

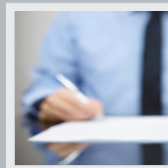
# Employee Benefits Broadcast

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## Today's Speakers



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Milwaukee, WI

## Today's Agenda

- Hidden ERISA Plans
- Record Retention for Benefits
- Investigating #MeToo Harassment Allegations

## Hidden ERISA Plans

## Types of ERISA Welfare Benefits

- Medical
- Surgical
- Hospital Care
- Sickness
- Accident
- Disability
- Unemployment (including severance)
- Day care centers
- Scholarship funds
- Prepaid legal services

## ERISA is Bad

- Summary plan description
  - \$110 per day penalty if don't provide upon request
- Form 5500 if more than 100 participants
  - \$2,140 per day penalty if late
  - Delinquent filer program available
- Fiduciary duties
  - Risk of lawsuit for breaches



## ERISA is Good

- Preempts state law (including laws that would award damages)
- Participant must exhaust claims and appeals process
- Can have “statute of limitations” on actions
- Courts will defer to plan administrator unless arbitrary and capricious
- No right to jury trial



## Usual Suspects #1 – EAPs/Wellness

- Wellness
  - Biometric screenings, then a health plan
  - Lunch-n-learns, challenges, then not a health plan
- EAPs
  - If vendor provides counselling, then a health plan
  - If vendor serves as referral only, then not a health plan

## Usual Suspects #2 – On-site Clinics and Telemedicine

- On-site clinic not a health plan if care limited to:
  - First-aid for worker-related injuries
  - Treatment of minor illnesses or injuries
- Telemedicine is a health plan if diagnoses and prescriptions

## Usual Suspect #3 – Voluntary Group Insurance Programs

Not considered ERISA plan if:

- No employer contributions
- Participation is voluntary
- **Employer plays limited role** – allows insurer to publicize (but does not endorse), collects premiums through payroll deductions, remits premiums to the insurance carrier
- Employer receives no consideration except reasonable expenses



## When is Employer Involvement Too Much?

- Contract is in employer's name
- Employer assists with claims filings or disputes
- Representing program as part of "employer's benefit package"
- Urging or encouraging participation in the program



## Usual Suspect #4 - Severance

- Lump sum severance related to one-time event (plant closing) not an ERISA plan
- If you have an “ongoing administrative scheme”, then have an ERISA plan
  - Amount and form of payment
  - Discretion in determining eligibility
  - Term of plan (one-time event vs. ongoing)
  - Level of administration



## How to Fix

- Wrap welfare plan and wrap SPD are your best friends
- Ensure that wrap plan list covered benefits as “medical”, not “PPO Gold Plan #1”
- Ensure that wrap SPD cross-references brochures or other booklets
- Ensure Form 5500 for wrap plan designates all benefits types



## Record Retention for Benefits



### Legal Framework

- ERISA §107: Form 5500 data
- ERISA §209: Retirement benefit calculations
- Code §6001: Compliance with the IRC qualification requirements





## ERISA §107 – Forms 5500 data

- Maintain any report, record, vouchers, worksheets, receipts, applicable resolutions underlying the information reported in the Form 5500
- Applies to all 5500 filers, including plans that are exempt from filing a 5500 because less than 100 participants at beginning of year, are unfunded, fully insured, combination of unfunded and fully insured, and not a MEWA
- Copies of electronically signed 5500, plus a manually signed copy



## ERISA §107 – Forms 5500 data

- DOL Opinion Letter 82-40A: recaps/summaries of data not acceptable
- Maintain claims, vouchers, work sheets, receipts
- §107: “verified, explained or clarified and checked for accuracy and completeness”



## ERISA §107 – How long to retain?

- Rule: 6 years after the filing date
- **Best Practice:** 8 years due to extensions plus a slight cushion
  - December 31, 2018 PY end
  - July 31, 2019 5500 due date
  - October 15, 2019 max 2.5 month extension
  - October 15, 2025, 6th anniversary from filing date
  - January 1, 2026 end of 8 years

## ERISA §209 Retirement Benefit Calculations

- Records sufficient to determine a participant's benefit, when payable, and if paid
  - Data to defend calculation
  - Compensation, service records from hire date
  - Proof benefit was paid

## ERISA §209 Retirement Benefit Calculations

- Includes ERISA §105(a) participant statements info
- All retirement plans:
  - Total accrued benefit
  - Vested percentage, or date 100% vesting achieved
  - If integrated: data supporting disparity calculation
  - Floor offset details



