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Employee Benefit Basics for Business Attorneys

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Benjamin L. Grosz
Ivins, Phillips & Barker

Lacy L. Durham
Deloitte Tax

Jeannie Leahy
former VP & Assistant General Counsel for Comp & Benefits in HP Legal Dept.

Steven H. Witmer
Ivins, Phillips & Barker

Presentation Agenda

- Introduction
- ERISA
- Fiduciary Duties & Liability
- Qualified Retirement Plans
- Executive Compensation & Fringe Benefits
- Health & Welfare
- Best Practices

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Panelist Introduction

- Ben Grosz
  - Associate at boutique tax law firm, practices EB & Estate Planning
- Jeannie Leahy
  - Special Counsel at large, business-focused law firm
  - In-House Benefits Counsel previously at HP, Boeing, Northrop
- Lacy Durham
  - Tax Manager at large national consulting firm, EB & Tax consulting
- Steve Witmer
  - EB Partner at boutique tax law firm, formerly an in-house secondee

Employee Benefits Law – Complex & Broad

- Federal Statutes and Regulations
  - ERISA
  - Tax Code
  - Patient Protection & Affordable Care Act (PPACA)
  - Other (e.g., HIPAA, FMLA, GINA, ADEA, USERRA)
- State Laws (e.g., Cal-COBRA, paid sick leave)
- Regulations (e.g., IRS, DOL, PBGC, EEOC, HHS)
- Case Law

ERISA – What is it? The Basics

- Comprehensive federal law
  - Employee Retirement Income Security Act of 1974
- Regulates employee benefit plans
  - Protects participants and beneficiaries
  - Requires disclosure and reporting
  - Provide uniformity in the administration of plans for employers
  - Establishes "standards of conduct, responsibility, and obligation for fiduciaries"
  - Provides for "appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b).

Business Opportunities

- Employee Recruitment, Morale, & Retention
- Taxes
  - Income Tax Avoidance for Employees (lower costs for Biz?)
    - Health Care (Medical, Dental, Vision)
    - Fringe Benefits (Adoption, Child Care, Transport, Café, Gym, etc.)
  - Income Tax Deferral for Employees (e.g., Retirement Plans)
  - Company Income Tax Deferral (e.g., Pensions) / Immediate Deduction
  - Payroll Tax Avoidance for Company and Employees
- Compliance & Risk Reduction

Business Risks & Issues

- Taxes
  - Penalties & Excise Taxes
  - Tax Qualification
- Claims and Litigation (including class actions)
- Audits (e.g., IRS, DOL, EEOC)
- Other Government Actions (e.g., PBGC insertion in M&A deal, EEOC injunctive lawsuits)
- Employee Recruitment, Morale, & Retention

How Do Benefits Issues Arise? (Examples)

- Business Question(s)
  - Various Depts. (e.g., HR, Finance, Legal, Compliance)
  - M&A (e.g., benefit-related liabilities can be substantial)
  - Vendor Contracts
- Participant Inquiry or Claim
- Vendors – Errors, Questions
- Audit
- Lawsuit

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Historical Background

- Protections for Employees and Participants
  - Shorter Vesting Periods
  - Stricter Funding Rules
  - Restrictions on Plan Termination
  - Studebaker: "ERISA's Enron"

ERISA

- Enacted in 1974
- Title I of ERISA (DOL)
  - Generally procedural (e.g., reporting/disclosure, fiduciary duties, prohibited transactions)
  - Applies to "pension" and "welfare" plans
- Title II of ERISA (IRS)
  - Tax-Qualification Rules (Code Section 401(a))
  - Generally substantive (e.g., coverage, vesting, non-discrimination)
  - Applies only to "pension" plans
- Preempts state regulation (except state insurance regulation)

Enforcement

- DOL Fines and Penalties
- IRS Disqualification and Penalties
  - Audit CAP penalties
  - Excise Taxes
- Lawsuits
  - Participants (Individual or class action)
  - DOL

Title I of ERISA

- Part 1: Reporting and Disclosure
- Part 2: Participation and Vesting
- Part 3: Funding
- Part 4: Fiduciary Responsibility
- Part 5: Procedures, Penalties and Preemption
- Part 6: COBRA
- Part 7: Group Health Plans

