

A Benefits and ERISA Primer for Employment Law Attorneys (from Advisors to Litigators)

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**A Benefits and ERISA Primer for
Employment Law Attorneys
(from Advisors to Litigators)**

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Outline

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Overview

Benefits represent 25% to 35% of an employee's compensation. Benefits provide everything from current health insurance to future retirement preparation. Benefits range from pet insurance to life insurance. And benefits are derived from employment. Thus, benefit issues will inevitably come up in an employment law practice.

This seminar provides a primer on benefits and ERISA for employment law attorneys – whether their practice is as an advisor or a litigator. It provides a discussion of benefits and then a discussion of ERISA, the federal law that regulates benefits.

Part I – Introduction

1. Benefits and ERISA

- Benefits are wide and varied
- ERISA does not cover all benefits, but all ERISA-covered plan are all benefits.

2. Overview

- Benefits
- ERISA overview
 - Scope
 - Reporting
 - Disclosure
 - Substantive
- ERISA fiduciary duties
- Common benefit and employment law overlap
 - Handbooks
 - Employment agreements

- Severance arrangements
- COBRA
- Deferred compensation
- ERISA claim procedures
- ERISA litigation
- ERISA enforcement

Part II – Benefits

3. Benefits Overview

- Benefits
 - Employers offer a wide range of benefits
 - From health insurance to retirement plans
 - From life insurance to employee assistance programs
 - From education assistance to disability insurance
 - From severance programs to disability benefits
 - From cafeteria plans to more than can be named
 - Why not just offer cash?
 - Competition (other employers offer)
 - Tradition (it is what is done)
 - Taxes (avoiding or delaying taxes)

4. Benefits Overview

- Benefits
 - Taxes
 - ERISA, when enacted, amended the Internal Revenue Code (Code)
 - Overlap of coverage, vesting, and other provisions
 - Code provisions (a sample) that address benefits:
 - Section 79 – group term life insurance
 - Section 101 – certain death benefits
 - Section 104 – compensation for injuries or sickness
 - Section 105 – amounts received under accident and health plans
 - Section 125 – cafeteria plans
 - Section 132 – fringe benefits
 - Section 401 et seq. – retirement plans
 - Section 409A – nonqualified deferred compensation
 - Section 457 – deferred compensation at state and local governments and tax exempt organizations
 - Section 4980B – COBRA (excise taxes)
 - Section 4980H – ACA (coverage penalties)

Part III – ERISA Overview

5. ERISA Overview - Background

- Employee Retirement Income Security Act of 1974
- ERISA
 - Prior to ERISA, there was limited federal oversight of benefits
 - After ERISA
 - Revised Internal Revenue Code
 - Created Employee Benefit Security Administration (EBSA)
 - Formerly Pension and Welfare Benefit Administration (PWBA)
 - Under Department of Labor (DOL)
 - Created Pension Benefit Guaranty Corporation (PBGC)
 - Safety net for defined benefit plans
 - Brief ERISA overview provisions
 - Title I – What is commonly referred to as “ERISA”
 - Title IV – Defined benefit plans (including PBGC and multiemployer plans)

6. ERISA Overview - Scope

- ERISA covers broad array of benefits, but not all benefits
 - Employee pension plans
 - Provide retirement income or result in deferral of income until termination or beyond
 - Includes: defined benefit (DB) and defined contribution (DC) plans (such as 401(k) plans), qualified and nonqualified (not 415 excess)
 - Employee welfare plans
 - Provide medical benefits or benefits in event of sickness, accident, disability, death, unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services
 - Includes: health, dental, vision, life, long term disability, and more
 - Plans not covered
 - Pay practices: short term disability via salary continuation and vacation (if it is not funded through trust)
 - Fringe benefits: dependent care reimbursement programs
 - Equity awards: stock options, etc. (unless tied to termination)
 - Bonus programs: annual and long-term incentive

7. ERISA Overview - Scope

- Limitation on scope
 - Some plans are subject to ERISA but are exempt from certain parts of ERISA
 - Welfare plans are not subject to participation, vesting, and funding rules of ERISA (Title I, Parts 2 and 3)
 - Top-hat plans are not subject to participation, vesting, funding, or fiduciary rules of ERISA (Title I, Parts 2, 3, and 4)
- Plans exempt from ERISA
 - Governmental plans
 - Church plans

