

ADMINISTRATION OF ERISA COVERED WELFARE PLANS  
SELECTED TOPICS

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## I. AN ERISA PLAN

A. DEFINITION OF “EMPLOYEE WELFARE BENEFIT PLAN”: An “employee welfare benefit plan” is any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants and beneficiaries, through the purchase of insurance or otherwise, (a) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (b) any benefit described in section 186 [29 U.S.C. 186(c)] of this title (other than pensions on retirement or death, and insurance to provide such pensions). ERISA § 3(1).

B. “ESTABLISHED OR MAINTAINED BY...”

1. Whether a benefit program is “established or maintained” by an employer or union is based upon the level of involvement of the employer or union.
2. Group Insurance Safe Harbor: DOL regulations provide that a “welfare plan” shall not include a group insurance program offered by an insurer to employees or employee organization members if –
  - a. neither the employer nor the employee organization make contributions;
  - b. participation in the program is completely voluntary for employees;
  - c. the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deduction or dues checkoff and to remit them to the insurer; and

- d. the employer or employee organization may receive no consideration, other than reasonable compensation (excluding profit) for administrative services actually rendered in connection with the payroll deductions or dues checkoff. 29 C.F.R. 2510.3-1(j).

C. PAYROLL PRACTICES: Welfare plans do not include the following payroll practices –

1. Payment of normal compensation, such as overtime;
2. Payment of compensation from the employer's general assets during medical absences;
3. Payment of compensation from the employer's general assets when the employee is absent for other than medical reasons, such as vacation or jury duty; and
4. Payment of compensation from the employer's general assets while the employee is on training or on sabbatical. 29 C.F.R. 2510.3-1(b).

The key here is that the payment is made from the employer's general assets. If the employer chooses to "fund" or purchase insurance to provide the benefit, such as disability benefits, a plan is created.

D. EXCLUSIONS FROM ERISA'S COVERAGE: Although they may meet the definition of "employee welfare benefit plan," ERISA does not apply to the following welfare plans:

1. Governmental plans. ERISA §§ 4(b)(1), (3) and (32).
2. Church plans. ERISA § 4(b)(2); 3(33).
3. Plans maintained solely to comply with workers compensation, unemployment compensation or disability insurance laws. ERISA § 4(b)(3).

## II. WRITTEN PLAN DOCUMENT AND FUNDING

- A. WRITTEN PLAN DOCUMENT: Every plan must be established and maintained pursuant to a written instrument which provides a procedure for establishing and carrying out a funding policy,

describes any allocation procedures, provides an amendment procedure and specifies the basis upon which payments are to be made under the plan. ERISA § 402(a)(1).

- B. FUNDING: A welfare benefit plan may be funded but is not required to be. ERISA § 301(a)(1).
  - 1. A welfare plan may be funded. Benefits or insurance premiums can be paid from a trust or other vehicle in which assets are set aside for this purpose, e.g., a VEBA. If benefits are provided directly rather than through insurance either from the employer's general assets or from a trust, the plan is considered "self-insured."
  - 2. Many plans are "unfunded." The employer may pay benefits or insurance premiums from its general assets. Employees may also pay insurance premiums.

### III. PLAN ASSETS AND TRUST REQUIREMENT

- A. IMPORTANCE OF IDENTIFYING "PLAN ASSETS": A plan sponsor may maintain a welfare plan without plan assets by paying benefits from its general assets. Because most of ERISA's fiduciary duties address the manner in which the fiduciary deals with "assets" of the plan, it is important to know when a plan has such assets. However, ERISA does not explicitly define the types of property that will be viewed as plan assets. Nevertheless, DOL has provided both general and specific guidance.
- B. CONTRIBUTIONS:
  - 1. Employee contributions become plan assets as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event later than 90 days after the amounts are deducted by the employer. 29 C.F.R. 2510.3-102(a).
  - 2. Employer assets used to directly pay benefits or insurance premiums may not be "plan assets."
- C. ORDINARY NOTIONS OF PROPERTY RIGHTS: In determining whether contributions are plan assets, the DOL will ask whether any assets have been set aside to provide benefits so as to create a beneficial interest in the plan. See e.g., DOL Adv. Op. 94-31A.

