

Employee Benefit Plan Review

ERISA Fiduciary Duties and Voluntary Benefits: New Litigation Trends

BY LAUREN SCHUSTER AND SARAH SISE

ERISA's fiduciary duties are not limited to retirement plans. Fiduciaries of employee welfare benefit plans—including employer-sponsored health and welfare plans that offer voluntary benefits such as accident, critical illness, and hospital indemnity insurance—are required to act solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence that a prudent person acting in a like capacity would use. These fiduciary standards apply with equal force to welfare benefit plans as they do to 401(k) and other retirement plans.

Over the past two decades, ERISA excessive fee litigation has reshaped the 401(k) and 403(b) retirement plan landscape. Plaintiffs in those cases have successfully invoked ERISA's fiduciary duties of prudence and loyalty to challenge unreasonable fees, excessive recordkeeping costs, and imprudent investment options.

Participants in welfare benefit plans are using the same ERISA principles and legal theories prevalent in the 401(k) excessive fee litigation to challenge costs related to these plans. In recent class action complaints such as *Pimm et al. v. United Airlines, Inc. et al.*,¹ *Fellows v. Allied Universal*² and *Hannum v. Banner Health*,³ plaintiffs allege that

employer-fiduciaries and their brokers breached ERISA's duties of prudence and loyalty by failing to monitor and control broker commissions, premiums, and loss ratios in voluntary benefits insurance plans. These cases assert that excessive broker commissions—sometimes exceeding 30 to 40 percent of premiums—were embedded in participant-paid premiums, resulting in participants paying far more than what similarly situated plans paid for identical coverage. The theories of liability mirror those used in retirement plan litigation: breach of fiduciary duty of prudence, failure to monitor, prohibited transactions with parties in interest, and knowing participation in fiduciary breaches. This article provides an overview of voluntary benefits, the key allegations in this emerging litigation, and practical steps employers can take to mitigate risk.

WHAT ARE VOLUNTARY BENEFITS

Voluntary benefits are supplemental benefits offered to employees, generally at no cost to the employer, with premiums paid 100% by employees. These benefits typically include insurance products that complement a major medical plan (such as critical illness, accident, and hospital indemnity coverage) as well as disability insurance, voluntary dental and vision coverage, optional life insurance, and legal assistance plans.

ALLEGATIONS IN RECENT LITIGATION

In *Pimm et al. v. United Airlines, Inc. et al.*, participants allege that the employer and Mercer, its benefits consultant, breached ERISA fiduciary duties in connection with the selection and oversight of voluntary benefit programs. The complaint asserts that the defendants failed to act prudently and loyally, resulting in excessive premiums paid by participants.

Plaintiffs specifically allege that the benefits consultant collected more than \$14 million in commissions between 2020 and 2024, representing approximately 36 percent of premiums, and had conflicts of interest that favored higher-cost options and excluded lower-cost alternatives. The complaint also alleges that the voluntary benefits had low loss ratios, estimated below 50 percent, and that the plan fiduciaries failed to report or address the benefits consultant's alleged fiduciary violations, which plaintiffs claim constituted a separate fiduciary breach.

In *Fellows v. Allied Universal*, participants in the Allied Universal Health and Welfare Benefit Plan brought a class action alleging that the employer, along with brokers Mercer Health and Benefits Administration, LLC and Lockton Companies, LLC, breached their fiduciary duties under ERISA. The complaint alleges that the brokers received approximately \$23 million in commissions from 2019 through 2024, averaging 39.8 percent of premiums—nearly four times the approximately 10 percent commission rate that similarly situated plans reported paying for identical voluntary benefits products. Plaintiffs assert claims for breach of the fiduciary duty of prudence, failure to monitor fiduciaries, prohibited transactions, and knowing participation in fiduciary breaches.

