

Welfare Benefit Programs

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The Legal Overlay

- ➔ The Internal Revenue Code
- ➔ The Employee Retirement Income Security Act
- ➔ The Patient Protection and Affordable Care Act
- ➔ The Labor Laws
 - ➔ USERRA
 - ➔ ADEA
 - ➔ FMLA
 - ➔ ADA

The Internal Revenue Code

- ➔ Code is enforced by U.S. Department of Treasury and the Internal Revenue Service
 - ➔ No private enforcement rights against employers
 - ➔ IRS and Treasury enforcement through excise and penalty taxes, audits, annual filings, and reporting
- ➔ Substantial overhaul of Internal Revenue Code in 1986, and numerous amendments since

Code and Taxation of Benefits

- ➔ Absent a special tax rule, the value of the benefits provided by an employer to an employee is taxable to an employee just like other compensation
- ➔ Generally, compensation and benefits are taxable when actually or constructively received
- ➔ Compensation and benefits are constructively received when employee has unrestricted right to it

Code and Taxation of Benefits (*cont'd*)

- ➔ Code sets forth *voluntary* requirements that, if satisfied, avoid inclusion – or at least immediate inclusion – in taxable income of many types of employee benefits
 - ➔ Deferral of taxes (e.g. retirement)
 - ➔ Avoidance of taxes (e.g. health)
 - ➔ In other words, if these (sometimes burdensome) requirements are satisfied, good tax results happen
- ➔ Code imposes penalties and excise taxes if certain requirements are not satisfied
 - ➔ In other words, if these requirements are not satisfied, bad tax results happen

Code and Employee Benefits

- ➔ Code has something to say regarding just about everything related to employee benefits:
 - ➔ Qualified retirement plans – Code §§ 401-404, 410-12, 414-417, 420, 457, 501
 - ➔ Nonqualified retirement plans – Code §§ 409A, 457
 - ➔ Health plans, medical reimbursement accounts, health reimbursement arrangements, disability programs – Code §§ 104, 105, 106, 213, 4980B
 - ➔ VEBAAs – Code §§ 419, 419A, 501, 505
 - ➔ Cafeteria plans – Code § 125

Code and Employee Benefits (*cont'd*)

- ➔ Code has something to say regarding just about everything related to employee benefits (*cont'd*):
 - ➔ Health savings accounts – Code §§ 106, 213, 223
 - ➔ Group term life insurance – Code §§ 79, 101
 - ➔ Adoption assistance – Code § 137
 - ➔ Legal services – Code § 120
 - ➔ Long-term care programs – Code §§ 106, 4980C
 - ➔ Dependent care programs – Code § 129
 - ➔ Tuition remission – Code §§ 117, 127

Code and Employee Benefits *(cont'd)*

- ➔ Code has something to say regarding just about everything related to employee benefits *(cont'd)*:
 - ➔ Fringe benefit programs – Code § 132
 - ➔ No additional cost service
 - ➔ Employee discounts
 - ➔ Working condition fringe (tuition remission)
 - ➔ De minimus fringe
 - ➔ Qualified transportation expenses
 - ➔ Qualified moving expenses
 - ➔ Qualified retirement planning services

Guiding Principles of Code

- ➔ Governmental employers (Code § 414(d)) and church plans (Code § 414(e)) exempted from many requirements that apply to private employers, particularly as to retirement plans
- ➔ Controlled group rules apply in many situations to aggregate employers
 - ➔ For-profit employers and tax-exempt employers
 - ➔ Good faith rules for governmental employers
- ➔ The Code typically limits how much compensation and benefits can be deferred or excluded from gross income
- ➔ A typical trade-off for beneficial tax effects is that plans may not discriminate in favor of highly compensated employees

ERISA

- ➔ Enacted in 1974, ERISA is a comprehensive statutory scheme governing employee benefits
- ➔ Largely procedural, very few substantive requirements, especially for health and welfare plans
- ➔ Department of Labor (DOL) responsible for administering and enforcing
- ➔ Contains parallel provisions to many of the Code sections governing pension plans and health plans

