ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, and Carolyn Smith provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan and Carolyn Smith are senior members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

VENDOR CREDITS—APPLICATION OF THE CREDITS AND GUARDRAILS

As mentioned in last month's article, it has become quite common for insurance carriers and service providers to offer employee benefit plans and their employer plan sponsors certain "credits" that can be used to pay for items such as employee benefit plan communications, benefit administration system improvements, or in certain instances unspecified future special administration projects. Although the terminology for these credits varies (e.g. innovation fees or credits, communication credits, technology credits etc.) we will use the term innovation credits as a catch-all for purposes of this article.

Last month we described the various ways innovation credits "flow" from a carrier or service provider back to a plan or plan sponsor and the different methods used to calculate the credits. Innovation credits are typically generated by "voluntary benefits" that are funded, often in substantial part, through participant premiums or contributions.

United States Department of Labor ("DOL") guidance, indicates that, although situations can differ, if innovation credits are generated from sources where the premiums or contributions are paid entirely by employees, the entire innovation credit would likely be considered a plan asset under ERISA. In instances where both the employer and the employees pay the premiums or contributions, then a pro-rata share of the innovation credit would likely be a plan asset.

We then discussed the ERISA fiduciary and prohibited transaction implications arising from these innovation credits as plan assets under ERISA including the fiduciary duty to only use plan assets for providing benefits or defraying reasonable expenses of administering the plan. Further it is a prohibited transaction for an ERISA plan fiduciary to:

- Deal with plan assets for the fiduciary's own interest or account;
- Act on behalf of a party whose interests are adverse to the plan; or
- Receive any consideration for the fiduciary's own personal account from any party dealing with such plan in connection with a transaction involving plan assets.

In this month's article we explore permitted uses of innovation credits where they are determined to be plan assets under ERISA. This analysis includes a discussion of what is the "plan" and what are permissible plan expenses.

A. IDENTIFYING THE PLAN

A fiduciary decision to take the innovation credits generated by the assets of one plan and apply them to the administrative expenses of another ERISA plan would likely be a fiduciary breach.

Indeed, in instances where medical loss ratio rebates from insurers are plan assets DOL flatly stated that: "[T]he use of a rebate generated by one plan to benefit the participants of another plan would be a breach of the duty of loyalty to a plan's participants." Technical Release 2011-04 ("T.R. 2011-04").

So, let's take an arrangement where the innovation credit comes from a vision or dental carrier and the benefit is funded completely by participant contributions. Those innovation credits are likely plan assets under ERISA, but what is "the plan"?

What if the credit is used to fund a benefits administration system or publish a benefits guide? Would a plan fiduciary be required to determine what percentage of the cost of the benefit administration system or benefits guide is attributable to the dental or vision benefit? Based on DOL guidance discussed later in this article that might be the case if each benefit is considered to be its own ERISA plan.

Many employers, however, use a "wrap plan" document to combine all welfare plan benefits into a single plan. The motivation behind a wrap plan document is typically unrelated to innovation credits but rather it is to reduce the number of "plans" for Form 5500 filings and to include any required ERISA language that might be missing from underlying documentation.

Still, that wrap plan may also serve to simplify the ERISA analysis for innovation credits. If all ERISA covered benefits are part of a single plan,

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then innovation credits generated by one benefit could be applied to the administrative expenses related to another benefit since it would be the administrative expense of the same "plan."

In other words, the innovation credit generated by the dental or vision carrier could be used to offset the administrative expenses of any benefit that was "wrapped." Therefore, when included in the same wrap plan. the innovation credit could be used for the expenses associated with producing a benefits booklet or wrap SPD that included medial, dental and vision benefits or a benefits administration system that included those benefits.

Even here, however, experienced benefits counsel should be consulted because with respect to payments associated with insurance demutualization proceeds, we have anecdotal experience of DOL asserting that proceeds should be used to benefit the participants who are or were enrolled in the specific benefit generating the credits even if a wrap document existed.

In the T.R. 2011-04 guidance on MLR rebates, DOL also stated that where a plan provides "benefits under multiple policies" this "benefit by benefit" approach was the preferred application of MLR rebates provided it was prudent overall.

B. PLAN EXPENSES AND EMPLOYER/SETTLOR EXPENSES

Last month we concluded that, where plan assets are involved, the use of innovation credits by an employer for its own purposes unrelated to plan administration would be a fiduciary breach and a prohibited transaction.

ERISA generally provides that he assets of an employee benefit plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

Also, DOL has stated that even for expenses related to the plan there are certain "settlor" functions that cannot be paid from plan assets such as certain actions establishing, amending or terminating a plan. Other activities that are expressly the responsibility of the employer or are non-benefit related are also settlor functions.

These would include preparation, distribution and filing of Forms 1094-C and 1095-C under the ACA; facilitating payroll deductions etc. In addition, administrative expenses related to non-ERISA benefits could not be paid from plan assets. Those expenses could include, for example, dependent care assistance account plans, transportation spending account plans, and health savings accounts (HSAs).

