Understanding the Impact of the Consolidated Appropriations Act and the Opportunity for Benefits Brokers to Educate Clients and Prospects

Gordon Zellers - InCite Performance Group
Hugh O'Toole - Innovu

The Consolidated Appropriations Act, 2021 (CAA) passed in December 2020 and established the plan sponsor as the fiduciary under ERISA/PHSA/IRS tax code. This new legislation has significant implications for employer-sponsored health plans and the brokers who support them.

Recently, InCite Performance Group partnered with Innovu to host a webinar on the implications of CAA for plan sponsors (employers). This article will go over the key points of that talk, followed by a separate Q&A interview on CAA with the CEO of Innovu, Hugh O'Toole.

By the end of this article, you will see how the CAA can offer an opportunity for benefits brokers to open new doors and educate buyers on a significant and eminent change to our industry.

The Consolidated Appropriations Act and Group Health Plans: The Basics

The Plan Sponsor as the Fiduciary

One of the most significant pieces of the CAA is that government agencies like the Department of Labor, the Department of Health and Human Services and the Treasury are going to hold the group health plan sponsor (aka the employer) responsible as the fiduciary of the plan. To learn more about your fiduciary responsibilities, click here.

While the employer has always been a fiduciary for their benefits plan, the CAA legislation puts teeth (through enforcement) behind it.

So, what does it mean to be a fiduciary under Employee Retirement Income Security Act of 1974 (ERISA) and the Public Health Service Act (PHSA)?

While it may seem a bit complicated, **here are the basics …**

As a fiduciary, plan sponsors must:

- Prove they have a process that is working in the best interest of the participant and beneficiary
- Carry out duties prudently
- Follow the terms of the plan documents consistent with ERISA
- Hold any plan assets in a trust
- Pay only reasonable plan expenses

Fiduciaries who don't meet the basic standards of conduct as outlined in CAA may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets.

In addition, fiduciaries may be subject to class action lawsuits as happened in the retirement space when the Pension Protection Act of 2006 went into effect.

Four Key Areas of the CAA to Know

The CAA established specific requirements for plan sponsors to comply with as a fiduciary. These four areas include:

1. Removes gag clauses from service provider contracts on price and quality information
2. Establishes reporting requirements for prescriptions
3. Requires the disclosure of direct and indirect compensation from all service providers
4. Requires parity in substance abuse and mental health benefits

Section 201 of the CAA amends ERISA, PHSA and the Internal Revenue Code to make sure employer-sponsored health plans have access to certain cost and quality care information by service providers.

Service providers are defined health care providers, third-party administrators, networks or associations of providers and others.

Historically, these gag orders have been outlined in insurance company contracts and have restricted the data that a plan sponsor receives and how they could use the data.

For example, in a contract with a 7,000 life client, the plan sponsor had to agree that if they ever left that specific BUCA, they would have to destroy their data. Think about the fact that you're now telling an ERISA fiduciary that when they leave that carrier they have to destroy their own data. This is exactly why this law was put in place.

The contract in this example also prohibited using the data to compare the current carrier to another. It also prohibited the plan sponsor from comparing the hospitals that serve their employees or performing any site of care analysis that might be used to narrow a network.

All of those things and more are built into these ASO contracts. Many times, the employer doesn't even realize they're signing off on them and the advisor doesn't know they exist. Now, group health plans may not agree to restrictions in their contracts that would prevent them from getting data and sharing it with participants on cost and quality of care information.

The prohibition of the gag clause is all about transparency to:

- Show that employee costs related to claims are expended in an efficient manner
- Provide enrollees with information to make informed, cost-effective healthcare decisions
- Share information with the plan sponsor to identify waste and develop strategies to reduce it

Action item: Closely review third-party administrator and other provider agreements for gag clauses, which must be removed.

