract. Functional fiduciary status is often decided by courts that review the specific facts, circumstances, and plan services provided. Generally, courts have not found PBMs to be functional fiduciaries, despite debate on this issue.

Nonfiduciaries

Other third parties (e.g., health FSA vendors) typically are not plan fiduciaries because their roles are "ministerial" (i.e., nondiscretionary and limited to following the plan's established rules and policies).

Fiduciary Self-Check/Review Items:

- Have you verified in the ERISA plan document who is designated as the "named fiduciary" and plan administrator? If the sponsoring employer is named, this generally means the board of directors of a corporation is the named fiduciary and plan administrator.
- Have you identified other parties within your organization who are plan fiduciaries? Keep in mind those acting in a discretionary capacity on behalf of the plan may be fiduciaries even if not officially designated as such (i.e., functional fiduciaries).
- Have you reviewed contractual agreements with third parties (particularly TPA agreements) to determine if any fiduciary authority is delegated to another party and the extent of any such delegated authority (e.g., claim and appeal decisions)?
- Do you recognize that any fiduciary obligations not specifically delegated remain with the employer/plan administrator?
- Do you realize that many third-party vendors (e.g., FSA, HRA) are typically not fiduciaries and will require clear direction from the plan administrator regarding any discretionary decisions (e.g., applying plan forfeitures)?

*In such case, it is important to also delegate to the TPA any discretionary authority to interpret and administer the plan and make factual determinations so a court may apply a standard of review more favorable to the plan if the benefit determinations are ever legally challenged.

Step 2: Understand ERISA Standards for Fiduciary Conduct

ERISA plan fiduciaries are held to a high level of conduct, like that of trustees, when performing fiduciary duties. Courts have described this standard as the "highest known to the law." Accordingly, ERISA fiduciaries must be able to discern which of their functions are fiduciary in nature and must perform these functions in accordance with ERISA's requirements.

Settlor vs. Fiduciary Function

Certain plan decisions are not fiduciary actions but instead are employer business (i.e., "settlor") decisions not subject to ERISA. For example, an employer's decisions regarding plan establishment, design (specific benefits and features), and termination are normally considered settlor functions that can be made for the employer's own benefit. However, the employer's implementation of these decisions is an act on behalf of the plan and thus subject to ERISA's fiduciary requirements.

Employers should recognize their two distinct roles and conduct affairs accordingly. For example, some employers establish separate committees and hold separate meetings to review plan business versus administrative matters.

Principal Standards of Conduct of an ERISA Plan Fiduciary

The primary standards of conduct applicable to an ERISA plan fiduciary include:

- The duty to act in accordance with the plan documents.
- The duty of undivided loyalty to plan participants.
- The duty of prudence.

These basic standards speak to how an ERISA fiduciary performs their obligations. Essentially, these standards must be applied to all fiduciary decisions and often overlap each other in application. For example, the hiring of plan service providers is a fiduciary duty that involves the duty to act in accordance with the plan document (e.g., following terms for delegating duties), the duty of loyalty (e.g., avoiding conflicts of interests), and the duty of prudence (e.g., gathering, reviewing, documenting, and retaining the fee and service information of several qualified providers).

Importantly, these standards overarch other fiduciary duties, such as the duty to file required reports with regulatory agencies (e.g., Form 5500) or the duty to comply with all applicable laws and regulations (e.g., the ACA, COBRA, MHPAEA, HIPAA, etc.), including providing required notices to plan participants, and many other duties that have evolved (and continue to evolve) over time as a result of legislation, court decisions, regulatory guidance, and technological changes (e.g., duty to maintain cybersecurity). For additional information about required group health plan notices, see the PPI publications **Required Group Health Plan Notices Overview** and **Required Group Health Plan Notices Chart**.

These basic standards are described further below. A failure to fulfill these duties is considered a fiduciary breach, which may result in litigation and significant liability.

Duty to Act in Accordance with the Written Plan Document

ERISA requires the plan administrator and other plan fiduciaries to operate the plan in accordance with the terms of a written plan document. Among other items, the plan document must include a description of benefits, eligibility, funding methods, claim and appeal procedures, and the plan amendment and termination process. As noted earlier, the document must designate a "named fiduciary" and specify the plan name, year, and number. Generally, the plan document should also include subrogation, reimbursement, and coordination of benefit rules.

Optional provisions that are generally recommended for inclusion in an ERISA plan document include identification of the plan administrator and sponsor, language that gives the plan administrator discretionary authority to interpret the plan terms (which may provide a more favorable standard of review in the event of litigation), and deadlines for participants to file lawsuits (which cannot be enforced absent adequate advance disclosure).

In the event of litigation or a regulatory audit, the plan document is one of the first items opposing counsel or an auditor will request. Therefore, to properly operate the plan and to respond to legal and regulatory inquiries, *it is imperative that plan fiduciaries are familiar with the written plan terms, particularly those applicable to their specific duties*.

Fiduciary Self-Check/Review Items:

- Do you have a current written ERISA plan document in place for each ERISA benefit (whether a "wrap" document or individual documents), and have plan fiduciaries read the terms?
- Have you confirmed that the eligibility terms for each benefit are accurate? For example, for medical plans subject to the ACA employer mandate, does the plan document accurately reflect the measurement method (look-back or monthly) for applicable employee classifications?
- Have you verified that the eligibility terms are coordinated with federal and state leave laws and the employer's leave policies so that COBRA is timely offered when benefit eligibility is lost due to a reduction in hours?
- Have you determined whether the document language provides the plan administrator with discretionary authority to interpret the plan terms? As noted above, this may result in a more favorable (i.e., discretionary) standard of review in litigation, *but only if the plan administrator has consistently followed the plan terms*.
- Are you familiar with the plan's written claims and appeals procedures?
- Do you adhere to the plan terms even when sympathetic employee fact patterns (e.g., allowing coverage of a specialty drug) may tempt you to make exceptions?
  - Making exceptions to the plan terms would be a fiduciary breach; as an alternative, though, consider amending the plan to provide expanded coverage for all participants.
- Are you prepared to provide a copy of the current plan document(s) within 30 days if requested in writing by a participant (or their authorized legal representative)?
  - Failure to timely respond can result in fines of $110 per day.

Duty of Loyalty

ERISA's duty of undivided loyalty requires plan fiduciaries to discharge their duties solely in the interest of participants and for the exclusive purpose of providing plan benefits or paying reasonable plan administration expenses (the exclusive benefit rule). In other words, the interest of participants and the plan must be put before business and personal interests. Importantly, when acting on behalf of the plan, fiduciaries must avoid self-dealing and conflicts of interest.

Plan Assets

The exclusive benefit rule extends to the use and handling of plan assets. "Plan assets" include:

- Participant contributions towards premiums or benefits.
- Amounts attributable to plan assets (e.g., the portion of insurance rebates due to participant contributions).
- Amounts held in a separate account or trust to pay plan benefits (i.e., not part of the employer's general assets).

ERISA generally requires plan assets to be held in a trust, but in the group health plan context, the DOL does not enforce this requirement with respect to participant contributions if the employer timely forwards such contributions to the carrier (for a fully insured plan) or applies the contributions to the payment of benefits (for a self-insured plan). "Timely" means as soon as the amounts can "reasonably be segregated from the employer's general assets," which is typically within days.

