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Johnson & Johnson Case Signals Employee Drug Price Suits to Come

By Sara Hansard

Deep Dive

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- Employer health plans left open to similar suits, attorneys say
 - Lowering liability will entail employers stepping up oversight

A novel lawsuit from an employee suing Johnson & Johnson Inc. for allegedly mismanaging drug benefits appears a harbinger of litigation to come against companies, especially those that rely on pharmaceutical industry middlemen to negotiate pricing and rebates.

Ann Lewandowski, a health-care policy and advocacy director for Johnson & Johnson, filed the proposed class action Feb. 5 in US District Court for the District of New Jersey. The suit said the New Jersey-based company mismanages its employee health plan by paying its pharmacy benefit manager, Express Scripts Inc., inflated prices for generic specialty drugs that are widely available at much lower cost.

Employers are likely to face legal challenges by employees for paying more than is necessary after being warned for years that previously hidden information on negotiated prices for health care services has become publicly available to potential plaintiffs through new laws and regulations. These new lawsuits would be comparable in some ways to those filed against companies for paying excessive fees or mismanaging investments in 401(k) defined contribution retirement plans, according to attorneys who advise employers.

Companies have taken the unusual step in recent years of suing their health plan administrators for breaching fiduciary duties under the Employee Retirement Income Security Act. For example, Kraft Heinz Co. sued health plan administrator Aetna Life Insurance Co. for allegedly approving fraudulent claims. That suit was dropped in December 2023 and the dispute went to arbitration.

There have also been suits filed by employers, unions, and employees against health plan administrators for causing them to overpay for medical bills and claims.

But the Johnson & Johnson case appears to be the first case brought by an employee against a major company alleging breach of ERISA fiduciary duty over mismanagement of health plan funds.

"The allegations and legal theories asserted in the complaint are meritless and, therefore, we will be moving to dismiss the complaint in its entirety," Johnson & Johnson media relations Senior Director Tesia Williams said in an email.

Suits Anticipated

"We've been anticipating that the fiduciaries of those plans that are hiring these third-party contractors are vulnerable to just the type of claims that Johnson & Johnson is facing here," said Joanne Roskey, a member of Miller & Chevalier Chartered's ERISA and employee benefits practice.

The complaint alleges that Johnson & Johnson mismanaged its prescription drug benefits program, costing employees millions of dollars in higher payments for drugs, as well as higher premiums, deductibles, coinsurance, copays, and lower wages or limited wage growth. Express Scripts, which is one of the nation's three largest PBMs, is not named as a defendant in the lawsuit.

The suit cites a charge of more than \$10,000 for a 90-day prescription of generic drug teriflunomide, used to treat multiple sclerosis, that would have cost as little as \$28 from online pharmacy Cost Plus Drugs.

"The burden for that massive over-payment falls on Johnson & Johnson's ERISA plans, which pay most of the agreed amount from plan assets, and on beneficiaries of the plans, who generally pay out-of-pocket for a portion of that inflated price," the suit said. "No prudent fiduciary would agree to make its plan and beneficiaries pay a price that is two-hundred-and-fifty times higher than the price available to any individual who just walks into a pharmacy and pays out-of-pocket."

The court will focus on whether the plan had a reasonable process for selecting and monitoring its drug benefits, Roskey said.

"This is a prudence case, and it's going to focus on the processes that were used to make the decisions about pharmacy benefits for this plan," she said.

The plan's expenses are paid from the Johnson & Johnson Salary Medical VEBA, an employer-sponsored trust to pay medical benefits, according to the suit.

"The fact that there's a trust has a bearing," Roberta Casper Watson, leader of the Wagner Law Group's health and welfare practice group, said. "Once the employer puts a dollar in the trust, then it's a plan asset," and plan assets are regulated by ERISA, she said.

Employee contributions are always plan assets, but their employers' contributions aren't necessarily plan assets "until the employer does something to make them plan assets," which would include contributing to a VEBA or paying claims, Watson said.

In many plans, the employer pays claims directly, rather than contributing them to a plan and having the plan pay the claim, she said.

"It's an aspect that'll affect a lot of people that might want to bring these cases," she said.

ERISA requirements may not apply to payments made from employer assets in a typical employer-sponsored plan because employees may not lose money from those expenditures, Watson said. Employees may not have standing to complain about things that cost the employer more money, she said.

But assets in a VEBA "would make them all plan assets and strengthen the ERISA case," Watson said.

The plaintiff claimed in the Johnson & Johnson suit that paying inflated prices for drugs harmed employees in part because it resulted in lower wages for them.

But the argument that an employer that paid less for its health plan might pay more in wages has proven weaker legally, Watson said.

"Historically that kind of an argument has not resulted in standing for the complainant," she said. "It's considered speculative."

Mitigating Liability

Employers can mitigate their liability exposure to these types of cases by ensuring they are engaged in a prudent process in selecting and monitoring their service providers, according to benefits attorneys who represent companies.

It is no longer a sufficient defense for employers to rely on brokers and plan administrators "to do the right thing," said Shawn Gremminger, president and CEO of the National Alliance of Healthcare Purchaser Coalitions.

Employers may need to add staff, spend more time examining contracts to ensure they're getting the best deal, "and then do a lot of digging to ensure that the people that they've signed contracts with are actually doing what they say they will do," he said.

The fact that Johnson & Johnson has become an early target of employee suits on fiduciary violations is "interesting," Gremminger said.

"They should understand drug pricing better than your average employer," he said.

Hospitals and health plans are required to make their negotiated prices publicly available, but drug prices and information about how PBMs like Express Scripts price the drugs they manage has not been as open.

Employer and consumer groups have called for more transparency from these middlemen, who have been known to engage in practices like “spread pricing”— charging companies’ insurers more for drugs than they pay pharmacies to fulfill their claims and pocketing the difference.

However, it’s still difficult for employers to get negotiated pricing and claims data that shed light on PBM operations and other aspects of plan spend in a usable format. Service providers, such as brokers and health plan consultants, are also required in some cases to provide information about the compensation they receive, but it isn’t clear how much information plan fiduciaries are actually getting, Roskey said.

The threat of another Johnson & Johnson suit also may prompt employers to look beyond the top three PBMs, which dominate marketshare, for alternative PBMs that are more transparent in their practices, she said.

Lewandowski, currently on leave due to a dispute over an accommodation for a medical condition, is represented by Wheeler, DiUlio & Barnabei PC and Fairmark Partners LLP.

The case is Lewandowski v. Johnson & Johnson, D.N.J., 1:24-cv-00671, 2/5/24.

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