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Employee Benefits

FOR EMPLOYERS

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A Note from the Editor

We are excited to present the newest edition of *Employee Benefits for Employers*. The lead item is an analysis of recent litigation trends involving loss causation, an important burden-of-proof issue in ERISA fiduciary claims, by René Thorne and Eugene Ubawike. Next, is a thoughtful review of ERISA issues in the M&A context, offering practical advice on identifying and minimizing potential exposures that might otherwise accompany your company's next big transaction, by Alec Nealon, Melissa Ostrower, and Kathryn Wheeler. Our Featured Lawyer is Monique Warren in our White Plains office, who tells us a little about her benefits practice (and her two Texas Longhorns, Rayford and Annabelle). As always, we offer concise summaries of recent employee benefits developments to help you stay abreast of this rapidly changing field. Be sure to check out the recent activities and upcoming events, as well as honorees recognized by *Chambers USA* in its 2017-18 edition. Congratulations to them, and thanks to the clients and friends of the firm who let Chambers know about their excellent work. We hope you enjoy the issue!

— Charles Seemann

View from Jackson Lewis: Proving Loss Causation in Breach of Fiduciary Claims — The Split Widens*

By René E. Thorne and Eugene U. Ubawike**

Under Section 409(a) of ERISA, a fiduciary who breaches duties to a plan "shall be personally liable to make good to such plan any losses to the plan *resulting from* each such breach."

Based on this "resulting from" language in Section 409, most circuit courts of appeals agree that ERISA requires that causation between the alleged breach and the claimed loss must be established before any liability may be imposed upon a breaching fiduciary. The courts are split, however, as to whether an ERISA plaintiff or the defendant-fiduciary bears the burden of proving the causal link between breach and loss. In other words, does the burden compose an element of the claim and thus fall upon the plaintiff, or does the burden constitute an affirmative defense and thus fall upon the defendant-fiduciary?

The Tenth Weighs In

Joining in the decades-old circuit divide, the Tenth Circuit recently held that because loss causation is an element of the claim, "the plaintiff [and not the defendant fiduciary] bears the burden of proving it." *Pioneer Centers Holding Co. ESOP & Trust v. Alerus Fin., N.A.* (10th Cir. 2017).

In that case, Pioneer owned and operated several automobile dealerships in Colorado and California, including Land Rover, Audi, and Porsche. In 2001, Pioneer sponsored an Employee Stock Ownership Plan ("ESOP"). Pioneer's founder, its President, and its Chief Financial Officer, served as the Plan's trustees. The Founder initially owned 100% of Pioneer's stock. Over the course of several years, he sold 37.5% of his Pioneer stock to the Plan and retained 62.5% ownership.

In 2009, the Plan's trustees proposed a stock transaction whereby the ESOP would become the 100% owner of Pioneer by purchasing the Founder's stock. Because the trustees' interests in the transaction were adverse to those of the ESOP, and to avoid any conflict of interest issues, the ESOP hired an independent fiduciary to determine whether, and on what terms, the Plan should purchase the Founder's shares.

The sale of the dealership was blocked by Land Rover, which maintained a prior agreement with Pioneer that granted the automaker the right to block any changes in Pioneer's ownership. Land Rover blocked the sale of Pioneer to the ESOP because it considered that the ESOP was unlikely to have the requisite financial capacity, business acumen, and dedication to properly operate the dealership.

The independent fiduciary for the ESOP advised the ESOP to not purchase the Founder's stock and the sale was ultimately abandoned. Just over a year later, however, Pioneer sold most of its assets to another party for $10 million more than what the ESOP would have paid for it. The ESOP viewed this as a dramatic loss to its portfolio and sued the independent fiduciary to recover the loss.

The U.S. District Court for the District of Colorado found that the ESOP had failed to establish causation between the breach and its claimed loss because the loss was so speculative — nothing showed that Land Rover would have approved the original sale. The district court thus granted summary judgment to the independent fiduciary. On appeal, the ESOP argued that the district court improperly placed on it, rather than on the independent fiduciary, the burden of proving causation.

The Tenth Circuit disagreed, holding that Section 409 "is silent as to who bears the burden of proving a resulting loss," and thus the rule applies that, "[w]here a statute is silent on burden allocation, the 'ordinary default rule is that plaintiffs bear the risk of failing to prove their claims.'"