1. Applying this test, DOL has made clear that the following are plan assets –
  - a. Assets placed in trust on behalf of the plan.
  - b. Trust assets used to offset a FAS funding liability.
  - c. Separate account in the name of a plan with a bank or third party (TPA).
2. The following are not plan assets –
  - a. an employer maintained checking account under which a TPA pays claims, and
  - b. trust established by employer to potentially use to pay contributions to plan in the future.

D. THE PLAN ASSETS REGULATION: The “plan assets” issue also arises in a different context when a plan invests its assets in another vehicle or contract. The issue there is whether the underlying assets of the vehicle will be considered “plan assets” whose management is subject to the ERISA fiduciary duties. DOL has indicated that when a plan invests in the following entities, the plan's assets include its interest in the entity (e.g., a share or a unit) but not the underlying assets owned by the entity:

1. a registered investment company (e.g., mutual fund shares), ERISA § 401(b)(1);
2. a "guaranteed benefit policy" issued by an insurance company, ERISA § 401(b)(2);
3. a registered security that is widely held and freely transferable, 29 C.F.R. 2510.3-101(a)(2);
4. an entity in which "benefit plan investors" hold less than 25% of the equity interests, id.; and
5. an "operating company" engaged in the production or sale of a product or service other than the investment of capital, or a "real estate operating company" or a "venture capital operating company."

E. TRUST REQUIREMENT:

1. All assets of a plan must be held in trust by one or more trustees, with the following exceptions relevant to welfare plans. ERISA § 403(a).
  - a. any assets of a plan consisting of insurance policies issued by State qualified insurers. ERISA § 403(b)(1).
  - b. assets of the insurance company or assets of a plan held by the insurance company. ERISA § 403(b)(2).
2. Cafeteria Plan Non-Enforcement Policy (Technical Releases 88-1 and 92-1): DOL will not assert a violation solely because of a failure to hold in trust employee contributions paid to a cafeteria plan even if those contributions are used to directly pay benefits or expenses (and not forwarded to an insurer). The policy applies even if the plan receives after tax contributions, such as COBRA contributions, as well as pre-tax contributions.

IV. FIDUCIARY STATUS

- A. DEFINITION OF A "FIDUCIARY": ERISA includes a code of conduct for individuals known as fiduciaries. The primary purpose for identifying fiduciaries is to determine who has responsibility and liability for each aspect of plan administration and management. Under ERISA § 3(21), a fiduciary includes any person who –
1. Exercises discretionary authority or control with respect to the management of a plan,
  2. Exercises any authority or control respecting management or disposition of plan assets,
  3. Has discretionary authority or responsibility in the administration of the plan, or
  4. Provides investment advice for a direct or indirect fee with respect to money or property of the plan. 29 C.F.R. 2510.3-21(c).
- B. NAMED FIDUCIARIES: Every plan must have at least one "named fiduciary" and a plan administrator. Those plans subject to ERISA's

trust requirement must also have a trustee. ERISA § 403(a).

1. The named fiduciary is a person designated in the plan document as having the "authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1).
  2. The "administrator" has specific statutory duties under both ERISA and the Code. For example, the administrator is responsible for reporting and disclosure.
- C. DISCRETION VS. MINISTERIAL DUTIES: DOL regulations indicate that persons who perform purely ministerial functions within a framework of policies, interpretations, rules and procedures made by others is not a fiduciary because he does not have discretionary authority or control. These functions might include application of eligibility rules, calculation of service credit, preparation of communications, maintenance of service records, calculation of benefits, processing of claims, and making recommendations to others for decisions with respect to plan administration. 29 C.F.R. 2509.75-8, D-2.
- D. INVESTMENT FIDUCIARIES:
1. Investment Managers: It is in the interest of the plan's fiduciaries to appoint managers who qualify as "investment managers" under ERISA. If the named fiduciary appoints an "investment manager," the fiduciary and trustee of the plan are no longer responsible for the management of the assets and are not liable for the manager's breaches. The plan fiduciary does retain the duty to monitor the manager. ERISA §§ 3(38), 402(c)(3), 405(d)(1).
  2. Investment Adviser: Even if an institution only advises the plan fiduciary, it will be a fiduciary if it regularly renders the advice for a fee with the understanding that the plan will rely upon it. ERISA § 3(21)(B).
- E. FUNCTIONAL FIDUCIARIES: While the named fiduciary, plan administrator and trustee are clearly fiduciary roles, any other person who exercises the authority or responsibility described in the fiduciary definition will be a fiduciary, whether or not he knowingly accepts that responsibility.
- F. EMPLOYEES AS FIDUCIARIES: It is not clear whether the individual employees of an investment manager who actually have

