



Tuesday, October 2, 2012

4:30 PM - 6:00 PM

**507 – S.O.S.: Employee Benefits Issue
Spotting for the Non-Benefits Lawyer**

Dana Hale

Director, Assistant General Counsel
Capital One Financial Corporation

Ronald Peppe

General Counsel & VP Human Resources
Canam Steel Corporation

Lisa Sotir Ozkan

General Counsel
NEA Member Benefits

Faculty Biographies

Dana Hale

Dana Hale is assistant general counsel, employee benefits at Capital One Financial Corporation. She has been an employment and benefits counsel for Capital One for several years, focusing exclusively on benefits law for the last few years. She is currently responsible for Capital One's welfare and retirement plans, as well as the company's severance, change of control and other executive compensation programs.

Prior to joining Capital One, Ms. Hale was labor and employment counsel at Paul Hastings in Washington D.C.

She is a graduate of University of Virginia School of Law.

Ronald Peppe

Ronald Peppe is the vice president for legal and human resources for Canam Steel Corporation, and oversees legal, human resources and risk management issues for the company. Canam is the US subsidiary of Canam Group Inc., a publicly traded manufacturing, construction and engineering company with operations in the US, Canada, China, Romania, India, Dubai, Saudi Arabia, and Vietnam. Canam fabricates steel construction components at 14 US plants, and builds projects such as sports stadiums, airports, convention centers, bridges and office buildings.

Mr. Peppe previously served as vice president law and technology for the Association of Corporate Counsel, and as vice president and associate general counsel at the Prudential Home Mortgage subsidiary of Prudential Financial.

Mr. Peppe is currently the co-chair of the ERISA subcommittee of the ACC Employment and Labor Law Committee. He previously served as co-chair of the ACC Environment and Sustainability Committee. He is a member of the City Council and previously served as chairman of the school board of Falls Church City, VA and was president of the board of education of Frederick County, MD. He currently serves on the board of directors of the Frederick County Chamber of Commerce.

Mr. Pepper earned a BA from The Johns Hopkins University, an MA from The Johns Hopkins School of Advanced International Studies, and a JD from The University of Maryland School of Law, where he served as notes and comments editor of the Maryland Law Review.

Lisa Sotir Ozkan

Lisa M. Sotir Ozkan is the general counsel and chief compliance officer for NEA's Member Benefits Corporation (MBC), a wholly-owned for-profit subsidiary of the National Education Association (NEA), a labor union representing 3 million educators in the United States. Based in Gaithersburg, MD, her responsibilities include legal counsel to MBC, day-to-day oversight of an ERISA-governed life insurance trust for NEA members, negotiating sponsorship arrangements for banking, insurance and retirement savings programs with Bank of America, Prudential, Wells Fargo, and other financial service providers, and managing MBC's relationship with its in-house staff union.

During her 20 years of practice, Ms. Sotir Ozkan has also served as associate general counsel and vice president of Blackboard Inc. and senior counsel at Teleglobe International, and was an associate at ThompsonHine and Gardner Carton & Douglas.

Ms. Sotir Ozkan received a BA from Cornell University, a JD from George Washington University and an LLM from the Vrije Universiteit Brussel.

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Lisa Sotir
Ron Peppe

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ERISA - Overview

- What does ERISA stand for?
- History of the Act 
- What is a plan?
 - Plan, fund or program maintained by employer
 - Purpose of providing welfare or pension benefits
 - To participants and their beneficiaries

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ERISA – Overview (cont.)


- What arrangements does ERISA cover?
 - Retirement
 - A plan providing retirement income to employees or resulting in a deferral of compensation by employees for after termination
 - DB vs. DC
 - Qualified vs. non-qualified
 - Health and Welfare
 - A plan established to provide participants and beneficiaries through the purchase of insurance or otherwise medical care, benefits in the event of sickness, accident, disability, death, unemployment, etc.
- Excludes payroll practices
 - Retiree grocery vouchers?
 - Retirement income, ascertainable benefits, administrative procedures, and source of funding

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ERISA – Overview (cont.)

