

# How Self-Funded Health Plan Sponsors Can Avoid Litigation Around Fiduciary Responsibilities

## Growing number of self-insured employers shore up systems and adopt innovative, bundled case rate benefits solution

Businesses are being sued for failing to meet their fiduciary duties.

An employer has at least two strategic objectives for employee health benefits: to attract and retain the best talent, and to control the company's healthcare spend. For many years, employers have provided health benefits and fully or partially achieved these objectives. But something's now gone terribly awry. Businesses are being sued for failing to meet their fiduciary duties – for unmanaged health plan costs that affect both employers and employees. Mounting litigation costs are hitting plan sponsors' balance sheets, and workers are taking note.

More than 100 of Cigna's self-insured clients and their plan administrators have been named as defendants in a massive fraud lawsuit. According to court documents:

1. "Defendants never monitored or tracked the specific fees that Cigna was paying to itself and never required Cigna to itemize and account for the financial transactions made by Cigna in sufficient detail."
2. "Defendants processed claims and determined that certain claim amounts were allowed under the plans, yet those allowed claims payments were never made to plaintiffs and instead [were] withheld by Cigna."<sup>1</sup>

This recent lawsuit is one of several alleging the dereliction of financial duties. The tsunami of millions of dollars in litigation signals that the intense scrutiny so commonplace for retirement benefits is now also on self-insured health benefits.

Judicious employers are taking a closer look at the experience and qualifications of their carriers.

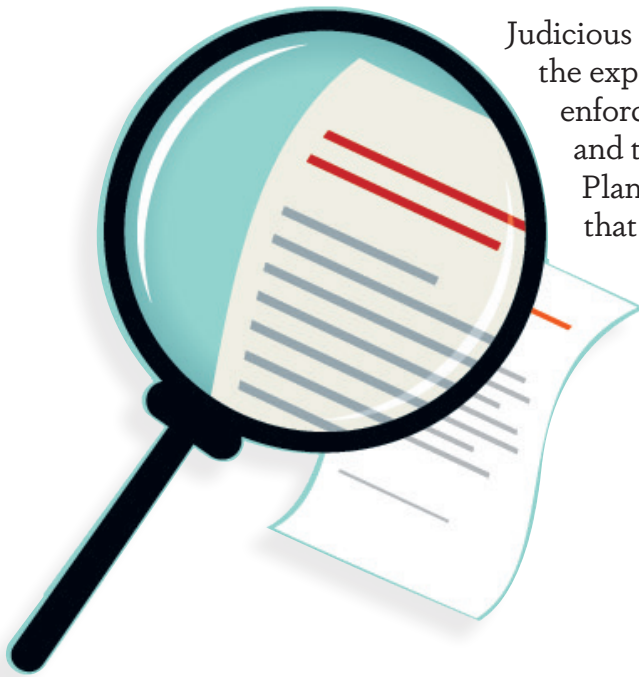
## Employers shore up systems to meet ERISA standards

As affected employers parry and thrust with plaintiff's attorneys and undergo U.S. Department of Labor investigations, savvy self-funded businesses are shoring up systems to meet their fiduciary responsibilities.

The Employee Retirement Income Security Act (ERISA) enforces standards of conduct for employers who manage employee benefits, including group health plans.<sup>2</sup> These standards include:

- Acting solely in the interest of participants and their beneficiaries
- Making well-advised decisions that ensure participants can benefit in the future
- Adhering to the group health plan documents
- Keeping plan assets in trust, if applicable
- Paying reasonable plan expenses

To meet ERISA standards of conduct, prudent employers are reviewing group health plan documents and ensuring they're properly maintained, current and compliant. Plan sponsors also are limiting their fiduciary liability in two ways: by documenting processes and by setting up agreements with health insurers and third-party administrators that clearly set forth each party's fiduciary responsibility and liability.



Judicious self-funded employers are taking a closer look at the experience and qualifications of their carriers, any enforcement actions against them, their performance record and their ability to access medical provider information. Plan sponsors are closely monitoring fees and expenses that are paid with group health plan assets to ensure that pricing meets ERISA's standard for what's reasonable. Employers also are familiarizing themselves with timeframes for claims processing and procedures for participants' appeals when benefits are denied.

For one plan sponsor's bundled hip replacement surgeries, the employee and employer paid \$0 and \$24,213, respectively, versus \$2,500 and \$42,153.

## Plan sponsors turn to narrow network, bundled case rate benefit plans

Additionally, to help meet their fiduciary responsibilities, plan sponsors are turning to specialized benefits management firms that provide access to high-quality healthcare with lower, fully transparent costs. Some firms specialize in bundling case rates for planned surgical procedures that include cardiac, vascular, orthopedic, bariatric, spine and neurological, cancer, and women's health conditions.

With many employers spending an estimated \$2,000 to \$5,000 more per employee for healthcare than necessary, these benefits firms can help plan sponsors correct course and avoid the lion's den of litigation.<sup>3</sup>

