

Detailed Table of Contents

	<i>Main Volume</i>	<i>Supple- ment</i>
FOREWORD.....	xiii	xiii
PREFACE	xv	xv
SUMMARY TABLE OF CONTENTS	xix	xix
INTRODUCTION TO THE FOURTH EDITION: A SYSTEM IN CRISIS? EMPLOYEE BENEFITS IN THE UNITED STATES: A LOOK TOWARD THE FUTURE.....	lxix	—
INTRODUCTION TO THE THIRD EDITION: FILLING IN THE GAPS: ERISA COMES OF AGE.....	lxxxix	—
INTRODUCTION TO THE SECOND EDITION: ERISA IN THE 21ST CENTURY.....	xcvii	—
INTRODUCTION TO THE FIRST EDITION: THE SOCIAL POLICY ORIGINS OF ERISA.....	cxi	—
CHAPTER 1. BRIEF HISTORY OF THE REGULATION OF EMPLOYEE BENEFITS.....	1-1	1
I. Pre-ERISA	1-1	—
II. Enactment of ERISA.....	1-9	—
III. Post-ERISA Legislation.....	1-11	—
CHAPTER 2. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: NATURE, COVERAGE, AND STATUTORY STRUCTURE	2-1	3
I. Introduction.....	2-2	—
II. Nature and Purpose of ERISA	2-2	—
III. Types of Plans	2-4	4
A. Single-Employer, Multiemployer, and Multiple Employer Plans.....	2-5	—

	<i>Main Volume</i>	<i>Supple- ment</i>
B. Plans Subject to ERISA and the Internal Revenue Code.....	2-6	—
1. Pension Plans	2-6	—
2. Welfare Plans	2-10	—
C. Plans Partially or Completely Exempt From ERISA.....	2-12	4
1. Top Hat Plans	2-12	—
2. Excess Benefit Plans	2-13	—
3. Code Section 457 Plans	2-14	—
4. Code Section 409A Plans.....	2-14	—
5. Governmental Plans	2-14	—
a. Application of ERISA to Public Sector Plans	2-14	—
b. Governmental Plan Status in General.....	2-15	—
i. Political Subdivision	2-15	—
ii. Agency or Instrumentality	2-16	—
iii. Additional Considerations	2-18	—
c. Governmental Plan Status in Special Circumstances	2-19	—
d. Application of Other Laws to Public Sector Plans	2-20	—
i. Qualified Plan Requirements Under the Code.....	2-20	—
ii. Other Code Provisions	2-22	—
e. State-Sponsored Retirement Savings Programs.....	2-22	—
6. Church Plans	2-23	4
IV. Statutory Structure	2-24	—
A. Overview	2-24	—
B. Title I: Protection of Participant Rights.....	2-26	—
1. Coverage	2-26	—
2. Reporting and Disclosure.....	2-27	—
3. Participation, Vesting, Accrual Formulas, and the Payment of Benefits	2-28	—
4. Minimum Funding Requirements.....	2-29	—
5. Fiduciary Responsibility	2-29	—
6. Enforcement.....	2-30	—
7. COBRA Health Care Coverage	2-31	—
8. Standards for Health Care Benefit Plans.....	2-31	—
C. Title II: Amendments to the Code Relating to Retirement Plans.....	2-32	—
D. Title III: Jurisdiction, Administration, and Enforcement	2-32	—
E. Title IV: Plan Termination Insurance.....	2-32	—
1. Pension Benefit Guaranty Corporation	2-32	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Coverage	2-33	—
3. Terminations	2-33	—
4. Liability	2-34	—
5. Reportable Events	2-34	—
6. Multiemployer Plans	2-34	—
CHAPTER 3. ADMINISTRATION AND ENFORCEMENT	3-1	7
I. Introduction	3-3	—
II. Department of Labor	3-3	9
A. Organization and Allocation of Authority	3-3	—
1. EBSA Offices	3-3	—
2. Solicitor of Labor	3-4	—
3. ERISA Advisory Council	3-5	—
B. General Rulemaking Authority	3-5	—
C. Express Rulemaking Authority: Prohibited Transaction Exemptions	3-6	—
1. Class Exemptions	3-7	—
2. Individual Exemptions	3-7	—
3. Prohibited Transaction Exemption Procedures	3-7	—
4. Expedited Procedures	3-8	—
5. Effect of Exemptions	3-9	—
6. Revocation or Modification of Exemptions	3-10	—
7. Public Inspection	3-10	—
D. Advisory Opinions, Information Letters, and Field Assistance Bulletins	3-10	—
1. Procedure for Requesting an Information Letter or Advisory Opinion	3-10	—
2. Conferences	3-11	—
3. Permissible Areas of Inquiry	3-11	—
4. Effect of Advisory Opinions and Information Letters	3-12	—
5. Field Assistance Bulletins	3-13	—
E. Investigations	3-14	—
F. Enforcement	3-15	—
1. Civil Suits	3-15	—
2. Civil Penalties	3-16	—
3. Intervention	3-16	—
G. Voluntary Compliance Programs	3-17	9
1. Delinquent Filer Voluntary Compliance Program	3-17	9
2. Voluntary Fiduciary Correction Program	3-18	9
H. Interface With Other Agencies	3-19	—
I. Additional Resources	3-19	10
III. Internal Revenue Service	3-20	10

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Organization and Allocation of Authority	3-20	10
B. Regulatory Powers.....	3-21	—
C. IRS Rulings	3-21	10
1. Revenue Rulings	3-22	—
2. Private Letter Rulings	3-22	—
3. Information Letters	3-22	10
D. Plan Qualification.....	3-23	10
1. Requesting a Determination Letter	3-23	—
a. What to File	3-24	—
b. Notice to Interested Parties.....	3-24	—
c. When to File	3-25	—
2. Technical Advice.....	3-25	—
3. Appealing a Proposed Adverse Determination	3-26	—
4. Final Determination	3-26	—
5. Tax Court Appeal	3-26	—
6. Voluntary Compliance and Self-Correction Programs	3-27	10
E. Minimum Funding Waivers	3-28	—
F. Excise Taxes	3-28	—
1. Excise Taxes That Apply to Prohibited Transactions	3-28	—
2. Excise Taxes That Apply for Failure to Meet Minimum Funding Standards	3-29	—
3. Other Excise Taxes.....	3-29	—
G. Additional Resources.....	3-30	10
IV. Pension Benefit Guaranty Corporation	3-30	10
A. Organization and Allocation of Authority	3-31	—
1. Statutory Authority of the PBGC.....	3-31	—
2. Advisory Committee.....	3-32	—
3. PBGC Funding and Investment Authority	3-32	—
4. Organizational Structure	3-33	—
B. Regulations, Opinion Letters, and Initial Determinations	3-34	—
C. Reportable Events.....	3-35	—
D. PBGC Premiums	3-35	—
1. In General.....	3-35	—
2. Premium Rates	3-36	—
3. Premium Collection	3-37	—
E. Investigation and Enforcement Authority.....	3-37	—
F. PBGC Programs	3-38	—
1. Early Warning Program.....	3-38	—
2. Alternative Dispute Resolution.....	3-38	—
G. Interface With Other Agencies	3-38	—
H. Additional Resources.....	3-39	11

	<i>Main Volume</i>	<i>Supple- ment</i>
CHAPTER 4. REPORTING AND DISCLOSURE	4-1	13
I. Introduction.....	4-3	—
II. Principal Means of Disclosing Terms of the Plan.....	4-4	—
A. Disclosure of Plan Terms Absent a Request.....	4-4	—
1. Summary Plan Description	4-4	—
2. Summary of Benefits and Coverage	4-11	—
3. Summary of Material Modification	4-12	—
B. Requests for Plan Documents.....	4-14	—
1. Written Requests by Participants and Beneficiaries (ERISA Section 104(b)(4)).....	4-14	—
2. Requests by the Department of Labor (ERISA Section 104(a)(6)).....	4-21	—
III. Reporting and Disclosure of Financial Information About the Plan.....	4-21	16
A. Annual Financial Reporting to the Government: Form 5500 (ERISA Section 103)	4-22	16
1. The Requirements	4-22	16
2. Compliance	4-24	—
a. Penalties.....	4-24	—
b. Voluntary Compliance Program for Delinquent Form 5500s.....	4-26	—
B. Financial Reporting to Others	4-27	—
1. Summary Annual Report (ERISA Section 104(b)(3)).....	4-27	—
2. Annual Funding Notice for Defined Benefit Plans (ERISA Section 101(f)).....	4-28	—
3. Additional Financial Disclosure Required for Multiemployer Plans (ERISA Sections 104(d) and 101(k))	4-30	—
IV. Additional Disclosures to Participants Concerning Their Benefits and Rights	4-31	—
A. Pension Benefits Statement	4-31	—
B. Notice of Amendments Reducing the Rate of Benefit Accruals or Eliminating or Reducing Early Retirement Benefits and Retirement-Type Subsidies.....	4-33	—
C. Survivor Annuity Notice and Explanation of Distribution Options	4-36	—
D. Domestic Relations and Medical Child Support Order Notices.....	4-37	—
E. Benefits Statement for Terminated Employees	4-38	—
F. Rollover Notice.....	4-39	—
G. Claims Denial Notice	4-40	—
H. Notice of Suspension of Benefits	4-40	—
I. Blackout Notice Required by the Sarbanes-Oxley Act of 2002.....	4-41	—

	<i>Main Volume</i>	<i>Supple- ment</i>
J. Notice of Funding Issues	4-42	—
1. Notice of Failure to Meet Minimum Funding Standards (ERISA Section 101(d)).....	4-42	—
2. Single-Employer Plans With Funding Issues (ERISA Section 101(j)).....	4-43	—
3. Multiemployer Plans in Endangered, Critical, or Critical and Declining Status (ERISA Section 305(b)(3)).....	4-43	—
K. Notice of Diversification Rights.....	4-44	—
L. Notice Regarding Qualified Default Investment Arrangements	4-44	—
M. Automatic Enrollment Notice.....	4-45	—
1. For 401(k) Plans.....	4-45	—
2. For Combined Plans.....	4-46	—
N. Notice of Rights of Military Personnel	4-46	—
O. Notice Requirements of Prohibited Transaction Exemption for Investment Advice	4-46	—
P. Fee Disclosure Requirements	4-47	—
V. Other Notice and Reporting Requirements	4-47	—
A. Service Provider Fee Disclosures to Plan Fiduciaries	4-48	—
B. Notice of Application for Determination of Qualification of Retirement Plan.....	4-48	—
C. Notice of Prohibited Transaction Exemption Application	4-49	—
D. Notice of Request for Extension of Amortization Period.....	4-49	—
E. Reporting and Payment of Excise Taxes	4-49	—
F. Notice of Merger, Consolidation, Spinoff, or Transfer and Determination Application for Terminating Retirement Plan.....	4-50	—
G. Notice of Withdrawal Liability to Employers Contributing to Multiemployer Plans	4-50	—
H. Notice of Transfer of Excess Pension Assets to Retiree Health Benefit Account.....	4-51	—
I. Notice of Distributions (Forms 1099-R, 1099-LTC, and 1099-SA).....	4-52	—
J. Notice of Withholding of Taxes.....	4-52	—
K. Contribution Reports for Certain Plans	4-53	—
VI. Reporting and Disclosure Relating to Pension Plan Termination Insurance.....	4-53	17
VII. Additional Notices Required for Welfare Plans	4-56	—
A. Affordable Care Act Notices and Reporting.....	4-56	—
B. Medicare Data Reporting	4-57	—
C. Additional Welfare Plan Notices and Reporting	4-58	—

	<i>Main Volume</i>	<i>Supple- ment</i>
VIII. General Issues Concerning Retention and Transmission of Documents	4-59	—
A. Retention of Records	4-59	—
B. Electronic Disclosure.....	4-61	—
1. DOL Electronic Disclosure Rules.....	4-61	—
2. Treasury Department Electronic Disclosure Regulations	4-63	—
IX. Reporting and Disclosure Requirements Under the Federal Securities Laws	4-65	—
A. Securities Act of 1933	4-65	—
1. Plan Interests and Assets as Securities.....	4-65	—
a. Participation Interests as Securities	4-65	—
b. Employer Stock as Securities	4-66	—
2. Transactions in Securities as Constituting the Offer or Sale of Securities.....	4-66	—
a. Plan Distributions	4-66	—
b. Sales by Plan Participants.....	4-66	—
3. Registration	4-67	—
a. Registration of Participation Interests	4-68	—
b. Registration of Employer Securities.....	4-68	—
4. Exemptions	4-69	—
5. Penalties	4-70	—
B. Securities Exchange Act of 1934.....	4-70	—
1. Registration	4-70	—
2. Periodic Reporting	4-71	—
3. Specialized Reporting	4-72	—
4. Antifraud Provisions	4-73	—
5. Proxy Solicitation and Shareholder Proposals...	4-74	—
a. Proxy Solicitation	4-74	—
b. Shareholder Proposals	4-74	—
6. Other Rules Relevant to Plans as Investors.....	4-75	—
a. Soft Dollars.....	4-75	—
b. Proxy Voting Rules for Mutual Funds and Investment Advisers	4-76	—
c. Market Timing and Late Trading.....	4-76	—
7. Sarbanes-Oxley Act of 2002	4-77	—
a. Pension Fund Blackout Periods.....	4-77	—
b. Corporate Governance Provisions Including Prohibition of Executive Loans...	4-77	—
X. Plan-Related Disclosures Under the LMRDA	4-78	18
 CHAPTER 5. REGULATION OF QUALIFIED RETIREMENT INCOME PLANS GENERALLY	 5-1	 19
I. Overview of Tax Treatment of Qualified Retirement Plans	5-5	—
II. Types of Qualified Retirement Plans	5-7	—

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Defined Contribution Plans	5-8	—
1. Profit-Sharing Plans	5-8	—
2. Money Purchase Pension Plans	5-9	—
B. Defined Benefit Plans	5-9	—
C. Special Characteristics of Plans to Which More Than One Employer Contributes	5-10	—
III. Calculation and Crediting of Service Under Qualified Retirement Plans	5-12	—
A. Hour of Service Defined.....	5-12	—
1. Determining Service to Be Credited to Employees.....	5-13	—
2. Equivalency Methods.....	5-13	—
a. Working Time Method	5-13	—
b. Period of Service Equivalency Method.....	5-13	—
c. Earnings Equivalency Method.....	5-13	—
d. Special Rules	5-14	—
3. Elapsed Time Method	5-14	—
4. Using Service Counting and Equivalency Methods.....	5-14	—
B. Break in Service Rules	5-15	—
C. Credited Time for Military Service	5-16	—
IV. Participation and Coverage Rules	5-18	24
A. Age and Service Requirements for Participation	5-19	—
1. Minimum Age and Service Requirements	5-19	—
2. Entry Date Rules	5-19	—
B. Coverage Tests for Determining Plan Qualification	5-20	24
1. Highly Compensated Employees	5-20	24
2. Determining the Entity to Be Tested.....	5-21	—
a. Aggregation of Related Employers	5-21	—
b. Aggregation and Disaggregation of Plans ...	5-22	—
c. Separate Lines of Business.....	5-22	—
d. Multiemployer and Multiple Employer Plans	5-23	—
3. Minimum Coverage Tests	5-23	—
a. Percentage Test.....	5-24	—
b. Ratio Test.....	5-24	—
c. Average Benefits Percentage Test	5-24	—
i. The “Reasonable Classification” Component.....	5-24	—
ii. The “Average Benefit Percentage” Component.....	5-24	—
4. Special Application Rules	5-25	—
a. Employees Who Benefit Under a Plan	5-25	—
b. Exclusion and Inclusion of Certain Employees	5-25	—

