

Welcome Benefits Forum 2026

From Risk to Readiness

Plan Document Updates for 2026 | *Brydon DeWitt*

Executive Compensation Compliance | *Nona Massengill*

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ERISA Fiduciary Risk Management | *Brydon DeWitt*

Q&A

Plan Document Updates for 2026

Presented by: Brydon M. DeWitt



2026 Amendment Deadline



For standard plans, discretionary SECURE/SECURE 2.0 amendments generally must be adopted by **December 31, 2026**.

IRS clarification — September 16, 2026: Notice 2024-02's December 31, 2026 deadline applies to discretionary amendments. Required amendments follow the RA List timeline under Rev. Proc. 2022-40.

Required vs. Discretionary Amendments: Sept. 16 IRS Clarification

Discretionary Amendments

- **Governing authority:** Notice 2024-02 and Rev. Proc. 2022-40 § 6.02.
- **Standard-plan deadline:** December 31, 2026 for discretionary SECURE/SECURE 2.0 provisions adopted in operation.
- **Example — Section 604:** Roth employer contributions implemented in 2023 require an amendment by 12/31/2026.
- **RA List treatment:** The permissive statutory provision itself will not appear on an RA List; applicable guidance appears in Part C, with an amendment due by the end of the second plan year after listing.

Required Amendments

- **Governing authority:** Rev. Proc. 2022-40 §§ 5.03(1)(b), 5.03(2)(b), and 6.01. The remedial amendment period generally expires on the last day of the second calendar year after the RA List is issued.
- **Roth catch-up — Section 603:** Expected on the 2027 RA List; amendment deadline generally 12/31/2029.
- **Future RA Lists after final regulations:** automatic enrollment (Section 101); long-term part-time employees (SECURE § 125 / SECURE 2.0 § 112); and certain RMD provisions.
- **Regulatory timing:** Final regulations are not expected to apply earlier than the plan year beginning six months after issuance.

LOOKING AHEAD | The 2026 RA List is expected to formalize these clarifications. Guidance for an already-adopted discretionary provision will appear in Part C when applicable; plans then amend within the applicable two-year period.

Legislative Timeline: Effective Provisions & 2026 Priorities

SECURE Act (2019)

- Auto-enrollment mandate for new 401(k)/403(b) plans
- Long-term part-time employee eligibility (500+ hours/year for 3 consecutive years)
- RMD age increased from 70½ to 72
- Pooled employer plans (PEPs) authorized
- Lifetime income disclosure requirements

CARES Act (2020)

- Coronavirus-related distributions up to \$100K (penalty-free)
- Increased plan loan limits to \$100K
- RMD waiver for 2020
- Charitable contribution enhancements
- Extended rollover period for CRDs (3-year repayment)

SECURE 2.0 (2022)

- RMD age: 73 (2023), then 75 (2033)
- Roth employer contributions permitted
- Student loan matching contributions
- Emergency savings accounts (Roth, up to \$2,500)
- Expanded self-correction under EPCRS

Roth Catch-Up Contribution Requirements

SECURE 2.0 Section 603 | Effective 2026

> What's Required

- Participants with wages exceeding \$145,000 (indexed) must make catch-up contributions on a Roth basis only
- Applies to 401(k), 403(b), and governmental 457(b) plans
- Wage threshold based on prior year FICA wages from same employer
- Participants earning under threshold may still elect pre-tax or Roth catch-up

> IRS Transition Relief

- IRS Notice 2023-62 provided a 2-year administrative transition period through 2025
- Plans without Roth features were not required to add them solely for catch-ups during transition
- Full compliance required since January 1, 2026 – transition relief has ended
- **Operational compliance is required now (since 1/1/2026).** The anticipated 12/31/2029 date (based on the expected 2027 RA List) is the plan document amendment deadline only

401(a)(9) RMD Changes & Other Key Provisions

> RMD Rule Changes

- **Age increases:** 72 (SECURE Act), 73 (2023 under SECURE 2.0), 75 (starting 2033)
- **Reduced excise tax:** Penalty for missed RMDs reduced from 50% to 25% (10% if corrected timely)
- **Roth employer contributions:** Designated Roth contributions to 401(k)/403(b) no longer subject to lifetime RMDs
- **Surviving spouse election:** May elect to be treated as employee for RMD purposes

> Other Key Provisions

- **Student loan matching:** Employers may treat student loan payments as elective deferrals for matching contribution purposes
- **Emergency savings:** Roth-linked accounts capped at \$2,500, first 4 withdrawals/year penalty-free
- **Enhanced auto-enrollment:** New 401(k)/403(b) plans must auto-enroll at 3–10%, with annual 1% escalation up to 10–15%
- **Self-correction expansion:** Broader EPCRS correction authority for inadvertent failures

Plan Amendments Due December 31, 2026

Two-track framework for standard plans following the Sept. 16, 2026 IRS clarification

WHAT IS DUE 12/31/2026

- **Discretionary provisions:** All SECURE/SECURE 2.0 provisions adopted in operation that are covered by the Notice 2024-02 extension.
- **Required provisions:** Any item already included on an RA List with an amendment deadline on or before December 31, 2026.
- **Deadline protection:** SECURE 2.0 anti-cutback relief depends on adopting the amendment by the applicable deadline.

WHAT IS NOT DUE 12/31/2026

- **Roth catch-up (Section 603):** Generally 12/31/2029, based on expected inclusion on the 2027 RA List.
- **Automatic enrollment (Section 101):** Future RA List after final regulations apply.
- **LTPT (SECURE § 125 / SECURE 2.0 § 112):** Future RA List after final regulations apply.
- **Certain RMD provisions:** Future RA List after final regulations apply.

PHASED AMENDMENT APPROACH | Adopt due discretionary and RA List amendments now; calendar later required amendments as they appear on future RA Lists. Different Notice 2024-02 deadlines apply to specified collectively bargained, governmental, and public-school 403(b) plans.

Plan Amendments Due December 31, 2026

> Critical Requirement

- Amendments must be consistent with actual plan operations since 2020
- Retroactive good faith compliance: Plans should have been operating in accordance with statutory changes since each provision's effective date
- Document–operation alignment: Amendments must match how the plan has actually been administered; mismatches create qualification risk

Action item: Audit operations now to identify gaps before amending. Amendments must match how the plan has actually been administered since each provision's effective date.