Different Types of Plans

- Defined Benefit Plan
- Defined Contribution Plan
- Welfare Plan
  - Group Health Plan
- Nonqualified Plan
- Non-Plan
  - No "ongoing administrative scheme"
  - Payroll practice

Reporting and Disclosure (Examples)

- To Participants and Beneficiaries
  - Summary Plan Description (SPD)
  - Summary of Material Modification (SMM)
  - Benefit Statements
  - Summary Annual Report (SAR)
- To DOL / IRS / PBGC
  - Annual Report (IRS Form 5500)
- To Plan Sponsors

Fiduciary Responsibility

- Specific Duties
  - Exclusive benefit
  - Prudence
  - Diversification
  - Plan documents
- Personal Liability for Breach
- Fiduciary Status is <u>Functional</u>
- Duty to Monitor/Co-Fiduciary Liability

Settlor vs. Fiduciary Functions

- Settlor Functions
  - Establishment, design, and termination
- Fiduciary Functions
  - Implementation of plan provisions
  - Participant communications
  - Review of claims
  - Handling plan assets
  - Choosing investment options
  - "Firestone" deference
- Procedural prudence is key
- Plan drafting can help

Prohibited Transactions

- Section 406(a): Transactions between a plan and a "party in interest"
  - "Party in interest" includes employer, certain employees, plan fiduciaries, and service providers
  - Various exceptions apply (e.g., employer securities, loans, reasonable compensation for services)
  - Rules are not intuitive
- Section 406(b): Self-dealing between a plan and a fiduciary
  - No exceptions
- Subject to IRS Excise Tax (Section 4975)

Claims Procedures/Civil Enforcement

- Claims Procedures
  - Timelines for claims and appeals
  - Again, procedural prudence is key
  - If followed, decision entitled to deference
- Civil Enforcement
  - 502(a)(1)(B): Recover benefits, enforce rights, clarify right to future benefits
  - 502(a)(2): Breach of fiduciary duty
  - 502(a)(3): Injunctions and equitable relief
  - Participants, beneficiaries, fiduciaries, and the DOL have standing to sue

DOL Correction Programs

- Voluntary Fiduciary Correction Program
  - Delinquent contributions
  - Party in interest transactions
  - Loan failures
  - Improper payment of expenses
  - Must "make the plan whole"
- Delinquent Filer Voluntary Compliance Program
  - Failure to file Form 5500
  - Per plan penalty applies

Plan Assets

- Subject to fiduciary duties
- Trust requirement
- No reversion to employer, except in limited circumstances
- Participant contributions
  - "Reasonably segregated"

What ERISA/Plan Role(s) Do You Play?

- Participant
- Business
  - Compliance
  - Strategy
  - Design
  - Operation
- Fiduciary

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Who is a Fiduciary? You?

- Plan sponsor (the company)
- Plan administrator (often a committee)
- Individuals
  - By designation (personal/title)
  - Service on a committee
  - Functional - i.e., you are a fiduciary to the extent you exercise discretion or control with respect to the plan

What it Means to be a Fiduciary

- Fiduciaries must affirmatively do certain things

….and

- Fiduciaries must avoid other things

What Fiduciary Rules Do You Have to Follow?

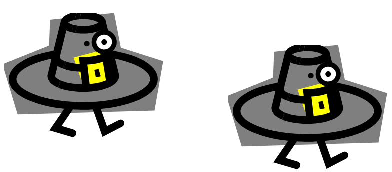
- Internal Revenue Code
  - Tax qualification rules for qualified plans (e.g., 401(k))
  - Exclusive benefit
  - Plan document requirement
- ERISA
  - Fiduciary rules set forth affirmative duties
  - Avoid prohibited transactions and fiduciary breaches
- Plan terms and rules

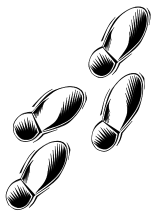
ERISA's Basic Fiduciary Rules

- Fiduciary "Do's"
  - Exclusive Benefit/Purpose Rule (duty of loyalty)
  - Prudence Rule (duty of care)
  - Diversification/Investment Rule
  - Plan Documents Rule
- Settler vs. fiduciary functions
- Co-fiduciary liability
- Fiduciary "Don'ts"
  - Prohibited transactions
  - Self dealing