discretion over the management of plan assets will be deemed fiduciaries. Dardaganis v. Grace Capital, Inc., 11 EBC 2081 (2d Cir. 1989); but see Confer v. Custom Engineering Co. 14 EBC 2067 (3d Cir. 1991) (individual employee not fiduciary unless he has specific discretionary responsibility). But it is clear that any fiduciary, including an individual, will be liable only to the extent of his exercise of discretion or authority.

G. FIDUCIARY VS. SETTLOR FUNCTIONS: Not all actions with respect to an ERISA plan are fiduciary acts. Some decisions, such as plan amendments, are viewed as “settlor” and not subject to ERISA’s fiduciary duties. Lockheed Corp. v. Spink, 517 U.S. 882 (1996); Hughes Aircraft Company v. Jacobson, 525 U.S. 432 (1999). However, the implementation of a settlor decision may involve a fiduciary act. DOL Adv. Op. 2001-01A (Jan. 18, 2001); DOL Guidance on Plan Expenses.

H: INSURANCE COMPANY AS FIDUCIARY: An insurance company may become a fiduciary in several ways.

1. Claims. The exercise of discretionary authority or responsibility to grant or deny claims confers fiduciary status, whether the insurer is acting as a carrier or a third party administrator.
2. CBOE”. The exercise of authority or control over the insurance policy, e.g., the unilateral ability to amend a policy, confers fiduciary status. See e.g., Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co., 713 F.2d 254 (7<sup>th</sup> Cir. 1983).
3. Harris Trust. If the general account assets are “plan assets,” e.g., the policy is not a “guaranteed benefit policy,” the insurer is a fiduciary with respect to those assets. ERISA § 401(b)(2)(B).
4. Advice. While mere marketing and selling activities are not fiduciary, if the activities rise to the level of “investment advice,” the insurer and agents will be fiduciaries. See e.g., Miller v. Lay Trucking Co., 606 F.Supp.1326 (N.D. Ind. 1985).

## V. GENERAL FIDUCIARY DUTIES

A. DUTY OF LOYALTY/EXCLUSIVE PURPOSE:



1. A fiduciary must discharge his duties "solely in the interest of the plan's participants and beneficiaries" and "for the exclusive purpose" of providing benefits and defraying reasonable expenses of administration. ERISA § 404(a)(1)(A). This rule is based on the common law trust duty of undivided loyalty.
2. A fiduciary does not violate this duty of loyalty if his actions incidentally benefit the fiduciary or another party so long as the actions are taken solely with the interests of the participants and beneficiaries in mind. Donovan v. Bierwirth, 680 F.2d 263 (2d Cir.), cert. denied 459 U.S. 1069 (1987).

B. DUTY OF PRUDENCE:

1. Prudent Professional Standard: A fiduciary must discharge his duties "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." ERISA § 404(a)(1)(B).
  - a. "A pure heart and an empty head are not an acceptable substitute for proper analysis." Donovan v. Cunningham, 716 F.2d 1445 (5th Cir. 1983).
2. Prudent Appointment of Service Providers: A named fiduciary (e.g., the plan sponsor) may utilize advisers and/or administrators to assist him in carrying out his responsibilities. The named fiduciary must act prudently in selecting the administrator and must monitor the performance of the administrator to ensure that the appointment remains appropriate.
3. Prudent Selection of Insurers and Insurance Contracts: The plan fiduciary is responsible for a prudent process in selecting and retaining the plan's insurer and negotiating the insurance contract.

