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EMPOWERING PLANS

The Double-Edged Sword of Discretion: How Even Great Plan Document Language Can Cause Gaps in Coverage





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Why Are We Here?



- Stark differences in plan, TPA, and stop-loss expectations
- Misunderstandings of the nature of the plan versus employee handbook
- Differing focus of those who write the Plan Document and those who write the Employee Handbook

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Today's Speakers



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PGCReferral: March 2017's Most FAQ

- If an employee is on leave due to a work related injury (the employee is receiving workers' compensation), is the employer mandated to terminate the employee from the health plan immediately and/or at some other timeframe and offer the employee COBRA?
- An employer group wants to exclude coverage for dependent spouses beginning at the next plan year. Is the employer required to give notice of this change? Will the employer have to offer COBRA to the spouses who lose coverage?
- If an employer (buyer) purchases the assets of another employer (seller), which entity is responsible for offering COBRA to current qualified beneficiaries on the seller's health plan? The seller is ceasing all operations and will cease to exist after the assets sale.



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Overview



- Political Update
- Plan Administrator's Discretion
- Standards
- Potential Stop-Loss Concerns & Horror Stories
- Changes We've Made



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Political Update: Repeal & Replace...Revived!



Speaker Ryan Says the GOP is Putting the “Finishing Touches” on an Obamacare Deal

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One Last, Frantic Effort to Pass the AHCA



➤ What's the Hurry?

- The 100-day mark is fast approaching
- Time is limited: gov't shutdown is looming; many are eager to move on to other issues: tax reform, infrastructure, immigration
- Insurers have to get their benefit packages in for the 2018 benefit year

➤ What Has Changed?

- Pressure from activists, donors, and the Trump Administration
- A new compromise has emerged between moderate Republicans and the Freedom Caucus which is expected to secure 18 to 20 new votes



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The MacArthur Amendment



- The Amendment Would:
 - Reinstates Essential Health Benefits as the federal standard
 - Maintain the following provisions of the AHCA:
 - Prohibition on denying coverage due to pre-existing medical conditions
 - Prohibition on discrimination based on gender
 - Guaranteed issue of coverage to all applicants
 - Guaranteed renewability of coverage
 - Coverage of dependents on parents' plan up to age 26
 - Community Rating Rules, except for limited waivers
- The Waivers Are the Key
 - Allows states to seek waivers from certain federal requirements in the name of lowering premium costs and expanding coverage. Waivers available for Essential Health Benefits and Community Rating Rules, except for the following categories:
 - Gender, Age, Health Status (unless state establishes a high-risk pool)



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What to Watch For



- Vote on Revised AHCA Could Come this Week!
- Part 02: Regulatory Changes Made Last Week to Help Stabilize the Individual Market
 - Shortened sign-up window for marketplace plans (45 days)
 - Curbs on special enrollment periods
 - Allow insurers to collect past debt for unpaid premiums
 - Permit more flexible designs for low-premium plans
- The Administration Can Still Derail the ACA
 - Block funding for subsidies
 - Refuse to enforce the individual or employer mandate
 - Let states more loosely define essential health benefits
 - Let the architecture crumble
- May 22: The ACA's Day in Court
- June 21: Decision Day for Insurers in the Federal Marketplace



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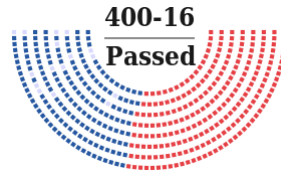
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A Final Note: The Self-Insurance Protection Act



- On April 5th, the House of Representatives passed the **Self-Insurance Protection Act** (SIPA; H.R. 1304) by a vote of 400 to 16. It now heads to the Senate
- Blocks federal efforts to regulate small stop-loss plans as health insurance by excluding the plans from the federal definition of “health insurance coverage”
 - “To amend the Employee Retirement Income Security Act of 1974, the Public Health Service Act, and the Internal Revenue Code of 1986 to exclude from the definition of health insurance coverage certain medical stop-loss insurance obtained by certain plan sponsors of group health plans.”
- SIIA did amazing work to help push through this legislation, the third version of this bill. SIIA members promoted the bill across the country
- Lead sponsor was Rep. Phil Roe (R-Tenn.)
- Note that this is defensive legislation; the federal gov’t is not currently regulating stop-loss insurance. This bill ensures that the feds do not try. The more difficult hurdle is at the state level, where we have already seen laws which regulate stop-loss



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Discretion: What Do Plan Documents Say?



- The Plan Administrator shall have sole, full and final discretionary authority to interpret all Plan provisions, including the right to remedy possible **ambiguities, inconsistencies and/or omissions** in the Plan and related documents; to make determinations in regards to issues relating to **eligibility** for benefits; to decide disputes that may arise relative to a Participant’s **rights**; and to determine **all questions of fact and law** arising under the Plan.
- The Trustees have the full and exclusive authority and discretion to determine pursuant to the rules of the Plan all questions of **coverage, eligibility**, and the **entitlement to benefits**, the methods of **providing or arranging for benefits**, and other related matters.
- The Named Fiduciary and the Plan Administrator have full discretionary authority to interpret and apply all Plan provisions including, but not limited to, resolving all issues concerning **eligibility and determination of benefits**. Final authority to interpret and apply the provisions of the Plan rests exclusively with the Plan Administrator. Decisions of the Plan Administrator **made in good faith** will be final and binding on all parties **including an applicable reinsurance carrier**.