	<i>Main Volume</i>	<i>Supple- ment</i>
c. Exclusion of Part-Time Employees	5-26	—
d. Rules With Respect to Former Employees	5-26	—
C. Minimum Participation Rules.....	5-27	—
1. In General.....	5-27	—
2. Prior Benefit Structures.....	5-27	—
V. Vesting and Benefit Accrual Rules.....	5-27	24
A. Minimum Vesting Rules	5-28	—
1. Statutory Minimum Vesting Schedules	5-28	—
2. Years of Service	5-30	—
3. Forfeitures	5-31	—
4. Disregard of Service for Accrual Purposes	5-33	—
5. Vesting Upon Plan Termination	5-33	—
B. Rules for Top-Heavy Plans	5-36	—
C. Nondiscrimination in Contributions or Benefits	5-38	—
1. In General.....	5-38	—
2. Nondiscriminatory Amounts Testing	5-39	—
3. Nondiscrimination Testing of Other Benefits, Rights, and Features.....	5-41	—
4. Nondiscrimination With Respect to Plan Amendments and Terminations	5-41	—
5. Corrective Amendments.....	5-42	—
6. Permitted Disparity	5-42	—
7. Definition of Compensation.....	5-44	—
D. Accrued Benefit Requirements.....	5-45	—
1. Permissible Accrual Methods	5-45	—
a. The 3 Percent Method	5-46	—
b. The 133 ¹ / ₃ Percent Rule.....	5-46	—
c. The Fractional Rule	5-46	—
d. Other Considerations.....	5-46	—
2. Year of Participation	5-47	—
3. Cash Balance Plans.....	5-48	—
E. Age Discrimination Rules	5-50	—
1. In General.....	5-50	—
2. Consideration of Prior Distributions.....	5-51	—
3. Actuarial Increase in Benefits.....	5-51	—
F. Restrictions on Amendments Affecting Accrued Benefits and Optional Forms.....	5-52	24
1. Anti-cutback Rule	5-52	24
a. Statutory and Regulatory Guidance.....	5-52	—
b. Court Decisions	5-54	24
2. Reductions of Future Benefit Accruals, Early Retirement Benefits, or Retirement-Type Subsidies	5-58	24
G. Other Rules Relating to Accrued Benefits.....	5-59	25
1. First Two Years of Service	5-59	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Actuarial Equivalent of Accrued Benefit	5-59	25
3. Allocation of Accrued Benefits Between Employer and Employee Contributions	5-59	—
4. Adjusting Accrued Benefits for Prior Distributions	5-60	—
H. Individual Limits on Contributions and Benefits	5-60	25
1. Failure to Comply	5-60	—
2. General Concepts	5-61	—
a. Limitation Year	5-61	—
b. Applicability	5-61	—
c. Plan Aggregation	5-61	—
d. Compensation	5-62	—
3. Limits for Defined Benefit Plans	5-64	25
a. “High 3 Years”	5-64	—
b. Annual Benefit	5-64	25
c. The 10-Year Rule	5-65	—
d. The \$10,000 Floor	5-65	—
4. Limits for Defined Contribution Plans	5-65	—
VI. Funding Requirements	5-66	—
A. Actuarial Assumptions and Permissible Funding Methods	5-67	—
B. Minimum Funding Rules—Single-Employer Plans	5-67	—
1. Current Funding Rules	5-67	—
2. Benefit Limitations in Underfunded Plans	5-69	—
3. Changes to the Funding Methods	5-69	—
C. Waivers	5-69	—
D. Multiple Employer Plans	5-70	—
E. Penalties	5-71	—
1. Penalties for Insufficient Contributions	5-71	—
2. Penalties for Nondeductible Contributions	5-72	—
VII. Life Insurance in Qualified Plans	5-72	—
A. Incidental Benefit Rule	5-72	—
B. When Life Insurance Protection Is Considered Incidental	5-72	—
1. Profit-Sharing Plans	5-72	—
2. Pension Plans	5-73	—
3. Taxation of Life Insurance Benefits	5-73	—
VIII. Deductions for Employer Contributions	5-75	25
A. In General	5-75	—
B. Deductibility of Employer Contributions Under Code Sections 162 and 212	5-76	—
C. Deductibility of Employer Contributions to Pension Plans Under Code Section 404	5-76	—
D. Deductibility of Employer Contributions to Profit-Sharing and Stock Bonus Plans	5-78	—

	<i>Main Volume</i>	<i>Supple- ment</i>
E. Deductibility of Employer Contributions to Employee Stock Ownership Plans.....	5-78	—
F. Combination of Plans	5-79	—
G. Compensation Limit	5-80	25
IX. Distributions From Plans	5-80	26
A. Commencement of Distributions.....	5-80	26
1. When Benefits Must Commence	5-80	26
a. Consent Rule for Early Distributions	5-80	26
b. Mandatory Distribution Events	5-83	—
c. Outer Limit of Age 70½ or Retirement	5-84	—
d. Death Distributions.....	5-85	—
e. Benefits for Participants in Active Military Service	5-86	—
2. Suspension of Benefits.....	5-87	—
a. Reemployment Prior to Normal Retirement Age.....	5-87	—
b. Employment After Normal Retirement Age	5-87	—
c. Section 203(a)(3)(B) Service.....	5-87	—
B. Forms of Distributions.....	5-89	26
C. Survivor Benefit Requirements	5-90	—
1. Plans Subject to Survivor Benefit Requirements	5-91	—
2. Qualified Joint and Survivor Annuity	5-92	—
3. Qualified Optional Survivor Annuity	5-92	—
4. Qualified Preretirement Survivor Annuity	5-92	—
5. Effect of the Participant's Marital Status	5-93	—
6. Spousal Consent Requirements for Alternative Form of Distribution or Designation of Alternative Beneficiary	5-94	—
7. Notice and Election Procedures	5-95	—
D. Assignment and Alienation of Benefits	5-98	—
1. Anti-alienation Rule and Application, in General.....	5-98	—
2. Bankruptcy Code Issues.....	5-100	—
3. Qualified Domestic Relations Orders	5-100	—
E. Loans to Participants	5-105	—
F. Plan Mergers, Transfers, and Spinoffs.....	5-107	—
G. Federal Tax Treatment of Distributions.....	5-109	26
1. Periodic Payments and In-Service Withdrawals	5-109	26
a. Periodic Payments	5-109	—
b. In-Service Withdrawals	5-110	26
c. Separate Contract Rule.....	5-111	—
2. Lump-Sum Distributions.....	5-111	—
3. Rollovers	5-112	27

	<i>Main Volume</i>	<i>Supple- ment</i>
a. Eligible Rollover Distributions.....	5-113	—
b. Direct Rollovers.....	5-114	—
c. Withholding on Eligible Rollover Distributions	5-115	—
d. Indirect Rollovers	5-115	27
e. Special Rules Applicable to Rollovers Between Individual Retirement Accounts and Roth IRAs	5-117	27
f. Explanation and Notice	5-118	—
4. Employer Securities	5-118	—
5. Early Distributions	5-119	—
a. Statutory Exceptions That Apply to Plans and IRAs.....	5-119	—
b. Statutory Exceptions That Apply Only to Qualified Plans and Section 403(b) Plans ...	5-120	—
c. Statutory Exceptions for Employee Stock Ownership Plans.....	5-120	—
d. Statutory Exceptions That Apply Only to IRAs.....	5-121	—
6. Failure to Make Minimum Required Distributions.....	5-121	—
7. Federal Tax Withholding Requirements.....	5-121	—
CHAPTER 6. REGULATION OF SPECIALIZED TYPES OF RETIREMENT INCOME PLANS	6-1	29
I. Employee Stock Ownership Plans	6-4	32
A. Statutory Requirements	6-4	32
1. Definition	6-4	32
2. Qualifying Employer Securities.....	6-4	—
3. Voting Rights	6-5	—
4. Special ESOP Distribution Requirements	6-6	32
a. What the Participant May Receive	6-6	—
b. When Distribution Must Begin	6-7	—
c. How Fast Must Distribution Be Completed	6-7	—
5. Diversification Election	6-7	—
6. Independent Appraiser	6-8	—
7. Miscellaneous Regulatory Requirements	6-8	—
8. Special Requirements for S Corporations.....	6-9	—
B. Exempt Loan Transactions	6-10	—
C. Benefits of Satisfying the ESOP Requirements	6-12	—
1. Tax-Deferred Sale	6-12	—
2. Dividend Deduction	6-13	—
3. Increased Deduction and Allocation Limitations	6-14	—
4. Other Tax Benefits	6-15	—

	<i>Main Volume</i>	<i>Supple- ment</i>
II. Section 401(k) Plans	6-15	—
A. In General	6-15	—
B. Special Rules Applicable to 401(k) Plans	6-16	—
1. Eligibility and Participation	6-16	—
2. Contributions.....	6-16	—
a. Elective Deferral Contributions.....	6-16	—
i. In General	6-16	—
ii. Limitations.....	6-17	—
iii. Automatic Contribution Arrangements.....	6-19	—
b. Designated Roth Contributions	6-20	—
i. In General	6-20	—
ii. Limitations.....	6-21	—
c. Employee After-Tax, Matching, and Nonelective Contributions	6-21	—
3. Distributions.....	6-22	—
a. In General	6-22	—
b. Distributions of Designated Roth Contributions	6-24	—
c. Hardship Distributions.....	6-24	—
d. Distributions of Default Elective Contributions Under EACAs.....	6-26	—
4. Investments	6-26	—
C. SIMPLE 401(k) Plans.....	6-27	—
1. Eligible Employer	6-27	—
2. Contribution Requirements	6-28	—
3. Exclusive Plan Requirement	6-28	—
4. Other Requirements	6-29	—
III. Nondiscrimination Tests.....	6-29	33
A. In General	6-29	—
B. Actual Deferral Percentage Test.....	6-31	—
C. Actual Contribution Percentage Test.....	6-33	—
D. Alternative Safe Harbors for ADP Testing	6-34	33
1. Safe Harbor Not Requiring Automatic Contributions.....	6-35	—
2. Safe Harbor Requiring Automatic Contributions.....	6-37	33
E. Alternative Safe Harbors for ACP Testing.....	6-38	—
IV. Individual Retirement Arrangements	6-38	—
A. Section 403(b) Plans.....	6-38	—
1. Eligibility and Participation	6-39	—
a. Employees Performing Services for Public Schools	6-39	—
b. Employees of Section 501(c)(3) Tax- Exempt Organizations	6-40	—
c. Coverage Rules.....	6-40	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Contributions.....	6-40	—
a. Nondiscrimination Requirements.....	6-41	—
b. Section 415 Contribution Limits.....	6-42	—
c. Section 402(g) Deferral Limits.....	6-42	—
3. Distributions and Rollovers.....	6-43	—
a. Distributions.....	6-43	—
b. Rollovers.....	6-44	—
B. Individual Retirement Arrangements, Simplified Employee Pension Plans, SIMPLE IRA Plans, and Deemed IRAs.....	6-44	—
1. IRA Structures, Eligibility, and Participation....	6-45	—
a. Individually Established IRAs: Individual Retirement Annuities, Traditional IRAs, and Roth IRAs.....	6-45	—
i. Individual Retirement Annuities.....	6-46	—
ii. Traditional IRAs and Roth IRAs.....	6-46	—
b. Employer-Established IRAs: SEPs, SIMPLE IRA Plans, and Deemed IRAs.....	6-47	—
i. SEPs.....	6-47	—
ii. SIMPLE IRA Plans.....	6-47	—
iii. Deemed IRAs.....	6-48	—
2. Contributions to IRAs.....	6-49	—
a. Deductible Contributions to Traditional IRAs.....	6-49	—
b. Nondeductible Contributions to Traditional and Roth IRAs.....	6-51	—
c. Excess Contributions to Traditional and Roth IRAs.....	6-51	—
d. Contributions to SEPs.....	6-52	—
e. Contributions to SIMPLE IRA Plans.....	6-53	—
3. Distributions.....	6-54	—
a. Traditional IRA, SEP, and SIMPLE IRA Plan Distributions.....	6-54	—
b. Roth IRA Distributions.....	6-55	—
4. Rollovers.....	6-56	—
V. Deferred Compensation Plans That Are Not Qualified Under Code Section 401.....	6-56	34
A. Section 409A.....	6-56	34
1. In General.....	6-56	—
2. Grandfathered Plans.....	6-57	—
3. 409A Requirements.....	6-58	34
a. Deferral Elections.....	6-58	—
b. Distributions.....	6-58	34
c. Funding.....	6-59	—
4. Penalties for Noncompliance.....	6-59	—

	<i>Main Volume</i>	<i>Supple- ment</i>
B. Section 457 Plans for State and Local Governments and Tax-Exempt Employers	6-60	35
1. Overview of Section 457	6-60	—
2. Eligible Plans	6-61	35
a. Eligibility and Participation	6-61	—
b. Contributions	6-62	—
i. Basic Annual Limitation	6-63	—
ii. Catch-Up Contributions	6-63	—
iii. Excess Deferrals Under an Eligible Plan	6-64	—
c. Taxation of Distributions and Rollovers	6-65	35
i. Distributions for Unforeseen Emergencies	6-65	—
ii. Minimum Required Distributions	6-66	—
iii. Distributions of Smaller Accounts	6-66	—
iv. Loans	6-67	—
v. Rollovers	6-67	—
d. Funding Rules	6-67	—
3. Ineligible Section 457 Plans	6-68	35
a. Eligibility and Participation	6-68	—
b. Contributions	6-68	—
c. Taxation of Distributions and Rollovers	6-68	35
d. Funding	6-69	—
VI. Miscellaneous	6-69	—
A. Catch-Up Contributions	6-69	—
B. Tax Credit for Qualified Retirement Savings Contributions	6-70	—
C. Deemed IRAs	6-71	—
CHAPTER 7. TAX TREATMENT OF WELFARE BENEFIT PLANS	7-1	37
I. Introduction	7-6	—
II. Tax Treatment of Benefits for Employees and Beneficiaries	7-7	44
A. General Rules	7-7	—
B. Taxation of Health and Accident Coverage and Benefits	7-8	—
1. Nature of Health and Accident Benefits	7-8	—
2. Exclusion of Employee-Paid Premiums and Benefits	7-9	—
3. Exclusion of Employer Contributions Generally	7-10	—
4. Exclusion of Employee Benefits	7-13	—
5. Medical Care Expenses Defined	7-14	—
6. Nondiscrimination Rules	7-19	—
7. Withholding	7-20	—

	<i>Main Volume</i>	<i>Supple- ment</i>
C. Health Reimbursement Arrangements.....	7-21	44
D. Cafeteria Plans.....	7-23	45
1. Cafeteria Plan Defined.....	7-23	—
2. Employee Defined.....	7-24	—
3. Cafeteria Plan Benefits Defined.....	7-24	—
a. Permissible Benefits	7-24	—
b. Excluded Benefits.....	7-25	—
c. Special Rule for Educational Institutions....	7-26	—
d. Vacation Benefits and Paid Time Off	7-26	—
4. Formal Requirements.....	7-26	—
5. Election of Benefits.....	7-27	—
a. Special Enrollment Rights.....	7-28	—
b. Change in Status.....	7-28	—
c. Medical Child Support Orders	7-30	—
d. Eligibility for Medicare and Medicaid	7-31	—
e. Change in Health Plan Cost.....	7-31	—
f. Change in Health Plan Coverage.....	7-31	—
g. Code Section 401(k) Elective Deferrals	7-32	—
h. Contributions to a Health Savings Account	7-32	—
6. Family and Medical Leave Act	7-33	—
7. Nondiscrimination Rules	7-34	45
a. Eligibility Test	7-35	—
b. Contributions and Benefits Test.....	7-37	—
c. Key Employee Concentration Test	7-37	—
d. Simple Cafeteria Plans	7-37	—
e. Other Safe Harbors From Nondiscrimination Testing	7-38	—
8. Trust Not Currently Required	7-39	—
9. Withholding	7-39	—
E. Flexible Spending Arrangements	7-39	45
1. Period of Coverage.....	7-40	—
2. Uniform Coverage Rule	7-40	—
3. Use-or-Lose Rule	7-40	—
4. Substantiation of Expenses and Use of Debit Cards	7-41	—
F. Health Savings Accounts.....	7-42	45
1. Eligibility	7-43	—
2. Employer Contributions.....	7-46	—
3. Nondiscrimination Rules	7-47	—
4. Funding Through a Cafeteria Plan and One- Time Transfer Rule	7-48	—
G. Archer Medical Savings Accounts	7-49	46
1. In General.....	7-49	—
2. Nature of Archer MSAs	7-50	—
3. Tax Advantages	7-50	—