C. DUTY OF DIVERSIFICATION:

1. A fiduciary must diversify the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." ERISA § 404(a)(1)(C).
2. ERISA's legislative history indicates that a fiduciary should not invest an "unreasonably large percentage" of plan assets in a "single security," in "one type of security," or in "various types of securities that are dependent upon success of one enterprise or upon conditions in one locality." ERISA Conference Report at 304.

D. DUTY TO FOLLOW THE PLAN DOCUMENTS:

1. A fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions" of ERISA. ERISA § 404(a)(1)(D).
  - a. These documents include the plan's insurance contracts. If an insurer violates its contract, it will be no defense that the plan sponsor or other plan fiduciary "waived" them or orally modified them, or acquiesced in the violation.
  - b. A fiduciary must decline to follow the plan document if the direction contained in the document is inconsistent with ERISA. For example, if the plan document provides for a payment to the employer prior to the termination of the plan, the fiduciary would be required to decline to follow such a provision.
2. The plan sponsor must ensure that plan and trust documents accurately reflect current administrative practices.
  - a. If the plan and not the plan sponsor will pay the expenses of managing plan assets (e.g., administrative fees), the plan document should authorize (or at least not prohibit) the plan's payment of expenses generally.

**E. PAYMENT OF PLAN EXPENSES:**

1. The assets of a plan may generally be used to pay the reasonable expenses of administering the plan. ERISA §§ 403(c)(1); 404(a)(1)(A)(ii).
2. The plan document should authorize the payment of expenses. (Expenses may be paid if the document is silent, but not if it prohibits payment or provides for payment of expenses by the employer.)
3. Reasonable expenses do not include “settlor” expenses, such as the expenses associated with drafting discretionary plan amendments. 2001 DOL Guidance on Plan Expenses.
4. If the service is provided by a “party in interest” with respect to the plan, the arrangement and the fees paid to the service provider must satisfy the conditions of the “services” exemption. ERISA §§ 406(a)(1)(C); 408(b)(2); 29 C.F.R. 2550.408b-2.
  - a. The service must be “appropriate or helpful” in administering the plan.
  - b. The arrangement must be reasonable. It must be terminable on short notice by the plan without penalty.
  - c. The compensation must be “reasonable.”
5. If a fiduciary reimburses itself for services provided to a plan (i.e. the fiduciary selects itself to provide services), the reimbursement must be limited to the fiduciary’s “direct expenses.” ERISA § 408(c)(2); 29 C.F.R. 2550.408c-2.

**VI. PROHIBITED TRANSACTIONS**

**A. PARTY IN INTEREST TRANSACTIONS:**

1. ERISA § 406(a) absolutely prohibits certain categories of transactions between a plan and a “party in interest.”
  - a. If a plan engages in a prohibited transaction, the fiduciary causing the plan to engage in the transaction

will be liable to the plan for any losses. The transaction may also be rescinded and any profits of the fiduciary disgorged. ERISA § 409.

- b. Unlike pension plans, welfare plan parties in interest are not subject to an IRS excise tax. However, DOL may impose a similar penalty on the party in interest under section 502(i). (Unlike the pension plan excise tax, this penalty is not mandatory or self-enforcing.)
2. Parties in Interest: Include any employer of or union representing covered employees, any service provider to the plan (e.g., recordkeepers, attorneys, actuaries, brokers), any fiduciary to the plan (e.g., investment managers, trustees, plan administrator), as well as a broad range of affiliates of each of these entities. ERISA § 3(14).
  - a. The sale of insurance to a plan does not make the insurer a service provider and thus a party in interest. However, the provision of services by an insurer under an “administrative services only” contract (ASO) would.
3. Prohibited Transactions: Absent an exemption, the following transactions are absolutely prohibited under ERISA § 406(a):
  - a. A sale, exchange or lease of property between a plan and a party in interest.  
  
Example: A sale of an insurance contract from an insurer to a plan when the insurer is already a service provider to the plan.
  - b. A loan or other extension of credit between a plan and a party in interest.  
  