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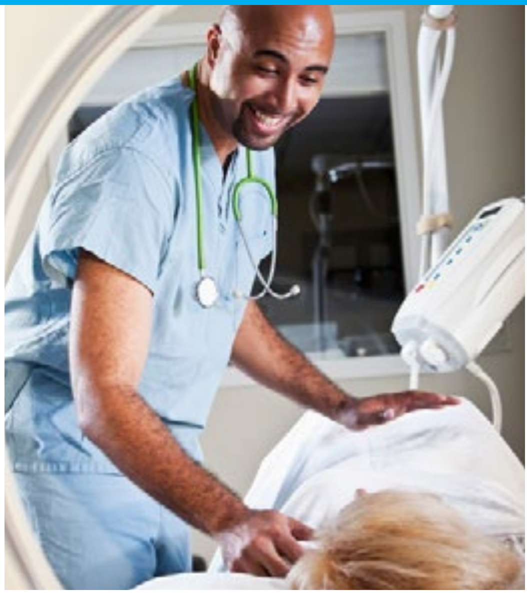

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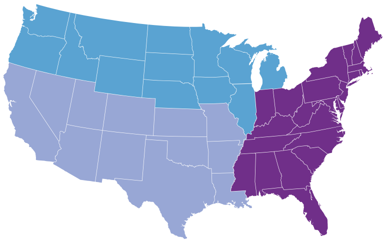

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Finally, plan documents should be consulted because while plan assets can never be used to pay a settlor expense there may be provisions in those documents providing that all or part f the plan administrative expenses are to be borne by the employer.

In Advisory Opinion 97-03A, DOL looked at "settlor" expenses in a series of hypotheticals In one of those hypotheticals an employer produced a twelve page booklet that included summary information about all the employer's benefit plans (health, dental, vision), as well as one full page devoted to non-ERISA covered benefits (e.g., the physical fitness center, limousine services) and employee activities (e.g., annual picnic, Holiday party, etc.).

The cost to prepare and distribute the booklet was approximately $125,000 annually. In analyzing whether the cost of the booklet could be paid from plan assets, DOL stated:

> "[A] portion of the $125,000 for preparation and distribution of the benefit booklets may also be a permissible plan expense. Clearly, the plan sponsor should pay that portion (1/12) of the costs of the booklet that relates to non-plan matters (i.e., physical fitness center, limousine services, picnic, etc.). In addition, a plan may pay only those reasonable expenses relating to that plan, and therefore, each of the plans should pay their proportionate share of the expenses of the booklet.

So, using this hypothetical, could innovation credits be used to pay the total cost of a benefit administration system or a wrap SPD? Likely not if the wrap SPD contained an explanation of HSAs, a dependent care assistance plan, buying and selling paid time off etc.

Also a benefit administration system would need to be examined to determine whether it performs settlor functions like production of 1095-C forms, aspects of payroll processing, enrollment in non-ERISA benefits or other non-ERISA HR functions.

If it is determined that settlor functions are implicated, then an allocation would need to be made to settlor functions similar to the DOL hypothetical above. Of course, for expenses such as a benefits administration system, the analysis is going to be far more complex that the preparation and distribution of a benefits booklet as in the hypothetical.

Further complicating the analysis is that the decision on how to allocate that expense between the employer and a plan is a fiduciary decision in itself. And, if the employer stands to benefit from the allocation then there are further prohibited transaction issues.

C. OTHER POTENTIAL COMPLIANCE ISSUES

Other issues to be addressed with counsel include whether the innovation credits might trigger a trust requirement or certain Form 5500 reporting such as additional Schedule C forms. Additionally, outside the scope of this article, are potential insurance rebating concerns that could arise for the insurance carrier and/or its brokers.

D. APPROACHES AND GUARDRAILS

One approach may be to use insurers or vendors who do not generate innovation credits. This might trigger a savings on premiums or other beneficial aspects of the coverage. Of course, employers, understandably, do not want to "leave money on the table" and if there is no ascertainable benefit to using an insurer or vendor that does not provide innovation credits over one that does then an employer will likely select the insurer or vendor that provides the credit.

Then, if innovation credits are involved the employer will need to decide whether it will take a benefit by benefit approach or the more aggressive plan-wide "wrap" approach. In the benefit by benefit approach is taken, the first step would be to see whether the innovation credit could be locked down, so it only pays the legitimate plan expenses for that benefit.

If the innovation credit is used for the expenses related to multiple benefits and/ or settlor expenses, then an allocation would need to be made on what percentage of that expense is related to the benefit. If the innovation credit is greater than the expense then, because of exceptions from ERISA's trust requirement for plan assets held by an insurer, it is better for the insurer to hold any excess credits.

The plan-wide wrap approach would essentially be the same except the analysis would be whether the innovation credit could be used exclusively for plan rather than settlor expenses. If the expense represented both settlor and plan expenses, then there would need to be an allocation between the two.

In both approaches any plan fiduciary should avoid making the allocation decision. For example, for a benefit administration system it would be preferable for the vendor for that system to provide the allocation percentages and analysis.

E. SUMMARY

As detailed in this month's and last month's articles innovation credits raise a number of complex ERISA issues. DOL is aware of these types of arrangements and has raised concerns so care should be taken to document that any innovation credits are being used exclusively for legitimate benefit or plan expenses. ■