	<i>Main Volume</i>	<i>Supple- ment</i>
4. Small Employer Defined.....	7-52	—
5. The Pilot Group.....	7-52	—
6. Limits on Amount Deductible or Excludable	7-53	—
7. Comparability Test for Employer Contributions.....	7-53	—
8. High-Deductible Health Plan Requirement	7-53	46
H. Code Section 132 Benefits	7-54	46
1. Covered Employees	7-54	—
2. No-Additional-Cost Services	7-55	—
3. Qualified Employee Discounts	7-55	—
4. Working Condition Fringes.....	7-56	—
5. De Minimis Fringes	7-58	—
6. Qualified Transportation Fringe Benefits	7-60	46
7. Qualified Moving Expense Reimbursements.....	7-62	—
8. On-Premises Athletic Facilities.....	7-63	—
9. Qualified Retirement Planning Services	7-63	—
10. Qualified Military Base Realignment and Closure Fringe Benefits	7-63	—
11. Nondiscrimination Rules	7-64	—
12. Withholding	7-64	—
I. Dependent Care Assistance Programs	7-64	—
1. In General.....	7-64	—
2. Dependent Care Assistance Defined.....	7-64	—
3. Employee Defined.....	7-65	—
4. Reimbursable Expenses	7-65	—
5. Substantiation Required; Unused Contributions Forfeited.....	7-65	—
6. Required Employee Notices	7-66	—
7. Limitations on Excludable Amount	7-66	—
8. Nondiscrimination Tests	7-66	—
9. Withholding	7-67	—
10. Employer-Provided Child Care Tax Credit.....	7-67	—
J. Group-Term Life Insurance	7-68	—
1. Nature of Life Insurance Benefits.....	7-68	—
2. Exclusion of Employer Contributions.....	7-68	—
3. Group-Term Life Insurance Defined.....	7-69	—
4. Employee Defined.....	7-69	—
5. Nondiscrimination Rules	7-70	—
6. Voluntary Employees' Beneficiary Associations	7-70	—
7. Dependent Coverage	7-71	—
8. Exclusion of Benefits.....	7-71	—
9. Accelerated Death Benefits.....	7-71	—
10. Withholding	7-73	—
K. Educational Assistance Programs.....	7-73	—
1. In General.....	7-73	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Nondiscrimination Tests	7-73	—
3. Educational Assistance Benefits Defined	7-74	—
4. Employee Defined.....	7-74	—
5. Other Rules	7-74	—
6. Withholding	7-75	—
L. Adoption Assistance Programs.....	7-75	46
1. In General.....	7-75	—
2. Limitations on Excludable Amount	7-75	46
3. Eligible and Special-Needs Child Defined	7-76	—
4. Qualified Adoption Expenses Defined.....	7-76	—
5. Formal Requirements.....	7-76	—
6. Nondiscrimination Requirements	7-77	—
7. Withholding and Reporting Requirements	7-77	—
8. Public Plans.....	7-77	—
9. Coordination With Code Section 23	7-77	—
M. Other Benefits.....	7-78	—
1. Vacation Benefits	7-78	—
2. Other Nonvested Benefits	7-78	—
3. Supplemental Retirement Income Plans	7-79	—
4. Special Sick Leave Programs for Public Sector Employees.....	7-79	—
III. Affordable Care Act Tax Provisions	7-79	46
A. Shared-Responsibility Requirements	7-79	46
1. Employer Shared-Responsibility Requirements—Code Section 4980H.....	7-79	—
a. Applicable Large Employer Status.....	7-80	—
b. Determination of Full-Time-Employee Status	7-81	—
c. Assessable Payments Under Code Section 4980H(a).....	7-83	—
i. Minimum Essential Coverage.....	7-83	—
ii. Offer of Coverage	7-83	—
d. Assessable Payments Under Code Section 4980H(b)	7-84	—
i. Minimum Value	7-85	—
ii. Affordability	7-86	—
e. Administration of Employer Shared- Responsibility Requirements	7-88	—
2. Individual Shared-Responsibility Requirements—Code Section 5000A	7-88	46
a. Minimum Essential Coverage	7-88	—
b. Exempt Individuals.....	7-89	—
c. Individual Shared-Responsibility Payment.....	7-90	—
B. Information Reporting Requirements.....	7-90	—
1. Coverage Reporting	7-90	—

	<i>Main Volume</i>	<i>Supple- ment</i>
a. Information Reporting by Applicable Large Employers—Code Section 6056	7-90	—
b. Information Reporting of Minimum Essential Coverage—Code Section 6055	7-91	—
c. Reporting Penalties and Transition Relief ...	7-92	—
2. Form W-2 Reporting	7-93	—
C. Tax Credits for Individuals and Small Businesses ...	7-94	47
1. Health Insurance Premium Assistance Tax Credit for Individuals—Code Section 36B	7-94	47
2. Small Business Tax Credit—Code Section 45R	7-95	47
a. Eligible Employers	7-95	—
b. Amount of Tax Credit	7-96	—
D. Excise Taxes and Fees	7-97	—
1. Excise Tax for Failure to Meet Group Health Plan Requirements—Code Section 4980D	7-97	—
2. Excise Tax on High-Cost Employer-Sponsored Health Coverage—Code Section 4980I	7-97	—
a. Applicable Coverage	7-98	—
b. Determining the Cost of Applicable Coverage	7-98	—
c. Applicable Dollar Limit	7-98	—
3. Patient-Centered Outcomes Research Trust Fund Fee	7-99	—
IV. Employer Deductions Under Code Section 162	7-100	—
A. Scope of Benefits Deductible	7-100	—
B. Deductions for Collectively Bargained Plans	7-101	—
C. Deductions for Retiree Benefits	7-101	—
D. Deductions for Benefits for Self-Employed Individuals (Partners and S Corporations)	7-101	—
E. Treatment of Benefits Included in Employee Income	7-102	—
F. Funded Vacation Pay Reserves	7-102	—
G. Excise Tax on Certain Miscellaneous Fringes	7-102	—
V. Employer Deductions Under Code Section 419	7-102	—
A. General Rule	7-102	—
B. Covered Welfare Benefit Funds	7-103	—
C. Qualified Cost	7-105	—
D. Qualified Direct Cost	7-105	—
E. Additions to Qualified Asset Accounts	7-106	—
1. General Limitation	7-106	—
2. Limitations Relating to Specific Types of Benefits	7-107	—
a. Postretirement Medical and Life Insurance Reserves	7-107	—

	<i>Main Volume</i>	<i>Supple- ment</i>
b. Supplemental Unemployment Benefits or Severance Benefits	7-109	—
c. Disability Benefits	7-109	—
d. Medical Benefits of Bona Fide Association Plans	7-109	—
3. Safe Harbors That May Make Actuarial Certification Unnecessary	7-109	—
4. Separate Accounts Required for Key Employees	7-110	—
F. Aggregation	7-110	—
G. After-Tax Income	7-111	—
H. Carryover of Excess Contributions.....	7-111	—
I. Exception for 10-or-More-Employer Plans.....	7-111	—
J. Certain Limits Inapplicable to Collectively Bargained Employer and Some Employee-Pay- All Plans	7-113	—
1. Collectively Bargained Plans	7-113	—
2. Employee-Pay-All Plans	7-115	—
K. Relationship of Employer and Welfare Benefit Fund Taxable Years.....	7-115	—
L. Unrelated Business Taxable Income.....	7-116	—
M. Excise Taxes on Disqualified Benefits Provided by a Welfare Benefit Fund.....	7-116	—
VI. Tax Treatment of Code Section 501(c) Organizations....	7-118	—
A. Tax-Exempt Status Generally	7-118	—
B. Special Nondiscrimination Rules of Code Section 505(a) for Nonbargained VEBAs	7-119	—
C. Application Requirements	7-120	—
D. Annual Returns	7-121	—
E. Voluntary Employees' Beneficiary Associations.....	7-121	—
1. Code Section 501(c)(9) Requirements.....	7-121	—
2. Voluntary Membership.....	7-121	—
3. Employee Defined.....	7-121	—
4. Employment-Related Common Bond.....	7-122	—
5. Eligibility Restrictions and Nondiscrimination Rules	7-123	—
6. Control Requirement.....	7-124	—
7. Prohibited Inurement and Benefit Nondiscrimination Rules	7-125	—
8. Permissible Benefits.....	7-128	—
a. In General	7-128	—
b. Life Benefits	7-128	—
c. Sick and Accident Benefits.....	7-129	—
d. Other Benefits.....	7-129	—
e. Nonqualifying Benefits	7-130	—
9. Permissible Beneficiaries.....	7-131	—

	<i>Main Volume</i>	<i>Supple- ment</i>
F. Retiree Health VEBAs.....	7-131	—
G. Supplemental Unemployment Benefit Trusts.....	7-132	—
1. In General.....	7-132	—
2. Writing and Sole Purpose Requirements	7-133	—
3. Nondiversion.....	7-133	—
4. Nondiscrimination Rules for Eligibility and Benefits	7-133	—
5. Definitions.....	7-134	—
a. Supplemental Unemployment Benefits	7-134	—
b. Employee Defined	7-134	—
c. Involuntary Separation	7-134	—
d. Subordinate Sick and Accident Benefits	7-134	—
6. Payments	7-134	—
7. Permanency.....	7-135	—
8. Tax Consequences to Employees.....	7-135	—
H. Unrelated Business Taxable Income of Code Section 501(c) Organizations and Welfare Benefit Funds	7-136	—
1. In General.....	7-136	—
2. Welfare Benefit Funds Maintained by Taxable Employers	7-136	—
3. Amount of Tax	7-137	—
VII. Retiree Health Benefits Under Code Section 401(h)	7-137	—
A. Code Section 401(h) Benefits.....	7-137	—
1. Retiree Health Benefits Subordinate to Retirement Benefits.....	7-138	—
2. Separate Code Section 401(h) Account	7-139	—
3. Reasonable and Ascertainable Employer Contributions to a Code Section 401(h) Account	7-139	—
4. Assets Used Only for Satisfaction of Liabilities	7-139	—
5. Separate Account for Key Employees.....	7-140	—
6. Requirement of Nondiscrimination.....	7-140	—
B. Code Section 420—Qualified Transfers of Excess Pension Assets to a Code Section 401(h) Account...	7-140	—
1. Excess Pension Assets.....	7-141	—
2. Qualified Transfers of Excess Pension Assets to a Code Section 401(h) Account	7-142	—
a. Limitation on Amount of Qualified Transfer.....	7-142	—
b. Minimum Cost Requirement of Qualified Transfers	7-142	—
3. Future Qualified and Collectively Bargained Transfers.....	7-143	—

	<i>Main Volume</i>	<i>Supple- ment</i>
a. Limitation on Amount of Future Qualified and Collectively Bargained Transfers.....	7-143	—
b. Minimum Cost Requirements of Future Qualified and Collectively Bargained Transfers	7-144	—
c. Special Rules for Collectively Bargained Transfers	7-144	—
CHAPTER 8. REGULATION OF EMPLOYEE HEALTH CARE		
BENEFIT PLANS.....	8-1	49
I. Introduction.....	8-5	54
II. Brief History of the Federal Regulation of Health Care Benefit Plans	8-6	—
A. ERISA and the Affordable Care Act.....	8-6	—
B. Other Federal Laws Regulating Health Care Benefit Plans.....	8-7	—
III. Eligibility and Enrollment.....	8-9	55
A. Introduction	8-9	—
B. Eligibility for Coverage: Nondiscrimination Rules	8-10	55
1. HIPAA Nondiscrimination Rule	8-10	—
2. GINA Nondiscrimination Rule	8-13	—
3. ACA Nondiscrimination Rule [New Topic].....	—	55
C. Wellness Programs: Exception to Nondiscrimination Rules	8-15	—
D. Dependent Eligibility for Coverage.....	8-17	—
1. Coverage for Children to Age 26	8-17	—
2. Requirements for Children Placed for Adoption	8-18	—
3. Qualified Medical Child Support Orders	8-18	—
4. Michelle’s Law.....	8-19	—
5. Same-Sex Spouses	8-20	—
E. Enrollment	8-21	—
1. Preexisting Condition Exclusions	8-21	—
2. Waiting Periods	8-22	—
3. Special Enrollment Periods.....	8-23	—
a. New Dependents.....	8-23	—
b. Loss of Other Coverage.....	8-24	—
c. Children’s Health Insurance Program Reauthorization Act of 2009.....	8-25	—
F. Prohibition on Rescissions of Coverage for Individuals	8-25	—
G. Guaranteed Availability and Renewability	8-26	—
IV. Required Health Care Benefits and Features Under ERISA and the Affordable Care Act	8-28	—
A. Introduction	8-28	—

	<i>Main Volume</i>	<i>Supple- ment</i>
B. Grandfathered Health Care Benefit Plans	8-29	—
C. Requirements Under the Affordable Care Act.....	8-31	—
1. Requirements Applicable to All Health Care Benefit Plans	8-32	—
a. Expanded Dependent Coverage	8-32	—
b. No Preexisting Condition Exclusions.....	8-32	—
c. Elimination of Lifetime and Annual Benefit Limits on Essential Health Benefits.....	8-33	—
d. Essential Health Benefits.....	8-33	—
e. Prohibition on Rescission of Coverage	8-35	—
f. Summary of Benefits and Coverage	8-35	—
g. Limitations on Waiting Periods	8-36	—
2. Other Requirements for Health Care Benefit Plans Not Exempt Under the Grandfathering Rules	8-36	—
a. Coverage of Preventive Health Services	8-36	—
i. Office Visits	8-37	—
ii. Out-of-Network Providers	8-37	—
iii. Reasonable Medical Management.....	8-37	—
iv. Exemptions for Nonprofit Religious Organizations and Closely Held For-Profit Entities	8-38	—
v. Health Reimbursement Arrangements, Flexible Spending Accounts, and Employer Reimbursement Arrangements.....	8-38	—
b. Access to Health Care Providers	8-39	—
c. Access to Emergency Services.....	8-39	—
d. Claims Determination and Appeals Procedures	8-40	—
e. Limitation on Cost-Sharing Requirements.....	8-40	—
f. No Exclusion for Clinical Trials.....	8-41	—
g. Nondiscrimination, Whistleblower, and Anti-retaliation Protections	8-41	—
D. Required Benefits Under ERISA.....	8-42	—
1. Minimum Hospital Stay for Childbirth.....	8-42	—
2. Reconstructive Surgery After a Mastectomy	8-43	—
3. Parity in Mental Health and Substance Use Disorder Benefits	8-44	—
V. Excepted Plans and Benefits	8-47	55
A. ACA-Excepted Plans, Including Retiree-Only Plans	8-47	55
B. Excepted Benefits	8-49	56
1. In General.....	8-49	56

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Limited Wraparound Coverage.....	8-50	—
VI. Continuation Coverage Requirements of COBRA	8-50	56
A. Introduction	8-50	—
B. Employers Subject to COBRA.....	8-51	—
1. In General.....	8-51	—
2. Employers Contributing to a Multiemployer Plan	8-51	—
3. Successor Employers	8-52	—
C. Plans Subject to COBRA.....	8-52	56
D. Qualified Beneficiaries	8-53	—
E. Qualifying Events.....	8-54	—
F. Benefits That Must Be Offered.....	8-56	—
G. Election Rights	8-56	56
H. Length of COBRA Continuation Coverage.....	8-57	—
1. Continuation Period Generally	8-57	—
2. Extensions of the COBRA Continuation Period	8-58	—
3. Statutory Reasons for Terminating Coverage Before the End of the Continuation Period.....	8-58	—
I. Conversion Options and Other “Self-Pay” Rights....	8-59	—
J. Cost of Continuation Coverage	8-60	—
K. Notice Requirements	8-61	—
1. Plan Administrator Notice to Employees of COBRA Rights (Initial COBRA Notice).....	8-61	—
2. Employer Notice to Plan Administrator of Qualifying Event	8-61	—
3. Qualified Beneficiary Notice to Plan Administrator of Certain Events.....	8-62	—
4. Plan Administrator Notice to Qualified Beneficiary of Election Rights.....	8-62	—
5. Qualified Beneficiary Notice to Plan Administrator of Election of COBRA Coverage	8-63	—
6. Plan Administrator Notice to Participant of Unavailability of COBRA Coverage.....	8-63	—
7. Plan Administrator Notice to Qualified Beneficiary of Termination of COBRA Coverage	8-63	—
L. Manner of Sending COBRA Notices	8-63	57
M. Required Content of COBRA Election Notice.....	8-64	—
N. Payment of Claims Incurred During the Election Period.....	8-64	—
O. Revocation of Waiver of Continuation Coverage	8-65	—
P. Prohibition on Employer Interference With COBRA Rights.....	8-65	—