Example: Where an insurance company is a service provider to the plan, the advance of funds by the insurer to the plan.
  - c. The provision of services, goods or facilities between the plan and a party in interest.  
  
Example: The plan's renewal of its ASO contract with the insurer. (Once the insurer begins to provide services, it becomes a "party in interest." Thus, any

renewal of a contract results in the provision of services by a party in interest.)

Example: The engagement of the plan's current administrator to provide additional services.

- d. The transfer of plan assets to a party in interest.

Example: The plan makes a gratuitous payment to a plan service provider.

- e. The use of plan assets by or for the benefit of a party in interest.

Example: An employer/fiduciary selects a policy for the plan with the understanding that the insurer will provide a lower rate to the employer on a non-plan policy.

## B. PROHIBITED CONFLICTS OF INTEREST:

In addition to transactions between the plan and "parties in interest," ERISA also prohibits self-dealing and other conflicts of interest by plan fiduciaries.

- 1. Self-Dealing: A fiduciary may not deal with the plan's assets in his own interest or for his own account. ERISA § 406(b)(1).

- a. DOL believes that a fiduciary should not even act in any transaction in which he has an interest that could affect his best judgment as a fiduciary. 29 C.F.R. 2550.408b-2(e)(1).

Example: An employer/fiduciary may not cause the plan to purchase an insurance policy with the understanding that the insurer will provide a lower rate to the employer on a non-plan policy.

- b. Section 406(b)(1) also prohibits a fiduciary from exercising any discretion to affect the amount or timing of his fees. 29 C.F.R. 2550.408b-2(e).

Example: Insurer acting as ASO claims administrator is paid on a "claims paid" basis.

- c. A fiduciary may not hire itself or its affiliate to provide services to the plan UNLESS -
  - i. it charges no additional fee,
  - ii. its fee is limited to recoupment of his "direct expenses" in providing the service, ERISA § 408(c)(2), or
  - iii. another exemption is available, e.g., ERISA § 408(b)(5).

- 2. Representing an Adverse Party: A fiduciary may not represent an adverse party in a transaction involving the plan.

Example: A consultant may not represent both the plan (in a fiduciary capacity) and a third party in negotiating a contract for the plan.

- 3. Kickbacks: A fiduciary may not receive any consideration for his personal account from any party dealing with the plan in a transaction involving plan assets.

Example: A plan sponsor who selects an insurer or broker for the plan may not receive a payment (or other consideration) for its own account from the broker or insurer in connection with that selection.

- a. This rule clearly prohibits traditional kickbacks, but it also prohibits less obvious transactions. For example, a plan sponsor who invests plan assets with an investment manager may not receive a discount from that manager on other services provided to the company rather than the plan.

C. EMPLOYER SECURITIES AND REAL PROPERTY:

ERISA §§ 406(a)(2) and 407 prohibit a plan from holding "employer securities" or "employer real property"<sup>1</sup> unless the securities and real property are "qualifying"<sup>2</sup> and, if the plan is not an individual account plan, no more than 10% of the plan assets are invested in employer securities and employer real property. In addition, a plan may not purchase employer securities or real property from a party in interest, such as the employer, absent an exemption.

Exemptive relief is provided by ERISA § 408(e) for a plan's purchase or sale of qualifying employer securities or qualifying employer real property if (a) no commission is charged, (b) the compensation is adequate, and (c) the 10% limit applicable to non-individual account plans is observed.

D. SOME BASIC EXEMPTIONS:

The following statutory or class exemptions issued by DOL provide relief for some specific investment transactions. Note: It is important to review each exemption carefully to determine whether it provides relief for Section 406(a), 406(b) violations, or both, and whether its conditions can be met.

1. Sales of Insurance Contracts and Payment of Commissions: PTE 84-24 provides relief for certain transactions with insurance companies, mutual fund underwriters, insurance agents and consultants. This exemption allows fiduciary salespersons to provide investment advice to plans and receive commissions on plan transactions if certain conditions are met. It also authorizes sales of insurance or mutual fund shares to plans by party in interest insurers or underwriters.