Exclusive Benefit Rule

- Duty to act solely for benefit of participants and beneficiaries
- Fiduciaries typically wear two hats: the fiduciary role and the business role
- Conflicts of interest: question of degree
  - May need to step aside





Business Function Exception

- Business functions are not subject to fiduciary rules
  - Starting a plan
  - Terminating a plan
  - Plan design and modification
- Following the plan and implementing business decisions are fiduciary functions
- Distinguishing business and fiduciary functions can be tricky

Prudence Rule

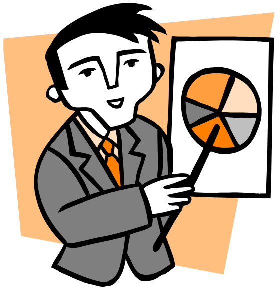
- Must discharge duties with the care, skill, prudence and diligence of a similarly situated prudent person
- Good outcome is not enough
- Absence is not a good defense

Prudence Rule (cont.)

- Largely a procedural rule
  - Was the fiduciaries' consideration adequate under the circumstances?
  - Was their investigation thorough enough?
  - Did they consider the appropriate factors?
  - Did they consult experts where appropriate?
  - Did they weigh/debate alternatives?
- Documentation

Diversification Rule

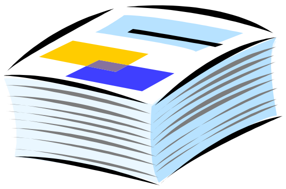
- Plan Administrator is generally responsible for all investment decisions regarding plan assets
- 401(k) plans – ERISA § 404(c) has a limited exception
  - Mandates certain amount of diversification in investment options
  - Procedural and disclosure requirements
  - Ongoing duty to monitor
  - Investment education vs. advice



- Employer stock – special rules

Plan Documents Rule

- Fiduciaries must follow the plan documents unless they conflict with ERISA
  - Example: lawsuits regarding company stock funds in 401(k) plans
- Plan documents: Plan, trust, summary plan description (SPD), etc.



Other Duties of the Plan Administrator

- Selection and oversight of plan service providers
  - E.g., recordkeeper, trustee, investment advisors, legal counsel, auditor, Form 5500 preparer, and others
- Selection and monitoring of investments
- Annual reporting
  - Form 5500
  - Summary Annual Reports for DC plans
  - Funding Notices and PBGC filings for DB plans

Other Duties of the Plan Administrator (cont.)

- Ensuring tax and legal compliance
- Maintenance and upkeep of plan documents and records
  - SPDs and Summaries of Material Modification
  - IRS determination letter filings
- Handling participant claims and appeals

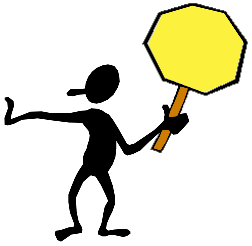
Fiduciary Liability

- Liability is personal

- Indemnification by plan sponsor
  - May be offered through plan
  - May be offered directly by plan sponsor
  - Usually an exception for gross misconduct
- Insurance protection

Liability for Other Fiduciaries

- Co-fiduciary liability for the breach of another fiduciary exists if—
  - A fiduciary knowingly participates in or acts to conceal another fiduciary's breach
  - By failing to comply with the fiduciary standards, a fiduciary enables another fiduciary to commit a breach
  - The fiduciary has knowledge of a breach by another fiduciary and does not act to correct it (which might require going to court)
- Duty to monitor delegations/appointments



Prohibited Transactions (Fiduciary "Don'ts")

- Transactions between a plan and a "party in interest" are generally prohibited
  - Loans or extensions of credit
  - Sales, exchanges, or leases
  - Transfers of property
  - Furnishing of goods or services

- Fiduciary self dealing prohibited

Prohibited Transactions (cont.)

- Parties in Interest
  - Fiduciaries
  - Service providers
  - Company, and its affiliates
  - Company employees, officers, directors and 10% shareholders
  - Participants other than in their capacity as participants

Prohibited Transactions (cont.)

- Some exceptions to PT Rules
  - Employer securities
  - Loans to participants
  - Fiduciary participation in a plan
  - Reasonable compensation for services
- Exceptions come in different forms
  - Statutory/regulatory exceptions
  - DOL class and private exceptions

Prohibited Transactions (cont.)