Additionally, employers must ensure that amounts attributable to plan assets are properly handled. For example, sponsors of fully insured plans should apply the plan asset portion of any insurance rebate, such as a medical loss ratio (MLR) rebate, in accordance with DOL guidance (Technical Release 1992-01), which generally requires the amount to be returned to plan participants in some form, such as a premium holiday, discount, or cash refund (and within 90 days of receipt to avoid the ERISA trust requirement). For further information about the treatment of MLR rebates, see the PPI publication **MLR Rebates: A Guide for Employers**. Sponsors of self-insured plans who obtain stop-loss coverage should understand that if participant contributions are used to purchase the stop-loss insurance, then a portion of any stop-loss reimbursement would be considered plan assets and subject to the trust requirement.

Although atypical, an employer that funds a group health plan through a trust must meet additional requirements, including appointing trustees to serve as fiduciaries and manage the trust assets, maintaining a trust document, and purchasing a fidelity bond to protect plan assets against loss due to fraud or dishonesty by plan officials.

Disclosure Obligations to Participants

The duty of loyalty encompasses a duty of fairness (i.e., treating all similarly situated participants in like manner) and a duty of disclosure to participants. Plan fiduciaries must disclose material benefit information and any related changes to participants, including but not limited to the distributions of summary plan descriptions (SPDs) and summaries of material modifications (SMMs) and required notices. Fiduciaries should carefully review all participant disclosures for clarity, accuracy, and completeness, and to ensure these are written in a manner that the average participant can understand.

Fiduciary Self-Check/Review Items:

- Do you timely forward participant cost-share contributions to the carrier (for a fully insured plan) or TPA (for a self-insured plan)?

- For a fully insured medical plan, do you ensure the portion of any MLR rebates attributable to participant contributions is allocated in accordance with the plan terms and DOL guidance?
- For a self-insured plan, do you ensure participant contributions are not used to pay stop-loss premiums (or alternatively, that the plan asset portion of any stop-loss reimbursement is maintained in a trust)?
- Do you carefully review and timely distribute SPDs to participants? (The initial SPD must be distributed within 90 days of plan enrollment.) After amending the plan, do you provide participants with SMMs or updated SPDs?
- If group health plan funding is through a trust, do you maintain a trust agreement and fidelity bond, as required?

Duty of Prudence

The duty of prudence requires that a plan fiduciary act with the same care, skill, prudence, and diligence of a comparable knowledgeable plan fiduciary acting under similar circumstances. This requirement is often referred to as the "prudent expert" test. In other words, when carrying out plan obligations, it's not sufficient for ERISA plan fiduciaries simply to act with the care of a reasonable person because they are held to a much higher bar.

Accordingly, fiduciaries must be well informed in their areas of responsibility and, as necessary, hire or consult with experts with the requisite background and experience to give appropriate advice. For example, a plan fiduciary reviewing an appeal of a medical claim should recognize the need to consult with a doctor or other medical professional for guidance if the fiduciary does not have the necessary knowledge or experience reviewing this type of claim.

Procedural Prudence

Importantly, with the duty of prudence, the focus is always on the fiduciary decision-making process as opposed to the results. In the event of a fiduciary breach lawsuit, the reviewing court would look at the fiduciary's conduct objectively at the time of the alleged act or omission and consider what a comparable prudent fiduciary would have done at that time under the prevailing circumstances. If a fiduciary acts as a prudent fiduciary would, by demonstrating care and due diligence in the decision-making process, they can avoid liability (even if, in hindsight, they would have made a different decision). For example, in the retirement plan context, a plan fiduciary with the requisite expertise who engaged in a prudent process to select a 401(k) investment option may not face liability in a lawsuit even if, in hindsight, the fiduciary would have made a different choice. In the event of a regulatory inquiry, the DOL normally adopts a similar approach (i.e., zeroing in on whether the fiduciary engaged in a prudent process to reach a decision and not the result).

The recent wave of class action lawsuits brought against ERISA plan fiduciaries assert various claims but primarily allege violations of the duty of prudence. For example, the plaintiffs typically claim that plan fiduciaries breached their duties to the plan and participants by failing to prudently select and monitor plan service providers and/or their compensation.

Accordingly, plan sponsors would be wise to review their fiduciary governance and decision-making practices.

Fiduciary Self-Check/Review Items:

- Do you understand the high standard to which your fiduciary decisions are compared?
- Do you engage experts when you do not have the requisite knowledge to make an informed decision regarding a discretionary matter?
- Do you have a formal structure and procedures in place for fiduciary decision-making?

Step 3. Review the Fiduciary Governance Structure and Consider Establishing a Committee

In the retirement plan context, it is common for the named fiduciary and ERISA plan administrator roles to be fulfilled by a formally designated committee. Employers may want to consider whether this committee approach would also be beneficial for the general administration of their group health and welfare plans. Establishing an employee benefits committee is not required nor necessarily appropriate for every organization, but it may help employers to facilitate and document a prudent decision-making process.

A designated committee can also serve to limit the fiduciary liability exposure of the company and their board of directors. As explained earlier, in the absence of a specific designation, the named fiduciary and plan administrative roles would default to the sponsoring employer, meaning members of the board of directors of a corporation (or the managers of a limited liability company or the partners in a partnership) can be held personally liable for a fiduciary breach. However, in some cases, these default fiduciaries may not have significant substantive knowledge regarding employee benefit plan management (e.g., establishing plan administrative procedures, selecting plan service providers, or carrying out the plan's ongoing operations). Accordingly, employers may wish to delegate these fiduciary roles to other individuals or entities with greater experience and expertise in managing benefit plans.

Employers/boards of directors are generally familiar with this type of committee structure, which is normally used for corporate governance purposes. Good corporate governance practices typically emphasize careful selection of members with defined roles, responsibility and accountability, ethics and integrity, and internal controls. All these practices can also be applied in the ERISA fiduciary context, particularly if a committee structure is adopted, to effectively oversee plan administration. For those with retirement committees already in place, it may just be a matter of adopting a similar arrangement for their health and welfare plans.

Selecting Plan Fiduciaries/Committee Members

Traditionally, with health and welfare plans, one or two individuals (e.g., from the human resources or benefits department) may be designated as plan administrator. The idea behind the committee approach is to expand this role to a small, dedicated group of knowledgeable individuals with relevant experience who are willing to serve as fiduciaries. These subject matter specialists from various areas of the company can weigh in on issues and provide different perspectives, resulting in more informed decisions. For example, members of a plan administrative committee may include executives or senior representatives selected from the human resources, finance, and, as applicable, compliance departments.

Each organization needs to structure and staff its committee based on their size and resources as well as the complexity of their benefit plans, among other factors. There is no required size, although five to seven members may allow for a sufficient variety of opinions without being unmanageable. An odd number is generally preferable to avoid a tie when voting on fiduciary matters.

Appointing Fiduciaries and Establishing an Employee Benefits Committee – Procedural Aspects

Employers should recognize that the selection and appointment of ERISA fiduciaries is itself an ERISA fiduciary duty. Therefore, employers should make formal appointments of plan fiduciaries in accordance with any requirements specified in the ERISA plan documents.

If a committee format is adopted, this is normally accomplished via the board of directors adopting a resolution to delegate fiduciary authority to a committee and a committee charter that affirms the scope of authority delegated to the committee and describes the committee's specific responsibilities. Accordingly, the charter serves as a foundational document that establishes the committee and outlines its fundamental principles, purpose, structure, and obligations. Please see **Sample Board Resolution to Form Fiduciary Employee Benefit Plan Committee and Plan Committee Charter** (Appendix B).

