WORKSHOP D

ERISA BASICS FOR EMPLOYMENT LAWYERS

Submitted By:

STANLEY BAUM, ESQ.
Cary Kane, LLP
New York, New York

SUSAN E. BERNSTEIN, ESQ.
Schulte Roth & Zabel LLP
New York, New York

ERISA BASICS FOR EMPLOYMENT LAWYERS

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") is a federal law that governs the administration of employee benefit plans. ERISA does not require employers to sponsor or maintain retirement or welfare plans, but if an employer chooses to sponsor an employee benefit plan, then ERISA applies. The federal statute sets forth minimum standards that apply to: (i) ensure that plans are established and maintained in a fair and nondiscriminatory manner, (ii) regulate the conduct that is expected of fiduciaries, (iii) direct the information that must be reported to the government and to participants, and (iv) ensure the receipt and protection of benefits. ERISA is administered and enforced by the U.S. Department of Labor (the "DOL"). The DOL has broad authority to audit and examine employee benefit plans.

I. PLANS COVERED BY ERISA

A. Types of Plans Subject to ERISA

Pension plans and welfare plans are generally subject to ERISA.

1. Pension Plans

A pension plan is any plan, fund, or program which is established or maintained by an employer, or by an employee organization, and which: (i) provides retirement income to employees or (ii) results in a deferral of income by employees until at least termination of employment. Section 3(2)(A) of ERISA.

There are generally three types of pension plans:

- a defined benefit pension plan, under which a participant's benefit is determined under a formula set forth in the plan, and is not dependent on the level of plan assets.
- a defined contribution pension plan which is a money purchase plan, under which a participant's benefit is based on the balance of an individual account maintained for him or her under the plan, and under which the employer is required to make an annual contribution on the participant's behalf based on a plan formula (e.g., 10% of pay).
- a defined contribution pension plan, not a money purchase plan, under which a participant's benefit is based on the balance of an individual account maintained for him or her under the plan, and to which the employer may, but is NOT required to, make contributions (these include 401(k) plans, profit-sharing plans, stock bonus plans and ESOPS).

Notes: There are "hybrid" versions of these pension plans, such as a cash balance plan and target benefit plan, and other arrangements that will fall into this definition of pension plan. Non-qualified plans of deferred pay, restricted stock, incentive stock options and nonstatutory stock options are not pension plans, unless they are part of a program which defers income until termination of employment.

The balance of the individual account of a participant in a defined contribution plan consists of the amounts contributed to the plan on his or her behalf, plus (or minus) any income (or losses) and forfeitures allocated to the account, less any administrative expenses charged to the account.

2. Welfare Plans

A welfare plan is any plan, fund, or program which is established or maintained by an employer, or by an employee organization, and which, through the purchase of insurance or otherwise, provides to participants and beneficiaries: (i) medical, surgical, or hospital care or benefits, (ii) benefits in the event of sickness, accident, disability, death or unemployment, or (iii) vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, or prepaid legal services. Section 3(1) of ERISA.

Severance benefits, dental care, vision care, group term life insurance, health flexible spending accounts, prescription drug, and employee assistance programs are also generally considered to be welfare plans subject to ERISA.

B. Exemptions from ERISA

1. Statutory Exemptions

A plan is NOT subject to ERISA if it is-

- a governmental plan;
- a church plan which has not elected ERISA coverage;
- maintained solely to comply with workmen's compensation, unemployment compensation or disability laws;
- maintained outside of the United States and primarily covers nonresident aliens; or
- an unfunded excess benefit plan ("unfunded" means no funds are set aside from employer creditors; "excess benefit" means benefits in excess of Internal Revenue Code (the "Code") limits).

Section 4(b) of ERISA.

2. Regulatory Exemptions

Severance Plan. An arrangement will NOT be treated as a pension plan, solely because it pays severance benefits upon termination of employment, so long as: (i) the payments are not contingent on the employee's retiring, (ii) the total amount of the payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination, and (iii) the payments to the employee are completed, generally, within 24 months after the termination of the employee's service. ERISA Reg. Sec. 2510.3-2(b).

Payroll Practice. An arrangement will NOT be treated as a welfare plan, if it is a "payroll practice." Payroll practices include the following-

- payment by an employer of compensation on account of work performed by an employee, including compensation at a rate above the normal rate, in extraordinary circumstances such as overtime pay, or shift, holiday or weekend premiums;
- payment of an employee's normal compensation, out of the employer's general assets, when the employee is physically or mentally unable to perform his or her duties, or is

otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); or
- payment of compensation, out of the employer's general assets, when the employee performs no duties (such as on holidays or vacation, or while performing military or jury duty).

ERISA Reg. Sec. 2510.3-1(b).

3. Case Law and Other Exemptions

An arrangement will not be a pension or welfare plan unless it has an ongoing administrative scheme for determining and administering eligibility for, amount of, and funding for benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Thus, a one-time payment, e.g., for severance, will generally not be a pension plan.