- Prohibited transactions are reported on IRS Form 5500 for the plan
- Prohibited transactions trigger an excise tax under Internal Revenue Code section 4975
  - 15% initial excise tax
  - 100% additional tax for failure to correct

Prohibited Transactions (cont.)

- Examples of Possible Violations
  - Discounts for the company from plan vendors
  - Hiring a company affiliate as a service provider
  - Use of plan assets to pay company expenses
  - Gifts and commissions from vendors
  - Failure to comply with participant loan rules
  - Noncash contributions to DB plans
- Definitely best to ask questions when you're not sure

Best Practices – What to do?

- Prudent Process – maintain and document
  - Have a three-person Committee (at least)
  - Meet on a regular basis and document the decision-making process
  - Consider establishing an investment policy
  - Choose vendors by getting bids and evaluating services/fees
  - Evaluate vendors on a regular basis
  - Ensure that plan provisions and procedures are properly followed

Best Practices – What to do? (cont.)

- Focus on fees paid from the plan and 401(k) investment fees
- Compliance with disclosure regulations:
  - 404(c) information to 401(k) plan participants
  - 408(b)(2) service provider information to fiduciaries: Initial disclosures in 2012 and any updates
  - Annual fee disclosure to 401(k) plan participants
  - Annual QDIA notice

Current Fiduciary Hot Topics – 401(k) plans

- 401(k) plan fees
  - Widespread lawsuits and big-dollar settlements
  - Ongoing DOL initiatives
- Target retirement date funds
- Company stock funds

Current Fiduciary Hot Topics – Pension plans

"De-risking" strategies, including:

- Liability-driven investment strategies
- Lump sum windows
- Plan termination

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Plan Qualification Requirements

- Tax Advantages
  - Current deduction for employer
  - Deferred taxation for employee
  - Tax-deferred build-up of earnings
  - Huge "tax expenditure"
- Not Applicable to Nonqualified Plans

Defined Contribution Plans vs. Defined Benefit Plans

- Defined Contribution (Individual Account) Plans
  - May include a 401(k) “cash or deferred arrangement”
  - Also include ESOPs
  - Defined *contribution* by employee and/or employer
  - Employee bears investment risk
  - Limited in-service distributions
  - No PBGC Insurance
- Defined Benefit Plans
  - Defined *benefit* at retirement
  - Employer bears investment risk
  - Generally no in-service distributions
  - PBGC Insurance

Basic Requirements

- Definite written program
- Communicated to employees
- Established and maintained by an employer
- Created or organized in the United States
- Maintained as a domestic trust in the United States

Documentary Compliance

- Determination Letters
- Five-year Filing Cycle
- Remedial Amendment Period
- Interim and Discretionary Amendments

Operational Compliance

- Employee Plans Compliance Resolution System (EPCRS)
  - "Amnesty" concept – no penalty for turning yourself in
  - "Make whole" principle
  - Self-Correction (SCP): No fee
  - Voluntary Correction Program (VCP):
    - Fixed fee based on size of plan
    - No audit while application pending
  - Audit CAP
    - Fee is a percentage of the "Maximum Payment Amount," which is the total tax payable in the event of plan disqualification
- Self-Audit

DB Plan Requirements – Eligibility & Vesting

- Coverage
  - May not require more than one year of service, or two if immediately vested; no minimum age above 21
  - Section 410(b) Coverage Test
- Vesting
  - Five-year cliff or seven-year graded
- Non-Discrimination (Section 401(a)(4))
  - General Non-Discrimination Test
  - Benefits, Rights and Features
  - Exemption for bargained plans

DB Plan Requirements – Benefit Accruals

- Accrued Benefit
- Funding Rules
- Backloading
- Section 411(d)(6): No takeaway of accrued benefit by amendment
- Benefit expectations may be reduced prospectively
  - 204(h) Notice

DB Plan Requirements - Distributions

- Survivor Benefit Rules
  - Qualified Joint and Survivor Annuity (QJSA) for married participants, single life annuity if not married
  - Qualified Preretirement Survivor Annuity (QPSA) for surviving spouses
  - Spousal consent required to waive default forms
  - Notice requirements (30 to 180 days)
  - Relative value disclosures
- Early Retirement Windows
- Anti-Alienation and QDROs (DC Plans as well)