Normally, the employer/board does not completely delegate all ERISA fiduciary obligations because it must monitor the performance of its appointees (i.e., oversee the committee). The level of oversight depends upon the amount of authority delegated; it may be possible for the appointees to largely monitor their own staff and simply report to the board at periodic intervals (which may also be specified in the board resolution and committee charter).

However, although atypical, it may be possible for the board members not to assume any fiduciary obligations and thus avoid fiduciary liability exposure. For example, the ERISA plan document could designate a benefits committee as the named fiduciary with the authority to appoint its own members. Accordingly, the board would be relinquishing control of the organization's ERISA fiduciary obligations to the committee. This approach may be worth consideration if the board's activities with respect to the benefit plans are otherwise normally limited to settlor functions (i.e., those involving plan establishment, design, amendment, and termination).

Ensuring Appointed Fiduciaries Understand and Acknowledge Their Duties and Obligations

When an employer appoints fiduciaries, it may be helpful to provide each appointee with a summary of their duties and responsibilities to ensure they understand the significance and scope of the role they will be assuming. For a committee member, this summary may include a general description of their duties and responsibilities (as referenced in the committee charter), the general guidelines for fulfilling these obligations (i.e., adherence to the duties of loyalty, prudence, and following the plan document terms), and specific considerations for particular duties (e.g., selecting and monitoring service providers and, fulfilling plan reporting and disclosure obligations). The summary may also explain prohibited conduct (e.g., engaging in activity with plan-adverse interests) and disqualification factors (e.g., violation of certain laws) for committee members. Please see **Sample Summary of Fiduciary Employee Benefit Plan Committee Duties and Responsibilities** (Appendix C).

The appointed fiduciaries would then acknowledge in writing that they have received and reviewed the summary and are willing to serve on the committee to fulfill the described obligations. Please see **Sample Fiduciary Employee Benefit Plan Committee Acknowledgement** (Appendix D).

Additionally, regular ongoing training should be provided to fiduciaries to reinforce the standards to which they must adhere and to provide updates on new developments. Notably, there is no sanctioned or certified ERISA fiduciary training materials or program, so employers have flexibility to tailor their training program to their organization's needs.

Of course, the employer's decision to appoint fiduciaries and/or establish an employee benefits fiduciary committee, including any related legal document requirements or fiduciary training aspects, should be reviewed with legal counsel.

Outsourcing Fiduciary Functions

Finally, some employers may consider more broadly outsourcing plan administrative functions to a third party. Although this occurs in the retirement plan context, it is less common with health and welfare plans (at least at this juncture). Perhaps we will see an increase in fiduciary outsourcing as more vendors enter this space; this will be a development to monitor. However, an employer would need to carefully consider whether they wished to surrender control of the plan's administration to an external third party.

Fiduciary Self-Check/Review Items:

- If the employer (i.e., board of directors) is the named fiduciary and plan administrator in the plan document, are board members sufficiently educated on knowledge of group health and welfare plan administration to fulfill this role without unnecessary liability exposure? Are the board members aware they can be personally liable for an ERISA fiduciary breach?
- Has the employer considered designating a committee, comprised of internal subject matter experts from various departments, to collectively serve as plan administrator and make discretionary plan decisions?
- If a committee has been designated by the board, is there a formal resolution and/or charter outlining the committee's scope of authority and responsibilities? Are there procedures in place to monitor the committee (e.g., by ensuring the board receives reports and updates on the committee's activities at regular intervals)?

Step 4: Adopt Prudent Practices for Making and Documenting Fiduciary Decisions

Since courts and regulators focus on procedural prudence, ERISA fiduciaries must establish, adhere to, and document their processes, particularly with respect to decision-making. Many employers can look to their corporate governance practices to provide a model for procedural prudence. Corporate boards typically meet at regular intervals in accordance with established procedures, follow a specific agenda, document their deliberative process, review and approve meeting minutes, and maintain meticulous records.

Establishing Prudent Practices

If an employee benefits committee is formed, the prudent policies and procedures usually begin with the establishment of operational and management rules to direct the activities of the committee. In the corporate context, these rules are known as "by-laws"; however, in the employee benefits context, the committee's operating rules are often incorporated in the committee charter.

Among other items, these rules will normally address: (a) committee membership, and the process for appointing and replacing members; (b) committee meetings, including the meeting schedule and frequency (e.g., quarterly), what constitutes a quorum (i.e., the minimum number of members needed to hold meetings or make decisions), and how members can participate in meetings (e.g., via a video conferencing platform) and cast votes; and (c) the process for amending the operating rules/charter. As noted above, legal counsel should be consulted to draft the committee charter and the rules and policies incorporated therein.

Regardless of the governance structure, ERISA plan fiduciaries must engage in thorough analyses and deliberations before reaching a fiduciary decision. Gathering sufficient relevant information (for example, in relation to the selection of a plan service provider) is crucial for ERISA group health plan sponsors to make informed fiduciary decisions and demonstrate a prudent process.

Additionally, since fiduciaries are held to a "prudent expert" rather than a "prudent person" standard of care, they should seek independent expert advice when necessary. This means that if a plan fiduciary, including the members of a fiduciary committee, lack the knowledge to make an informed decision on a particular matter, they must find the expertise elsewhere. For example, a plan fiduciary selecting a PBM should consult with an independent expert or consultant if they lack expertise regarding the pharmacy benefits, pricing structures, and proposed contract terms.

As explained in the next section, the fiduciary decision-making process should always be documented.

Documenting Decisions in Formal Minutes

For both a committee and a non-committee structure, documentation of the decision-making process should be in the form of formal minutes. Meeting minutes are one of the most important types of documentation that a fiduciary committee can use to demonstrate that its ERISA fiduciary obligations were fulfilled prudently. As a practical matter, without such minutes, it will be very difficult for the plan fiduciaries to show that they have engaged in a prudent decision-making process, particularly many months or even years later, when an inquiry may arise.

Overall, the goal of the minutes is to include sufficient information to demonstrate good judgment and consistency in decision-making from a compliance perspective but not details that could potentially be used against plan fiduciaries in the event of litigation or an audit. It's important to keep in mind that legal counsel representing plaintiffs may request (or subpoena) minutes to build their case (e.g., breach of fiduciary claim). The DOL would also normally ask for the minutes as part of a standard document request in an investigation. Thus, an employer's ability to provide orderly and carefully drafted minutes can be very helpful in addressing these types of inquiries.

Generally, minutes should include meeting specifics such as the date, time and place, the names and roles of attendees, important background information or context, the matters discussed, and any decisions made or actions taken. Notably, the minutes should NOT be a transcript of the meeting but instead should provide factual information and impartial summaries of the discussions. Written materials presented at the meeting (e.g., proposals, summaries, slide decks) should be included as an attachment. Please see **Sample Meeting Minutes** (Appendix E).

It is preferable for minutes to be drafted during the meeting to ensure accuracy. A knowledgeable human resources representative, employee benefits consultant, or legal counsel may be suitable for this role. The minutes should be approved by committee members shortly thereafter (when memories are fresh) to establish a strong evidentiary record. If not approved earlier, the minutes of the prior meeting should be approved and recorded at the next meeting.

Meeting minutes, along with other documents, should generally be retained (along with other plan-related documents/materials) for eight years. The minutes should be maintained in reasonable order in a safe, accessible place and in a manner that allows for ready review or examination. If maintained in electronic format, the record keeping system must have reasonable controls to ensure the integrity, accuracy, authenticity, and reliability of the retained records.