The court acknowledged an exception to this rule exists within the common law of trusts, whereby once a plaintiff beneficiary has proven that a trustee has committed a breach of trust and that a loss followed, the burden shifts to the trustee to prove that the loss would have occurred even without the breach. But it found that this exception does not apply to Section 409:

> To begin, there is nothing in the language of [section 409] or in its legislative history that indicates a Congressional intent to shift the burden to the fiduciary to disprove causation. Nor is there anything that suggests Congress intended to make the lack of causation an affirmative defense or an exemption to liability. Whether something constitutes an element, as opposed to an affirmative defense or exception, turns on whether "one can omit the exception from the statute without doing violence to the definition of the offense."
>
> [Section 409] imposes liability on a breaching fiduciary for "any losses to the plan resulting from each such breach." The

> requirement that the losses to the plan have resulted from the breach cannot be omitted from the statute without substantially changing the definition of the claim, thereby doing violence to it.

Thus the Tenth Circuit concluded that "causation is an element of the claim [for breach of fiduciary duty] and that the plaintiff bears the burden of proving it." Because the ESOP could not prove causation between the independent fiduciary's conduct and the plan's speculative $10 million loss, the appellate court affirmed the district court's grant of summary judgment to the independent fiduciary.

The Circuit Split

In placing the burden of causation on plaintiffs, the Tenth Circuit joins the Second, Sixth, Ninth, and Eleventh Circuits on this fractious issue. On the other side of the issue stand the Fourth, Fifth, and Eighth Circuits, holding that "once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation." See e.g. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014).

Although divided on the burden allocation issue, both camps agree that the "resulting from" language of Section 409 requires proof that an alleged breach caused the claimed loss. For instance, the Tenth Circuit cited to the Fourth Circuit's decision in *Plasterers' Local Union No. 96 Pension Plan v. Pepper,* 663 F.3d 210, 218 (4th Cir. 2011), which held that "causation of loss is *not an axiomatic conclusion* that flows from a breach of [fiduciary] duty."

The circuit split seems to stem, however, from the (mis?) application of the common law of trusts, which carries a burden-shifting framework: once a beneficiary proves a trustee's breach and a following loss, the burden is on the trustee to show that her breach did not cause the loss.

In *Tatum*, the Fourth Circuit applied this common law of trusts principle to Section 409 and shifted the causation burden to the fiduciary defendant. The Fourth Circuit found that application of the common law of trusts burden-shifting framework "comports with the structure and purpose of ERISA" because a plaintiff who has established a breach and a following loss ought not to be required to additionally prove a causal link under a statute designed to protect such a plaintiff.

The dissent in *Tatum* disagreed, noting that the majority relied on, among other cases, *Martin v. Feilen,* 965 F.2d 660, 671 (8th Cir. 1992) to justify shifting the causation burden to the fiduciary. But a key distinction between *Martin* and *Tatum* (and many other cases of fiduciary breach) is that, in *Martin*, the breach constituted dishonest self-dealing, and not just a benign lack of prudence. This distinction, the dissent argued, makes it clear that *Martin* applied the causation burden to the fiduciary because it sought to heed Congressional intent to protect employee benefit plans and their beneficiaries from dishonest stewards. Where however, a fiduciary is not dishonest, but only imprudent or similarly deficient, no burden should be placed on the fiduciary to disprove causation of loss.

Like the *Tatum* dissent, the Tenth Circuit squarely rejected the notion that the common law of trusts should always be woven into ERISA. Citing the U.S. Supreme Court in *Varity Corp. v. Howe,* 516 U.S. 489, 497 (1996), the Tenth Circuit observed that "[t]he 'law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.'" Thus, according to the Tenth Circuit, where the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there is no reason to read the statute as requiring the plaintiff to show only that the loss is related to the breach. It further warned that shifting the burden to defendant-fiduciaries could dis-incentivize employers from undertaking fiduciary responsibility with respect to ERISA plans.

Conclusion

At bottom, where a circuit court might place the causation burden depends not upon statutory language, but upon trust principles. Circuit courts that place the burden on the plaintiff seem interested in limiting sweeping fiduciary liability. On the other hand, circuit courts that place the burden on the fiduciary seem interested in protecting plan participants. ERISA breach claims are currently pending in the district courts of the Fourth Circuit so perhaps it may soon have the opportunity to reevaluate its holding in *Tatum*.