Why “SECURE 3.0”?

- > Since November 2025, Congress has introduced dozens of bipartisan retirement bills positioned as building blocks for an anticipated omnibus dubbed “SECURE 3.0”
- > Not a single introduced bill (yet) – an anticipated package assembled from many individual bipartisan bills, following the model of:
 - SECURE Act (2019)
 - SECURE 2.0 Act of 2022 (Consolidated Appropriations Act, 2023)

Recurring SECURE Themes

1. Savings enhancement & increased coverage
2. Preservation / protection of lifetime income
3. Simplification & clarification of plan rules

Why SECURE 3.0 Could Be Bigger & Different

> **SECURE Act (2019)**

- 29 provisions | ~\$15.7B cost

> **SECURE 2.0 (2022)**

- 92 provisions | ~\$40B cost

> **SECURE 3.0 (anticipated)**

- 100+ provisions | ~\$120B+ cost

3x the cost of SECURE 2.0 – driven by universal auto-enrollment and expanded Saver's Match alone

What Makes It Bigger

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- **Coverage gap focus:** 57 million workers lack access to any workplace plan
- **Federal matching:** Saver's Match converts tax credit into direct deposits (much more expensive)
- **Auto-enrollment mandate:** Extending beyond new plans to all existing plans is the most discussed expansion
- **Bipartisan momentum:** Retirement remains one of the few areas with genuine cross-aisle cooperation

Outlook & Timing: Political Dynamics

> Congressional Timeline

- **2025-2026:** Relatively quiet – committees collecting bills, holding hearings, building the roster of component provisions.
- **2027:** Expected active year. Post-midterms, possibly divided Congress creates incentive for bipartisan packages. Senate Finance and House W&M historically use retirement as a vehicle.
- **End of 2028:** “Decent chance” of an enacted package per industry insiders. Could attach to year-end omnibus (the model for SECURE 1.0 & 2.0).
- **Key Dynamic:** Finding ~\$120B in “pay-fors” within existing tax-advantaged retirement provisions may slow the package or limit its scope.

Furthest-Along Vehicles

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INVEST Act (H.R. 3383)

- Passed House; CITs in 403(b) plans

Protecting Prudent Investment Act (H.R. 2988)

- Passed House; ESG/pecuniary standards

Both likely to be folded into any omnibus as “starter” provisions.

Anticipated Centerpiece Provisions

Universal Auto-Enrollment

Extend mandatory auto-enrollment (currently new plans only) to all existing 401(k)/403(b) plans. Default rate 3-6%. Would be the single most impactful coverage provision.

Federal Automatic IRA

Require employers without a plan (10+ employees) to auto-enroll workers in a federal IRA. Fills the largest coverage gap. Modeled on state-level programs (CalSavers, etc.).

Expanded Saver's Match

Broaden eligibility and increase the federal matching contribution deposited directly into accounts. Could double the number of eligible workers and triple the match amount.

Four Policy Buckets Shaping SECURE 3.0

1

Expanding Access

Federal Auto-IRA mandate; universal auto-enrollment; lower age thresholds; small-employer credits; portability between state programs

3

Easing Administration

CITs in 403(b); Form 5500 reform; lost-account registry; auto re-enrollment every 3 years; unified fiduciary standards

2

Ensuring Parity

Nonprofits & charities access to startup credits; student-loan match parity; part-time worker protections; ESG/pecuniary standards clarity

4

Empowering Participants

Expanded Saver's Match; PLESA to \$5K; lifetime income portability; emergency savings access; children's savings accounts (401Kids)

The Cost Challenge: Finding “Pay-Fors”

> Potential Pay-For Sources

- Limiting high-balance tax benefits (e.g., mega-Roth restrictions)
- Tightening RMD rules for very large accounts
- Reducing catch-up contribution limits for high earners
- Accelerating Roth conversion requirements
- Revenue-raising timing shifts (Roth = upfront revenue)

~\$120B

- Estimated 10-year cost of universal auto-enrollment + expanded Saver’s Match – roughly 3x the total cost of SECURE 2.0

Key Takeaway: The package’s scope will ultimately be defined by the size of the offsets Congress can identify – policy ambition is ahead of fiscal reality.

Executive Compensation Compliance

Presented by: Nona K. Massengill



Key Terms You'll Hear Today

Plain-language definitions

Specified Employee

A key employee of a public company (generally top ~50 officers by compensation) who must wait 6 months after departure to receive deferred compensation payouts triggered by departure.

Separation from Service

The formal end of the employment relationship under 409A – not just resignation, but a threshold, permanent intended reduction in services below 20% of prior level. Parties demonstrated intent is key.

Substantial Risk of Forfeiture

A condition meaning the employee could actually lose the benefit – must involve meaningful future service or performance requirements (critical for 457(f) plans and certain 409A exemptions).

Covered Employee under IRC section 162(m)

Officers whose pay is subject to the \$1M deduction cap: CEO, CFO and next 3 highest-paid NEOs (status attaches to future years), plus an expanded group from recent legislation (generally an additional 5 highest paid employees).

Nonqualified Deferred Compensation: Section 409A

> Common Compliance Failure #1: Timing of Deferral Elections

- Elections must be made before the year in which the compensation subject to the deferral is earned
- Initial eligibility exception: 30 days after eligibility, establishment of new plan – with respect to compensation earned after initial election
- Performance-based comp: generally, 6 months before period end; nuance is what constitutes performance-based comp for this purpose

> Common Compliance Failure #2: Permissible Distribution Events

- Only 6 triggers allowed: separation from service, disability, death, specified time, change in control, unforeseeable emergency
- No early distribution provisions permitted
- Plan terminations can result in earlier distributions with strings attached
- Short-term deferral exception to 409A can tie payment to other criteria, if the exception is satisfied

Nonqualified Deferred Compensation: Section 409A (cont.)