As mentioned previously, it is advisable to separate meetings regarding plan settlor (e.g., plan design) and fiduciary (e.g., plan administrative) functions. If not possible, and committee members play dual roles (i.e., make both plan settlor and fiduciary decisions), the minutes should distinguish the capacity in which the members are acting with respect to a particular topic or decision.

Documentation of a prudent process in well-drafted meeting minutes advances sound fiduciary practices, improves plan administration, and helps fiduciaries defend their actions against potential fiduciary breach claims or regulatory investigations.

Fiduciary Self-Check/Review Items:

- Do you engage independent experts if plan fiduciaries lack the necessary knowledge and experience to address a particular plan issue (e.g., the appeal of a complex medical claim)?
- Is fiduciary training provided to internal parties serving as plan fiduciaries?
- Do you have formal meetings at regular intervals to discuss health and welfare benefit issues?
- Are formal minutes taken at each meeting, and are these minutes reviewed and approved by the committee members or other internal staff?

Step 5: Recognize that Selecting and Monitoring Service Providers Is a Fiduciary Function

ERISA plan fiduciaries should understand that the hiring and monitoring of plan service providers are fiduciary functions. In fact, a common allegation in many of the recent fiduciary breach lawsuits is that the fiduciaries failed to prudently select and monitor their group health plan service provider (specifically, their PBM).

Therefore, group health plan fiduciaries must engage in a prudent process when selecting a service provider. The process should involve gathering and carefully evaluating sufficient information regarding the qualifications of the potential service providers and reasonableness of their fees, deliberating and reaching a measured decision regarding the most suitable candidate, and documenting the process. In many cases, conducting a formal request for proposal (RFP) process and evaluating the responses is the most effective means to select service providers, particularly with respect to medical TPAs and PBMs.

Although the selection method depends on the particular facts and circumstances, the DOL has indicated that plan fiduciaries should generally request information from multiple service providers (whether through a formal RFP or otherwise) and base their comparison on the same information furnished by each. In addition to costs, the evaluation should consider the quality of the services, the experience and qualifications of the professionals who will be providing plan services, and whether required licenses and ratings (e.g., of insurers, brokers, TPAs) are current. Fiduciaries should also obtain information about the firm itself, including its performance record and experience with group health plans of similar size and complexity, its financial condition, and any recent litigation or enforcement action taken against the firm.

Even after a service provider is selected, the plan fiduciary maintains a fiduciary obligation to monitor their performance and should therefore ensure the resulting contract provides for periodic reporting from the service provider and the right to audit their performance. In addition, an employer should establish a formal review process and follow it at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements. When monitoring service providers, employers should act to ensure the service providers are meeting their contractual obligations and any service performance standards, including by reviewing any reports they provide, asking about policies and practices (such as a TPA's claims processing systems), verifying the actual service fees charged, ensuring proper maintenance of plan records, and following up on participant complaints.

Selecting Healthcare Services and Provider Networks

Specific to choosing healthcare services and provider networks, DOL guidance provides that fiduciaries must also assess the "quality of care," which takes into account the scope of available services, the qualifications of medical providers and specialists and their ratings and accreditations, the ease of patient access to providers, and information about provider operations. Among other items, fiduciaries should also review the provider's procedures to timely consider and resolve patient questions and complaints, patient confidentiality protections, and enrollee satisfaction statistics.

A self-insured group health plan's named fiduciaries are responsible for monitoring the overall operations of the plan but normally delegate certain responsibilities, including claims review and adjudication, to a medical TPA. Often, a broker or consultant assists with the selection of the TPA, which is primarily based on plan claims and spending data. Once the TPA is selected, the employer should work with legal counsel to ensure that TPAs that process claims and appeals acknowledge their fiduciary status in the resulting service provider agreement, and

that the named fiduciaries maintain access to plan data and audit rights so they can monitor the TPA's performance. Furthermore, the employer should request that the TPA assume contractual liability for the plan's full compliance with the CAA 2021 and TiC requirements, including but not limited to the MHPAEA non-quantitative treatment limitation comparative analysis, prescription drug data collection reporting, gag clause attestation, and machine-readable file postings.

Selecting a PBM

As mentioned above, the need for prudence when choosing a PBM has been highlighted by recent fiduciary breach litigation. For example, the complaint in a prominent 2024 case alleged that plan fiduciaries did not regularly conduct RFPs and failed to consider other types of PBMs, which incentivized their PBM to overcharge the plan. Although these claims were dismissed, plan fiduciaries should still pay particular attention to their PBM selection process.

When evaluating a PBM, a fiduciary must assess service fees, claims administration capabilities, utilization management programs, and participant services as they would when evaluating a medical TPA. However, a PBM evaluation must also consider complex financial terms, including the overall pricing structure (i.e., traditional versus pass-through/transparent), formulary management, rebate administration, and pricing guarantees. Accordingly, if the plan fiduciary does not have the requisite knowledge or experience to understand the proposed financial and contractual terms, prudence may require the fiduciary to engage an independent expert (e.g., a consultant or legal counsel) for advice and guidance.

Furthermore, the fiduciary (or their legal counsel) should ensure the terms of any resulting contract are clear and consistent with the PBM's RFP response and provide the fiduciary with access to claims data and audit rights to monitor the PBM's performance.

DOL Cybersecurity Tips for Hiring Service Providers

The DOL has also issued guidance for plan sponsors and fiduciaries on best practices for maintaining cybersecurity, including a recommendation that plans use service providers that follow strong cybersecurity practices. Key tips for service provider selection include:

1. Asking about the service provider's information security standards, practices and policies, and audit results — and comparing them to the industry standards adopted by other organizations.
2. Validating implemented security standards.
3. Evaluating the service provider's track record (including its history of security incidents and breaches).
4. Determining whether the service provider has cybersecurity and identity-theft insurance.
5. Documenting contractual provisions for cybersecurity and information security standards.

Evaluation of Fees

When evaluating service provider compensation, fiduciaries are not required to select the lowest bidder but must ensure that the compensation is reasonable for the services provided. Therefore, fiduciaries must understand the estimated fees and expenses, whether assessed individually for services or as part of a "bundled" service arrangement. Fiduciaries should ask prospective providers for information regarding any indirect compensation, such as finder's fees, commissions, or revenue sharing. For brokerage and consulting services provided to group health

plans, plan sponsors should ensure they receive a Section 408(b)(2) compensation disclosure, which includes their direct and indirect compensation for plan services, prior to entering the contract or arrangement, carefully review and evaluate its content, and document the process. The fees and expenses should be monitored throughout the relationship to determine whether they are still reasonable.

A plan fiduciary's failure to prudently select and monitor plan service providers and their compensation can result in a fiduciary breach, prohibited transaction, and potential liabilities.

Fiduciary Self-Check/Review Items:

- Do you have a prudent process in place for selecting a plan service provider and is it documented?
- Do you request information about a service provider's cybersecurity practices as part of the evaluation process?
- Do you ensure the service agreement terms allow for you to monitor the service provider's performance, such as through audit rights?
- Do you engage a consultant or counsel with expertise in pharmacy benefits to assist with selecting a PBM and negotiating the contract terms?
- Do you carefully review each plan service provider's compensation to ensure it is reasonable?
- Do you receive a Section 408(b)(2) compensation disclosure from each group health plan service provider, and do you have a process in place to carefully review it, determine if the compensation is reasonable, and document the process?