8. ERISA Overview - Reporting

- Plans are subject to reporting to federal government
- Form 5500 (annual report)
 - Primary reporting form used by DOL, IRS, and PBGC
 - Retirement plans
 - Generally, applies to all qualified DB and DC plans (nonqualified are not)
 - Generally, all plans with 100 or more participants are subject to audit
 - Participant defined as eligible for plan
 - Welfare plans
 - Generally, applies to all welfare plans with 100 or more participants
 - No audit unless welfare plan has trust (vast majority do not)
 - Participant defined as benefiting under plan
 - Changes to Form 5500
 - DOL and IRS are proposing changes to Form 5500 to gather more information and to have it apply to more plans, but not sure that they will be adopted due to new regulatory environment

9. ERISA Overview - Disclosure

- ERISA requires that number of communications be provided to participants
 - In general
 - Summary plan description (SPD)
 - Summary of material modifications (SMM)
 - Summary annual report (SAR)
 - Retirement plan additional examples
 - DB plans: benefit statement and annual funding notice
 - DC plans: benefit statement (including annual and quarterly investment and fee disclosures)
 - Health plan additional examples
 - Summary of benefits coverage (SBC) and accompanying glossary
 - COBRA notices
 - HIPAA privacy notice
 - DOL rules on electronic distribution of these documents make it difficult to do so for non-employees

10. ERISA Overview – Substantive Requirements

- ERISA requires that number of communications be provided to participants
 - In general
 - Retirement plans – coverage and eligibility
 - Retirement plans – vesting
 - Retirement plans – anti-alienation (exception for QDROs)
 - Health plans – COBRA (continuation coverage)
 - Health plans – HIPAA
 - Health plans – ACA
 - Internal Revenue Code contains parallel provisions
 - One significant difference – private individuals cannot seek to enforce Internal Revenue Code

Part IV – ERISA – Fiduciary Duties

11. ERISA Fiduciary Duties - Overview

- ERISA provides fiduciary rules for those who administer and are responsible for plan
- ERISA defines fiduciary as
 - Person who:
 - Exercises discretionary control over plan management or plan assets
 - Renders investment advice for fee
 - Has discretionary responsibility over plan administration
 - Person who is named as fiduciary with respect to plan
- If drafting employment agreement, indemnification, and insurance are points to consider if employee is fiduciary

12. ERISA Fiduciary Duties - Overview

- ERISA fiduciary duties
 - Duty of loyalty
 - Duty of prudence
 - Duty of diversification
 - Duty to act in accordance with plan documents
- ERISA also prohibits certain action known as prohibited transactions (viewed as generally breaching fiduciary duties)
- Fiduciary status is important
 - Fiduciaries are named in litigation
 - Fiduciaries may be personally liable

13. ERISA Fiduciary Duties – Prohibited Transactions

- Fiduciaries have duty to avoid causing plan to engage in certain prohibited transactions
- ERISA prohibits certain transactions unless an exemption applies
- ERISA 406 (section 4975 of Code)
 - Prohibited transaction is transaction between plan and “party-in-interest” (“disqualified person” under Code)
 - Parties in interest includes:
 - Plan fiduciary
 - Person providing services to plan
 - Employer
 - Employee, officer, or director of employer
 - Employee organization

14. ERISA Fiduciary Duties – Prohibited Transactions

- ERISA 406(a) – Prohibited transactions with party-in-interest include:
 - Sale or exchange or leasing of property
 - Lending of money or other extension of credit
 - Furnishing of goods, services, or facilities
 - Transfer to, or use of, plan income or assets
 - Transfer of property from party-in-interest to plan

15. ERISA Fiduciary Duties – Prohibited Transactions

- ERISA 406(b) – Prohibited transactions with fiduciary include:
 - Fiduciary deals with plan assets in fiduciary’s own interest
 - Fiduciary acts on behalf of party whose interests are adverse to plan or plan’s participants and beneficiaries
 - Fiduciary receives consideration from party in transaction involving plan assets
- Prohibited transaction rules were meant to be broad
- Congress created three layers of exemptions
 - Statutory exemptions (ERISA 408)
 - Class exemptions
 - Individual exemptions

