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New York AG and U.S. DOL to Cooperate in Enforcing Federal and State Laws

The New York State Attorney General's Health Care Bureau (AG) and the U.S. Department of Labor Employee Benefits Security Administration (DOL) recently announced they have entered into an agreement to share information and work cooperatively to address violations of the Federal Employee Retirement Income Security Act (ERISA) and New York State laws applicable to employer health benefit plans. This unique agreement increases the regulatory and prosecutorial reach of two already powerful agencies with potentially significant implications for employers, plan fiduciaries, health insurers, third-party health benefit administrators, and their vendors.

While DOL has previously entered into agreements with state attorney general offices to address specific issues implicating both state and federal law, this agreement is unique in that it is open-ended and broadly focused on an entire industry. The DOL-AG agreement states that the agencies will share "information on a continuing basis regarding particular insurers, fiduciaries, service providers, and other entities and individuals involved with employee benefit plans covered by ERISA, or other applicable federal or state law."

The AG and the DOL intend to share information regarding:

- > Complaints concerning employee benefit plans, insurers, and related service providers;
- > Violations of ERISA, state law, state or federal regulations and regulatory guidance; and
- > Claims administration, including claims review procedures and external review.

The AG's press release provides some insight into what may be the subject of initial investigations, stating that, "[b]y teaming up with the U.S. Department of Labor's Employee Benefits Security Administration, we will make sure that all types of health plans comply with our vital federal and state consumer protection laws, such as the Affordable Care Act's preventive services provisions and laws requiring equal coverage for mental health and addiction treatment."

As noted by the AG, the two agencies working together will have access to information, investigative authority, and enforcement tools exceeding that of either agency acting independently. DOL has broad regulatory discretion and a reach that extends to both insured and self-insured employee health benefit plans. DOL regularly audits health insurers, self-insured employer health benefit plans, and third-party administrators. If DOL identifies violations, it may impose substantial criminal and civil penalties. The AG investigates violations of New York State law and similarly has authority to pursue substantial criminal and civil penalties under State law. Unlike DOL, due to federal preemption, the AG cannot independently investigate self-insured employee health benefit plans and most violations of federal law.

Approximately 60 percent of employees with employment-based health insurance coverage are enrolled in self-insured plans. Absent this agreement, the AG would have limited jurisdiction to pursue perceived violations of ERISA relating to such plans. Exclusive federal regulation of self-insured plans was designed to permit large employers to administer employee health benefit plans across state lines subject to consistent and uniformly enforced regulatory requirements. Through the DOL agreement, the AG will now have a role in overseeing how such plans operate in New York State.

The focus on mental health parity is likely to be especially challenging. Requirements regarding coverage of mental health and alcohol and substance abuse have rapidly evolved in recent years under both state and federal laws. Such requirements have varied by market and differed depending on whether a plan was insured or self-insured. If the AG conducts retrospective audits for time periods where these requirements were in an almost continuous state of flux, there may be differences of opinion as to the applicable requirements.

New York health plans that offer fully insured coverage have extensive experience working with the AG's Health Bureau. However, self-insured employers, and TPAs serving such employers, should now be aware that the AG's Health Bureau will have a role in overseeing their compliance with federal rules.

Greenberg Traurig will continue to closely monitor the developments regarding the agreement between the AG and DOL, including potential investigations.

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