**We are saddened to report that our colleague Eugene Ubawike passed away on August 8, 2017. He was a thoughtful and energetic colleague, who will be missed by all who knew him.

Executive Compensation and Employee Benefits in Mergers and Acquisitions

By Alec Nealon, Melissa Ostrower and Kathryn Wheeler

Although not always at the forefront of the deal agenda, executive compensation and employee benefits (referred to as "compensation and benefits" hereafter) considerations are a vital part of most corporate transactions. The parties typically need to identify and allocate any benefits-related costs and other risks and liabilities to avoid unforeseen financial consequences in the future. Furthermore, post-closing benefits arrangements for the affected employees generally need to be negotiated (*e.g.,* recognition of prior service and level of benefits) and structured. Compensation and benefits decision points arise at every stage of a transaction.

This article highlights some of the key compensation and benefits issues of which employers should be aware in a "typical" transaction involving the purchase of equity of a target entity or assets of a seller entity, or some combination of the two.[1]

Due Diligence

A typical transaction commences with purchaser due diligence. The primary goal of compensation and benefits due diligence is to understand the universe of the target employees, their compensation arrangements and benefit plans, in order to (1) identify and evaluate any potential liabilities (whether actual or contingent) within the scope of the transaction and (2) design post-closing compensation and benefits arrangements for the target employees.

Although a multitude of issues may be identified in diligence, this non-exhaustive list highlights some of the more common material "red flag" diligence items:

- Defined benefit pension plans, which may be underfunded;
- Multiemployer pension plans and the associated withdrawal liability;
- Self-funded health and welfare plans, associated stop-loss coverage, and run-out claims funding;
- Retiree health and welfare obligations;
- Unfunded deferred compensation liabilities;
- Large incentive equity pools;
- Significant bonuses and severance packages that become payable or vest in connection with the transaction;
- Material noncompliance with applicable tax law or the terms of the governing plan;
- Collective bargaining agreements that require partici-

pation in union pension and health and welfare plans; and

- Any material compensation and benefits liabilities not reflected in the target's financials.

Depending on various factors (including the size and timing of the transaction, the bid competitiveness, the size of the target employee population, and the complexity of the target's compensation and benefits arrangements), the purchaser may conduct in-depth compensation and benefits diligence or may opt for a high-level, red-flags review only.

Transaction Agreement

The purchaser's negotiation of the transaction agreement must be informed by its due diligence findings. Compensation and benefits issues arise primarily (though not exclusively) in the following provisions of a typical transaction agreement:

- **Assumption/exclusion of liabilities**. Particularly in the context of an asset purchase (as further discussed below), the parties should clearly allocate responsibility for any compensation and benefits liabilities related to the target employees.

- **Seller representations and warranties**. The primary purpose of seller compensation and benefits representations and warranties is to assure the purchaser that there are no undisclosed material employment or benefit plan liabilities that will affect the purchaser or the post-closing business. Thorough representations and warranties tailored to the due diligence findings ensure the adequacy of information disclosed in the diligence phase and allow the purchaser to identify liabilities that may not have been apparent from the diligence materials. Following the closing, however, the protection offered by the representations and warranties is only as good as the associated indemnity provisions and the seller's financial ability to satisfy any indemnity obligations, to the extent not covered by an escrow arrangement or third-party insurance.

- **Interim operations restrictions**. The purchaser typically will seek to impose restrictions on compensation, benefits, and employment-related actions of the seller or target (hiring and firing, increases in compensation or benefits, adoption of new plans, or grants of new awards) during the interim period between the signing of the agreement and closing of the transaction. The purchaser's primary goal is to materially "freeze" the compensation and benefits of the target, or otherwise applicable to the target employees, at the level in effect as of the signing, in order to avoid accruing increased liabilities or otherwise materially changing the economics of the deal.

- **Purchaser compensation and benefits covenants**. The parties typically will agree to a set of purchaser compensation and benefits covenants, the substance and complexity of which may vary widely depending on the specifics of each transaction. Among other things, such covenants may require the purchaser to make specific offers of employment, to provide certain compensation and benefits (or a certain level of compensation and benefits) to the target employees for a specific period following the closing, and/or to provide past service credit or credit for prior contributions and accruals to the target employees under the purchaser's plans. To appreciate the potential liabilities and practical implications of the covenants, the purchaser must have obtained good knowledge of the compensation and benefits applicable to the target employees through its diligence.