ERISA *(cont'd)*

- ERISA does not apply to
 - **Governmental employers** – ERISA § 3(32)
 - **Non-electing church plans** – ERISA § 3(33)(A)
 - **Unfunded excess benefit plan** – ERISA § 3(36)
- ERISA fiduciary standards often set standard for governmental employers
- Governmental employers and non-electing church plans may intentionally or inadvertently adopt ERISA standards (e.g. COBRA)

ERISA *(cont'd)*

- ➔ Unlike the Code, ERISA encourages private enforcement litigation by participants, beneficiaries and others
- ➔ Broad preemption of state law
 - ➔ Governmental employers and non-electing church plans subject to state law health mandates, wage laws
 - ➔ Beware of inadvertent multiple employer welfare arrangements (MEWAs)

ERISA Requirements

- ➔ Requirements for ERISA-Covered Plans:
 - ➔ Reporting and Disclosure – ERISA §§ 101-111
 - ➔ Annual reports - Form 5500s
 - ➔ Summary annual reports (SAR)
 - ➔ Summary plan description (SPD)
 - ➔ Summary of material modifications (SMMS)
 - ➔ Additional notices for both pension and welfare plans
 - ➔ Fiduciary Responsibility – ERISA §§ 401-414
 - ➔ Written Plan Document – ERISA § 402 (consider "wrap" plan document)
 - ➔ Civil Enforcement – ERISA §§ 501-517

ERISA Welfare Plan

- ➔ An **ERISA-covered welfare plan** is a:
 - ➔ plan, fund or program;
 - ➔ established or maintained;
 - ➔ by an employer, employee organization, or both;
 - ➔ for the purpose of providing medical, surgical, or hospital care, benefits in the event of sickness, accident, disability, death or unemployment, vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services, or severance benefits;
 - ➔ to a participant or beneficiary.

ERISA Welfare Plan (cont'd)

- ➔ Is there a plan, fund or program?
 - ➔ No plan if arrangement does not create a need for an ongoing administrative program for processing claims and paying benefits. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211 (1987)
 - ➔ An employer has established an ERISA plan if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982)

Exemptions from ERISA

- ➔ Important exemptions from definition of ERISA employee welfare benefit plan:
 - ➔ **Unfunded payroll practices**
 - ➔ Self-funded short-term disability programs
 - ➔ Vacation, overtime, and shift premium pay
 - ➔ Military and jury duty pay
 - ➔ **On-premises facilities** such as recreation and dining facilities
 - ➔ **Limited on-premises medical facilities** for treatment of minor injuries or illness or rendering first aid for on-the-job accidents (would not exclude many modern on-site health clinics)
 - ➔ **Group insurance programs where employer has very limited involvement**, employer makes no contributions, participation is voluntary, and employer makes no profit from program
 - ➔ Applies to many "voluntary benefits"

The "Other" Welfare Benefit Programs

- ➔ Dental
- ➔ Vision
- ➔ Employee Assistance Programs
- ➔ On-Site Clinics
- ➔ Wellness Programs
- ➔ Cafeteria Plans
- ➔ Long Term Disability
- ➔ Life Insurance
- ➔ Severance

Dental and Vision Plans - Code

- ➔ Code excludes from an employee's income employer contributions to premium – Code § 106
- ➔ Code excludes from an employee's income the qualified medical expenses actually paid from the plan on behalf of employee and his/her dependents – Code § 105
- ➔ Self-insured dental and vision plans are subject to nondiscrimination rules – Code § 105(h)
 - ➔ Fully-insured dental and vision plans – *new rules under PPACA delayed until final regulations*

Dental and Vision Plans - ERISA

- ➔ Almost all dental and vision plans are group health plans subject to ERISA
- ➔ Some plans may fall into the voluntary benefit exemption if voluntary, all employee paid, and no or very limited employer involvement
- ➔ Consider including in "wrap" plan to comply with ERISA requirements

Dental and Vision Plans - Excepted Benefits

- ➔ If a dental or vision plan is an **excepted benefit** it is exempt from many requirements.
- ➔ A dental or vision plan is an excepted benefit if it is a "limited scope plan":
 - ➔ fully insured; or
 - ➔ participants have the right to elect not to receive coverage for the benefits and participants that elect to receive coverage must pay an additional premium
- ➔ 12/24/13 proposed regulation removes requirement that an additional premium must be charged
 - ➔ Can rely on regulation at least through 2014