Prescription Drug Disclosures

The CAA requires plan sponsors to report prescription drug information to the DOL, HHS and Treasury, including:

- Beginning and end dates of the plan year
- Number of plan participants and beneficiaries
- Each state in which the plan is offered
- The 50 brand prescription drugs most frequently dispensed, including number of paid claims for those drugs
- The 50 most costly prescription drugs by annual spend, including annual spend amount for those drugs
- The 50 prescription drugs with the greatest increase in plan expenditures
- Data on total healthcare spending
- Average monthly premium paid by employers and employees
- The impact on premiums of rebates coupons and other similar remuneration paid by drug manufacturers to the plan
- Any reductions in premiums and out-of-pocket costs associated with rebates, fees or other remuneration as described in the last bullet

One of the most significant changes is going to be the transparency and disclosure of rebates at a drug level.

Today, with the use of data, employers can find an additional 20% to 30% savings. Based on the new reporting requirements, particularly looking at rebates on a drug level, there will be additional opportunities for savings.

Action item: Revise agreements with third-party administrators (TPAs) and pharmacy benefit managers to allow full access to claim information, rebates, fees and other forms of remuneration.

Compensation Disclosures

The CAA includes rules that require that service providers (including brokers and consultants) disclose the compensation they may receive to recommend certain insurance carriers, benefits administrators and other vendors to plan sponsors/employers.

These disclosure requirements assist the plan sponsor in determining if the compensation arrangement is “reasonable."

The new rules apply to contracts where the service provider expects to receive $1,000 or more in direct or indirect compensation in relation to brokerage or consulting services on group health plans.

The CAA establishes that plan sponsors can immediately terminate contracts with providers that fail to disclose this compensation.

Action item: Identify and review all service provider agreements, and begin discussions with service providers on when they will meet disclosure requirements.

Mental Health and Substance Abuse Benefits

The CAA creates new requirements for group health plans to ensure compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). The MHPAEA prohibits group health plans that offer mental health and substance abuse benefits from giving less favorable terms and conditions than for medical and surgical benefits.

Group health plans and issuers are now required to formally analyze and document their compliance, and make this available to the regulator of the plan. Regulators are required to request no less than 20 comparative analyses per year.

Action items: Ensure the group health plan has a vendor that will provide this comparative analysis, and be prepared to respond to a request for documentation.

Practical Next Steps for Benefits Brokers

First, make sure that your clients and prospects are aware of the changes that the CAA brings. Brokers have a great opportunity to attract more business and retain clients if they educate and prepare their clients to comply with CAA.

Some practical next steps for you, the broker, are:

- Make sure clients acknowledge they are the fiduciary for their healthcare program
- Help clients establish a compliance fiduciary procurement process and educate them on their roles and responsibilities as a fiduciary
- Ensure clients are prepared to identify and eliminate gag orders in their TPA/insurance agreements by the end of the year
- Identify the various regulatory reporting requirements of the CAA, specifically prescription drugs
- Determine how you will calculate and report both your direct and indirect compensation
- Explain to clients they need their own data to fully comply with CAA regulations, and help them access and store their data

Interview with CEO Hugh O'Toole of Innovu on the Implications of the CAA for Benefits Brokers

In the following interview, InCite Performance Group's partner and advisor, **Gordon Zellers**, caught up with Innovu CEO, **Hugh O'Toole**, to further discuss the basics of the Consolidated Appropriations Act and its implications for benefits brokers and advisors.

Gordon: Can you share a bit of personal history going back to your time in the retirement space when you saw similar changes to that industry as we are seeing now in the healthcare sector due to CAA?

Hugh: I've been in employee benefits for 32 years, the first five in healthcare. And then I took about a 25-year hiatus and went into the retirement industry. The Consolidated Appropriations

Act also happened about 15 years ago in the retirement industry with the Pension Protection Act of 2006.

I have a bit of a unique insight into how CAA will play out based on my experience of watching the Pension Protection Act of 2006 go into effect and how the industry responded, how it affected the broker community, who won, who lost and so on.

