

Detailed Table of Contents

PREFACE	xiii
SUMMARY TABLE OF CONTENTS	xv
INTRODUCTION	iv

PART I PROCEDURAL ISSUES

CHAPTER 1 WELFARE PLANS.....	1-1
I. Overview.....	1-3
II. Statutory Language.....	1-3
ERISA Section 3(1), Definition of Welfare Plan.....	1-3
ERISA Section 3(3), Definition of Plan	1-4
Labor Management Relations Act Section 302(c)(5)–(9), Restrictions on [Payments to Employee Representatives]: Exceptions.....	1-4
III. Definition of Welfare Plan	1-6
A. How to Determine Whether ERISA Governs a Welfare Plan	1-6
1. Is It a “Plan, Fund, or Program”?.....	1-7
a. A Plan, Defined and Construed	1-7
b. The Writing Requirement	1-8
c. An Ongoing Administrative Scheme.....	1-15
2. Is the Plan “Established or Maintained” by an Employer or Employee Organization?.....	1-23
a. In General	1-23
b. Bare Purchases of Insurance and Reimbursement of Insurance Premiums	1-25
c. Intent to Establish a Plan	1-26
3. Is the Benefit Provided by an Employer or Employee Organization?	1-26

a. In General	1-26
b. Multiple Employer Welfare Arrangements and Commercial Products	1-28
c. Voluntary Employee Beneficiary Associations	1-29
4. Is the Purpose of the Plan to Provide an Enumerated Benefit?	1-30
a. In General	1-30
b. A Plan Within a Plan	1-32
5. Are the Benefits Provided to Participants or Beneficiaries?	1-34
a. Are Employees Involved?	1-35
b. Plans With No Employees	1-39
c. Plans With One Employee	1-40
d. Owner and Spouse	1-42
e. Dual Status Employees	1-43
B. Is the Welfare Plan Excluded Under DOL Regulations?	1-46
1. Payroll Practices	1-46
2. On-Premises Facilities	1-49
3. Holiday Gifts	1-49
4. Sales to Employees	1-49
a. In General	1-49
b. Dependent Coverage	1-49
c. Other Concessions	1-50
5. Hiring Halls	1-50
6. Remembrance or Flower Funds	1-50
7. Strike Funds	1-51
8. Industry Advancement Programs	1-51
9. Certain Group or Group-Type Insurance Programs	1-51
a. In General	1-51
i. No Employer Contributions	1-52
ii. Voluntary Participation	1-53
iii. No Endorsement	1-53
iv. No Compensation	1-56
v. Severance of the Policy From the Plan to Defeat ERISA Coverage	1-56
b. Individual Conversion Policies	1-57
10. Unfunded Scholarship Programs	1-59
11. Vacation Plans	1-59
12. Other Excluded Benefits	1-60
C. Checklist for Determining Whether a Welfare Plan Is Covered by ERISA (Figure 1-1)	1-62
IV. Burden of Proof	1-63
V. Standard of Review	1-63
CHAPTER 2 PENSION PLANS	2-1
I. Overview	2-2
II. Statutory Language	2-2

ERISA Section 3(2), Definition of Pension Plan.....	2-2
ERISA Section 3(3), Definition of Plan	2-3
Labor Management Relations Act Section 302(c), Restrictions on [Payments to Employee Representatives]: Exceptions.....	2-3
III. Definition of Pension Plan.....	2-4
A. How to Determine Whether a Pension Plan Is Governed by ERISA	2-4
1. Plan, Fund, or Program; Ongoing Administrative Scheme	2-4
2. Established or Maintained.....	2-6
3. Employer-Employee Relationship	2-7
4. Source of Funding	2-7
5. Deferral of Income	2-7
6. Reasonably Ascertainable Benefits and Procedures.....	2-9
B. Is the Pension Plan Excluded as an IRA Under DOL Regulations?.....	2-9
C. Other Types of Pension Plans	2-10
1. Annuity Contracts, SEPs, and SIPs.....	2-10
a. Annuities.....	2-10
b. Simplified Employee Pension Plans.....	2-10
c. Savings and Investment Plans.....	2-10
2. Severance Plans.....	2-10
3. Bonuses, Including Stock Purchase Plans.....	2-11
a. Bonuses.....	2-11
b. Stock Bonus Plans	2-11
c. Stock Option Plans	2-12
d. Stock Incentive Plans.....	2-12
4. Supplemental Executive Retirement Plans and Top Hat Plans	2-13
IV. Standard of Review.....	2-16
 CHAPTER 3 PLANS EXCLUDED FROM ERISA COVERAGE	3-1
I. Overview.....	3-2
II. Statutory Language.....	3-2
ERISA Section 4, Coverage	3-2
ERISA Section 3(12), Industry Affecting Commerce	3-3
ERISA Section 3(32), Governmental Plan	3-3
ERISA Section 3(33)(A)–(C), Church Plans	3-4
ERISA Section 3(36), Excess Benefit Plans.....	3-5
III. What Plans Are Excluded by ERISA?.....	3-5
A. ERISA Applies to Plans Sponsored by Employers Affecting Commerce	3-5
B. Governmental Plans	3-6
1. Governmental Agency or Instrumentality	3-7
2. Political Subdivision of a State	3-9
3. The “Established or Maintained” Requirement	3-10
4. Mix of Public and Private Employees	3-13

5. Plans of Indian Tribal Governments “Included” in the Definition of Governmental Plan	3-14
a. Prospective Versus Retrospective Application.....	3-14
b. Essential Governmental Functions	3-15
c. Abrogation of Sovereign Immunity.....	3-16
6. Other Plans	3-16
C. Church Plans	3-16
1. The “Established” Requirement	3-17
2. The “Maintained” Requirement	3-17
3. “Controlled by or Associated with a Church”	3-19
D. Workers’ Compensation, Unemployment Compensation, or Disability Plans	3-21
E. Foreign Plans	3-22
F. Unfunded Excess Benefit Plans	3-24
1. Sole Purpose.....	3-24
2. Unfunded.....	3-25
3. Difference Between Excess Benefit and Top Hat Plans.....	3-26
IV. Can an Otherwise Exempt Plan Opt In to ERISA Coverage?	3-27
V. ERISA Coverage and Federal Subject Matter Jurisdiction	3-29
 CHAPTER 4 CAUSES OF ACTION.....	4-1
I. Overview.....	4-2
II. Statutory Language.....	4-2
ERISA Section 502(a), (c), Civil Enforcement	4-2
ERISA Section 409, Liability for Breach of Fiduciary Duty	4-7
ERISA Section 510, Interference With Protected Rights	4-7
ERISA Section 515, Delinquent Contributions	4-8
ERISA Section 4003(e)(1), (f)(1), Civil Actions by [PBGC]; Civil Actions Against [PBGC].....	4-8
ERISA Section 4070(a), Enforcement Authority Relating to Terminations of Single-Employer Plans	4-9
ERISA Section 4301(a), (b), Civil Actions	4-9
III. ERISA Causes of Action	4-9
A. Actions Under Section 502	4-9
1. Actions for Benefits Under Section 502(a)(1)(B).....	4-9
2. Actions for Breach of Fiduciary Duty Under Section 502(a)(2).....	4-11
3. Actions for Equitable Relief Under Section 502(a)(3).....	4-12
4. Actions for Failure to Provide Individual Benefit Statements Under Section 502(a)(4)	4-18
5. Actions Brought by the Secretary of Labor Under Section 502(a)(5).....	4-18
6. Actions Brought by the Secretary of Labor to Collect Civil Penalties	4-19
7. Actions by a Participant or Beneficiary to Recover Civil Penalties Under Section 502(a)(1)(A).....	4-19

8. Actions to Order Compliance With a Qualified Medical Child Support Order Under Section 502(a)(7).....	4-20
9. Actions Brought in Connection With Choice of Annuity Providers Under Section 502(a)(9)	4-20
10. Actions Brought in Connection With Multiemployer Plans Under Section 502(a)(10)	4-20
11. Actions for Review, Restraint, or Mandamus Under Section 502(k)	4-20
12. Assessment of a Penalty on Impermissible Distributions Under Sections 502(m) and 206(e)	4-21
B. Suits to Redress Discrimination, Retaliation, and Coercive Interference Under Section 510	4-21
C. Actions to Redress Age, Sex, or Disability Discrimination.....	4-22
D. Actions for Delinquent Contributions Under Section 515.....	4-22
E. Actions for Withdrawal Liability Under Section 4301	4-23
F. Actions Brought by the Pension Benefit Guaranty Corporation Under Section 4003	4-24
 CHAPTER 5 PREEMPTION AND REMOVAL.....	 5-1
I. Overview.....	5-2
II. Statutory Language.....	5-3
ERISA Section 514, Other Laws	5-3
III. Express ERISA Preemption.....	5-7
A. ERISA’s Definition of “State Laws”	5-7
B. Preemption of State Laws That “Relate to” ERISA-Regulated Employee Benefit Plans	5-8
1. ERISA-Regulated Plans	5-8
2. The “Connection with” or “Reference to” Test.....	5-8
a. “Connection with” a Plan after <i>Travelers</i>	5-9
b. “Reference to” a Plan after <i>Travelers</i>	5-11
c. Lower Federal Courts	5-11
C. Exceptions to Express Preemption.....	5-14
1. Pre-ERISA Acts	5-14
2. State Insurance, Banking, and Securities Laws.....	5-15
3. Qualified Domestic Relations Orders and Qualified Medical Child Support Orders	5-15
4. Federal Laws	5-15
5. Criminal Laws	5-16
6. Permitted State Regulation of Multiple Employer Welfare Arrangements	5-17
7. Recoupment of Medicaid Payments by the States	5-17
IV. ERISA’s Saving and Deemer Clauses.....	5-17
A. The Saving Clause Before <i>Kentucky Ass’n of Health Plans, Inc. v. Miller</i> : The McCarran-Ferguson Test.....	5-18
B. The Clean Break From the McCarran-Ferguson Factors: <i>Miller</i> and Beyond	5-19
C. The Deemer Clause.....	5-21

