PUBLICATION

Are "Voluntary" Benefit Programs The Next Big Thing In ERISA Litigation?

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In late December 2025, the same law firm that initiated the wave of "excessive fee" 401(k) litigation matters in 2006 (which continues to this day) filed a spate of lawsuits alleging that several large employers (and their benefit consultants) breached their fiduciary duties under ERISA by allowing excessive or unreasonable premiums to be charged to their employees in connection with so-called "voluntary benefit" programs offered by those employers.

The common element of these voluntary benefit programs—such as accident, critical illness, cancer screening and hospital indemnity insurance—is that employers do not contribute to the premiums. Employees pay 100% of the premiums through payroll deductions.

As alleged in the complaints, voluntary benefit programs may be marketed as a way for employees to protect against rising out-of-pocket costs not covered by their employer-sponsored health insurance. For example, a "critical illness" policy may provide a lump-sum benefit to employees who are diagnosed with one of certain specified major illnesses.

The complaints generally allege that the employers offering these programs could and should have negotiated lower premiums. According to the plaintiffs, the higher premiums may be the result of potentially excessive broker commissions, and excessive compensation to the consultants that administer them. The complaints speculate that employers offer these voluntary benefit programs without first engaging in a request for proposal process.

The complaints ultimately hinge on a threshold issue: do the voluntary benefit programs at issue constitute "employee welfare benefit plans" within the meaning of ERISA §3(1) (29 U.S.C. §1002(1))? If the programs constitute employee welfare benefit plans, the fiduciaries of those plans are subject to ERISA's fiduciary duties, including the duty of loyalty and prudence. If courts determine that the programs at issue constitute ERISA-governed benefit plans, the defendants could be held liable for breaching ERISA's fiduciary duties if they also conclude that they failed to engage in an appropriate process to negotiate the premiums being charged for those programs. If, on the other hand, the programs do not constitute employee welfare benefit plans, neither the companies that sponsor them nor the consultants that administer them could be held liable as ERISA fiduciaries in connection with their administration.

At least some employers that offer these programs do so on the assumption that they fall within a Department of Labor ("DOL") "safe harbor" regulation, 29 C.F.R. §2510.3-1(j). That regulation provides that the term "employee welfare benefit plan" *shall not* include programs that satisfy its requirements, which are that:

1. no contributions are made by an employer or employee organization (such as a union);
2. participation in the program is completely voluntary for employees;
3. the employer's sole functions regarding the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions, and to remit them to the insurer; and
4. the employer receives no consideration—cash or otherwise—in connection with the program, other than reasonable compensation (but not profit) for administrative services actually rendered in connection with payroll deductions.

Historically, most of the litigation addressing whether an employer meets the requirements of the safe harbor regulation turns on whether, in the opinion of the judge reviewing the situation, the employer's conduct rises to the level of "endorsing" the program for purposes of the third element of the regulation. DOL Advisory Opinion 1994-23A states that an employer will be considered to have endorsed a program if it "expresses … any positive, normative judgment regarding the program." As a result, the "endorsement" question is likely to be highly dependent on the specific facts of the case—as well as on the view of the judge to whom the issue is presented. In some instances, open enrollment materials and other communications generated by employers could be viewed as touting these benefit programs—facts that would tend to weigh in favor of the conclusion that the employer endorses the program.

In the context of these voluntary benefit programs, plaintiffs are also likely to assert that employers may have received some form of consideration as a result of offering the program. For example, they may assert that employers or benefit consultants have received revenue sharing, or alternatively, that benefit consultants have provided free or discounted services for the employer or its other benefit programs in recognition of the commissions the benefit consultants have received in connection with the sale of the voluntary benefit program. Those facts, if proven, could be used to show that the employer has failed the fourth element of the safe harbor regulation—that the employer has received no consideration in connection with the program.

Moreover, courts may take into account the extent to which the employer negotiates the program's premiums or features. The Sixth Circuit Court of Appeals, for example, has expressly stated that one of the factors courts should consider in determining whether an employer has "endorsed" a program is whether "… the employer plays an active role in either determining which employees will be eligible for coverage *or in negotiating the terms of the policy or the benefits* provided …" *Thompson v. America Home Assur. Co.,* 95 F.3d 429, 436 (6th Cir. 1996). Consequently, employers who actively engage in negotiating the program's terms and costs are, other things being equal, less likely to satisfy the safe harbor provisions. If courts accept the plaintiffs' theory that the voluntary benefits programs constitute employee benefit plans, then employers who have simply offered the programs without actively negotiating their terms risk a finding that they have breached their fiduciary duties for having failed to do so.

Note that a program offered by an employer who satisfies the safe harbor requirements "shall not" be an employee welfare benefit plan. For the moment, the DOL position is that, at least with respect to larger employers, the *only* way for a program to avoid employee welfare benefit plan status is for the employer to satisfy the safe harbor regulation: "It is the Department's position that a program will be excluded from Title I of ERISA pursuant to regulation section 2510.3-1(j) only if the activities of the employer or employee

organization do not exceed any of the limitations set forth in the regulation." (Adv. Op. 1994-23A.) But the DOL does not have the final word on the subject. In other contexts, courts hold that a program may not be an ERISA plan *even if* the employer has not satisfied all of the applicable safe harbor regulation's requirements: "[t]he fact that [a] plan is not excluded from ERISA coverage by this regulation does not compel the conclusion that the plan is an ERISA plan." *Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program*, 997 F.3d 848, 858 (9th Cir. 2021).

Traditionally, we would expect the DOL to advocate for the position most favorable to employees/participants—in this case, that a voluntary benefit program constitutes an ERISA plan. Today's DOL may or may not toe that same party line. In recent months, the DOL has filed amicus briefs in multiple litigation matters siding with employer-defendants in ERISA litigation matters. Whether it will side with employers (and benefit consultants) in this current round of cases remains to be seen. But as a practical matter, courts facing the issue are more likely to conclude that programs sponsored by employers who do not meet the safe harbor regulation's requirements are, in fact, employee welfare benefit plans—and that those employers are subject to ERISA's fiduciary duties in connection with those plans.

In the short term, we expect most employers (and benefit consulting firms) that have been sued so far to challenge these cases on motions to dismiss. Those defendants are likely to argue, among other things, that it is purely speculative to assume that lower premiums would have resulted if the employers had negotiated more aggressively. Those arguments may resonate with business-friendly judges who are reluctant to disincentivize employers from offering valuable benefits to their employees.

What can employers that offer these programs do while we await the outcome of that litigation? First, they should review the roster of programs they offer, critically assess how those programs are communicated to their employees, and evaluate the likelihood of a successful argument that they are "endorsing" the program. They should also review the services that their benefit consultants provide for the employer and the compensation the consultant receives for those services, and evaluate whether the employer itself is receiving any consideration in exchange for offering the program to its employees. Going forward, employers should assess whether it makes more sense to assume that a court may ultimately find their program to be an employee benefit plan—and to treat those programs with the same level of oversight they do their acknowledged benefit plans—rather than to rely on a federal judge to ultimately conclude their program is exempt from ERISA.

It also makes sense for employers to assess whether they have appropriate insurance coverage in the event they are sued with respect to their voluntary benefit programs.