Note: Similarly, an arrangement will not be a pension or welfare plan unless the employer, or employee organization, has discernable involvement with the establishment or maintenance of the plan. Oddly, the terms "employer" and "employee" are not defined with any precision by the statute. See Section 3(5) and (6) of ERISA. For purposes of ERISA, an "employee" is identified as such by using traditional agency law criteria for identifying master-servant relationships. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

Note: ERISA basically provides minimum standards for plan terms and conditions, when a plan is established voluntarily. Nothing in ERISA requires an employer to create and offer a plan.

II. REPORTING AND DISCLOSURE

A. The Plan Administrator

In the case of a plan subject to ERISA, the Plan Administrator is responsible for the reporting and disclosure requirements of ERISA. The "Plan Administrator," for purposes of ERISA, is the person specifically designated as such by the terms of the plan document, or if no such person is designated, then the Plan Sponsor.

In turn, the "Plan Sponsor" is:

- the employer in the case of a single employer plan,
- the employee organization (e.g., a union) when the plan is established by the organization or
- the board of trustees in the case of a multiemployer plan.

Section 3(16) of ERISA.

B. Automatic ERISA Disclosure Requirements

The Plan Administrator is automatically required to furnish or file the following:

1. All Plans-

The SPD. The summary plan description, or "SPD", provides information about the plan and how it operates, in summary, nontechnical terms, in accordance with the regulations. It must include contact information for the Plan Administrator, a description of eligibility to participate and benefits available, a participant's obligations, a claims procedure and information on participants' rights under ERISA and available DOL assistance. ERISA regulations prescribe rules for format, style and content. Sections 101(a)(1) and 102 of ERISA; ERISA Reg. Sec. 2520.102-2 and 3.

In general, the SPD must be provided to a participant within 90 days after he or she becomes a participant, and to a beneficiary within 90 days after he or she first receives benefits. Section 104(b)(1) of ERISA. If any change is made to the plan which affect the contents of the SPD, then a revised SPD, or a summary of material modification, must be provided to participants and beneficiaries within 210 days after the end of the plan year in which the change is adopted. In any event, the SPD must be revised and updated every 5 years if any change is made to the plan or SPD, or every 10 years if no change is made. See Section 104(b)(1) of ERISA.

The Annual Report. The Plan Administrator must file an annual report with the Internal Revenue Service (the "IRS") and the DOL. Sections 101(b)(1), 103 and 104 of ERISA; Section 6058 of the Code. Form 5500 is used for this purpose, and discloses financial and other information about the plan. The Form 5500 is due by the final day of the 7th month after the close of the plan year, unless an extension is obtained or permitted. See Instructions for Form 5500.

The SAR. This is an annual summary of the Form 5500, and is provided to participants and beneficiaries (other than those in certain pension and welfare plans), within 9 months after the end of the plan year, or if later 2 months after the due date of the Form 5500 (with approved extension). Requirements for SARs, including the prescribed format, is found in ERISA Reg. Sec. 2520.104b-10.

2. Pension Plans-

Periodic Pension Benefit Statements. These statements generally describe the entitlement to, the amount of and the vesting in a participant's pension benefit, as well as certain information on investments in the case of a defined contribution plan. The statement must be provided to participants at specified times, depending on the type of plan (once per quarter for defined contribution pension plans that permit participants to direct the investment of their accounts, once per year for other defined contribution pension plans, and once every 3 years for a defined benefit pension plan). Section 105(a) of ERISA.

Statement of Accrued and Nonforfeitable Benefits These are statements for a pension plan of total accrued benefits and total nonforfeitable pension benefits, if any, which have accrued, or

the earliest date on which benefits become nonforfeitable. The statement is provided to a participant when he or she terminates employment or has a 1-year break in service. See Section 209 of ERISA.

The Annual Funding Notice. This annual notice contains information about the status and financial condition of a defined benefit pension plan, including the plan's funding percentage, assets and liabilities, and a description of the benefits guaranteed by the Pension Benefit Guaranty Corporation (the "PBGC"). See Section 101(f) of ERISA and Field Assistance Bulletin 2009-01. The notice is provided to participants, beneficiaries receiving benefits, each labor organization representing participants under the plan, each employer that has an obligation to contribute under the plan, and the PBGC. It must be furnished not later than 120 days after the end of the plan year for large plans (plans with more than 100 participants), and no later than the earlier of the date on which the annual report is actually filed or the latest date on the annual report must be filed (including extensions) for small plans (plans with no more than 100 participants).

The Multiemployer Plan Summary Report. This annual report contains certain financial information pertaining to a multiemployer pension plan, such as contribution schedules, benefit formulas, number of employers obligated to contribute, number of participants on whose behalf no contributions were made for a specified period of time, number of withdrawing employers, and withdrawal liability. See Section 104(d) of ERISA. It must be provided to each employee organization and to each employer that has an obligation to contribute to the plan within 30 days after the due date of the annual report.

Failure to Meet Funding Standards. A notice must be provided in the case of a failure to make a required installment or other plan contribution to satisfy the minimum funding standard within 60 days of the contribution due date (this is not applicable to multiemployer plans). It must be provided to participants, beneficiaries and alternative payees under a qualified domestic relations order (a "QDRO") within a "reasonable" period of time after the failure. Section 101(d) of ERISA.