DC Plan Requirements – Types of Contributions

- Participant Contributions
  - Elective Deferrals
  - After-Tax Contributions
  - Roth Contributions
  - Catch-up Contributions
  - Rollover Contributions
- Employer Contributions
  - Matching Contributions
  - Profit-Sharing Contributions
  - Stock Contributions
  - Discretionary (or Non-Discretionary)

DC Plan Requirements – Vesting & Benefit Limits

- Vesting Rules Vary by Contribution Type
  - Immediate vesting in participant contributions
  - 3-year cliff or 6-year graded for company contributions
- ADP/ACP Tests
  - HCE contributions may not exceed non-HCE contributions by more than a stated limit
- Other Benefit Limits
  - 402(g): Elective deferrals
  - 415: Annual additions
  - 401(a)(17): Compensation taken into account

DC Plan Requirements – Investments

- Participant-Directed Investment
  - ERISA Section 404(c) Protection
  - Fiduciary duties apply to selection of investment options
- Employer Stock
  - PPA requires diversification rights
- Fees (Disclosure is key)
- Default Investments & QDIA

Qualified Default Investment Alternatives

- Typical Types of Funds
  - Life-cycle or target retirement date fund
  - Allocation among existing plan options by an investment service
  - Group-based product (e.g., a balanced fund)
- 30-Day and Annual Notice Requirements
  - "Springing" relief
- No Fees and Restrictions for 90 Days
- Grandfathered Stable Value Funds
  - Only applies to previously invested amounts

DC Plan Requirements – Distributions

- After-Tax & Rollover – Anytime
- Elective Deferrals
  - Severance from employment
  - Death
  - Disability
  - Age 59 ½
  - Hardship
  - Loan
  - Qualified reservist distribution
- Company Contributions
  - More legal flexibility for employer plan design choices
- 10% Penalty under Section 72(t)

DC Plan Requirements – Optional Features

- Roth 401(k) Contributions
- Brokerage Window
- Testing Safe Harbor
- Automatic Enrollment
  - Qualified Automatic Contribution Arrangement
  - Eligible Automatic Contribution Arrangement

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Executive Compensation Programs and Plans

- SERPs, Excess Plans, and Supplemental Pensions
- "Top Hat" Plans (i.e., Non-Qualified Deferred Comp)
- Incentive Stock Options & Non-Qualified Stock Options
- Restricted Stock, Phantom Stock, Stock Bonus
- Golden Parachutes – Change-in-Control and Severance Agreements
- Executive Perquisites
  - E.g., personal use of corporate jet

Executive Compensation Law – Not So Simple

- Tricky Tax Rules
  - Code § 409A – Nonqualified Deferred Comp Plan Rules
  - Code §§ 83, 421, 422 – Stock & Stock Options
  - Code § 162(m) – limits deductibility of certain exec comp
  - Code § 280G – Tax penalties for excessive golden parachute payments
- Top-Hat Plans subject to fewer ERISA requirements
- Securities Rules – SEC Disclosures

Section 409A – Basic Overview

- Covers all forms of deferred compensation (unless specifically excluded); prescribes general rules for:
  - Elections to defer compensation
  - Payment of deferred compensation
  - Mandatory six-month payment delay for payments to "specified employees" following termination
  - Reporting and withholding of deferred compensation
- Even if plan documents are compliant, operational failures may result in additional taxes and interest
- Calculating taxes and penalties is a mess

Section 409A – Business Issues

- Errors occur all too frequently
- Adverse Tax Consequences for Company and Exec
  - 20% penalty tax
  - Current taxation of vested deferred comp
  - Premium interest tax equal to federal underpayment plus 1% back to vesting date, on all vested amounts under plan
  - Unfavorable plan aggregation rule for operational failures
- Correction Opportunities (limited window)
  - Operational Failures → IRS Notice 2008-113 (and 2010 Notices)
  - Plan Document Failures → IRS Notices 2010-6 & 2010-80

