

**Resource Center****PROPOSED CLASS ACTION FILED AGAINST PLAN FIDUCIARIES ALLEGES PRESCRIPTION DRUG MISMANAGEMENT**

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A proposed class action filed against Johnson & Johnson (“J&J”) serves as a good reminder to employers and plan fiduciaries that pharmacy benefit manager (“PBM”) arrangements dictate not only an ever-increasing portion of an employer’s annual health care spend, but can also serve as the basis for allegations of employer wrongdoing and fiduciary breach. The case is *Lewandowski v. Johnson & Johnson*, D.N.J., No. 1:24-cv-00671, complaint 2/5/24.

The *Lewandowski* plaintiff, an employee and plan participant, alleges that J&J and its Pension & Benefits Committee (including its individual members) breached their fiduciaries duties and engaged in other ERISA violations through the mismanagement of the J&J prescription drug benefits plan. More specifically, the complaint alleges that defendants agreed to grossly inflated generic drug prices and mail-order pharmacy incentives which resulted in unreasonable profits to the PBM. The complaint further alleges that the resulting prescription drug overpayments, paid by both plan participants and the J&J plan itself, were a direct consequence of the defendants’ failure to exercise prudence in their prescription drug benefit decision-making and oversight.

PBM arrangements and their profits have been in the spotlight for some time now, and prudent employers and plan fiduciaries should take note. If the ever-increasing costs of prescriptions drugs are not reason enough, employers and plan fiduciaries should also consider the broader legal exposures, including participant litigation. In addition, various employer and plan fiduciary reporting and disclosure obligations under the Consolidated Appropriations Act, 2021 not only add to these exposures but also pave the way for increased regulatory scrutiny of employer health care costs, including prescription drug benefits.

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Keeping the following in mind can help limit employer and plan fiduciary liability where PBM arrangements are concerned:

- As with most employee benefit plan vendors, good fiduciary hygiene dictates a formal RFP for PBM selection.
- PBM contract negotiation requires a critical eye for provisions that may unreasonably benefit the PBM (e.g., spread pricing or rebate retention) or otherwise create conflicts of interest (e.g., PBM-owned pharmacies).
- On an ongoing basis, employers and plan fiduciaries should monitor their PBM arrangements with the same detail and scrutiny afforded to any other critical employee benefit plan vendor.

Please let us know if you have questions about this development or your plan's PBM arrangement in general.

This summary is provided as an informational tool. It is not intended to be and should not be considered legal advice, and receipt of this information does not establish an attorney-client relationship.