

# Voluntary Benefit Programs Under Fire: What Employers Need to Know Now

A Practical Guidance® Article by José M. Jara and Traci M. Clements, Fox Rothschild LLP



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This article addresses a recent ERISA litigation trend in which class actions are targeting employers and benefits consultants over voluntary benefit programs, such as accident, critical illness, cancer and hospital indemnity insurance.

## Key Points

- **ERISA class actions targeting voluntary benefits are on the rise.** Plaintiffs allege employers and brokers breached fiduciary duties through self-dealing and excessive commissions.
- **The strongest defense is proving ERISA doesn't apply.** The DOL safe harbor exempts programs where the employer doesn't contribute, participate, or endorse beyond minimal involvement.
- **Employers should take proactive steps now.** Audit safe harbor compliance, document governance processes, and map all service provider compensation.

Employers offering voluntary benefit programs such as accident and critical illness insurance face a growing wave of ERISA class action lawsuits alleging fiduciary breaches and excessive broker commissions, with plaintiffs seeking

disgorgement and plan loss recovery. For employers who have historically treated voluntary benefits as low-risk, employee-funded offerings, these cases demand immediate attention and a proactive defense posture.

## The Claims at a Glance

The complaints follow a consistent theory: Employers and brokers allegedly steered participants toward high-commission, low-value insurance products, resulting in excessive premiums. Plaintiffs seek disgorgement, fiduciary removal and plan loss recovery. Recent filings include granular data on commission rates and loss ratios. For example, one complaint alleges broker commissions of approximately 38.6% of premiums (nearly four times the roughly 10% market rate) and loss ratios below 50%. Other filings allege that employers never conducted requests for proposal (RFP) and that brokers provided things of value to employers in exchange for permitting excessive commissions.

## The Threshold Defense: ERISA Does Not Apply

The strongest line of defense remains establishing that the Employee Retirement Income Security Act (ERISA) does not govern the voluntary benefit program in the first place. Under the Department of Labor safe harbor at 29 C.F.R. § 2510.3-1(j), a group insurance arrangement is exempt from ERISA if the following four conditions are met: (1) the employer does not pay or contribute to premiums; (2) the employer receives no compensation beyond reasonable administrative costs; (3) participation is entirely voluntary; and (4) the employer does not endorse the program beyond permitting payroll deductions and facilitating advertising.

The fourth condition — endorsement limitation — is the primary point of attack in these cases. Plaintiffs argue that

use of employer logos, integration into employer-branded enrollment platforms, or employer assistance with claims administration constitutes endorsement sufficient to bring the program within ERISA's scope. Employers who can demonstrate strict separation between voluntary programs and their broader benefits infrastructure will be best positioned to defeat these claims.

## Fiduciary Breach Theories: Know the Allegations

If ERISA coverage is established, plaintiffs advance several theories of fiduciary breach:

- **Broker self-dealing.** Brokers allegedly curated high-commission options while withholding lower-cost alternatives, prioritizing commission revenue over participant interests.
- **Employer failure to monitor.** Employers allegedly failed to establish processes ensuring reasonable compensation and prudent administration of voluntary benefit programs.
- **Commingling of plan assets.** Revenue generated from voluntary benefit premiums was allegedly redirected to subsidize other services, violating ERISA's exclusivity requirement.
- **Expanding third-party liability.** More recent filings add claims for knowing participation in fiduciary breach and prohibited transactions against broker defendants.

## Practical Steps to Strengthen Your Defense

Employers should take the following actions now to mitigate exposure and build a defensible record:

- **Preserve the safe harbor.** Audit current voluntary benefit programs against all four safe harbor criteria. If possible, maintain a "hands off" posture by avoiding employer logos on program materials and keeping voluntary benefits visually and administratively distinct from employer-sponsored plans. Ensure communications clearly characterize these programs as voluntary and employee-funded.
- **Implement fiduciary governance (if ERISA applies).** Where a plan sponsor affirmatively elects to have the voluntary benefits program treated as an ERISA-covered employee welfare benefit plan, the sponsor should establish a robust fiduciary governance framework commensurate with that designation. This means adopting the same oversight processes that the organization already applies to its retirement and group health plans.

The governance framework should address three core areas: broker and consultant compensation, carrier selection and retention, and ongoing plan performance monitoring. Plan fiduciaries should regularly benchmark premiums, commissions and fee arrangements against prevailing industry standards, and should periodically evaluate carrier loss ratios and claims experience to confirm that the plan continues to operate in the best interests of participants. By embedding these practices into a documented governance process, the plan sponsor can demonstrate procedural prudence and reduce the risk of fiduciary liability under ERISA's duty of prudence and duty of loyalty standards.