V. Implied ERISA Preemption.....	5-22
VI. Removal to Federal Court.....	5-23
A. Complete Versus Ordinary Preemption.....	5-24
B. Procedural Issues	5-27
VII. Impact of ERISA Preemption on Specific Substantive Areas	5-29
A. Wrongful Discharge and Employment Discrimination	5-29
B. Promises of Benefits and Misrepresentations	5-32
C. Fraud-in-the-Inducement Cases	5-35
D. Claims Based on Benefit Denials and Fiduciary Breaches, in General.....	5-36
E. Suits Against Nonfiduciaries.....	5-38
F. Domestic Relations Law and Beneficiary Designations.....	5-40
G. Suits by Service Providers and Plans.....	5-42
H. Defenses in Collection Suits	5-43
I. State Health Care Reform	5-44
 CHAPTER 6 ENUMERATED PARTIES	 6-1
I. Overview.....	6-2
II. Statutory Language.....	6-3
ERISA Section 3(7), [Definition of Participant]	6-3
ERISA Section 3(8), [Definition of Beneficiary]	6-3
ERISA Section 3(21), [Definition of Fiduciary]	6-3
ERISA Section 402(a), Establishment of Plan	6-4
ERISA Section 502(a), Civil Enforcement.....	6-4
III. Enumerated Parties	6-5
A. Participants and Beneficiaries.....	6-7
1. In General.....	6-7
2. Participants	6-8
3. Employees and Former Employees.....	6-9
4. Beneficiaries.....	6-10
B. Fiduciaries.....	6-11
1. In General.....	6-11
2. Statutory Fiduciaries	6-14
a. In General	6-14
b. Investment Managers and Those Who Render Investment Advice	6-16
3. Former Fiduciaries	6-19
C. Secretary of Labor.....	6-20
IV. The Importance of Alleging Status as an Enumerated Party	6-20
V. General Principles Courts Apply in Determining Fiduciary Status	6-21
A. Functional Realities Control Fiduciary Status	6-22
B. Fiduciary Status Exists to the Extent That the Person Acts in a Fiduciary Capacity	6-24
C. Engaging in Ministerial Acts Does Not Confer Fiduciary Status.....	6-25
D. Fiduciary Status Is Determined by an Objective Standard	6-26
VI. Special Situations	6-27

A. De Facto Fiduciaries	6-27
B. Service Providers Other Than Investment Managers.....	6-31
C. Persons With Authority to Appoint Trustees.....	6-31
D. Employers That Sign Securities and Exchange Commission Filings	6-32
E. Pension Benefit Guaranty Corporation	6-33
F. Derivative Suits	6-33
G. Fiduciary Status of Delinquent Employers.....	6-34
 CHAPTER 7 STANDING.....	7-1
I. Overview.....	7-2
Figure 7-1. Who Can Sue Under ERISA?.....	7-3
II. Statutory Language.....	7-6
ERISA Section 502(a), (b), Civil Enforcement	7-6
III. Standing to Sue Under ERISA	7-8
A. Constitutional Standing.....	7-8
1. Actual Injury	7-9
a. Type of Plan.....	7-11
i. Defined Benefit Plans.....	7-11
ii. Defined Contribution Plans	7-13
b. Remedies Sought.....	7-13
i. Monetary Damages, Declaratory Relief, Restitution, and Disgorgement.....	7-14
ii. Nonmonetary Injunctive Relief.....	7-16
iii. Injunctive Relief	7-16
iv. Combined Equitable and Injunctive Relief	7-17
2. Causal Connection	7-18
3. Redressable Injury.....	7-19
B. Prudential Standing.....	7-20
C. Statutory Standing.....	7-22
IV. When Is Standing Determined?.....	7-24
A. Former Employees and Cashed-Out Participants	7-25
B. Employees.....	7-29
C. Beneficiaries.....	7-30
V. Burden of Proof	7-32
VI. Standard of Review.....	7-33
 CHAPTER 8 DERIVATIVE AND OTHER STANDING	8-1
I. Overview.....	8-2
Figure 8-1. Nonenumerated Parties Who Have Implied Standing to Sue Under ERISA.....	8-3
II. Statutory Language.....	8-3
ERISA Section 502(d)(1), Status of Employee Benefit Plan as Entity.....	8-3
III. Standing of Nonenumerated Parties	8-3
A. Plan	8-4
B. Employer	8-5
1. In General.....	8-5

2. As a Fiduciary	8-5
3. For Return of Mistaken Contributions	8-6
C. Does a Union Have Standing to Sue?	8-8
IV. Derivative Standing.....	8-9
A. Assignees	8-9
B. Derivative Standing for Delinquent Contributions	8-15
C. Creditors.....	8-15
D. Representational Standing	8-15
V. Burden of Proof	8-18
VI. Standard of Review.....	8-18
 CHAPTER 9 POTENTIAL DEFENDANTS.....	 9-1
I. Overview.....	9-2
II. Statutory Language.....	9-2
ERISA Section 502(a) and (c), Civil Enforcement. See Chapter 4, Causes of Action, at Section II.....	9-2
ERISA Section 502(d)(1) and (2), Status of Employee Benefit Plan as Entity	9-2
III. Defendants in Specific Causes of Action.....	9-2
A. Denial of Benefits	9-2
1. The Plan, Plan Administrator, and Trustees	9-3
2. Third-Party Administrators and Insurers.....	9-6
3. The Employer.....	9-8
4. De Facto Plan Administrators	9-9
5. Miscellaneous.....	9-9
B. Statutory Penalties	9-10
Figure 9-1. Statutory Civil Penalties That Can Be Sought by Participants and Beneficiaries.....	9-11
Figure 9-2. Statutory Civil Penalties That Can Be Sought by the Secretary	9-13
C. Breach of Fiduciary Duty.....	9-20
D. Equitable Relief	9-22
E. Failure to Furnish a Statement of Accrued Benefits	9-25
F. Enforcing Plan Compliance With a Qualified Medical Child Support Order.....	9-25
G. Purchase of “Executive Life”-Type Annuities.....	9-26
H. Judicial Review of Actions by the Secretary of Labor.....	9-26
I. Intervention in Action Brought by the Secretary	9-26
J. Discrimination.....	9-26
 CHAPTER 10 REMEDIES	 10-1
I. Overview.....	10-2
II. Statutory Language.....	10-3
ERISA Section 409, Liability for Breach of Fiduciary Duty	10-3
ERISA Section 502(a), Civil Enforcement. See Chapter 6, Enumerated Parties, at Section II.....	10-3
III. Available Remedies	10-3

A. Remedies in Actions to Recover Benefits Under Section 502(a)(1)(B)	10-3
1. Remedies Following a Favorable Decision on the Merits	10-3
2. Remedy for a Procedural Error	10-4
3. Effect of a Plaintiff's Death on a Claim Under Section 502(a)(1)(B)	10-6
B. Remedies to Recover for Fiduciary Breaches Under Sections 502(a)(2) and 409	10-6
1. Who May Obtain Relief Under Section 502(a)(2)?	10-6
2. Removal Under Section 409 and Other Equitable Remedies	10-9
3. Measuring Damages Under Section 502(a)(2)	10-10
C. Remedies Under Section 502(a)(3)	10-10
1. Individual Relief Under Section 502(a)(3)	10-11
2. Appropriate Equitable Relief	10-11
a. Restitution	10-12
b. Surcharge	10-16
c. Injunctive Relief	10-20
d. Reformation	10-22
e. Equitable Estoppel	10-24
f. Rescission	10-25
g. Disgorgement and Accounting for Profits	10-26
D. Remedies Under Section 502(a)(5)	10-27
E. Prejudgment Interest	10-27
F. Remedies Available to Redress Failure to Provide Information	10-29
G. Other Statutory Remedial Provisions	10-35
1. Civil Penalties	10-35
2. Enforcement of Qualified Medical Child Support Orders	10-36
3. Defined Benefit Plan Funding Notices	10-36
4. Relief With Respect to Insurance Annuity Purchases	10-37
5. Restraint and Mandamus	10-37
6. Penalties for Section 206(e) Violations	10-38
CHAPTER 11 PRELIMINARY RELIEF	11-1
I. Overview	11-2
II. Statutory Language	11-3
Federal Rules of Civil Procedure, Rule 65(a) and (b), Injunctions and Restraining Orders	11-3
III. Standard for Obtaining Preliminary Relief	11-4
A. Standard for Preliminary Relief, in General	11-4
1. First Circuit	11-4
2. Second Circuit	11-4
3. Third Circuit	11-5
4. Fourth Circuit	11-6
5. Fifth Circuit	11-6

6. Sixth Circuit	11-6
7. Seventh Circuit	11-7
8. Eighth Circuit	11-7
9. Ninth Circuit	11-8
10. Tenth Circuit	11-8
11. Eleventh Circuit	11-9
12. D.C. Circuit	11-9
B. Demonstrating Irreparable Injury to the Plaintiff	11-9
1. Denial of Health Care Benefits	11-10
2. Plaintiff Injury Premised on the Defendant's Poor Financial Condition	11-13
3. Other Examples of Irreparable Harm	11-14
C. Balancing of Hardships	11-15
D. Demonstrating a Likelihood of Success on the Merits	11-16
E. Equity and Public Policy Considerations	11-18
IV. Standard of Review	11-19
CHAPTER 12 STATUTES OF LIMITATIONS	12-1
I. Overview	12-2
II. Statutory Language	12-2
ERISA Section 413, Limitation of Actions	12-2
ERISA Section 4003(e)(6), Operation of [PBGC]; Civil Actions by [PBGC]; . . . Limitation on Actions	12-3
ERISA Section 4301(f), Civil Actions [Multiemployer Plans]	12-3
III. Limitation Period	12-3
A. ERISA Section 502(a)(1)(B) Claims	12-3
Figure 12-1. State Law Limitation Periods for Contracts	12-5
B. ERISA Section 502(a)(3) Through (9) Claims	12-12
C. ERISA Section 502(c) Claims	12-13
D. ERISA Section 510 Claims	12-14
Figure 12-2. ERISA Section 510—Analogous State Limitation Periods	12-16
E. ERISA Section 515 Claims	12-19
F. Breach of Fiduciary Duty Claims	12-20
1. Six-Year Limitation Period	12-21
2. Three-Year Limitation Period	12-23
3. Separate Limitation Period for Fraud or Concealment	12-27
G. Pension Benefit Guaranty Corporation Cases	12-29
H. Withdrawal Liability Cases	12-30
I. COBRA Cases	12-30
J. Subrogation Cases	12-30
IV. Accrual and Tolling	12-31
A. Accrual	12-31
1. Benefit Denial Claims	12-31
2. Claims Alleging Interference With Protected Rights	12-34
3. Claims Alleging Breach of Fiduciary Duties	12-35
4. Miscellaneous Claims	12-36
5. Continuing Violations	12-37

