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Employee Sues Plan Sponsor, Alleging Mismanagement of Pharmacy Benefits

In what may be the first lawsuit of its kind, an employee has filed suit accusing a company (Johnson & Johnson or “J & J”) of mismanaging its workers’ prescription drug benefits. This is a new tack in efforts to hold employers accountable for high prescription drug costs. The lawsuit, filed last week in a federal court in New Jersey, alleges that J & J breached its fiduciary duty by mismanaging the plan’s prescription drug program, resulting in extra costs for employees and the plan. In particular, the suit alleges that both the plan and the employees grossly overpaid for some generic drugs (designated as specialty medications) by millions of dollars.

The suit provides an example of a generic prescription that was available at retail pharmacies for as little as \$40.55 for a 90-day supply. The cost under the plan for that same 90-day supply was \$10,239.69. The suit alleges that this significantly inflated pricing demonstrates that contrary to ERISA’s fiduciary requirements, J & J failed to exercise prudence in selecting and managing the plan’s “pharmacy benefit manager,” or PBM, at the expense of the participants and the plan’s assets.

The J & J suit is the latest development in recent lawsuits that have focused on self-funded employer fiduciary duties under ERISA, spurred in part by recent federal healthcare pricing transparency laws. For example, last year, Kraft Heinz, an employer plan sponsor,

sued Aetna, its former third-party health plan administrator, alleging Aetna enriched itself to the plan’s detriment through undisclosed fees and automated claim processing.

The J & J suit, however, is the first time an employee and participant under the plan has sued the employer sponsor for breach of fiduciary duty. Undoubtedly, it will not be the last of its kind. For all employee plan sponsors, the J & J suit is a reminder that under ERISA, employers, as group health plan sponsors, have a fiduciary duty to manage their plan prudently. As fiduciaries, plan sponsors should consider practices that are in the best interest of the plan (and may protect the employer from suit).

Self-funded employers are particularly at risk from these fiduciary claims, as unlike a fully-insured plan, the plan sponsor makes more choices regarding plan vendors. As this new case demonstrates, in the context of self-funded plan PBM management, such practices include: (i) using a formal RFP process for PBM selection; (ii) during PBM contract negotiations, watching carefully for provisions that may unreasonably benefit the PBM (such as spread pricing or rebate retention) or otherwise create conflicts (such as PBM pharmacy ownership); and (iii) on an on-going basis, monitoring PBM activity and arrangements for prudence and fairness.

Moreton & Company will continue to follow the J & J suit and provide future updates.

Please visit www.moreton.com/news-events/ for more information and to view other client alerts. This Client Alert was written by Carolyn Cox, who provides our clients with compliance services. For additional questions, please contact Carolyn at 801-715-7110 or ccox@moreton.com.

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