The structure and specifics of each transaction have a significant impact on the extent to which each of the above aspects is emphasized:

- **Equity purchase**. In a purchase of the equity interests in a target entity, the separate identity of the target as an employer and sponsor of its benefit plans typically would not change absent a subsequent merger or other dissolution of the target, and the target's compensation and benefit liabilities generally would transfer with the target automatically by operation of law. This places greater emphasis on identifying all actual or contingent liabilities of the target through the diligence process and through detailed and targeted seller representations and warranties, but may simplify the structuring of post-closing compensation and benefits for the target employee population to the extent the purchaser simply permits the target to continue its own compensation and benefits arrangements. Particular care should be taken to consider the impact of any equity transaction on the purchaser's controlled group and on the nondiscrimination testing of the purchaser's retirement and certain health and welfare plans.

- **Asset purchase**. In a purchase of assets (including employees) from a seller entity, the compensation and benefit liabilities of the seller, by default, would remain with the seller, unless expressly assigned to and assumed by the purchaser. As a result, clear and well-informed liability allocation provisions are essential to all parties in an asset transaction context. Because benefit plans sponsored by the seller would remain with the seller in an asset purchase (unless assigned to and assumed by the purchaser), such transactions also require greater emphasis on the transition of the target employees out of the seller plans and their integration into the purchaser's benefits structure. This typically results in more extensive purchaser compensation and benefits covenants, which address the post-closing treatment of the transferred employees.

Practical Considerations

The following is a non-exhaustive list of further practical compensation and benefits considerations that may arise in diligence review, negotiation of the transaction agreement, pre-closing preparations, and post-closing integration:

- Tax-qualified retirement plans:
    - If assumed by purchaser:
        - Merge assumed plans with purchaser plans or keep separate?
        - Terminate target's plan prior to the closing (as there may be limitations on terminating plans post-closing)?
        - Plan changes may be required to avoid multiple employer status and inadvertent coverage failures.
    - If not assumed by purchaser:
        - Agree to a trust-to-trust transfer of plan assets and liabilities or participant-directed rollovers from seller plans?
        - Establish "mirror" plans to satisfy purchaser covenants?
        - Will a partial termination of the seller plan occur?
    - Impact on post-closing nondiscrimination testing.
    - For pension plans, consider underfunding liability, multiemployer plan withdrawal liability, Pension Benefit Guaranty Corporation (PBGC) filings and involvement.
    - Purchaser plan changes may be required to avoid inadvertent coverage failures.
    - Participant communications, post-closing benefits integration, and plan administration issues.
- Health and welfare plans:
    - Plan administration and integration issues (flexible spending accounts, health savings accounts, vacation time, copayment/deductible credits, and so on).
    - Allocation of COBRA liability, if triggered in connection with the transaction.
    - Allocation of liability for pre-closing self-funded claims.
    - Participant communications.

- Executive compensation:
    - Treatment of outstanding equity or cash awards held by target employees and post-closing retention of key executives.
    - Code Section 409A compliance and correction of identified issues.
        - If the transaction is mid-year, how will it affect outstanding employee deferral elections?
        - Should the plan be terminated under the special Code Section 409A termination rule?
        - How will specified employees be determined post-transaction, if applicable?
    - Code Sections 280G and 4999 tax on excess parachute payments and loss of employer deduction; use of pre-closing shareholder cleanse vote where available.
    - Negotiation and structuring of post-closing management employment agreements, equity plans and other retention arrangements.

Conclusion

This summary highlights some of the most significant compensation and benefits considerations in a "typical" equity or asset purchase. It is not exhaustive. Due to the wide variety of possible transaction structures, the complexity and uniqueness of each transaction, and the myriad of potential compensation and benefits liabilities and structural issues that may arise, parties are strongly encouraged to seek advice from sophisticated legal counsel and other qualified third-party advisors, in order to negotiate the transaction process with confidence and avoid significant pitfalls.

Endnote:

[1] Various additional employment and labor law considerations, though not covered here, often are closely intertwined with the compensation and benefits considerations that are the subject of this article.