3. Welfare Plans-

The SBC. This is a template which summarizes the benefits and coverage provided by a group health plan. A glossary of terms is included. This template must be provided to participants and beneficiaries with enrollment and renewal materials. It must also be provided to the special Health Insurance Portability and Accountability Act ("HIPAA") enrollees within 90 days of enrollment. A notice of a material modification to the terms and discussion contained in the SBC must be provided to participants and beneficiaries within 60 days of the modification's effective date. ERISA Reg. Sec. 2590.715-2715.

Summary of Material Reduction in Covered Services or Benefits. This is a summary of an amendment to, or a change in information contained in, the SPD of a group health plan. It must be provided to participants, when the amendment or change is a material reduction in covered services or benefits, generally within 60 days after adoption of the amendment or change. Section 104(b)(1) of ERISA.

COBRA Notices. A group health plan is required to allow participants and their dependents to elect to continue health coverage when it would otherwise end. See Sections 601-607 of ERISA. This continued coverage is referred to as "COBRA Coverage," and several notices pertaining to this coverage must be provided. These notices include: (i) the initial COBRA notice (describing the right to purchase COBRA Coverage), (ii) the COBRA election notice (describing the right of participants and dependents to elect COBRA Coverage upon the happening of certain events and other options to buy health coverage, e.g., through an Affordable Care Act ("ACA") marketplace described below), and (iii) notice of unavailability of COBRA Coverage or early termination of COBRA Coverage. The notices must be provided to participants, spouses and dependents, generally based on who is affected by the notice. See ERISA Reg. Secs. 2590.606-1 and 4.

Notice of Special Enrollment Rights. This notice describes special HIPAA enrollment rules under a group health plan when other health coverage is lost or there is a change in family status. It is provided to employees eligible for coverage under the group health plan, before the employee is initially offered the opportunity to enroll. ERISA Reg. Sec. 2590.701-6(c).

Notice of Coverage Options. Employers must provide a written notice to all new employees informing them of the ACA marketplace for health insurance, the potential tax credit and the possible loss of employer contributions if health insurance is purchased in the marketplace. See Technical Release No. 2013-02 for requirements.

C. Requirement To Furnish Documents Upon Request

The Plan Administrator must furnish the following upon request-

Plan Documents**.** The Plan Administrator must provide copies of the plan documents and certain other documents pertaining to the plan (such as the latest SPD or any summary of material modification, the latest Form 5500, the trust agreement, applicable collective bargaining agreement, and other instruments under which the plan is established or operated), upon the request of a participant or beneficiary, within 30 days of the request. Sections 104(b)(4) of ERISA; ERISA Reg. Sec.2520.104b-1(b).

Note: The request for the documents must be made in writing. The Plan Administrator may charge the requestor up to 25 cents per page to be copied. ERISA Reg. Sec. 2520.104b-30(b.)

Note: The Plan Administrator is also required to make the above documents available at its principal office and other locations for copying or inspection. Section 104(b)(2) of ERISA; ERISA Reg. Sec. 2520.104b-1(b)(3).

Others.

- the SBC and glossary, within 7 days of a request by a participant or beneficiary.
- a periodic pension benefit statement for a defined benefit pension plan, as requested by a participant or beneficiary, but not more than once per year.
- a statement of accrued and nonforfeitable benefits, as requested by a participant, but not more than once per year.

- multiemployer pension plan information, including periodic actuarial reports, quarterly, semi-annual, or annual financial reports, and amortization extension applications, within 30 days of the written request (but not more than once per year) made by a participant, a beneficiary receiving benefits, a labor organization representing participants under the plan, or any employer that has an obligation to contribute to the plan.

D. Other Disclosure and Reporting

There are numerous other instances in which the Plan Administrator is required to file or furnish information, in addition to the situations outlined above. For a complete list see the DOL's "Reporting and Disclosure Guide for Employee Benefit Plans," available online.

III. Participation, Vesting, Survivor Annuities and Funding

A. Application

The rules of ERISA pertaining to participation, vesting, survivor annuities and funding do NOT apply to welfare plans. They generally DO apply to pension plans which are subject to ERISA, except:

- a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;
- an excess benefit plan;
- any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in Section 736 of the Code;
- a plan established and maintained by a society, order, or association described in Section 501(c)(8) or (9) of the Code, if no part of the contributions to or under such plan are made by employers of participants in such plan;
- a trust described in Section 501(c)(18) of the Code; or
- a plan which is established and maintained by a labor organization described in Section 501(c)(5) of the Code, and which does not at any time after September 2, 1974, provide for employer contributions.

Section 201 of ERISA.

B. Participation

A pension plan may NOT require, as a condition of participation, that an employee complete a period of service with the employer extending beyond the later of the following dates: (i) the date on which the employee attains age 21, or (ii) the date on which he or she completes 1 year of service (can require 2 years if the employee is 100% vested after completing 2 years of service). Further, except pursuant to clause (i), the plan may NOT deny participation on the basis of an employee attaining a specified age. In general, a "year of service" is a 12-month period, determined by reference to the date of hire (and may subsequently change to the plan year), during which the employee completes at least 1000 hours of work.

Once the employee meets the plan's minimum age and service requirements (and may otherwise participate), he or she must become a participant in the plan by no later than the earlier of: (i) the first day of the first plan year beginning after the date on which he or she satisfies these requirements, or (ii) the day which is 6 months after the date on which he or she satisfies these requirements.

