Employee Benefits: The Evolving Benefits Landscape for Nonprofits

March 24, 2026

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Who Is an ERISA Fiduciary?

An ERISA fiduciary is anyone who:

- Has discretionary authority or control over the management of plan assets;
- Has discretionary authority or responsibility over the administration of the plan; or
- Provides investment advice for a fee or other direct or indirect compensation.

Employers are typically ERISA fiduciaries.

Employers often delegate some of their fiduciary duties to a committee.

Employers that sponsor an employee benefit plan wear two “hats”:

  - One for the “settlor” activities and
  - One for the “fiduciary” activities.

This applies both to retirement plans and to health and welfare plans.

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Settlor Activities vs. Fiduciary Activities

Settlor Activities

- Decision to establish plan;
- Decision to amend plan;
- Decision to merge plan;
- Decision to terminate plan; and
- Decision to add or change certain plan features (e.g., auto-enrollment, employer contributions, cover or not cover a medical procedure or prescription drug, etc.).

Fiduciary Activities

- Implementation of any of the "settlor" actions;
- Selection, oversight, and monitoring of all service providers (e.g., investment advisors, recordkeepers, and third-party administrators);
- Decisions on plan investment options;
- Decisions regarding payment of fees by participants; and
- Decisions of claim appeal.

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ERISA Fiduciary Duties

1. Duty of Loyalty—Act for the exclusive purpose of providing benefits to participants and beneficiaries and paying plan expenses.
2. Duty of Prudence—Act with the same level of care, skill, and diligence as a prudent person would in the circumstances.
3. Duty to Follow Plan Documents—Act in accordance with the plan documents.
4. Duty to Diversify—Must diversify the assets of the plan to minimize the risk of large losses.

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Plan Governance: Where Employers Fall Short

- Infrequent committee meetings
- Weak documentation practices
- Unclear delegation structures
- Lack of fiduciary training

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Selection and Monitoring Expectations

- All Plans – Selection of Service Providers
  - Regular RFP cycles
  - Documented benchmarking process is essential
- Retirement Plans – Investment Options
  - Policy statement
  - Scrutinize share class selection
  - Watch list
  - Again, documented benchmarking process is essential
- Health Plan – Compliance with Various Laws (MHPAEA, Transparency)
- Committee Minutes as Key Defense Evidence
- Outside Expertise without Conflicts of Interest

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Operational Compliance Risks

Retirement Plans

- Late remittance of employee deferrals
- Incorrect eligibility calculations
- Payroll system misalignment
- Using incorrect definition of compensation

Health and Welfare Plans

- Incorrect eligibility files
- Mismanagement of claims process or COBRA process

All Plans

- Failure to follow the terms of the plan
- Failure to amend plan documents in a timely manner

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Correcting Mistakes Proactively

IRS Employee Plans Compliance Resolution System (EPCRS) (for retirement plans)

- Self-correction opportunities expanded
- Mitigates penalties and fiduciary exposure

DOL Voluntary Fiduciary Correction Program

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Fiduciary Liability Coverage

Review policy regularly

- Are coverage limits appropriate in light of increasing litigation risk?
- Are exclusions (especially for health and welfare plans) acceptable?
- Is fiduciary coverage aligned with cyber liability coverage?
- Are HIPAA risks covered?

Practice Point: Fiduciary liability carriers don't want to learn about prescription drugs. Expect them to start asking questions designed to test whether your committee is protecting itself against PBM-related fiduciary litigation.

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Hot Fiduciary Issues: Compliance

1. Cybersecurity
2. Misuse of participant's personal information and data
3. Artificial intelligence
4. Cryptocurrencies as investment options

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Hot Fiduciary Issues: Litigation

Retirement Plans

- Excessive fee claims remain prevalent
- Target-date fund scrutiny increasing
- Forfeiture allocation challenges
- Cybersecurity-related fiduciary theories emerging

Health and Welfare Plans

- Challenges to pharmacy benefits and PBMs
- Challenges to “voluntary” benefits

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Focus: Litigation Developments

The ERISA Litigation Landscape: Why This Matters Now

A wave of ERISA class actions hit employers in 2025. Forecast is the same for 2026.

Why now? Currently, more enforcement through litigation than regulatory action.

- Increased participant expectations → litigation surge
- SCOTUS reduced the threshold for prohibited transaction claims
- SECURE 2.0 implementation is under way
- Transparency implementation is under way

Why does it matter? Fiduciary liability exposure is personal exposure.

- Escalating class action settlement values
- Operational complexity and compliance gaps
- Reputational risk tied to plan governance

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Service Provider Contracts: SCOTUS Opened the Floodgates

***Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025)**

- **Background:** A plan must not contract with a service provider unless the fees are reasonable. Technically, the contract is a "prohibited transaction" (PT) and the reasonable fee is an exception, making the contract no longer a PT.
- **Pre-*Cunningham* Rule**
  - Plaintiffs must allege ***both*** that a plan contracted with a service provider ***<u>and</u>*** that the fee was unreasonable.
- **Post-*Cunningham* Rule**
  - Plaintiff need only allege that a prohibited transaction occurred.
- **Practical Result**
  - Harder to dismiss complaints.
  - More actions, more nuisance settlement payments.