Dental and Vision Plans - Excepted Benefits

(cont'd)

- ➔ A dental or vision plan that is an **excepted benefit** is exempt from:
 - ➔ HIPAA portability (*includes special enrollment, pre-existing condition exclusions, certificates of creditable coverage, nondiscrimination based on a health status*)
 - ➔ Mental Health Parity Equity Act
 - ➔ Women's Health and Cancer Rights Act
 - ➔ Newborn and mother's Health Protection Act
 - ➔ Genetic Information Nondiscrimination Act (GINA)

Dental and Vision Plans - Excepted Benefits

(cont'd)

- ➔ A dental or vision plan that is an **excepted benefit** is exempt from *(cont'd)*:
 - ➔ PPACA coverage mandates
 - ➔ e.g. adult child, appeals and external review, preventive care, annual and lifetime dollar limit, out-of-pocket limits, etc.
 - ➔ May voluntarily comply with adult child rule
 - ➔ Transitional reinsurance fee
 - ➔ PCORI fee
 - ➔ Summary of benefit coverage (SBC) rules
 - ➔ W-2 reporting of cost of coverage

Dental and Vision Plans - Excepted Benefits

(cont'd)

- ➔ Dental and vision plans that are **excepted benefits** do not:
 - ➔ Satisfy employer shared responsibility mandate – are not an "offer" of "minimum essential coverage"
 - ➔ Satisfy the individual coverage mandate – are not "minimum essential coverage"
 - ➔ Disqualify participant from subsidies on Exchange

Dental and Vision Plans - Excepted Benefits

(cont'd)

- ➔ If a dental or vision plan is **not** an excepted benefit – e.g. the plan is mandatory – it has to comply with above laws
 - ➔ Compliance may be difficult
 - ➔ Treat as "integrated" with medical coverage

Other Requirements for Dental and Vision Plans

- ➔ Dental and vision plans are generally subject to:
 - ➔ HIPAA privacy (*except fully-insured*)
 - ➔ COBRA (*if employer has 20 or more employees*)
 - ➔ USERRA
 - ➔ FMLA (*if employer has 50 or more employees*)
 - ➔ ADA (*if employer has 15 or more employees*)
 - ➔ ADEA – generally not a compliance issue
- ➔ Dental and vision plans do **not** cause an individual to be HSA ineligible

Employee Assistance Plans - Code

- ➔ Code excludes from an employee's income employer contributions to premium – Code § 106
- ➔ Code excludes from an employee's income the qualified medical expenses actually paid from the plan on behalf of employee and his/her dependents – Code § 105
- ➔ EAPs are subject to nondiscrimination rules – Code § 105(h)

Employee Assistance Plans - ERISA

- ➔ EAPs **may** be subject to ERISA – depends on terms of program:
 - ➔ EAP which only provides referrals which an employee could obtain free of charge regardless of employment status and which does not employ any counselors in-house or on a contractual basis is not subject to ERISA. ERISA Op. Ltr. No. 91-026A
 - ➔ EAP that provides assistance in dealing with wide range of major personal problems affecting mental or physical health through contractual arrangement with an independent organization staffed by trained counselors is an ERISA plan. ERISA Op. Ltr. 88-0004A.

Employee Assistance Plans - COBRA

- ➔ COBRA **may** apply to an EAP if employer has 20 or more employees:
 - ➔ COBRA applies to a group health plan, defined as a welfare benefit plan which provides **medical care**.
 - ➔ COBRA regulations state that
 - ➔ medical care does not include anything that is merely beneficial to the general health of an individual, such as a vacation. Thus, if an employer maintains a program that furthers general good health, but the program does not relate to the relief or alleviation of health or medical problems and is generally accessible and used by employees without regard to their physical condition or state of health, that program is not considered a program that provides medical care and so is not a group health plan . . .

