Employee Benefits Broadcast
The Benefits News You Need in 60 Minutes or Less

For audio participation, dial 866.837.9782 and follow the prompt.

“The Benefits News You Need in 60 Minutes or Less”

Tuesday, July 24, 2012
12:00 p.m. – 1:00 p.m. CST
Employee Benefits Broadcast

Housekeeping Issues

- Call 866.493.2825 for technology assistance
- Dial *0 (star/zero) for audio assistance
- To ask questions, use the pull down Q&A menu
- We encourage you to Maximize the PowerPoint to Full Screen Usage:
  - Hit F5 on your keyboard
- To print a copy of this presentation:
  - Click on the printer icon in the lower right hand corner. Convert the presentation to PDF and print as usual.
- Foley will apply for HRCI and CLE credit after the Web conference. To qualify, please log-in to both the audio and web portions of the program.

Today’s Topics

- **In The Spotlight:** ERISA Litigation — Will the New Fee Disclosure Rules Spawn More Litigation?
- **Risky Business:** Participant Disclosures — Troubling Developments
- **Headline News:** Health Plan Disclosures — The Summary of Benefits and Coverage
ERISA Litigation — Will the New Fee Disclosure Rules Spawn More Litigation?

Gregg H. Dooge

The Fee Disclosure Rules

- Require service providers to report direct and indirect compensation to plan
- Require plan to make fee disclosures to plan participants
- Between Form 5500 information and fee disclosures, plan fee/expense information will be readily available
**ERISA Litigation/The ABB Case**

- Class action lawsuit challenging 401(k) plan fees
- Plan sponsor (ABB, Inc.) liable for $35.2 million
- Case demonstrates importance of 401(k) plan fees and the new disclosures

**The ABB Case**

- ABB liable for:
  - Failure to monitor the recordkeeping fees and revenue-sharing payments made to the plan trustee
  - Failure to negotiate rebates to offset or reduce the cost of administrative services that are charged to plan participants
- ABB lacked a deliberative process for:
  - Reviewing the total fees and/or compensation received by the trustee, and
  - Comparing the trustee’s fees/compensation to market rate of compensation
The ABB Case

- Indirect fees, e.g., revenue sharing, were important to court’s decision
  - Revenue sharing: Amounts received from third parties in connection with plan
  - Trustee was entitled to retain revenue sharing payments
- Plan sponsor did not know how much the revenue sharing payments were – and thus did not know how much the trustee was paid

Court determined that failure to review/monitor trustee’s total fee/compensation package, and to compare it to market, was a breach of fiduciary duty
  - Focus on lack of process
- Also, plan investment policy statement required that “rebates” be used to reduce plan costs
  - Allowing trustee to retain indirect compensation was inconsistent with investment policy statement
In the Spotlight

Take-Aways

- Establish a process for reviewing fees
  - Need to understand total amount of fees/revenue, not just mutual fund expense ratio
  - Need to benchmark service provider fee/compensation package against market rate for services
    - Growing list of vendors who provide this service
  - Need to document the review
- Ensure that documents are consistent
  - Court focused on language in investment policy statement
  - A poorly worded investment policy statement, or a statement that is not followed in practice, is worse than not having an investment policy statement

Risky Business

Participant Disclosures — Troubling Developments

Casey K. Fleming
Overview

- Growing number of participant disclosure requirements
- Recent cases highlight the importance of accurate and clear participant disclosures
- What can a plan administrator (and its legal counsel) do to ensure that participant disclosures are correct?

Disclosure Rules

- ERISA and the Code have extensive participant disclosure requirements
  - SPDs and SMMs
  - COBRA Notices
  - Annual notices (Women’s Cancer, CHIPRA)
  - Claim and appeal denials (including EOBs)
  - Account and pension benefit statements
  - New: SBC and ERISA 404(a)(5) fee disclosures
### Disclosure Rules

- Disclosures required by ERISA or relating to ERISA plan are typically treated as fiduciary act
- Written in a manner calculated to be understood by a plan participant
- Sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of rights and obligations

### Disclosure Penalties

- Breach of fiduciary duty
- ERISA – monetary penalties
- Code – excise taxes
Equitable Remedies

- CIGNA vs. Amara
- No contractual remedy available under ERISA 502(a)(1)(B)
- However, all sorts of equitable remedies could be available under ERISA 502(a)(3)
Risky Business