	<i>Main Volume</i>	<i>Supple- ment</i>
Q. Enforcement and Sanctions	8-65	57
1. Actions Under ERISA Section 502.....	8-65	57
2. Tax Penalties Under the Code.....	8-68	—
VII. Continuation Coverage Requirements Under USERRA	8-68	57
VIII. Family and Medical Leave Act	8-69	—
IX. Privacy and Security of Health Information	8-71	—
A. Introduction and History of the Privacy and Security Rules.....	8-71	—
B. Persons and Entities Subject to the Privacy and Security Rules.....	8-72	—
1. Covered Entity	8-72	—
a. Health Plan	8-72	—
b. Health Care Providers.....	8-73	—
c. Health Care Clearinghouses	8-73	—
2. Entities That Are Not Covered.....	8-74	—
a. Employers, Plan Sponsors, and Excepted Benefits Providers	8-74	—
b. Business Associates	8-74	—
C. Information Covered Under the Privacy and Security Rules.....	8-75	—
1. Health Information.....	8-75	—
2. Individually Identifiable Health Information	8-75	—
3. Protected Health Information.....	8-75	—
D. The HIPAA Privacy Rule	8-76	—
1. Required Disclosure of Protected Health Information	8-76	—
2. Permitted Disclosure of Protected Health Information	8-77	—
3. Consent and Authorization for Disclosure of Protected Health Information.....	8-78	—
4. Permitted Disclosures to Employers and Plan Sponsors, Business Associates, and Insurance Carriers Providing “Excepted Benefits”	8-79	—
a. Employers and Plan Sponsors	8-79	—
b. Business Associates	8-80	—
c. Excepted Benefits Carriers	8-81	—
5. Minimum Necessary Standard for Disclosure of PHI.....	8-81	—
E. The HIPAA Security Rule	8-82	—
F. The HITECH Breach Notification Rule	8-83	—
1. Breach and Risk of Compromise of PHI	8-84	—
2. Unsecured PHI	8-84	—
3. Breach Notification Rules.....	8-85	—
a. To Individuals	8-85	—
b. To the Media.....	8-85	—

	<i>Main Volume</i>	<i>Supple- ment</i>
c. To the Secretary of HHS.....	8-86	—
d. By a Business Associate	8-86	—
G. HIPAA Implementation and Notice		
Requirements	8-86	—
H. The Administrative Simplification Rules	8-88	—
1. Electronic Data Interchange.....	8-88	—
a. Entities Covered by the EDI Regulations....	8-88	—
b. General Rule and Covered Transactions	8-88	—
2. Medical Code Sets	8-89	—
3. Unique Identifiers for Standard Electronic Transactions	8-89	—
I. Individual Rights and PHI	8-90	—
1. Rights to Inspect, Obtain Copy, Request Amendment, and Receive Notice.....	8-90	—
2. Right to Accounting of Disclosures	8-91	—
3. Right to Request Restriction, Challenge Use....	8-91	—
J. Preemption of State Privacy Laws.....	8-92	—
K. Enforcement of the Privacy and Security Rules	8-92	—
X. Medicare and Medicaid.....	8-94	—
A. Medicare Coordination.....	8-94	—
1. The Medicare Secondary Payer Program.....	8-94	—
2. Medicare Coordination and Retirees	8-97	—
3. The Retiree Drug Subsidy Program.....	8-97	—
a. Qualified Prescription Drug Plan	8-97	—
b. Sponsor Subsidy	8-98	—
4. Prescription Drug Coverage Notices.....	8-99	—
B. Medicaid Coordination.....	8-99	—
XI. Health Plan Fraud and Abuse.....	8-99	—
XII. Federal Employees Health Benefits Act	8-101	58
A. Establishment and Administration.....	8-101	—
B. FEHB Claims Review Procedures.....	8-102	—
C. Federal Court Jurisdiction, Preemption, and the <i>McVeigh</i> Decision.....	8-104	58
D. State Law Taxes and Fees.....	8-106	—
XIII. Multiple Employer Welfare Arrangements	8-107	—
A. Introduction	8-107	—
B. Development of MEWA Regulation and History of Fraudulent MEWAs	8-108	—
C. Arrangements Excluded From the Definition of a MEWA.....	8-110	—
1. Two or More Employers	8-110	—
2. Collectively Bargained Welfare Benefit Plans ...	8-111	—
3. Rural Electric Cooperatives and Rural Telephone Cooperative Associations	8-113	—
D. Regulation of MEWAs Under State and Federal Law	8-113	—

	<i>Main Volume</i>	<i>Supple- ment</i>
1. When Is a MEWA an Employee Benefit Plan?.....	8-114	—
a. Group or Association of Employers	8-114	—
b. Employee Organization	8-117	—
2. When Does a MEWA Include ERISA Employee Benefit Plans?	8-117	—
3. MEWA Exception to ERISA Preemption	8-118	—
E. MEWA Reporting Requirements.....	8-121	—
F. MEWAs and the Affordable Care Act	8-123	—
CHAPTER 9. PLAN INSURANCE AND PLAN TERMINATION	9-1	59
I. Introduction.....	9-3	62
A. Plan Termination Under Pre-ERISA Common Law	9-3	—
B. Internal Revenue Code	9-4	—
C. Legislative History of Title IV and the Pension Benefit Guaranty Corporation	9-5	—
D. PBGC Guarantee Programs	9-6	62
II. Coverage	9-7	—
A. Coverage Rules.....	9-7	—
B. Coverage Exclusions	9-8	—
1. Individual Account Plans	9-8	—
2. Government Plans	9-9	—
3. Church Plans	9-9	—
4. Plans Maintained by Fraternal Societies or Voluntary Employees' Beneficiary Associations	9-10	—
5. Plans That Do Not Provide for Employer Contributions.....	9-10	—
6. Unfunded Top Hat and Excess Plans	9-11	—
7. Plans Primarily for Nonresident Aliens	9-11	—
8. Plans for Substantial Owners	9-12	—
9. Plans of International Organizations and Plans to Comply With Workers' Compensation, Unemployment Compensation, or Disability Insurance Laws	9-12	—
10. Plans Maintained by Professional Service Employers With No More Than 25 Active Participants.....	9-13	—
III. PBGC Guarantees and Other Title IV Benefit Matters...	9-14	62
A. Guaranteed Benefits	9-14	—
1. Annuity Form.....	9-14	—
2. Pension Benefits.....	9-15	—
3. Entitlement to the Benefit	9-17	—
4. Nonforfeitable Benefits Requirement	9-18	—

	<i>Main Volume</i>	<i>Supple- ment</i>
a. Disclaimer Clauses	9-18	—
b. Termination Date	9-18	—
c. Death Benefits	9-19	—
d. “Bad Boy” Clauses	9-20	—
B. Limits on Single-Employer Plan Guarantees	9-20	62
1. Guarantees on Termination	9-20	—
2. Maximum Guaranteed Benefits	9-21	62
3. Phase-In Rules	9-22	—
4. Form of PBGC Benefit Payments	9-24	—
5. Additional Benefits That the PBGC May Pay ...	9-24	—
C. Allocation of Assets.....	9-25	—
D. Application of Guarantees in Bankruptcy Cases.....	9-26	—
E. PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments	9-27	—
F. Recapture of Certain Pre-termination Payments to Participants	9-27	—
G. Limits on Multiemployer Plan Guarantees.....	9-28	—
1. Guarantees on Insolvency	9-28	—
2. Benefits Not Guaranteed.....	9-28	—
3. Limit on Amount Guaranteed	9-29	—
IV. Terminations of Single-Employer Plans	9-29	63
A. Standard Terminations.....	9-31	63
1. Conditions	9-31	—
2. Procedures.....	9-33	63
a. Notice of Intent to Terminate	9-33	—
b. Proposed Termination Date	9-34	—
c. Notice to the PBGC.....	9-34	—
d. Benefit Statements.....	9-35	—
e. Review Period; Notice of Noncompliance.....	9-35	—
f. Challenge to Plan Termination Under a Collective Bargaining Agreement	9-36	—
g. Administration of Plan During Pendency of Standard Termination Procedures	9-36	—
h. Final Distribution of Assets	9-37	63
B. Distress Terminations	9-39	—
1. Conditions	9-39	—
2. Procedures.....	9-41	—
a. Notice of Intent to Terminate	9-41	—
b. Proposed Termination Date	9-41	—
c. Notice to the PBGC.....	9-41	—
d. PBGC Determinations.....	9-42	—
e. Administration of Plan During Pendency of Procedures	9-43	—

	<i>Main Volume</i>	<i>Supple- ment</i>
f. Challenge to Plan Termination Under a Collective Bargaining Agreement	9-43	—
g. Commitment to Make the Plan Sufficient ...	9-44	—
h. Requirement to Disclose Information to Affected Parties	9-44	—
C. Involuntary Terminations.....	9-45	—
D. Restoration of Plans.....	9-47	—
V. Employer Liabilities Relating to Plan Termination and Missed Contribution Liens.....	9-49	—
A. Single-Employer Plans	9-49	—
1. Basic Liability	9-49	—
2. Calculating the Amount of Liability	9-51	—
3. Liens by the PBGC	9-51	—
4. Priority Status in Bankruptcy	9-52	—
5. Successor Liability	9-53	—
6. Avoidance of Liability	9-53	—
7. Collection of PBGC Liability	9-54	—
B. Multiple Employer Plans.....	9-54	—
C. “Downsizing” Liability.....	9-55	—
VI. Asset Reversions	9-57	—
A. Satisfaction of Obligations Due Participants.....	9-58	—
B. Allocation of Surplus to Employee Contributions ...	9-59	—
C. Plan Provisions Permitting Reversion	9-59	—
D. Asset Reversion Guidelines.....	9-61	—
VII. Reporting and Disclosure Requirements.....	9-63	63
A. Reportable Events.....	9-63	—
1. Post-event Reporting (ERISA Section 4043(a)).....	9-64	—
2. Advance Reporting (ERISA Section 4043(b))...	9-66	—
3. Filing of Reportable Event Notices	9-66	—
B. Notice of Missed Contributions Totaling Over \$1 Million (Form 200).....	9-67	—
C. Annual Employer Reporting Under ERISA Section 4010	9-67	—
D. Early Warning Program	9-68	63
VIII. PBGC Information Penalties.....	9-69	64
IX. Premium Payments	9-70	64
A. Flat-Rate Premiums	9-71	64
B. Variable-Rate Premiums	9-72	64
C. Enforcement of Premium Requirements	9-72	64
1. Filing and Payment Requirements	9-72	—
2. Interest and Penalties	9-73	64
3. Record-Keeping Requirements and Audits.....	9-74	—
D. Termination Premium.....	9-74	—
X. PBGC Administrative Review Procedures.....	9-75	—

	<i>Main Volume</i>	<i>Supple- ment</i>
CHAPTER 10. FIDUCIARY RESPONSIBILITY	10-1	67
I. Introduction.....	10-6	—
II. Who Is a Fiduciary?.....	10-8	73
A. ERISA’s Functional Definition of Fiduciary	10-8	—
B. The Three Categories of Fiduciary Conduct	10-9	73
1. Management of the Plan or Investment of Plan Assets	10-9	—
2. Investment Advice.....	10-10	73
3. Administration of the Plan.....	10-12	—
C. Applications and Limitations of the Functional Fiduciary Standard.....	10-13	74
1. Plan Sponsors: Employers, Unions, and the “Settlor Function” Rule.....	10-13	74
2. Corporate Officers and Directors	10-18	74
3. Mutual Funds and Insurers.....	10-21	75
a. Mutual Funds.....	10-21	—
b. Insurers and Guaranteed Benefit Contracts.....	10-21	75
i. Insurer a Fiduciary Because of Authority or Responsibility With Respect to Underlying Fund	10-21	75
ii. Insurer a Fiduciary Because of Authority or Responsibility With Respect to the Contract.....	10-24	—
c. Other Fiduciary Relationships of Insurers... ..	10-25	—
4. Banks.....	10-27	—
5. Attorneys, Accountants, and Actuaries	10-28	—
6. Bankruptcy Receivers	10-29	—
7. Investment Consultants, Stock Brokers, and Insurance Agents.....	10-29	75
8. Third-Party Administrators	10-30	75
9. Taft-Hartley Plan Trustees’ Plan Design Decisions.....	10-32	—
a. Joint Boards.....	10-32	—
b. Contributing Employers and Their Principals	10-33	—
10. Pharmacy Benefit Managers	10-34	—
11. Employee Benefit Plans, Funds, and Trusts.....	10-35	—
D. Importance and Identification of Plan Assets	10-35	76
1. General Principles.....	10-35	76
2. Plan Assets: The Look-Through Rule.....	10-36	—
a. General Rule.....	10-36	—
b. Equity Interests.....	10-36	—
c. Publicly Offered Securities.....	10-37	—
d. “Significant Participation” by Plan Investors.....	10-37	—

	<i>Main Volume</i>	<i>Supple- ment</i>
e. Mandatory Applications of the Look-Through Rule: Commingled Investment Funds	10-38	—
f. Governmental Mortgage Pools.....	10-39	—
3. Plan Assets: Insurance Companies and Mutual Funds.....	10-39	—
4. Plan Assets: Employee Stock Ownership Plans.....	10-40	—
5. Plan Assets: Participant Contributions.....	10-40	—
E. Starting and Stopping as a Fiduciary.....	10-42	—
III. Plan and Trust Requirements	10-43	76
A. Formal Requirements	10-43	—
1. Written Instrument.....	10-43	—
2. Named Fiduciary.....	10-46	—
3. Plan Content.....	10-46	—
a. Mandatory Provisions.....	10-46	—
b. Optional Provisions	10-48	—
B. ERISA's Trust Requirement	10-48	76
1. General Rule	10-48	76
2. Exceptions to the Trust Requirement.....	10-49	—
3. Delegation of Trustee Asset Management Authority	10-50	—
4. Assets Held by Two or More Trustees	10-50	—
C. Indicia of Ownership of Plan Assets Outside the United States.....	10-50	—
D. Allocation and Delegation of Fiduciary Responsibility	10-51	—
1. Responsibility of Named Fiduciaries.....	10-51	—
2. Directed Trustees	10-52	—
3. Investment Managers	10-56	—
IV. Fiduciary Standards Under ERISA Section 404.....	10-57	76
A. Exclusive Purpose Rule.....	10-58	76
1. In General.....	10-58	—
2. Plan Design Decisions	10-60	76
3. Fiduciary Expenses as Distinguished From Settlor Expenses.....	10-61	—
B. Prudence Rule.....	10-62	77
1. Procedural Prudence	10-63	77
2. Use of Experts as Part of Procedural Prudence.....	10-66	—
3. Other Prudence Issues.....	10-68	—
4. Safe Harbor Rule—Modern Portfolio Theory ...	10-69	—
C. Diversification Rule.....	10-71	—
1. In General.....	10-71	—
2. Individual Account Plans	10-73	—
D. Plan Document Rule	10-74	77