Step 6: Address Fiduciary Liability Exposure

Plan administrators and other plan fiduciaries may be personally liable for breaches that result in plan losses or harm caused to participants while they serve as fiduciaries. Thus, fiduciaries who fail to abide by the basic standards of conduct may be personally liable to restore any losses to the plan or profits made through improper use of the plan's assets resulting from their acts or omissions. Liability for fiduciary breaches can also include other equitable or remedial relief, as a court deems appropriate, and civil penalties imposed by the DOL.

However, it may be possible to limit the liability of ERISA fiduciaries, such as through the purchase of fiduciary liability insurance. Fiduciary liability insurance is a specific type of coverage that protects businesses and plan fiduciaries from fiduciary breach claims (e.g., allegations of mismanagement of plans or plan assets). Fiduciary liability insurance can be an effective risk management tool and is distinct from errors and omissions coverage or directors and officers coverage, which may exclude losses due to ERISA fiduciary status. The employer or fiduciaries typically purchase this coverage since there are restrictions on the use of plan assets for this purpose.

Of course, as with any purchase of insurance, the scope and coverage of fiduciary liability insurance depends upon the specific policy terms. Employers should carefully review these terms, including but not limited to the scope of coverage (i.e., individuals, plan, and types of losses covered), the carrier's defense obligations and qualifications, and any coordination of coverage provisions.

Finally, fiduciary liability insurance should not be confused with the ERISA fidelity bond that is required when a plan is funded through a trust. As explained in Step 2, the fidelity bond is designed to protect the plan from fraud and dishonesty by plan officials. Fiduciary liability insurance, which protects the fiduciary, is completely discretionary and typically excludes fraud and deceptive practices (which are normally covered by the ERISA fidelity bond).

Indemnification

Additionally, employers can indemnify employees who serve in a fiduciary capacity (e.g., a plan administrative role) using their general assets (but not plan assets). Indemnification refers to a contractual arrangement in which one party agrees to compensate another party financially if a particular event occurs. For example, a fiduciary may be liable for a breach of a fiduciary duty (e.g., failure to file a Form 5500) but could potentially be reimbursed by the employer for a monetary obligation that results from the breach. Accordingly, indemnification can provide some form of monetary protection for plan fiduciaries (but is an additional potential cost to the employer). Language indemnifying a plan fiduciary may be in the plan document and in service contracts with third-party service providers and should always be reviewed carefully by legal counsel.

Accordingly, employers seeking to provide their ERISA plan fiduciaries with some financial protection from potential liabilities should consider consulting with an experienced broker regarding fiduciary liability insurance or their legal counsel with respect to contractual indemnification for further information.

Fiduciary Self-Check/Review Items:

- Are you aware that plan fiduciaries can be personally liable for fiduciary breaches?
- Have you verified whether your insurance covers ERISA fiduciary liabilities?

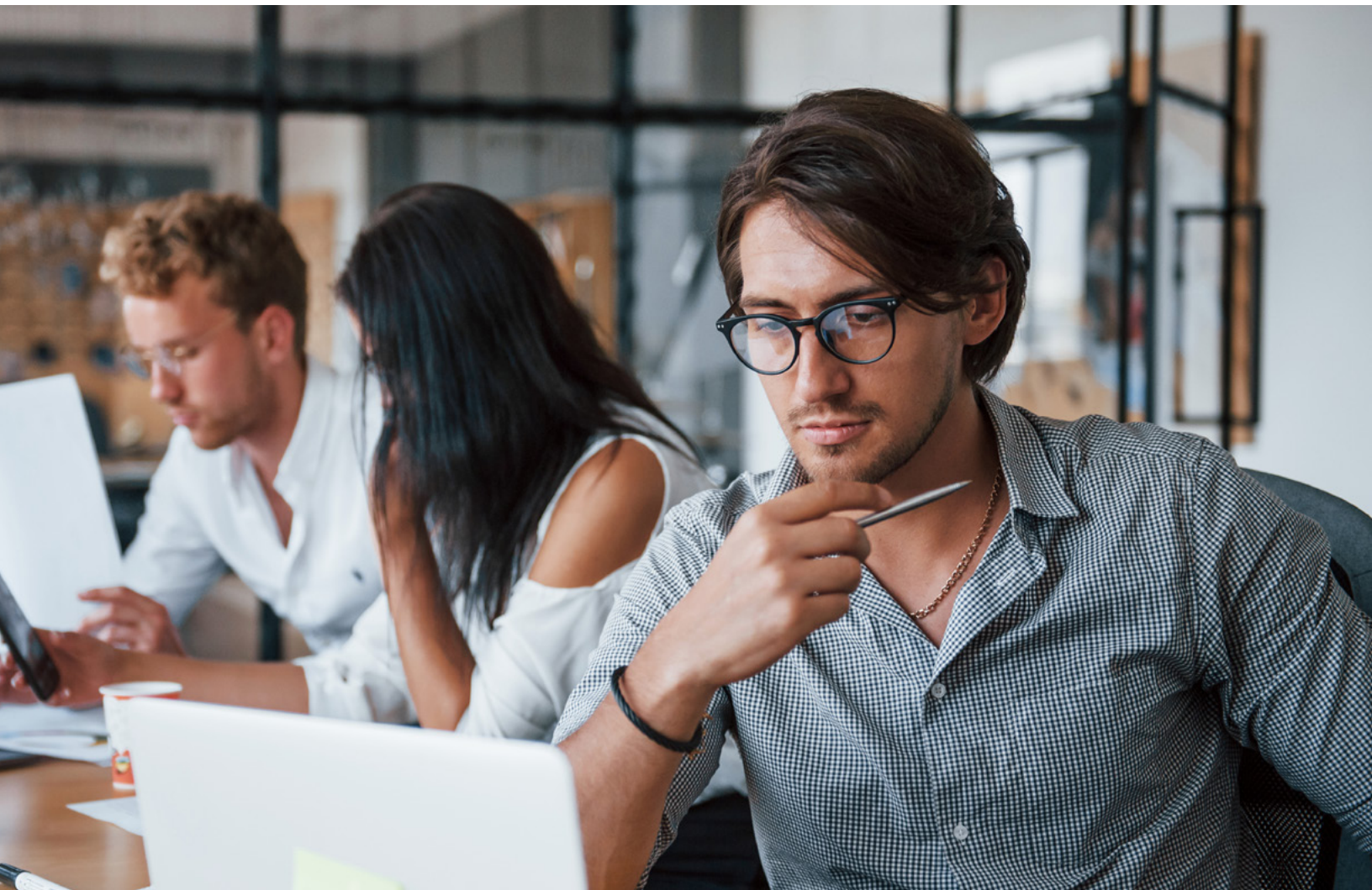
- Have you engaged legal counsel to review the appropriate measures to protect those serving as ERISA fiduciaries of your organization's benefit plans?

Summary

ERISA requires employers that sponsor and administer plans to act in a fiduciary capacity with respect to the plans and plan assets. These fiduciary obligations, including duties of loyalty and prudence, have recently come to the forefront in the group health plan context as a result of transparency legislation, fiduciary breach lawsuits, and increased regulatory scrutiny.

Accordingly, employers should act now to review their fiduciary governance practices to ensure they are fulfilling their fiduciary obligations to their plans and participants. Employers should consider formally establishing a benefits committee and should engage in a prudent decision-making process that is documented. Employers should pay particular attention to their obligations to prudently select and monitor service providers. Fortunately, despite many uncertainties in our employee benefits environment, engaging in prudent practices has consistently proven to improve plan administration and protect employers from potential liabilities.

