



**Monday, October 20**  
**2:30 pm-4:00 pm**

## **211 ERISA: Top 10 Compliance Areas**

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## Faculty Biographies

### Matthew Aufman

Matthew Aufman is senior counsel for Welch Foods, Inc. in Concord, MA. Mr. Aufman's practice encompasses all legal aspects of the company's benefit plans, which include defined-benefit and 401(k) plans, multi-employer (union) pension plans, and a wide range of health and welfare benefits. Mr. Aufman also provides primary legal support to the company's supply chain and international business groups, and he has negotiated significant corporate transactions including domestic and international license agreements, long-term supply agreements, and contract manufacturing arrangements.

Prior to joining Welch's, Mr. Aufman was an associate in the employee benefits group of a Boston-based law firm.

### David Canarie

David Canarie is assistant vice president and special counsel for Unum in Portland, ME. His practice areas are welfare benefit plan issues under the Employee Retirement Income Security Act (ERISA), including group life, accidental death and dismemberment, long-term and short-term disability matters, as well as technology licensing and vendor contracts.

Prior to joining Unum, Mr. Canarie was in private practice working with financial services clients in Internet distribution channels. Mr. Canarie has also served as primary technology counsel for a Fortune 200 company and has practiced before state and federal agencies, including the Senate Finance Committee, the House Ways and Means Committee and the Joint Committee on Taxation.

Mr. Canarie is currently chair of the Maine State Bar Association CLE committee and is a frequent lecturer at continuing legal education seminars. Other recent speaking engagements include the Defense Research Institute ERISA Conference in Washington, DC, and the Academy of Legal Studies in Business Annual Meeting in Tampa, Florida. He is an adjunct instructor of business law at Saint Joseph's College of Maine, and provides pro bono litigation services to low-income domestic violence victims as volunteer attorney with the Domestic Violence Pro Bono Litigation Panel.

Mr. Canarie received his BA from St. Anselm College and is a graduate of Boston University School of Law, where he was editor-in-chief of, and published in, the *American Journal of Law & Medicine*.

### Lisa Sotir Ozkan

Lisa Sotir Ozkan is the general counsel for NEA's Member Benefits Corporation, the wholly owned for-profit subsidiary of the National Education Association, in Gaithersburg, MD. NEA's Member Benefits Corporation is responsible for the marketing

and oversight of voluntary supplementary benefits available to NEA members, including life insurance available through a VEBA trust, a 403(b) program marketed to school districts, and various other insurance, financial, discount and professional development programs. Ms. Sotir Ozkan's responsibilities include advising ERISA compliance for these programs, as well as for the multiple retirement (both defined benefit and defined contribution) and welfare (including self-insured) plans of NEA's Member Benefits for its employees.

Prior to joining NEA's Member Benefits Corporation, Ms. Sotir Ozkan was with Blackboard Inc., as the lawyer responsible for among other things US and international employment issues.

Ms. Sotir Ozkan received a BA from Cornell University and is a graduate of George Washington University School of Law. She also received an LLM from the Vrije Universiteit Brussel.



## 1. Plan Documents



### Plan Documents

- ERISA requires Summary Plan Descriptions (SPDs) that are:
  - Are written understood by the "average plan participant; and
  - Accurate and comprehensive to apprise such participants of their rights and obligations.
- A detailed list of information be included in the SPD. 29 USC § 1022(b), available [here](#).



### Plan Documents

- ERISA does not require employers to create welfare benefit plans.
- **But**, if an ER implements a plan, ERISA requires that it must be memorialized: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 USC §1102(a)(1), available [here](#).
- ERISA requires that every written instrument "shall" specify: funding; administration; the amendment process; and the basis for payments. 29 USC §1102(b), available [here](#).



