DOL Sues Health Plan Alleging SPD and Wellness Program Failures

Steven Brett | 631-414-4020 | steven.brett@marcumfs.com

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On August 16, 2017, the Department of Labor ("DOL") filed a lawsuit against Macy's Inc. Health and Welfare plan (and its third party administrators) under ERISA Title I.

Specifically, the complaint alleges:

- The health plan and its fiduciaries failed to follow the written terms of the health plan's Summary Plan Description (SPD) when reimbursing out-of-network claims; and
- The wellness program that includes a tobacco surcharge violated the HIPAA wellness program rules.

The complaint alleges breach of fiduciary duty and asks, in part, for readjudication of all out-of-network claims administered outside plan terms and for restitution of all the tobacco surcharges imposed.

Failure to Amend SPDs

According to the DOL's complaint, Macy's changed the reimbursement threshold for out-of-pocket claims from "the lesser of the provider's normal charge for a similar service or supply or between 75%-80% of usual and customary charges" to the Medicare Allowable Rate when it is less than the provider's normal charge for a similar service or supply. Allegedly, the SPD was not amended to include language describing that the reimbursement for out-of-network claims would be the Medicare Allowable Rate when less than provider's normal charge. Additionally, the health plan participants were not provided a copy of any summary of material modification reflecting the change in reimbursement.

Wellness Program Failures

The DOL alleges the tobacco cessation wellness program sponsored by Macy's did not meet the requirements of the wellness regulations to provide a nondiscriminatory wellness program for the years 2011 to present day. Briefly, the employer imposed a surcharge on an employee's premium for individuals who were smokers. While such surcharges are permissible, there are specific guidelines that must be followed to comply with HIPAA wellness regulations.

Specifically, the DOL alleges the wellness rules were violated because the program:

- Required covered members participating in a tobacco cessation program to be tobacco free for six consecutive months in order to avoid a premium surcharge;

- Did not allow individuals who completed the tobacco cessation program to avoid the entire surcharge (i.e., retroactively correct the application of a surcharge); and

- From 2011-2013, the materials describing the wellness program failed to include a notice of a reasonable alternative standard to avoid the surcharge.

Why is this Important?

The recent filing by the DOL of this complaint signals the agency has not backed away from pursuing ERISA violations against employer-sponsored health plans. It also highlights the importance for plans to keep documents up-to-date to ensure administration is consistent with the written terms of the plan. Finally, it highlights the importance of following the rules when it comes to wellness programs, specifically offering a reasonable alternative to achieve the reward without conditioning it on satisfying the original standard (e.g., non smoker status) and making the full reward available upon completion of the alternative.

It will be interesting to see Macy's response and to follow developments in this litigation and any actionable items for plan sponsors. We will continue to keep you apprised.