



DOL Announces Temporary Reasonable Good Faith Standard for Disclosures by Group Health Plan Service Providers

January 2022

The United States Department of Labor (DOL) announced a temporary enforcement policy applying a reasonable good faith standard for disclosures required to be made by certain health plan service providers to plan fiduciaries under the Consolidated Appropriations Act of 2021 (CAA).

The policy, announced in Field Assistance Bulletin No. 2021-03 on December 30, 2021, provides that a covered service provider will not be treated as having failed to make the required disclosures as long as the service provider makes disclosures in accordance with a reasonable good faith interpretation of the requirements. The Bulletin also provides additional guidance for plans and service providers on what constitutes reasonable good faith interpretations.

Employers who are group health plan fiduciaries should be receiving these disclosures from their covered service providers. If not, employers/plan fiduciaries should be prepared to ask their covered service providers for this information.

This Aon bulletin discusses:

- The background to the disclosure rules;
- The DOL's temporary enforcement policy; and
- The DOL's guidance on reasonable, good faith interpretations.

Background to the Disclosure Rules

The CAA amended ERISA Section 408(b)(2) to require group health plan service providers to disclose specific information about direct and indirect compensation that the service provider expects to receive related to services provided to the group health plan. The new disclosure rules apply to persons who provide "brokerage services" or "consulting" to group health plans subject to ERISA and who reasonably expect to receive \$1,000 or more in direct or indirect compensation in connection with providing those services.

The information generally must be disclosed reasonably in advance of the covered service provider and the group health plan entering into a contract or arrangement and should be designed to provide the responsible plan fiduciary with sufficient information to assess the reasonableness of the compensation received by the service providers. Information should also be provided regarding any potential conflicts of interest that may exist because of a covered service provider receiving indirect compensation from sources other than the plan or plan sponsor.

The DOL's Temporary Enforcement Policy

Group health plan service providers may adopt various methods to comply with the required disclosures under amended ERISA Section 408(b)(2)(B). In recognition of this fact, the DOL will not treat a covered service provider as having failed to make the required disclosures to a responsible plan fiduciary if the covered service provider made the disclosures in accordance with a reasonable good faith interpretation of ERISA Section 408(b)(2)(B). Additionally, ERISA Section 408(b)(2)(B)(viii) provides conditional relief for responsible plan fiduciaries in connection with disclosure failures by covered service providers. Therefore, the DOL will interpret that relief in light of the enforcement policy for covered service providers. In short, covered service providers and plan fiduciaries are expected to implement these requirements using a reasonable good faith interpretation of the law, pending future guidance or rulemaking.

The DOL's Guidance on Reasonable, Good Faith Interpretations

In addition to the temporary enforcement policy described above, the DOL provided the following additional guidance related to service provider disclosures.

- **Look to pension plan guidance.** In order to comply with the new requirements, covered service providers may look to prior DOL guidance developed for pension plan service providers. The DOL would view it as a good faith and reasonable step for group health plan service providers to take into account the DOL's guidance on its regulation for pension plans in connection with similar disclosure requirements.
- **Disclosures apply to all group health plans...** The disclosure requirements under ERISA Section 408(b)(2)(B) apply to both fully insured and self-insured group health plans, as well as grandfathered plans. In addition, the requirements apply to both large and small group health plans. However, qualified small employer health reimbursement arrangements are not subject to these provisions.
- **... Including dental and vision plans.** Although limited scope dental and vision plans are not subject to certain requirements under Part 7 of ERISA, those plans are covered plans subject to the disclosure requirements of ERISA Section 408(b)(2)(B). Therefore, the service provider disclosure requirements apply equally to limited scope dental and vision coverage as it does to other group health coverage.
- **It's the services that matter.** Covered service providers include providers of brokerage and consulting services to group health plans, regardless of whether the service providers are licensed or market themselves as brokers or consultants. ERISA Section 408(b)(2)(B) does not define either "brokerage services" or "consultant" but instead provides a list of services that may constitute the subject matter of brokerage services or consulting. Whether or not the service provider calls itself a "broker" or "consultant" is not dispositive, but whether it is providing the services under ERISA Section 408(b)(2)(B). If the service provider is providing those services, it is subject to the disclosure requirements.
- **Flexibility and sufficiency in disclosure.** Service providers may not know and therefore may not be able to disclose compensation amounts in advance before a contract or arrangement is entered into with a group health plan (for example, if compensation depends on several variables such as

participants' benefit elections, changes to elections, and usage rates). Therefore, covered service providers have flexibility in how they disclose compensation they reasonably expect to receive. However, the DOL highlights that regardless of the methodology used to disclose compensation, the adequacy of the disclosure should be measured against the primary goals of the requirements — to provide the plan fiduciary with sufficient information about the compensation received to allow the fiduciary to evaluate the reasonableness of the compensation and the severity of any conflicts of interest.

- **Effective Date.** The new requirements apply beginning on December 27, 2021. However, the guidance clarifies that only contracts or arrangements for services subject to the requirements which are entered into, extended, or renewed on or after December 27, 2021, are required to comply with the disclosure requirements in ERISA Section 408(b)(2)(B). The date on which the contract or arrangement between an agent/broker and plan fiduciary will be the date the contract or arrangement was executed. In the case of an agent/broker that enters into a contract or arrangement with a fiduciary through the use of “broker of record” (BOR) agreement, the date it is considered entered into for purposes of these requirements is the earlier of the date the BOR is submitted to the insurance carrier or the date on which a group application is signed for insurance coverage for the following plan year (provided it is done in the normal course and not for purposes to avoid the disclosure obligations).

Aon Statement

- As part of our longstanding commitment to transparency and integrity, Aon has routinely disclosed (via the Comprehensive Disclosure Statement) detailed information about the nature and amount of compensation we receive, which satisfies the requirements of the guidance.
- Aon is closely monitoring amendments to ERISA Section 408(b)(2), and will continue to provide clients with information to assess the reasonableness of compensation, including any details needed to ensure compliance with amended Section 408(b)(2).
- Clients with questions about the compensation disclosures related to Aon services should reach out to their account executive.

Resources

Field Assistance Bulletin No. 2021-03 can be found [here](#).



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