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# New Wave of ERISA Litigation Targets Voluntary Welfare Benefits

*A spate of new lawsuits, all by the same plaintiff's firm, look to establish a new, niche area of ERISA liability.*

A prominent plaintiff's firm has recently filed four coordinated lawsuits that could expose an entirely new front in ERISA litigation. The lawsuits target voluntary benefits programs—specifically accident, critical illness, hospital indemnity, and cancer insurance. The complaints identically allege that plan sponsors and their brokers breached fiduciary duties and engaged in prohibited transactions by allowing excessive broker commissions, failing to conduct competitive bidding processes, and monitoring carriers and brokers inadequately. Plaintiffs rely heavily on Form 5500 data showing multi-year commission payments are significantly higher than industry comparators. They argue that high commissions cause participants to overpay for coverage. Each complaint seeks class certification, disgorgement of broker commissions, plan reforms, and removal of fiduciaries.

## The Litigation Landscape is Unclear

The complaints pose several questions that courts will need to clarify. For one, broker fiduciary status under ERISA is murky. It is unclear whether a broker screening carrier bids, handling enrollment and administrative tasks, and collecting commissions from carriers would give rise to fiduciary status. Courts have historically treated brokers as non-fiduciary service providers in many situations, but they apply a functional test that looks at actual discretionary control. The answer often depends on the specific facts.

Second, the complaints seek to extend traditional "excessive fee" ERISA theories (previously applied to 401(k) recordkeeping and investment management) into the voluntary welfare benefits space by treating embedded broker commissions and low loss ratios as evidence of imprudence and

prohibited transactions. The extent to which fiduciary prudence standards developed in the 401(k) excessive-fee context apply to voluntary welfare benefits—where participation is optional and employee-funded—has not been litigated extensively.

Third, the complaints allege excessive broker commissions (ranging from 23% to 40% of premiums) mathematically depress loss ratios below 50%. There is an evidentiary question of whether loss ratios and commission percentages alone can establish imprudence, or alternatively, whether courts will require evidence about the actual selection and monitoring processes employed.

### **What Employer Should Do**

For employers that sponsor voluntary benefits programs should consider the following:

Confirm Form 5500 filings are correct.

Review broker selection and monitoring processes.

Ensure broker compensation arrangements are documented and benchmarked against the market.

Confirm that service provider agreements clearly spell out which roles are fiduciary and which are not.

### **A Cautionary Tale for Brokers**

Brokers can also consider steps to reduce potential exposure, including the following:

Review the voluntary plans they broker for potential ERISA exposure.

Provide clear justification for their commission structures.

Define fiduciary obligations in service agreements clearly.

Undertake a legal compliance review and build out fiduciary practices, in anticipation of the possibility a court finds that the brokers function as fiduciaries or willingly participate in fiduciary breaches, as the lawsuits allege.

### **The Bottom Line**

In sum, all four complaints advance the same fundamental theory: Employers who sponsor voluntary welfare benefits programs—and their brokers—harm participants through excessive fee arrangements.

The legal landscape is not yet developed with respect to voluntary welfare benefit plans, where employer fiduciary obligations are traditionally more limited. Accordingly, how the courts will handle these claims is still unclear.

Despite the many unknowns, we anticipate that these lawsuits will:

Provide in-depth briefing on core ERISA foundational questions. For example, the definition of an employee welfare plan under ERISA, the voluntary plan safe harbor requirements, and whether a plan's falling outside that safe harbor implicates it as an ERISA plan.

Push the boundaries of fiduciary duties and prohibited transaction rules under ERISA. Once a court resolves the threshold question of whether ERISA applies, it will still need to determine whether ERISA's fiduciary duties are triggered and if so, who are the fiduciaries. Those issues will further instruct whether this new wave of cases is likely to take off or whether the courts shut it down in their initial stages.

Create a chilling effect on employers offering voluntary benefits. Many employers are well-intentioned in offering voluntary benefits to their employees. However, the risk of litigation and onerous fiduciary obligations may lead to more employers contemplating whether the juice is worth the squeeze.

### **Contact us**

The Husch Blackwell Employee Benefits & Executive Compensation team and the ERISA & Employee Benefits Litigation team actively monitor such developments and are here to help with any of your benefit needs. We will continue to monitor these cases and provide updates as courts rule on dispositive motions. Please contact Molly Callender Hobbs or Brandon Hall if you have questions about your voluntary benefits programs or would like assistance reviewing your fiduciary processes and broker arrangements.