## ERISA §209 Retirement Benefit Calculations

- DC plans additional data for ERISA §105(a)
  - As of most recent valuation date, value of each investment which holds account assets
  - Value of assets held in employer stock



## ERISA §209 What to retain?

- Permanent records
  - Individually designed plans: **signed** plan documents, amendments, **dated** ERISA §204(h) notices, IRS determination letters, annuity contracts
  - Preapproved plans: adoption agreements, base plan documents, amendments, appendices, opinion letters, advisory letters
  - Collective bargaining agreements
  - Trust agreements, amendments
  - Trust statements, documentation of when a benefit was paid



## ERISA §209 What to retain?

- Permanent records – SPDs, SMMs
- Record of what SPD version was distributed, when distributed and to whom
- Electronic SPDs: careful records of what version appeared when on the intranet



## ERISA §209 What to retain?

### Participant records per IRS Maintaining Retirement Plan Records

- Census data
- Account balances
- Contributions and earnings
- Loan documents, hardship documentation
- Compensation data
- Participant statements
- Signed participant benefit distribution election forms with spousal consents



## ERISA §209 What to retain?

- DBP benefit calculations worksheets
- Signed participant benefit distribution election forms with spousal consents
- Death certificates, or documentation how plan knew a payee had died, i.e., professional search firm reports
- Records of diligent searches for missing/nonresponsive payees



## ERISA §209

- Organize permanent records for easy access and readability
- Electronic: must be easily accessible and printable



## ERISA §209 How long to retain?

- IRS: Until all liabilities are satisfied and plan cannot be audited
  - 3 years after tax return is filed
  - 6 years after tax return is filed if under-reported income is more than 25% of the gross income stated in return
  - 4 years from filing date for employment tax records, i.e., all wage, annuity and pension payments
  - **Best Practice** - employment tax records 5 years



## ERISA §209 How long to retain?

- Participant law suits to claim Plan benefits
- No ERISA statute of limitations (SoL) for benefit claims
- Generally, courts look to a similar state SoL, i.e., breach of a contract

## ERISA §209 How long to retain?

- US Supreme Court: a plan can enforce its own SoL as long as it is reasonable
- ERISA's reliance on a plan's written terms
- 3 year SoLs have been upheld

## ERISA §209 When does the SoL clock start?

- Plan document cannot define when clock starts
- Depends on benefit type and jurisdiction case law
- Can be after plan's claims/appeals procedures have been exhausted
- Each DBP payment started a new SoL because each was a new breach. Issue was the validity of an amendment which reduced the benefit. Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan, 856 F2d 1418 (9<sup>th</sup> Cir. 1988).
- Case law: a new statute of limitations starts with each monthly disability payment. Nikaido v. Hughes Aircraft Co. Income Insurance Plan, 42 F3d, 447 (1994)



## IRC §6001 Documentation to Demonstrate Compliance with IRC

- Proof of timely retirement plan payments
- IRC 401(a)(14) vested participants terminate before NRA. Distribution deadline is by 60<sup>th</sup> day after end of PY in which the latest of the following occurs:
  - Participant attains NRA
  - 10th anniversary of participant's entry date
  - Participant's termination date

If miss deadline, pay an actuarially increased NRB to delayed start date, or pay NRB plus a lump sum equal to missed payments increased with interest





## IRC §6001 Documentation to Demonstrate Compliance with IRC

- IRC 401(a)(9) age 70-1/2 minimum required distributions
  - 5% owners: April 1 following the year they are age 70-1/2, even if still employed
  - Non-5% owners: April 1 following the year they are age 70-1/2, or termination if later



## IRC §6001 Documentation to Demonstrate Compliance with Code's qualification requirements

- Nondiscrimination test results and supporting data
- Controlled group data
- Direct rollover election forms
- Benefit distribution forms, QJSA notices/waivers
- QDRO, QMSCO procedures, checklists



## ERISA Fiduciary Liability – Plan Investments

- Committee minutes
  - Fee bench marking studies, rationale for decisions regarding new provider
  - Investment fund review and monitoring
  - Investment fund changes
  - Reviews of service providers' fees and performance



## ERISA Fiduciary Liability – How Long to Retain?

### ERISA §413 Statute of Limitations for Fiduciary Breaches

- 3 years after earliest date claimant had actual knowledge of breach, or
- 6 years from last act that was part of alleged breach, or if fraud or concealment from date of discovery of breach or omission



## Challenges in Records Retention

- Mergers and acquisitions: IRS position re retirement plans
  - Copy of all plan documents, amendments, determination letters for acquired plan