Section 202 of ERISA.

C. Vesting

A pension plan must provide that an employee's right to his or her normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. For this purpose, "normal retirement age" is the later of age 65 or the 5th anniversary of participation (or an earlier normal retirement age established by the plan). Section 3(24) of ERISA.

Further, in the case of a defined benefit pension plan, an employee must vest according to one of the two following schedules selected by the plan:

- if the employee has completed at least 5 years of service, the employee must have a nonforfeitable right to 100% of his or her accrued benefit, or
- the employee attains a nonforfeitable right to his or her accrued benefit of 20% after completing 3 years of service, 40% after completing 4 years of service, 60% after completing 5 years of service, 80% after completing 6 years of service and 100% after completing 7 years of service.

In the case of a defined contribution pension plan, an employee must vest according to one of the two following schedules selected by the plan-

- if the employee has completed at least 3 years of service, the employee must have a nonforfeitable right to 100% of his or her accrued benefit, or
- the employee attains a nonforfeitable right to his or her accrued benefit of 20% after completing 2 years of service, 40% after completing 3 years of service, 60% after completing 4 years of service, 80% after completing 5 years of service and 100% after completing 6 years of service.

For vesting purposes, a "year of service" is a calendar year, plan year, or other 12- consecutive month period designated by the plan during which the participant has worked for at least 1,000 hours. The plan may disregard the following years:

- years of service before age 18;
- years of service during any period for which the employee failed to make required employee contributions;
- years of service during any period for which the employer did not maintain the plan or a predecessor plan;
- years of service prior to a "1-year break in service" (a calendar year, plan year, or other 12-consecutive month period designated by the plan during which the employee

fails to work for more than 500 hours) until the employee subsequently completes a year of service; and

- in the case of a multiemployer plan, years of service: (i) with an employer after a complete withdrawal of that employer from the plan, (ii) after a partial withdrawal affecting the employee and related to the decertification of the applicable collective bargaining representative, or (iii) with any employer under the plan after its termination date.

Section 203 of ERISA.

D. Survivor Annuities

An "applicable" pension plan must provide that-

- in the case of a vested participant, who does not die before his or her pension starting date, the accrued benefit payable to this participant is provided in the form of a qualified joint and survivor annuity, and
- in the case of a vested participant who dies before his or her pension starting date, and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of that participant.

An "applicable" pension plan is:

(i) any defined benefit pension plan,
(ii) any defined contribution money purchase pension plan, or
(iii) any other defined contribution pension plan, unless: (x) the plan provides that the participant's nonforfeitable accrued benefit is payable in full, on the death of the participant, to the participant's surviving spouse (or another beneficiary to which the spouse consents), (y) the participant does not elect the payment of benefits in the form of a life annuity, and (z) for the participant, the plan is not a direct or indirect transferee of benefits from a plan which is described in (i) or (ii).

For these purposes, a "qualified joint and survivor annuity" is an annuity: (i) payable for the life of the participant, with a survivor annuity for the life of the participant's spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (ii) which is the actuarial equivalent of a single annuity for the life of the participant.

A "qualified preretirement survivor annuity" is a survivor annuity payable for the life of the participant's surviving spouse, if the payments to the surviving spouse under the annuity are generally not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof).

There are provisions under which the participant can waive payment in these qualified forms, provided that the spouse consents to the waiver.

Section 205 of ERISA.

E. Benefit Accrual Requirements

In a defined benefit pension plan, benefits must accrue (i.e., must be earned) at a rate which is treated as sufficient by the statute.

Section 204 of ERISA.

F. Funding

ERISA sets a "minimum funding standard", under which the employer must make a certain level of contributions each year to a plan, to which the funding requirements apply. These requirements generally apply to each defined benefit pension plan and each defined contribution money purchase pension plan. The amount of the minimum annual contribution which must be made is generally based on the level of the plan assets and promised benefits (in a defined benefit plan) or on the amount of promised contributions (in a money purchase plan). Sections 301 to 305 of ERISA.

G. Other Rules and Considerations

There are several other rules to keep in mind, which apply to the plans subject to the ERISA vesting and participation rules:

1. Anti-Cutback Rule

A pension plan cannot be amended to reduce a benefit that has already been earned. Section 204(g) of ERISA.

2. No Assignments

A participant's benefit in a pension plan cannot be alienated or assigned for the benefit of his or her creditors or otherwise, except: (i) as may be required by a QDRO, which provides benefits for alimony or support to the participant's spouse or for support to his or her child, (ii) as security for an allowable plan loan or (iii) in certain other situations. Section 206(d) of ERISA.

3. Commencement of Benefits

Unless the participant elects otherwise, payment of a participant's benefit under a pension plan must begin not later than by the 60th day after the close of the plan year in which the latest of the following occurs:

- the participant attains the earlier of age 65 or the normal retirement age specified under the plan
- the participant reaches his or her 10th anniversary of the start of plan participation, or
- the participant terminates his or her service with the employer.

Section 206(a) of ERISA.