Part V – Common Overlap

16. Common Overlap – Intersection of Employment Law & ERISA

- “E” in ERISA stands for employee so ERISA is naturally connected to employment law issues
- ERISA covered benefits are subject to federal employment laws
 - ADA
 - ADEA
 - Title VII, etc.
- Benefits represent about one third of employee’s total compensation

17. Common Overlap - Handbooks

- Handbook often address benefits that are subject to ERISA
 - Risks created by describing benefits
 - Risk – Handbook description is inconsistent with benefit plan
 - Example: Health plan document (plan-summary plan description (SPD)) is usually updated each year
 - Unless handbook is also updated differences can arise regarding eligibility, benefits, and plan rules
 - Risk – Handbook description is summary of summary, so many important provisions excluded
 - Example: Benefit plan document has detailed claim procedures
 - Handbook may limit description and exclude important aspects of benefit plan
 - Best practice – Handbook has minimal, high level description of benefits and refer reader to SPD for benefit
 - Example:
 - “Employer offers a broad array of benefits to its employees, including 401(k) plan, medical and dental coverage, life insurance, and short term and long term disability benefits. Please see the plan documents for those plans for more information on eligibility.”

18. Common Overlap – Employment Agreements

- Employment agreements often address benefits subject to ERISA
 - Increasingly require knowledge of ERISA and Internal Revenue Code (particularly section 409A)
- ERISA connection (provisions subject to ERISA)
 - Benefits
 - Severance
 - Deferred compensation
- Internal Revenue Code connection
 - Benefits
 - Severance
 - Deferred Compensation
 - Annual incentive (bonus)
 - Long-term incentive
 - Equity awards

19. Common Overlap – Employment Agreements

- Employment agreements with benefits subject to ERISA
 - Risks created by describing benefits
 - Risk – Employment agreement provision itself constitutes ERISA plan
 - Example: Employment agreement promises nonqualified deferred compensation and describes arrangement – no separate plan document exists
 - Risk – Employment agreement is inconsistent with benefit plan
 - Example: Employment agreement promises certain level of employer contribution or vesting schedule under tax-qualified retirement plan
 - Risk – Law change occurs that creates issues
 - Example: ACA made lifetime medical benefits more difficult to provide based on new nondiscrimination rules that apply to insured plans
 - Best practice – Confirm participation in broad-based plans and executive benefits subject to their terms (and cash in lieu of perks)
 - Example:

“Executive shall be eligible to participate in employer’s broad based benefit plans subject to the terms of those plans. In addition, executive shall participate in employer’s executive benefit plans offered to similar executives subject to the terms of those plans.”

20. Common Overlap – Severance Arrangements

- Severance arrangements may be subject to ERISA
 - If severance arrangement provides for an “ongoing administrative program” or “ongoing scheme” then likely is subject to ERISA
 - Fort Halifax Packing v. Coyne, 482 U.S. 1, 107 S.Ct. 2211 (1987)
- Aspects of severance that constitute “ongoing administrative program” or “ongoing scheme”
 - Examples:
 - Payments paid over time
 - Payments subject to offset if other employment obtained within certain period of time (clawback)
 - Eligibility (and perhaps subsidies) for health continuation coverage
 - Noncompete provision (reporting or monitoring of next employment)
- Severance arrangements covering just one employee may be subject to ERISA

21. Common Overlap – Severance Arrangements

- Severance arrangements subject to ERISA
 - Risks to employer of severance arrangement subject to ERISA
 - Risk – Failing to comply with ERISA’s compliance
 - Failing to file Form 5500 (annual report)
 - Failing to provide summary plan description (SPD) to participants
 - Risk – Being fiduciary
 - Plan administrator subject to potential litigation
 - Personal liability risk
 - Impact on employee
 - Claim procedures
 - Plan administrator to provide fair review of claims
 - Plan administrator to document reasons for decision
 - Litigation
 - Federal court
 - No jury trial
 - No punitive damages