B. Tolling	12-40
1. No Tolling During Filing in Inappropriate Forum	12-40
2. No Tolling During Negotiations	12-41
3. Tolling During Exhaustion of Internal Remedies	12-41
4. Tolling Due to Fraudulent Concealment	12-42
5. Tolling Due to Incompetence and Other Conditions.....	12-43
C. Contraction of Statute of Limitations	12-44
D. Relation Back to Original Pleading	12-48
V. Burden of Proof	12-49
VI. Equitable Estoppel and Laches	12-50
VII. Choice of Law.....	12-51
VIII. Standard of Review.....	12-52
CHAPTER 13 EXHAUSTION OF REMEDIES	13-1
I. Overview.....	13-2
II. Statutory Language.....	13-3
ERISA Section 503, Claims Procedure	13-3
III. Exhaustion Requirement.....	13-3
A. Claims Denial Cases	13-3
1. When Is Exhaustion Required?.....	13-3
2. What Qualifies as Exhaustion?	13-5
B. Statutory Violation Cases.....	13-5
IV. Exceptions to the Exhaustion Requirement.....	13-7
A. The Claims Procedure Regulation’s “Deemed Exhausted” Exception	13-7
1. The Claims Procedure Regulation and Its Interpretation Prior to the “Strict Adherence” Amendment	13-8
2. The “Strict Adherence” Amendment.....	13-10
3. The Administrative Record on Review	13-11
B. Other Exceptions to the Exhaustion Requirement.....	13-12
1. Futility	13-13
a. Futility Not Found	13-14
b. Futility Found	13-15
2. Lack of Meaningful Access.....	13-17
a. Where the Plan Withholds Necessary Information.....	13-18
b. Where the Participant Cannot Reasonably Understand the Requirements.....	13-19
c. Where Egregious Circumstances Exist.....	13-20
3. Irreparable Harm	13-20
4. Permissive Internal Appeals	13-21
5. Reverse Exhaustion	13-22
V. Exhaustion as an Affirmative Defense.....	13-22
VI. Standard of Appellate Review	13-24
CHAPTER 14 SUBJECT MATTER JURISDICTION	14-1
I. Overview.....	14-2
II. Statutory Language.....	14-2

28 U.S.C. §1331, [Original Jurisdiction of the District Courts]	14-2
ERISA Section 502(e)(1), Civil Enforcement: [Exclusive and Concurrent Jurisdiction]	14-3
ERISA Section 502(f), Civil Enforcement: [Jurisdiction Notwithstanding] Amount in Controversy; Citizenship of Parties.....	14-3
III. Federal Court Subject Matter Jurisdiction.....	14-3
A. Federal Court Subject Matter Jurisdiction Generally	14-3
1. Jurisdiction Over ERISA Claims	14-3
2. Jurisdiction Over Related State Law Claims.....	14-5
B. Circumstances Where the Federal Courts May Lack Subject Matter Jurisdiction	14-6
1. The Case Does Not Involve Resolution of an ERISA Claim	14-7
2. The Case Does Not Involve an ERISA Plan	14-8
3. Status as an Enumerated Party	14-10
4. The Cause of Action Arose Prior to the Effective Date of ERISA	14-12
5. The Plaintiff Does Not Seek a Remedy Available Under ERISA	14-13
C. Consequences of the Lack of Federal Subject Matter Jurisdiction.....	14-14
IV. Concurrent State Court Jurisdiction	14-14
V. Standard of Review.....	14-15
VI. Burden of Proof	14-15
CHAPTER 15 SERVICE OF PROCESS	15-1
I. Overview.....	15-2
II. Statutory Language.....	15-2
ERISA Section 502(d)(1), Status of Employee Benefit Plan as Entity.....	15-2
ERISA Section 502(e)(2), Jurisdiction	15-3
ERISA Section 502(h), Service Upon Secretary of Labor and Secretary of the Treasury	15-3
ERISA Section 4301(d), Venue and Service of Process	15-3
Federal Rules of Civil Procedure Rule 4(e), Serving an Individual Within a Judicial District of the United States	15-3
Federal Rules of Civil Procedure Rule 4(h), Serving a Corporation, Partnership, or Association	15-4
Federal Rules of Civil Procedure Rule 4(k), Territorial Limits of Effective Service	15-4
Federal Rules of Civil Procedure Rule 12(b), How to Present Defenses	15-4
Federal Rules of Civil Procedure Rule 12(h)(1), Waiving and Preserving Certain Defenses	15-5
III. Service of Process.....	15-5
A. Nationwide Service of Process	15-5

1. Only Enumerated Parties Can Use Nationwide Service	15-7
2. Service on Nonparties	15-7
3. Worldwide Service	15-7
4. Service of Trial Subpoenas.....	15-8
B. How Service Is Made.....	15-8
1. Service on Plans	15-10
2. Service on Alter Egos.....	15-11
3. Service on Employers.....	15-12
C. Effect of Insufficient Service	15-13
D. Extension of Time for Service of Process.....	15-13
IV. Burden of Proof	15-14
CHAPTER 16 VENUE	16-1
I. Overview.....	16-2
II. Statutory Language.....	16-3
ERISA Section 502(e)(2), [General Venue Provision]	16-3
ERISA Section 502(k), Jurisdiction of Actions Against the Secretary of Labor	16-3
ERISA Section 4003(e)(2), [Venue for PBGC Cases]	16-3
ERISA Section 4007(c), [Venue for PBGC Civil Action to Recover Premium Penalty and Interest]	16-3
ERISA Section 4301(d), Venue and Service of Process [for Withdrawal Liability Cases]	16-3
28 U.S.C. §1404(a)–(c), Change of Venue	16-4
28 U.S.C. §1406(a), [Dismissal or Transfer for Venue Defect].....	16-4
Federal Rules of Civil Procedure Rule 12(h)(1), Waiving and Preserving Certain Defenses	16-4
III. Choice of Venue.....	16-4
A. Liberal Construction of Venue Provisions in ERISA Cases	16-4
B. Possible Venue Sites.....	16-6
1. Where Is the Plan Administered?.....	16-6
2. Where Did the Breach Occur?	16-7
a. Denial of Benefit Cases	16-7
b. Breach of Fiduciary Duty Cases.....	16-8
3. Where Does the Defendant Reside?.....	16-9
4. Where May Defendants Be Found?	16-9
a. <i>Varsic</i> : The Leading Case	16-9
b. Minimum Contacts	16-10
5. Forum Selection Clauses	16-11
C. Special Situations.....	16-15
1. Actions Against the Secretary of Labor	16-15
2. Withdrawal Liability and Shutdown Benefits	16-15
3. Assignees.....	16-16
IV. Motions to Transfer	16-17
A. Purpose.....	16-17
B. Court’s Discretion to Transfer.....	16-17
C. Deference Given to the Plaintiff’s Choice of Venue	16-19
D. Relevant Factors in Deciding Whether to Transfer	16-21

1. Convenience	16-26
a. Convenience of Parties	16-26
b. Convenience of Witnesses	16-26
c. Inconvenience in Benefits Claims To Be Decided on the Record.....	16-27
d. Convenience of Attorneys.....	16-28
2. Production of Documents.....	16-28
3. Interest of Justice.....	16-29
a. Financial Burdens	16-29
b. Obstacles to a Fair Trial.....	16-29
c. Possibility of Delay	16-30
d. Court's Familiarity With the Relevant Law	16-30
E. Appeal.....	16-31
V. Waiver of Improper Venue	16-32
VI. Dismissal for Lack of Venue.....	16-32
VII. Venue for Removed Cases	16-32
VIII. Burden of Proof	16-32
IX. Standard of Review.....	16-33
CHAPTER 17 PERSONAL JURISDICTION	17-1
I. Overview.....	17-2
II. Constitutional and Statutory Language	17-2
U.S. Constitution, Amendment V, [Due Process Clause]	17-2
Federal Rules of Civil Procedure Rule 4(k)(1)(C), [Jurisdiction Over Defendant as Authorized by Statute]	17-3
Federal Rules of Civil Procedure Rule 12(b), How to Present Defenses.....	17-3
Federal Rules of Civil Procedure Rule 12(h)(1), Waiving and Preserving Certain Defenses	17-3
III. Personal Jurisdiction.....	17-3
A. Majority View: National Contacts.....	17-3
B. Minority View: Minimum Contacts With the Forum State.....	17-7
C. Is the Exercise of Personal Jurisdiction Fair and Reasonable?	17-9
D. Pendent Personal Jurisdiction	17-9
IV. Withdrawal Liability Cases.....	17-10
V. Waiver of Personal Jurisdiction	17-11
VI. Burden of Proof	17-12
VII. Standard of Review.....	17-13
CHAPTER 18 JURY TRIALS	18-1
I. Overview.....	18-2
II. Availability of Jury Trial Under ERISA	18-3
A. Actions for Benefits Under ERISA Section 502(a)(1)(B)	18-3
B. Actions for Breach of Fiduciary Duty Under ERISA Section 502(a)(2)	18-5
C. Actions for Injunctions or Other Equitable Relief Under ERISA Section 502(a)(3).....	18-6