- Primary Goals of ERISA
 - Protect workers (DOL)
 - Disclosures, participation/ vesting, funding, fiduciary duties, COBRA, HIPAA, enforcement
 - Improve the design and regulation of plans (IRS)
 - Qualification standards for tax breaks (pension plans, 125 Cafeteria plan rules, non-discrimination rules (105(h)), etc.
 - Enforce worker benefit rights (DOL and IRS)
 - Enforcement and administration rules
 - Provide insurance for workers who lose their pensions (PBGC)




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ERISA – Overview (cont.)

- Requirements of an ERISA plan
 - Written plan document
 - Procedures (benefit payments, claims, amendments...)
 - Special funding (e.g., trust for pension plans)
 - Fiduciary duties (prudence, etc.)
 - Reporting & disclosures (SPDs, SARs, 5500s)
- Benefits of an ERISA plan
 - Deference (if follow plan terms)
 - Federal preemption of state laws relating to benefits
 - Self-funded vs. insured
 - Limited remedies (but see *Amara*)



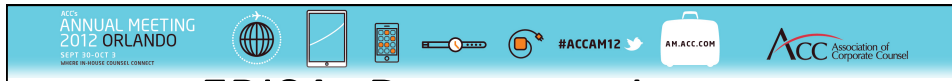
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ERISA - Plan Document Issues

- What is a “written plan document”?
- What must be in an SPD?
- When do you have to provide it?
- Do you have plans that are ERISA plans but not properly documents (example: severance plans)?
- How can you provide it (electronic, paper, publication)?



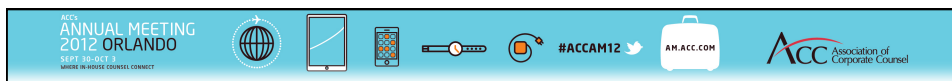
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ERISA- Document Issues

- Wrap Documents
 - A single document that incorporates all the employers plans, and includes the SPD's, the group health policies and certificates of coverage
 - Make sure it allows discretion to interpret plan terms



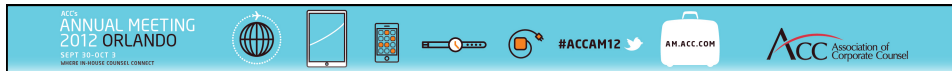
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ERISA- Document Issues

- \$110 dollar a day penalty for failing to provide documents
- Annual requirements (including SPD, Summary Annual Report)
- On Demand requirements
- Providing documents does not mean just putting them on the company intranet



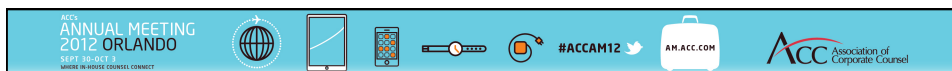
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ERISA- Document Issues

- Statutes of Limitation
 - Many states have very long SOL, some up to 15 years
 - Can be limited by contract in the plan document
- Forum Selection
- Anti-assignment clauses
- Who is included- part time and contractors



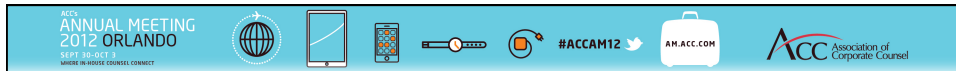
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ERISA- Plan Document Issues

- Cigna Corp. v. Amara 131 S. Ct 1866 (2011)
 - The SPD is not the plan, so a sponsor might not be bound by the SPD terms, likewise a sponsor can not enforce terms that are only in the SPD BUT
 - Equitable arguments and relief are also available.
 - New cases following Amara just coming out. See McCravy v. Metropolitan Life Insurance Company



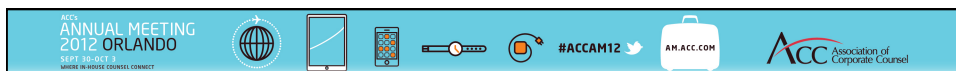
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ERISA- Penalties

