

Voluntary Benefits Under a Microscope
Litigation Risks and DOL Audit Readiness

Attorney Client Privileged Communication
and Work Product

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  - We encourage questions (even though your audio lines are muted)
  - To submit a question, use the Q&A icon on your Zoom tool bar to submit a question
  - If time permits, your questions will be answered at the end of this presentation. And if there is insufficient time, the speaker will respond to you via e-mail after this presentation

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Upcoming 2026 Webinars

- 2026 webinars:
  - Form 4 Training Course (11/12/26)
  - Compensation: Year-End Review of 2026 Items (12/10/26)

Sign up here: https://www.hunton.com/en/insights/executive-compensation-webinar-schedule.html

Speaker Bios



Jessica Agostinho
Partner

Jessica helps clients navigate the complex and evolving area of employee benefits law, including tax-qualified retirement plans (both defined contribution and defined benefit pension plans), nonqualified deferred compensation plans, health and welfare benefit issues and executive compensation matters. She also frequently handles benefits and compensation issues arising in corporate transactions, employment agreements and vendor contract negotiations. She works with clients on a broad array of employee benefits matters, advising on compliance with ERISA, the Internal Revenue Code, the Affordable Care Act, SECURE 1.0 and SECURE 2.0, HIPAA and COBRA. In addition, she regularly advises on compensation and benefits aspects of employment agreements and severance arrangements.

Jessica has experience providing advice to employers and plan sponsors at all stages in an organization's life cycle. In the transactional context she regularly negotiates employee benefits representations and covenants, helps clients navigate executive compensation issues arising under Section 409A and Section 280G of the Code, and advises on benefits transition and integration issues.

She is a trusted advisor for employers and plan sponsors, helping them understand their ongoing legal obligations with respect to retirement and welfare benefit plans, keeping them up to date on regulatory changes, and advising on plan amendments and terminations.

In addition to for-profit entities, Jessica also regularly advises tax-exempt and not-for-profit entities on their unique executive compensation and benefits requirements, in particular under Section 457 of the Code.

Speaker Bios



Rob Cipolla
Partner

As a partner on Hunton's employee benefits and executive compensation team, Rob counsels public, private, tax-exempt, and governmental entities, and other clients in matters including qualified retirement plans, health and welfare plans, and related benefit matters.

Rob finds practical business solutions that meet each client's needs arising within the technical regulatory framework of employee benefits law under ERISA and the Internal Revenue Code. He has significant experience advising clients regarding the design, administration, operations, reporting, and disclosure of defined benefit plans, 401(k) retirement plans, 403(b) and 457 plans, employment agreements, non-qualified deferred compensation plans, stock plans, multiemployer plans, and health plans.

Rob helps employers attain favorable rulings from the IRS, DOL, and other governmental agencies, and he assists clients in obtaining the desired outcomes in audits by such agencies.

Rob has meaningful experience advising both public and private clients on the employee benefit and executive compensation aspects of mergers and acquisitions, which he uses to help clients assimilate plans and workforces following transactions.

Speaker Bios



Michelle Lewis
Partner

Michelle concentrates her practice in the areas of health and welfare plans, qualified retirement plans, and executive deferred compensation plans. She delivers insightful and practical advice to clients in addressing a broad spectrum of employee benefit issues, including drafting plan documents, preparing IRS submissions, resolving ERISA and Internal Revenue Code compliance issues, advising on benefit claims and appeals, addressing various litigation issues, and negotiating employee benefit vendor contracts and HIPAA business associate agreements.

ERISA Background

- Enacted in 1974
  - Consistent administration and enforcement for covered benefit plans across all states
  - Protections for plan participants in case of company or plan failure
  - Defines fiduciary duties for plan administrators
- Applies to both retirement plans (e.g., 401(k), pension) and welfare benefit plans (including health plans)
- ERISA does not require employers to establish benefit plans, but sets forth certain standards if a plan is established – including fiduciary duties