22. Common Overlap - COBRA

- In U.S., health coverage is tied to employment so loss of employment usually results in loss of health coverage
- COBRA meant to address this by providing coverage while employee is in between jobs
 - Continuation coverage for period of 18 to 36 months depending on basis for loss of health coverage
 - Health exchanges reduced some of need for COBRA
- In every employment termination, employee needs to consider what employee will do for health coverage

23. Common Overlap - COBRA

- COBRA applied to group health plans subject to ERISA
 - Group health plans include
 - Medical
 - Dental
 - Health flexible spending accounts
 - Health reimbursement arrangements (HRAs)
 - Possibly:
 - Employee assistance plan
 - Wellness programs
- Note: State mini-COBRA laws may also apply to insured group health plans

24. Common Overlap - COBRA

- COBRA, ERISA, and group health plans
 - Risk to employer on COBRA notice process
 - Potential litigation if COBRA not offered
 - Potential penalties for failure to provide COBRA notice
 - Impact on employer
 - ERISA disclosure
 - Notices to employees
 - » Initial (or general) notice
 - » Election notice
 - » Unavailability notice
 - » Termination of coverage notice
 - Impact on employee
 - Difficult choice of COBRA versus exchange or coverage through spouse
 - Cost of COBRA (102% of employer and employee premiums)

25. Common Overlap – Deferred Compensation

- Deferred compensation plans (plans that defer compensation until termination or later) are subject to ERISA
 - Examples
 - Supplemental executive retirement plan (SERP)
 - Usually plan that supplements defined benefit plan
 - Usually provides for
 - Becoming less common
 - Nonqualified deferred compensation plan
 - Usually plan that supplements 401(k) plan
 - Usually allows employees to contribute own compensation
 - Usually provides for investment in same investments as under 401(k) plan
 - Section 409A of Internal Revenue Code gets lot of attention here, but also need to consider ERISA
 - Section 409A – Focuses on and limits changes to time and form of payment
 - Section 409A – Imposes significant taxes and penalties for violations
 - Section 409A – Note can apply to severance arrangements

26. Common Overlap – Deferred Compensation

- Deferred compensation plans subject to ERISA
 - Risks to employer of deferred compensation subject to ERISA
 - Risk – Plan covers more than select group of management and highly compensated employees
 - Example: Employer covers deep into management ranks (covering individuals who are not in position to protect themselves)
 - Risk – Employer fails to file top hat letter with DOL
 - Example: Employee does not submit letter and DOL finds on audit; potential penalties of more than \$2,000 per day for each day for each year that filings are late (potential penalties in the millions in some cases)
 - Impact on employer
 - Exempt from portions of ERISA (Parts 1 through 4 of Title I), but still subject to Part 5 of Title I (claim procedures and more)
 - Even though exempt from ERISA disclosure, need to provide plan and or summary for other purposes (including claim procedures)
 - Impact on employee
 - Claim procedures (see earlier slide)
 - Litigation (see earlier slide)

Part VI – ERISA Claim Procedures

27. ERISA Claim Procedures - Overview

- ERISA provides plan is to contain claim procedures for claimants (participants, beneficiaries, and anyone with colorable claim for benefits) to resolve disputes
- What is a claim?
 - Any time participant or claimant (beneficiary) requests benefit, that is claim
 - Examples of claims
 - Retirement plans
 - Loan
 - Hardship distribution
 - Qualified domestic relations order (QDRO)
 - Health plans
 - Treatment
- Failure to have or to follow claim procedures means claimant is deemed to have exhausted claim procedures, was denied, and claimant may sue

28. ERISA Claim Procedures - Overview

- ERISA claim processes vary depending on type of plan
 - Retirement plans (and plans other than health plans)
 - In general
 - Claim denial due 90 days after receipt of claim
 - Claimant allowed at least 60 days to appeal claim denial
 - Appeal denial due 60 days after receipt of appeal
 - Health plans
 - Three different time frames for responding to claims
 - Urgent care claims (24 hours on claim; 72 hours on appeal)
 - Pre-service claims (15 days on claim; 30 days on appeal)
 - Post-service claims (30 days on claim; 60 days on appeal)
 - Disability benefits (retirement or other plans)
 - Special rules – New rules proposed for 2018
 - Claim denial due 45 days after receipt of claim
 - Claimant allowed at least 60 days to appeal claim denial
 - Appeal denial due 45 days after receipt of appeal