PPI Clients may download copies of our publications from the Client Help Center. For further information regarding PPI's full range of consulting services, see **ppibenefits.com**.



Appendix A

Fiduciary Governance Overview and Checklist

Instructions for Fiduciary Governance Overview and Checklist

This overview and checklist is meant to provide a high-level overview list of action items an employer could take in establishing an ERISA fiduciary governance program related to the employer's group health and welfare plan offerings. More information on each action item can be found in the ERISA Fiduciary Governance: A Guide for Employers publication. This overview and checklist is nonexhaustive and may not capture every step required or necessary to establish a fiduciary governance program.

Legal Disclaimer: PPI Benefit Solutions does not provide legal or tax advice. Employers should work with their own internal or external legal counsel to solidify their approach to a fiduciary governance program, including action items, policies, and procedures.

Action Item	Comments & Status
Governance Program Establishment & Process	
Identify plan fiduciaries (named, delegated, and functional).	
Consider establishing a plan fiduciary committee (and if established, appoint committee members and adopt committee charter).	
Appoint committee members and formalize committee formation via charter adoption.	
Educate committee members on their fiduciary duties and obligations.	
Educate committee members on the guiding principles in making plan-related decisions (including the duty to act in accordance with plan documents, the duty of loyalty to plan participants, and the duty of prudence).	
Establish fiduciary policies and procedures.	
Provide regular training for fiduciaries.	
Obtain fiduciary insurance and/or fidelity bond (if plan assets held in trust).	
Conduct regular fiduciary meetings and memorialize decision-making process via meeting minutes.	
Establish practice of engaging independent experts if plan fiduciaries lack the necessary knowledge and expertise on a particular plan issue.	
General Selection and Monitoring of Plan Service Providers (PSPs)	
When vetting and hiring a PSP, consider the PSP's qualifications, service levels, fees, and quality of work.	
Obtain and evaluate references.	
Obtain and evaluate benchmarking data.	
Document decision-making process (via committee minutes or other records).	
If appropriate, negotiate reduced fees and/or enhanced services.	

Appendix A (Cont.)

Fiduciary Governance Overview and Checklist

Action Item	Comments & Status
For selected PSPs, request broad audit rights and regular reporting from the PSP in the services agreement to ensure the PSP is meeting their contractual obligations and any performance standards.	
Establish a formal PSP review process and follow that review process at regular intervals.	
Establish regular request for proposal (RFP) process every 3-5 years (or sooner if PSP issues arise).	
Request and carefully review a PSP's cybersecurity practices as part of the evaluation process.	
For broker and consultant PSPs, review ERISA 408(b)(2) compensation disclosure to determine if PSP fees are accurate and reasonable.	
Selecting and Monitoring Carriers and Third-Party Administrators (TPAs) as PSPs	
Review administrative services agreement and evaluate fees and terms; ask questions if appropriate.	
Evaluate and understand which services the carrier/TPA provides.	
Ask whether the carrier/TPA follows Consolidated Appropriations Act (CAA) 2021 requirements, including the requirement to: - File RxDC reports. - Post machine-readable files (MRFs). - Provide an internet-based price comparison tool. - Remove all gag clauses from any service agreements. - Submit the annual gag clause attestation.	
Ask whether the carrier/TPA reports and pays related Patient-Centered Outcomes Research Institute (PCORI) fees.	
Ask whether the carrier/TPA prepares and provides a non-quantitative treatment limitation (NQTL) analysis as required by the Mental Health Parity and Addiction Equity Act (MHPAEA). If yes, named fiduciaries should review the analysis, understand its conclusions, and obtain assurances from the carrier/TPA that any NQTLs are justified and/or removed and that the analysis otherwise complies with MHPAEA.	

Appendix A (Cont.)

Fiduciary Governance Overview and Checklist

Action Item	Comments & Status
Selecting and Monitoring Rx Benefit and Pharmacy Benefit Managers (PBMs) as PSPs	
Review Rx and/or PBM services agreement and evaluate fees and terms; ask questions if appropriate.	
Ask whether the Rx or PBM PSP files RxDC reports.	
Ask whether the Rx or PBM PSP prepares and provides a NQTL analysis as required by MHPAEA. If so, named fiduciaries should review the analysis, understand its conclusions, and obtain assurances from the Rx or PBM PSP that any NQTLs are justified and/or removed and that the analysis otherwise complies with MHPAEA.	
General Plan Compliance	
Understand and follow plan documents in making plan-related decisions.	
Understand and adhere to the plan's written claims and appeals procedures.	
Consider periodic eligibility audits.	
Ensure benefits under insurance policy/benefits guides are consistent with plan documents.	
Distribute all plan-related notices as required by federal and state law.*	
Understand and comply with all other federal and state compliance and filing requirements.	

*For assistance, PPI clients can download the following publications from the Client Help Center: **Required Group Health Plan Notices Chart**, and **Required Group Health Plan Notices Overview**.

Appendix B

SAMPLE: Board Resolution to Form Fiduciary Employee Benefit Plan Committee (Plan Committee Charter)

Instructions for Sample Board Resolution to Form Fiduciary Employee Benefit Plan Committee (Plan Committee Charter)

The sample Board Resolution and Plan Committee Charter is meant to describe a general resolution by a board of directors to delegate fiduciary governance to an employee benefit plan committee and to serve as a charter for the formation of that committee. Employers should include any company-specific information and modify details relating to their particular situation and strategy. Once adopted, this resolution and charter should be retained alongside all other plan materials.

Legal Disclaimer: PPI Benefit Solutions does not provide legal or tax advice, and this Sample is not intended for actual use. Employers should work with their own internal or external legal counsel to solidify its terms prior to adoption.

[NAME OF COMPANY]

1. The Fiduciary Employee Benefit Plan Committee shall be composed of individuals appointed by the Board of Directors of [NAME OF COMPANY]. Members of the Fiduciary Employee Benefit Plan Committee shall serve until their resignation, death, or removal by the Board. In addition, a member shall be removed from the Committee, without further action by the Board, if the member's affiliation with [NAME OF COMPANY] is terminated.
2. The Fiduciary Employee Benefit Plan Committee shall act pursuant to authority delegated by the Board of Directors of the Plan Sponsor (the "Board"), subject at all times to the right of the Board to withdraw such delegation and undertake the responsibilities previously delegated to the Fiduciary Employee Plan Committee directly. Such delegations are valid only to the extent permitted by, and provided for in, the Plan.
3. The main purpose of the Fiduciary Employee Benefit Plan Committee is to act pursuant to delegated authority by the Board to satisfy the obligations of the Board under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, as follows:
    a. Selecting the group medical plan third-party administrator (TPA), pharmacy benefit manager (PBM), and other service providers (including dental and vision providers), as applicable.
    b. Periodically evaluating the performance of the TPA and PBM for adherence to the contract terms and applicable law.
    c. Ensuring plan documents and employee disclosures are accurate, timely updated and as applicable, furnished or made available to participants.
    d. Fulfilling required reporting obligations with all applicable government agencies.
    e. Overseeing compliance of plans with all applicable laws, including the Patient Protection and Affordable Care Act (ACA), ERISA, Consolidated Omnibus Budget Reconciliation Act (COBRA), Health Insurance Portability and Accountability Act (HIPAA), and the Mental Health Parity and Addiction Equity Act (MHPAEA).
    f. Determining participant benefit eligibility and responding to employee communications and complaints.
    g. Conducting regular training of appropriate personnel regarding their fiduciary obligations, as applicable.
    h. Fulfilling any other obligations within the scope of the ERISA Section 3(16) Plan Administrator role.