Welfare Benefit Plans Subject to ERISA

- **Medical & Health**
  - Group health insurance (medical, surgical, hospital)
  - Dental and vision plans
  - Health FSAs (Flexible Spending Accounts)
  - Health Reimbursement Arrangements (HRAs)
  - Prescription drug plans
- **Income Protection**
  - Short-term & long-term disability insurance
  - Accidental death & dismemberment (AD&D)
  - Group term life insurance
- **Other Welfare Benefits**
  - Employee Assistance Programs (EAPs — if providing more than referrals)
  - Apprenticeship or training programs
  - Scholarship funds (certain circumstances)
  - Prepaid legal services plans
  - Severance pay plans
  - Dependent care FSAs (certain circumstances)
- **Not Subject to ERISA**
  - Government / public employer plans
  - Church plans (unless they elect in)
  - Plans maintained outside the U.S. for nonresident aliens
  - Payroll practices (e.g., paid sick leave from general assets with no separate fund)
  - Health Savings Accounts (HSAs) (but the underlying health plan is usually subject to ERISA)

Rule of Thumb: ERISA applies if the plan is established or maintained by a private-sector employer or employee organization to provide benefits to employees or their beneficiaries.

What ERISA Status Demands

ERISA status creates operational duties across governance, documentation, communications and administration.

- **Plan Documents & SPD**
  - Maintain a written plan document
  - Distribute a Summary Plan Description to participants describing the plan terms in “plain English”
  - Provide a Summary of Material Modifications to notify participants of changes to plan provisions
- **Fiduciary Duties**
  - Plan administrators and named fiduciaries must act prudently and solely in the interest of participants.
- **Reporting & Disclosure**
  - File Form 5500 annually for welfare plans with 100+ participants
  - Issue notices required under COBRA, HIPAA, and Medicare Part D
  - Issue annual Summary of Benefits and Coverage
- **Claims, Preemption, Rights**
  - Meet ERISA claims and appeals timelines; participants generally may sue once claims procedures are exhausted
  - ERISA preempts most state laws except insurance, banking and securities

ERISA Fiduciary

- Named in the Plan and by function
- Courts often describe ERISA fiduciary duties as among the “highest known to law”
- ERISA fiduciary duties are strict because fiduciaries manage retirement and benefit plan assets for participants and beneficiaries, who rely on those benefits for financial security
- Duties are enforced rigorously because fiduciaries often control other people’s money and make decisions affecting employees’ retirement savings, health benefits, and long-term economic well-being

Fiduciary Duties Under ERISA

Duty of Loyalty

Must act solely in the interest of plan participants and beneficiaries

Duty of Prudence

Must act with the *care, skill and diligence* of a prudent person who is *familiar with such matters*

Duty to Follow Plan Documents

(Unless they are contrary to ERISA or other applicable law)

Duty of Diversification

To reduce the risk of large losses

A Deeper Dive: The Duties of Loyalty & Prudence

Loyalty

1. Requires fiduciaries to act *solely in the best interest of participants and beneficiaries*.
2. Plan fiduciaries cannot consider company (plan sponsor) interests when making fiduciary decisions

Prudence

1. Requires fiduciaries to *exercise the care, skill, prudence, and diligence of a knowledgeable and careful fiduciary*.
2. Hire advisors when the fiduciary does not have the required expertise (e.g., investment advisors, consultants)
3. Focus is on *process*
4. Duty to select *and monitor* service providers – not allowed to "set it and forget it"
5. Also includes an obligation to only pay reasonable fees
    - Conduct periodic RFPs to confirm that fees are reasonable
    - Review sources of direct and indirect compensation

Voluntary Benefit Plan Lawsuits

- On December 23, 2025, four large employers and several national consulting firms were sued in connection with their actions regarding voluntary benefit plans.
- Complaints allege breach of fiduciary duty, prohibited transactions and self dealing.
- These cases will turn on the following:

1. Does ERISA Apply?
2. Fiduciary Process and Governance
3. Commission and Compensation Controls
4. Form 5500 reporting and documentation.

Voluntary Plan Safe Harbor

- No employer contribution – not only direct employer contributions but also reimbursement from an HRA.
- Must be voluntary – no auto enrollment.
- Limited employer involvement – allowing insurance presentations onsite, collecting after-tax premiums and remitting them.
- Do not receive any compensation other than to process the payroll deductions.

Voluntary Plans

Estimated that 80% of "voluntary plans" don't meet the safe harbor.