D. Actions for Interference or Retaliation Under ERISA	
Section 510.....	18-7
E. Actions for Delinquent Contributions Under ERISA	
Section 515.....	18-7
F. Actions Raising Both Labor Management Relations Act and ERISA Claims.....	18-8
1. Retiree Health Claims	18-8
2. Delinquent Contributions	18-10
G. Advisory Juries and Jury Trials by Consent	18-10
III. Standard of Review.....	18-11
CHAPTER 19 ATTORNEYS' FEES	19-1
I. Overview.....	19-2
II. Statutory Language.....	19-2
ERISA Section 502(g), Civil Enforcement	19-2
ERISA Section 4070(e), Enforcement Authority Relating to Terminations of Single-Employer Plans	19-2
ERISA Section 4221(a)(2), [Arbitration of Disputes over Withdrawal Liability].....	19-3
ERISA Section 4301, [Actions Relating to Withdrawals from Multiemployer Plans].....	19-3
III. Fee-Shifting in ERISA Cases	19-3
A. Jurisdiction.....	19-3
B. ERISA Section 502(g)(1).....	19-4
C. ERISA Section 502(g)(2).....	19-5
D. Other ERISA Fee Provisions	19-6
E. Non-ERISA Statutes and Rules	19-7
IV. Determining Whether to Award Discretionary Attorneys' Fees	19-7
A. Discretionary Attorneys' Fees Before <i>Hardt</i>	19-8
B. Discretionary Attorneys' Fees After <i>Hardt</i>	19-9
V. Calculating a "Reasonable" Fee Award	19-10
A. The Lodestar Approach.....	19-11
B. Percentage of Recovery as an Alternative to the Lodestar Approach.....	19-13
C. Services That May Be Covered in a Fee Award.....	19-14
VI. Procedural Considerations	19-16
A. Timing the Attorneys' Fee Request.....	19-16
B. Proof Required to Support the Attorneys' Fee Request.....	19-17
VII. Costs	19-17
VIII. Standard of Review.....	19-18
CHAPTER 20 STANDARD OF REVIEW FOR ADVERSE BENEFIT DETERMINATIONS	20-1
I. Overview.....	20-3
II. <i>Firestone Tire & Rubber Co. v. Bruch</i>	20-5
A. The Standard of Review Before <i>Firestone</i>	20-5
B. The Standard of Review After <i>Firestone</i> : De Novo Versus Deferential Review.....	20-6

III. The Mechanics of Bestowing Discretion.....	20-7
A. Burden of Proof as to the Applicable Standard of Review	20-7
B. Language Necessary to Confer Discretion	20-7
C. Source of Discretionary Authority	20-13
1. Discretionary Authority Provision in the Formal Plan Document and Not in the Summary Plan Description	20-14
2. Discretionary Authority Provision in the Summary Plan Description and Not in the Formal Plan Document	20-15
D. Effective Delegation of Duly Reserved Discretion to a Third Party	20-18
1. Requirement for Express Delegatory Authority	20-18
2. Written Procedures to Effectuate Delegation.....	20-20
E. States’ Prohibition of Discretionary Authority Clauses.....	20-21
IV. De Novo Review	20-24
A. Evidence Courts May Consider on De Novo Review.....	20-24
1. ERISA De Novo Review Means a Plenary Review Without Limitation on the Evidence Considered	20-24
2. Admission of New Evidence on ERISA De Novo Review Is in the Discretion of the Trial Court	20-24
3. ERISA De Novo Review Means De Novo “Consideration” of the Same Evidence Before the Plan Administrator	20-25
4. ERISA De Novo Review Is Limited to the Administrative Record Absent Exceptional Circumstances	20-26
5. Admission of Extra-Record Evidence on ERISA De Novo Review Permissible Upon a Showing of “Good Cause”.....	20-28
B. The Mechanics of De Novo Review	20-28
V. Deferential Review	20-30
A. Reasonableness, Substantial Evidence, and Other Judicial Touchstones of Deferential Review	20-30
B. Evidence Courts May Consider on Deferential Review	20-37
1. Limiting Review to the Administrative Record.....	20-37
2. Exceptions Permitting Supplementation of the Administrative Record	20-39
C. Judicial Consideration of the Conflicted Administrator After <i>Metropolitan Life Insurance Co. v. Glenn</i>	20-44
1. Overview of <i>Glenn</i> : The “Combination of Factors” Standard of Review	20-44
2. <i>Conkright v. Frommert</i> : “People Make Mistakes”	20-47
3. Appellate Cases Post- <i>Glenn</i>	20-48
a. First Circuit.....	20-49
b. Second Circuit	20-51
c. Third Circuit	20-53
d. Fourth Circuit	20-55
e. Fifth Circuit	20-56
f. Sixth Circuit.....	20-60

g. Seventh Circuit	20-64
h. Eighth Circuit	20-66
i. Ninth Circuit	20-69
j. Tenth Circuit	20-74
k. Eleventh Circuit	20-78
l. D.C. Circuit	20-81
D. Loss (or Other Impairment) of Deferential Review	20-81
1. Where an Unauthorized Party Acts for the Plan	20-81
2. Untimely or Other Procedurally Deficient Appeal Determinations	20-82
3. De Novo Review as a Remedy for “Flagrant” Procedural Violations	20-87
4. Curing Less Egregious Procedural Violations	20-87
5. The Standard of Review Following Remand to the Administrator	20-90
E. ERISA Common Law Rules of Construction Affecting the Standard of Review	20-90
1. Contra Proferentem	20-90
a. First Circuit	20-92
b. Second Circuit	20-92
c. Third Circuit	20-93
d. Fourth Circuit	20-94
e. Fifth Circuit	20-94
f. Sixth Circuit	20-94
g. Seventh Circuit	20-95
h. Eighth Circuit	20-95
i. Ninth Circuit	20-96
j. Tenth Circuit	20-97
k. Eleventh Circuit	20-97
l. D.C. Circuit	20-98
2. The Doctrine of Reasonable Expectations	20-98
VI. The Standard of Review for “Top Hat” Plans	20-100
 CHAPTER 21 PRETRIAL DISCOVERY IN ERISA BENEFITS CASES	21-1
I. Overview	21-1
II. Discovery in Cases Applying De Novo Review	21-3
III. Discovery in Cases Applying Arbitrary and Capricious or Abuse of Discretion Review	21-5
A. Effect of Structural Conflict of Interest	21-7
B. Limited Conflict Discovery Allowed	21-8
C. Scope of Limited Discovery	21-12
1. Post- <i>Glenn</i> Conflict Discovery	21-12
2. 2015 Amendments to Federal Rules of Civil Procedure	21-14
D. Quantum of Permissible Discovery	21-14
E. Conflict Discovery Prohibited	21-16
IV. Discovery for Other Purposes	21-18
V. Standard of Review	21-19

CHAPTER 22	ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT	
	DOCTRINE	22-1
I.	Overview	22-1
II.	The Fiduciary Exception to the Attorney-Client Privilege	22-2
III.	Privilege and Work Product in the Context of an ERISA Litigation Claim	22-9
IV.	The Government’s Right to Assert the Trustee-Beneficiary Exception	22-13
CHAPTER 23	CLASS ACTIONS.....	23-1
I.	Overview.....	23-2
II.	Statutory Language	23-3
	Federal Rules of Civil Procedure Rule 23(a), (b), (f), Class Actions	23-3
III.	Requirements of Federal Rule 23(a).....	23-4
A.	Rule 23(a)(1): Numerosity	23-4
B.	Rule 23(a)(2): Commonality	23-6
C.	Rule 23(a)(3): Typicality.....	23-9
D.	Rule 23(a)(4): Adequacy of Representation.....	23-12
IV.	Requirements of Federal Rule 23(b)	23-14
A.	Rule 23(b)(1).....	23-15
B.	Rule 23(b)(2).....	23-17
C.	Rule 23(b)(3)	23-20
V.	Particular ERISA Class Action Claims.....	23-22
A.	Claims for Benefits Under ERISA Section 502(a)(1)(B)	23-22
B.	Disclosure, Misrepresentation, and Prudence Claims Under ERISA Section 502(a)(2) and (a)(3)	23-24
C.	Suits to Enforce Plan and Statutory Provisions	23-30
VI.	ERISA Class Action Defenses.....	23-31
A.	Lack of Standing	23-31
B.	Class Members Have Signed Releases	23-33
C.	Self-Directed Plans Under ERISA Section 404(c)	23-35
D.	Failure of Nonparty Class Members to Exhaust Administrative Remedies	23-37
	1. Courts Recognizing Vicarious Exhaustion by the Class Representative	23-37
	2. Cases Rejecting Vicarious Exhaustion	23-38
VII.	Appellate Review of Ruling on Class.....	23-41
VIII.	Class Certification Experts	23-43
IX.	Settlement of ERISA Class Actions	23-46
A.	The Department of Labor Class Exemption	23-46
B.	The Class Action Fairness Act of 2005.....	23-46

PART II PENSION, MEDICAL, AND OTHER BENEFITS

CHAPTER 24	THE AFFORDABLE CARE ACT AND ERISA LITIGATION	24-1
I.	Overview of the Affordable Care Act	24-2
II.	Statutory Language.....	24-3