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Discretion: What Does The Law Say?



- "...the plan administrator's interpretation of ambiguous plan provision should be judged as follows: (a) as a result of **reasoned and principled process** (b) **consistent with any prior interpretations** by the plan administrator (c) **reasonable in light of any external standards** and (d) **consistent with the purposes of the plan.**"
- The Plan Administrator's interpretation must be "**reasonable and made in good faith.**"
- *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1003 (10th Cir. 2004)



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Discretion: Different Viewpoints



- **Plan Administrator:** Discretion gives the Plan Administrator a framework to adjudicate claims even when language is ambiguous. The Plan Administrator's word is the law and must be reasonable – but the Plan Administrator is usually the Plan Sponsor, and wants to minimize spend...
- **TPA:** Most TPAs don't want to exercise discretion because it makes the TPA a fiduciary. If discretion is necessary, the TPA will generally kick the determination over to the Plan Administrator.
- **Stop-Loss Carrier:** The Plan's discretion can be dangerous since it doesn't bind the carrier, and can lead to large claim denials. Even if the policy "mirrors" the plan language, it doesn't mirror the Plan Administrator's discretion, if the carrier deems it unreasonable.



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Conflict of Interest



- “...an ‘apparent’ conflict of interest exists whenever a plan administrator is responsible for both funding and paying claims.” *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1108 (9th Cir. 2000)
- Argument: Fiduciary duty to both contain costs (AKA minimize payments) *and* treat members fairly is a recipe for disaster
- Outsourcing claims or appeal determinations is key



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Plan Administrator’s Discretion



- Effect on stop-loss:
 - Stop-loss policy may have its own discretionary clause
 - Individual discretion by item
 - “Mirroring” the *plan document* – just language, or interpretations too?

READ YOUR POLICY!



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Plan Administrator's Discretion



- Examples of Stop-Loss Concerns:
 - Open-ended "hazardous activity" exclusion results in the plan paying ATV crash claims while the carrier denies using the same plan language
 - Plan excludes claims caused by "illegal acts," and Plan Administrator decides that those include only felonies, but the carrier disagrees and excludes a DWI crash



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Plan Administrator's Discretion



- Examples of Compliance Concerns:
 - Plan will pay at the lesser of a contract rate or U&C, so the Plan Administrator chooses U&C (in violation of the network contract)
 - Plan document omits legally required exemption from exclusion based on medical condition, so Plan Administrator doesn't apply that exemption



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Plan Administrator's Discretion



- Special Case Study: Leave of Absence
 - Plan continues coverage during any employer-approved LOA
 - Stop-loss can't underwrite that
 - Employer's whims can result in unpredictable LOAs
- Are your employers "gap-free?" (They *can* be...)



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Plan Administrator's Discretion



- Special Case Study: U&C
 - Plan language says it will pay the lesser of 150% of Medicare or a contracted rate
 - Plan initially pays 150% of Medicare; provider balance-bills; plan settles claim at 200% of Medicare
- **Discretion** issue? **Stop-loss** issue?



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Plan Administrator's Discretion



- Special Case Study: U&C (again)
 - Plan says it will pay “an amount the Plan Administrator deems reasonable”
 - Where does one even *begin*?
 - This leaves a lot up to the imagination and requires a great deal of discretion



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Recent Changes



- We have been on the front lines of disputes between plans, brokers, TPAs, and stop-loss regarding issues of discretion
- We have seen first-hand the disruption that is caused by questionable interpretations of plan language, or plan/handbook gaps in coverage
- We have consulted the law, various audit firms, and other resources – and here is some language we have revised:



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Recent Changes



- Discretionary authority not *limited*, but *contained*
- Rather than give blanket discretion to determine medical necessity or U&C, the plan document lists specific resources that the Plan Administrator can use to make the determination
- Ability to perform independent medical review to determine medical necessity after the fact: removed from medical and included within LTD
- Clarified and removed any ambiguity from description of Mental Health and Substance Abuse Benefits; added definitions of “Intensive Outpatient Services,” “Partial Hospitalization,” and “Resident Treatment Facility”



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Recent Changes



- Clarified continuation of coverage during different types of leave of absence
 - Disability leave options now include:
 - Continuation due to **layoff**
 - Continuation due to **STD leave**
 - Continuation due to **LTD leave**
 - Continuation due to **ADA leave** (a non-FMLA leave)
 - Continuation due to **other non-FMLA leaves**



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Flagship Plan Document: Phia's Best Practices



- Delays In Plan Drafting Cause Many Plans To Administer Old Plans – Or In Some Cases – No Plan
- To Combat This, The Phia Group Has Developed Its Flagship Plan Document Template
- A Condensed Version Of Its Industry Acclaimed, Fully Customizable Template
- The Phia Group Has Created A Nearly Complete Plan Document – By Pre-Selecting What It Deems To Be The Best Provisions In Every Regard
- All That Remains Is To Fill In Biographical Information, Insert A Schedule Of Benefits, And Eligibility Criteria
- **Contact Tim Callender** at 781-535-5631 or tcallender@phiagroup.com



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