



HAYS COMPANIES

# Update: Preliminary Approval Granted in Blue Cross Blue Shield Settlement

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Earlier this month, the Federal District Court Judge overseeing the Blue Cross Blue Shield anti-competitive class-action lawsuit granted preliminary approval of the settlement reached by the parties. While a preliminary approval means it is possible that the final settlement may be subject to some changes, the proposed settlement and the order granting preliminary approval gives greater insight into the likely final terms of the settlement that we would like to share with our colleagues and clients.

## MONETARY SETTLEMENT

As mentioned in our last article, the settlement contains both a monetary settlement as well as injunctive relief. In regards to the monetary settlement, Blue Cross has agreed to pay \$2.67 billion in this case - which represents 7.3% to 14.3% of the estimated damage range - a “reasonable recovery” under the prevailing legal standard. Plaintiffs’ counsel will receive a portion of this settlement for legal and administrative fees (not to exceed 25%), and the remaining net funds will be allocated among the class members - with 93.5% of the net settlement fund to be distributed among fully insured class members and 6.5% to be distributed among the self-funded class members.

Both plan sponsors (employers) and employees will qualify for settlement funds. The settlement class period for fully-insured businesses and individuals is February 7, 2008, through October 16, 2020, while the class period for those that are self-funded is September 1, 2015, through October 16, 2020. Taft-Hartley and Government accounts\* are excluded from the settlement, as are stand-alone vision and dental plans.

The settlement administrator will determine how the funds are allocated to the respective classes. The current plan of distribution provides a proposed default pro-rata allocation of the funds between employers and employees at the following rates:

- For fully-insured claimants with single coverage, 85% to employers and 15% to employees;
- For fully-insured claimants with family coverage, 66% to employers and 34% to employees;
- For self-funded claimants with single coverage, 82% to employers and 18% to employees; and
- For self-funded claimants with family coverage, 75% to employers and 25% to employees

\*Per the settlement: “Government Account” means only a state, a county, a municipality, an unincorporated association performing municipal functions, a Native American tribe, or the federal government (including the Federal Employee Program). A Government Account includes all Members of the Government Account. No other entity that is not a state, county, municipality, unincorporated association performing municipal functions, Native American tribe or the federal government is a Government Account, unless it is required by law to provide any health care coverage it makes available to Members only under, or as a participant in, a Commercial Health Benefit Product approved, selected, procured, sponsored or purchased by a Government Account. Entities that are not Government Accounts (e.g., utility companies, school districts, government-funded hospitals, public retiree benefit plans, public libraries, port authorities, transportation authorities, waste disposal districts, police departments, fire departments) will receive notice and an opportunity to submit a claim form to the extent they are otherwise within the definition of the Damages Class.



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The plan also grants employers and employees the opportunity to appeal the default allocation by submitting evidence demonstrating that their actual percentages differed or that other damages were higher.

JND Legal Administration LLC will serve as the Notice and Claims Administrator for the settlement. Their deadline to provide notice to eligible class members is May 31, 2021, and the claims filing deadline is November 5, 2021.

The majority of the settlement funds will be distributed within 30 days of the Court's entry of Final Judgement – tentatively scheduled for October 20-21, 2021.

**Note:** Class members should be on the lookout for enterprises that purport to be official administrators of the class-action as many of these entities seek to provide unnecessary services at a high cost.

## HISTORIC SETTLEMENT INJUNCTIVE RELIEF GRANTED

As Judge David Proctor emphasized in his decision granting preliminary approval of the settlement, “the prospective injunctive relief in this case is wide-reaching and bears greater importance for the class than the monetary relief...Unlike many antitrust cases, this suit does not involve a defunct conspiracy. The settlement terms take this into account by offering forward-thinking, pro-competitive reforms that will change the nature of defendants’ business moving forward.”

This notable non-monetary relief includes the elimination of the “National Best Efforts” program. The program required Blue Cross companies to place primary focus on Blue Cross and Blue Shield-branded business instead of allowing member companies to market coverage under their separate brand. The program is estimated to have “accounted for 97 percent of the total damages in the case.”

Other injunctive relief includes the opportunity for certain Qualified National Accounts\* to receive a second bid from another Blue Cross and/or Blue Shield company of their choice. The earliest eligible employers will be able to obtain the second Blue Cross bid will be April 1, 2022.

*\*Qualified National Accounts are employers with over 5,000 employees with employees that are highly dispersed outside of the local Blue Cross and/or Blue Shield company's service area. The option for a second bid will be available to a specified group of these employers, identified in the settlement agreement, who collectively employ 33 million eligible self-funded members.*

Also included in the deal are limits on Blue Cross' use of “Most Favored Nations” Clauses and Differentials and on Blue Cross' restraints on acquisitions (i.e., whether an individual Blue Plan may be acquired by another Blue Plan). There will also be a five-year monitoring effort, headed by an agreed-upon committee, that will review new rules or practices proposed by Blue Cross in their business dealings.

## HAYS WILL CONTINUE TO MONITOR THE SITUATION AND PROVIDE IMPORTANT UPDATES

While final approval of the settlement is tentatively scheduled for October 20-21, 2021, Hays Companies will continue to monitor the situation and provide important updates as they become available.

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