Cigna vs. Amara - Equitable Remedies

- Reformation of Contract
- Estoppel
- Surcharge

Provision in the SPD; Not in the Plan
Kaufmann vs. Prudential – Facts

- Participant Kaufmann entitled to LTD benefits
- Seven months into receiving benefits, Prudential terminated them because concluded no longer disabled
- Claim denial letter issued Feb. 23, 2006 stated 180 days to appeal

Appeal filed Feb. 17, 2009; three years later
- Filed suit the following day
- On Feb. 26, 2009, Prudential informed Kaufmann that would not consider the appeal because untimely
Kaufmann vs. Prudential – Documents

- SPD said 180 days to file appeal
- Plan document silent; only stated that lawsuit could be initiated within 3 years from date proof of loss required
- SPD explicitly stated that “does not constitute part of the plan”

Kaufmann vs. Prudential – District Decision

- Kaufmann alleges 180-day appeal period unenforceable because not in plan document
- Court agrees
  - Cites to DOL §2560.503-1(b): “every [ ] plan shall establish and maintain reasonable procedures governing the ….appeal of adverse benefit determinations”
  - Rejects Prudential’s argument that SPD was part of plan: SPD said not part of plan and Supreme Court decision in Amara said SPD is not the terms of the plan
**Risky Business**

**Kaufmann vs. Prudential – Takeaways**

- If SPD provisions are part of the plan document, clearly say so
- Often, “umbrella” welfare plan document does not contain all terms and conditions, but cross-references SPD
  - However, if SPD says “not part of plan document”, this is incorrect and can be used against plan sponsor
- Alternatively, have more full-blown plan document and ensure all SPD provisions are also in plan

**NOTE**

- Although the holding in Kauffman is that a provision in the SPD is not enforceable because it was not in plan, don’t expect that result if SPD promises more benefits than the plan document intended
- Amara equitable remedies
The Importance of Cross-References

Kitterman v. Coventry Health Care of Iowa -- Facts

- Plan participant read first 2 pages of 3-page summary of health plan benefits
- First 2 pages said “Out-of-Pocket Maximum” for “Non-Participating Provider” was $8,000
- Third page of summary clarified that: Amounts in excess of the “Out-of-Network Rate” do not count towards the “Out-of-Pocket Maximum”
<table>
<thead>
<tr>
<th><strong>Risky Business</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Kitterman v. Coventry Health Care of Iowa -- Facts</strong></td>
</tr>
<tr>
<td>▪ Participant went to Mayo Clinic (Non-Participating Provider) on assumption that maximum exposure to her was $8,000</td>
</tr>
<tr>
<td>▪ Ultimately, was told she was responsible for $23,000 of unpaid benefits because those were in excess of the “Out-of-Network Rate”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Risky Business</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Kitterman v. Coventry Health Care of Iowa -- Claim</strong></td>
</tr>
<tr>
<td>▪ Participant sued because second page “did not invite the reader to turn the page” or otherwise indicate that the phrase “Out-of-Pocket Maximum” meant something other than plain interpretation</td>
</tr>
<tr>
<td>▪ Lower court agreed</td>
</tr>
<tr>
<td>▪ Appealed to 8th Circuit Court of Appeals</td>
</tr>
</tbody>
</table>
Risky Business

Kitterman v. Coventry Health Care of Iowa -- Decision

- 8th Circuit disagreed – Participant must review document as a whole
- Remanded back to lower court for decision whether there was a conflict between summary and plan document
- Court held no conflict – Participant liable for the excess charges

Risky Business

Kitterman v. Coventry Health Care of Iowa -- Takeaway

- Courts made right decision, but at what cost to plan sponsor?
- For want of a nail the shoe was lost.
  For want of a shoe the horse was lost.
  For want of a horse the rider was lost.
  For want of a rider the message was lost.
  For want of a message the battle was lost.
  And all for the want of a horseshoe nail.
- So, for want of a cross-reference or indication to “read on,” a plan sponsor was involved in lots of litigation
Clarity and Significance

**Thompson vs. S.C. Johnson Plan - Facts**

- S.C. Johnson implemented cash balance plan
- Annual interest credit = the greater of 4% or 75% return on plan’s investments
- Lump sum calculated by projecting account balance forward using 30-year Treasury rate, and then discounting back at 30-year Treasury rate
- Effect ➔ lump sum distribution equals account balance
- Improper during time period in question
Thompson vs. S.C. Johnson Plan - Facts

- SPD description of lump sum: “the entire value of your account is paid in one payment”
- Several newsletters stating that the lump sum distribution would be the amount in the cash balance account