Endorsement by employer may include:

1. Employer selection of the insurance coverage or company.
2. Use of employer's name or logo on the communications.
3. Designating the employer as plan administrator or sponsor.
4. Recommending the plan to employees.
5. Paying premiums through a cafeteria plan
6. Assisting employees with claims and disputes.
7. No consideration to the employer – broker kickbacks, discounts, bundled pricing.

Eight Cases

- Plaintiffs sued Plan Sponsor and Brokers for breach of fiduciary duty, prohibited transactions and self dealing, including the following allegations:
- Plan fiduciaries failed to compare prices, make reasonable prudent selections of vendors, subpar loss ratios (the amount they paid out in benefits vs. premiums taken in),
- Broker steered employers towards more expensive, commission rich products,
- Employer received indirect compensation or benefits.

Endorsements

Plaintiffs claim the Employer endorsed plans and invalidated the safe harbor by:

1. Notifying insurers of newly eligible employees
2. Issuing electronic communication to the employees of the benefits
3. Including the employer logo on the enrollment materials
4. Reporting the voluntary plans on the IRS Form 5500s

Voluntary Plan Lawsuit Proactive Steps

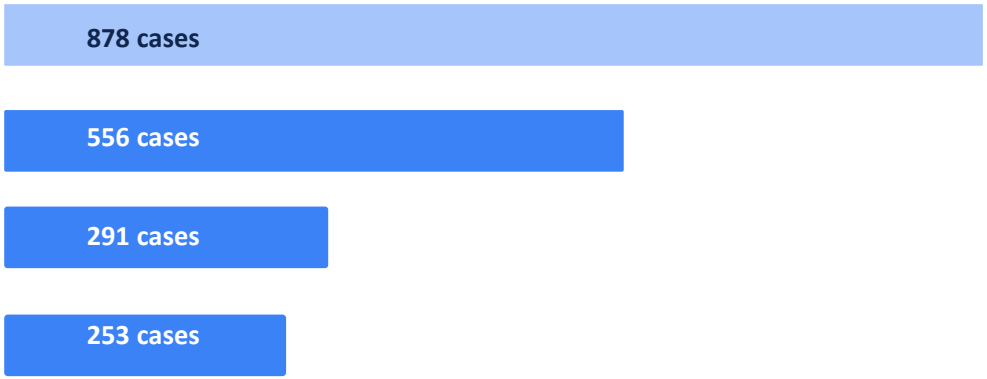
Assess ERISA Coverage of all benefits – do they meet the four requirements of the safe harbor?

Consider making the voluntary benefit an ERISA Plan

1. Demand broker transparency in conflicts of interest and in fees and compare those fees with other providers
2. Document fiduciary process.
3. Review insurance loss ratios and compare those to other products.
4. Avoid self dealing and conflicts of interest.

DOL Audit Preparedness
FY 2025: The Numbers Behind the Risk

EBSA closed hundreds of cases last year — and most ended in money or money or required correction.



$714.4 million
Recovered through civil investigations

$468.7 million
Recovered informally, no case opened

63 %
Closed civil cases with a result

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DOL Audit Preparedness
What DOL Actually Asks to See

Foundation

Plan Documents & SPDs

Formal plan document, amendments, SPD, SMMs, delegation records, and proof participants received disclosures.

Operations

Claims, COBRA, HIPAA

Denial notices, appeals, external review, COBRA elections and premiums, enrollment, privacy.

FY 2026 focus

Federal Mandates

ACA protections, NQTL comparative analyses under CAA 2021, No Surprises Act cost-sharing.

Process

Fiduciary Governance

Named fiduciaries, committee minutes, vendor diligence and fees, conflicts, cybersecurity, plan assets.

— Recurring finding: plans running on a vendor booklet with no complete ERISA plan document.

Example of a DOL Audit request

ATTACHMENT A

COPIES OF ITEMS IDENTIFIED BELOW SHOULD BE SUBMITTED AS INDICATED IN THE COVER LETTER

1. Plan document.

2. Summary Plan Description (SPD), including any changes in Plan benefits and entitlement to benefits.

3. Summary of Benefits and Coverage (SBC), Notices of Material Modifications, and Uniform Glossary.

4. All contracts with insurance companies for the provision of health benefits.

5. If self-insured, all contracts for claims processing, administrative services, and reinsurance.

6. Documents which describe the responsibilities of both the employer and employees with respect to the payment of the costs associated with the purchase and maintenance of health and welfare benefits.