ERISA Section 715, Additional Market Reforms.....	24-3
Fair Labor Standards Act (FLSA) §18, 29 U.S.C. §218c, added by PPACA Section 1558, Protections for Employees	24-4
III. ERISA Enforcement of ACA Mandates	24-4
IV. Constitutional and Statutory Litigation Challenging the ACA.....	24-6
A. Challenges to the Individual Mandate and Medicaid Expansion.....	24-6
B. Contraceptive Coverage Cases.....	24-7
C. Other Challenges.....	24-9
V. Employer Coverage Mandates and Exposure to ERISA Liability	24-11
A. Exceptions for Plans With Grandfathered Status.....	24-11
B. Essential Health Benefits	24-12
C. Mental Health Benefits and the Federal Parity Act.....	24-14
VI. ACA External Review Requirements	24-15
A. Pre-ACA Claims Procedures Under ERISA.....	24-16
B. The ACA’s External Review Requirements	24-16
C. Are IROs Subject to ERISA Fiduciary Duties?.....	24-18
D. Does ERISA’s Deferential Standard of Review Apply to IROs?	24-19
VII. Employers and Health Insurance Exchanges.....	24-20
A. Benefit Strategies Involving Exchanges	24-21
B. Potential Litigation Involving Exchanges and “Soft Landings”	24-21
1. Vested Benefits and Reasonable Modifications	24-21
2. Misrepresentation Claims Regarding Exchanges and Preemption Issues.....	24-22
3. Statutory Reporting and Disclosure Claims and Issues	24-22
4. Selecting Specific Exchanges and Avoiding Prohibited Transactions.....	24-23
5. Implementation Challenges.....	24-23
6. Duty to Monitor, Co-fiduciary Liability, and Benefit Claims	24-24
VIII. Section 510 and Workforce Restructuring.....	24-24
A. The ACA’s “Pay or Play” Mandate and Whistleblower Protections.....	24-25
B. Restructuring to Avoid the ACA’s “Pay or Play” Mandate and Potential ERISA Section 510 Claims	24-26
IX. The ACA’s Whistleblower Protections	24-27
A. Statutory Provision.....	24-27
B. Claims Procedures	24-28
C. Burden-Shifting Framework	24-28
D. Arbitration Prohibited; Remedies	24-29
 CHAPTER 25 WRONGFUL DENIAL OF BENEFITS	 25-1
I. Overview.....	25-2
II. Statutory Language.....	25-3
ERISA Section 502(a)(1)(B), Civil Enforcement.....	25-3
III. Procedural Matters Regarding Benefit Denials	25-4

A.	Limitation Periods by Contract	25-4
1.	Contractual Limitations on Lawsuits	25-4
2.	Contractual Limitations on Filing Claims	25-5
B.	Notification of the Basis for the Denial	25-5
C.	Right to Internal Appeal	25-7
D.	Exhaustion	25-8
E.	Waiver of Grounds for Denial	25-9
F.	Record on Appeal	25-10
G.	Remand	25-10
IV.	Benefit Denial Litigation	25-11
A.	Health Care Plans	25-11
1.	Eligibility for Coverage Under the Plan	25-13
2.	Experimental or Investigational Treatment	25-15
3.	Medical Necessity	25-16
4.	Usual, Reasonable, and Customary Charges	25-16
5.	Preexisting Conditions	25-17
6.	Treatment of Illness/Provision of Medical Care	25-19
7.	Efforts to Seek Preliminary Injunctions to Prevent Benefit Denials	25-20
B.	Severance Plans	25-20
1.	What Constitutes Cause?	25-22
2.	Change in Control and Constructive Discharge	25-24
3.	Effect of Violation of ERISA's Disclosure Requirements	25-27
4.	Informal and Implied Severance Plans	25-27
C.	Pension Plans	25-27
1.	Participant Entitlement to Benefits	25-27
2.	Calculation of Benefit Amount	25-30
3.	Break-in-Service Rules	25-32
4.	Suits for Vested Benefits Following Plan Termination	25-33
V.	Standard of Review	25-33
CHAPTER 26	DISABILITY BENEFIT CLAIMS	26-1
I.	Overview	26-2
Figure 26-1.	Sources and Characteristics of Disability Coverage	26-4
II.	Pre-litigation Considerations	26-6
A.	Exhaustion of Administrative Remedies	26-6
B.	Administrative Claim and Review Procedures	26-7
C.	Limitation Periods for Disability Claim Litigation	26-12
III.	Litigation Considerations	26-14
A.	Eligibility and Coverage	26-14
B.	Discovery	26-15
C.	Standard of Review and Plan Interpretation Issues	26-17
D.	Treating Doctors Versus Reviewing Doctors	26-18
E.	Evidence of Disability	26-19
1.	The Meaning of "Disabled"	26-19
2.	Vocational Evidence	26-20
3.	Defining "Occupation"	26-21

IV. Relationship Between Social Security Disability Insurance and ERISA	26-23
V. Specific Disabilities	26-25
A. Mental Disorders.....	26-25
B. Fibromyalgia, Chronic Fatigue Syndrome, Myofascial Pain Disorders, and Other Painful Conditions	26-26
VI. Disabled While Still Employed	26-28
VII. Continuing Disability Reviews	26-28
VIII. Offsets Against Disability Benefits.....	26-30
CHAPTER 27 LIFE AND ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE	27-1
I. Overview.....	27-2
II. Issues in Life Insurance Litigation	27-3
A. Interpleader	27-3
B. Preemption	27-4
1. State Laws and Divorce Decrees Regulating Beneficiary Designations	27-4
2. Converted and Ported Life Insurance Policies	27-5
C. Remedies.....	27-6
III. Frequently Litigated Issues Involving Accidental Death and Dismemberment Plans.....	27-7
A. What Is an “Accident”?.....	27-7
B. Common Exclusions	27-9
1. Suicide.....	27-9
2. Accident	27-10
3. Intoxication and Self-Inflicted Injury.....	27-11
C. Course of Employment	27-12
D. Medical Risk	27-12
CHAPTER 28 MANAGED CARE LITIGATION	28-1
I. Overview.....	28-2
II. Supreme Court Cases.....	28-2
A. Background.....	28-2
B. <i>Pegram v. Herdrich</i>	28-3
C. <i>Aetna Health Inc. v. Davila</i>	28-4
III. Quality and Quantity and Mixed Decisions.....	28-5
A. Preemption of Coverage Decisions, Including Eligibility and Quantity Claims	28-5
B. No Preemption of Quality of Benefit and Mixed Decisions.....	28-6
IV. Rate of Payment and Right of Payment Decisions	28-7
A. Preempted Right of Payment Claims.....	28-8
B. Nonpreempted Rate of Payment Claims.....	28-8
V. Negligence Cases After <i>Davila</i>	28-9
A. Negligence and Malpractice Cases Based on State Law	28-9
B. Negligent Misrepresentation Cases Based on State Law	28-10
C. Preemption of State Laws Imposed on MCOs.....	28-12
1. Preemption, In General	28-12

2. Laws Targeting MCOs Held Preempted.....	28-13
3. Laws Targeting MCOs and Insurers Held Not Preempted.....	28-13
CHAPTER 29 COBRA LITIGATION	29-1
I. Overview	29-2
II. Statutory Language.....	29-4
ERISA Section 601, Plans Must Provide Continuation Coverage to Certain Individuals.....	29-4
ERISA Section 602, Continuation Coverage.....	29-4
ERISA Section 603, Qualifying Event	29-6
ERISA Section 604, Applicable Premium.....	29-7
ERISA Section 605(a)(1)–(2), Election	29-8
ERISA Section 606, Notice Requirements.....	29-8
ERISA Section 607, Definitions and Special Rules	29-9
ERISA Section 609(a)(1), Additional Standards for Group Health Plans.....	29-10
ERISA Section 714, Coverage of Dependent Students on Medically Necessary Leave of Absence	29-11
III. Statutory Overview	29-12
A. Period of Coverage.....	29-13
B. Qualifying Events	29-13
C. Election Period.....	29-13
D. Notice.....	29-14
E. Applicable Premiums.....	29-14
IV. Coverage Requirements.....	29-14
A. Qualifying Events	29-16
1. Termination of Employment or Reduction of Hours	29-16
2. Gross Misconduct.....	29-18
3. Divorce or Legal Separation.....	29-21
4. Loss of Coverage Not Due to a Qualifying Event.....	29-22
B. Required Coverage.....	29-24
C. Period of Coverage.....	29-25
1. Statutory Period of Coverage	29-25
2. Termination Prior to End of Statutory Period of Coverage.....	29-26
3. Termination for Nonpayment of Premiums	29-26
4. Termination for Other Reasons	29-27
D. Conversion Rights Upon Termination of Coverage	29-28
E. Premiums	29-29
V. Notice Requirements	29-30
A. ERISA Section 606 Notice Requirements	29-30
1. Initial COBRA Notice.....	29-30
2. COBRA Election Notice	29-30
3. Furnishing of COBRA Notices	29-31
4. Notice Requirements	29-31
a. Employers.....	29-32
b. Employees and Other Qualified Beneficiaries	29-32

c. Plan Administrators	29-32
B. ERISA Section 102 Notice Requirements	29-33
C. No Notice Required	29-33
D. To Whom Must Notice Be Provided?	29-34
E. Who Is Required to Give Notice?	29-34
F. What Constitutes Adequate Notice?	29-35
1. Address and Delivery	29-35
2. Language and Writing Requirements	29-39
G. Timely Election of Coverage	29-40
VI. Corporate Transactions	29-40
VII. Remedies for COBRA Violations	29-42
A. Civil Penalties	29-44
B. Claims of Fiduciary Breach	29-48
C. Other Remedies for COBRA Notice Violations	29-50
VIII. Preventive Strategies to Avoid COBRA Litigation	29-52
IX. Other Aspects of COBRA Litigation	29-54
A. Exhaustion	29-54
B. Estoppel	29-54
C. Standing to Sue	29-55
CHAPTER 30 SPOUSAL RIGHTS	30-1
I. Overview	30-3
II. Statutory Language	30-3
ERISA Section 3(8), Definition of Beneficiary	30-3
ERISA Section 205(a)–(e)(1), Requirement of Joint and Survivor Annuity and Preretirement Survivor Annuity	30-3
ERISA Section 206(d)(1), (d)(3)–(5), Assignment or Alienation of Plan Benefits	30-9
ERISA Section 402(b)(4), Establishment of Plan	30-12
ERISA Section 404(a)(1)(D), Fiduciary Duties	30-12
ERISA Section 514(a), (b)(7), Other Laws	30-12
III. Definition of Spouse After <i>United States v. Windsor</i>	30-13
IV. QJSAs, QOSAs, QPSAs, QDROs, and QMCSOs	30-14
A. Qualified Joint and Survivor Annuities, Qualified Optional Survivor Annuities, and Qualified Preretirement Survivor Annuities	30-14
1. QJSA Requirements	30-14
a. Waivers	30-15
b. One-Year Marriage Requirement	30-16
c. Vesting	30-16
d. Exempt Plans	30-17
2. Qualified Optional Survivor Annuity	30-17
B. Qualified Domestic Relations Orders	30-18
C. Qualified Medical Child Support Orders	30-21
V. Qualification and Other QDRO Requirements	30-22
A. When the Right to Spousal Benefits Terminates	30-22
B. Can a Probate Order Be a QDRO?	30-22
C. Is There a Deadline for Obtaining a QDRO?	30-23