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Target-Date Fund Scrutiny

Allegations of imprudent glide paths

- Active vs. passive fee comparisons
- Custom vs. off-the-shelf considerations
- Need for documented selection rationale

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Challenges to Plan Forfeiture Practices

- **Plan Forfeiture Class Action Trends**
  - What should the employer do with Participant A's forfeited employer contributions of $24,000?
    - This question is the basis of dozens of class action lawsuits across the U.S.
  - **Conventional Wisdom – Apply Forfeitures to Reduce ER Contribution Obligation**
    - IRS Rev. Proc. 71-19 and Prop. Treasury Reg. § 1.401-7 (Feb. 2, 2023).
      - Since 1971, the IRS has allowed retirement plans *to reduce the employer's contribution obligation* with forfeited contributions.
        - This practice has never seriously been questioned until 2024.
  - **New Theory – Apply in Best Interest of Participant (Fees or Increased Benefits)**
    - More than 30 class actions have recently been filed against plans pursuing this theory.
      - Many, but not all, have been dismissed. Several have been settled for millions of dollars.
        - Litigation risk persists!
  - **Defense Against Plan Forfeiture Litigation**
    - Amend plan to **mandate** application of forfeitures to employer contribution obligation, removing fiduciary discretion over forfeitures, reducing exposure to fiduciary duty claims.

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Challenges Related to PBMs and Pharmacy Benefits

Three cases dismissed for lack of standing

- *Knudsen v. MetLife Group* – District of NJ, upheld by Third Circuit
- *Lewandowski v. Johnson & Johnson* – District of NJ, appeal pending in the Third Circuit
- *Navarro v. Wells Fargo* – District of Minnesota, likely to be appealed to the Eighth Circuit

One case just made it past the motion to dismiss

- *Stern v. JP Morgan Chase* – Southern District of NY

Legal Points

- Excessive drug prices result in harm = higher premium → not enough for standing
- Excessive drug prices result in harm = higher coinsurance → enough for standing, if plaintiff evaluates all drugs in the formulary (not just the allegedly excessive ones)
- Structure of PBM agreement allows excessive drug prices, so is a breach of fiduciary duty → SDNY says no, because pricing is a settlor function
- PBM contract is a prohibited transaction → SDNY says allegations are enough, because *Cunningham*

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Challenges Related to Voluntary Plans

- Ancillary Benefits: Accident, Critical Illness, Hospital Indemnity, etc.

- Allegation #1: Plans do not qualify for the "voluntary" exception.
  - Plans are subject to ERISA.
  - Employers have fiduciary duties with respect to the plans.
- Allegation #2: Employers (among others) have breached their fiduciary duties:
  - Failed to have competitive bidding
  - Failed to negotiate reasonable premiums
  - Failed to control excessive commissions to brokers
  - Failed to monitor loss ratios

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Focus: Compliance Developments

Regulatory Changes for Retirement Plans

- **Private Funds (Equity, Credit, and Real Estate)**
  - Exec. Order, "Democratizing Access to Alternative Assets for 401(k) Investors" (Aug. 2025)
- **Environmental, Social and Governance (ESG) & Diversity, Equity, and Inclusion (DEI)**
  - Exec. Order, "Protecting American Investors and Retirement Savings" (Dec. 2025)
    - Directs DOL to issue regulations that are "solely in the financial interest of American workers and retirees," which excludes ESG and DEI factors.
    - Litigation
- **Fiduciary Rule on Investment Advice**
  - Cases Vacated/Back to Five-Part Fiduciary Test (Mar. 2026)

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OBBB: Trump Accounts

Effective July 4, 2026

- New tax-advantaged investment vehicle for children under the age of 18.
- Operates like an IRA with an annual **contribution limit of $5,000** (indexed for inflation) ***per child***.
- Tax-favored contributions permitted, up to $2500 per employee per year, in the aggregate:
  - Employees may make ***pre-tax salary reduction*** contributions to their dependents' Trump Accounts.
  - **Employers may contribute** to the Trump Accounts of the children of an employee ***on a tax-free basis***.
- The employer contributions must be made pursuant to a **written plan document** to be eligible for favorable tax treatment. (IRS/DOL anticipate issuing rules allowing these contributions under the employer's cafeteria plan.)
- The federal government will make a $1,000 contribution to the Trump Account of a child born in 2025-2028.

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SECURE 2.0 Plan Amendment Deadline

Don’t Forget Your Plan Docs!