> Common Compliance Failure #3: Six-Month Delay (Public Companies Only)

- Payments to specified employees must be delayed 6 months upon separation from service, if payment is triggered by separation
- Annual identification procedures required
- Language must appear in the document from the outset

> Consequences & Correction

- Penalties: immediate income inclusion + 20% additional tax + premium interest, applied to all amounts deferred for the affected individual
- Documentary vs. operational failures: plan document violates 409A vs. plan administered inconsistently with its terms
- IRS correction programs: Notice 2008-113 (operational), Notice 2010-6 (documentary) – limit relief, strict eligibility

409A: Public Company Perspective

The specified employee six-month delay requirement

Example: Departing CFO of a NYSE-Listed Company

A CFO leaves in March. As a specified employee, payout of her \$500,000 SERP that is due to be paid on normal or early retirement payout cannot begin until September – a full 6-month delay from separation. The company must identify specified employees annually (typically the top 50 by compensation) and maintain written identification procedures. Failure to delay = 20% excise tax on the entire plan balance.

409A: Public Company Perspective (cont.)

> What Employers Should Know

- Maintain an annual specified employee list (update each April 1 – unless a different timetable has been formally established)
- Coordinate with payroll on 6-month delay for all departing specified employees
- Document your identification methodology in the plan document
- The delay applies to all 409A nonqualified deferred compensation – SERPs, bonus deferrals and equity-settled arrangements
 - Unless the arrangement qualifies for an exemption (e.g., short-term deferral)
- When agreements are adopted, discuss with counsel inclusion of 409A language from the outset – (6-month delay; installments as separate payments, etc.)

409A: Private Company Perspective

No specified employees – but deferral election timing can be a pitfall

Example: Family-Owned Business Offering Executives a NQDC Plan

A family-owned manufacturing company adopts a NQDC plan mid-year for its CEO and COO. They must make initial deferral elections within 30 days of becoming newly eligible, with respect to compensation earned after the date the election becomes irrevocable. Missing this window means the employees cannot defer Year 1 compensation – there is no cure for a late election.

409A: Private Company Perspective (cont.)

> Action Items for HR

- Calendar the 30-day initial election deadline for all new participants
- Ensure annual deferral elections are completed before December 31 for the coming year
- Obtain a 409A valuation before granting options; consider appropriateness for other equity-based awards
- 162(m) does not apply to private companies

> Key Differences

- No 6-month delay applies (no “specified employees” at private companies)
 - Still consider identifying installments as separate payments for 409A purposes
- 409A valuation is a best practice for options, and often used for other equity-settled awards

409A: Tax-Exempt Employers & Universities

Section 457(f) adds a second compliance layer on top of 409A

Example: University Supplemental Retirement Benefit for Select Employees

A university offers select leaders a \$200,000 supplemental retirement benefit payable after 5 years of continued service. This plan must comply with both Section 409A (timing of elections and distributions) and Section 457(f) (which generally taxes the benefit when the substantial risk of forfeiture lapses – *i.e.*, at the 5-year mark, not when paid**). The “substantial risk of forfeiture” under 457(f) has its own definition requiring substantial future services and varies somewhat from the definitions under 409A or IRC section 83(b) (“83(b)").

**Certain, limited exceptions (*e.g.*, short-term deferrals) may apply and should be evaluated with counsel.

409A: Tax-Exempt Employers & Universities (cont.)

> 457(f) Key Rules

- Taxes at vesting (when forfeiture risk lapses), not at payment, unless a limited exception applies
- “Substantial risk of forfeiture” = meaningful future service (in limited circumstances, non-competition restrictions may defer vesting – must be evaluated with counsel under current, applicable law)
- 409A also applies – must satisfy both regimes simultaneously
- Rolling risk of forfeiture extensions now limited by final regs; care to comply with 409A is also needed in this context

> General Principles

- No traditional equity compensation available for tax-exempts
- Alternatives: SERPs, matching in NQDC plans, retention bonuses, 457(f) forfeiture-conditioned plans
- IRC section 457(b) eligible plans limited to lower amounts (~\$23,500/yr)
- Work with counsel to thread the 409A/457(f) needle

Equity-Based Compensation, Limits, and Selected Additional Tax Rules

How requirements vary across public, private, and tax-exempt employers

(Public and) Private Companies: Equity Alternatives

Alternative equity structures

Example: Profits Interests in an LLC-Structured Company

A PE-backed healthcare services company (structured as an LLC taxable as a partnership) grants profits interests to its management team. These provide a share of future appreciation above a “participation threshold” without requiring the executive to purchase equity. Taxed under partnership rules (Rev. Proc. 93-27) – generally no income at grant if properly structured. Must navigate 409A for any liquidity features.

(Public and) Private Companies: Equity Alternatives (cont.)

> Equity Alternatives for Private Companies

- Profits interests (LLC/partnership)
- Phantom equity / Shadow stock
- Stock Appreciation Rights (SARs)
- Restricted (founder) stock
- Restricted LLC units
- Must obtain 409A valuation for options and SARs – safe harbors include independent appraisal

> Section 83(b) Elections — (Public and) Private

- Strict 30-day deadline after property is transferred – engage counsel as early as possible, including before grant
- Allows taxation at the date of grant, and capital gains period to commence at grant
- S corporations may require an 83(b) election
- Relevant to transfers of property (restricted stock, profits interests), not promises to deliver property later
- Take care in transactions, new investor requirements , and where rollover equity is offered

Tax-Exempt Employers: Compensation Design

No equity compensation – but significant retention tools available

Example: University President Compensation Package

A university president receives base salary of \$600K plus a supplemental retirement plan worth \$300K/year, vesting after 5 years of service. The \$300K annual credit is subject to both 457(f) (generally, taxed at vesting) and 4960's excise tax analysis (21% employer excise on compensation >\$1M). The board must structure the package to manage both the executive's 457(f) tax timing and the university's potential 4960 liability.

Tax-Exempt Employers: Compensation Design (cont.)