- \$110 a day
- Suit for failure to provide benefits
- Fiduciary responsibility
- Equitable relief



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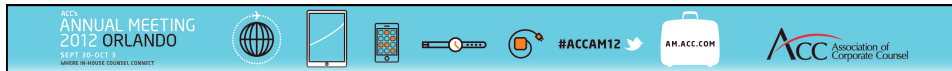
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ERISA - Fiduciary Issues

- A fiduciary under ERISA is one who:
 - Exercises discretionary authority or control with respect to the management of a plan
 - Exercises any authority or control respecting management or disposition of plan assets
 - Has discretionary authority or responsibility in the administration of the plan
 - Provides investment advice for a direct or indirect fee with respect to money or property of the plan.

**Fiduciary responsibility flows from discretion,
not title**

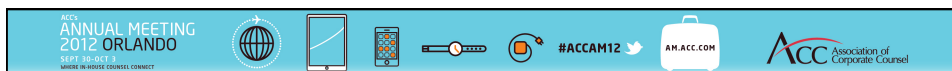


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ERISA - Fiduciary Issues (cont.)

- Designated fiduciaries:
 - Plan Sponsor
 - Plan Administrator
 - Trustees
 - Investment Manager
- 3(21) Named Fiduciary – the fiduciary designated in the plan document as having the "authority to control and manage the operation and administration of the plan."



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ERISA - Fiduciary Issues (cont.)

Prohibited Transactions


- Transactions between a plan and a "party in interest" OR transactions where conflicts of interest
- Parties in Interest: Employer, service provider, fiduciary, and affiliates
- Include property deals, provision of services, transfer of assets, self-dealing, kickbacks
UNLESS exemption

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ERISA- Fiduciary Issues (cont.)


- Penalties for Prohibited Transactions
 - Fiduciary liable for losses and profit disgorgement
 - Transaction may be rescinded
 - Party in interest liable for excise taxes or civil penalty

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409A - Overview

- Governs non-qualified deferred compensation (NQDC)
 - Sweeping legislation enacted in response to Enron, etc.
- What is NQDC?
 - Legally binding right in one year to receive taxable compensation/benefits in a later year
 - E.g., NQDC plans, severance, offer letters/ employment contracts, bonus plans, CIC agreements, certain stock rights, reimbursements/ in-kind benefits
- Governs the time and form of elections and payments

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409A – Election Rules

- Election rules
 - Initial elections (voluntary vs. hard-wired)
 - Prior to earning, irrevocable, specify time and form of payment
 - **Watch for:** offer letters, deferred sign-on bonuses, demoted employees
 - Newly eligible participants
 - 30 days, prospective comp only
 - **Watch for:** promotions, acquisitions
 - Changes to distribution elections
 - 12 month / 5 year rule
 - **Watch for:** impact from late pay design decisions

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409A – Payment Rules

- Permitted payment events
 - Fixed date/schedule
 - Separation from service
 - Presumptions of separation
 - **Watch for:** conversion to contractors, “stay-on payroll”, garden leave
 - Disability/ death
 - CIC
 - Unforeseeable emergency

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409A – Payment Rules (cont.)

- What is timely payment?
 - Late payment okay if paid by the later of:
 - End of calendar year in which payment is due; or
 - 15th day of third month following specified date, as long as not permitted to designate calendar year
 - Watch for: releases
 - Early payment ok if:
 - Paid no earlier than 30 days before payment date; and
 - Employee does not designate calendar year
 - Watch for: argument that same year isn't "early"
 - Top- 50 Rule
 - Generally top 50 highest paid (> \$160k, adjusted annually)
 - No payment for six months if paid on account of separation

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409A – Penalties

- Penalties for violations
 - Employee:
 - 20% on all vested amounts (including like-kind NQDC)
 - Inclusion in income (year in which violation occurs)
 - Underpayment premium interest penalty
 - E.g., if pay late, interest penalty applies beginning with first year amounts were deferred
 - Employer:
 - Potential failure withhold/ report
 - Possible negligence claim against COF
 - Associate experience/ reputational impacts