	<i>Main Volume</i>	<i>Supple- ment</i>
V. Application of the Section 404 Fiduciary Standards	10-76	78
A. Fiduciary Communications	10-76	78
1. Misrepresentations and Failures to Disclose With Respect to Existing Plan Terms or Circumstances	10-77	78
a. Where a Participant Has Inquired.....	10-77	78
b. Where a Participant Has Not Inquired.....	10-78	78
c. Retiree Health Benefits.....	10-79	—
d. Disclosures Concerning Financial Information	10-80	—
e. Fiduciaries’ Knowledge of Misrepresentations.....	10-81	—
2. Misrepresentations and Failures to Disclose With Respect to Prospective Plan Terms or Circumstances	10-82	—
a. Affirmative Material Misrepresentations	10-82	—
b. Liability for Silence.....	10-84	—
3. Duty to Produce Documents Upon Request	10-85	—
4. Duty to Disclose Other Fiduciaries’ Breaches...	10-85	—
5. Fiduciary Communications in Connection With Employer Stock	10-86	—
6. Right of Action and Remedies	10-86	—
B. Selection and Monitoring of Service Providers.....	10-86	—
C. Collections	10-89	—
D. Benefit Administration	10-90	—
E. Employer Securities Issues.....	10-91	79
1. Hostile Tender Offers	10-91	—
2. Employee Stock Ownership Plans	10-92	79
3. Employer Securities Held in ESOPs and Participant-Directed Individual Account Plans	10-97	80
a. Imprudent Investment Claims	10-97	80
b. Disclosure Claims.....	10-99	—
F. Excessive Fee Cases	10-101	82
G. Investment Policy	10-103	—
1. In General.....	10-103	—
2. Nonfinancial Considerations.....	10-104	—
3. Voting Plan Stock.....	10-105	—
4. Directed Individual Account Plans	10-106	—
a. Section 404(c) Issues.....	10-107	—
b. Cases Addressing Section 404(c)	10-108	—
c. Other Issues Relating to Directed Individual Account Plans.....	10-109	—
5. Participant Education	10-110	—
VI. Duty to Protect Against Violations by Other Fiduciaries	10-111	82

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Knowing Participation in or Concealment of Fiduciary Breaches: Section 405(a)(1)	10-112	—
B. Failure to Comply With Section 404(a)(1) Fiduciary Standards: Section 405(a)(2).....	10-113	82
C. Failure to Correct Another's Breach: Section 405(a)(3).....	10-114	—
VII. Liability for Breach of Fiduciary Duty	10-115	83
A. In General	10-115	—
B. Preexisting Breaches	10-115	—
C. Burden of Proof and Causation	10-116	—
D. Measure of Loss Under Section 409	10-122	—
1. Investment Loss Cases	10-123	—
2. Cases Involving Improper Use of Plan Assets ...	10-126	—
E. Extent of Injunctive Relief	10-127	—
F. Plan and Individual Recovery for Breaches of Fiduciary Duty.....	10-129	—
G. Releases of Fiduciary Breach Claims.....	10-132	—
H. Liability of Nonfiduciaries for Fiduciary Misconduct	10-132	—
1. Claims Against Nonfiduciary Defendants.....	10-132	—
2. The <i>Harris Trust</i> Decision	10-134	—
3. Developments After <i>Harris Trust</i>	10-135	—
I. Civil Penalty for Breach	10-137	83
J. Contractual Exculpation, Insurance, and Indemnification.....	10-139	—
K. Equitable Contribution and Indemnification	10-142	83
VIII. Prohibited Transactions.....	10-144	83
A. ERISA.....	10-144	—
1. Statutory Provisions	10-144	—
a. Definition of Party in Interest.....	10-144	—
b. ERISA Section 406	10-145	—
c. ERISA Section 407(a).....	10-146	—
2. Knowledge Under Section 406(a).....	10-146	—
B. Internal Revenue Code	10-147	—
1. Provisions Covering Prohibited Transactions ...	10-147	—
2. Individual Retirement Arrangements	10-148	—
C. Penalties for Violation of the Prohibited Transaction Restrictions	10-149	—
1. IRS Excise Taxes.....	10-149	—
2. ERISA Section 502(i) Civil Penalties	10-151	—
3. Limitations Period.....	10-151	—
D. Application of the Prohibited Transaction Rules.....	10-152	83
1. Sale, Exchange, or Lease of Property	10-153	—
2. Loans.....	10-154	—
3. Furnishing of Goods, Services, and Facilities ...	10-155	—
4. Transfer of Assets.....	10-155	—

	<i>Main Volume</i>	<i>Supple- ment</i>
5. Employer Security or Property	10-158	—
a. Qualifying Employer Security.....	10-159	—
b. Qualifying Employer Real Property.....	10-159	—
c. Acquisition	10-160	—
d. The 10 Percent Limitation.....	10-160	—
e. Adequate Consideration	10-160	—
6. Section 406(b)—Fiduciary Self-Dealing	10-161	83
a. Personal Use of Plan Assets	10-162	83
b. Acting on Behalf of Adverse Parties	10-164	—
c. Receipt of Consideration From a Third Party in a Transaction Involving Plan Assets.....	10-166	—
d. Fee Payments.....	10-168	—
E. Exemptions From the Prohibited Transaction Restrictions	10-170	84
1. Statutory Exemptions.....	10-171	—
a. Participant Loans—Section 408(b)(1).....	10-171	—
b. Reasonable and Necessary Services— Section 408(b)(2).....	10-171	—
i. Necessary Services	10-171	—
ii. Reasonable Contract or Arrangement	10-171	—
iii. Reasonable Compensation.....	10-172	—
c. ESOP Loans—Section 408(b)(3)	10-174	—
d. Bank Deposits—Section 408(b)(4)	10-174	—
e. Insurance Transactions— Section 408(b)(5).....	10-175	—
f. Ancillary Bank Services— Section 408(b)(6).....	10-175	—
g. Securities Conversion— Section 408(b)(7).....	10-175	—
h. Pooled Investment Funds— Section 408(b)(8).....	10-175	—
i. Plan Distributions—Section 408(b)(9).....	10-176	—
j. Multiemployer Plans— Section 408(b)(10).....	10-176	—
k. Multiemployer Transactions— Section 408(b)(11).....	10-176	—
l. Certain Employer Stock Sales— Section 408(b)(12).....	10-176	—
m. Retiree Health Account Transfers— Section 408(b)(13).....	10-176	—
n. Investment Advice—Section 408(b)(14).....	10-176	—
o. Block Trades—Section 408(b)(15)	10-177	—
p. Electronic Trades—Section 408(b)(16).....	10-177	—

	<i>Main Volume</i>	<i>Supple- ment</i>
q. Additional Service Provider Relief— Section 408(b)(17).....	10-178	—
r. Foreign Exchange Transactions— Section 408(b)(18)	10-178	—
s. Cross Trading—Section 408(b)(19)	10-179	—
t. Prohibited Transaction Self-Correction— Section 408(b)(20).....	10-179	—
2. Scope of Statutory Exemptions: Do They Apply to Section 406(b)?	10-180	—
3. Administrative Exemptions.....	10-181	84
a. Class Exemptions	10-183	—
b. Individual Exemptions.....	10-184	84
i. Basic Transactions	10-184	84
ii. Variations on Class Exemptions	10-185	—
iii. Developing Situations.....	10-185	84
4. Special Problems.....	10-185	—
a. Dual Capacity Trustees.....	10-185	—
b. Fiduciary Compensation.....	10-186	—
c. Employee Stock Ownership Plans and Other Transactions Involving Employer Securities	10-187	—
d. Health Savings Accounts	10-188	—
IX. Bonding.....	10-188	—
A. Type of Bond	10-188	—
B. Amount of Bond.....	10-189	—
C. Exemptions From the Bonding Requirements	10-189	—
X. Statute of Limitations for Breach of Fiduciary Duty		
Claims	10-189	85
A. Three Years After “Actual Knowledge”.....	10-190	85
1. First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits	10-190	85
2. Third and Fifth Circuits	10-192	—
3. Fourth and Tenth Circuits.....	10-193	—
B. The Six-Year Statute of Limitations	10-193	85
C. Fraud or Concealment	10-196	—
D. Other Tolling Issues.....	10-197	—
 CHAPTER 11. ERISA PREEMPTION AND EFFECT ON OTHER LAWS	 11-1	 87
I. Introduction.....	11-3	—
A. Scope of ERISA Section 514	11-4	—
B. ERISA Definition of State Law.....	11-4	—
II. Plan Covered by ERISA.....	11-5	90
A. Definition of Employee Benefit Plan	11-5	—
B. Existence of a Covered Plan in the Absence of a Formal Document or ERISA Compliance.....	11-7	—

	<i>Main Volume</i>	<i>Supple- ment</i>
C. Ongoing Plan Administration	11-9	—
D. Level of Employer Involvement Necessary for the Establishment or Maintenance of a Plan	11-11	—
1. DOL Safe Harbor and the Cases Construing It	11-11	—
2. Other Cases on Employer Involvement	11-12	—
3. Multiple Employer Welfare Arrangements	11-13	—
E. Arrangements Excluded by Statute or Regulation ...	11-13	90
1. Vacation Pay and Other Payroll Practices	11-13	90
2. Plans Maintained Solely to Provide Workers’ Compensation, Disability, or Unemployment Benefits	11-15	—
3. Other Plans	11-17	—
F. Conversion Policies	11-18	—
III. State Laws That Conflict With ERISA	11-19	—
IV. The Enigmatic “Relate To” Clause	11-21	—
A. Expansive View of “Relate To” Applied in Early Cases	11-21	—
B. Limits of “Relate To”: The <i>Travelers</i> Trilogy	11-23	—
1. Supreme Court Decisions Recognizing Limits Before <i>Travelers</i>	11-23	—
2. <i>Travelers/Dillingham/De Buono</i>	11-23	—
C. Supreme Court Decisions Applying the “Relate To” Clause After the <i>Travelers</i> Trilogy	11-26	—
D. Circuit Court Attempts to Define the Boundaries of Preemption	11-27	—
E. Lack of ERISA Standing	11-29	—
V. Statutory Exceptions to Preemption	11-30	—
A. The Saving and Deemer Clauses	11-30	—
1. Insurance Regulation	11-30	—
a. Determining Whether a State Law Regulates Insurance	11-30	—
i. <i>Kentucky Ass’n of Health Plans v.</i> <i>Miller</i>	11-31	—
ii. Evolution of Test Before <i>Kentucky</i> <i>Ass’n of Health Plans</i>	11-32	—
b. State Laws That Regulate Insurance But Conflict With ERISA’s Exclusive Enforcement Scheme	11-34	—
c. Effect of the Deemer Clause	11-35	—
d. Particular Categories of Cases	11-37	—
2. State Banking and Securities Laws	11-38	—
B. Generally Applicable Criminal Laws	11-38	—
C. Hawaii Prepaid Health Care Act	11-39	—
D. Multiple Employer Welfare Arrangements	11-39	—
E. ERISA Interaction With Other Federal Laws	11-39	—

	<i>Main Volume</i>	<i>Supple- ment</i>
F. Effect of Section 514 on Pre-ERISA Events	11-41	—
VI. Complete Preemption and Removal.....	11-43	—
VII. Application of Preemption to Particular Claims	11-44	90
A. Benefit Denials and Processing of Benefit Claims.....	11-44	90
B. Laws Regulating Fiduciary Conduct, Reporting, Funding, and Disclosure	11-47	—
C. Wrongful Death Claims.....	11-47	—
D. Service Provider Claims	11-49	—
1. Claims by Plans, Participants, Employers, and Fiduciaries Against Service Providers.....	11-49	—
2. Claims by Providers Against Plans, Employers, and Fiduciaries	11-54	—
3. Medical Malpractice Cases	11-54	—
E. Severance Pay	11-54	—
F. Wrongful Discharge Claims	11-55	—
1. Common Law Claims	11-55	—
2. Employment Discrimination Laws	11-58	—
G. Fraud and Misrepresentation Claims.....	11-60	—
1. Circumstances Where State Law Claims Are Often Found Preempted	11-60	—
2. Circumstances Where Preemption Is Less Likely	11-62	—
H. Common Law and Statutory Regulation of Health Coverage and Delivery of Medical Services	11-66	—
1. Introduction.....	11-66	—
2. Mandated Benefits Cases	11-68	—
3. State Surcharge Regimes	11-70	—
4. Regulation of Provider Groups: Any Willing Provider Legislation.....	11-71	—
5. Third-Party Administrator Licensing Statutes ...	11-72	—
6. Medical Malpractice and Related Claims	11-72	—
a. The <i>Pegram</i> and <i>Davila</i> Decisions	11-72	—
b. The Effect of <i>Davila</i>	11-75	—
c. Prior Case Law	11-76	—
7. State Law Claims by Health Care Providers.....	11-78	—
I. Domestic Relations Laws	11-79	—
1. Pre-Retirement Equity Act Cases.....	11-79	—
2. Post-Retirement Equity Act Cases	11-80	—
a. Testamentary Powers Under ERISA	11-80	—
b. Beneficiary Designations Under ERISA	11-82	—
J. State Wage Payment and Collection Statutes, Prevailing Wage Laws, and Apprenticeship Statutes	11-83	—
1. Wage Payment and Collection	11-83	—
2. Prevailing Wage and Apprenticeship Laws.....	11-86	—

	<i>Main Volume</i>	<i>Supple- ment</i>
K. State Tax Laws.....	11-88	—
L. State Escheat and Unclaimed Property Laws.....	11-89	—
VIII. ERISA’s Interrelationship With Federal Bankruptcy Laws.....	11-90	—
A. Introduction.....	11-90	—
B. Bankruptcy of an Employer—Claims by Employee Benefit Plans.....	11-92	—
1. Claims Arising After Commencement of the Bankruptcy Case.....	11-94	—
2. Claims Arising Before Commencement of the Bankruptcy Case.....	11-97	—
3. Rejection of Executory Contracts.....	11-98	—
C. Related Matters.....	11-102	—
1. First-Day Orders.....	11-102	—
2. Participation in Bankruptcy Proceedings and Appointment to a Creditors’ Committee.....	11-102	—
3. Preferences.....	11-103	—
4. Retiree Medical Benefits.....	11-104	—
5. Plan Termination Settlements With the PBGC.....	11-104	—
CHAPTER 12. CIVIL PRACTICE AND PROCEDURE.....	12-1	93
I. Introduction.....	12-5	—
II. Claims for Relief.....	12-8	98
A. Section 502(a)(1)(A): Suits to Redress Failure to Provide Required Information.....	12-8	—
1. Claim for Relief.....	12-8	—
2. Plaintiffs.....	12-11	—
3. Defendants.....	12-11	—
4. Statute of Limitations.....	12-12	—
5. Remedies.....	12-12	—
6. Other Actions to Obtain Documents.....	12-14	—
B. Section 502(a)(1)(B): Suits to Enforce Benefit Rights or Plan Terms.....	12-15	98
1. Claim for Relief.....	12-15	98
2. Plaintiffs.....	12-18	—
3. Defendants.....	12-18	—
4. Statute of Limitations.....	12-21	98
a. General Rules.....	12-21	98
b. Accrual of a Claim for Relief.....	12-23	—
c. Tolling.....	12-26	—
5. Remedies.....	12-28	—
C. Section 502(a)(2): Suits to Redress Breaches of Fiduciary Duty.....	12-29	99
1. Claim for Relief.....	12-29	99
2. Plaintiffs.....	12-31	—

	<i>Main Volume</i>	<i>Supple- ment</i>
3. Defendants	12-32	—
4. Statute of Limitations.....	12-32	—
5. Remedies.....	12-32	—
D. Section 502(a)(3): Suits to Enforce ERISA and Plan Provisions	12-33	99
1. Claim for Relief	12-33	99
a. <i>Varity Corp. v. Howe</i>	12-33	—
b. Post- <i>Varity</i> Developments	12-34	99
i. Claims for Breach of Fiduciary Duty	12-35	—
ii. Equitable Estoppel Claims.....	12-35	99
iii. Statutory Violations	12-36	—
iv. Plan Term Violations.....	12-37	—
v. Claims for Interest on Delayed Benefit Payments	12-37	—
vi. Claims for Contribution, Indemnification, and Restitution	12-38	100
vii. Interpleader Actions.....	12-38	—
2. Plaintiffs	12-39	—
3. Defendants	12-39	—
4. Statute of Limitations.....	12-39	—
5. Remedies.....	12-40	100
a. Supreme Court Jurisprudence	12-40	—
b. Impact of the Supreme Court Rulings on the Types of Available Relief.....	12-44	100
i. Claims for Restitutionary Relief.....	12-45	100
ii. Breach of Fiduciary Duty Claims.....	12-47	—
iii. Subrogation Issues	12-48	—
iv. Section 510 Litigation.....	12-49	—
v. Other Types of Claims Raising Remedy Issues Under Section 502(a)(3)	12-49	—
(1) Claims for Life Insurance Payments	12-49	—
(2) Requests to Modify Plan Records	12-49	—
(3) Rescission	12-50	—
(4) Traceability Issues.....	12-50	—
(5) Constructive Trust.....	12-51	—
(6) Suits to Invalidate/Reform Plan Document.....	12-51	—
(7) Miscellaneous	12-51	—
E. Section 502(a)(4): Suit for Violation of ERISA Section 105(c).....	12-52	—
1. Claim for Relief	12-52	—
2. Plaintiffs	12-52	—