Appendix B (Cont.)

SAMPLE: Board Resolution to Form Fiduciary Employee Benefit Plan Committee (Plan Committee Charter)

4. The Fiduciary Employee Benefit Plan Committee shall meet regularly to discuss plan-related issues. A majority of members of the Committee shall constitute a quorum for any action to be taken by the Fiduciary Employee Benefit Plan Committee at a meeting. A majority of the members participating in the meeting may take any action or make any determination at a meeting of the Fiduciary Employee Benefit Plan Committee. Members of the Fiduciary Employee Benefit Plan Committee may participate in a meeting of such Committee by means of a conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other at the same time and where participation by such means shall constitute presence in person at a meeting.

5. The Fiduciary Employee Benefit Plan Committee shall have the resources and authority appropriate to discharge its responsibilities, including the authority to consult counsel to the Plan and other experts or consultants at the expense of the Plan.

6. This Charter may be amended by action of a majority of the members of the Fiduciary Employee Benefit Plan Committee at a meeting or by the Board providing that, if amended by the Fiduciary Employee Benefit Plan Committee, the Fiduciary Employee Benefit Plan Committee shall present such Charter, as amended, to the Board at its next regularly scheduled meeting.

Employee Benefit Plan Committee Duties:

The Committee shall be responsible for the following activities:

- Becoming familiar with the Plan and its terms.
- Educating themselves on legal and compliance obligations of the Plan and overseeing plan compliance.
- Regularly attending plan committee meetings (and keeping accurate meeting minutes).
- Selecting carriers, administrators, service providers, and other vendors through an objective process.
- Reviewing, confirming, and documenting reasonableness of plan expenses and services for each plan vendor.
- Overseeing and monitoring day-to-day plan administration.
- When necessary, interpreting plan provisions and reviewing benefit claims and appeals.
- Providing for Committee fiduciary training as necessary.
- Reporting, to the Board of Directors, any potential elective increase in plan expenditures.
- Reviewing and confirming maintenance of all fiduciary practice standards.
- Confirming that the Committee and Board of Directors have adhered to the Exclusive Benefit Rule of ERISA Section 404(a).
- Reporting to the Board of Directors, at least quarterly, on all significant issues affecting the Plan.

Employee Benefit Plan Committee Charter Executed By and On:

Print Name: _____

Signature: _____

Date: _____

Appendix C

SAMPLE: Summary of Fiduciary Employee Benefit Plan Committee Duties and Responsibilities

Instructions for Sample Summary of Fiduciary Employee Benefit Plan Committee Duties and Responsibilities

The sample description of benefit committee member duties and responsibilities is meant as a high-level description of duties and responsibilities that generally exist for employee benefit committees. Employers should modify the description to capture any specific duties or responsibilities based on specific employer and group health plan needs. The Summary of Committee Duties and Responsibilities should be attached to the Fiduciary Committee Appointment and Acknowledgment Letter as a supplement in describing specific duties and responsibilities for incoming committee appointees.

Legal Disclaimer: PPI Benefit Solutions does not provide legal or tax advice, and this Sample is not intended for actual use. Employers should work with their own internal or external legal counsel to solidify its terms prior to adoption.

[EMPLOYER NAME] Health and Welfare Benefit PlanSummary of Committee Duties and Responsibilities

Below is a general description of the duties and responsibilities relating to committee members' participation in the Fiduciary Employee Benefit Committee.

General Scope of Committee Member Duties and Responsibilities

Generally, committee members would be required to do the following:

- Become familiar with the Plan and its terms.
- Educate themselves on legal and compliance obligations of the Plan and oversee plan compliance.
- Regularly attend plan committee meetings (and keep accurate meeting minutes).
- Select carriers, administrators, service providers, and other vendors through an objective process.
- Review, confirm, and document competitiveness of plan expenses and services for each plan vendor.
- Oversee and monitor day-to-day plan administration.
- When necessary, interpret plan provisions and review benefit claims and appeals.
- Provide for Committee fiduciary training as necessary.
- Report, to the Board of Directors, any potential elective increase in plan expenditure.
- Review and confirm maintenance of all fiduciary practice standards.
- Confirm that the Committee and Board of Directors have adhered to the Exclusive Benefit Rule of ERISA Section 404(a).
- Report to the Board of Directors, at least annually, on all significant issues affecting the Plan.

Appendix C (Cont.)

SAMPLE: Summary of Fiduciary Employee Benefit Plan Committee Duties and Responsibilities

General Guidelines in Fulfilling Duties and Responsibilities

In general, in carrying out their duties and responsibilities, ERISA requires committee members to act solely in the best interest of plan participants and beneficiaries for the exclusive purpose of providing the promised benefits and paying reasonable plan costs relating to plan administration. Committee members are bound to make decisions in accordance with the terms of the written plan documents and should be reasonable and prudent – as compared to a reasonable and prudent person acting in a like capacity and who is familiar with similar health and welfare plan matters – in any decisions that require discretion.

Specific Considerations in Selection and Oversight of Plan Service Providers

With prudence, committee members may weigh the following factors in the selection and retention of plan service providers (including consultants):

- Experience: Proven experience and track record with group health plans of a similar size, industry, funding type, etc.
- Level of Service: The level, detail, and extent of actual services provided.
- Company Infrastructure: The ability, size, and capacity for completing the work, including whether the company has appropriate technology, safeguards, cybersecurity, encryption, etc. to deliver services competently.
- Fee Amounts: The amount, source, and duration of fees and other compensation, including incentives and any potentially hidden fees.
- Company policy on contracts, agreements, and practices: The length and duration of contracts, the terms and conditions of the agreements, considerations of the company's practices and policies, and company's views towards compliance with plan-related federal and state laws.

Specific Considerations Relating to Legal and Plan Compliance

Committee members are responsible for educating themselves on both their duties and responsibilities under ERISA and on plan-related compliance obligations. Examples of such obligations include proper and timely governmental filings (e.g., DOL Form 5500, CMS Medicare Part D creditable status filing, IRS Forms 1094/95-C, etc.) at the federal and state levels and employee notification requirements (e.g., Medicare Part D notices, SPDs, etc.). While committee members may not be required to perform the actual compliance, they are responsible to ensure plan compliance is achieved.

Certain Prohibitions on Committee Member Activity

ERISA and other laws prohibit committee members from certain activity, including but not limited to:

- Receiving Kickbacks: Kickbacks are direct or indirect payments or other consideration from a third party that relates to a plan transaction.
- Self-Dealing: Using plan assets in a manner that serves their own interest.
- Conflicting Interests: Engaging in activity or making decisions with plan-averse interests.

Appendix C (Cont.)

SAMPLE: Summary of Fiduciary Employee Benefit Plan Committee Duties and Responsibilities

Legal Responsibility and Indemnification for Committee Member Actions

Generally, [EMPLOYER NAME] will indemnify committee members against any and all claims, losses, damages, expenses, and liabilities that arise out of any committee member's acts, decisions, or omissions while performing plan-related duties, with the exception of acts, decisions, or omissions that relate to the committee member's willful misconduct, fraud, or intentional misrepresentation.

Disqualifications from Serving on the Committee

Under ERISA, an individual may not serve as a fiduciary committee member if the individual has been convicted of any of the following (generally within the past 13 years):

- Robbery, burglary, grand larceny, or arson
- Bribery, extortion, embezzlement, perjury, or fraud
- Felony violation of a federal or state substance abuse law
- Murder, assault with intent to kill, kidnapping, or rape

Further, if the individual has violated any of the below laws, the individual may not serve as a Fiduciary Committee Member.