Employee Assistance Plans – Excepted Benefits

- ➔ EAPs have not historically fallen within the definition for excepted benefits:
 - ➔ If the EAP was a group health plan subject to COBRA, it was also subject to HIPAA portability, PPACA coverage mandates, etc.
 - ➔ Appeared that EAP coverage could disqualify employee from subsidy on the exchange
 - ➔ EAP needed a summary of benefit coverage (SBC)
 - ➔ Arguably exempt from transitional reinsurance fee since not major medical coverage
 - ➔ Exempt from PCORI fee if did not provide significant medical care or treatment

Employee Assistance Plans – Excepted Benefits (*cont'd*)

- ➔ Proposed regulation issued on 12/24/2013 treats EAP as an **excepted benefit** if:
 - ➔ EAP does not provide "significant" benefits in the nature of medical care
 - ➔ EAP's benefits are not coordinated with another group health plan
 - ➔ Cannot be a gatekeeper to group health plan
 - ➔ Cannot condition eligibility on group health plan participation
 - ➔ Group health plan cannot finance EAP benefits
 - ➔ No employee premiums or contributions are required to participate in EAP
 - ➔ No cost-sharing is involved
- ➔ Can rely on regulation at least through 2014

Employee Assistance Plans – Excepted Benefits (*cont'd*)

- ➔ If an EAP qualifies as an **excepted benefit**, it is exempt from:
 - ➔ HIPAA portability
 - ➔ Mental Health Parity Equity Act
 - ➔ Women's Health and Cancer Rights Act
 - ➔ Newborn and Mother's Health Protection Act
 - ➔ Genetic Information Nondiscrimination Act (GINA)
 - ➔ PPACA coverage mandates
 - ➔ Transitional reinsurance fee
 - ➔ PCORI fee
 - ➔ Summary of benefit coverage (SBC) rules

Employee Assistance Plans – Excepted Benefits (*cont'd*)

- ➔ However, an EAP remains subject to:
 - ➔ HIPAA privacy
 - ➔ W-2 reporting of cost of coverage (*unless employer does not charge a COBRA premium if COBRA applies or another exception applies*)

On-Site Medical Clinics – Code

- ➔ Code excludes from an employee's income employer contributions to premium for health plan coverage – Code § 106
- ➔ Code excludes from an employee's income the qualified medical expenses actually paid from the health plan on behalf of employee and his/her dependents – Code § 105
- ➔ On-site medical clinics are subject to nondiscrimination rules – Code § 105(h)

On-Site Medical Clinics – ERISA

- ➔ On-site medical clinics are generally group health plans under ERISA
- ➔ Limited on-premises medical facilities for treatment of minor injuries or illnesses or rendering first aid for on-the-job accidents exempt from ERISA
- ➔ Include on-site medical clinic in wrap plan to aid compliance

On-Site Medical Clinics - COBRA

- ➔ COBRA applies to many on-site health clinics
 - ➔ An on-site medical clinic "that is intended to relieve or alleviate a physical condition or health problem," is a group health plan for COBRA purposes because it provides "health care"
 - ➔ However, the provision of health care at an employer's on-premises facility is not a group health plan for COBRA purposes if it satisfies all of the following requirements:
 - ➔ The health care consists primarily of first aid that is provided during the employer's working hours for treatment of a health condition, illness, or injury that occurs during those working hours;
 - ➔ The health care is available only to current employees; and
 - ➔ Employees are not charged for the use of the facility.

On-Site Medical Clinics – Excepted Benefits

- ➔ On-site clinics are **excepted benefits** exempt from:
 - ➔ HIPAA portability
 - ➔ Mental Health Parity Equity Act
 - ➔ Women's Health and Cancer Rights Act
 - ➔ Newborn and Mother's Health Protection Act
 - ➔ Genetic Information Nondiscrimination Act (GINA)
 - ➔ PPACA coverage mandates
 - ➔ Transitional reinsurance fee
 - ➔ PCORI fee
 - ➔ Summary of benefit coverage (SBC) rules

On-Site Medical Clinics – Other Requirements

- ➔ On-site medical clinics are also exempt from HIPAA privacy rules
- ➔ However, on-site medical clinics are subject to:
 - ➔ W-2 reporting of cost of coverage (*unless employer does not charge a COBRA premium if COBRA applies or another exception applies*)
 - ➔ USERRA
 - ➔ FMLA (*if employer has 50 or more employees*)
 - ➔ ADA (*if employer has 15 or more employees*)
 - ➔ ADEA – generally not a compliance issue