	<i>Main Volume</i>	<i>Supple- ment</i>
3. Defendants	12-52	—
4. Statute of Limitations.....	12-52	—
5. Remedies.....	12-52	—
F. Section 502(a)(5): Claim for Relief by the Secretary of Labor	12-53	—
G. Section 502(a)(6): Suits to Collect Civil Penalties ...	12-54	—
1. Claim for Relief	12-54	—
2. Parties.....	12-56	—
3. Procedure	12-57	—
4. Statute of Limitations.....	12-58	—
5. Remedies.....	12-58	—
H. Section 502(a)(7): Suits to Enforce Compliance With a Qualified Medical Child Support Order	12-58	—
1. Claim for Relief	12-58	—
2. Plaintiffs.....	12-58	—
3. Defendants	12-59	—
4. Statute of Limitations.....	12-59	—
5. Remedies.....	12-59	—
I. Section 502(a)(8).....	12-59	—
J. Section 502(a)(9).....	12-59	—
1. Claim for Relief	12-59	—
2. Plaintiffs.....	12-59	—
3. Defendants	12-60	—
4. Statute of Limitations.....	12-60	—
5. Remedies.....	12-60	—
K. Section 502(a)(10).....	12-60	—
L. Section 502(k): Actions for Review, Restraint, and Mandamus.....	12-61	—
1. Claim for Relief	12-61	—
2. Plaintiffs.....	12-61	—
3. Defendants	12-61	—
4. Statute of Limitations.....	12-61	—
M. Section 502(m): Penalty on Impermissible Distributions	12-62	—
1. Claim for Relief	12-62	—
2. Plaintiffs.....	12-62	—
3. Defendants	12-62	—
4. Remedies.....	12-62	—
III. General Procedural Issues.....	12-62	101
A. Standing and the Ability to Sue Under ERISA	12-62	101
1. Article III Standing	12-62	101
2. Statutory Standing: Enumerated Parties	12-65	—
a. Participants	12-66	—
i. Employees.....	12-66	—
ii. Former Employees.....	12-67	—

	<i>Main Volume</i>	<i>Supple- ment</i>
iii. Non-employees: Sole Proprietors, Partners, and Owners	12-70	—
iv. Ability of Participants of One Plan to Sue on Behalf of Participants in Other Plans	12-71	—
b. Beneficiaries	12-72	—
c. Fiduciaries	12-74	—
d. Secretary of Labor	12-75	—
3. Nonenumerated Parties' Ability to Sue Under ERISA	12-75	101
a. Plans	12-75	—
b. Unions	12-76	—
c. Employers	12-76	—
d. The Pension Benefit Guaranty Corporation.....	12-77	—
e. Assignees.....	12-77	101
f. Executors and Administrators	12-79	—
g. Other.....	12-79	102
B. Subject Matter Jurisdiction for Suits Brought Under Section 502	12-80	—
1. Exclusive and Concurrent Jurisdiction	12-80	—
2. Involvement of Plan Required for Subject Matter Jurisdiction	12-82	—
3. Supplemental Jurisdiction.....	12-83	—
4. Enjoining State Action	12-84	—
5. Effect of Agreement to Arbitrate.....	12-85	—
6. Title 28 U.S.C. §1331	12-86	—
C. Declaratory Judgment Actions	12-87	102
D. Removal and Relationship to State Proceedings	12-89	102
1. Removal Based on Concurrent or Exclusive Federal Jurisdiction.....	12-89	—
2. Removal on the Basis of Complete Preemption	12-89	102
a. The "Well-Pleaded Complaint" Rule	12-90	—
b. The Complete Preemption Exception Generally	12-90	—
c. Complete Preemption in ERISA Cases	12-91	102
i. Availability of Claim Under Section 502(a) and Standing.....	12-94	102
ii. Independent Legal Duties	12-95	—
iii. Viability of Claim in Federal Court After Removal.....	12-95	—
d. Contrast With Defensive Preemption Under Section 514.....	12-96	—
3. Burden of Pleading Federal Jurisdiction, Motions for Remand	12-96	—

	<i>Main Volume</i>	<i>Supple- ment</i>
4. Complete Preemption Doctrine in Federal Court Actions	12-97	103
E. Venue	12-97	—
1. Section 502(e)(2)	12-97	—
a. Where the Plan Is Administered.....	12-98	—
b. Where the Breach Took Place	12-99	—
c. Where a Defendant Resides or May Be Found.....	12-99	—
2. Transfer of Venue	12-99	—
F. Service of Process and Personal Jurisdiction	12-101	—
G. Exhaustion of Administrative Remedies for Statutory Claims	12-102	—
H. Jury Trials	12-103	103
I. Extrac contractual Compensatory and Punitive Damages	12-106	103
J. Attorneys’ Fees and Costs	12-108	104
1. General Principles Applicable to All Circuits....	12-108	—
2. Presumption Favoring Award Under Section 502(g)(1) to Prevailing Parties in Some Circuits.....	12-112	—
3. Awards Under Section 502(g)(1) to Prevailing Defendants	12-113	—
4. Awards Under Section 502(g)(1) to Nonprevailing Parties—What Is “Some Success on the Merits”?	12-115	—
5. Amount of Fee Under Section 502(g)(1).....	12-117	104
6. Common Fund Awards.....	12-120	—
K. Prejudgment Interest.....	12-121	104
1. In General.....	12-121	104
2. Discretionary Standard.....	12-121	—
3. Factors Considered in Determining Whether to Award Prejudgment Interest.....	12-122	—
4. Accrual of Prejudgment Interest Claims.....	12-124	104
5. The Rate of Prejudgment Interest Awarded	12-124	104
IV. Class Actions.....	12-127	104
A. Application of Rule 23	12-127	104
1. Rule 23(a).....	12-127	104
a. Numerosity	12-127	104
b. Commonality	12-128	105
c. Typicality	12-130	105
d. Adequacy of Class Representatives.....	12-132	105
e. Adequacy of Class Counsel Under Rule 23(a)(4) and Rule 23(g)	12-134	—
2. Rule 23(b)	12-135	106
a. Rule 23(b)(1)	12-135	—
b. Rule 23(b)(2)	12-137	—

	<i>Main Volume</i>	<i>Supple- ment</i>
c. Rule 23(b)(3)	12-137	—
B. Class Definitions and Ascertainability	12-139	—
1. Appeals	12-141	—
2. Class Exemption for Settlement of Certain Fiduciary Breach Claims.....	12-141	—
3. “Nonclass” Actions Under ERISA on Behalf of a Plan	12-142	—
CHAPTER 13. BENEFIT CLAIMS	13-1	107
I. Introduction	13-3	—
II. Claims Procedures.....	13-4	110
A. Overview	13-4	—
B. Reasonable Internal Claims Procedures	13-7	—
1. Claims and Review Procedures for All Employee Benefit Plans	13-7	—
2. Claims and Review Procedures for Non- Grandfathered Health Plans Under the Affordable Care Act.....	13-9	—
3. Claims and Review Procedures for Disability Benefit Plans	13-10	—
C. Adequate Notification of Benefit Determination	13-10	110
1. Adverse Benefit Determinations	13-12	—
2. Timing of Notification of Benefit Determinations.....	13-13	—
a. Notification of Adverse Benefit Determinations Generally.....	13-13	—
b. Notification of Health Plan Benefit Determinations	13-13	—
c. Notification of Disability Plan Benefit Determinations	13-14	—
3. Manner and Content of Notification of Benefit Determinations.....	13-15	110
a. Notification of Adverse Benefit Determinations Generally.....	13-15	110
b. Notification of Health Plan Adverse Benefit Determinations.....	13-16	—
c. Notification of Health Plan Adverse Benefit Determinations in Non- Grandfathered Plans	13-16	—
d. Notification of Disability Plan Adverse Benefit Determinations.....	13-17	—
D. Full and Fair Review of Adverse Benefit Determinations	13-18	111
1. Procedures for Appeals of Adverse Benefit Determinations.....	13-19	111

	<i>Main Volume</i>	<i>Supple- ment</i>
a. Appeal Procedures for All Employee Benefit Plans.....	13-19	111
b. Additional Appeal Procedures for Health Care Benefit Plans	13-20	—
c. Additional Appeal Procedures for Non- Grandfathered Health Care Benefit Plans ...	13-21	—
d. Additional Appeal Procedures for Disability Benefit Plans.....	13-22	—
2. Access to Relevant Documents.....	13-23	—
E. Adequate Notice of Adverse Benefit Determinations After Appeal.....	13-25	—
1. Timing of Notification of Benefit Determinations After Appeal	13-25	—
a. In General	13-25	—
b. Timing of Health Plan Benefit Determinations After Appeal.....	13-25	—
c. Timing of Disability Plan Benefit Determinations After Appeal.....	13-26	—
2. Manner and Content of Notification of Benefit Determinations After Appeal	13-26	—
a. In General	13-26	—
b. Notifications of Health Care Benefit Claims Determinations After Appeal	13-27	—
c. Notifications of Health Care Benefit Claims Determinations by Non- Grandfathered Health Plans After Appeal ...	13-27	—
d. Notifications of Disability Benefit Claims Determinations After Appeal.....	13-27	—
F. ACA External Review Procedures	13-29	—
1. State External Review Requirements.....	13-30	—
2. Federal External Review Requirements.....	13-32	—
a. Scope	13-32	—
b. External Review Process Standards: Request and Preliminary Review	13-32	—
c. External Review Process Standards: Referral for External Review.....	13-33	—
i. Referral to Independent Review Organization	13-33	—
ii. Referral to HHS External Review	13-35	—
G. Failure to Establish or Follow Reasonable Claims Procedures	13-35	111
1. In General.....	13-35	111
2. Non-Grandfathered Health Care Benefit Plans.....	13-36	—
3. Disability Benefit Plans	13-36	—
H. Remedies for Procedural Violations	13-36	112

	<i>Main Volume</i>	<i>Supple- ment</i>
III. Exhaustion of Claims Review Procedure.....	13-42	112
IV. Judicial Review	13-48	113
A. Standard of Review.....	13-48	113
1. <i>Firestone Tire & Rubber Co v. Bruch</i> and <i>Metropolitan Life Insurance Co. v. Glenn</i>	13-50	—
2. The Significance of Language Granting Power to Interpret the Plan.....	13-51	—
3. Source or Location of Discretionary Authority to Interpret the Plan and Determine Eligibility for Plan Benefits.....	13-53	113
4. What Language Sufficiently Conveys Discretion.....	13-54	113
5. Identifying the Party That Has the Discretionary Authority	13-59	—
6. Scope of Power-Granting Language	13-60	—
7. Other Considerations That Bear on the Effectiveness of Power-Granting Language.....	13-61	114
B. Plan Interpretation and the Standard of Review	13-63	—
1. <i>Contra Proferentem</i>	13-63	—
2. Reasonable Expectations	13-66	—
C. Evidentiary Issues.....	13-67	114
1. What Is the “Administrative Record”?.....	13-68	114
2. Scope of Evidence in Arbitrary and Capricious Review Cases.....	13-69	115
3. Scope of Evidence in De Novo Review Cases...	13-71	115
4. Remands to the Plan Administrator to Consider New Evidence.....	13-73	115
5. Scope of Evidence Relating to Conflict of Interest Assertions.....	13-73	116
D. Standards for Deviation From Terms of Formal Plan Documents.....	13-78	116
1. Unambiguous SPD Provisions Providing More Generous Benefits	13-80	—
2. Where an SPD’s Silence Fails to Notify Participants of Important Rules	13-83	116
3. Non-SPD Representations That Are Inconsistent With Unambiguous Written Plan Provisions.....	13-84	117
4. Representations Contrary to the Plan’s Interpretation of Ambiguous Written Plan Provisions.....	13-88	117
5. Misrepresentation Made Prior to Plan Establishment.....	13-89	—
E. Conflict of Interest.....	13-90	118
1. Circumstances Giving Rise to a Conflict.....	13-90	—
a. Insurance Company Serving Dual Roles.....	13-91	—

	<i>Main Volume</i>	<i>Supple- ment</i>
b. Employer Serving Dual Roles	13-91	—
c. Taft-Hartley Funds.....	13-93	—
2. Effect of Conflict of Interest on the Standard of Review	13-94	—
3. Establishing Causation and the Seriousness of a Conflict	13-95	118
4. Effect of Conflict of Interest Assertions on the Scope of the Record to Be Considered by the Court	13-98	—
F. Factors Used to Determine Abuse of Discretion Other Than Conflict of Interest	13-100	—
G. Manner of Adjudication: Summary Judgment and Bench Trial Proceedings	13-103	—
H. Remand as a Judicial Remedy	13-105	118
1. Basis for Remand.....	13-106	—
2. When a Remand Is Appropriate.....	13-106	118
 CHAPTER 14. ISSUES UNIQUE TO HEALTH CARE, DISABILITY, AND OTHER WELFARE		
BENEFIT PLANS.....	14-1	119
I. Introduction.....	14-4	—
II. Issues Unique to Health Care Benefit Plans	14-4	123
A. ERISA Health Care Benefit Plans in Changing Times	14-4	—
B. Exclusions and Limitations	14-5	123
1. Burden of Proof.....	14-5	—
2. Lack of Medical Necessity.....	14-6	123
3. Experimental and Investigative Procedures	14-8	—
4. Preexisting Condition Exclusions After the Affordable Care Act	14-11	—
5. Custodial Care and Skilled Nursing Care	14-11	—
6. Intentional Acts, Intoxication, Suicide, and Illegal Acts	14-12	—
a. Intentional Acts.....	14-12	—
b. Intoxication.....	14-13	—
c. Suicide	14-13	—
d. Illegal Acts.....	14-13	—
7. Limitations for Specific Conditions or Care.....	14-14	—
a. Mental Health	14-14	—
b. Dental Care.....	14-15	—
c. Infertility.....	14-15	—
d. Other Specific Medical Diseases or Conditions	14-16	—
8. Limitations on Amounts Paid.....	14-16	—
a. Usual, Customary, and Reasonable Charges	14-16	—