H. Additional Rules For Qualified Plans

Going beyond the rules of ERISA, the employer may want its pension plan to "qualify" under the Code. If the plan qualifies, then: (i) the plan may be funded with a trust which is tax-exempt, (ii) subject to certain limits, employer contributions to the plan are tax-deductible, and (iii) distributions to participants receive favorable tax treatment, such as forward averaging and eligibility for rollover to an IRA. To be qualified, the plan must meet the conditions of the Code, some of which parallel the ERISA rules, and others of which are additional, such as:

- an additional required beginning date for the start of benefit payments and minimum required distributions each year;
- limits on the amount of benefits and contributions;
- minimum requirements as to the amount of work force participation;
- no discrimination in contributions and benefits; and
- top-heavy contributions and vesting.

See Sections 401 to 417 of the Code.

IV. FIDUCIARY REQUIREMENTS AND PROHIBITED TRANSACTIONS

A. Coverage

The ERISA fiduciary and prohibited transaction rules apply to each pension and welfare plan which is subject to ERISA, other than (among others):

- a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;
- an excess benefit plan; or
- any agreement described in Section 736 of the Code, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

Section 401(a) of ERISA.

B. Requirements

1. Written Plan

Each plan must be established and maintained pursuant to a written instrument (the "Plan Document").

The Plan Document must provide for one or more named fiduciaries (each a "Named Fiduciary"), who jointly or severally have authority to control and manage the operation and administration of the plan. A "Named Fiduciary" means a fiduciary who is named in the Plan

Document, or who, pursuant to a procedure specified in the Plan Document, is identified as a fiduciary by the employer and/or the employee organization maintaining the plan.

Further, the Plan Document must set forth-

- a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of ERISA;
- any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan;
- a procedure for amending the plan, and the identity of the person(s) who have authority to amend the plan; and
- the basis on which payments are made to and from the plan.

Section 402 of ERISA.

Note: Despite this requirement, even an unwritten, informal arrangement can rise to the level of being a pension or welfare plan subject to ERISA, if based on the surrounding circumstances a reasonable person can determine the intended benefits and beneficiaries, the source of funding and the administrative procedures for receiving the benefits. *Donovan v. Dillingham*, 688 F. 2d 1367 (11th Cir. 1982).

Note: With certain exceptions, a plan can be amended or terminated at any time.

2. The Trust

With certain limited exceptions, all assets of the plan must be held in trust by one or more trustees (each, a "Trustee"), pursuant to a trust instrument (the "Trust Instrument"). The Trustee(s) must be either named in the Trust Instrument or the Plan Document or appointed by a Named Fiduciary, and upon acceptance of being named or appointed, the Trustee(s) will generally have exclusive authority and discretion to manage and control the assets of the plan.

A Named Fiduciary may appoint one or more Investment Managers, to invest all or a portion of the plan's assets. The Trustee(s) will not be responsible for the investment of assets assigned to the Investment Manager(s).

The assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Sections 402 and 403 of ERISA.

Note: Welfare plans under which benefits are paid from the employer's general assets, or from certain insurance policies, are not subject to the trust requirement. See Technical Release No. 1992-01.

C. Fiduciary Duties

1. Who is a Fiduciary?

A Named Fiduciary, Trustee and Investment Manager will each always be a "fiduciary" for purposes of the ERISA fiduciary requirements. See Section 3 and 402 of ERISA.

Any other person will be treated as a fiduciary for such purposes, to the extent that the person: (i) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of the plan. Whether a person is covered in (i) to (iii) is a functional test, as to what the person actually does or the authority he or she actually has.

Section 3(21)(A) of ERISA.

Note: Currently, a person who renders investment advice for a fee is considered a fiduciary only if such investment advice is: (i) rendered on a "regular basis," (ii) provided pursuant to an agreement, arrangement, or understanding, (iii) a primary basis for an investment decision, and (iv) individualized to the particular needs of the plan. ERISA Reg. Sec. 2510.3-21.

Under recently promulgated DOL rules, which will begin to take effect in April 2017, a person rendering investment advice for a fee will be deemed a fiduciary if that person simply makes a "recommendation" constituting investment advice and the person: (i) represents or acknowledges that he or she is acting as a fiduciary within the meaning of ERISA or the Code, (ii) renders advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the recipient, or (iii) directs the advice to a specific recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the employee benefit plan. Significantly, the rule no longer requires that investment advice be provided to the recipient on a regular basis or with the understanding that it will be used as a primary basis for the recipient's decision.

2. What are the Fiduciary Duties?

A fiduciary must, when managing, investing and disposing of plan assets, and when managing and administering the plan, to the extent those duties are assigned to him or her:

- discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries and (ii) defraying reasonable expenses of administering the plan;

- act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
- act in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with the requirements of ERISA.

Special rules exist for a defined contribution pension plan which holds employer stock, or which permits participants and beneficiaries to direct the investment of their individual accounts.

Note: Whether a decision or action by a fiduciary is prudent is often determined by the procedure used to make the decision or take the action, and is often measured by the facts and circumstances existing at the time the decision is made or the action is taken, and not by hindsight.

Except as permitted in the ERISA regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the U.S. district courts.

Section 404 of ERISA.

Note: When a person engages in a "settlor" function (that is, an employer activity), he or she need not meet the fiduciary duty requirements. A settlor function is typically a decision or action involving plan design and determination of its terms and conditions, or the establishment, amendment or termination of the plan.