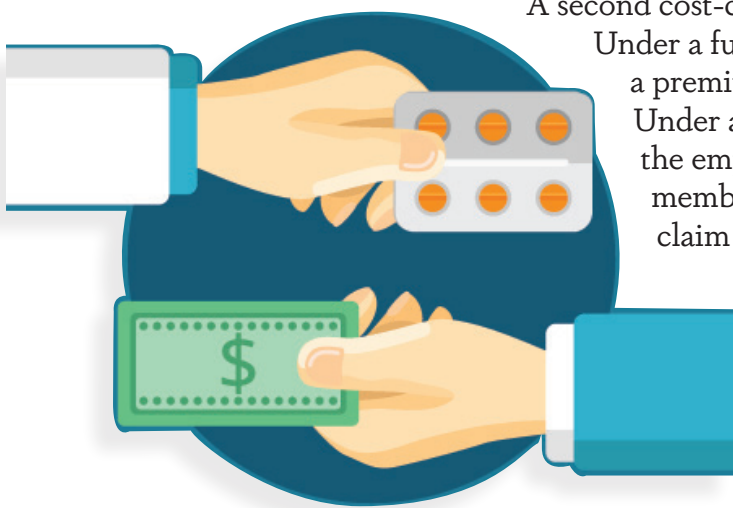
Bundled surgical case rates give plan sponsors a strong strategic advantage in meeting their fiduciary duties. These narrow-network benefits can save self-funded employers 20 to 50 percent over broad-network PPOs on costly major surgeries such as spinal fusions, hip replacements, angioplasties and coronary bypasses.<sup>4</sup>

As an example, for one plan sponsor's bundled hip replacement surgeries, the employee and employer paid \$0 and \$24,213, respectively, versus \$2,500 and \$42,153. For a variety of bundled surgeries, another employer saved \$3.8 million in a single year.

## Organizations self-fund and target drug spending

A second cost-containment strategy is to self-fund the health plan.

Under a fully insured arrangement, the employer pays a premium regardless of how its health plan is running. Under a self-funded, or self-insured, arrangement, the employer pays only for the medical claims of its plan members. In years that employees are reasonably healthy, claim cost savings go straight to the bottom line. Typically, employers purchase stop-loss insurance, which caps what the company will pay in years with heavy claims.



## Specialty drugs for chronic illnesses present a challenge.

A third approach to meeting fiduciary responsibility is to target prescription drug costs. Pharmacy benefits typically account for 15 percent to 20 percent of an organization's healthcare spending, and they represent the fastest-growing slice of the employer health benefits pie. Specialty drugs for chronic illnesses such as multiple sclerosis and hepatitis C present a particular challenge. Although these medications treat just 1 percent of workers, they account for 15 percent or more of drug plan costs.<sup>6</sup> To rein in prescription drug spend, employers:

- Use pharmacy benefit managers, or PBMs, that bring drug price economies
- Employ a tiered co-pay design, pairing the lowest co-pays with the lowest-cost drug options
- Manage formularies to include the most cost-effective and cost-efficient medications
- Mine pharmacy benefits data so care coordinators can identify and guide high-utilization plan members
- Follow "step-therapy protocols," which begin members on preferred medications and escalate to more expensive drugs only as need or efficacy dictates.

## Disease management, wellness programs help control costs

A fourth strategy for meeting fiduciary responsibility is to launch and incentivize both disease management and wellness programs. These programs in fact are not duplicative. Disease management supports the minority of plan

members who live with chronic health conditions such as diabetes that account for most health benefit costs.

Worksite wellness programs help healthy individuals – the majority of plan members – remain so, incentivizing behaviors and lifestyle choices that mitigate high health risks associated with inactivity, poor diet and aging.

Deployed in tandem, disease management and wellness programs can mount an effective assault on healthcare spending. But participation in such programs is where the rubber meets the road, so well-conceived incentives are essential for success. Examples of member incentives include:

- Reimbursing for participation in a smoking-cessation program
- Waiving co-pays or deductibles for prenatal care or well-baby visits
- Waiving out-of-pocket payments or reducing insurance premiums for attending weight-loss and exercise classes
- Funding health savings accounts for completing health risk assessments before and after worksite health programs



The most discerning will note today's litigious headwinds around fiduciary responsibilities.

Although not without their detractors, disincentives have been adopted by a number of employers. These include increased premiums and out-of-pocket liability for abstaining from worksite programs. Some value-based plan designs and adjudication software financially disincent medical services and prescription drugs that fail to meet evidence-based guidelines or constitute an unwarranted variation in care.

More than two millennia ago, Aesop's Fables instructed us to "look and see which way the wind blows before you commit yourself." The most discerning in the self-funded community will note today's litigious headwinds around the fiduciary responsibilities of health plan sponsors. The most prudent will shore up systems and processes to meet ERISA standards of conduct, and the most innovative will adopt narrow-network, bundled case rate benefit plans as well as other proven approaches.

## Footnotes

1. Flores, M., "Over 100 Cigna Administered Self-Insured ERISA Health Plans Sued for Embezzlement-Health Plan Litigation Tsunami," AVYM.com blog, June 11, 2016.
2. U.S. Department of Labor, "Health Plans & Benefits: Fiduciary Responsibilities," [www.dol.gov](http://www.dol.gov), 2016.
3. Chase, David, "CFOs and HR Execs Facing Millions in Personal Liability Due to Unmanaged Health Benefits Plans," Forbes, [www.forbes.com](http://www.forbes.com), May 26, 2016.
4. BridgeHealth, analysis of employer customer claims data, 2013-2016.
5. Op. cit., BridgeHealth claims data analysis.
6. Bliss, Wendy, "Managing Health Care Costs," Society for Human Resource Management, [www.shrm.org](http://www.shrm.org), July 15, 2015.

## About BridgeHealth

Founded in 2007, BridgeHealth is a bundled medical services benefit management company that offers a suite of products for self-insured group health plans to improve quality and outcomes of surgery, reduce costs and positively affect the rate of unnecessary surgery. Through decision support, a high-quality narrow network, care coordination and other strategies, clients get real savings in cost and high-quality outcomes while providing an outstanding patient experience through a facilitated process. Clients achieve very quantifiable results for themselves and their employee/plan members in a manner that integrates with their full suite of health plan benefits. BridgeHealth is headquartered in Denver, Colo., with offices in Chicago, Ill.

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