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409A - Severance

- Severance compensation to be paid under a severance plan or severance agreement is generally considered deferred compensation, unless an exception exists – and payments can be subject to different rules.
- If no exception applies:
 - Severance pay can be subject to the 409A six-month delay for key employees
 - The agreement must specify the payment date for severance pay
 - Reimbursements for certain benefit coverage, taxes, and other amounts must meet the Section 409A timing requirements
- Severance payment exception applies if involuntary, then:
 - 2X pay, capped at 2X the Section 401(a)(17) limit (\$250,000 for 2012, or \$500,000)
 - Paid within two years from year of separation


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409A - Other Exempt Arrangements

- Short-term deferral rule
 - Payment must be received by March 15th of the year following the year payment is “earned”
 - Earned = no longer subject to SROF (condition on future performance)
 - Include in plan document
 - Not required but allows for straddling
- Reimbursements/ in-kind arrangements
- Others (COBRA, limited amounts, etc.)

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409A – Corrections

- Operational Errors:
 - Error must be inadvertent and unintentional
 - Must have taken steps to avoid recurrence of failure
 - Fully corrected
 - Limits for insiders (directors, officers, or 10% shareholders)

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409A – Corrections

- Same year as violation - no penalties
- End of first year following year error occurred
 - No penalties if repaid; repay any earnings End of second year following year error occurred
 - 20% penalty on amount of error only – no underpayment interest penalty
 - Amend tax return for year in which error occurred (some cases)
 - Additional relief for amounts under 402(g) limit (\$16,500 for 2012)
- Plan document Errors


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Healthcare Reform

- The basics:
 - The law was signed March 23, 2010
 - Some things already in place
 - Some things happen in 2013 and 2014
 - Some things were challenged in court


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Health Care Reform

- 2010 (Really 2011 plan year):
 - Patient Bill of Rights
 - Dependents covered to age 26
 - No lifetime limits on coverage/start phase out of annual limits
 - No preexisting exclusions for children
 - Preventative care at no cost to patient
 - Right to appeal




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Health Care Reform

- 2012
 - Mostly behind the scenes changes for health providers
 - New voluntary long term care plan (oops, than one was later cancelled, in case you are asked about it!)




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Health Care Reform

- 2013
 - Limit FSA to \$2500
 - Fiscal year plans can keep higher limits through 2012-2013 plan year
 - Employers can adopt retroactive amendments by December 31, 2014
 - See IRS Notice 2012-40

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Health Care Reform

- 2013 (Continued)
 - W-2 Reporting for work performed in 2012
 - IRS Notice 2012-9 on what is included
 - On site medical clinics, EAPS not included UNLESS part of the group health plan and subject to COBRA premium
 - Dental and vision not included IF they qualify as excepted benefits under HIPAA (separately insured or together but can be chosen separately)
 - Some exceptions for small employers

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Health Care Reform

- 2014
 - No higher rates for health status or gender
 - Exchanges!/Tax Credits
 - Individual coverage mandate (tax?)
 - Employer mandate
 - Expanded Medicaid (?)
 - Annual limits totally gone
 - Preexisting and gender pricing gone
 - Tax credit for small business


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Health Care Reform

- What else is in there?
 - Privacy breaks and space for working mothers
 - NIH Study on post-partum depression
 - Funding for abstinence education
 - Limits on power-driven wheel chairs
 - No discrimination against entities that will not provide assisted suicide services
 - Five year program to promote fluoridation of the water and other dental health issues

SOS -- Employee Benefits Issue Spotting For the Non Benefits Lawyer

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ERISA Overview

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ERISA Fiduciary Issues

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409A Overview

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<http://www.seyfarth.com/publications/Final-Deferred-Compensation-Regulations> (Final Deferred Compensation Regulations)

409A Releases

<http://www.mcguirewoods.com/news-resources/item.asp?item=6092> (Employee Release Provisions Present Section 409A Trap for the Unwary)

409A Corrections

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Health Care Reform

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