## Consequences of Inadequate Record Retention – Burden of Proof Shifts to Employer

- Participant terminated in 1979 with a vested \$505 NRB payable in 2004. Employer was later sold twice and new buyers assumed plan. When plan terminated in 1988, he elected a lump sum over an annuity. Lump sum was never paid. He called and was told he was entitled to the annuity, which never commenced. When he called in 2004, he was told because no annuity was purchased for him he must have been paid the lump sum. He sued. The employer had to prove that his lump sum was paid. Because there was no record that the lump sum was paid, plan had to pay his benefit. Preite v. Charles of the Ritz Group Pension Plan, 471 F. Supp 2d 1271 (2006)



## Another Case Where Burden of Proof Shifts to Employer

- Dispute re employer contributions to a multi-employer plan. Plan trustees sued the employer for more contributions because of the under-reporting of covered employees. Because employer had no records, burden shifted from the trustees to the employer since §209 requires employer to maintain records to prove a benefit amount. Employer had to contribute more. Central Pension Fund of Int'l Union of Operating Engineers v. Ray Haluch Gravel Co. (1<sup>st</sup> Cir., No. 11-1944 (2012).



## Records Maintenance **Best Practices**

- Offsite storage: Employer must have continued access after vendor relationship ends
- Be mindful of technology upgrades/changes in electronic records storage
- Monitor/upgrade to assure continued security of electronic records
- Organize to quickly find information, manipulate and print information



CLE Code

Investigating #MeToo Harassment  
Allegations

## The Premise of #MeToo

- The victims of sexual harassment have been ignored too long.
- Companies, including their human resources departments and attorneys are focused on protecting the company for liability.
- The victims are often ignored or discredited.
- The #MeToo movement emphasizes that victims must be heard and that the default must be that the victims are truthful, for why else would they publicly voice their complaint.



## #MeToo Magnitude

- Nine members of congress have lost their jobs in the last 6 months (including 3 in one week in December). Allegations include:
  - Groping
  - Asking female staffer to act as a surrogate
  - Love letters to a female staffer
  - Undisclosed settlements using tax payer money
  - Inappropriate comments and verbal abuse
  - And more.....



## Investigation Considerations

- When to investigate?
  - Any time you learn of potential harassment, regardless of the source
  - Anonymous reports may make investigations more difficult, but they cannot eliminate duty to investigate
  - If managers are aware of report and do nothing, their knowledge and inaction will be attributed to the company

## Investigation Considerations

- Who should investigate?
  - Who are the accusers / accused?
    - Involvement of HR?
    - Senior leadership?
    - Legal?
    - Potential media interest?
  
- Internal investigator ➡ outside counsel ➡  
credentialed independent investigator

## Investigation Considerations

- Attorney Client Privilege
  - What aspects of the investigation / final report are privileged?
  - Using privilege (or lack thereof) as a tool

## Investigation Considerations

- How to investigate?
  - Allow opportunity for venting, but don't end interview until you have the "facts"
  - If accuser is reluctant to participate, remind them of (1) company's desire to protect employees and (2) company's legal obligation to investigate all allegations
  - If accuser is anonymous: Investigate those around the accused



## Investigation Considerations

- **Maintaining Confidentiality**
  - Investigators ordinarily like to limit discussion of topics under investigation
  - Asking accuser to not discuss allegations may fuel perception of attempt to silence accuser
  - Special considerations if accuser resigns and enters into severance agreement



## Investigation Considerations

- **“He Said/She Said”**
  - Many harassment allegations will not have witnesses
  - Investigators are entitled to make judgment calls – “he said/she said” does not necessarily prevent company from reaching conclusions
  - If you do believe one party over another, be sure to document basis for that decision



## Investigation Considerations

- “He Said/She Said” – Factors to consider
  - Number of allegations against accused (Cosby, Weinstein)
  - Motives for dishonesty from either party
  - Consistency of accounts
  - Employment history of individuals
  - Does the person appear credible (body language, eye contact, nervous, defensive, evasive)?



## Bottom Line

- Good process protects both the company and its employees
  - Uncovers the truth
  - Helps company make an informed decision regarding possible action in response
  - Helps protect from future claims by the accuser as well as the accused



## Questions?

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- CLE questions? Contact Kayla Huven at [khuven@foley.com](mailto:khuven@foley.com). Certificates of attendance will be distributed via email to eligible participants approximately 8 weeks after the web conference.

# Thank You.