Recent Developments

Procedures for Multiemployer Plan Suspension of Benefits Applications Revised

The Multiemployer Pension Reform Act ("MPRA") permits sponsors of multiemployer defined benefit plans in critical and declining status to suspend benefits in certain situations. With Rev. Proc. 2017-43, the IRS has revised the application procedures for such suspensions. The changes, which mostly clarify or simplify the application process, are based on the Department of Treasury's experience in processing the applications received and are effective for applications made on or after September 1, 2017. The changes include simplification of, and clarification on, the sample calculations required with an application, a provision allowing the Treasury Department to request additional materials to correct any errors it identifies, and the addition of requirements to provide a narrative statement of the reasons a plan is in critical and declining status as well as the accountant's report from the most recently filed Form 5500.

ACA Payments Due, Despite Executive Order

On January 20, 2017, President Donald J. Trump signed an Executive Order directing federal agencies to reduce potential burdens imposed by the Affordable Care Act. The Order has created some confusion over whether the ACA's requirements (including its shared responsibility provisions) will be enforced. Recently, the IRS has reiterated that the shared-responsibility and individual requirements still apply. This means that applicable large employers must offer most full-time employees minimum essential coverage that is affordable and provides minimum value, and individuals must have minimum essential coverage, or, in each case, be potentially subject to shared responsibility payments.

DOL Considers Amending or Delaying Final Disability Claims Regulations

In late 2016, the Department of Labor issued final regulations revising claims and appeals procedures under ERISA for plans that offer disability benefits. The new requirements will apply to claims for disability benefits filed on or after January 1, 2018. See our prior coverage of the regulations here. Recently, however, the DOL has indicated that it is taking a second look at these regulations, raising the possibility that the regulations may be amended or the effective date may be delayed. Employers and plan administrators are left in a quandary, since it is unclear at this point whether the regulations will actually be changed or eliminated. Those sponsoring and administering plans subject to ERISA disability claims procedures may find it prudent to work toward compliance by January 1, 2018 (since it is fast approaching), but keep an eye out for any changes before then.

Challenge to Section 1557 Transgender Rules on Hold While HHS Considers Changes

Section 1557 of the Affordable Care Act prohibits discrimination in certain health plans and programs on the basis of sex, age, race, color, national origin, and disability. The U.S. Department of Health and Human Services (HHS) issued regulations under Section 1557, which include provisions related to health insurance coverage for transgender individuals. After a legal challenge to certain provisions of the regulations, including coverage of gender-transition services, a Texas district court issued a preliminary injunction on the enforcement of the provisions on December 31, 2016. On July 10, 2017, the court granted HHS a stay in the proceedings pending reconsideration by the new administration. It is unclear at this point what, if anything, HHS will do with these regulations. However, as we have described in the past, there are legal considerations other than the HHS regulations for employers to analyze in determining whether and to what extent coverage for transgender-related services should be provided.

Update on Proposed ESOP Legislation

Several legislative proposals related to Employee Stock Ownership Plans are making their way through Congress. Senators Peters (D-Mich.) and Risch (R-Idaho) have proposed legislation to promote ESOPs (S. 1538) by directing the Service Corps of Retired Executives, a nonprofit group supported by the Small Business Administration, to offer information and resources intended to facilitate employee ownership of businesses. Senators Roberts (R-Kan.) and Cardin (D-Md,) recently introduced the Promotion and Expansion of Private Employee Ownership Act (S. 1589), which would defer capital gains taxes for qualified sellers of S corporation shares, an advantage currently available only to sellers of C corporation stock. Back in April, the House passed the Encouraging Employee Ownership Act (H.R. 1343), which would ease SEC rules and make it easier for companies to provide stock-based compensation. States with pending ESOP-related legislation include Colorado, which is considering a bill that would create a loan program for ESOPs; Pennsylvania, which is considering tax changes that would mirror the federal deferral of gains on sales of C corporations; and Texas, which is considering a proposal to give ESOP companies preference for state contracts.

En Banc Fifth Circuit to Rehear Standard-of-Review Case

The Fifth Circuit granted a rehearing *en banc* in a case involving the appropriate standard of judicial review in an ERISA denial of benefits case. In *Ariana M. v. Humana Health Plan of Tex., Inc.*, a three-judge panel affirmed use of an abuse of discretion standard, even though the plan did not explicitly confer discretion on the Administrator. For more details of the underlying decision, please refer to our blog.