Section 409A – IRS Correction Programs

- Advantages of Corrections Program
  - Limits the violation to amounts directly involved in the failure; no other plans affected
  - No premium interest; in some cases no additional taxes at all
  - IRS claims that employers are not more likely to be audited after using the program
- Limitations of Corrections Programs
  - Only specified types of failures can be corrected
  - Can't correct operational failures more than 2 years old
  - Detailed reporting on tax returns filed for correction year (exception for employee's tax return for operational failure corrected in failure year)
  - Operational failures are not corrected unless employer takes commercially reasonable steps to prevent recurrence; need good story for repeat offenses
  - Early payments cannot be corrected if the employer experienced a substantial financial downturn during the year of payment

Section 409A – Common Deferral Errors

- Definition of compensation not administered correctly
- Mid-year enrollment for newly eligible participants
  - May only defer amounts earned following enrollment; bonuses may be pro-rated
- Bonus deferral elections often apply to amounts paid in the second year after the election is made
- May be able to correct errors before year-end without using the corrections program

Section 409A – Common Payment Errors

- Identifying Section 409A Separation from Service
  - Reduction in hours
  - Leave of absence
  - Transfer to affiliates, especially if the affiliate is on a different payroll system
  - Ongoing consulting work after termination of employment
  - Rehire following termination
  - Acquisitions & dispositions

Fringe Benefits – Common Issues

- Taxes
  - Income Tax Treatment for Employees
  - Deduction Rules for Company
  - Employment (Payroll) Taxes
  - Employer Penalties for Errors
- Non-Discrimination Provisions
- Other "Special" Rules – can be tricky
- Record Retention

Fringe Benefits – Common Types

- Adoption Assistance – Code § 137
- Dependent Care – Code § 129
- Educational Assistance (up to $5,250) – Code § 127
- Group Term Life Insurance (up to $50k) – Code § 79
- Moving Expenses – Code § 132(g)
- Transit & Parking Benefits – Code § 132(f)(4)
- Company Cafeteria – Code § 132(e)(2)
- Company Gym – Code § 132(j)(4)

Fringe Benefits – Common Types

- Meals & Lodging "for convenience of the employer"
- "No Additional Cost Services" – Code § 132(b)
- "Qualified Employee Discounts" – Code § 132(c)
- "Working Condition Fringe" Benefit – Code § 132(d)
  - Company Cars?
  - Cell Phones
- "De Minimis" Fringe Benefits – Code § 132(e)
- Expense Reimbursements

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Health & Welfare Plans are Generally Subject to ERISA

- Medical, Dental, & Vision
- Health FSAs and HRAs
- Wellness Programs
- Flu Shots, Health Screenings, Nurse Hotlines
- Disability Insurance
- Life Insurance, AD&D & Other Death Benefits
- Day-Care Center
- Employee Assistance Plans (EAPs)
- Prepaid Group Legal Plans

ERISA Health & Welfare Plans

- Most ERISA rules apply
  - Reporting and Disclosure
  - Participation & Nondiscrimination
  - Fiduciary Rules
  - Procedures
  - Penalties
  - Preemption
- Exempt from vesting and funding rules

ERISA Claims Procedures

- DOL Claim Regulations
  - Rules depend on type of plan
  - Timelines
  - Notice requirements
  - No Conflicts of interest – Independence and Impartiality
  - Participant appeal rights
- Must be exhausted before lawsuit filed
- Courts generally defer to Plan decisions

Affordable Care Act – Core Requirements

- The ACA aims to expand health coverage through a series of provisions (generally effective 1/1/2014):
  - **Individual mandate:** Mandates all Americans, with some exceptions, to maintain a minimum level of health coverage or face a tax.
  - **Insurance Exchanges**: Creates health insurance Exchanges and provides Premium Tax Credits (PTCs) to assist eligible individuals with the purchase of coverage.
  - **Medicaid expansion:** Allows states to expand Medicaid up to 138% of federal poverty level.
  - **Employer mandate:** Mandates employers with 50 or more full-time equivalents to offer coverage to full-time employees and their dependents or pay taxes if an employee obtains Exchange coverage and a PTC. **Now Effective in 2015**

Affordable Care Act – New Medicare Taxes (in 2013)

- New 0.9% Medicare tax on high-wage employees
  - $200K for single filers, $250K for married filers
  - Employer withholding is required for wages
  - Employees may adjust their withholding allowances
- New 3.8% Medicare tax on unearned income
  - Tax applies to net investment income to the extent modified AGI exceeds the same $200K/$250K thresholds
  - Does not apply to wages
  - No employer withholding required