On-Site Medical Clinics – Other Requirements (*cont'd*)

- ➔ An on-site medical clinic does not:
 - ➔ Satisfy employer shared responsibility mandate
 - ➔ Satisfy the individual coverage mandate
 - ➔ Disqualify participant from subsidies on Exchange
- ➔ An on-site clinic may disqualify employees from health savings account (HSA) eligibility unless charged fair market value for services

Wellness Programs - Code

- ➔ Wellness program may be a group health plan – or part of a group health plan - if it provides medical benefits
- ➔ Code excludes from an employee's income employer contributions to premium for health plan coverage – Code § 106
- ➔ Code excludes from an employee's income the qualified medical expenses actually paid from the health plan on behalf of employee and his/her dependents – Code § 105
- ➔ If a group health plan, wellness program is subject to nondiscrimination rules – Code § 105(h)

Wellness Programs - ERISA

- ➔ A wellness program **may** be a group health plan under ERISA if it provides medical benefits
- ➔ Wellness programs are analyzed under same rules that apply to EAPs in determining if ERISA covered (*see slide #27*)
- ➔ Wellness program may be component of the major medical plan

Wellness Programs - COBRA

- ➔ COBRA **may** apply to a wellness program if employer has 20 or more employees:
- ➔ COBRA applies to a group health plan, defined as a welfare benefit plan which provides **medical care**
 - ➔ Medical care includes the diagnosis, cure, mitigation, treatment, or prevention of disease, and any other undertaking for the purpose of affecting any structure or function of the body
- ➔ See slide 28 for EAPs – same analysis

Wellness Programs - Other Requirements

- ➔ If a wellness program is a group health plan under COBRA, it is also a group health plan for purposes of:
 - ➔ HIPAA portability
 - ➔ Mental Health Parity Equity Act
 - ➔ Women's Health and Cancer Rights Act
 - ➔ Newborn and Mother's Health Protection Act
 - ➔ Genetic Information Nondiscrimination Act (GINA)
 - ➔ Summary of benefit coverage (SBC) rules

Wellness Programs - Other Requirements (*cont'd*)

- ➔ However, a wellness program remains subject to:
 - ➔ HIPAA privacy
 - ➔ W-2 reporting of cost of coverage (*unless employer does not charge a COBRA premium if COBRA applies or another exception applies*)
- ➔ Unless wellness program provides significant benefit in the nature of medical care or treatment
 - ➔ Not subject to transitional reinsurance fee or PCORI fee
 - ➔ Will not cause an employee to be HSA ineligible

Disability Plans - Code

- ➔ Disability benefits are not taxable to the employee if the premiums are paid by the employer and/or employee on an after-tax basis - Code §§ 104, 105
- ➔ Disability benefits are taxable to the employee if the premiums are paid by the employer and/or employee on a pre-tax basis – Code § 105
- ➔ Nondiscrimination rules apply to self-insured disability plan - Code § 105(h)
 - ➔ Fully-insured rules under PPACA are delayed

Disability Plans - ERISA

- ➔ Short term disability plans are generally employer payroll practices exempt from ERISA
- ➔ Careful if dollars are set aside for these plans
- ➔ Long-term disability plans are generally fully-insured plans that are subject to ERISA

Disability Plans – Excepted benefits

- ➔ Disability plans are **excepted benefits** exempt from:
 - ➔ HIPAA portability
 - ➔ Mental Health Parity Equity Act
 - ➔ Women's Health and Cancer Rights Act
 - ➔ Newborn and Mother's Health Protection Act
 - ➔ Genetic Information Nondiscrimination Act (GINA)
 - ➔ PPACA coverage mandates
 - ➔ Transitional reinsurance fee
 - ➔ PCORI fee
 - ➔ Summary of benefit coverage (SBC) rules

Disability Plans – Other Requirements

- ➔ Disability plans are also exempt from HIPAA privacy rules.
- ➔ However, the following labor laws apply:
 - ➔ ADEA – biggest concern (*see slide #48*)
 - ➔ ADA – equal access to benefits
 - ➔ USERRA – provided on same basis as to other employees on a leave of absence