Thompson vs. S.C. Johnson Plan - Claim

- Class action claim for bigger lump sums
- S.C. Johnson defense – claims are time-barred
  - Six years from when participant knows or should know of conduct giving rise to claim
  - Participants were on notice about how lump sum calculated!
  - Because materials provided more than six years prior to claim filing date, statute of limitations has run
Risky Business

Thompson vs. S.C. Johnson Plan - Decision

- Disclosures not good enough to start running of statute of limitations
  - Statement that the “entire value of your account will be paid in one payment” did not explain how that value is decided
  - SPD statements did not describe that “early lump-sum distributions would not be increased to reflect the present value of future interest credits continuing to age 65”

- Person familiar with future interest credits might still assume that those future credits somehow incorporated into account balance
- Newsletters did not carry the weight of SPD – not likely to alert a participant that he was being deprived of a right
Risky Business

Thompson vs. S.C. Johnson Plan - Takeaways

- Carefully consider disclosures about potentially controversial or unclear issues
- “Your lump sum payment will equal your account balance. Your account balance is your annual allocations plus the interest credits made to date. Nothing more. No adjustments. Really, we mean it. It’s the same as what you think of as a 401(k) balance. Whatever is in the account, that’s all you get.”

---

Risky Business

Thompson vs. S.C. Johnson Plan - Takeaways

- Carefully consider use of newsletters vs. formal SMM
- Make sure communication indicates that it will be discussing important rights or is treated as a supplement to the SPD
What Should a Plan Administrator (and Legal Counsel) Do?

Tips

- Check each provision of SPD against plan document
- And then check whether each provision of plan document is summarized in SPD
- Only way to confirm that documents are coordinated
Tips

- Read disclosure for legal rules
  - Is the statement legally correct?
  - Are all of the SPD requirements included?
- Then re-read for:
  - Clear and understandable
  - Internally consistent and not redundant
  - Appropriate cross-references

Tips

- Rethink typical disclaimers
  - “Plan controls if inconsistent with SPD”
  - “This is only a summary of legal plan document”
- Rather, should it say something like:
  - “The eligibility, enrollment and benefit provisions of this SPD are part of the plan. Other provisions in the SPD summarize detailed provisions contained in a separate plan document. If you would like a copy of the separate plan document, contact XXX.”
Tips

- Non-SPD disclosures should clearly state their importance, including if intended to be an SMM
- Don’t try to hide “bad news”
- Explain consequences:
  - “If you don’t enroll in COBRA by the 60-day deadline, you will permanently forfeit your right to elect COBRA continuation coverage.”

Tips

- Audit participant communications and disclosures being provided by vendors
  - EOBs
  - Appeal denials
- Ensure contract requires their legal compliance and provides adequate indemnity
Case Cites

- CIGNA Corporation vs. Amara, 131 S. Ct. 1866 (U.S. 2011)
- Kaufmann v. Prudential Insurance Company of America, Case No. 11-CV-119-PB (N.H. 2012)
- Kitterman v. Coventry Health Care of Iowa, 788 F. Supp. 2d 892 (N.D. Iowa 2011)
- Thompson vs. Employees Retirement Plan of S.C. Johnson, 651 F.3d 600 (7th Cir. 2011)
Health Care Reform Created SBCs

- Brought to you by the Patient Protection and Affordable Care Act (ACA)
- Help employers and employees to better understand coverage and better compare options
- Increase competition amongst insurance companies

Covered Plans

- Group health plans (self or fully insured)
  - HRAs (but can be combined with regular medical)
- But not excepted benefits:
  - Stand-alone dental or vision
  - Health savings accounts (HSAs)
  - Most medical flexible spending accounts
  - Retiree only plans
  - Expatriate coverage (temp. exception for 1st year only)
Who Provides? Who Receives?

- For self-insured plan:
  - Plan administrator: participants and beneficiaries who are eligible (including COBRA qualified beneficiaries)
- For fully-insured plan:
  - Insurance carrier: the plan
  - Ins. carrier and plan admin.: participants and beneficiaries who are eligible

Distribution Deadlines – to Employees/Beneficiaries

- Include with any written enrollment materials
  - Open enrollment starting Sept. 23 or later
  - New enrollment starting first day of plan year on or after Sept. 23
- If renewal is automatic: 30 days before first day of new year
- HIPAA Special Enrollees: 90 days after enrollment
- Upon request: 7 business days from request
Distribution Deadlines – Insurer to Employer