Affordable Care Act – New Employer Fees

- PCORI fee for comparative effectiveness research (2012-2018)
  - Fee per "covered life" ($1 in 2012, $2 in 2013, indexed thereafter); first payment was due July 31, 2013
  - Tax paid by insurer for insured coverage, and by plan administrator for self-insured coverage
  - May not be paid from plan assets, with certain exceptions
  - Deductible as an ordinary and necessary business expense
- Transitional Reinsurance Assessment Program (2014-2016)
  - Fee per "covered life" was $63 for 2014; should be smaller for 2015, 2016; first payment was due January 15, 2015
  - Self-insured plans must pay the fee but are not entitled to any proceeds from the program
  - May be paid from plan assets
  - Deductible as an ordinary and necessary business expense

Affordable Care Act – Phase-in of Employer Requirements

- Employer mandate – IRS transition relief
  - Notice 2013-45 delayed the employer mandate excise tax and information reporting requirements for one year.
    - Excise taxes not assessed until 2016, for 2015 violations.
  - Transition relief makes it easier to avoid excise taxes for 2015.
- Information reporting to employees and the IRS
  - Reporting not required for 2014 coverage; earliest filing due for 2015 coverage to be filed in 2016
    - Covered lives by insurers and self-insured employers (IRC section 6055), and
    - Coverage offered to full-time employees by large employers (IRC section 6056)

Affordable Care Act – Shared Responsibility Penalty

- "Large employers" (employer with ≥50 full-time equivalent employees within the employer's controlled group) may be subject to an excise tax if at least one full-time employee whose household income is between 100% and 400% of the federal poverty level receives a premium tax credit for exchange coverage and an employer either:

Fails to offer coverage to full-time employees and their dependents	OR	Offers coverage to full-time employees that does not meet the law's affordability or minimum value standards

Annual Excise Taxes can be very expensive.
Can be thousands of dollar per full-time employee, even if only one full-time employee is receiving a premium tax credit.

Shared Responsibility Penalty – Section 4980H: Key Facts

- Excise taxes are pro-rated and calculated separately for each month; inflation-adjusted after 2014.
- Excise tax payments are not deductible by the employer.
- Excise taxes are calculated separately for each controlled group member, and CG members are not liable for taxes incurred by other CG members.
- Excise tax under section 4980H(a) applies if the CG member fails to offer minimum value coverage to at least 95% of full-time employees and their dependents (70% for 2015).
- Raises the stakes for worker classification – failure to treat workers as employees could trigger the subsection (b) penalty, or worse, trigger the subsection (a) penalty for failing to satisfy the 95% (70%) safe harbor.
  - Where workers are misclassified, coverage offered by a staffing agency is treated as if it were offered by the employer, if certain requirements are satisfied.

Affordable Care Act – Summary of Employer Reporting Provisions

Due January 31 each year FORM W-2	Starting 2016, due each January 31 to employee & March 31 to IRS FORMS 1094-B & C, 1095-B & C	
§ 6051	§ 6055	§ 6056

• **Purpose:** Provide employees with information on cost of employer-provided coverage
• **Reporting by:** Employers filing 250 Forms W-2 or more
• **Information reported:** Aggregate cost of employer-provided group health plan for each covered employee
	• **Purpose:** Provide individuals and IRS with information to administer individual mandate
	• **Reporting by:** Insurance providers, government agencies, multiemployer plans or employers that sponsor self-insured plans
	• **Information reported:**
	  • Employer- and employee-specific data
	  • Months during which individual is covered
		• **Purpose:** Provide IRS with information to administer employer mandate and IRS and individuals information to administer premium tax credit
		• **Reporting by:** Large employers subject to ACA
		• **Information reported:**
		  • Employer identifying info; info for all full- time employees
		  • Plan data e.g., employee cost, month-by-month

Affordable Care Act – Cadillac Plan Excise Tax

- Code section 4980I imposes a non-deductible, 40% excise tax on high-cost health coverage
  - Applies to the excess of monthly cost of coverage over a specified threshold
  - Tax is paid by the insurer for insured plans, and by the employer or plan administrator for self-insured plans
  - Takes effect in 2018
- Employers will need to calculate the excise tax and report the excess benefit to the IRS and coverage providers
  - Potentially significant penalties may apply to employers who do not calculate the tax correctly, if there is an underpayment
- No guidance; many unanswered questions
- Absent a legislative fix, the Cadillac tax threshold is projected to dip below the minimum value threshold within 15-20 years.

