The CAA: A Fiduciary Guiding Light for 401k and Benefits Advisors

New legislation in the healthcare plan space requires transparency and greater fiduciary responsibility. Sound familiar? What does it mean for 401k advisors, and how can they capitalize on its provisions?

Posted by John Sullivan, Editor-In-Chief — May 28, 2021 in 401(k) Investments, Products, Your 401k News 0

Lighthouse Beach 3D illustration - Twilight overtakes a seashore as a nearby lighthouse lights up the sky with a powerful beam to warn sailors.

The Consolidated Appropriations Act of 2021, signed into law at the end of December, brought significant changes for health insurance brokers. Yet, there's substantial opportunity for retirement plan advisors as well—especially those with a firm grasp of fiduciary roles and responsibilities.

Simply put, transparency is coming to healthcare much as it did in the retirement industry. The CAA clearly states the plan sponsor is a fiduciary, removes gag clauses in carrier contracts pertaining to price and quality information, and requires 408(b)(2)-style broker compensation disclosure.

"It's the evolution of fiduciary duty," said Jamie Greenleaf, Managing Director and Founder of TILT, a health benefits advisory firm that seeks to increase transparency, decrease costs and help advisors bring a consistent process to how participants select their healthcare plans. "It's taking the same path that the retirement industry did 20-plus years ago."

Her dual role as TILT founder and lead advisor and principal of Cafaro Greenleaf, a top retirement and benefits advisory firm, gives her a unique view of the recent legislation's impact and the incredible opportunity for retirement plan advisors.

"This is what we saw the retirement space go through, where retirement plan advisors traditionally didn't take a fiduciary eye to the benefits spend in determining if it was in the best interest of the participant," she explained. "But now they must, and that's what's happening in healthcare."

While health insurance brokers haven't had a formal fiduciary duty, plan sponsors have, she noted. Yet, it was one they failed to address because they didn't see the liability in the same way as their retirement plan benefits.

"The broker will now have to disclose their compensation," she said. "Anything that's paid over and above $1,000 is going to have to be disclosed on the Form 5500. Wow, that sounds like what happened in the retirement space."

She saw it as a new business line, to a certain degree, and retirement plan advisors can take their knowledge of ERISA and establish processes and the same kind of framework around the healthcare space.

"Retirement consultants know more than they think," she claimed. "They believe that because it's healthcare, they won't understand it, but they do. We do this every day. We look at plan design, and we determine if the company is spending its dollars in the most advantageous way for the employees. We look at transparency and how to teach employees to become better prepared for retirement. The fiduciary processes that we have in place can transfer right into healthcare."

Hugh O'Toole, CEO of Pittsburgh-based data analytics firm Innovu, was even more optimistic. He claimed the passage of the CAA and its healthcare-related provisions—as well as the consolidation of retirement advisors with health insurance and property/casualty advisors—is too big of a coincidence to ignore.

"Top tier retirement advisors have perfected running a fiduciary procurement play," O'Toole noted. "This is exactly what the future of healthcare consulting will require. The aggregators with proper execution have a huge opportunity to gain market share if they use the fiduciary strengths of the retirement consultant with the knowledge of the healthcare advisor."

Defined contribution déjà vu

The issue of transparency and fiduciary duty within the group health plan space is something high-profile attorney and ERISA expert Marcia Wagner hit upon early. The Founder and Managing Partner of The Wagner Law Group recently released a white paper titled Disclosure to Welfare Plan Participants: A Fiduciary Duty, as well as a webinar dedicated to the topic.

"There is a fiduciary duty to disclose material information to participants in group health plans," Wagner definitively stated to webinar attendees. "While it's not often referred to as a fiduciary duty, it is not a new duty, but rather one with a firm basis in trust law. It has simply not been articulated as such."

She said it will be discussed more frequently and with more importance as courts are increasingly involved.

"There is going to be, I believe, a veritable tidal wave when people understand that the fiduciary responsibilities, liabilities, and obligations are equally applicable in the wild west of welfare benefit plans, as they are in, for example, 401k plans," Wagner argued.

To back her assertion, she referenced Section 404 of Title 1 of ERISA, which set forth four basic principles of trust law: duties of prudence, loyalty, diversification of plan assets, and the administration of the trust in accordance with its terms.

"The is no question that these four principles are equally applicable to employee welfare benefit plans under ERISA as they are to employee pension benefit plans," Wager added.

She noted two trust law components, specifically, when describing the healthcare plan sponsor's fiduciary duty to disclose material information to participants.

"Plan participants must be provided with material information that will allow them to make informed decisions …this same point was made in the preamble of the recently issued final regulation on healthcare transparency," she explained.

Second, decisions should be made with cost-consciousness in mind; a fiduciary cannot waste a beneficiary's money, and they are obligated to minimize costs.

"The determination of an appropriate medical plan is a different type of investment decision than investing in a 401k plan, but the fiduciary principles are applicable," she said, reinforcing the similarities between the two.

In an echo of 408(b)(2), she said that in most—if not all—disclosure requirements under ERISA, "the information should be provided in a manner that is calculated to be understood by the average plan participant."

In other words, plain, understandable, and straightforward.

She emphasized that information, technology, and the common law of trusts are not static, so fiduciary duties, therefore, cannot be either.

"Articulation of the ERISA fiduciary duty in the context of healthcare plans may be new, but the duty to disclose information to participants of which they are unaware in order to allow them to make informed, cost-conscious decisions is not."

Outsourcing obstacles

In addition to transparency in pricing and 408(b)(2)-style disclosures, similarities exist in questions surrounding the outsourcing of fiduciary responsibilities, the service providers covered, and the complexities it entails. It's something that's made 3(38), 3(21), and 3(16) extremely topical in the retirement plan space recently, and Wagner sees a similar path for healthcare plan fiduciaries.

"Who is a covered service provider?" she rhetorically asked. "At the end of the day, this all comes down to the employer's responsibility, but the employer can clearly be subcontracting this to the broker or insurance company itself, but it's evolving."

The fiduciary responsibility principles are on the plan sponsor, or the so-called named fiduciary, she emphasized. Still, whomever the sponsor subcontracts to, at least initially, will argue they are not a fiduciary.

“The question will be—how does the law evolve, and will it evolve to say brokers are in fact fiduciaries? The industry created a huge wall between welfare benefits and pension benefit arrangements. They’re all employee benefit arrangements and all subject to the same fiduciary principles. That is going to lead to the changes that you saw in the 401k-arena coming [to healthcare plans], in a more tightened timeframe, because of technological changes to the welfare benefit world.”

Regulatory road ahead

Greenleaf, for her part, reflected on the past when considering healthcare brokers and sponsors fiduciary future.

Noting the traditional lack of awareness, she said she would routinely ask 401k sponsors what they were paying for the plan. The answer, inevitably, would often be, “It’s free.”

“I would chuckle because last time I looked, nobody works for free,” Greenleaf related. “There was a total lack of understanding of the services provided and the fees charged. I think with these new transparency regs and the CAA, we’re going to have to disclose more data around what is made on the healthcare plan and its reasonableness given the services provided.”

As with retirement plans, that’s not a bad thing, and she called it an eye-opener for plan sponsors who have yet to take a close look at the actual costs. If it’s an opportunity to save additional dollars and help their employees do so too, even better.

“Kudos to the new regulations, although I’m surprised I’m saying that,” Greenleaf concluded. “If we’re able to design plans that allow them to reduce their costs and put that money into health savings accounts that they can use throughout their lifetime, we will all be better off.”

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