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<sup>1</sup> "Employer real property" is real property leased to the plan sponsor or an affiliate. Employer securities are securities issued by the plan sponsor or an affiliate. ERISA §§ 407(d)(1), (2).

<sup>2</sup> "Qualifying employer securities" include stock, marketable obligations and certain limited partnership interests if immediately following the acquisition no more than 25% of the stock is held by the plan and at least 50% of the outstanding stock is held by persons independent of the issues. "Qualifying real property" must be dispersed geographically and suitable for more than one use.

2. Provision of Services by a Party in Interest: A party in interest may provide (and be paid for) services to a plan if (i) the services are necessary for the operation of the plan, (ii) they are supplied under a reasonable arrangement (which includes the plan's right to terminate without penalty on reasonably short notice), and (iii) the plan pays no more than reasonable compensation. ERISA § 408(b)(2). This exemption does not provide relief for self-dealing (e.g., it does not allow a fiduciary to cause the plan to pay itself additional fees).
3. Interest-Free Loans: Prohibited Transaction Exemption 80-26 permits a party in interest to make an interest-free, unsecured loan to (or guarantee the debt of) a plan. The loan proceeds may be used only for (i) payment of the ordinary operating expenses of the plan (including benefit payments), or (ii) for a term of three days, for purposes incidental to the operation of the plan.
4. ERISA § 408(b)(5) and PTE 79-41: Under certain conditions, these exemptions permit an insurer (and its affiliates) to sell certain insurance contracts to plans covering their own employees.
5. Prohibited Transaction Class Exemption ("PTE") 79-60: This exemption covers the sale of insurance or annuity contracts to plans maintained by the insurance agent or broker for its own employees.
6. Prohibited Transaction Class Exemption ("PTE") 95-60: Because the assets of an insurer's general account may, under some circumstances constitute plan assets, this exemption provides relief from the prohibited transaction provisions for certain transactions of the general account.

## VII. REPORTING AND DISCLOSURE

- A. FORM 5500: With a number of exceptions, every welfare plan must annually file a Form 5500 with DOL. ERISA §§ 103, 104. (The Form 5500 satisfies the Code filing requirement for employers maintaining certain "fringe benefits" described in section 6039D of the Code.) The extent of the required information depends on the type of benefit and the manner in which benefits are provided (funded vs. unfunded).



1. With some exceptions, an audited financial statement must accompany the Form 5500 of plans that hold “plan assets.”
2. Schedule A: An insurance company that provides some or all of the benefits under the plan or holds assets of the plan in a separate account must certify to the plan administrator within 120 days of the end of the plan year any information necessary to enable the administrator to file its Form 5500. ERISA § 103(a)(2); 29 C.F.R. 2520.103-5; § 103(e). This information is typically provided on the Schedule A to the Form 5500.
3. Schedule C: Certain parties providing services to the plan for a fee must be identified on Schedule C along with the amount of the fees.
4. The plan administrator is obligated to file the Form 5500. ERISA § 104(a). DOL may assess a civil penalty of \$1000 per day for the failure to file a Form 5500. ERISA § 502(c)(2).

B. SUMMARY PLAN DESCRIPTION AND SUMMARY OF MATERIAL MODIFICATIONS:

1. The plan administrator must furnish to participants (but is not required to file with DOL) a document that summarizes the benefits under the plan and provides certain additional information about the plan, such as the identity of its fiduciaries and its claims procedures. The SPD must be provided to new participants within 90 days and must be updated every 5 years (if amended during that period) and otherwise every 10 years. ERISA §§ 101(a)(1), 102; 29 C.F.R. 2520.102-1, -2, -3, -4; 104(b).
2. If the information provided in the SPD changes, a Summary of Material Modifications (or an updated SPD) must be provided to participants within 210 days after the end of the plan year in which the changes are adopted. (There are shorter deadlines for group health plans.) 29 C.F.R. 2520.104b-3.
3. DOL has proposed regulations for the electronic distribution of the SPD. Prop. Labor Reg. 2520.104b-1(c). (The safe harbor for group health plans is final.)