ACA – Tax for Failure to Meet Group Health Plan Requirements

- Preexisting section 4980D imposes an excise tax for any failure to meet the Code's group health plan requirements
- Section 9815 incorporates certain ACA provisions into the Code's group health plan requirements
- Requirements subject to 4980D tax include the insurance market reforms, including the prohibition on waiting periods that exceed 90 days
- Tax: $100 per day of noncompliance
- Taxpayers are to voluntarily report 4980D violations on Form 8928Insurance reforms apply to group health plan offered by an employer

HIPAA – Basic Overview

- Portability Rules
- Insurance Market Rules
- Privacy and Security Rules
  - Privacy Notice
  - Policies and Procedures to safeguard personal health info
  - "Business Associate" requirements
- Applies to "group health plans"

HIPAA – Business Issues

- Business is a Plan Sponsor
  - May also be a plan administrator
- Personal Health Info – Privacy & Security Obligations
  - HITECH Act – strengthened rules
  - Data Breach Notification
- Risks of Non-Compliance
  - Excise Taxes
  - Civil Penalties & even Criminal Penalties
  - Lawsuits (perhaps w/ ERISA Attorneys' Fees)

COBRA – Basic Overview

- Permits "Qualified Beneficiaries" to continue group health coverage by paying for it themselves
  - When coverage lost due to a "Qualifying Event" (termination, death, divorce, etc.)
  - Time limits (typically 18 or 36 months)
  - Typically pay full cost (or 102%)
- "Covered employees," spouse, and dependent child
- Applies to "group health plans"

COBRA – Business Issues

- Notices and Communications
  - Initial COBRA Notice
  - COBRA Election Notice
  - Many others
- Risks of Non-Compliance
  - Excise Taxes
  - Statutory Penalties
  - ERISA Lawsuits (w/ Attorneys' Fees)

Health & Welfare – Other Statutes

- Federal Statutes, including:
  - Americans with Disabilities Act (ADA)
  - Age Discrimination in Employment Act (ADEA)
  - Pregnancy Discrimination Act (PDA)
  - Title VII of the Civil Rights Act of 1964 (Title VII)
  - Genetic Information Nondiscrimination Act (GINA)
  - Mental Health Parity laws (MHPA, MHPAEA)
- State Laws, including:
  - State Continuation Coverage Laws (e.g., Cal-COBRA)

Presentation Agenda

- Introduction
- ERISA
- Fiduciary Duties & Liability
- Qualified Retirement Plans
- Executive Compensation & Fringe Benefits
- Health & Welfare
- Best Practices

Best Practice: "An Ounce of Prevention is Worth a Pound of Cure"

- Know and follow myriad rules and obligations
- Good fiduciary process
- Documentation
- Vendor selection, contracts, and oversight
  - Indemnification
- Periodic Self-Audits

Best Practice – Correct Errors

- Plan Qualification – IRS's EPCRS (Rev. Proc. 2013-12, as modified by Rev. Proc. 2015-27)
- DOL Correction Programs
  - Voluntary Fiduciary Correction Program
  - Delinquent Filer Voluntary Compliance Program
- 409A Corrections under IRS Notices 2008-113, 2010-6, and 2010-80
- COBRA & HIPAA Corrections

Thank You…

IVINS, PHILLIPS & BARKER, founded by two of the original judges on the United States Tax Court in 1935, is the leading law firm in the United States exclusively engaged in the practice of federal income tax, employee benefits and estate and gift tax law. Our decades of focus on the intricacies of the Internal Revenue Code have led numerous Fortune 500 companies, as well as smaller companies, tax exempt organizations, and high net worth individuals to rely on the firm for answers to the most complicated and sophisticated tax planning problems as well as for complex tax litigation. We provide expert counsel in all major areas of tax law, and we offer prompt and efficient attention, whether with respect to the most detailed and intricate of issues or for rapid responses to emergency situations.

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