- ERISA
- The Labor-Management Reporting and Disclosure Act of 1959
- U.S. Code Chapter 63, Title 18, relating to mail fraud
- Investment Company Act of 1940, Section 9(a)(1)

Appendix D

SAMPLE: Fiduciary Employee Benefit Plan Committee Appointment Letter and Appointee Notice of Acknowledgment

Instructions for Sample Fiduciary Employee Benefit Plan Committee Acknowledgement

The sample acknowledgment letter should be sent to any newly nominated committee member as an acknowledgment of their appointment to the committee. Employers should gather the signature of the committee member to include as documentation of the committee's membership and the individual acknowledgment of each member's willingness to serve on the committee. A sample Appointee Notice of Acknowledgment is provided below to assist in gathering committee member appointee signatures.

Legal Disclaimer: PPI Benefit Solutions does not provide legal or tax advice, and this Sample is not intended for actual use. Employers should work with their own internal or external legal counsel to solidify its terms prior to adoption.

[DATE]
[COMMITTEE MEMBER NAME]
[COMMITTEE MEMBER ADDRESS]

RE: Fiduciary Employee Benefit Plan Committee Appointment

Dear [COMMITTEE MEMBER NAME]:

[EMPLOYER NAME] has appointed you to serve as a member of the Fiduciary Employee Benefit Plan Committee (the Committee) for the [EMPLOYER NAME]'s employee benefit plan (the Plan). The Committee is meant to oversee and manage operation and administration of the Plan and to make strategic decisions relating to the Plan. As a member of the committee and along with other committee members, you will have discretionary decision-making authority on Plan-related decisions, including the selection of benefits, providers, carriers, administrators, consultants, vendors, and other plan service providers. As a member of the Committee making these decisions, you will be considered a "Plan Fiduciary," which means you have heightened responsibilities to act in a certain manner. Primarily, that includes the duty to act prudently in making objective decisions, the duty to act in the sole interest of Plan participants and beneficiaries, and the duty to follow the terms of the Plan. The attached Summary of Committee Duties and Responsibilities describes these heightened responsibilities in more detail. Please review that attachment for more information and to better understand your role as a member of the Committee.

We are excited for your service as a committee member! After reviewing the Summary of Committee Duties and Responsibilities, please sign and return this Letter of Acknowledgement to formalize your committee appointment.

Warm Regards,

[EMPLOYER REPRESENTATIVE]
[EMPLOYER NAME]
[EMPLOYER REPRESENTATIVE CONTACT EMAIL/PHONE NUMBER]

Attachment: Summary of Committee Duties and Responsibilities

Appendix D (Cont.)

SAMPLE: Fiduciary Employee Benefit Plan Committee Appointment Letter and Appointee Notice of Acknowledgment

Appointee Notice of Acknowledgement

As a Plan Committee appointee, and by virtue of my signature below, I acknowledge that I have received and reviewed the Summary of Committee Duties and Responsibilities. I also acknowledge that I understand and am willing and able to meet those duties and responsibilities in my position on the Plan Committee.

Print Name: _____

Signature: _____

Date: _____

Appendix E

SAMPLE: Meeting Minutes

Instructions for Sample Meeting Minutes

Meeting minutes are intended to be a high-level description of a particular committee meeting, including date, attendance, agenda items, discussion, exhibits/materials used in the discussion, decisions, and reasons for the decision. Rather than a full transcript, minutes should describe briefly the agenda items and discussion points, including a recap of the actual committee member discussion, conclusions, and the basis for those conclusions. Minutes should serve as the beginning point for discussion at the subsequent committee meeting. Any exhibits or other materials distributed to committee members should be incorporated into the minutes by reference and retained in the committee's files. Minutes should be stored with other committee files and referenced when needed.

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[NAME OF COMPANY] [MEETING DATE]
[QUARTER AND YEAR]
[PLAN NAME]

Meeting Minutes of [NAME OF COMPANY]'s Health and Welfare Benefits Committee

The Health and Welfare Benefits Committee of [EMPLOYER NAME] held a meeting on [DATE] at [LOCATION].

Attendance

- Committee Members: List both those in attendance and those who are absent.
- Non-Committee Members: List those in attendance.

Review Prior Meeting Minutes

- Meeting minutes from prior meeting should be distributed in advance of the meeting.
- Review and approve meeting minutes from prior meeting (and, if applicable, note any discrepancies).

Due Diligence: Review Any Recent Consultant Reports and Notes
Note the following reports, if applicable:

- Broker/Consultant Reports
- Internal HR/Benefit Team Reports
- Internal and External Legal Counsel Report
- Actuarial Reports
- Auditor Reports

Discuss/address any outstanding issues from those reports and include the following:

- Materials: Include any presentations, slides, notes, etc.
- Considerations: Include brief descriptions of discussion points among the committee members, pros and cons in responding one way or another to issues identified in the reports, and proposed solutions or conclusions on those issues.

Appendix E (Cont.)

SAMPLE: Meeting Minutes

- Motions and Vote Tallies: Include motions made by committee members and final vote counts. Voting itself can be performed by show of hands, voice (ayes or nays), or in writing. While unanimity is not required, votes can be recorded as unanimous where applicable. Include the decision/conclusion relating to whether the committee accepted or rejected a particular recommendation and whether a particular motion passed or failed.

Due Diligence: Current Plan Service Provider Report
Note the following items, as appropriate:

- Review performance of current service provider(s), including carriers, administrators, pharmacy benefit managers, vendors, point solution programs, etc.
- Describe any performance issues or particular participant complaints that are known to the committee.
- Materials: Include any presentation materials (e.g., slides, information packets, request for proposal (RFP) responses, etc.)
- Considerations: Include brief descriptions of discussion points among the committee members, pros and cons in responding one way or another to issues identified in the reports, and proposed solutions or conclusions on those issues.
- Motions and Vote Tallies: Include motions made by committee members and final vote counts. Voting itself can be performed by show of hands, voice, or in writing. Unanimity is not required, but votes can be recorded as unanimous where applicable. Include the decision on whether a particular recommendation was accepted or rejected and whether a particular motion passed or failed.

Due Diligence: Prospective Plan Service Provider (Vendors, Consultants, Advisor, Administrators, etc.)
Note the following items:

- Contact Information: Names and contact information for potential plan service provider.
- Materials: Include any presentation materials (e.g., slides, information packets, RFP responses, etc.)
- Considerations: Include brief descriptions of discussion points among the committee members, pros and cons in responding one way or another to issues identified in the reports, and proposed solutions or conclusions on those issues.
- Motions and Vote Tallies: Include motions made by committee members and final vote counts. Voting itself can be performed by show of hands, voice, or in writing. Unanimity is not required, but votes can be recorded as unanimous where applicable. Include the decision on whether a particular recommendation was accepted or rejected and whether a particular motion passed or failed.

Review of Any Outstanding Issues Relating to the Fiduciary Benefit Plan Committee Responsibilities
Add and describe any outstanding tasks relating to general responsibilities of the committee—see General Description of Benefits Committee Responsibilities.

Miscellaneous Agenda Items
Add, describe, and address any other agenda items from committee members.

Upcoming Committee Meetings
Note future committee meeting dates, times, and locations.

Meeting Adjournment
When there is no further business on the agenda, and on a motion to conclude, the meeting is adjourned.

PPI BENEFIT SOLUTIONS