C. SUMMARY ANNUAL REPORT: Unless an exception applies, the plan administrator must provide a summary of the financial

information contained in the Form 5500 (in a specific format) to participants within 9 months of the close of the plan year. ERISA § 104(b)(3); 29 C.F.R. 104b-10. One of the exceptions is for unfunded welfare plans.

- D. **INFORMATION ON REQUEST:** The plan administrator must furnish upon a participant's request a copy of the latest SPD, Form 5500, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator can assess a reasonable charge for doing so. ERISA § 104(b)(4). Any administrator who fails to provide requested information within 30 days may, in the court's discretion, be liable to the participant in the amount of up to \$110 per day. ERISA § 502(c)(1).

### **VIII. LIABILITY AND ENFORCEMENT**

- A. **PERSONAL LIABILITY OF FIDUCIARY:** A fiduciary is personally liable to the plan for losses resulting from breach of fiduciary duty, and must "disgorge" any profits that the fiduciary earns as a result of a breach. ERISA §§ 409, 502.
- B. **CO-FIDUCIARY LIABILITY:** A fiduciary may also be liable for the breaches of another fiduciary if –
1. he knowingly participates in or knowingly undertakes to conceal the breach of the other fiduciary;
  2. his own breach enables another fiduciary to commit a breach; or
  3. he has knowledge of another fiduciary's breach and fails to take reasonable steps to remedy it. ERISA § 405.
- C. **20% DOL PENALTY:** In any action or settlement involving the DOL, DOL must assess a penalty of 20% of the "applicable recovery amount" in a case of a breach of fiduciary duty or co-fiduciary liability. ERISA § 502(l). DOL may waive or reduce the penalty only if it concludes that (1) the fiduciary acted reasonably and in good faith, or (2) the fiduciary could not be expected to make the plan whole without severe hardship unless a waiver is granted. Waivers are rare.
- D. **LIABILITY OF "PARTIES IN INTEREST":** In Harris Trust and Savings Bank v. Salomon Brothers, Inc., 530 U.S. 238 (2000), the

Supreme Court confirmed that a non-fiduciary party in interest who knowingly engages in a prohibited transaction with a plan can be liable for “appropriate equitable relief” even though ERISA’s prohibited transaction rules impose no specific duties on parties in interest. The ruling also raises the possibility that persons who are not parties in interest could be liable for “knowing participation” in a plan fiduciary’s breach.

E. LAWSUITS AND INVESTIGATIONS:

1. Right to Sue
  - a. ERISA permits participants to sue to enforce the terms of the plan or Title I of ERISA. ERISA §§ 502(a)(1), (2) and (3).
  - b. DOL has a broad right of action to sue to enforce Title I. ERISA §§ 502(a)(2), (4), (5).
2. DOL Investigative Authority: DOL has broad authority to investigate possible violations of Title I of ERISA. ERISA § 504.

F. INDEMNIFICATION AND EXCULPATION:

1. ERISA § 10(a) provides that any provision in any agreement purporting to relieve a fiduciary from responsibility for any fiduciary duty shall be void as against public policy. Thus a plan may not waive its fiduciary claims against a fiduciary or indemnify that fiduciary.
2. The Section 410 prohibition does not preclude –
  - a. a plan from purchasing insurance to protect itself from losses if the insurance permits recourse against the fiduciary;
  - b. a fiduciary or third party purchasing insurance to cover the fiduciary’s potential liability; or
  - b. indemnification agreements that leave the fiduciary fully responsible and liable, but merely permit another party to satisfy the liability incurred by the fiduciary in the same manner that insurance might. For example, section 410 does not prohibit the indemnification of a

fiduciary by an employer or union or the indemnification by a fiduciary of its employees. 29 C.F.R. 2509.75-4 (Interpretive Bulletin relating to indemnification of fiduciaries).