Note: One fiduciary duty which arises out of the statute is the obligation to provide truthful, complete and materially accurate, non-misleading information about the plan and current and proposed changes to it. The only remedy for this breach may be the "equitable relief" described below.

3. Co-Fiduciary Liability

ERISA provides that a fiduciary could have liability for the breach of another fiduciary:

- if he or she participates knowingly in, or knowingly undertakes to conceal, an act or omission of the other fiduciary, knowing that the act or omission is a breach;

- if, by his or her failure to comply with ERISA fiduciary requirements when carrying out his or her own responsibilities, he or she has enabled the other fiduciary to commit a breach; or

- if he or she has knowledge of a breach by the other fiduciary, unless he or she makes reasonable efforts under the circumstances to remedy the breach.

Section 405 of ERISA.

D. Delegation of Duties

A plan may expressly provide for procedures for Named Fiduciaries to designate other persons to carry out fiduciary responsibilities (other than trustee responsibilities). A Named Fiduciary who delegates fiduciary responsibilities under such express terms will generally NOT be liable for an act or omission of the person to whom fiduciary responsibilities were delegated. However, the Named Fiduciary will still remain subject to (i) the duty to monitor the activities of the delegee, (ii) co-fiduciary liability, and (iii) liability for the initial delegation. Section 405(c) of ERISA.

E. Prohibited Transactions

1. Transaction with a Party In Interest

A fiduciary shall not cause the plan to engage in a transaction, if he or she knows (or should know) that such transaction constitutes a direct or indirect:

- sale or exchange, or leasing, of any property between the plan and a party in interest;
- lending of money or other extension of credit between the plan and a party in interest;
- furnishing of goods, services, or facilities between the plan and a party in interest;
- transfer to, or use by or for the benefit of, a party in interest of any assets of the plan; or
- acquisition, on behalf of the plan, of any employer security or employer real property.

In turn, a "party in interest" is:

(A) any fiduciary, counsel, or employee of the plan;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization (e.g., a union) any of whose members are covered by the plan;

(E) an owner of 50 percent or more of an entity which is an employer or an employee organization as described in (C) or (D);

(F) certain relatives of the persons described in (A), (B), (C) or (E);

(G) companies owned by persons described in (A) through (E);

(H) an employee, officer, director and certain owners of persons described in (B), (C), (D), (E) or (G), or of the plan; or

(I) certain partners and joint venturers of persons described in (B), (C), (D), (E) or (G).

Sections 3(14) and 406(a) of ERISA.

2. *Self-Dealing By The Fiduciary*

A fiduciary shall not—

- deal with the assets of the plan in his or her own interest or for his or her own account;
- in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; or
- receive any consideration for his or her own personal account from any party dealing with the plan in connection with a transaction involving the plan's assets.

Section 406(b) of ERISA.

Note: The Code has prohibitions which parallel those described above in Section 4975 and which apply to qualified retirement plans and certain other arrangements. An excise tax is imposed under the Code if a prohibited transaction occurs. ERISA also imposes a penalty (discussed below) on the amount recovered from a breach of fiduciary duties claim, though this penalty is offset by any excise tax imposed under the Code. Section 502(l) of ERISA.

3. *Exemptions*

The transactions described above are nevertheless permitted if carried out in compliance with a statutory or administrative exemption. The statutory exemptions are found in Sections 407 and 408 of ERISA. The administrative exemptions are commonly called "Prohibited Transaction Class Exemptions," promulgated and maintained in accordance with DOL procedure.

The most prominent of the statutory exemptions is that found in Section 408(b)(2), which permits contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. When the party in interest is a fiduciary, or another service provider, earning at least $1,000 from the plan, in order to use this exemption, the party in interest must make disclosures about the services it is providing and the fee it is charging, under ERISA Reg. Sec. 2550.408b-2(c)(1). Also, Section 408(b)(17) generally allows a party in interest, other than a fiduciary, to enter into certain transactions with the plan e.g., selling property or lending money, so long as the plan receives no less, and pays no more, than adequate consideration.

Section 408(b)(1) permits loans to plan participants, which would otherwise be prohibited transactions. Section 408(c)(2) provides that a fiduciary may receive reasonable compensation for services rendered (unless he or she already receives full time pay from the employer).

Section 407 contains rules under which the plan can acquire and hold employer stock or real estate property.

F. Indemnification

ERISA provides that any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA is void as against public policy. Section 410(a) of ERISA. In addition, a fiduciary may not be indemnified by the plan or a fund holding plan assets for a breach of fiduciary duties. ERISA Reg. Sec. 2509.75-4. However, ERISA does not prohibit the fiduciaries from obtaining insurance which will indemnify them in the event they become liable for a breach.

G. Bonds

Every fiduciary, and every person who handles funds or other property of the plan, is required to be bonded, with limited exceptions. The amount of the bond must be not less than 10% of the amount of the plan assets or the funds handled. In no case may the bond be less than $1,000 nor more than $500,000, except that the DOL may prescribe a higher dollar amount. Section 412 of ERISA.