Disability Plans - ADEA

- ➔ Generally, same types and amounts of benefits must be provided without regard to age
- ➔ An exception applies if employer is incurring the same cost for the benefit for older and younger workers ("equal cost defense")
 - ➔ Benefit becomes more expensive with age
 - ➔ Benefit part of a bona fide employee benefit plan
 - ➔ Plan requires the lower benefits
- ➔ Benefits are not equal if plan specifies an age based cut-off for the length of time payments will be made or denies benefits based on age become eligible for the benefit

Disability Plans – ADEA (*cont'd*)

- ➔ **Safe harbor** applies:
 - ➔ For disabilities that occur at age 60 or less, benefits cease at age 65; and
 - ➔ For disabilities that occur after age 60, benefits cease 5 years after disability
- ➔ If any other reduction in benefit amount or length of benefits in plan, employer must demonstrate through data that it expended equal cost and reduced amount/duration only to extent necessary to preserve cost.

Life Insurance Plans - Code

- ➔ Group term life insurance not taxable to employee up to \$50,000 of coverage if policy is carried directly or indirectly by the employer
- ➔ Imputed cost of coverage exceeding \$50,000 must be included in income and subject to employment taxes, reduced by amount paid by employee toward coverage
- ➔ Nondiscrimination rules apply – Code § 79

Life Insurance Plans - ERISA

- ➔ Group term life insurance plans are generally fully-insured plans that are subject to ERISA
- ➔ Some plans may fall into the voluntary benefit exemption if voluntary, all employee paid, and no or very limited employer involvement

Life Insurance Plans – Other Requirements

- ➔ Not a group health plan, so not subject to COBRA, HIPAA, PPACA coverage mandates, SBC rules, W-2 cost of coverage reporting, etc.
- ➔ However, the following labor laws apply:
 - ➔ ADEA – biggest concern (*see slide 53*)
 - ➔ ADA – equal access to benefits
 - ➔ USERRA – provided on same basis as to other employees on a leave of absence

Life Insurance Plans - ADEA

- ➔ Generally, same types and amounts of benefits must be provided without regard to age
- ➔ However, as with disability plans, **equal cost defense** applies
- ➔ No safe harbor applies for life insurance plans, but can use age brackets for up to 5 years for demonstrating a specific reduction in benefits.

Cafeteria Plan - Code

- ➔ If an employee is given a choice between cash and a nontaxable benefit, generally taxable to employee regardless of the employee's choice
- ➔ If Code Section 125 is satisfied, however, employee is not taxed unless the employee elects cash
- ➔ Nondiscrimination rules apply – Code § 125
 - ➔ Separate nondiscrimination rules also apply to health FSA included in a cafeteria plan - Code § 105(h)
 - ➔ Separate nondiscrimination rules also apply to dependent care FSA included in a cafeteria plan - Code § 129

Cafeteria Plan – Code (*cont'd*)

- ➔ Plan must be in writing
- ➔ Must generally be amended before plan year begins
- ➔ Premium conversion – qualified benefits
- ➔ Flexible spending accounts – health and dependent care
- ➔ Elections are generally irrevocable
 - ➔ mid-year change rules apply
 - ➔ retroactive changes limited
- ➔ Long-standing proposed rules

Cafeteria Plan – Code (*cont'd*)

- ➔ Employee can choose between cash or “qualified benefits” –
 - ➔ Health, dental, vision, prescription drug coverage
 - ➔ Health FSA or dependent care FSA
 - ➔ AD&D
 - ➔ Group term life insurance
 - ➔ Disability coverage
 - ➔ Vacation days or pay
 - ➔ Wellness benefits
 - ➔ Adoption assistance
 - ➔ Health savings account

Cafeteria Plan – Code (*cont'd*)

- ➔ Qualified benefits do **not** include
 - ➔ Dependent group term life
 - ➔ Educational assistance programs
 - ➔ Transportation benefits
 - ➔ Long-term care insurance
 - ➔ Employer provided meals and lodging
 - ➔ 403(b) contributions
 - ➔ Health reimbursement arrangements
 - ➔ Any benefits that defer compensation