This is a huge win for efficiency and effectiveness for both the employer and participants. Brokers who are early adopters and use CAA to differentiate their practice will also be the big winners.

One could expect that the brokers who take the lead and help their clients comply with the legislation will be the big winners, while those that lag behind will lose share.

This is exactly what happened in the retirement industry with the Pension Protection Act. There were about 250,000 advisors that worked in what I would call the mid-market retirement plan market, and made up about 70% of that advisor community. Today, 70% of the mid-market is covered by about 2,000 advisors.

Laws like CAA can be extremely disruptive. As transparency increases, margins for advisors will naturally compress. If we look back on the retirement industry with the passage of the Pension Protection Act, we saw that there were two types of advisors:

1) Those who were reactive in adapting to the law and saw their margins decrease significantly, and
2) Those that embraced the law and saw margin compression (albeit on at a smaller level) and offset that reduction by growing their business.

Really, for most everybody reading this article, it's how you can put yourself in a position for your firm and your clients to win.

Gordon: Based on many conversations I've been having with many of our agency clients. My sense is few of them truly understand the Consolidated Appropriations Act. Can you offer a big

picture view of the changes that CAA will cause to the ERISA law, including the four main compliance requirements and their approximate timing that employers need to be aware of?

Hugh: It's important to understand ERISA and the PHSA for public entities has applied to health and welfare plans since 1974. So why the change?

The assumption that has existed since 1974 is that employers paid for 100% of healthcare expenses for their employees and dependents. And the reality, in our data [at Innovu], is that the employees are paying 10% to 50% of their healthcare spend.

And that has alerted Congress to the fact that the same kind of laws that needed to be applied to the 401(k) industry now need to go into healthcare.

What they are saying in the law is the plan sponsor, which is usually the employer, is now very clearly the fiduciary. If you're a fiduciary, it means you're going to need to prove that you're working in the best interest of your participants.

In order to do that, the four components to note remove the barriers that exist within the industry for plan sponsors to have transparency and make the best decisions possible.

So the first provision is the removal of gag clauses, which are actually defined in insurance company contracts. As a plan sponsor goes to get their data, there have been serious restrictions on the data that would be provided or how that plan sponsor could use that data.

Those now are prohibited, and plans have to attest to the agencies each year that they have no such clauses in their agreements. This requirement took effect on enactment of the CAA on December 27, 2020. Until any further guidance is issued, plans and issuers are expected to implement the requirements prohibiting gag clauses using a good faith, reasonable interpretation of the statute. However, the Departments intend to issue implementation guidance to explain how plans and issuers should submit their attestations of compliance and anticipate beginning to collect attestations starting in 2022.

The second provision is around pharmacy, and it lays out very specific areas that will need to be reported to the federal government. And probably the most significant change is going to be the transparency and disclosure of rebates at a drug level.

The initial reports are to be provided to the agencies by December 27, 2021, and then by June 1, 2022. The agencies will defer enforcement related to the 2021 and 2022 reports until they issue further guidance.

Still, the agencies "strongly encourage plans" to get ready to report 2020 and 2021 plan year data no later than December 27, 2022. For more, see Innovu's FAQs on the matter.
The third provision applies directly to anybody that provides services to the plan, for example, the broker-broker consulting community.

Historically, brokers have had to disclose all direct compensation they were earning pursuant to the health plan. Starting with 2021 plan year end, brokers, for the first time, will need to disclose to their client all indirect compensation they receive as a result of working with the plan.

Examples of indirect expenses would include things such as overrides for product placement from insurance companies, PBMs and stop loss carriers, as well as rewards, trips and excessive entertainment.

And then the fourth part of CAA is that there is equality in the access to mental health and substance abuse to the same level that you are providing access to medical and surgical benefits. The analyses will need to be done by July of 2022.

Gordon: Clients have always been fiduciaries of their employee benefits programs. However, the CAA changes things a bit. So can you offer a little commentary on the impact of CAA specifically to this area?