> Section 4960 Excise Tax

- 21% excise tax on compensation >\$1M paid by tax-exempt organizations
- Tax is on the employer, not the employee
- Also applies to excess parachute payments
- OBBB expanded the application of the rule to all current and former employees, but IRS guidance indicates some limits will apply to the lookback for the period from 2017 - 2025
- Parallel to 162(m) for public companies but works differently

> 162(m) vs. 4960 Comparison

- 162(m) disallows a deduction for public companies
- 4960 imposes an excise tax on tax-exempts
- Both use a \$1M threshold but different mechanics
- 4960 generally focuses on vesting, rather than payment timing, for counting compensation against the limit
- 4960 generally measures compensation for the calendar year that ends in the tax-exempt employer's fiscal year

Equity Design: Public Companies

Design considerations

> Performance-Based Awards

- Layered or more than one performance objective for various elements of total compensation
- Multi-year performance periods (3+ years)
- Relative vs. absolute measurement
- Payout curves with caps at 200%

> RSU Vesting Structures

- What is the appropriate schedule (3 years, 4 years)
- Back-weighted for retention
- Double-trigger CIC acceleration is common – evaluate the specifics of the service-based trigger in the context of the plan, institutional shareholder expectations and organizational goals and planning

> Broad-Based Programs

- ESPPs offer equity opportunity beyond C-suite
- Must be shareholder approved if certain tax favored features are desired
- Retention equity for key talent
- Annual refresh grants common

Equity Design Trends: Private & Tax-Exempt

Alternative structures when traditional stock isn't available

> Private Companies

- **Profits interests (LLC structures):** Share of appreciation above threshold; favorable tax treatment under Rev. Proc. 93-27, other applicable tax law and guidance
- **Phantom equity / value appreciation rights:** Cash-settled; avoids dilution; subject to 409A timing rules unless a particular 409A exemption applies
- **Valuation Challenges:**
 - 409A valuation for exercise price of options, other appreciation rights, unless certain exceptions apply
 - Safe harbors: independent appraisal (as of a date no more than 12 months before grant date or other applicable date and no significant corporate changes)

Equity Design Trends: Private & Tax-Exempt (cont.)

> Tax-Exempt / Universities

- **Retention bonus structures:** Lump sum paid after defined service period; subject to 457(f) timing
- **Milestone-based payouts:** Tied to key organizational goals / targets, and substantial future services
- **457(f) forfeiture-based deferred comp:**
 - Requires genuinely substantial future service (final regs 2020)
 - Short-term deferrals (payment to be made within a defined, limited period of time post-vesting) can bypass both 457(f) and 409A – must draft carefully

280G — Private and Public Companies

> Private Companies

– 280G General Tax Consequences

- If compensation contingent on a change in control or closely associated event equals at least three times historic compensation over the five years before the closing year, excise tax (executive) and deduction limit (employer) may apply

– Types of Compensation

- Cash bonuses, severance, accelerated vesting, change in control-related equity triggers, etc.

– Potential Exceptions

- Partnerships (no public company parent), S Corporations, Shareholder Approval

– Caution

- Each element of the above is nuanced; early planning (even if no transaction is being contemplated) with tax counsel or other tax advisors is key

280G — Private and Public Companies (cont.)

> **Public Companies**

- Similar tax consequences, types of compensation, but no exceptions are available
- **Caution**
 - Design-based provisions, restructuring and other mitigation should be evaluated and can be used as applicable, with parties working in consultation with tax counsel and accountants

Tax Considerations: Side-by-Side

	Public	Private	Tax-Exempt
Deduction limit	162(m): \$1M cap	No limit (no 162(m))	4960: 21% excise >\$1M
409A applies?	Yes – full rules	Yes – no special exemption	Yes + 457(f) overlay
Equity options	ISOs, NQSOs, Restricted Stock, RSUs, PSUs	Profits interests, options, phantom	None
280G	Yes	Yes – determine whether exceptions or shareholder vote is available	No
83(b) available?	Yes (restricted stock)	Yes (restricted stock)	N/A (no equity)

What does this mean for your organization? Identify which column applies to you, then focus on those specific compliance requirements.

Next Steps: Action Items for Employers

> **Audit Your Deferral Elections**

- Review timing of all NQDC elections; ensure initial elections are within the 30-day window and annual elections locked before December 31.

> **Review Clawback Policies**

- Public companies: confirm Dodd-Frank compliance, contractual rights
- Private companies: consider a voluntary policy – PE sponsors increasingly expect it; must tailor to individual compensation structure; consider giving Board or Managers contractual rights and whether award agreements otherwise cover.

> **Check Your 409A Valuations**

- Private companies: ensure independent appraisals are current (12-month safe harbor). Any material event requires a new valuation.

> **Map your tax exposure**

- Public companies: 162(m) covered employee list. Tax-exempt: Section 4960 analysis for compensation >\$1M. Both: model excise/deduction impact.

Next Steps: Reminders for Employers



409A penalties apply to ***all*** amounts deferred under the plan, not just the portion that failed



A single operational error can trigger a 20% excise tax plus interest on the executive's entire deferred compensation balance



The cost of getting it wrong far exceeds the cost of getting it right

Virginia Paid Leave Law Developments

Presented by: Matthew T. Anderson



Virginia Paid Family & Medical Leave: Overview

SB 2/HB 1207 | Signed April 22, 2026 | Va. Code Ann. §§60.2-800 to 60.2-818

> Program Structure

- 16th state to provide PFML for private-sector employees
- Contributions start 4/1/2028; Claims can be made 12/1/2028
- State-administered; shared employer/employee payroll contributions
- Private plan opt-out available
- 11+ employees: must remit both portions
- Smaller employers: exempt from employer contribution

Up to 12 weeks
paid leave per year

Up to 80%
wage replacement (capped)

120 days
job protection threshold

Virginia Paid Family & Medical Leave: Overview

> Covered Leave Reasons

- Birth/placement of child
- Employee's own serious health condition
- Care for family member with serious health condition
- Care for covered service member
- Qualifying military exigencies
- Safe time leave (domestic violence, sexual assault, stalking)