- Upon application – 7 business days to respond
- Renewal
  - Include in written materials
  - Automatic renewal: 30 days before first day of new year, or 7 days after (i) insurer receives written confirmation to renew or (ii) issuance of new policy, whichever is earlier

Distribution Deadlines – Insurer to Employer (cont’d)

- Upon request – 7 business days to respond
- Insurers and Employers: 60 days advance notice required if mid-year material change
Distribution Methods

- Paper always acceptable
- If on-line enrollment, can provide on-line
- Not yet enrolled = Internet posting with “postcard” notification
- Already enrolled = DOL electronic disclosure rules

Distribution Methods

- Always free of charge
- Either separate or as part of other materials, including SPD, if prominent
Anti-Duplication Rule

- Single SBC sent to employee’s home address if all dependents also are at same address
- If Administrator knows a dependent lives at a different address, second SBC required

Which SBCs Provided?

- SBC for each benefit package for which the person is eligible
- Renewals: SBC for option in which employee is enrolled
- Employee/beneficiary can request SBC for any option for which is eligible
Headline News

SBC Format

- Mandated format
- No more than 4 double-sided pages
- At least 12-point font

And now..... a dramatic presentation

---

Headline News

SBC Content – 12 Requirements

1. Coverage description
2. Exceptions, reductions and coverage limitations
3. Cost sharing provisions, i.e., deductibles, coinsurance, copays
4. COBRA or other continuation rights
SBC Content – 12 Requirements (cont’d)

6. Coverage examples
   ▪ Whether service is covered and applicable cost sharing
   ▪ Pregnancy, Type 2 Diabetes

7. Statement that SBC is only a summary; refer to Plan, policy or certificate to determine all terms

8. Contact information for questions and obtaining copy of plan document or policy/certificate

9. If provider network: internet address for obtaining a list of network providers

10. For RX formularies: internet address for obtaining information on RX coverage

11. Internet address for obtaining Uniform Glossary and contact information of how to get paper copies of Uniform Glossary or SBC

12. January 1, 2014: statement on whether the Plan provides minimum essential coverage (generally, coverage that meets the individual responsibility requirement under ACA) and if Plan’s share of total allowed costs of benefits meets applicable requirements
### Uniform Glossary of Coverage
- Glossary of typical terms used in health plans
- Mandatory format - use gov’t provided form
- Must simply make available, not affirmatively provide
  - Within 7 business days of request
- Indicates that policy or plan governs in event of inconsistency

### Challenges
- Health plan with separate claims administrators – regular and Rx
- Explaining add-ons (wellness programs, HSAs, etc.)
- Ensuring SBC and SPD/other materials not contradictory
Challenges

- Coverage examples
  - May need to add explanatory notes, such as “assumes single employee coverage” or “assumes wellness program requirements met”
  - On-line calculator to help fill in coverage examples

SBC and Foreign Languages

- Foreign language assistance required if employees reside in a county where more than 10% of the population speaks the same language
  - Must include sentence on availability in other language
- See DOL website regarding Guidance on Internal Claims and Appeals Procedures for chart
Reminder re: Changes

- Material changes to the content of an SBC
- Other than in connection with open enrollment or renewal
- Notice of modification must be provided within 60 days BEFORE the effective date of the change
- Can be either notice or updated SBC
  - Will serve as SMM for ERISA plans

Lots (and lots) of Guidance

- [www.dol.gov/ebsa](http://www.dol.gov/ebsa) - Affordable Care Act
  - Final regulations
  - FAQs
  - Sample templates
- [http://cciio.cms.gov/resources/other/index.htm#sbcug](http://cciio.cms.gov/resources/other/index.htm#sbcug)
  - Calculator
  - Chinese, Navajo, Spanish, Tagalog translations
Penalty for Noncompliance

- $1,000 for each employee or beneficiary for willful failure to provide an SBC
- Until further notice, group health plans must continue to report and pay the IRC § 4980D $100 a day excise tax on Form 8928

Questions & Answers
Contact Information

- **Gregg H. Dooge**
  414.297.5805
gdooge@foley.com

- **Casey K. Fleming**
  414.319.7314
cfleming@foley.com

- **Leigh C. Riley**
  414.297.5846
lriley@foley.com

- **Isaac J. Morris**
  414.297.4973
imorris@foley.com

Mark Your Calendar

- The final session of the 2012 Employee Benefits Broadcast Series will take place on the following date:
  – October 23, 2012
Employee Benefits Broadcast

Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley’s website within 24 to 48 hours:
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:
  http://www.zoomerang.com/Survey/WEB22GAWYMPW8M