	<i>Main Volume</i>	<i>Supple- ment</i>
b. Annual and Lifetime Dollar Limits on Benefits.....	14-17	—
C. Coordination of Benefits, Subrogation, Reimbursement, and Escape Clauses	14-17	123
1. Introduction.....	14-17	—
2. Coordination of Benefits Provisions	14-17	123
3. Subrogation, Reimbursement, and Escape Clauses	14-21	123
a. Subrogation and Reimbursement Clauses Generally	14-21	—
b. Preemption of State Laws Relating to Subrogation and Reimbursement	14-22	123
c. Applying Subrogation and Reimbursement Clauses.....	14-22	—
d. Escape Clauses	14-24	—
e. Cooperation Clauses and Acknowledgment Forms.....	14-24	—
D. Limitations on Recoupment Rights Under Make-Whole and Common Fund Doctrines	14-26	123
E. Recoupment Rights and Equitable Remedies Under ERISA Section 502(a)(3)— <i>Knudson</i> , <i>Sereboff</i> , <i>Montanile</i> , and <i>McCutchen</i>	14-28	124
1. Right to Enforce Reimbursement Provisions	14-28	124
2. Available Equitable Relief: <i>Knudson</i> and <i>Sereboff</i>	14-29	—
3. Aftermath of <i>Knudson</i> and <i>Sereboff</i>	14-30	—
4. Defenses in Reimbursement Cases: <i>McCutchen</i> and <i>Montanile</i>	14-31	—
5. Enforcing Recoupment Provisions Through Self-Help	14-32	—
F. Provider Claims Against Plans: Assignment and Misrepresentation	14-32	124
1. Assignment of Benefit Claims	14-32	—
2. Misrepresentation Claims Brought by Health Care Providers.....	14-34	—
a. Preemption Issues.....	14-35	—
b. Estoppel Claims.....	14-35	—
3. Other Claims Brought by Health Care Providers Against Plans	14-35	124
G. Other Supreme Court Cases Affecting Health Plans	14-36	—
1. <i>Pegram v. Herdrich</i>	14-36	—
2. <i>Rush Prudential HMO Inc. v. Moran</i>	14-37	—
3. <i>Kentucky Association of Health Plans, Inc. v. Miller</i>	14-37	—
4. <i>Aetna Health Inc. v. Davila</i>	14-37	—

	<i>Main Volume</i>	<i>Supple- ment</i>
H. ERISA Health Care Benefit Plans and Medical Malpractice.....	14-37	—
III. Issues Unique to Disability Benefit Plans.....	14-38	124
A. Eligibility.....	14-38	124
B. Proving Disability.....	14-39	125
1. Burden of Proof.....	14-39	—
2. Medical Evidence.....	14-39	125
a. Treating/Examining Physicians and Nonexamining Physicians.....	14-39	125
b. Type of Evidence Required—Objective and Clinical Findings and Symptom Reports.....	14-43	—
i. As to Medical Condition.....	14-43	—
ii. As to Work Capacity.....	14-44	—
3. Vocational Evidence.....	14-44	—
a. “Own Occupation”.....	14-44	—
b. “Any Occupation”.....	14-47	—
i. Vocational Assessments, Physical Capacity, and Job Availability.....	14-48	—
ii. Nonmedical Vocational Factors—Age, Education, Prior Work Experience, Fluency in English.....	14-50	—
iii. Impact of Non-exertional Impairments—Pain, Fatigue, Cognitive Issues.....	14-51	—
iv. Prior Earnings.....	14-52	—
v. Transferable Skills Analyses and Labor Market Surveys.....	14-52	—
c. Functional Capacity Evaluations.....	14-52	—
4. Effect of Social Security Determination.....	14-53	125
a. As to Disability.....	14-55	125
b. As to Onset.....	14-57	—
5. Proving Onset.....	14-57	—
a. Working While Disabled.....	14-58	—
b. Retrospective Diagnosis; Relation Back of Medical Findings.....	14-59	—
c. Process of Nature.....	14-59	—
6. Exclusions and Limitations.....	14-60	126
a. Burden of Proof.....	14-60	—
b. Preexisting Conditions.....	14-60	—
c. Mental and Nervous Disorder Benefit Limitations; Self-Reported Illness Benefit Limitations.....	14-62	126
d. Illegal Acts.....	14-64	—
e. Legal Versus Factual Disability.....	14-64	—
C. Common Proof Issues.....	14-65	126

	<i>Main Volume</i>	<i>Supple- ment</i>
1. Risk of Disability	14-65	—
2. Surveillance.....	14-66	126
3. Injury Versus Sickness	14-68	—
4. Combination of Impairments	14-68	—
5. Sufficiency and Appropriateness of Treatment	14-68	127
D. Offset Provisions in Disability Plans.....	14-68	127
IV. Issues Unique to Life Insurance Benefit Plans	14-70	—
A. Eligibility	14-70	—
B. Exclusions.....	14-72	—
1. Suicide.....	14-72	—
2. Intoxication	14-73	—
3. Other Intentional Acts	14-75	—
V. Issues Unique to Severance Benefit Plans	14-76	127
A. Limitations and Exclusions	14-76	127
B. Releases of Claims	14-77	—
C. Business Sales and Other Corporate Events.....	14-77	128
D. Plan Amendments Just Before Employee Terminations	14-78	—
VI. Welfare Plan Termination, Cancellation, Transfer, and Withdrawal Issues	14-79	128
A. Cancellation and Termination of Welfare Benefits Generally	14-79	—
1. Claims Involving Rescission of Coverage and Retroactive Coverage Changes	14-82	—
2. Claims Involving Inadequate Disclosures by Plans	14-83	—
3. Preemption Issues	14-84	—
B. Transfers and Other Uses of Plan Assets.....	14-84	—
1. Department of Labor Advisory Opinions	14-84	—
2. Cases Under ERISA and the Labor Management Relations Act.....	14-85	—
3. IRS Rulings.....	14-86	—
C. Withdrawal Liability.....	14-86	—
D. Modification, Reduction, and Termination of Retiree Benefits	14-87	128
1. Contract-Based Claims	14-87	—
a. Claims Relying on Section 301 of the Labor Management Relations Act.....	14-88	—
b. Claims Relying on Section 502(a)(1)(B) of ERISA	14-92	—
2. Communications-Based Claims.....	14-95	—
a. Estoppel Claims.....	14-95	—
b. Breach of Fiduciary Duty Claims.....	14-96	—
3. Adverse Changes During Bankruptcy.....	14-97	128

	<i>Main Volume</i>	<i>Supple- ment</i>
CHAPTER 15. EMPLOYMENT DISCRIMINATION AND EMPLOYEE BENEFITS	15-1	129
I. Introduction	15-3	—
II. Title VII of the Civil Rights Act	15-4	—
A. Pregnancy Discrimination in Employee Benefits	15-4	—
1. Supreme Court Cases and the Pregnancy Discrimination Act	15-4	—
2. Equal Employment Opportunity Commission Guidance	15-5	—
3. EEOC Guidelines and the Affordable Care Act	15-6	—
4. Pregnancy-Related Issues and Employee Benefit Plans	15-6	—
a. Impact of Pregnancy on Service Credits Under Employee Benefit Plans	15-6	—
b. Infertility Coverage	15-7	—
c. Contraception Coverage	15-7	—
d. Abortion Coverage	15-8	—
B. Gender-Based Distinctions in Defined Benefit Pension Plans	15-8	—
C. Other Title VII Claims and Employee Benefit Plans	15-10	—
III. Benefits Issues for Same-Sex Spouses, Domestic Partners, and Transgender Individuals	15-11	132
A. Same-Sex Marriage: Development of Federal Law	15-11	132
1. Supreme Court Opinions in <i>Windsor</i> and <i>Obergefell</i>	15-11	—
2. Implications of <i>Windsor</i> and <i>Obergefell</i> for Employee Benefit Plans	15-11	—
a. Pension Plans	15-12	—
b. Welfare Plans	15-12	—
3. Retroactivity Issues	15-12	132
4. Antidiscrimination Laws	15-13	—
5. Federal and State Public Employees	15-13	—
B. Domestic Partnerships and Civil Unions	15-14	—
C. Transgender Issues	15-15	132
IV. Equal Pay Act	15-16	—
V. Age Discrimination in Employment Act	15-17	133
A. ADEA Section 4(a) and the General Prohibition of Age Discrimination	15-17	—
B. Older Workers Benefit Protection Act of 1990 and Section 4(f)(2)	15-18	—
C. Application of Section 4(f)(2) Regulations Post-OWBPA	15-19	—
1. Identifying a Bona Fide Plan	15-20	—

	<i>Main Volume</i>	<i>Supple- ment</i>
2. Observing the Terms of a Bona Fide Plan	15-20	—
3. Cost Justification.....	15-21	—
D. Waivers Under the ADEA	15-23	133
1. The Validity of ADEA Waivers Generally	15-23	133
2. Special Rules Applicable to ADEA Waivers Involving Exit Incentive Programs or Other Employment Termination Programs	15-25	—
3. Application of the OWBPA to Litigation Settlement Agreements	15-26	—
4. Issues That Arise Where the ADEA Waiver Is Found Invalid	15-27	—
E. ADEA Issues Arising With Early Retirement Incentives and Severance Pay Plans	15-27	—
1. Pre-OWBPA Case Law	15-27	—
2. General Principles of the OWBPA.....	15-28	—
a. Section 4(l)(1) Exceptions to the Equal Benefit or Equal Cost Principle	15-28	—
b. Section 4(l)(2) Benefit Coordination Exceptions	15-30	—
c. Age-Based Reductions in Retirement Incentives for Tenured Faculty	15-31	—
3. Post-OWBPA Litigation Over Retirement Incentives	15-31	—
F. Age Discrimination Issues in Pension Benefits.....	15-32	—
1. In General.....	15-32	—
2. Age Discrimination Issues Regarding the Rate of Benefit Accrual	15-34	—
G. Specific Types of Welfare Benefit Reductions Due to Age.....	15-35	133
1. Life Insurance	15-35	—
2. Long-Term Disability.....	15-35	—
a. Cost Justification	15-35	—
b. Offset of Pension Benefits	15-36	—
3. Health Insurance	15-37	—
4. Seniority	15-37	133
VI. Americans with Disabilities Act	15-38	—
A. Introduction	15-38	—
B. Scope of ADA Coverage	15-39	—
1. Covered Entity	15-39	—
2. Qualified Individual	15-40	—
3. Disability	15-41	—
a. “Substantially Limits”	15-42	—
b. “Major Life Activities”	15-43	—
c. Impairments That Consistently Meet the Definition of Disability.....	15-43	—
4. The Association Provision of the ADA.....	15-44	—

	<i>Main Volume</i>	<i>Supple- ment</i>
C. ADA Section 501(c) and Benefit-Related Discrimination	15-45	—
D. ADA Title III and Benefit Claims	15-48	—
E. Application of the ADA to Specific Types of Benefit-Related Discrimination	15-49	—
1. AIDS/HIV	15-49	—
2. Limits on Infertility Procedures	15-49	—
3. Mental Health Limitations	15-50	—
4. Discrimination Between Different Types of Disabilities	15-50	—
5. Pension Benefits.....	15-51	—
VII. Genetic Information Nondiscrimination Act.....	15-52	—
VIII. Wellness Programs	15-53	—
A. Title I of the ADA and Wellness Programs	15-54	—
1. EEOC Regulatory Guidance	15-54	—
a. Employee Health Program	15-55	—
b. Definition of Voluntary	15-55	—
c. Confidentiality	15-56	—
d. Inapplicability of the ADA’s Safe Harbor Provision.....	15-56	—
B. GINA and Wellness Programs	15-56	—
IX. Veterans and Employee Benefits.....	15-58	134
A. Uniformed Services Employment and Reemployment Rights Act.....	15-58	134
1. In General.....	15-58	—
2. Health Plan Coverage.....	15-59	—
3. Pension Plan Coverage.....	15-61	—
B. The Heroes Earnings Assistance and Relief Tax Act of 2008	15-63	—
X. Interference With Protected Rights Under ERISA Section 510.....	15-64	134
A. ERISA Section 510: The Statutory Framework	15-64	—
B. Conduct Within the Scope of Section 510.....	15-65	—
C. Parties Covered by Section 510.....	15-66	—
1. Plaintiffs	15-66	—
2. Defendants	15-68	—
D. Proving Discriminatory Intent Under Section 510...	15-68	134
E. Loss of Benefits Through Plan Amendments and Terminations	15-70	—
F. Loss of Benefits Resulting From Plant Closings, Reorganizations, or Reductions in Force.....	15-71	—
G. ERISA Section 510 Procedural Issues	15-72	135
1. Exhaustion of Claims Procedures	15-72	—
2. Statute of Limitations.....	15-73	135
3. Remedies.....	15-74	—
4. Jury Trials.....	15-75	—

	<i>Main Volume</i>	<i>Supple- ment</i>
5. Removal	15-76	—
6. Waivers of ERISA Section 510 Claims	15-76	—
 CHAPTER 16. ISSUES UNIQUE TO JOINTLY ADMINISTERED PLANS		
	16-1	137
I. Legislation and Regulation of Jointly Administered Plans	16-3	—
A. Historical Development and Regulation of Jointly Administered Pension and Welfare Benefit Plans	16-3	—
B. ERISA Regulation of Jointly Administered Plans....	16-5	—
C. Application of the Settlor/Fiduciary Doctrine to Jointly Administered Plans	16-6	—
II. Substantive Requirements of Section 302(c)(5) of the Taft-Hartley Act	16-7	140
A. Jurisdiction Over Statutory Compliance	16-7	—
B. Existence and Structure of Trust.....	16-8	140
1. Written Agreement.....	16-9	140
2. Annual Audit Requirement	16-12	—
3. Equal Representation	16-12	—
C. Appointment and Duties of Trustees	16-15	—
1. Appointment of Trustees.....	16-15	—
2. Removal of Trustees.....	16-16	—
3. Independence and Authority of Trustees.....	16-17	—
D. Arbitration of Trustee Deadlocks	16-19	—
1. Statutory Requirements.....	16-19	—
2. Issues Subject to Arbitration	16-19	—
E. Sole and Exclusive Benefit Rule	16-21	—
1. Judicial Review of Plan Terms and Administration	16-21	—
2. Plan Inclusion and Exclusion of Certain Classes of Participants	16-21	—
3. Plan Transfers, Changes in Representation, and Reciprocity	16-23	—
III. Criminal Liability Under Section 302 of the Taft- Hartley Act	16-24	—
IV. Actions to Enforce the Contribution Obligation	16-26	—
A. Duty to Pursue Recovery of Delinquent Contributions	16-26	—
B. Judicial Enforcement of the Contribution Obligation	16-26	—
1. Subject Matter Jurisdiction	16-26	—
a. Who May Bring Collection Actions	16-27	—
b. NLRB Jurisdiction Issues	16-28	—
c. Independent Basis for Jurisdiction in Suits Against Third Parties	16-29	—

	<i>Main Volume</i>	<i>Supple- ment</i>
d. Jurisdiction Issues Where the Collective Bargaining Agreement Has Expired.....	16-30	—
e. Jurisdiction Over Counterclaims Against Fund Trustees	16-31	—
f. Exhaustion in Collection Cases.....	16-32	—
2. Contract Validity Defenses.....	16-33	—
a. General Rule: Fund Not Subject to Defenses Employer Can Raise Against Union.....	16-33	—
b. Excepted Defenses: Contract Void Ab Initio or Illegal.....	16-35	—
c. Defenses That Raise the Issue of Who Is a Party to the CBA.....	16-36	—
d. Impleading the Union.....	16-37	—
3. Miscellaneous Other Defenses.....	16-38	—
4. Contract Interpretation Issues	16-38	—
5. Scope of Contribution Obligation.....	16-41	—
a. Which Employees' Work Is Taken Into Account	16-41	—
b. What Work Is Taken Into Account	16-42	—
c. Which Fund Is Entitled to the Contributions	16-43	—
d. Proof of Amount Owed	16-44	—
6. Res Judicata and Collateral Estoppel.....	16-45	—
7. Personal and Diversity Jurisdiction.....	16-46	—
8. Venue.....	16-47	—
9. Statute of Limitations.....	16-47	—
10. Right to Jury Trial.....	16-49	—
C. Payroll Audits	16-49	—
1. Audit Rights.....	16-49	—
2. Scope of Audit	16-50	—
D. Remedies Available Upon a Finding of Delinquency.....	16-51	—
1. Liquidated Damages, Interest, and the Commencement of Litigation	16-51	—
2. Attorneys' Fees and Costs	16-52	—
3. Injunctive Relief.....	16-54	—
4. Other Remedies.....	16-54	—
5. Remedy Issues Unique to Audits	16-55	—
6. Post-judgment Remedies	16-55	—
E. Individual Liability, Piercing the Corporate Veil, and Liability of Others.....	16-56	—
1. Individual Liability	16-56	—
2. Liability of Affiliated Company as Alter Ego....	16-58	—
3. Liability of Affiliated Company Under the Single-Employer Doctrine	16-59	—