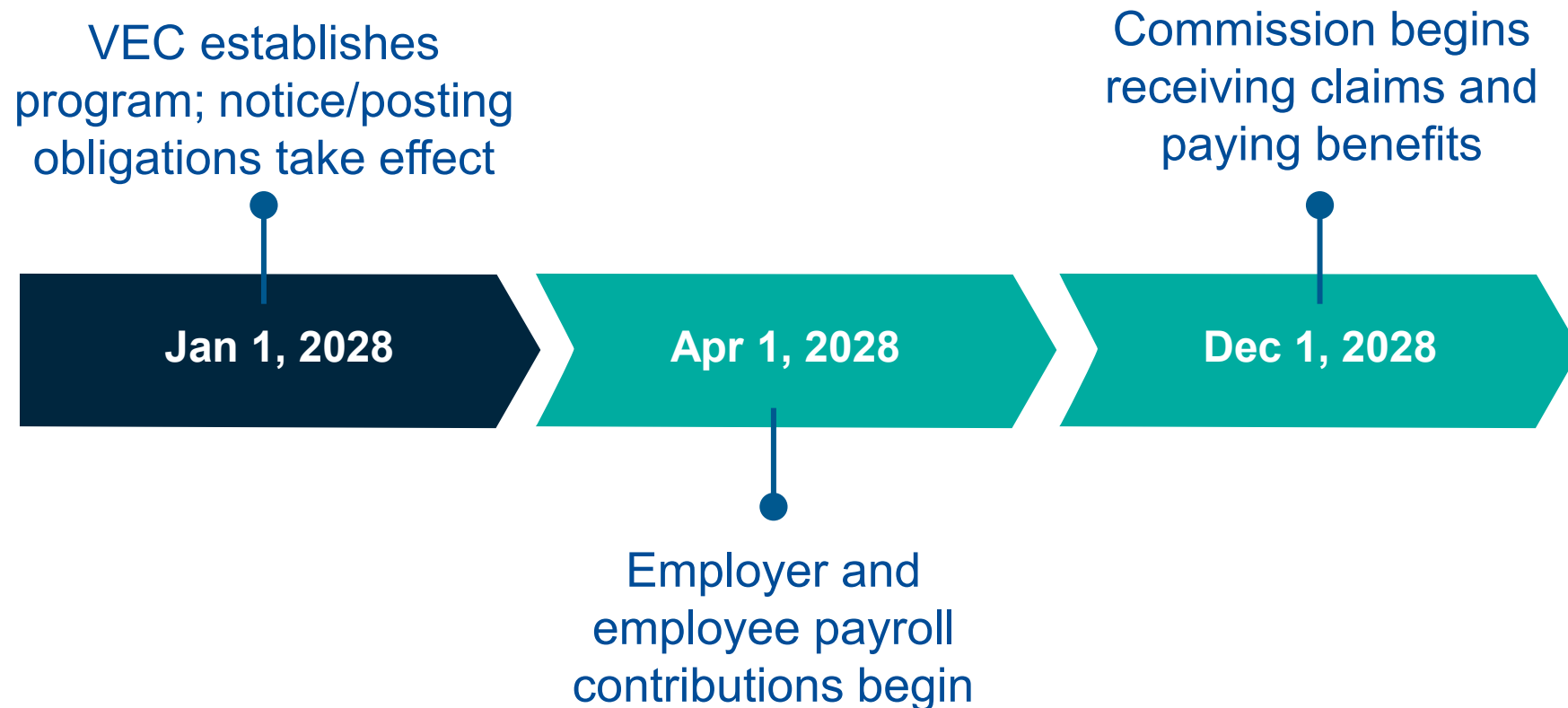
Up to 12 weeks
paid leave per year

Up to 80%
wage replacement (capped)

120 days
job protection threshold

Virginia PFML: Compliance Timeline

- > Planning window is **now** — update payroll, revise leave policies, train HR before 2028



Virginia PFML: FMLA Comparison

Feature	Federal FMLA	Virginia PFML
Coverage	50+ employees within 75 miles	If the employer pays \$1,500 in wages/quarter OR has 1 employee
Pay	Unpaid; may substitute accrued leave	Paid — up to 80% wage replacement
Job Protection	12 months + 1,250 hours	After 120 days of employment
Leave Reasons	Birth/placement, health, exigency, caregiver	Same as FMLA + safe time leave
Coordination	N/A	Runs concurrently; coordinate to avoid stacking

Virginia Paid Sick Leave: Key Provisions

HB 5/SB 199 | Signed May 20, 2026 | Va. Code Ann. §§40.1-33.6:1 to 40.1-33.6:7

- > 21st state with a general paid sick leave mandate
- > Applies to private employers, phased in by size
- > Accrual: 1 hour per 30 hours worked, up to 40 hours annually
- > Unused leave carries over to next year
- > Covered uses: own illness/injury/preventive care, family member care, domestic violence/sexual assault/stalking absences

Virginia Paid Sick Leave: How it Differs from PFML

> Purpose:

- Short-term, day-to-day needs vs. extended leaves for serious conditions

> Funding:

- Employer-funded accrual (no payroll tax) vs. joint payroll contributions

> Duration:

- 1 hour/30 hours worked (max 40 hours/year) vs. up to 12 weeks wage replacement

> Administration:

- Employer-administered vs. VEC (with private plan opt-out)

Virginia Paid Sick Leave: Compliance Deadlines



Employers with
50+ employees
must comply



Employers with
25+ employees
must comply



All employers
with at least
1 employee
must comply

Enforcement - Civil fines and private right of action

Action Items For Employers

- ☐ Audit current PTO/sick leave policies
- ☐ Implement accrual tracking systems
- ☐ Train managers on new requirements

Paid Leave Law Changes Across the States

New Programs Launched In 2026

> Delaware

- Healthy Delaware Families Act; benefits January 1, 2026; up to 12 weeks birth/adoption/foster, 6 weeks caregiving; 10+ employees

> Minnesota

- FMBI Program, January 1, 2026; up to 12 weeks, 20 weeks total/year; all employers

> Maine

- Claims processing by May 1, 2026; up to 12 weeks/benefit year

Paid Leave Law Changes Across the States

Expansions & Amendments

> Colorado

- +12 weeks NICU leave (January 1, 2026)

> Rhode Island

- TCI 6→8 weeks; added sibling/bone marrow/organ

> Washington

- Job restoration expanded to 25+ (phasing to 8+)

> New Jersey

- FLA threshold 30→15 employees

> Hawaii

- Military exigency leave (July 1, 2026)

Paid Leave Law Changes Across the States

New Laws Enacted (Future Effective)

> Virginia PFML

- Contributions April 2028, benefits December 2028

> Virginia Paid Sick Leave

- Phased July 2027 – January 2029

Paid Leave Law Changes Across the States

Other Developments

> State

- Oklahoma

- Paid maternity, public school employees (July 2026)