- **Document everything.** Maintain records of all decision-making processes, selection criteria and monitoring procedures. Retain written analyses supporting the reasonableness of compensation arrangements, including benchmarking studies or market comparisons.
- **Map service provider compensation.** Develop a comprehensive view of all direct and indirect compensation received by brokers, consultants and carriers. Explicitly define fiduciary or non-fiduciary roles in service agreements and identify and eliminate or disclose any cross-subsidization between plans.

## The Bottom Line

The plaintiffs' bar is refining its approach with each new filing, and additional employers will likely face similar challenges in the coming months. However, employers who act now by shoring up safe harbor compliance, implementing documented governance processes, and ensuring arm's-length relationships with service providers will be well-positioned to defend against these claims or avoid them entirely. Our team stands ready to assist in evaluating your voluntary benefit programs, assessing litigation exposure and implementing the oversight frameworks necessary to mount a strong defense.

For more information, please contact José M. Jara at [jjara@foxrothschild.com](mailto:jjara@foxrothschild.com), Traci M. Clements at [tclements@foxrothschild.com](mailto:tclements@foxrothschild.com) or another member of Fox Rothschild's ERISA Litigation Practice Group.

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### José M. Jara, Fox Rothschild LLP

José focuses his practice on the Employee Retirement Income Security Act (ERISA) and employment litigation and counseling. He has extensive experience in representing corporations, tax-exempts, associations, pension funds, boards of trustees, Employee Stock Ownership Plans (ESOPs), defined benefit and defined contributions plans, multiple employer plans, multiemployer plans, and executives in areas of employment, ERISA, and other employee benefits law matters.

José's practice includes representing clients under investigation by the U.S. Department of Labor's (DOL) Employee Benefits Security Administration and defending clients from lawsuits filed by DOL's Office of the Solicitor regarding civil and/or criminal violations of ERISA.

He defends plan sponsors, boards of directors and fiduciaries against ERISA class action litigation alleging breach of fiduciary duty under ERISA, including excessive fees, imprudent investments, delinquent employee contributions and improper valuation of employer stock. In addition, José provides legal advice to plan sponsors and fiduciaries on fiduciary responsibilities, plan fees and expenses, plan asset regulations and ERISA-prohibited transactions and exemptions.

He also works with clients to correct retirement plan errors under the IRS Employee Plans Compliance Resolution System, fiduciary violations under the DOL Voluntary Fiduciary Correction Program and annual reporting failures under the DOL Delinquent Filer Voluntary Compliance Program.

José advises clients on a broad range of labor and employment law issues such as wrongful termination, sexual harassment and discrimination, restrictive covenants, retaliation and matters related to labor law such as grievances, arbitrations and collective bargaining. He also defends companies against EEOC charges and DOL wage and hour investigations, conducts interactive harassment training, carries out internal investigations and drafts employment and severance agreements.

In addition, José assists clients with professional liability insurance matters, providing legal counsel on Directors & Officers (D&O), fiduciary and Employment Practices Liability (EPL) insurance issues. He has served as monitoring and coverage counsel and provided legal advice to underwriters on a variety of provisions of the insurance policy.

José speaks frequently on ERISA and employment law topics. He recently delivered presentations on DOL and IRS Health and Welfare Plan audits, Fiduciary Issues in ESG Investing, ERISA Prohibited Transactions and Exemptions, 2021 Employment Law Issues on the Enforcers' Radar, ESOP challenges and enforcement activity, and sexual harassment in the workplace, among other subjects.

### Traci M. Clements, Fox Rothschild LLP

Traci advises middle-market businesses on employee benefits, executive compensation and labor and employment matters, with a particular focus on ERISA compliance and practical, day-to-day problem solving.

Drawing on her experience as former in-house counsel and an HR professional, she often serves as an outside general counsel for clients who want clear answers, efficient execution, and advice that works in the real world, not just on paper.

Clients rely on Traci to anticipate risk, manage complexity, and provide steady guidance across both routine workplace issues and high-stakes moments. She handles employee benefits counseling and compliance, including health and welfare plan drafting, retirement plan corrections (self-correction, VCP, and VFCP), and executive compensation matters such as nonqualified deferred compensation plans and guidance related to ACA, ERISA, and IRC Sections 409A and 280G.

She also frequently supports corporate transactions by identifying and resolving benefits-related issues during diligence, helping clients surface and fix problems before they become deal disruptors.

Traci counsels employers on labor and employment matters, including workplace policies, training, and executive employment agreements. When issues extend beyond her core practice, she acts as the client's first call and coordinates seamlessly with colleagues across Fox Rothschild's national platform. Clients value having a single point of contact who understands their business, assembles the right resources, and keeps matters moving without unnecessary friction.

Her approach to client service is grounded in trust and clarity. Traci listens carefully, breaks complex issues into manageable pieces, and pairs the academic answer with the practical path forward. The result is pragmatic guidance that helps clients stay compliant, manage risk, and move forward with confidence.

Before joining Fox Rothschild, Traci served as in-house counsel for construction, insurance, and technology companies and practiced at local and regional law firms.

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