	<i>Main Volume</i>	<i>Supple- ment</i>
4. Liability of Affiliated Company as Successor ...	16-59	—
F. Non-ERISA Enforcement of the Contribution Obligation	16-60	—
G. Return of Employer Contributions	16-61	—
H. Claims for Contributions Due to Pension Plan's Failure to Meet Minimum Funding Standards	16-63	—
V. Funding Rules for Multiemployer Plans	16-64	—
A. Basic Minimum Funding Requirements.....	16-64	—
B. Rules for Certain Underfunded Plans Under the Pension Protection Act and Multiemployer Pension Reform Act	16-66	—
1. Actuarial Certifications and Required Notices	16-68	—
2. Funding Improvement and Rehabilitation Plans	16-69	—
3. Special Rules Applicable to Critical Status Plans	16-71	—
4. Restrictions on Benefits and Contribution Levels for Endangered and Critical Status Plans	16-71	—
C. 2010 Pension Relief Act	16-72	—
D. Special Rules for Critical and Declining Status Plans	16-73	—
1. Limitations on Suspending Benefits	16-74	—
2. Actuarial Certifications and Notices	16-74	—
3. Implementing Benefit Suspensions Under the MPRA	16-74	—
4. Restrictions on Benefits and Contribution Limits for Plans in Critical and Declining Status.....	16-75	—
VI. Multiemployer Pension Plan Amendments Act—Plan Termination Insurance.....	16-75	141
A. Guarantees for Insolvent Multiemployer Plans	16-75	141
B. Plan Insolvency.....	16-76	—
1. Insolvency Notice	16-77	—
2. Insolvency Benefit Level Notice	16-77	—
C. Rules Governing Plans After Mass Withdrawal	16-77	—
D. Financial Assistance	16-78	—
E. Mergers and Transfers	16-79	142
1. Mergers and Transfers Between Multiemployer Plans.....	16-79	—
2. PBGC Facilitation of Mergers Between Multiemployer Plans.....	16-80	142
3. Mergers and Transfers Between Multiemployer and Single-Employer Plans.....	16-81	—
4. Partition of Multiemployer Plans.....	16-82	142

	<i>Main Volume</i>	<i>Supple- ment</i>
5. Transfers Following a Change in Bargaining Representative.....	16-83	—
VII. Coal Industry Retiree Health Benefit Act of 1992.....	16-83	—
A. Introduction to the Coal Act.....	16-83	—
1. History.....	16-83	—
2. The Combined Fund.....	16-84	—
3. The 1992 Plan.....	16-85	—
B. Legal Challenges to the Coal Act.....	16-85	—
1. Constitutional Challenges.....	16-85	—
2. Other Legal Challenges.....	16-86	—
C. The 2006 Amendments and the 2007 National Bituminous Coal Wage Agreement.....	16-87	—
CHAPTER 17. MULTIEMPLOYER PLAN WITHDRAWAL		
LIABILITY	17-1	145
I. Introduction.....	17-3	—
II. Determination and Assessment of Withdrawal Liability.....	17-3	147
A. Duty of Plan Sponsor to Determine, Assess, and Collect Withdrawal Liability.....	17-3	—
B. Computation of Liability.....	17-4	147
1. Allocation Formulas.....	17-4	147
a. Presumptive Method.....	17-4	147
b. Modified Presumptive Rule.....	17-5	—
c. Rolling-Five Method.....	17-6	—
d. Direct Attribution Method.....	17-6	—
e. Other Allocation Methods.....	17-6	—
2. Actuarial Assumptions and Methods.....	17-8	—
3. Payment Schedule.....	17-9	—
4. Pension Protection Act and Multiemployer Pension Reform Act Adjustments.....	17-12	—
5. Liability Computation Under a Merged Plan.....	17-13	—
C. Duty of Employer to Provide Information.....	17-14	—
D. Duty of Plan Sponsor to Provide Information.....	17-15	—
E. Notice of Withdrawal Liability.....	17-16	—
III. Definition of Withdrawal.....	17-18	—
A. Complete Withdrawal.....	17-18	—
B. Partial Withdrawal.....	17-21	—
C. Aggregation of Related Employers.....	17-24	—
D. Labor Dispute Exception.....	17-26	—
E. Corporate Transfers and Mergers.....	17-29	—
F. Sales of Assets.....	17-31	—
1. Bond/Escrow and Contract of Sale Requirements.....	17-34	—
2. Continued Contribution Obligation.....	17-36	—
3. Mixed Sales and Closings.....	17-37	—

	<i>Main Volume</i>	<i>Supple- ment</i>
4. Bona Fide Arm's-Length Sale of Assets	17-38	—
G. Transactions to Evade or Avoid Liability	17-38	—
H. Mass Withdrawal	17-40	—
IV. Special Industry Provisions.....	17-42	—
A. Construction Industry	17-42	—
1. Complete Withdrawal	17-42	—
2. Partial Withdrawal.....	17-45	—
3. Additional Rules	17-45	—
B. Entertainment Industry	17-45	—
1. Complete Withdrawal	17-45	—
2. Partial Withdrawal.....	17-46	—
C. Trucking Industry	17-47	—
D. Retail Food Industry	17-48	—
E. Coal Industry Plans Subject to Code Section 404(c).....	17-49	—
F. Special Rules for Other Industries.....	17-49	—
V. Effective Date of Withdrawal.....	17-50	—
A. Complete Withdrawal	17-50	—
B. Partial Withdrawal	17-53	—
VI. Special Definitions and Relief Provisions.....	17-53	—
A. Closed Facility Rule	17-53	—
B. Sale of Assets, Net Worth Limitation, and Insolvency.....	17-54	—
C. Transfers Following a Change in Certified Bargaining Representative.....	17-57	—
D. De Minimis Rule	17-58	—
E. Abatement of Withdrawal Liability	17-59	—
F. Free Look.....	17-59	—
G. Withdrawal Liability Reimbursement and Payment Funds	17-60	—
VII. Constitutionality.....	17-61	—
A. Trilogy of Supreme Court Cases Upholds MPPAA's Constitutionality.....	17-61	—
B. Constitutional Challenges in the Lower Courts.....	17-62	—
VIII. Enforcement and Collection Disputes.....	17-63	148
A. Standing, Jurisdiction, and Venue.....	17-63	—
B. Review Procedures	17-67	—
C. Arbitration of Withdrawal Liability Claims	17-68	148
1. Arbitration and the Exhaustion Requirement ...	17-68	—
2. Initiation of Arbitration	17-71	148
3. Consequences of a Failure to Initiate Arbitration in a Timely Manner	17-73	—
D. Arbitration Procedures.....	17-75	—
1. Selection of the Arbitrator.....	17-76	—
2. Discovery	17-76	—
3. Prehearing Conference.....	17-77	—

	<i>Main Volume</i>	<i>Supple- ment</i>
4. Conduct of the Hearing	17-77	—
5. Issuance of the Award	17-78	—
6. Burdens of Proof	17-78	—
7. Assessment of Costs and Attorneys' Fees	17-79	—
E. Default	17-80	—
F. Collection of Payments Pending Arbitration	17-81	—
G. Collection Actions, Enforcement of Award, Interest, Liquidated Damages, and Attorneys' Fees	17-86	—
H. Statute of Limitations	17-89	—
I. Bankruptcy Issues	17-90	—
J. Jury Trial	17-92	—
IX. Co-employer Liability	17-93	148
A. Definition of "Employer"	17-93	—
B. Controlled Group Liability	17-95	148
C. Shareholder, Director, or Officer Liability	17-99	—
D. Successor Employer Liability	17-100	149
X. Third-Party Claims	17-101	—
XI. Welfare Plan Withdrawal Liability	17-103	—
 CHAPTER 18. COLLECTIVE BARGAINING AND EMPLOYEE BENEFITS	 18-1	 151
I. Introduction	18-2	—
II. Duty to Bargain Over Employee Benefits	18-3	152
A. Duty to Bargain Over Pension, Profit-Sharing, and Stock Plans and Benefits	18-4	—
B. Duty to Bargain Over Welfare Plans and Benefits ...	18-7	153
1. General	18-7	153
2. Retiree Welfare Benefits	18-8	—
III. Circumstances Where Bargaining May Not Be Required Over Plan Issues	18-9	—
A. Attenuated Connection With Plan	18-9	—
B. Conflict With Policies of the NLRA	18-10	—
C. No Change in Existing Conditions of Employment	18-11	—
D. Waiver or Consent to Changes	18-13	—
1. Provisions Commonly Found in Plan Documents	18-14	—
2. Provisions Commonly Found in Collective Bargaining Agreements	18-15	—
3. Acts or Omissions Showing Acquiescence	18-17	—
E. Impasse	18-18	—
IV. Recurring Issues Involving the Duty to Bargain in Employee Benefits Cases	18-19	153
A. Selection of Insurance Carrier	18-19	—
B. Increases in Employee Contributions	18-20	153

	<i>Main Volume</i>	<i>Supple- ment</i>
C. Failure to Contribute to a Plan.....	18-22	—
V. Duty to Supply Information.....	18-24	153
VI. Interference and Discrimination Cases and Related Issues.....	18-28	154
A. Threats to Withdraw or Promises to Grant Benefits.....	18-28	154
B. Benefit Plan Provisions Related to Union Status	18-29	—
1. Exclusions From Coverage Based on Union Status.....	18-29	—
2. Credit Provisions Based on Union Status	18-31	—
3. Benefits for Employees on Union Leave	18-31	—
C. Treatment of Employee Benefits During a Strike	18-33	—
VII. Arbitration of Benefits Issues Under CBAs.....	18-36	—
VIII. Preemption Under the NLRA and LMRA	18-39	154
A. NLRA Preemption.....	18-39	—
B. LMRA Section 301 Preemption	18-42	154
 CHAPTER 19. CRIMINAL ENFORCEMENT AND CIVIL RICO	 19-1	 157
I. Introduction.....	19-2	—
II. ERISA Title I Crimes.....	19-3	—
A. Reporting and Disclosure Violations.....	19-4	—
1. Act or Omission Must Relate to an ERISA- Covered Plan.....	19-4	—
2. Defendant Must Be Subject to a Statutory Obligation	19-5	—
3. Violation Must Be Willful.....	19-6	—
B. Interference With Plan and ERISA Rights	19-6	—
1. Who Is a Defendant?.....	19-6	—
2. What Constitutes Fraud, Violence, or Threat Thereof?	19-7	—
3. Fraud, Violence, or Threat Thereof Must Be Directed at Participants or Beneficiaries.....	19-7	—
4. Interference Must Be Willful	19-7	—
C. Disqualification From Plan Service.....	19-7	—
D. Preemption of State and Federal Criminal Prosecution	19-8	—
III. ERISA-Specific Crimes in Title 18, United States Code	19-9	159
A. Plan Covered by Title I of ERISA Required	19-9	—
B. Theft or Conversion of Plan Assets	19-9	159
1. Who Is a Defendant?.....	19-9	—
2. Plan Must Be Deprived of Its Assets	19-10	—
3. Defendant Must “Embezzle,” “Steal,” or “Unlawfully Convert”	19-11	159
4. Act Must Be Willful.....	19-12	—

	<i>Main Volume</i>	<i>Supple- ment</i>
5. Convictions	19-14	—
C. Falsification of Plan-Related Documents	19-15	—
1. Documents Must Be Required Under Title I	19-15	—
2. Violation Must Be Committed “Knowingly”	19-17	—
3. Defenses	19-18	—
D. Improper Payments to Plan Officials	19-18	—
1. Exempted Payments	19-19	—
2. Who Is a Defendant?	19-19	—
3. Intent	19-20	—
4. No Loss of Plan Assets Necessary for Conviction	19-22	—
IV. Criminal Liability Under the Taft-Hartley Act, Section 302	19-23	159
V. Health Care Fraud	19-24	159
A. Fraud	19-25	159
B. Theft or Embezzlement	19-26	—
C. False Statements	19-27	160
D. Obstruction of Criminal Investigations of Health Care Offenses	19-28	—
E. Investigative Procedures	19-28	—
VI. Racketeer Influenced and Corrupt Organizations (RICO)	19-28	161
A. Introduction	19-28	—
B. RICO’s Prohibitions	19-29	—
C. Elements of RICO Actions	19-30	161
1. Establishing a Pattern of Racketeering Activity	19-30	—
a. Predicate Offenses for Racketeering	19-30	—
b. Exception for Fraud in the Sale of Securities	19-30	—
c. Establishing a Pattern of Activity	19-30	—
2. Identifying the Injury	19-31	161
3. Identifying the Enterprise	19-33	—
4. Participation in the Enterprise	19-34	—
5. Conspiracy to Violate RICO	19-34	—
6. Time Limitations on Bringing Action or Prosecution	19-35	—
7. Effect of McCarran-Ferguson Act	19-35	—
 CHAPTER 20. ETHICS, PRIVILEGE, AND RELATED CONCERNS UNIQUE TO THE PRACTICE OF BENEFITS LAW		
	20-1	163
I. Introduction	20-2	—
A. Applicable Law	20-2	—
B. Informing Clients of Changes in the Law	20-4	—
II. Entity Representation	20-4	—

	<i>Main Volume</i>	<i>Supple- ment</i>
A. Communications With the Constituents of the Organization	20-5	—
B. Inadvertent Formation of Attorney-Client Relationship.....	20-6	—
C. Representing Constituents	20-8	—
D. Reporting Breaches of Fiduciary Duties	20-9	—
III. Multiple Representation.....	20-11	165
A. Conflicts Rule.....	20-11	165
1. Deciding Whether There Is a Conflict	20-12	165
a. Direct Adversity	20-12	—
b. Materially Limited Representation.....	20-13	165
2. Obtaining Consent if Permitted	20-13	—
B. Additional Issues in Multiple Representation	20-14	165
1. Settlement Conflicts.....	20-14	—
2. Duties of Defense Counsel Appointed Under a Fiduciary Liability Insurance Policy	20-14	—
3. Withdrawal From Multiple Representation	20-15	—
4. Duties to Former Clients.....	20-16	—
a. Who Is a Former Client?	20-16	—
b. Deciding Whether There Is a Conflict.....	20-17	—
c. Confidential Information of a Former Client	20-18	—
5. Imputed Disqualification in Conflicts Cases	20-19	—
6. Disqualification of Counsel in Conflicts Cases	20-20	165
IV. Fiduciary Representation	20-22	—
A. Identifying the Client.....	20-23	—
B. Confidentiality Obligations	20-23	—
1. Duty of Confidentiality Where the Fiduciary Is the Sole Client.....	20-24	—
2. Duty of Confidentiality Where the Plan Is the Client.....	20-25	—
3. Duty of Confidentiality Where the Beneficiaries Are the Clients.....	20-25	—
V. Attorney-Client Privilege and Work Product Immunity	20-26	166
A. Attorney-Client Privilege.....	20-26	166
1. The Attorney-Client Privilege in the Employee Benefits Setting	20-27	—
2. The Attorney-Client Privilege in Entity Representation.....	20-28	166
3. The Attorney-Client Privilege in Multiple Representation.....	20-29	—
4. The Attorney-Client Privilege in Fiduciary Representation.....	20-30	166

	<i>Main Volume</i>	<i>Supple- ment</i>
a. The Fiduciary Exception to the Privilege in the ERISA Context.....	20-30	166
i. Early Cases Requiring Good Cause....	20-30	—
ii. Later Rationales for Not Requiring Good Cause.....	20-32	166
b. Limitations on the Fiduciary Exception	20-34	167
i. Settlor Functions.....	20-35	167
ii. Personal Liability.....	20-36	167
iii. Divergent Interests	20-37	—
iv. Top Hat Plans.....	20-40	—
5. Waiving the Attorney-Client Privilege.....	20-40	—
B. Work Product Immunity	20-42	168
1. Anticipation of Litigation	20-44	—
2. Fiduciary Exception.....	20-45	—
3. Preserving the Work Product Protection.....	20-47	—
VI. Choice of Law and the Unauthorized Practice of Law ...	20-48	—
TABLE OF CASES	Cases-1	169
TABLE OF EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) SECTIONS	ERISA-1	173
TABLE OF INTERNAL REVENUE CODE (IRC) SECTIONS.....	IRC-1	175
INDEX	Index-1	—