In *Hannum v. Banner Health*, a participant in the Banner Health Master Health and Welfare Plan similarly alleges that the employer breached its ERISA fiduciary duties by selecting and maintaining a

supplemental health insurance program with excessively high premiums driven by inflated broker commissions. The complaint alleges that Lockton Companies, LLC, and BCInsourcing LLC served as brokers and received approximately \$20.8 million in commissions over six years, representing an average of 33.5 percent of premiums. In 2020, when BCInsourcing entered as co-broker, commissions increased from 13.2 percent to 67.6 percent of premiums. The plaintiff asserts claims for breach of fiduciary duty of prudence, prohibited transactions, and knowing participation by the brokers. The complaint emphasizes that comparable large employer plans routinely maintained commission rates of 10 percent or less for substantially similar products.

The Hannum complaint introduces the concept of a “heaped” commission arrangement, in which the broker may receive a substantially higher first-year payout (more than five times the prior year's rate), with the elevated cost embedded in the premium rates participants pay in future years. Heaped commission structures may attract particular scrutiny and create an incentive for brokers to recommend carrier changes (or adding co-brokers) to capture the heaped commission payouts.

The complaints allege common themes: that broker commissions embedded in participant-paid premiums greatly exceeded market rates, that fiduciaries failed to benchmark or competitively bid broker services, and that the resulting low loss ratios demonstrate participants received inadequate value for their premium dollars.

EMPLOYER AND FIDUCIARY RESPONSE TO NEW VOLUNTARY BENEFITS LITIGATION

Employers should evaluate whether their voluntary benefits are subject to ERISA or structured to fall within the Department of Labor's

voluntary plan safe harbor. This distinction matters because ERISA-exempt benefits are not subject to the fiduciary duties at issue in the litigation. Safe harbor status requires that participation be entirely voluntary, that no employer contributions be made, that the employer not endorse the plan, and that the employer not receive consideration beyond reasonable administrative compensation.

ERISA exemption, however, is not always the preferred outcome. In some circumstances, ERISA coverage may be advantageous due to federal preemption and more predictable remedies, while non-ERISA arrangements may be subject to state law claims, including potential punitive damages.

SAFE HARBOR PITFALLS AND ENDORSEMENT RISK

Even limited employer involvement can jeopardize safe harbor protection. Involvement in insurer selection, negotiation of plan terms, linking coverage to employment status, recommending a plan, allowing cafeteria plan participation, or assisting with claims may all be cited as evidence of endorsement. Statements suggesting that ERISA applies, or the use of the employer's name in connection with the benefit, can raise similar concerns.

Employers should also remain alert to co-fiduciary issues and take appropriate steps if potential fiduciary breaches by service providers are identified.

Recent litigation highlights that endorsement may be interpreted broadly, including through benefit enrollment platforms. Design features that suggest employees should enroll in all voluntary

benefits, or that enrollment is incomplete without doing so, could attract scrutiny over time. Employers may benefit from reviewing enrollment workflows to identify messaging or defaults that could be perceived as steering or endorsement.

PRACTICAL STEPS TO REDUCE LITIGATION RISK

For voluntary benefits subject to ERISA, strong governance remains critical. Employers should maintain a formal committee structure, meet regularly, and document fiduciary decision-making. Premiums and commissions should be reviewed for reasonableness and supported by benchmarking or other market data. The allegations in these recent cases emphasize the relatively low

loss ratios, suggesting that requesting loss ratio information during insurer or broker selection may be a useful diligence tool.

Employers should also remain alert to co-fiduciary issues and take appropriate steps if potential fiduciary breaches by service providers are identified. Documentation of negotiation efforts is particularly important, as plaintiffs have pointed to commission levels near 10 percent as potentially defensible, while higher ranges (especially at or above 25-30%) may expose fiduciaries to liability. Plaintiffs can review Form 5500 filings to identify these fee and commission outliers for potential litigation.

Finally, employers should monitor conflicts of interest involving brokers and vendors, including

discount arrangements tied to voluntary benefits. The plaintiffs' allegations reinforce that prudent benefit options do not offset imprudent ones, and that each voluntary benefit should be supported by a prudent process and appropriate documentation. 🌀

NOTES

1. Pimm et al. v. United Airlines, Inc. et al., No. 25-cv-15581 (N.D. Ill, filed December 23, 2025).
2. Fellows v. Allied Universal (S.D.N.Y., filed December 23, 2025).
3. Hannum v. Banner Health (D. Ariz., filed April 28, 2026).

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