



# ERISA REFRESHER AND PITFALLS PHP LEVEL UP

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# ERISA REFRESHER

## Plans Subject to ERISA:

- Employee Pension Benefit Plans
- Employee Welfare Benefit Plans

# PENSION PLANS

- Plans or arrangements that:
  - Provide retirement income
  - Defer receipt of compensation to termination of employment and beyond
- Includes all types of retirement plans (e.g., traditional defined benefit pension, cash balance and other "hybrid" designs, 401(k) and other defined contribution plans; 403(b) tax-sheltered annuities; Section 457 deferred comp plans of governments and tax-exempt organizations, multiemployer (Taft-Hartley) pension plans)

Welfare plans—provide types of benefits identified in the statute, including:

- Health benefits (e.g., medical, dental, vision prescription drug, long-term care, counseling and mental health benefits, medical flexible spending accounts)
- Life insurance and other death benefit plans (e.g., group term life, accidental death and dismemberment, and business travel accident insurance plans)
- Disability benefits
- Severance benefits (unless they constitute pension benefits)
- Child care centers
- Scholarship programs
- Funded vacation plans
- Prepaid legal services plans
- Apprenticeship and similar training programs

# WELFARE PLANS DO NOT INCLUDE:

- Most health savings accounts (HSAs)
- Dependent care flexible spending accounts and other dependent care assistance plans
- Educational assistance other than scholarship programs
- Vacation benefits paid from general assets and other exempt "payroll practices"

# EXEMPT PLANS

- Governmental plans
- Church plans (unless elect to be subject to ERISA)
- "Top hat" plans
- Common "payroll practices" (vacation, sick pay, short-term disability, paid personal time and similar salary continuation benefits paid from employer's general assets)

# FIDUCIARY AND NON-FIDUCIARY ACTS

# FIDUCIARY AND NON-FIDUCIARY ACTS

- Settlor (or corporate) vs. fiduciary
- Settlor acts are not fiduciary, while actions involving plan management or plan asset management often are fiduciary
  - Decisions regarding whether to establish a plan and what the terms of the plan are settlor – that is, corporate – decisions
    - Examples
      - What is the vesting schedule?
      - Is there a match and if so, what amount?
      - Do we have a medical plan?



# FIDUCIARY AND NON-FIDUCIARY ACTS

## CONT.

- Settlor decisions are not subject to ERISA's fiduciary rules
- Operating the plan once it has been established is fiduciary

### ➤ Fiduciary actions

- Interpreting plan terms, including determining benefit claims
- Selecting plan investments
- Engaging service providers for a plan
- Communicating to plan participants regarding plan
- Appointing other fiduciaries
- Using plan assets to pay plan expenses and benefits

# FIDUCIARY AND NON-FIDUCIARY ACTS

## ➤ Fiduciary vs. ministerial

- Only discretionary authority gives rise to fiduciary status when it comes to matters of plan administration
  - Ministerial acts “within a framework of policies, interpretations, rules, practices and procedures made by other persons” are not fiduciary
  - Examples:
    - Processing a distribution
    - Updating participant information
- But, any authority gives rise to fiduciary status when it comes to matters of plan asset management

# FIDUCIARY AND NON-FIDUCIARY ACTS

## ➤ Who is a fiduciary?

- Named fiduciary – a person/entity who is named as a fiduciary in the plan documents or pursuant to a procedure set forth in the plan document (Required to have at least one)
  - Roquette Retirement Committee
  - Roquette Benefit Committee
- Functional fiduciary – a person/entity who performs a fiduciary function, even if not formally assigned responsibility for that function
- Accidental – people who act in a fiduciary function, but did not intend to or didn't know they were (Dangerous place to be)

# FIDUCIARY AND NON-FIDUCIARY ACTS CONT.

- Examples of fiduciary
  - ERISA “plan administrator” (not the “third party administrator”)
  - Investment and Appeal Committees

# FIDUCIARY EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE

➤ *Bland v. Fiatellis* (2005) – 7<sup>th</sup> Circuit recognizes fiduciary exception

- Privilege should not apply when there is an alleged breach of fiduciary duty
- This applies to plan administration or management
- Does not apply to settlor functions

- Plaintiff's counsel may also assert fiduciaries, represent participants and, therefore, privilege should not apply
- Argument ceases when interests of fiduciary and participant diverge:
  - Claim denial?
  - Lawsuit?
  - Be careful what you put in writing or voicemail.

# PITFALLS

# MENTAL PARITY ANALYSIS

- CAA 21 requires employers to analyze and confirm compliance with mental parity.
- Extremely difficult process.
  - DOL audited plans and none fully complied.
- Beware of provider and/or lawyer letters.



# ACA PAY OR PLAY

- Misconception that 1095-Cs are not required because individual mandate has been eliminated.
- IRS issuing penalty notices for both 1094-Cs and 1095-Cs.
- Abatement for cause.
- Also, pay or plan still applies.
  - Controlled group;
  - 5% buffer;
  - 226-J letters from IRS.

# STOP-LOSS ISSUES

- Incurred and Paid.
  - What is “paid?”
- Advanced or simultaneous funding issues.
- Extended coverage on leave?
- Year end claims and/or other disputes.
- Early termination of policy.
- Conflict between plan terms and policy.

# NO SURPRISE ACT

## ➤ Covers:

- Emergency;
- Non-network provider at network facility;
- Air Ambulance.

## ➤ Providers are filing numerous challenges to qualifying payment amounts.

## ➤ Questions:

- Is service subject to NSA?
- Who will handle informal negotiations?
- Stop-loss issues?

# DOL TOLLING

- March 1, 2020 to 60 days following end of pandemic.
- One year tolled (ignored) from date of event.
- Applies to:
  - COBRA
    - Election
    - Premiums
    - Notice
  - Special Enrollment
  - Appeals
  - Request for information

# ACA'S FULL TIME vs. PLAN'S ELIGIBILITY

- For pay or plan purposes, full-time is determined over initial or standard measurement periods, and applies for following stability period.
- Plans often end coverage after FMLA/Leave (usually 90 days).
- Thus, a member may be considered full-time under ACA, but ineligible for coverage under plan.

# MORE OLDIES, BUT GOODIES

1. The Unsophisticated Sponsor
2. Phantom Eligibility
  - Layoffs
  - Leaves
  - Severance
3. Controlled Group Issues
4. HDHP/HSA issues
  - Minimum Deductible
5. HIPAA Privacy

# QUESTIONS AND DISCUSSION