- **SECURE 2.0 Operational Deadlines – COME AND GONE**
  - Plans needed to comply operationally with SECURE 2.0 earlier than 2026.
    - Examples:
      - Long-Term Part-Time (LTPT) Employee Eligibility
        - SECURE Acts lowered the 401(k)/403(b) eligibility threshold for part-time employees from 1,000 hours of service to 500 hours of service over 2 consecutive years.
        - SECURE Acts required plans to permit LTPT Employee participation beginning on January 1, 2024.
- **SECURE 2.0 Plan Amendment Deadline**
  - Long-Term Part-Time Employee Amendment Deadline – Dec. 31, 2025
  - Required Minimum Distribution Age (73 (2023–32); 75 (2033+)) – Dec. 31, 2022 (extended)
  - Student Loan Matching Contributions (Optional) – December 31, 2025
  - Mandatory Roth Catch-Up – Last Day of 2027 plan year.
- **Plan Document Failure = Disqualification = IRS consequences and fiduciary failure**

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Long-Term, Part-Time Employee Eligibility

Reduced service requirement threshold

- Increased eligibility tracking complexity
- Expanded participant population
- Two different rules (3 year then 2 year)
- Potential cost and testing implications

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Required Minimum Distribution (RMD) Updates

RMD age increased

- Penalty reduced for missed RMDs
- Plan document updates required
- Administrative coordination with recordkeepers

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Mandatory ROTH Designation for Age 50+ Catch-Up

- The Setting Every Community Up for Retirement Enhancement (SECURE) Act 2.0 of 2022:
  - **Mandatory Roth Catch-Up Rule**
    - Any employee earning compensation of $150,000 **MUST** remit catch-up and super-catch-up contributions on a **ROTH** basis.
      - "Compensation" = Social Security wages reported in Box 3 of Form W-2
  - **Compliance Deadline: January 1, 2026**
      - Plan documents must be amended to reflect this new rule.
  - **Operational Issues for Employers**
    - No Roth Option, No Catch-Up for High-Income Employees
    - Monitor Payroll to Identify Roth Threshold
    - Correct Compliance Errors
      - Failure to correct = disqualification of plan's tax-advantaged status.
  - **Exemption**
    - Special section 403(b) catch-up contributions for employees of a qualified organization with 15 years of service are not subject to Mandatory Roth Catch-Up rule.

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Mental Health Parity & Addiction Equity Act (MHPAEA)

Continues to be an EBSA enforcement priority.

Focus is non-quantitative treatment limitations (NQTLs)

Required: Comparative Analysis

- Are NQTLs for mental health/substance use disorder benefits comparable to NQTLs for medical/surgical benefits?
- Comparability must be assessed for both benefits as written and benefits in operation.
- Data is required to assess "in operation."

Not a one-and-done, but also no timing specified for re-evaluation

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Service Provider Fee Disclosures for Group Health Plans

Consolidated Appropriations Act, 2026 (CAA 2026)

- Previously: Applied to certain consultants and brokers.
- Now: Applies to a service provider who reasonably expects to receive at least $1,000 in direct or indirect compensation in connection with any of the following services for a group health plan: "plan design, insurance or insurance product selection (including vision and dental), recordkeeping, medical management, benefits administration selection (including vision and dental), stop-loss insurance, pharmacy benefit management services, wellness design and management services, transparency tools, group purchasing organization agreements and services, participation in and services from preferred vendor panels, disease management, compliance services, employee assistance programs, or third-party administration services, or consulting services related to any such services."

Fiduciaries must receive or request the disclosures.

- Upon receipt, must review and evaluate.
- Documentation!

Question: What is the effective date?

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PBM Contracting

Document vendor selection process

Consider these risk-mitigation strategies:

- Engaging independent PBM consultant
- Requesting data regarding litigation-risk hotspots (a developing area)
  - Prices greater than benchmark
  - Spread pricing
  - Rebates
- Ensuring audit and data access rights
- Posing questions that mirror CAA 2026 required disclosures (next slide)

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CAA 2026 PBM Disclosures

Effective Dates

- CAA 2026 : 1/1/29 for calendar-year plans
- DOL Rules: Still in proposed form.

A taste of CAA 2026

- Large employer plans (100+) entitled to full disclosure, others get summary
- For each covered drug: compensation paid by plan to PBM, compensation paid by PBM to pharmacy, information related to pricing (WAC, AWP, etc.), total number of claims, total out-of-pocket spending
- Total rebates, fees, alternative discounts, or other remuneration received by the plan and the service provider
- For 50 drugs with the highest spending (or over $10,000): formulary placement rationale and identification of changes from the prior year
- PBM must remit 100% of rebates, fees, alternative discounts, and other remuneration to the plan

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ACA Penalty Enforcement

The IRS continues to develop its enforcement capabilities.

It has been 10 years since the ACA employer penalties began for large employers.

It is time to revisit and rebalance!

- **One Extreme**: “We don’t ever want to pay any penalties.” Coverage is offered to all full-time employees (as defined by the ACA) and is affordable for all.
- **The Other Extreme**: “We can live with the penalties, because they are cheaper than paying for coverage.” Coverage may or may not be offered. If offered, it may or may not be subsidized.
- **In the Middle**: “We don’t ever want to pay the ‘big’ penalty.” Coverage is offered to all full-time employees (as defined by the ACA) and is affordable for some. The “some” is calibrated by taking into account: cost, overall approach to benefits, impact on recruiting and retention, etc.

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Questions?

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