D. Continuing Nature of Distribution	30-25
E. Qualification Factors	30-26
1. Relation to Child Support, Alimony, or Marital Property Rights.....	30-27
2. Identification of Plan Participant.....	30-28
3. Provision of an Address.....	30-29
4. Specification of Amount or Percentage of the Participant’s Benefits.....	30-31
5. Specification of Number of Payments or Periods	30-32
6. Identification of the Plan	30-32
7. Limitation of Benefits to the Types Provided by the Plan.....	30-33
8. Limitation to the Amount of Benefits Provided by the Plan.....	30-34
9. Recognition of Previously Designated Alternate Payee.....	30-34
F. Looking Behind a QDRO	30-34
G. Which Courts Have Jurisdiction to Determine the Validity of a QDRO?.....	30-37
H. Waiver of Benefit Entitlement.....	30-38
I. Modification of QDROs.....	30-38
J. Miscellaneous Cases	30-39
VI. Preemption of Community Property Law.....	30-40
VII. Beneficiary Designation Cases	30-41
A. <i>Egelhoff v. Egelhoff</i>	30-41
B. Beneficiary Designation Issues.....	30-44
1. Waiver by Divorce or Settlement Agreement.....	30-45
2. Waiver by Prenuptial Agreement.....	30-47
3. Waiver by Litigation.....	30-48
4. Waiver by Murder.....	30-48
5. Waiver by Tax Levy.....	30-49
6. Waiver by Embezzlement.....	30-49
7. Beneficiary Designation Change by Will.....	30-50
C. Doctrine of Substantial Compliance	30-50
D. Imposition of Constructive Trust	30-53
E. Breach of Fiduciary Duty.....	30-55
F. Individual Retirement Accounts.....	30-56
G. Miscellaneous Cases	30-56
VIII. Standard of Review.....	30-58
CHAPTER 31 RETIREE WELFARE BENEFITS.....	31-1
I. Overview.....	31-2
II. Retiree Welfare Benefits Under ERISA	31-3
A. Collectively Bargained Plans	31-5
1. The Historical Circuit Split: The Life and Death of <i>Yard-Man</i>	31-5
2. <i>M&G Polymers USA, LLC v. Tackett</i>	31-6
B. Nonunion Plans.....	31-8

- C. Reservation-of-Rights Clauses and Burden of Persuasion 31-9
- D. Cases Relying on SPDs..... 31-11
- E. ERISA’s Fiduciary Standards and Retiree Benefit Termination 31-12
- III. Survey of Current Circuit Court Cases 31-13
 - A. First Circuit 31-13
 - 1. Cases Involving Unionized Workforces 31-13
 - 2. Cases Involving Nonunionized Workforces 31-13
 - B. Second Circuit..... 31-13
 - 1. Cases Involving Unionized Workforces 31-13
 - 2. Cases Involving Nonunionized Workforces 31-15
 - C. Third Circuit..... 31-15
 - 1. Cases Involving Unionized Workforces 31-15
 - 2. Cases Involving Nonunionized Workforces 31-16
 - D. Fourth Circuit..... 31-16
 - 1. Cases Involving Unionized Workforces 31-16
 - 2. Cases Involving Nonunionized Workforces 31-18
 - E. Fifth Circuit..... 31-18
 - 1. Cases Involving Unionized Workforces 31-18
 - 2. Cases Involving Nonunionized Workforces 31-19
 - F. Sixth Circuit 31-20
 - 1. Cases Involving Unionized Workforces 31-20
 - 2. Cases Involving Nonunionized Workforces 31-23
 - G. Seventh Circuit..... 31-24
 - 1. Cases Involving Unionized Workforces 31-24
 - 2. Cases Involving Nonunionized Workforces 31-26
 - H. Eighth Circuit..... 31-27
 - 1. Cases Involving Unionized Workforces 31-27
 - 2. Cases Involving Nonunionized Workforces 31-28
 - I. Ninth Circuit 31-28
 - 1. Cases Involving Unionized Workforces 31-28
 - 2. Cases Involving Nonunionized Workforces 31-29
 - J. Tenth Circuit 31-29
 - 1. Cases Involving Unionized Workforces 31-29
 - 2. Cases Involving Nonunionized Workforces 31-30
 - K. Eleventh Circuit 31-30
 - 1. Cases Involving Unionized Workforces 31-30
 - 2. Cases Involving Nonunionized Workforces 31-30
 - L. D.C. Circuit..... 31-30

PART III ISSUES UNIQUE TO PENSION PLANS

- CHAPTER 32 DEFINED BENEFIT PLAN INVESTMENTS 32-1
 - I. Overview..... 32-2
 - II. Statutory Language..... 32-2
 - ERISA Section 404(a), (b), Fiduciary Duties 32-2
 - ERISA Section 406, Prohibited Transactions 32-3

ERISA Section 408(a), (b)(1)–(3), Exemptions From Prohibited Transactions	32-4
III. Application of Statutory Fiduciary Standards to Plan Investment Issues	32-5
A. Duty of Loyalty	32-5
B. Duty of Prudence	32-8
C. Duty of Diversification	32-14
D. Duty to Act in Accordance With Plan Documents	32-17
IV. Prohibited Transactions in Plan Investments	32-18
A. Transactions Between a Plan and a Party in Interest	32-20
B. Fiduciary Self-Dealing	32-21
C. Fiduciary Acting on Behalf of a Party With Interests Adverse to Those of the Plan	32-23
D. Fiduciary Receiving Consideration for Its Personal Account From a Party Dealing With the Plan	32-23
V. Plan Expenses	32-24
CHAPTER 33 AMENDMENT AND TERMINATION OF PENSION PLANS	33-1
I. Overview	33-2
II. Statutory Language	33-3
ERISA Section 204(g), Benefit Accrual Requirements	33-3
ERISA Section 4041(a)(1), (b)(1), (c)(1), Termination of Single-Employer Plans	33-4
ERISA Section 4042(a), Authority to Institute Proceedings to Terminate a Plan	33-4
ERISA Section 4047, Restoration of Plans	33-5
ERISA Section 4061, Amounts Payable by [PBGC]	33-5
ERISA Section 4062, Liability for Termination of Single-Employer Plans Under a Distress Termination or a Termination by [PBGC]	33-5
ERISA Section 4068, Lien for Liability	33-13
ERISA Section 4069, Treatment of Transactions to Evade Liability; Effect of Corporate Reorganization	33-15
III. Plan Amendments	33-15
A. In General	33-15
B. Reduction of Accrued Benefits	33-19
1. Amendments Having the Effect of Reducing Accrued Benefits	33-19
2. Plan Amendment Versus Plan Interpretation	33-23
3. Reductions in Benefits Resulting From Acquisitions	33-24
4. Early Retirement Benefits and Retirement-Type Subsidies	33-25
5. Other Issues	33-27
C. Cash Balance Conversions	33-28
IV. Standard Termination Issues	33-30
V. Distress Termination Issues	33-34
A. Distress Termination Requirements	33-34
B. Termination Date	33-37

C. Controlled Group Liability	33-39
1. Membership in Contributing Sponsor's Controlled Group on Termination Date	33-39
2. Transactions to Evade Liability	33-41
D. Priority of Pension Benefit Guaranty Corporation Claim	33-42
E. Restoration	33-42
CHAPTER 34 FEES AND INVESTMENT PRUDENCE LITIGATION IN DEFINED CONTRIBUTION PLANS	34-1
I. Overview and Emerging Developments	34-2
II. General Characteristics of the Claims	34-3
A. General 401(k) and 403(b) Plan Cases	34-3
B. Proprietary Fund Cases	34-4
C. Gatekeeper Cases	34-5
III. Common Issues and Defenses in Excessive-Fee Litigation	34-6
A. Whether Plaintiffs State a Claim	34-6
B. Procedural and Substantive Prudence	34-9
1. Procedural Prudence	34-9
2. Substantive Prudence	34-11
C. Disclosure Duties Regarding Revenue Sharing and Fees	34-12
1. Regulatory Requirements	34-12
D. Section 404(c) Safe Harbor for Plan Fiduciaries	34-14
E. Class Certification	34-15
F. Statute of Limitations Defense	34-16
G. Damages and Other Relief Awarded	34-17
IV. Key Issues in Gatekeeper Cases	34-17
A. Fiduciary Status of Service Provider	34-17
B. Whether Revenue-Sharing Payments Are Plan Assets	34-20
C. Plaintiff's Standing to Bring a Claim	34-21
D. Class Certification	34-23
E. Guaranteed Benefit Policies	34-24

PART IV DISCRIMINATION

CHAPTER 35 EXECUTIVE COMPENSATION LITIGATION	35-1
I. Overview	35-2
II. Statutory Language	35-2
ERISA Section 3(1), Definition of Welfare Benefit Plan	35-2
ERISA Section 3(2)(A), Definition of Pension Benefit Plan	35-3
ERISA Section 3(36), Excess Benefit Plans	35-3
ERISA Section 4(a)(1), (b)(5), Coverage	35-3
ERISA Section 201(2), (7), Coverage	35-4
ERISA Section 301(a)(3), (a)(9), Coverage	35-4
ERISA Section 401(a)(1), Coverage	35-4
III. Types of Executive Compensation Arrangements	35-5
IV. Scope of ERISA Coverage of Executive Compensation Arrangements	35-5