Cafeteria Plan - ERISA

- ➔ Premium conversion cafeteria plan is not covered by ERISA
- ➔ But health FSA that is part of a cafeteria plan is subject to ERISA, as are other underlying benefit features
- ➔ Normally a requirement to hold participant contributions in trust under ERISA, but not enforced by DOL if certain requirements met

Tuition Remission

- ➔ Qualified Tuition Reduction – Code § 117(d)
 - ➔ Undergraduate only for employee, retiree and tax dependents
 - ➔ Graduate for employee, retiree and tax dependents who are graduate students
- ➔ Educational expenses - Code § 127
 - ➔ Undergraduate or graduate for employee only up to \$5,250
- ➔ Working condition fringe – Code § 132
 - ➔ Undergraduate or graduate for employee only for work related education

Severance Benefits - Code

- ➔ Applicability of Code depends on what benefits are offered under severance plan
- ➔ Code Sections 457(f) and 409A may apply if continued salary or other compensation and does not meet **bona fide severance pay plan exception**
- ➔ Code Section 105 may apply if continued health benefits

Severance Benefits - ERISA

- ➔ Severance plan may be exempt from ERISA if it is not a "plan, fund or program"
- ➔ Long history of case law (*see slide #15*)
- ➔ If not exempt, may be either a welfare plan or a pension plan under ERISA

Federal Labor Laws

- ➔ Uniformed Services Employment and Reemployment Rights Act of 1994 – **USERRA**
- ➔ Age Discrimination in Employment Act of 1967 – **ADEA**
- ➔ Family Medical Leave Act - **FMLA**
- ➔ Americans with Disabilities Act of 1990- **ADA**

USERRA

- ➔ USERRA generally covers all employers
- ➔ Protects rights of individuals in the uniformed services
 - ➔ Provides for reemployment after a period of uniformed service
 - ➔ Safeguards rights to benefits under retirement and health plans during and after period of uniformed service
- ➔ Health plan benefits
 - ➔ Applies to medical, vision, dental, health FSA
 - ➔ Similar protection to COBRA, but applies regardless of employer size
 - ➔ Upon return from period of uniformed service, health coverage must be reinstated without preexisting condition exclusions or waiting period

ADEA

- ➔ ADEA generally applies to employers that employ 20 or more employees
- ➔ Prohibits discrimination against any individual with respect to compensation, terms, conditions or privileges of employment because of age
 - ➔ Early retirement incentive plans
 - ➔ Retiree health
 - ➔ Long term disability
 - ➔ Life insurance
 - ➔ Can arise as an issue with respect to any type of employee benefit

FMLA

- ➔ FMLA generally applies to employers that employ 50 or more employees
- ➔ Requires employer to provide job-protected leave of up to 12 weeks for eligible employees
 - ➔ Who need to care for a newborn or newly adopted child
 - ➔ Who need to care for a family member with a serious health condition
 - ➔ Who suffer from a serious health condition
 - ➔ Who have a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on covered active duty
- ➔ 26 weeks of leave are available during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, or next of kin.

FMLA and Health Plans

- ➔ Employer must maintain group health plan coverage for FMLA leave under same conditions as if working during leave period
 - ➔ Applies to medical, dental, vision, health FSA
- ➔ If coverage lapses due to non-payment of premium, employer must restore employee to same level of coverage upon returning from leave as if no leave had been taken
- ➔ If employer pays premiums for employee, can recover from employee when returns to work

ADA

- ➔ ADA generally applies to employers that employ 15 or more employees
- ➔ Prohibits discrimination on the basis of disability in all terms and conditions of employment
 - ➔ Cannot base hiring or termination decisions on impact of disabled individual (or a disabled dependent) on health plan
 - ➔ Must give same access to benefit plans to disabled employee as to other employees

ADA and Employee Benefits

- ➔ Prohibits disability-based distinctions in employee benefits unless distinction is not a subterfuge to evade the purposes of ADA
- ➔ Disability-based distinction singles out for different treatment
 - ➔ A particular disability
 - ➔ A discrete group of disabilities
 - ➔ Disability in general
- ➔ Does not prohibit a benefit plan provision that applies to a number of dissimilar conditions that affect individuals with and without disabilities
- ➔ **Example:** wellness programs

QUESTIONS?