Fifth Circuit Approves Combined SPD and Plan Document

Recently, in *Rhea v. Alan Ritchey, Inc.*, the Fifth Circuit affirmed a trial court's finding that a single document can serve as both the formal plan document and the summary plan description (SPD) for an ERISA plan. The ruling stands in stark contrast to *dicta* in the Supreme Court's decision in *CIGNA Corp. v. Amara*. The Fifth Circuit distinguished *Amara* because the dispute was not based on conflicts between the SPD and the plan document, but whether the SPD could function as the plan document absent a separate written instrument. The Fifth Circuit acknowledged the erroneous reference to a formal plan document may be sloppy, but that did not amount to a breach of any fiduciary duty or render the SPD unenforceable.

Supreme Court Decision Affecting the Church-Plan Exemption

On June 5, 2017, the Supreme Court unanimously reversed three separate circuit court rulings on the scope of ERISA's exemption for "church plans." In *Advocate Healthcare Network et al. v. Stapleton et al.*, the Court considered whether pension plans may be exempt from ERISA as a "church plan," even if they are maintained by a church-affiliated organization, but not "established" by a church. For further discussion, please refer to our article found here.

Federal Agencies Release FAQs on Mental Health Parity

In June 2017, joint FAQs about the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) were released by DOL, HHS and Treasury. The MHPAEA provides that financial requirements and treatment limitations imposed on mental health and substance use disorder benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical and surgical benefits. The FAQs include explicit clarifications reiterating eating disorders as a mental health condition, rendering associated treatment a "mental health benefit" within the meaning of the MHPAEA. Furthermore, the FAQs solicit public feedback on improving disclosures required by the MHPAEA. Parties wishing to submit comments must send them to the Department of Labor by September 13, 2017.

Featured Lawyer: Monique Warren

By Daniel O'Neil

This issue's featured employee benefits lawyer is Principal Monique Warren. I sat down with Monique to ask her a few questions.

It seems like your career has taken you all over the country, but where did you grow up? I grew up in Tomball, Texas, out in the middle of nowhere. It was very rural. We lived in an old rented farmhouse with a pasture all around us. We had no money most of the time, but it was idyllic for a kid. I've kind of spent the rest of my life trying to duplicate it. When I was a freshman in high school, I started saving up to be an exchange student and when I was a senior, I went to Denmark as an exchange student for the whole year. I had no idea what to do after that, but I knew I wanted to go to college. I had two brothers — twins — and they were at Texas A&M, so that's where I went.

After college, you worked in Human Resources? People called it "Personnel" back then. It was essentially payroll and benefits. When I was in my second year, they passed the Immigration Reform and Control Act, and some attorneys came around. They were trying to scare everybody by saying "it's going to turn the world inside out." As it happened, it was a two-page form for when you're onboarding employees — it wasn't called "onboarding" then. Guess what? The world *didn't* turn inside out. It was at that point I thought I want to go see what these lawyers are up to and maybe approach things a little differently — maybe not use fearmongering as a marketing tool. Today, for HR people, the framework is still the same. It's still the same basic issues and still the same process. Minus the fearmongering, of course.

And so you went to law school? Yes. My husband's job took us up to Chicago. My favorite law professor was in tax and he made ridiculously complex things make sense. Nowadays, that's what I get a lot of good feedback about — helping clients make sense of things that seem incomprehensible. It is something I pride myself on and I think that the HR experience helped with that.

What do you do every day, and how do you explain to people what it is that you do? I do a lot of work related to the health care reform. We're all waiting with bated breath … for nothing to happen. In talking to people, I say that I work for a large national firm that is sort of like a giant boutique. We work strictly on workplace-related law and strictly on the employer side. Because of our size and our focus, it is cost efficient for our clients. Pretty much anything that's workplace-related, we're going to have someone with the answer. I am proud of that.

If you could change one thing in the Tax Code, what would it be? I would eliminate it — that would put me out of work, but it'd be okay. Over many years, Congress has tried to manipulate everyone's behavior using the Code. They're trying to implement public policies through taxation. The problem is that, in striving to be fair, they've made it extremely complex. I think it should just be completely gutted. You're never going to make everybody happy. So just pick something, implement it, and keep it simple.