- A. Does the Arrangement Provide Pension or Welfare Benefits?..... 35-6
- B. Has the Plan Been “Established or Maintained” by an Employer?..... 35-7
- C. Does the Agreement Constitute a “Plan”? 35-7
- D. ERISA Coverage Issues Raised by Executive Compensation Arrangements..... 35-8
 - 1. Stock Bonus Plans..... 35-8
 - 2. Severance Agreements 35-9
 - 3. Excess Benefit Plans 35-9
- V. Which ERISA Provisions Apply to Top Hat Plans 35-11
 - A. “Unfunded” Status 35-12
 - B. Primary Purpose..... 35-13
 - C. Providing Deferred Compensation 35-14
 - D. Select Group..... 35-14
 - E. Highly Compensated or Management Employees..... 35-15
 - F. Bargaining Power..... 35-15
- VI. Application of ERISA Procedural Rules to Top Hat Plans 35-16
 - A. ERISA Section 502(a)(1)(B)..... 35-16
 - B. ERISA Section 502(a)(2)..... 35-17
 - C. ERISA Section 502(a)(3)..... 35-18
- VII. Exhaustion of Administrative Remedies for Top Hat Plans 35-19
- VIII. Standard of Review in Top Hat Plan Cases 35-20
 - A. In General..... 35-20
 - 1. Third and Eighth Circuits..... 35-21
 - 2. Courts That Apply *Firestone Tire & Rubber Co. v. Bruch*: Fifth, Seventh, and Ninth Circuits 35-22
 - 3. The Fourth Circuit..... 35-23
 - B. Conflict-of-Interest Cases 35-24
- IX. Special Issues Raised in Top Hat Claims..... 35-24
 - A. Estoppel and Oral Agreements to Provide Benefits..... 35-24
 - B. Termination “For Cause” 35-25
 - C. Breach of Fiduciary Duty Counterclaims and Forfeiture of Rights..... 35-26
 - D. Executive Compensation Agreements That Contain Noncompetition Provisions..... 35-27
 - E. Knowing and Voluntary Waiver or Modification of Top Hat Plans 35-27
- CHAPTER 36 CONTINGENT WORKERS AND THE GIG ECONOMY 36-1
 - I. Introduction 36-2
 - II. Overview..... 36-2
 - III. Statutory Language..... 36-4
 - Code Section 401(a)(2), Qualified Pension, Profit-Sharing, and Stock Bonus Plans 36-4
 - Code Section 414(n), Definitions and Special Rules; Employee Leasing 36-4

ERISA Section 404(a)(1), Fiduciary Duties. See Chapter 41 (Fiduciary Duties Regarding 401(k) and ESOP Investments in Employer Stock), at Section II.....	36-7
ERISA Section 510, Interference With Protected Rights. See Chapter 37 (Interference With Protected Rights), at Section II.	36-7
IV. Benefit Eligibility as a Function of Worker Status	36-7
A. Favorable Treatment of Employee Benefit Plans Under the Internal Revenue Code.....	36-7
B. Tax Consequences of Misclassification	36-9
1. Consequences of Improperly Excluding Employees	36-9
2. Consequences of Improperly Including Independent Contractors	36-10
C. Who Is a “Common Law Employee” for Benefit Eligibility Purposes?	36-11
D. Who Is a Contingent Worker?.....	36-14
1. Independent Contractors	36-15
2. Benefit Claims and Misclassification: <i>Vizcaino v.</i> <i>Microsoft</i> and Its Progeny	36-15
3. Microsoft Inoculation Provisions	36-22
4. Procedural Issues.....	36-24
5. DOL Fiduciary Claims: <i>The Herman v. Time Warner Inc.</i> Litigation	36-25
6. Leased Employees.....	36-27
7. Case Law Treatment of Leased Employees’ Eligibility to Participate in a Service Recipient’s Plans	36-28
8. Part-Time, Temporary, and Seasonal Workers	36-33
V. Changes in Worker Status: ERISA Section 510 Claims.....	36-36
VI. Professional Employer Organizations: Who Is the Employer?	36-38
VII. Employer Shared Responsibility Under the Affordable Care Act	36-43
VIII. The Emergence of Gig Economy Workers	36-45
IX. Suggestions	36-46
 CHAPTER 37 INTERFERENCE WITH PROTECTED RIGHTS.....	 37-1
I. Overview.....	37-2
II. Statutory Language.....	37-3
ERISA Section 510, Interference With Protected Rights	37-3
ERISA Section 511, Coercive Interference	37-3
III. Construction of ERISA Section 510.....	37-3
A. Interference With Rights	37-3
B. Retaliation for Exercising ERISA Rights	37-4
C. Retaliation for Testimony or Inquiry.....	37-4
D. Specific Intent	37-6
E. Remedies.....	37-6
IV. Procedural Issues	37-6
A. Standing to Bring ERISA Section 510 Claims	37-6

- B. Permissible Defendants in ERISA Section 510 Cases..... 37-8
- C. Statute of Limitations..... 37-9
- D. Exhaustion of Administrative Procedures..... 37-10
- E. Standard of Judicial Review..... 37-11
- V. Analytical Framework for Proving and Defending ERISA
 - Section 510 Claims 37-11
 - A. Where There Is Circumstantial Evidence of Discriminatory Intent 37-12
 - 1. First Stage of the *McDonnell Douglas* Framework: Establishing an ERISA Section 510 Prima Facie Case 37-13
 - 2. Second Stage of the *McDonnell Douglas* Framework: Production by the Defendant of Legitimate Reasons for the Adverse Action 37-15
 - 3. Third Stage of the *McDonnell Douglas* Framework: Proving the Employer’s Proffered Reason Was Pretextual..... 37-16
 - B. Where There Is Direct Evidence of Discriminatory Intent 37-18
- CHAPTER 38 AGE DISCRIMINATION IN EMPLOYEE BENEFITS 38-1
 - I. Overview and Background 38-2
 - A. Age Discrimination in Employment Act..... 38-2
 - B. Older Workers Benefit Protection Act and Early Retirement Exceptions to the ADEA..... 38-4
 - II. Statutory Language 38-6
 - 29 U.S.C. §623(a), Employer Practices 38-6
 - 29 U.S.C. §623(f)(2), Lawful Practices; Age an Occupational Qualification; Other Reasonable Factors; Laws of Foreign Workplace; Seniority System; Employee Benefit Plans; Discharge or Discipline for Good Cause 38-6
 - 29 U.S.C. §623(i)(1)–(2), (10)(A), Employee Pension Benefit Plans; Cessation or Reduction of Benefit Accrual or of Allocation to Employee Account; Distribution of Benefits After Attainment of Normal Retirement Age; Compliance; Highly Compensated Employees 38-7
 - III. Age Discrimination in Employment Act Coverage 38-8
 - A. Who Is Covered by the ADEA?..... 38-8
 - B. Who Is Protected by the ADEA? 38-9
 - IV. Proving a Violation of the ADEA 38-10
 - A. Prima Facie Case 38-10
 - B. Disparate Treatment and Disparate Impact..... 38-12
 - V. Issues in Employee Benefits/ADEA Litigation 38-16
 - A. Former Employees 38-16
 - B. Ability to Reduce Benefits as Employees Age 38-17
 - C. Cash Balance Pension Plans 38-21
 - D. Age Discrimination Against Younger, Protected Employees..... 38-23
 - E. Offset of Benefits 38-24
 - F. Waivers and Releases 38-25

PART V FIDUCIARY DUTIES AND REMEDIES

CHAPTER 39	VIOLATION OF FIDUCIARY DUTY BY MISREPRESENTATION AND NONDISCLOSURE	39-1
I.	Overview.....	39-2
II.	Misrepresentation Claims	39-3
A.	Window Plans and the “Serious Consideration” Cases	39-3
1.	First-Generation Cases	39-4
2.	Second-Generation Cases.....	39-5
3.	Implications for Employers.....	39-10
B.	Individual Misrepresentation Claims	39-10
1.	<i>Varity Corp. v. Howe</i>	39-10
2.	Application of <i>Varity</i>	39-11
C.	Special Case of Disclosures in Summary Plan Descriptions	39-13
III.	“Failure to Disclose” Claims	39-15
A.	The Ever-Evolving and Expanding “Duty to Inform” Claims	39-15
1.	Trust Law Duties to Inform.....	39-15
2.	Judicial Application of Duties to Inform.....	39-16
3.	Limits on the Duty to Inform	39-21
B.	The Duty to Inform and Plan Interpretation	39-24
C.	The Duty to Inform and Processing Benefit Claims	39-25
IV.	Some Defenses	39-26
A.	Whether “Fiduciary” Communications Are Involved.....	39-26
1.	Potential Agency Defenses.....	39-26
2.	Fiduciary Versus Business Communications	39-28
B.	The “Equitable Remedies” Limitation.....	39-31
1.	Pre- <i>Amara</i> Limitations.....	39-31
2.	<i>CIGNA Corp. v. Amara</i>	39-34
C.	ERISA Preemption and Disclosure Claims	39-35
V.	Methods to Limit Exposure	39-37
VI.	Disclosure Claims Related to Plan Investments and Plan Assets	39-39
CHAPTER 40	ESTOPPEL AS A BASIS FOR RECOVERY FOR MISREPRESENTATION	40-1
I.	Overview.....	40-2
II.	Basic Elements of an Estoppel Claim.....	40-3
A.	First Circuit	40-4
B.	Second Circuit.....	40-5
C.	Third Circuit.....	40-6
D.	Fourth Circuit.....	40-7
E.	Fifth Circuit.....	40-8
F.	Sixth Circuit	40-8
G.	Seventh Circuit.....	40-9
H.	Eighth Circuit.....	40-9
I.	Ninth Circuit	40-10
J.	Tenth Circuit	40-10
K.	Eleventh Circuit	40-11

