New Lawsuits Focus on Fiduciary Duties for Voluntary Benefits

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Schlichter Bogard LLC, a law firm well-known for filing lawsuits against retirement plan fiduciaries (and recently health and welfare plan fiduciaries), filed separate class action lawsuits against four employers, their employee benefit plan fiduciaries, and their employee benefit brokers and consultants, alleging these parties breached their fiduciary duties with respect to voluntary accident, critical illness, and hospital indemnity plans. The lawsuits, which allege millions of dollars in plan losses, seek to hold the plan-sponsor employers, plan fiduciaries, and brokers/consultants jointly and individually liable for breaching their fiduciary duties to the voluntary benefit plans.

Background

Voluntary Benefits

Many employers offer voluntary benefits to their employees, such as accident, critical illness, and hospital indemnity plans. Employees usually pay all the premiums for voluntary benefits. While many voluntary benefit plans are exempt from ERISA, qualifying for this exemption is complicated. Voluntary benefit plans create a significant ERISA compliance risk, because if any one of the regulatory requirements to establish an ERISA exception fails, then the plan is subject to ERISA's many requirements, including fiduciary rules.

ERISA Fiduciary Duties and Prohibited Transactions

Under ERISA, a person is a fiduciary with respect to a plan to the extent they exercise any discretionary authority or discretionary control in management of the plan or exercise any authority or control in management or disposition of the plan's assets. ERISA imposes strict duties on plan fiduciaries. ERISA requires fiduciaries to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the then-prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use.

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ERISA also lists certain "prohibited transactions:"

- Furnishing of goods or services between the plan and a "party in interest" (such as a service provider, plan fiduciary, or employer)
- Transferring any plan assets to a party in interest
- Engaging in self-dealing

However, certain ERISA party-in-interest prohibited transactions, and fiduciary self-dealing transactions are allowed and are defensible if they meet specific criteria, including that the transactions are for reasonable compensation.

The Lawsuits

The law firm filed lawsuits against Laboratory Corporation of America Holdings, United Airlines, CHS/Community Health Systems, and Allied Universal. The lawsuits also named the fiduciaries from each of these companies, as well as their insurance brokers and consultants—Willis Towers Watson, Mercer, Gallagher, and Lockton.

The four lawsuits are nearly identical. They contend that:

- All the voluntary benefit programs are ERISA plans.
- The employers and their voluntary benefits brokers are plan fiduciaries.
- The fiduciaries violated their duties with respect to the management and administration of the voluntary benefit plans by failing to monitor, negotiate, and ensure prudent and reasonable selection of insurance carriers for the voluntary benefits.
- The fiduciaries failed to ensure prudent and reasonable broker commissions, insurance loss ratios, and premiums for the voluntary benefits.
- The fiduciaries failed to use any fiduciary process to monitor and control premiums and broker commissions, use competitive bidding, or leverage the plans' sizes to reduce premiums and broker fees.
- The employer-fiduciaries breached their duties by failing to monitor or evaluate the performance of their brokers, including failing to ensure the brokers had a prudent process in place to evaluate voluntary benefits and the related premiums, commissions and loss ratios.
- The employers and their brokers engaged in prohibited transactions and knowingly participated in the other's violation of the prohibited transaction rules.

The lawsuits seek to hold the employers, their brokers, and the plan fiduciaries *personally* liable for all plan losses, have them disgorge any profits, and remove the plan fiduciaries who breached their duties.

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Important Actions for Employers and Plan Fiduciaries

With the increased attention on health and welfare plans and related litigation, employers should consider taking the following steps to help reduce their exposure to litigation and personal liability.

- If an employer does not have a fiduciary committee in place for health and welfare benefits, consider forming a committee, adopting a committee charter, and delegating fiduciary responsibilities to the committee.
- Review the criteria for classifying certain benefits as voluntary and assure the regulatory components for the exception apply.
- Review and negotiate all administrative service agreements and broker/consultant agreements. Avoid simply signing the vendor's standard form agreement.
- Request and review service and fee disclosures from health plan brokers and consultants.
- Consider whether the brokers' and consultants' direct and indirect compensation is reasonable and whether there are any conflicts of interest.
- Ensure broker and consultant compensation information is accurately reported on annual Form 5500 filings.
- Periodically conduct a request for proposal (RFP) process for all insurer, third-party administrator, pharmacy benefit manager, and broker/consultant services.
- Periodically collect and review benchmark information for all benefits and vendors and compare it to current and prospective arrangements or proposals.
- Document the process the fiduciaries used to obtain, review, monitor and benchmark proposals, agreements, and vendor performance. It is critical that health plan fiduciaries document their procedural prudence.

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