7. In accordance with the Health Insurance Portability and Accountability Act of 1996, please provide the following records.

   a. A copy of the Plan's rules for eligibility to enroll under the terms of the Plan (including continued eligibility).

   b. A sample of the certification provided to those employees who have lost health care coverage since January 1, 2009 or to be provided to those who may lose health care coverage under this plan in the future, which certifies creditable coverage earned under this plan;

   c. A copy of the record or log of all Certificates of Creditable Coverage for individuals who lost coverage under the Plan or requested certificates;

   d. A copy of the written procedure for individuals to request and receive certificates;

   e. A sample general notice of preexisting condition informing individuals of the exclusion period, the terms of the exclusion period, and the right of individuals to demonstrate creditable coverage (and any applicable waiting or affiliation periods) to reduce the preexisting condition exclusion period, or proof that the plan does not impose a preexisting condition exclusion;

   f. Copies of individual notices of preexisting condition exclusion issued to certain individuals per the regulations (including any lists or logs an administrator may keep of issued notices), or proof that the Plan does not impose a preexisting condition exclusion;

   g. A copy of the necessary criteria for an individual without a certificate of creditable coverage to demonstrate creditable coverage by alternative means;

   h. Records of claims denied due to the imposition of the preexisting condition exclusion (as well as the Plan's determination and reconsideration of creditable coverage, if applicable), or proof that the Plan does not impose a preexisting condition exclusion;

   i. A copy of the written procedures that provide special enrollment rights to individuals who lose other coverage and to individuals who acquire a new dependent, if they request enrollment within 30 days of the loss of coverage, marriage, birth, adoption, or placement for adoption, including any lists or logs an administrator may keep of issued notices; and

   j. A copy of the written appeal procedures established by the Plan.

8. A copy of the Plan's rules regarding coverage of medical/surgical and mental health benefits, including information as to any aggregate lifetime dollar limits and annual dollar limits.

9. The Plan's Newborns' Act notice (this should appear in the plan's SPD), including lists or logs of notices an administrator may keep of issued notices.

10. A copy of the Plan's rules regarding pre-authorization for a hospital length of stay in connection with childbirth.

11. A sample of the written description of benefits mandated by WHCRA required to be provided to participants and beneficiaries upon enrollment.

12. A sample of the written description of benefits mandated by WHCRA required to be provided to participants and beneficiaries annually.

13. Materials describing any wellness programs or disease management programs offered by the plan. If the program offers a reward based on an individual's ability to meet a standard related to a health factor, the plan should also include its wellness program disclosure statement regarding the availability of a reasonable alternative.

14. If the Plan is claiming or has claimed grandfathered health plan status within the meaning of section 1251 of the Affordable Care Act, please provide the following records:

Example of a DOL Audit request

a. A copy of the grandfathered health plan status disclosure statement that was required to be included in plan materials provided to participants and beneficiaries describing the benefits provided under the Plan.

b. Records documenting the terms of the Plan in effect on March 23, 2010 and any other documents necessary to verify, explain or clarify status as a grandfathered health plan. This may include documentation relating to the terms of cost sharing (fixed and percentage), the contribution rate of the employer or employee organization towards the cost of any tier of coverage, annual and lifetime limits on benefits, and if applicable, any contract with a health insurance issuer, which were in effect on March 23, 2010.

15. Regardless of whether the Plan is claiming grandfathered status, please provide the following records in accordance with section 715 of ERISA as added by the Affordable Care Act:

a. In the case of a plan that provides dependent coverage, please provide a sample of the written notice describing enrollment opportunities relating to dependent coverage of children to age 26.

b. If the Plan has rescinded any participant's or beneficiary's coverage, supply a list of participants or beneficiaries whose coverage has been rescinded, the reason for the rescission, and a copy of the written notice of rescission that was provided 30 days in advance of any rescission of coverage.

c. If the Plan imposes a lifetime limit or has imposed a lifetime limit at any point since September 23, 2010, please provide documents showing the limits applicable for each plan year on or after September 23, 2010.

Please provide a sample of any notice sent to participants or beneficiaries stating that the lifetime limit on the dollar value of all benefits no longer applies and that the individual, if covered, is once again eligible for benefits under the plan.

d. If the Plan imposes an annual limit or has imposed an annual limit at any point since September 23, 2010, please provide documents showing the limits applicable for each plan year on or after September 23, 2010.