V. Claims Procedures

In accordance with ERISA regulations, a participant is entitled to file a claim for benefits (or for clarification of his or her rights or entitlements under the plan). When a claim is filed the plan must-

- provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for the denial, written in a manner calculated to be understood by the filer, and

- afford a reasonable opportunity to any participant or beneficiary whose claim for benefits has been denied for a full and fair review by the appropriate Named Fiduciary of the decision denying the claim.

Section 503 of ERISA.

The ERISA regulations on claims procedures are extensive. See ERISA Reg. Sec. 2560.503-1.

Note: Under case law, participants and beneficiaries are generally required to exhaust their administrative remedies by following and completing the plan's claims procedures on their claims for benefits before they are permitted to bring suit on these claims under the enforcement rules described below.

Note: If a court reviews a claim denial under the enforcement rules discussed below, the following obtains. A decision by the Plan Administrator denying a claim for benefits, made in accordance with the plan's claims procedures, will be subject to a deferential review, as opposed to a de novo review, by the court if the plan documents clearly grant the Plan Administrator discretionary authority to interpret the plan or decide claims. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Under a deferential review, the court will not overturn the Plan Administrator's decision unless there has been an abuse of discretion. A conflict of interest (e.g., the Plan Administrator deciding the claim is the employer or insurer who must pay the claim if it is approved) will be considered and weighed by the court in determining if there has been such abuse. *Metropolitan Life Ins. v. Glenn*, 554 U.S. 105 (2008).

VI. ENFORCEMENT

A. Enforcement Actions

A civil action may be brought by (for example) by:

- a participant or beneficiary to: (i) seek a penalty for the failure of the Plan Administrator to provide documents or other information to him or her, or (ii) recover benefits, enforce his or her rights, or clarify his or her rights to future benefits under the terms of the plan.
- a participant, beneficiary or fiduciary: (i) for appropriate relief under 409 of ERISA (under which fiduciaries may be personally liable for losses they caused to the plan by breaching their duties, or for profits made by using plan assets for their own account), or (ii) to (x) enjoin any act or practice which violates any provision of ERISA or the terms of the plan or (y) obtain other appropriate equitable relief to redress these violations or to enforce any provisions of ERISA or the terms of the plan.
- the DOL for appropriate relief under Section 409 of ERISA, or to collect civil penalties.

Section 502(a) of ERISA.

Note: The remedy of "equitable relief" is the remedy that must be sought when none of the other remedies are available. Any discussion of equitable relief today must begin with the Supreme Court case of *CIGNA Corporation v. Amara*, 563 U.S. 421 (2011). There, the Court suggested that equitable relief in an ERISA case could include reformation, estoppel and surcharge. The federal courts have been developing, and continue to develop, this suggestion in cases after *Amara*.

Note: An enforcement action has: (i) no or limited discovery, (ii) no recovery of punitive or emotional distress damages, and (iii) no jury trials.

B. Penalties

1. *Failure to Provide Documents*

Any Plan Administrator, who fails or refuses to comply with a request under Section 104(b)(4) of ERISA for the Plan Document or any information (unless such failure or refusal results from matters reasonably beyond the control of the Plan Administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after the request is made may, in the court's discretion, be personally liable to the participant or beneficiary in the amount of up to $110 a day from the date of the failure or refusal (and the court may in its discretion order such other relief as it deems proper). Section 502(c)(1)(B) of ERISA; ERISA Reg. Sec. 2575.502c-1.

Note: For the penalty to apply the request for the documents and other information has to have been made in writing. Even though the statute requires furnishing the requested documents and information by mail, personal delivery will also suffice. ERISA Reg. Sec. 2520.104b-1(b)(2).

2. *Other Civil Penalties Assessed Against the Plan Administrator*

Civil penalties may also be assessed against the Plan Administrator, including the following amounts:

- $2,063 per day, for failure to file Form 5500 when due.
- $28 per day, if the Plan Administrator fails to furnish reports (e.g., pension benefit statements) to certain former participants and beneficiaries.
- $147 per day, if the Plan Administrator fails to provide information requested by the DOL, but no greater than $1,472 per request.
- $131 per day, if the Plan Administrator fails to provide a black-out notice or notice of right to divest employer securities and beneficiaries in a defined contribution retirement plan.
- $1,632 per day, if the Plan Administrator fails to provide certain financial and actuarial information.
- $110 per day for failure to follow the COBRA Coverage requirements of the Code. Section 4980B of the Code (not ERISA).

ERISA Sections 209 and 502(c).

The above amounts reflect recent DOL adjustments, as published in the Federal Register on July 1, 2016, and making the increases effective August 1, 2016.

3. *Civil Penalties for Violations By Fiduciaries*

In the case of any breach of fiduciary responsibility, or violation of any duty under ERISA, by a fiduciary, or any knowing participation in such a breach or violation by any other person, the following obtains. The DOL shall assess a civil penalty against the fiduciary or other person in

an amount equal to 20 percent of the applicable recovery amount. The "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation: (i) pursuant to a settlement agreement with the DOL, or (ii) ordered by a court to be paid by the fiduciary or other person to a plan, or to its participants and beneficiaries, in a judicial proceeding instituted by the DOL.

Section 502 of ERISA.

Note: The DOL's Voluntary Fiduciary Correction Program allows fiduciaries to voluntarily self-correct certain ERISA violations and thereby avoid enforcement actions and further penalties.