- Mississippi

- 6 weeks paid parental for state employees

- Maryland

- Final PFML regs March 2026; deductions January 2027, benefits January 2028

> Federal

- No new mandate; Section 45S tax credit made permanent (One Big Beautiful Bill Act)

Pay Transparency Law Changes

Jurisdiction	Status	Key Requirements
Virginia	New, effective July 1, 2026	Salary range in all postings; salary history ban; AG enforcement (\$1K/\$5K); private right of action; 15-day cure
California	Amendment, January 1, 2026	SB 642 revised “pay scale” definition; 15+ employees must include pay scale in postings
Maine	New, effective July 29, 2026	10+ employees; pay range in postings; disclose on request; 3-year records
Connecticut	Amendment, October 1, 2026	Wage range + benefits in all postings; extends to out-of-state positions reporting to CT
Washington	Regs, effective May 22, 2026	Clarify posting/applicant definitions; allow fixed-wage disclosure; 5-day correction window
Delaware	Enacted, effective September 26, 2027	26+ employees; compensation range + benefits in postings
Federal	—	No federal pay transparency legislation; no salary range disclosure requirement

ERISA Fiduciary Risk Management

Presented by: Brydon M. DeWitt



401(k)/403(b) Fee Litigation

- > **2026 update:** Courts continue to focus on fiduciary process, comparator evidence, standing, and arbitration limits. The wave of excessive fee cases continues post-Hughes v. Northwestern (2022) and Cunningham v. Cornell (2025).
 - **Recordkeeping fees:** Claims of excessive per-participant charges; comparison to market rates and failure to solicit competitive bids
 - **Investment management fees:** Challenges to high-cost actively managed funds when lower-cost index alternatives exist
 - **Proprietary fund claims:** Use of affiliated investment products allegedly benefiting the fiduciary over participants
 - **Failure to monitor:** Allegations of inadequate fiduciary processes for reviewing and replacing underperforming investments
 - **Settlement trends:** Large settlements driving continued filings; smaller plans now targeted alongside mega-plans

401(k)/403(b) Fee Litigation

> Defense Strategies

- Document fiduciary process
- Benchmark fees regularly against industry data
- Conduct competitive RFPs for recordkeeping services
- Maintain investment policy statement with clear monitoring criteria
- Consider independent fiduciary advisors

Hughes v. Northwestern (2022)

Supreme Court held that offering a mix of prudent and imprudent options does not shield fiduciaries from liability

Hughes v. Northwestern Univ., 595 U.S. 170 (2022)

> **Supreme Court:** Participant choice does not excuse fiduciary failure to monitor menu options

> **Facts**

- Northwestern DC plans let participants choose from administrator-selected menu
- Participants alleged: (1) failure to monitor/control recordkeeping fees; (2) higher-cost retail share classes where materially identical institutional classes existed; (3) excessive options causing confusion
- Seventh Circuit dismissed, reasoning that participant choice and availability of low-cost options defeated the claims

Hughes v. Northwestern Univ., 595 U.S. 170 (2022) (cont.)

> Holding & Reasoning

- **Held:** Seventh Circuit erred; participant choice and a broad menu do not shield fiduciaries from liability
- **Tibble standard:** Fiduciaries must independently evaluate each menu option and remove imprudent investments within a reasonable time
- **Context-specific:** ERISA prudence is evaluated in context; courts must consider the range of reasonable judgments, not just whether some options were adequate
- **Practical impact:** Reinforced that menu design is a fiduciary act subject to ongoing monitoring, not a one-time selection

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

- > **Supreme Court:** Prohibited-transaction exemptions are affirmative defenses, not pleading elements
- > **Facts**
 - Cornell 403(b) participants alleged plans engaged in prohibited transactions with TIAA and Fidelity for recordkeeping services
 - Plaintiffs claimed plans paid more than reasonable fees under § 406(a)(1)(C)
 - Lower courts required plaintiffs to plead around § 408/§ 1108 exemptions at the complaint stage

Cunningham v. Cornell Univ., 145 S. Ct. 1020 (2025) (cont.)

> Holding & Reasoning

- **Held:** Plaintiffs alleging § 406(a)(1)(C) need only plead the statutory prohibited-transaction elements; § 408 exemptions are affirmative defenses for defendants
- **Statutory structure:** § 1106 defines prohibited transactions and § 1108 separately sets out exemptions; treating 21+ statutory and regulatory exemptions as pleading elements would be impractical
- **Case management:** District courts can manage meritless suits via Rule 7 replies, Article III screening, discovery limits, Rule 11 sanctions, and ERISA fee shifting
- **Practical impact:** Prohibited-transaction claims will be easier to plead; early exemption-defense preparation is now essential

2026 Appellate Decisions: Process & Comparators

Third and Eleventh Circuits address fiduciary process and comparator evidence standards

> In re Quest Diagnostics (3d Cir. June 22, 2026)

- **Facts:** 401(k) participants challenged retention of Fidelity Freedom Funds and Invesco real-estate fund based on underperformance, risk, and IPS arguments
- **Held:** Affirmed summary judgment for Quest; ERISA is mostly concerned with process, not outcomes
- **Reasoning:** Quest used outside advisors, held quarterly committee meetings, maintained IPS frameworks, reviewed data, met with fund managers, and followed up; fiduciary reliance on advisors must be justified and informed, not reflexive
- **Lesson:** Poor performance alone does not require drastic or sudden action when process is documented

2026 Appellate Decisions: Process & Comparators (cont.)

> **Johnson v. Russell / Royal Caribbean (11th Cir. August 17, 2026)**

- **Facts:** Royal Caribbean replaced Vanguard TDFs with Russell TDFs after RFP; Russell had “to” glidepath, emerging-markets tilt, high pricing flagged in RFP, low client adoption, negative Morningstar rating; later underperformed Vanguard and American Funds
- **Held:** Reversed summary judgment; no universal apples-to-apples comparator requirement
- **Reasoning:** If challenged features themselves allegedly make the investment imprudent, strict comparator requirement is inappropriate; objective imprudence inquiry is fact-intensive, measured against a hypothetical prudent fiduciary with like aims
- **Lesson:** Document rationale for fund transitions, including why differentiating features are prudent

Arbitration & Class Waiver Limitations

Effective vindication and representative § 502(a)(2) fiduciary claims

> **Pover v. Capital Group (9th Cir. July 30, 2026)**

- **Facts:** Participant alleged Capital Group retained underperforming funds to collect transaction fees; plan had arbitration clause with waiver of class, collective, or representative claims
- **Held:** Waiver unenforceable under effective-vindication doctrine where it prevented § 502(a)(2) representative claims on behalf of the plan for plan-wide relief
- **Reasoning:** § 409 and § 502(a)(2) create a cause of action to enforce fiduciary duties owed to the plan; such claims must be brought in a representative capacity; blocking them eliminates the statutory remedy
- **Note:** Dissent argued the waiver should be read more narrowly

Arbitration & Class Waiver Limitations (cont.)