## IX. ERISA PREEMPTION

- A. BROAD PREEMPTION: ERISA section 514 contains a broad preemption provision. It provides that, with some exceptions, ERISA will “supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).”
- B. BASIC PREEMPTION ANALYSIS:
1. Does the state law “conflict” with ERISA? If so, it’s preempted.
  2. If no conflict, does the law “relate to” an ERISA plan? If not, it’s not preempted.
  3. If the law “relates to” an ERISA plan, is the law “saved” from preemption because it is a state insurance, banking, or securities law, generally applicable criminal law or other federal law?
  4. Is the “saved” insurance law nonetheless preempted because it violates the “deemer” clause? The “deemer clause” provides that no plan shall be deemed an insurance company, bank or investment company for purposes of state laws regulating these entities.
- C. “RELATES TO”:
1. Traditional Standard was Very Broad: The Supreme Court stated that a state law relates to a plan “if it has a connection with or reference to a plan.” Shaw v. Delta Air Lines, 463 U.S. 85, 97 (1983). Some state actions affect plans “in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” Id. at 100, n.21. Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988) (state garnishment law not preempted).
  2. New York State Conference of blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) suggests a new approach to the “relates to” question. Finding the Shaw

formulation so broad as to be unhelpful, the Court focused on Congress' objective in adopting section 514 – the elimination of the threat of conflicting and inconsistent state regulation in order to preserve uniform plan administration. The Court held that state surcharges on hospital bills paid by certain third party payors was not preempted, even though the law had an indirect economic influence on ERISA plans whose insurers had to pay the surcharge.

3. Post-Travelers: While the area is still unsettled, it is clear that the Supreme Court will be taking a less expansive view of the state laws that “relate to” employee benefit plans.

## **X. MULTIPLE EMPLOYER WELFARE ARRANGEMENTS**

- A. DEFINITION: An arrangement established to provide welfare benefits to employees of two or more “employers.” ERISA section 3(40)(A).
  1. A MEWA does not include a plan established (1) pursuant to an approved collective bargaining agreement, or (2) a rural electric or telephone cooperative. Id.
  2. If all employers whose employees are covered by the arrangement are “under common control,” the arrangement will be viewed as a single “employer” arrangement and not a MEWA.
  3. An arrangement can be a MEWA even in the absence of any employer involvement. DOL Adv. Op. 88-05 (arrangement established by an association to provide benefits to ministers and employees of multiple schools is a MEWA even though employers not involved).
- B. A MEWA CAN BE AN ERISA PLAN, BUT NEED NOT BE:
  1. A welfare arrangement sponsored by multiple employers is an ERISA plan (a “multiple employer plan”) if the employers constitute “a group or association of employers acting in the interest of its employer-members to provide benefits for employees.” ERISA section 3(5) (definition of employer includes a “group or association”).
  2. DOL has said that the employer association must be a “cognizable bona fide group or association of employers.” It is

not sufficient for several unaffiliated employers to merely execute identical participation agreements as a means to fund benefits “without any genuine organization relationship between the employers.” DOL Adv. Op. 90-07A (April 6, 1990).

C. CONSEQUENCES OF MEWA STATUS:

1. FOR MEWAs THAT ARE ERISA PLANS

a. ERISA: Title I of ERISA applies as it does to any other welfare plan.

b. State Regulation: States may regulate the MEWAs as insurance. The scope of permissible regulation depends upon whether the MEWA is fully insured or not.

i. Fully insured: Permits any state insurance law mandating reserve or contribution levels designed to ensure the plan’s ability to pay benefits, and any licensing, registration and other requirements to ensure compliance with these mandates. ERISA section 514(b)(6)(A)(i).

ii. Not fully insured (self-insured): Permits any state insurance law that is not inconsistent with Title I of ERISA. ERISA section 514(b)(6)(A)(ii). These might include more stringent standards of conduct, reserve or contribution requirements, and licensing. DOL Adv. Op. 90-18A (July 2, 1990).

2. FOR MEWAs THAT ARE NOT PLANS

a. ERISA: ERISA does not directly regulate the MEWA if it is not a plan. However, if a plan purchases coverage from a MEWA, the assets of the MEWA will be deemed “plan assets.” Any person exercising authority over those assets will be a fiduciary of the participating plan.

b. State Regulation: State regulation is not preempted.