16. If the Plan is **NOT claiming** grandfathered health plan status under section 1251 of the Affordable Care Act, please also provide the following records:

a. A copy of the choice of provider notice informing participants of the right to designate any participating primary care provider, physician specializing in pediatrics in the case of a child, or health care professional specializing in obstetric or gynecology in the case of women, and a list of participants who received the disclosure notice.

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b. If the Plan provides any benefits with respect to emergency services in an emergency department of a hospital, please provide copies of documents relating to such emergency services for each plan year on or after September 23, 2010.

c. Copies of documents relating to the provision of preventive services for each plan year on or after September 23, 2010.

d. Copy of the Plan's Internal Claim and Appeals and External Review Processes.

e. Copies of a notice of adverse benefit determination, notice of final internal adverse determination notice, and notice of final external review decision.

f. If applicable, any contract or agreement with any independent review organization or third party administrator providing external review.

17. In accordance with the Families First Coronavirus Response Act (FFCRA) of March 18, 2020 and the Coronavirus Aid, Relief and Economic Security Act (CARES Act) of March 27, 2020. Please provide the following documents received on or after March 18, 2020.

a. All documents including but not limited to reports identifying all requests for prior or pre-authorization of services for COVID-19 testing.

b. All documents including but not limited to reports identifying all claims grievances or claims appeal(s) for the Plan, including any Explanation of Benefits and/or Adverse Benefit Determination Letters sent to participants related to COVID-19.

c. All documents including but not limited to materials received, reviewed or used by the Plan to approve or deny the Claims.

d. All correspondence including but not limited to emails or reports, received by or sent by the Plan relating to the Claims.

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Audit Preparedness
Reducing Your Audit Risk

Most triggers are self-inflicted — filings, complaints, and undocumented vendor oversight.

File Form 5500 Clean and On Time Time

Reconcile filing data before submission; anomalies and late filings trigger audits.

Close Participant Complaints Fast

Track repeat themes across TPA, PBM, and carrier before they turn systemic.

Test the Processes Regularly

Test claims, appeals, COBRA, eligibility, and and contributions against plan terms.

Demand Audit-Ready Vendor Records Records

Require reports, compliance certifications, and current parity analyses from vendors.

Run a Compliance Calendar

Cover filings, notices, vendor deliverables, governance; track corrections to closure.

Audit Readiness
Building an Audit-Ready Culture

Compliance as an operating discipline, not an
an annual filing exercise

Governance Structure

Recurring meetings with agendas, minutes, decisions, decisions, tracked actions

Trained Staff

Train HR on claims escalation, communications, privacy, privacy, COBRA

Central Repository

Audit-ready records: controlled access, version version history, contracts

Minimum retention period, but indefinite for any any records necessary to prove eligibility, vesting, and the calculation or payment of benefits

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DOL Audit Readiness
Six Years Is the Floor, Not the Whole Rule

- Section 107 clock runs from the Form 5500 filing date or its due date
- Records must verify, explain, and check the accuracy of every filing
- Section 209 sets no fixed period: keep benefit records until benefits are fully paid fully paid
- Retain plan documents, SPDs, claims and appeals, payroll, COBRA, fee and committee records
- Suspend routine destruction the moment litigation or an agency inquiry is is anticipated

6 Years

ERISA Section 107 Minimum

Minimum retention for records supporting required reports and disclosures.

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DOL Audit Readiness
What to Do This Quarter

Close Document Gaps

Full ERISA plan document and SPD per plan, not a vendor booklet.

Run a Compliance Calendar

Filings, notices and vendor deliverables on on one tracked schedule.

Refresh Parity Analyses

Keep NQTL comparative analysis current.

Vendor Oversight

Diligence before hiring, periodic reviews after appointment.

Test Core Processes

Audit claims, appeals, COBRA and eligibility periodically.

Stand Up the Repository

Secure, searchable six-year records with controlled access.

Identify issues early, correct them fully, document the correction, then fix the control.

Don’t Forget Next Month’s Webinar

- Title:
  - **Form 4 Training Course**

- When:
  - **10:00 am to 11:00 am Central**
  - **November 12, 2026**

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