> **Duke v. Luxottica (2d Cir. February 5, 2026)**

- **Facts:** DB plan participant alleged use of outdated actuarial assumptions for J&S annuity calculations reduced monthly payments; plan included mandatory individual arbitration
- **Held:** Standing to seek plan reformation under § 502(a)(2), but not monetary repayment to plan; effective-vindication doctrine barred individual arbitration of representative claim
- **Reasoning:** Monetary payments to a DB plan would not redress participant injury (employer bears shortfalls/receives surpluses); individual-only arbitration would materially interfere with the statutory right to pursue representative plan relief

Key caveat:

Arbitration clauses remain useful, but individual-only waivers that block representative § 502(a)(2) remedies face significant enforceability risk. Not all ERISA arbitration clauses are invalid.

ERISA Fiduciary Cases: Holdings & Lessons

Concise comparison of 2022–2026 risk-management authorities with enhanced reasoning

Case	Key Holding & Reasoning	Fiduciary Lesson
Hughes v. Northwestern S. Ct. (2022)	Participant choice and broad menus do not cure imprudent options; Tibble requires ongoing independent evaluation.	Monitor every menu option; remove imprudent investments within a reasonable time.
Cunningham v. Cornell S. Ct. (2025)	§ 408 exemptions are affirmative defenses; plaintiffs need only plead prohibited-transaction elements.	Prepare exemption defenses early; document § 408 compliance before litigation.
In re Quest Diagnostics 3d Cir. (2026)	Prudent process defeated underperformance claims; fiduciary reliance on advisors must be justified, not reflexive.	Document advisor review, IPS criteria, committee meetings, and follow-up actions.
Johnson / Royal Caribbean 11th Cir. (2026)	No universal apples-to-apples comparator; imprudence can be shown through the investment's own features.	Document why fund transitions are prudent despite differentiating features (fees, glidepath, adoption).

ERISA Fiduciary Cases: Holdings & Lessons (cont.)

Case	Key Holding & Reasoning	Fiduciary Lesson
Matula v. Wells Fargo 8th Cir. (2026)	Forfeiture challenge dismissed; concrete account injury required even for plan-level violations.	Tie forfeiture decisions to plan terms; ensure plaintiffs face concrete-injury threshold.
Kelly v. Altria 4th Cir. (2026)	Ministerial recordkeeper communications are not fiduciary advice; ASA is a plan document under § 104(b)(4).	Train vendors to avoid advice-like statements; review document request protocols.
Pover / Duke 9th & 2d Cir. (2026)	Individual-only arbitration may not bar representative § 502(a)(2) claims under effective-vindication doctrine.	Review arbitration/class-waiver drafting; preserve representative remedy pathways for ERISA claims.

Risk Management Takeaways

Key action items from 2022–2026 fiduciary case law

- > **Process documentation:** Maintain detailed records of committee deliberations, advisor recommendations, IPS criteria, and fund monitoring; justified reliance on advisors, not reflexive deference (Quest)
- > **Fee benchmarking:** Conduct regular competitive RFPs; document market comparisons for recordkeeping and investment fees (Hughes, Cunningham)
- > **Fund transition diligence:** Document rationale for fund replacements with performance data, fee analysis, glidepath considerations, and participant impact; note differentiating features and why they are prudent (Johnson/Royal Caribbean)
- > **Forfeiture policies:** Confirm plan document provisions align with IRS rules; tie decisions to plan terms and concrete participant impact to survive standing challenges (Matula)

Risk Management Takeaways (cont.)

- > **Recordkeeper oversight:** Distinguish ministerial administration from fiduciary advice; train call centers and benefits staff; review document request procedures under § 104(b)(4) (Kelly v. Altria)
- > **Prohibited transaction compliance:** Prepare exemption defenses early under § 408/§ 1108; ensure service arrangements are documented before litigation (Cunningham)
- > **Arbitration clauses:** Representative § 502(a)(2) fiduciary claims may not be forced into individual-only arbitration; review dispute resolution provisions for effective-vindication compliance (Pover, Duke)
- > **Menu monitoring:** Independently evaluate every investment option; do not rely on participant choice or menu breadth as a defense (Hughes)

ESG Guidance & Alternative Investments

Evolving regulatory landscape for ERISA plan investments

> **ESG Investing Guidance**

- DOL 2022 Rule: Affirmed that ESG factors may be considered when “relevant to the risk-return analysis”
- Political volatility: Regulatory back-and-forth between administrations creates compliance uncertainty
- Prudence standard: ESG considerations must tie to financial materiality under ERISA’s duty of prudence
- Proxy voting: Updated guidance on exercising shareholder rights in ESG contexts

ESG Guidance & Alternative Investments (cont.)

> **Alternative Investments**

- Growing interest in private equity, hedge funds, and real assets in DC plans
- DOL Information Letter (2020): Private equity may be appropriate in diversified vehicles like target-date funds
- Fiduciary due diligence: Heightened requirements for valuation, liquidity, and fee transparency
- Risk considerations: Illiquidity, valuation complexity, and higher fee structures require robust monitoring

DOL Proposed Rule: Six-Factor Safe Harbor

March 30, 2026 | Comments closed June 1, 2026

The DOL proposed regulations provide that if the fiduciary objectively, thoroughly, and analytically considers applicable factors, the fiduciary's judgment is presumed reasonable under ERISA § 404(a)(1)(B).

