

The New Group Health Plan Broker Disclosure Rule

Bringing transparency to conflicts of interest in the marketplace

When employers engage brokers and consultants to help them choose health plan arrangements for their employees, they expect, and deserve, unbiased advice. Too often they get advice clouded by incentives paid to the same advisers they are entrusting with their fiduciary obligations. These incentives range from broker commissions and overrides to referral fees, six-figure bonuses and exotic vacations for helping retain business for, or steering more business to, an insurance company, third-party administrator (TPA), pharmacy benefits manager (PBM) or other vendor. The resulting conflicts of interest have contributed heavily to spiraling health plan costs for employers and employees. The Consolidated Appropriations Act, 2021 (the “Act”), enacted in December 2020, added a new fee disclosure rule to address this problem.

Overview of the new disclosure rule

The new fee disclosure rule requires brokers and consultants to disclose, well in advance of entering or extending a contract for brokerage or consulting services with an ERISA-covered health plan, virtually all compensation expected to be paid in connection with the contract, regardless of which entity – the broker or one of its affiliates or subcontractors – performs the services or receives the compensation. This includes **direct compensation** received directly from a health plan and **indirect compensation** received from any source other than the plan, the plan sponsor, the broker or its affiliate. Indirect compensation includes compensation paid by a vendor to a broker based on incentives that are not solely related to the contract with the covered health plan. The disclosure rule does not apply to arrangements where ALL compensation paid in connection with the plan services is paid by the health plan sponsor from its own funds.

While the new rule may not entirely solve the problem of misaligned interests in the marketplace, it will give employers better information with which to make their health plan decisions and likely spur changes in industry practices.

Key facts about the disclosure

1. The broker or consultant must disclose all direct and indirect compensation that will be paid in connection with a service arrangement to the responsible plan fiduciary **BEFORE** entering, extending or renewing any contract or other arrangement for health plan brokerage or consulting services **on or after December 27, 2021**.
2. The new requirements apply to ERISA-covered health plans and mirror regulations applicable to ERISA-covered retirement plan providers.

A contract or other arrangement for covered health plan brokerage or consulting services will be a prohibited transaction under ERISA *unless* the broker or consultant complies with the new fee disclosure rule.

Besides fees paid by a health plan to a broker or consultant, compensation that must be disclosed includes:

- **Commissions**
- **Bonuses paid by vendor**
- **Finder’s fees**
- **Retention fees**
- **Incentive payments not solely related to the plan**

3. If a broker fails or refuses to disclose all compensation covered by the new rules, the plan fiduciary may incur liability unless it requests any missing information and reports disclosure failures that are not promptly corrected in writing to the U.S. Department of Labor.
4. Even if a plan is exempt from ERISA, the plan fiduciary should request disclosure to enable better decision-making.

Disclosure contents

The broker or consultant must provide the following disclosure for each covered service arrangement:

1. A description of the services to be provided.
2. A description of all direct compensation that the broker, consultant or its affiliate or subcontractor expects to receive.
3. A description of all indirect compensation, including incentives that are not solely related to the contract with the covered health plan.
4. A description of all transaction-based compensation that will be shared among the broker and one or more of its affiliates or subcontractors.
5. A description of any contract termination fees and how any prepaid amounts will be calculated and refunded.
6. If applicable, a statement indicating that the broker or its affiliate or subcontractor expects to provide fiduciary services to the plan.

The disclosure must include enough information to enable the plan fiduciary to understand the fee arrangements, including how much compensation will be paid (or how to determine that amount), the identity of the payers and payees, and where applicable, whether the payers or payees are affiliates or subcontractors of the broker or consultant.

How Korn Ferry can help

We can help employers understand and evaluate the disclosure information that they receive from their brokers and review their current health and welfare benefits programs for cost-efficiency opportunities. We never lose sight of who our true partners are – our clients. Unlike our competitors, we are truly independent advisers and do not accept vendor commissions or any other indirect compensation, and we do not sell to internal solutions.

Case studies

Pharmacy Benefit Manager Coalition Analysis

A broker placed a client in the broker's own PBM coalition, indicating that the overall deal was the best one in the marketplace due to economies of scale. We conducted an independent analysis and found that the client could have saved 18% in the most recently completed plan year with better discount and rebate guarantees and improved contractual language. The broker was receiving per capita fees from the PBM based on prescription counts and a fee to be the exclusive PBM but had not disclosed these fees to the client.

Medical Plan Renewal Analysis

We conducted an independent request for proposals (RFP) process for a self-funded health plan. We determined that the current broker did not conduct a thorough analysis of potential medical and pharmacy vendors when the plans were last marketed and found overall projected savings of 12%. Although we do not accept any vendor fees, we learned, and were able to show the client, that the incumbent vendor had offered substantial monetary incentives for renewals.

WANT TO LEARN MORE? PLEASE CONTACT US

Steve Kapper
415-656-7678

steven.kapper@kornferry.com

Rich Kasnia
240-271-7014

richard.kasnia@kornferry.com

Melissa Rasman
215-500-4812

melissa.rasman@kornferry.com

About Korn Ferry

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