

Employers Offering Voluntary Benefits Face a New Wave of ERISA Litigation

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Just about 20 years ago, Schlichter Bogard LLC, a prominent national plaintiffs' law firm, filed a wave of putative ERISA class actions challenging how employers administered their 401(k) plans. Those cases led to two decades of litigation. Hundreds of similar cases were filed, resulting in billions in settlements and judgments. What largely started as a challenge to a discrete issue—how 401(k) plans used revenue sharing—quickly turned into lawsuits challenging almost every aspect of how employers and fiduciaries administer 401(k) plans.

Just before Christmas 2025, the Schlichter firm once again delivered an unwelcome holiday surprise to employers across the United States. On December 23, Schlichter filed four nearly identical class action lawsuits targeting co-called “voluntary benefit plans.” The complaints named as defendants United Airlines, CHS/Community Health Systems, Laboratory Corporation of America Holdings, and Universal Services of America along with their benefits consultants—Mercer, Gallagher, Willis Towers Watson, and Lockton.

These lawsuits represent what may well be the opening salvo in a new wave of ERISA litigation. Plaintiffs' lawyers hope these cases will fundamentally reshape how employers offer voluntary benefits like accident, critical illness, cancer, and hospital indemnity insurance to their employees.

“Voluntary Benefits”

The term “voluntary benefits” is a colloquial term referring to non-traditional benefit plan options that employers might offer to their employees. Generally speaking, these plans offer benefits that traditional ERISA benefit plans (such as group health and disability plans) do not cover. Common examples include insurance that covers out-of-pocket costs resulting from accidents or hospital stays, or long-term care coverage. In theory, employers do not directly fund or sponsor these plans, but instead simply give insurers the opportunity to pitch these products to employees. Employees get the benefits of group rates along with the convenience of having premiums deducted from their

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ERISA Coverage

The first question raised by these cases is whether ERISA (and its fiduciary obligations) even apply. Many employers believe their voluntary benefits fall under a Department of Labor safe harbor (29 C.F.R. § 2510.3-1(j)) that exempts such plans from ERISA coverage. To qualify for this exemption, four conditions must be met: (1) the employer cannot make any contributions to the plan (2) it must not receive more than reasonable compensation for administrative costs, (3) employee participation is completely voluntary, and (4) the employer does nothing to endorse or administer the plan beyond allowing payroll deductions.

In the new wave of complaints, Schlichter argues that the employers have failed to satisfy the second and fourth requirements. The complaints allege that the employers indirectly benefited by receiving indirect compensation from the brokers and sponsors. The Schlichter complaints likewise argue that the employers have endorsed the plan by engaging in seemingly innocuous activities, such as notifying insurers of newly eligible employees, issuing enrollment reminders via email, or including the employer's logo on communication materials. The complaints also allege that the employers reportedly conceded in their Form 5500 filings with the Department of Labor that their voluntary benefit plans are subject to ERISA.

The Allegations

The four complaints make similar allegations. Each alleges that ERISA applies to these plans, and thus the employer has a fiduciary obligation to properly administer these plans. Each alleges that the employers breached their fiduciary duties under ERISA by failing to properly monitor and control the costs of these voluntary benefit programs. For example, the complaints contend that defendants failed to monitor premiums, failed to properly vet insurers and the plans' loss ratios, and failed to monitor broker commissions.

The complaint against United Airlines exemplifies Schlichter's strategy. The approximately 50-page complaint alleges that United Airlines breached its fiduciary duties with respect to its voluntary benefit plan by failing to compare premiums charged to other similarly situated plans. It further alleges that the voluntary benefit programs allegedly adopted by United Airlines had subpar loss ratios (*i.e.*, the amount that the plans paid out in benefits compared to the amount of premiums received). Further, the complaint presents a comparison showing that while comparable voluntary benefit programs had broker commissions averaging between 2.1% and 19% of premiums, United's program allegedly featured commissions of 36%, raising costs to participants.

The complaint further alleges claims against United Airline's broker, Mercer Health and Benefits Administration. The complaint alleges that Mercer became a fiduciary when it steered the employer toward more expensive, commission-rich products. The complaint further alleges that both United and Mercer engaged in self-dealing—Mercer profited from steering employees toward more expensive, commission-rich products while United

allegedly benefited from indirect services and support provided by the broker. This dynamic created a conflict of interest that the complaint characterizes as operating at the expense of plan participants.

Practical Steps

To avoid the expenses and distraction of litigation, employers offering voluntary benefits should consider taking the following proactive steps to minimize litigation risk:

Assess ERISA Coverage Status. Employers should carefully evaluate whether their voluntary benefit programs truly meet all four requirements of the Department of Labor's safe harbor exemption. If the plan involves any employer contribution, endorsement activities, or if the employer receives benefits from brokers/sponsors (cash or otherwise), future plaintiffs may allege, rightly or wrongly, that the plan falls under ERISA's fiduciary requirements. Employers should know that the open-ended nature of the DOL safe-harbor poses some challenges to employers seeking to comply with their duties under ERISA. To maximize the likelihood that ERISA will not apply, at a minimum, 5500 filings should be carefully reviewed to ensure the employer is not endorsing the plan as an ERISA plan if the employer is not treating it as an ERISA plan.

Ensure ERISA Fiduciary Compliance: Even if the employer does not believe the plan is covered by ERISA, given the risks the employer should consider administering the plan as if it were governed by ERISA. This can include soliciting competitive bids from multiple carriers, engaging in RFPs periodically, and carefully documenting the decisions the employer makes along with the reasons for such decisions.

Demand Broker Transparency. Request full disclosure of all broker compensation, including base commissions, contingent commissions, bonuses, and any other forms of payment received from carriers. The Schlichter complaints emphasize the alleged failure to disclose conflicts of interest, so documenting these arrangements and evaluating whether compensation is reasonable is essential. Consider, for example, moving to a flat fee arrangement or otherwise limiting the possibility that brokers might have a conflict of interest.

Document Fiduciary Processes. Establish and follow formal procedures for selecting carriers, monitoring plan performance, and reviewing costs. Maintain detailed records of committee meetings, requests for proposals, carrier evaluations, and the rationale for decisions.

Review Insurance Loss Ratios. Request and analyze loss ratio data from carriers—the percentage of premiums actually paid out in claims.

Avoid Indirect Benefits: To avoid self-dealing claims (and ensure compliance with the safe harbor), employers should ensure that they do not receive compensation from then brokers or insurers in connection with the voluntary benefit plan.

Looking Ahead

Interest in these lawsuits is exceptionally high given Schlichter Bogard's track record. If history repeats itself, the four initial complaints may represent just the first batch of a much larger litigation campaign.

For employers offering voluntary benefits, the message is clear: voluntary benefit plans are targets for plaintiffs' class action firms. Benefits consultants and brokers face similar pressures to demonstrate that their compensation is reasonable and that they are acting in plan participants' best interests rather than their own. As these cases proceed through the courts, the entire voluntary benefits industry will be watching closely to see whether Schlichter Bogard can replicate its 401(k) litigation success in this new arena.

The immediate risk to unprepared employers can be significant. Taking proactive steps now to evaluate ERISA coverage, enhance oversight processes, and ensure broker arrangements serve participants' interests, can help employers avoid becoming the next target in Schlichter Bogard's litigation campaign.

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