29. ERISA Claim Procedures - Overview

- ERISA requires claim denial letters to
 - Explain reasons claim was denied
 - Reference plan provisions that are basis for determination
 - Describe any additional materials or information needed to perfect claim
 - Describe plan's claim procedures including
 - Time limits
 - Statement of right to sue under section 502(a) of ERISA
 - Additional details may be needed for health plan denials
- ERISA claim denial letters are viewed as an essential communication by courts
 - Plan should note any rules regarding claim litigation
 - Venue
 - Choice of law
 - Statute of limitations

30. ERISA Claim Procedures - Suggestions

- Consider letter to be first exhibit in any legal action
- Letter content
 - Provide background
 - Provide timeline (especially where timing is important)
 - Provide plan provisions that are basis for denial
 - Provide analysis (why plan provisions are not met)
 - Provide statement of status and ability to bring ERISA claim
 - Include information on plan claim limits, legal action limits, venue, and choice of law

Part VII – ERISA Litigation

31. ERISA Litigation

- ERISA provides that claimants may bring cause of action under ERISA
 - Claimant may bring action to
 - Recover benefits
 - Enforce plan terms
 - Obtain plan information required to be provided
 - Relief for breach of fiduciary duty
 - When plaintiff can recover money compared to equitable relief is an area of ongoing development
 - If claimant lost money, then money may be recovered
- ERISA is exclusive means for relief (claimants generally cannot bring state law claims)
- ERISA litigation
 - No punitive damages
 - No jury trial
 - Successful plaintiff may recover attorney fees

32. ERISA Litigation – State Law and Preemption

- ERISA generally preempts state law
 - Example of application
 - Insured health plan is subject to state law (because state can regulate insurance company offering health plan to employer)
 - Self-insured health plan is not subject to state law (deemer clause)
- Scope is subject of ongoing clarification
 - Recent issues
 - State's ability to require third-party administrators to provide health plan claim data preempted
 - State's ability to impose tax on plan affirmed by 6th Circuit (appeal)
- ERISA provides that state law claim within scope of ERISA that state law claim is preempted

Part VIII – ERISA Enforcement

33. ERISA – DOL Enforcement

- ERISA provides DOL is responsible for enforcement of ERISA
 - DOL may assess monetary penalties
 - DOL may assess criminal penalties
 - DOL may bring litigation
- DOL monitoring of Form 5500
 - DOL contacts employers if it detects problem, such as
 - Late filing
 - Missing audit
 - Incorrect information
- DOL audits
 - DOL conducts targeted and random audits
 - Sources - Form 5500 filings and calls to DOL

Part IX – ERISA Addendum

34. Benefits and ERISA Questions

- Questions

35. Benefits and ERISA

- Daily updates and resources
 - BenefitsLink (www.benefitlink.com)
 - BNA

36. Employer

- Cross references
 - BenefitsLink has a U.S. Code to ERISA cross reference chart

Part X – ERISA Disclosure

36. ERISA Disclosure

- ERISA contains a number of sections that address disclosure in different contexts

37. ERISA – Disclosure in Practice

- Responding to 104(b) disclosure request
 - What is basis for disclosure?
 - Section 104(b)(4) requires plan to provide:
 - Latest summary plan description
 - Latest annual report (Form 5500)
 - Any terminal report
 - Bargaining agreement
 - Trust agreement
 - Contract or instruments under which plan is established or operated
 - May plan charge for disclosure?
 - Yes – reasonable copying costs
 - Time frame for disclosure?
 - Within 30 days after receipt of request

38. ERISA – Disclosure in Practice

- Responding to 404(a) disclosure request
 - What is basis for disclosure?
 - Section 404(a) (fiduciary duties) requires plan to provide:
 - Prospectuses upon request
 - Annual disclosure
 - May plan charge for disclosure?
 - No
 - Time frame for disclosure?
 - As soon as reasonably practicable

39. ERISA – Disclosure in Practice

- Responding to 503 disclosure request
 - What is basis for disclosure?
 - Section 503 (claims) requires plan to provide:
 - All documents and other information relevant to claimant's claim
 - May plan charge for disclosure?
 - No
 - Time frame for disclosure?
 - As soon as reasonably practicable