L. D.C. Circuit.....	40-12
III. Establishing the Elements of an Estoppel Claim.....	40-12
A. Detrimental Reliance	40-12
B. Material Representation.....	40-14
1. Definition of “Material”	40-15
2. Types of Representations	40-15
3. Actual Harm.....	40-16
C. Reasonable Reliance	40-17
1. Reservation-of-Rights Clauses.....	40-20
2. Inaccurate Summary Plan Descriptions	40-22
D. Ambiguous Plan Terms.....	40-24
1. Ambiguity in Written Plan Terms as a Condition to an Estoppel Claim	40-24
2. Exceptions to the General Rule.....	40-29
E. Extraordinary Circumstances Required	40-31
IV. Effect of Type of Plan	40-34
A. Pension Versus Welfare Plans	40-34
B. Single-Employer Versus Multiemployer Plans	40-34
 CHAPTER 41 FIDUCIARY DUTIES REGARDING 401(k) AND ESOP INVESTMENTS IN EMPLOYER STOCK.....	 41-1
I. Overview.....	41-2
II. Statutory Language.....	41-5
ERISA Section 404(a)–(c)(1)(A), Fiduciary Duties.....	41-5
ERISA Section 406, Prohibited Transactions.....	41-6
ERISA Section 407(a)(1), (a)(2), (b)(1), Limitation With Respect to Acquisition and Holding of Employer Securities and Employer Real Property by Certain Plans	41-7
III. Procedural Issues	41-7
A. Standing	41-8
B. Relationship Between the ERISA Case and the Securities Fraud Case	41-9
C. Federal Rule of Civil Procedure 9(b)’s “Plead Fraud With Particularity” Requirements for ERISA Fiduciary Claims	41-10
D. Class Actions on Behalf of the Plan Under ERISA Section 502(a)(2)	41-11
IV. Substantive Issues Common to Failure to Disclose and Prudent Investment Claims	41-13
A. Damages and Duties in Light of the Securities Laws’ “Disclose or Abstain” Rule	41-13
B. Directors and Officers and the Duty to Monitor	41-14
C. Company Status as a Plan Fiduciary.....	41-17
D. Directed Trustees and Plan Investments in Employer Stock	41-18
V. Prudent Investment Claims.....	41-21
A. The Distinction Between a Settlor and a Fiduciary in Regard to Plan Investments	41-21

B. The Standard of Prudence Regarding Investments in Employer Stock.....	41-21
C. Fund Selection Under ERISA Section 404(c)	41-27
VI. “Failure to Disclose” Claims	41-29
A. Communications and Fiduciary Status	41-29
B. Affirmative Disclosure Duties Regarding a Company’s Business and Financial Information.....	41-32
C. ERISA Section 404(c) as a Defense to Disclosure Claims.....	41-34
VII. Special Issues in ESOPs of Closely Held Companies.....	41-35
A. Valuing the Company’s Stock.....	41-37
B. Separating ESOP Administration From Company Management.....	41-44
C. Control of the Closely Held Company and of the ESOP.....	41-47
CHAPTER 42 CIVIL RICO.....	42-1
I. Overview.....	42-2
II. Statutory Language.....	42-3
18 U.S.C. §1962, Prohibited Activities.....	42-3
18 U.S.C. §1961(1), Definition of Racketeering Activity	42-3
18 U.S.C. §1961(3), Definition of Person	42-4
18 U.S.C. §1961(4), Definition of Enterprise.....	42-4
18 U.S.C. §1961(5), Definition of Pattern of Racketeering Activity	42-4
18 U.S.C. §1964(c), Civil Remedies	42-4
III. Activities Prohibited by RICO.....	42-4
IV. RICO’s Definitions	42-5
A. Racketeering Activity.....	42-5
B. Pattern of Racketeering Activity	42-6
C. Enterprise	42-6
D. Person.....	42-6
V. Elements of a Civil RICO Action	42-7
A. Establishing the Injury and Its Causation	42-7
1. Causation of the Injury	42-7
2. What Constitutes an Economic Injury for RICO Purposes	42-14
B. Identifying the Racketeering Acts.....	42-14
C. Establishing a Pattern of Racketeering Activity.....	42-15
D. Identifying the Enterprise	42-18
E. Participation in the Enterprise.....	42-25
F. Conspiracy to Violate RICO	42-27
G. Aiding and Abetting a RICO Violation.....	42-29
H. Vicarious Liability	42-30
VI. Procedural Issues	42-30
A. Time Limitations on Bringing Action.....	42-30
B. Arbitration of Civil RICO Claims.....	42-33
C. Effect of the McCarran-Ferguson Act.....	42-33

PART VI MULTIEmployer PLANS

CHAPTER 43	DELINQUENCY ACTIONS.....	43-1
I.	Overview.....	43-2
II.	Statutory Language.....	43-3
ERISA Section 502(a)(2), (3), Persons Empowered to Bring a Civil	Action.....	43-3
ERISA Section 502(g)(2), Civil Enforcement.....		43-3
ERISA Section 515, Delinquent Contributions.....		43-3
III.	Collection of Delinquent Employer Contributions Owed to	
Multiemployer Plans.....		43-4
A.	The Collective Bargaining Agreement.....	43-5
B.	Workers Covered Under the CBA.....	43-7
C.	Termination of the Obligation to Contribute.....	43-9
D.	The Right to Audit.....	43-10
E.	Plan Assets.....	43-12
F.	Potential Plaintiffs.....	43-13
G.	Potential Defendants.....	43-15
1.	Breaching Fiduciaries.....	43-15
2.	Alter Egos, Single Employers, and Joint Employers.....	43-16
3.	Successor Liability.....	43-19
4.	Individual Liability.....	43-20
5.	Sureties.....	43-22
H.	Collection Remedies Under ERISA.....	43-22
I.	Collection Remedies Under Other Laws.....	43-28
1.	Federal Laws.....	43-28
2.	State Laws.....	43-28
J.	Statute of Limitations.....	43-29
K.	Bankruptcy Considerations.....	43-30
L.	Defenses.....	43-32
M.	Burdens of Pleading and Proof.....	43-35
IV.	Withdrawal Liability.....	43-36
V.	Collection of Delinquent Contributions From Single Employers.....	43-36
A.	Timely Payment of Appropriate Amount.....	43-37
B.	Breach of Fiduciary Duty.....	43-38
C.	Remedies.....	43-40
D.	Parties to Prohibited Transactions.....	43-40
CHAPTER 44	SPECIAL RULES FOR MULTIEmployer PLANS.....	44-1
I.	Overview.....	44-3
II.	Statutory Language.....	44-6
ERISA Section 515, Delinquent Contributions.....		44-6
ERISA Section 4001(a)(3), (a)(8), (a)(10), (a)(11), and (b)(1),	Definitions.....	44-6
ERISA Section 4201, Withdrawal Liability Established; Criteria	and Definitions.....	44-7
ERISA Section 4202, Determination and Collection of Liability;	Notification of Employer.....	44-7

ERISA Section 4203(a), (b), (e), Complete Withdrawal	44-7
ERISA Section 4204(a), (b)(1), Sale of Assets	44-8
ERISA Section 4205(a), (b), Partial Withdrawals	44-9
ERISA Section 4212(a), (c), Obligation to Contribute.....	44-10
ERISA Section 4213(a), (c), Actuarial Assumptions	44-10
ERISA Section 4218, Withdrawal Not to Occur Merely Because of Change in Business Form or Suspension of Contributions During Labor Dispute	44-11
ERISA Section 4219(b), (c)(1)(A), (c)(1)(C), (c)(2), (c)(3), and (c)(5), Notice, Collection, etc., of Withdrawal Liability.....	44-11
ERISA Section 4221(a)–(d), Resolution of Disputes	44-13
ERISA Section 4225(a), (b), and (d), Limitation on Withdrawal Liability.....	44-14
ERISA Section 4301, Civil Actions.....	44-16
III. Complete Withdrawal and Partial Withdrawal.....	44-17
A. Identifying a Complete Withdrawal	44-17
1. Covered Operations.....	44-17
2. Obligation to Contribute.....	44-18
3. Rules for Specific Industries	44-21
B. Identifying a Partial Withdrawal	44-22
IV. Controlled Groups and Other “Employers”	44-23
A. The Pervasive Controlled Group Rule	44-23
1. Common Control.....	44-24
2. Trade or Business	44-25
3. Foreign Controlled Groups.....	44-27
B. Other Statutory and Nonstatutory Bases for “Employer” Status.....	44-28
1. Alter Egos.....	44-28
2. Personal Liability	44-28
3. Joint Employers.....	44-29
V. Changes in Ownership and Other Transactional Issues.....	44-30
A. Successor Liability Under ERISA for Stock Sales and Covered Reorganizations	44-30
B. Withdrawal Liability Resulting From Asset Sales	44-32
C. Other Possible Successorship Theories.....	44-33
D. Transactions to Evade or Avoid Liability.....	44-35
VI. Determining the Amount of an Employer’s Withdrawal Liability	44-35
A. Determining the Plan’s Unfunded Vested Benefits.....	44-36
B. Determining the Employer’s Allocable Share of Unfunded Vested Benefits.....	44-38
C. Adjustments to the Employer’s Allocable Share	44-39
VII. Dispute Resolution, Remedies, and Other Procedural Matters	44-42
A. Assessment of Withdrawal Liability	44-42
B. Mandatory Arbitration	44-43
1. Arbitration Proceedings	44-43
2. Judicial Review of Arbitration Awards.....	44-45
3. The Scope of Arbitral Jurisdiction	44-46
C. Interim Payments, Default, and Collection.....	44-48

D. Civil Actions	44-52
E. Bankruptcy Issues	44-55
APPENDIX A U.S. CODE—ERISA CORRESPONDENCE TABLE.....	A-1
TABLE OF EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)	
SECTIONS.....	TE-1
TABLE OF CASES	TC-1
INDEX	IN-1