Factor	Fiduciary Focus
Performance	Compare similar alternatives; evaluate expected risk-adjusted returns over an appropriate time horizon, net of anticipated fees and expenses.
Fees	Determine fees/expenses are appropriate in light of expected risk-adjusted returns and other value (diversification, volatility reduction, lifetime income features); lowest cost is not automatically required.
Liquidity	Confirm liquidity is sufficient for plan-level and participant-level needs, including reallocations, loans, hardship withdrawals, distributions, and redemptions.
Valuation	Confirm timely and accurate valuation processes, especially for assets lacking public market prices; independent and conflict-free valuation is important.
Benchmarking	Use a meaningful benchmark with similar mandates, strategies, objectives, and risks; no one benchmark fits all alternatives.
Complexity	Assess whether fiduciaries have the expertise and capacity to understand and monitor the option; engage qualified advisers or managers when needed.

Six Factors vs. 2021 DOL Guidance

Proposed Rule Factor	2026 Proposed-Rule Posture	2021 DOL Guidance Warning
Performance	Risk-adjusted return analysis may support alternatives, especially where diversification/low correlation improves outcomes.	Do not treat the 2020 Information Letter as an endorsement of PE/alternatives; prudence must be plan- and product-specific.
Fees	Higher fees may be justified by value proposition; lowest-cost option not required.	Complex fee structures require expertise; fiduciaries must understand whether costs are reasonable for DC participants.
Liquidity	Must be adequate for plan and participant transactions.	DC plans have participant access/reallocation needs that differ from DB plans; illiquidity requires caution.
Valuation	Must support timely, accurate, preferably independent/conflict-free valuation.	PE/alternatives can be difficult to value; many fiduciaries may lack resources to evaluate these issues.
Benchmarking	Requires meaningful comparator(s) with similar objectives, strategies, and risks.	Fiduciaries should not rely on generalized claims about alternatives; comparative analysis is essential.
Complexity	Fiduciary must have capacity to understand/monitor or hire qualified help.	Small-plan fiduciaries are generally unlikely to be suited to evaluate PE absent specialized expertise.

Note: DOL rescinded the 2021 Supplemental Statement in 2025; comparison shown to highlight the policy shift.

Forfeitures Litigation

Recent wave of lawsuits challenging how plan sponsors use forfeited plan balances

- > **Offset employer contributions:** Using forfeitures to reduce employer contribution obligations rather than benefiting participants directly
- > **Pay plan expenses:** Applying forfeited amounts to cover plan administrative costs
- > **Reduce participant fees:** Allocating forfeitures to reduce fees assessed against participant accounts
- > **Proposed DOL regulations:** IRS proposed rules (2023) would require forfeitures to be used within 12 months; may limit employer flexibility

Forfeitures Litigation (cont.)

> Key Litigation

- *Perez v. Qualcomm; Matula v. Wells Fargo* (8th Cir. 2026)
 - Plaintiffs allege that using forfeitures to offset employer contributions violates ERISA's duty of loyalty. The plan document permitted multiple uses, but the employer chose the method benefiting the company. 2026 update: In *Matula v. Wells Fargo* (8th Cir. May 12, 2026), the Eighth Circuit affirmed dismissal for lack of Article III standing where the complaint did not allege actual injury to the participant's account, but remanded without prejudice. Concrete injury remains a threshold issue.

Practical Implications:

- Review plan document forfeiture provisions
- Document fiduciary decision-making process
- Consider participant-favorable uses when permissible

Voluntary Benefits Litigation

ERISA Preemption & Fiduciary Status Questions

ERISA Preemption Issues

Voluntary benefits programs (hospital indemnity, accident insurance, critical illness) may or may not be ERISA plans depending on employer involvement, endorsement, and contributions.

Fiduciary Status

Questions about whether employers act as fiduciaries when selecting, endorsing, or facilitating enrollment in voluntary benefit products. Level of employer involvement is key.

Voluntary Benefits Litigation (cont.)

ERISA Preemption & Fiduciary Status Questions

Safe Harbor Requirements

DOL safe harbor for payroll-deduction programs: employer must not endorse, contribute to, or receive consideration from the program beyond reasonable compensation.

Litigation Trends

Claims alleging employers received undisclosed compensation or kickbacks from insurers for steering employees to specific voluntary products. Growing plaintiff activity. 2026 update (Kelly v. Altria, 4th Cir. Aug. 10, 2026): Recordkeepers performing ministerial functions are not fiduciaries. Distinguish administration from advice; train call center staff; maintain document request protocols.

Voluntary Benefits: Safe Harbor & Plaintiff Theories

ERISA exemption elements and reported fiduciary breach allegations

> DOL Safe Harbor: 29 C.F.R. § 2510.3-1(j)

- (1) No contributions: No employer or employee-organization contributions to the program
- (2) Voluntary: Employee participation is completely voluntary
- (3) Limited role: Employer's sole functions, without endorsing the program, are permitting insurer publicity, collecting premiums via payroll deduction, and remitting premiums
- (4) No consideration: Employer receives no cash or other consideration other than reasonable compensation, excluding profit, for administrative services actually rendered
- All four required: Non-endorsement is the key concept; evaluated from the perspective of an objectively reasonable employee
- Endorsement risks: Selecting exclusive insurer/terms, urging participation, describing as "company benefits," performing claims/admin functions, restricting eligibility, receiving non-de minimis economic benefits

Voluntary Benefits: Safe Harbor & Plaintiff Theories

> **Reported Plaintiff Theories (Confirm Against Complaints)**

- Employers/fiduciaries selected, endorsed, or promoted voluntary-benefit products in violation of safe harbor
- Undisclosed compensation: employers or brokers/consultants received commissions, revenue sharing, or insurer-paid compensation tied to enrollment or premiums
- Failure to prudently evaluate cost/value of voluntary products and monitor vendor compensation arrangements
- Breach of loyalty by favoring employer/vendor economics over participant interests
- Prohibited transactions involving unreasonable compensation or conflicted service arrangements
- See also Winsor v. Sequoia (9th Cir. 2023): welfare-plan commission claims dismissed for lack of Article III standing where plaintiffs failed to plead higher contributions caused by challenged conduct

Note: Plaintiff theories are based on publicly reported allegations. Complaint-specific assertions and case status should be confirmed against actual filings before external use.

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