What's the coolest thing you've ever done? Raising Texas Longhorns — the cows, not the undergraduates of the University of Texas (my sister's alma mater). My family has two Texas Longhorns. The boy, Rayford, is probably 1,600 pounds. Annabelle probably weighs 1,400 pounds. They were supposed to be horses, but my husband and I were a little impulsive about our farm animal acquisitions. I've wanted horses my entire life. I rode when I was younger, but I never had a horse of my own, so it's one of these childhood dreams. Eventually, I will have my horse.

Media…

- **Brian Goldstein**, **Daniel O'Neil**, and **Kenneth Weafer** discuss the best-interest contract exemption (BICE) in "Everything You Wanted to Know About BICE but Were Afraid to Ask," published by *Benefits Quarterly*.
- **Brian Johnston** comments on implications of health care reform for businesses and health care subsidy payments in "Businesses May Bear Brunt of Move to Withhold Health Care Subsidy Payments," published by SHRM.
- **Charles Seemann** discusses new research indicating an increase in plaintiff victory rates in ERISA cases in "Dive in Plaintiff Victories Not Seen in ERISA Cases," published by *Bloomberg BNA*.
- **Robert Perry** authors "Primer on Withdrawal Liability," published by *Association of Corporate Counsel*.
- **Keith Dropkin** authors "Be Wary of Designs to Avoid Employment Taxes through Wellness Plan Benefits," published by SHRM.

Staying current of changing laws, regulations, trends, and strategies is a challenge. Jackson Lewis can help. Subscribe to our blog, the *Benefits Law Advisor Workplace* (at benefitslawadvisor.com), and have updates written by experienced attorneys sent to your inbox, or follow us on Twitter (at twitter.com/jacksonlewispc).

Honors...

Chambers USA Recognizes Jackson Lewis and Its Attorneys in 2017 Edition

We are pleased to announce the firm and 68 of its attorneys have been recognized in the 2017 edition of *Chambers USA: America's Leading Lawyers for Business*, a prestigious annual guide ranking the leading law firms in the U.S. In addition to the firm's national and statewide rankings, Jackson Lewis attorneys earned individual recognition as "Leaders in Their Field." For a list of those individually recognized, click here.

Attorneys from our Employee Benefits practice include:

- Kelvin C. Berens
- Randal M. Limbeck
- Joy M. Napier-Joyce
- Andrew C. Pickett
- Andreas N. Satterfield Jr.
- Charles F. Seemann III
- René E. Thorne

Jackson Lewis Earns Top-Tier Ranking in 2017 Legal 500

We are pleased to announce that the firm and its attorneys have been recommended in *The Legal 500 United States 2017* in five practice areas, including Employee Health and Retirement Plans. Benefits lawyers Joy Napier-Joyce, Raymond Turner, and Stephanie Zorn were individually recommended for their legal prowess.

Best Lawyers in America© Honors Jackson Lewis Attorneys in Its 2018 Edition

We are pleased to announce 193 attorneys were recognized in the 2018 Edition of *The Best Lawyers in America©*, including benefits attorneys Brian P. Goldstein, Joy Napier-Joyce, Randal M. Limbeck, Charles F. Seemann III, and René E. Thorne.

Upcoming Seminars

October

- ***What You Need to Know About ERISA Plans Right Now***, Natalie Nathanson at the Jackson Lewis Denver Employment Law Seminar, Denver, CO
- ***Employee Benefits Update***, Randal M. Limbeck at The Nebraska Society of CPAS' 17th Annual Fall Conference, Lincoln, NE

November

- ***2017: How Have Employment & Employee Benefits Laws Changed ... And Stayed the Same?***, Tyler Brown, Jewell Lim Esposito, and Wayne Yoshigai at Prince Waikiki Hotel, Honolulu, HI

For more on what our attorneys are up to in the coming months, go to jacksonlewis.com/events.

Webinar

- ***Discretion under Fire: ERISA Plan Fiduciaries Face Challenges to Their Decisionmaking***
  September 20, 2017 | 10:00 AM - 11:00 AM EST | Joy M. Napier-Joyce and Charles F. Seemann III

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