Hugh: The biggest piece of the CAA is really for the first time, since 1974, the understanding that healthcare is now greatly participant paid and that the fiduciary standard that has applied to other participant-directed, participant-shared expense programs (like a 403(b) retirement plan) is now going to apply to health and pharma benefits.

And that's because the employee is at financial risk if the plan fiduciary makes poor procurement decisions. The regulators were very cognizant of those areas where employees were being harmed as a result of the fiduciary not using a prudent procurement process, and CAA is a direct action to rectify this.

Another major disruptor that comes with the law is class action lawsuits. Class action attorneys will look for populations of employees that they believe were handled inappropriately and sue the employer on behalf of all the underlying participants.

So between legislation and class action lawsuits, CAA really raises the bar for the employer on why they have to take the decision-making process around the procurement of health benefits to a totally different level than it's at today.

Gordon: Our clients use thought leadership as a strategy for new client development. Can you share how you believe the CAA can offer an opportunity for our agency clients to open new doors and educate buyers on a significant and eminent change to our industry?

Hugh: This has similarities to what happened to the broker community after the Pension Protection Act. Prior to the PPA, the industry was covered by many firms including insurance agents, bankers, wirehouses and independents--many of which used commissions to generate revenue.

With the additional standard around fiduciary regulation, there was a huge consolidation of the broker community to those best-in-class firms that ran a fiduciary process and were not conflicted.

For example, there's a brokerage group called CAPTRUST. In 2006, nobody in the country would have known their name. After the Pension Protection Act, they became the largest, most dominant registered investment broker to the retirement industry in the entire country.

And that's the opportunity for somebody out in the audience today, if you fully embrace this, you can gain huge market share right now by educating your clients on this important change.

Gordon: Innovu offers a cutting-edge data analytics platform. Can you help our clients understand specifically how your platform can support compliance with the four requirements of the CAA, and any other areas that you'd like to highlight about the platform?

Hugh: Absolutely, and thank you for that opportunity. The reality of CAA is that every plan sponsor, hopefully helped by their broker, will become a better fiduciary of their health insurance pharma programs.

As a broker, you're going to need the data. You're going to need to document a process. You're going to need to perform analysis. You're going to have to support the decision-making with benchmarking. You're going to have to run market checks through an RFP process.

And, you're going to have to report things to the federal government and ultimately to work in the best interest of your participants. It's going to be all about transparency.

So think of Innovu as a tool kit to support a great broker in their mission of supporting their clients.

We can give you real data to make real decisions. And then you can monitor those decisions so that your client can prove through documentation that they had a process to work in the best interest of the participant.

The key under ERISA is that it is all about processes, not about the outcome. So what did we do at Innovu? We make sure that we can vault the process, the documents, the minutes to meetings and benchmarking RFPs, so that if the DOL shows up or a company faces a class action lawsuit, you can provide a very detailed level of documentation on your process.

We also have a full analytics platform to look at operational expense savings by removing the fraud, waste and abuse that's inherently baked into our healthcare system.

We also can benchmark any subset of data so that you can see how your client looks against other clients that have the same size, same geographical area, same industry. These tools perfectly complement the good consulting work you're going to want to do for your clients.

The CAA Toolkit

To recap, as a fiduciary, plan sponsors are responsible for:

- Implementing a process to fully document their procurement process for medical benefits and pharmacy
- Demonstrating a decision-making process based on the plan's actual data and perform required regulatory reporting and analyses
- Benchmarking their plan against industry accepted standards and RFP practices

To help support brokers and their clients in meeting these obligations, Innovu has developed a CAA Toolkit that includes vaulting of your data and your procurement process / documentation, regulatory reporting and benchmarking.

A big InCite thank-you to Innovu CEO Hugh O'Toole for sharing his subject matter expertise on the Consolidated Appropriations Act and the opportunity for brokers to use this thought leadership with their clients and prospects.