

Publications

Vorys Benefits Brief: What Employers Need to Know About Voluntary Benefits Litigation

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Class action lawsuits have recently been filed against employers that offer voluntary benefit programs, as well as against the employers' brokers and benefits consultants. These suits specifically target employers that offer certain types of voluntary benefits that are entirely employee paid. The complaints are essentially identical and claim that employers breached their fiduciary duties under ERISA when brokers and benefit consultants who recommended the benefits were paid excessive commissions. The complaints also allege that the brokers and benefits consultants were also fiduciaries and that the payment of excessive commissions resulted in nonexempt prohibited transactions under ERISA.

Voluntary Benefits

"Voluntary benefits" is a term used to refer to a broad range of insurance products. These products include life insurance, disability insurance, critical illness insurance, and accident insurance as well as hospital and fixed indemnity insurance, pet insurance, ID theft protection, legal services, and financial counseling. The litigation has been limited to employee-paid supplemental hospital and fixed indemnity insurance, and critical illness insurance. These benefits targeted by the lawsuits are potentially regulated as employee welfare benefits plans under ERISA. In fact, these benefits are only exempt from ERISA if they meet all of the requirements of ERISA's voluntary benefit safe harbor.

The voluntary benefit safe harbor exempts a benefit from ERISA if all of the following conditions are satisfied: (1) the employer does not make any contributions to the program; (2) participation in the program is completely voluntary for employees; (3) the employer's sole involvement is limited to permitting the insurer to publicize the program to employees, collecting premiums through payroll deductions, and remitting those premiums to the insurer; and (4) the employer receives no consideration or compensation in connection with the program other than reasonable compensation for the administrative services actually rendered in connection with payroll

deductions.

Many employers who are trying to fit within the ERISA voluntary benefit safe harbor do not engage in negotiations about the benefits to avoid the allegation that their involvement exceeded permitted under the third prong. Employers may be surprised by the commission, fees and profit built into many of these voluntary benefit products.

ERISA Obligations

If voluntary benefits do not satisfy the ERISA voluntary benefit safe harbor and are, therefore, subject to ERISA, employers must comply with ERISA's requirements for employee welfare benefits plans, including participant notices and disclosures, claims and appeals requirements, and potentially filing an annual Form 5500 for that benefit. Additionally, the employer (or any other plan fiduciary) must comply with ERISA's fiduciary obligations. An employer's fiduciary obligations regarding voluntary benefits include a determination that any fees, including premiums paid by employees, are reasonable and in line with market standards. In addition, fiduciaries have an ongoing obligation to monitor the administration of those voluntary benefits. Lastly, a fiduciary must avoid any conflict of interest. The lawsuits argue that the voluntary benefits at issue are ERISA plans, and that the employers breached their fiduciary duties by selecting products that maximized the revenue that was paid to the brokers who recommended the products.

Next Steps for Employers

If you are an employer that takes the position that your voluntary benefits are exempt from ERISA under the voluntary benefit safe harbor, you should carefully evaluate whether your voluntary benefits satisfy all four requirements of the safe harbor. Even minor deviations can cause a program to fall outside of the safe harbor.

If you are an employer that takes the position that your voluntary benefits are subject to ERISA, you should:

- Formalize oversight of the selection of the voluntary benefits including broker selection.
- Make sure that a Schedule A is attached to the plan's Form 5500 for each voluntary benefit and that each Schedule A discloses all of the direct and indirect fees paid to the insurance company and the commissions paid to the broker.
- Establish a monitoring process to review performance and loss ratios.
- Benchmark the amount of broker commissions against the market.
- Confirm that any fiduciary liability insurance covers your selection of these voluntary benefits.

Contact Legal Counsel

For questions or additional information about this Vorys Benefits Brief and its application, consult with legal counsel.