C. Statute of Limitations

No action may be commenced under ERISA with respect to a fiduciary's breach of any responsibility, duty, or obligation, or with respect to a violation, under ERISA after the earlier of:

- six years after: (i) the date of the last action which constituted a part of the breach or violation, or (ii) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
- three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

However, in the case of fraud or concealment by the fiduciary, the action may be commenced not later than six years after the date of discovery of the breach or violation.
Section 413 of ERISA.

The statute of limitations, for any suit brought under ERISA, but not described in Section 413, is determined by reference to analogous state law (or if any, a shorter period of time for bringing suit set forth in the plan).

D. No Interference With ERISA Rights

It is unlawful for any person (e.g., the employer, Plan Administrator or other fiduciary) to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary:

- for exercising any right to which he or she is entitled under the provisions of any plan or ERISA,
- for the purpose of interfering with the attainment of any right to which the participant or beneficiary may become entitled under the plan or ERISA, or
- because he or she has given information or has testified or is about to testify in any inquiry or proceeding under ERISA.

In short, the statute prohibits the employer from retaliating against an employee who exercises ERISA or plan rights, or who provides information about the plan.

Section 510 of ERISA.

E. ERISA Preemption

In general, the provisions of ERISA will supersede any and all State laws insofar as they may now or hereafter relate to any plan which is subject to ERISA.
Section 514(a) of ERISA.

A State law will "relate" to a plan if it has a connection with or reference to a plan. *Shaw. v. Delta Air Lines*, 463 U.S. 82 (1983).

Exception: ERISA does not preempt any State law which regulates insurance, banking, or securities. BUT, a plan and its trust is not treated as an insurance company or insurance provider for purposes of any State law which regulates insurance companies. Section 514(b)(2) of ERISA. Thus, while ERISA does not preempt State insurance law, this exception does not apply to group health plans which are subject to ERISA.

Exception: An individual who is not a plan participant or beneficiary cannot raise the preemption issue.

F. Jurisdiction and Venue

In general, the U.S. district courts have exclusive jurisdiction of civil actions under ERISA brought by the DOL or by a participant, beneficiary, or fiduciary. However, state courts of competent jurisdiction and U.S. district courts have concurrent jurisdiction of actions brought by a participant or beneficiary to recover benefits due to him or her, to enforce his or her rights, or to clarify his or her rights to future benefits under the terms of the plan.

When an action is brought in a U.S. district court, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.
Section 502(e) of ERISA.

CHECKLIST FOR EMPLOYMENT LITIGATORS ABOUT ERISA MATTERS

When undertaking employment litigation on behalf of a client, a lawyer should determine whether the client has any employee benefit plan issues relating to his or her employer or work. These issues could affect the employment matter, and could help the lawyer obtain a favorable disposition or settlement of the litigation. This checklist will help the lawyer identify whether one or more employee benefit plan issues are present.

1. Ask the client about the plans which cover him or her at work. Also, ask the client for a copy of the employee handbook, and check online, to see what plans the employer offers.

2. Determine the employee's position in the employer, e.g., executive, management, rank and file, or union member. Ask the client for his or her service and compensation history with the employer, the client's age and participation history in the employer's plans, and whether the client became disabled while working for the employer.

3. For each plan, obtain a copy, from the client or online if available, of the following documents:

    - the written plan document and any amendments;
    - the SPD and any notices of changes to the SPD, also known as a summary of material modification or SMM;
    - insurance contracts which pay the plan benefits;
    - third party administrative or service contracts;
    - any communications, announcements and notices to the client from the employer, fiduciaries, third-party administrator or insurer pertaining to the plan and the benefits it provides;
    - and any communications (e.g., benefit claims and appeals of claim denials) from the client to the same;
    - benefit statements, funding notices and SARs; and
    - any decisions on the client's benefit claims made under the plan's claims procedures.

4. Based on the above, determine if the client has any ERISA claims. For example, consider the following:

    - ➢ did the client receive all disclosures pertaining to the plans, which are required to be provided or which were requested?
    - ➢ was any disclosure received erroneous or misleading?
    - ➢ do the amounts shown on the benefit statements appear to be correct?
    - ➢ were the plans operated in accordance with the plan's terms?
    - ➢ was the client denied severance pay, a disability pension, or any other benefit, to which he or she appears to be entitled?
    - ➢ was the client misclassified as an independent contractor and thereby denied benefits that would have been due if properly classified as an employee?
    - ➢ did the employer retaliate for, or otherwise interfere with, the client's assertion of rights to benefits?

- were employer contributions (such as 401(k) contributions taken from your client's pay) properly and timely deposited into the plan's trust?
- did the fiduciaries properly manage plan assets (e.g., by making prudent and diversified investments, and ensuring that the plan's fees are reasonable fees)?
- if applicable, did the client receive all of his or her COBRA notices, and have the opportunity to elect to receive COBRA coverage?
- was any claim denial incorrect?
- did any plan officials use assets of the plan for his or her own interest?
- have plan assets been used to pay expenses that are not authorized by the plan document, or are not necessary for the proper administration of the plan, or that were not reasonable?
- has the plan engaged in any transaction with related persons that are prohibited or was not negotiated at arm's length?