### Plan Documents

- Medical Reimbursement account cases re: plan documents.
  - American Family Mut. Inc. Co. v. U.S. 815 F. Supp. 1206 (W.D. Wisc.1992);*
  - Wollenburg v. U.S. 75 F. Supp.2d 1032 (D. Neb. 1999);*
  - IRS Rev. Rul. 2002-58.*
- 2008 Cafeteria Plan Regulations.
- 2008 HEART Act.
- Self-funded plans.



## Plan Documents

- Have them
- Provide them
- Update them
- DOL activity



## 5500 Form Issues

- Each year plans required to file 5500 forms to indicate financial condition, investments and operations.
- 29 USC §1023(a)(1)(A), available [here](#) and IRC §6039D, available [here](#).
- Part of ERISA's overall reporting and disclosure framework.
- DOL Employee Benefits Security Administration 5500 Form home page is available [here](#).



## 2. 5500 Forms



## 5500 Recent Developments

- Delinquent Filer Voluntary Compliance Program, available [here](#).
- E-Filing: *EFAST*, available [here](#).
- 2009 Form 5500: 40 Department of Labor FAQs, available [here](#).



## 5500 Forms

- Monitor compliance
- Take advantage of DFVC, if applicable
- Enforcement activities



## Group Life Insurance

- ERISA: Plan shall be administered per plan documents. 29 U.S.C. §1104(a)(1)(D), available [here](#).
- *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), available [here](#), and its progeny.
- Perfect storm
  - Outdate beneficiary designations
  - Larger amounts of life coverage
- Practical suggestions



## 3. Welfare Benefit Plan Issues



### HEART Act (H.R. 6081)

- Signed 6/16/2008; pension and welfare benefit plan changes.
- Amends §125 with new (h) changing the “use it or lose it rule” for flexible spending accounts.
- If called to active military duty for  $\geq 179$  days, may get unused FSA balance if requested before plan deadline.
- Amendments to plan documents required
- Many other changes; for more information, click [here](#).



## 2008 Proposed Cafeteria Plan Regulations

- Original §125 regulations in 1984, followed by
  - draft regulations;
  - temporary regulations; and
  - much "informal guidance."
- Comprehensive coverage of §125 issues; prior regulations withdrawn.
- Effective date: January 1, 2009.
- For Proposed Regulations, click [here](#). For Treasury Department press release, click [here](#).



## Wellness Programs

- On February 14, 2008, DOL issued Field Assistance Bulletin 2008-02, available [here](#).
- Guidance in the form of a 10-question checklist to determine if and how an ER should comply with HIPAA regulations.



## Genetic Information Nondiscrimination Act of 2008.

- Amends Title VII, ERISA, Social Security Act, Public Health Act and IRC. Summary available [here](#).
- Amends ERISA to restricts ability of health plans and health insurers to request genetic information or testing for individual or family members. 29 USC §1182(a)(1)(F), [here](#).
- Phased in: May and October 2010.



## 4. Same Sex/Domestic Partner Benefits



## Same-Sex Marriage and Domestic Partner Benefits

States with Laws Conferring Rights on Same Sex Couples (as of May 2008):

- CA and MA allow same-sex marriage.
  - CA referendum in November
  - Politically settled in MA
- RI recognizes out-of-state gay marriages.
- VT, CT, NJ, and NH recognize civil unions that are comparable to marriage. Laws differ re: recognition of out-of-state civil unions.
- Other domestic partnership laws
  - OR (rights similar to civil unions)
  - HI, ME, DC, WA (partial rights)

Source: National Conference of State Legislatures (<http://www.ncsl.org/programs/ol/samesex.htm>)



## Federal Laws Governing Rights of Same Sex Couples

Defense of Marriage Act (DOMA)

- States need not recognize out-of-state gay marriages
  - "No [state] shall be required to give effect to any public act, record, or judicial proceeding of any other [state] respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other [state], or a right or claim arising from such relationship."
  - A majority of states have passed constitutional or statutory provisions barring recognition of same-sex marriages.
- Same-sex marriages not recognized as "marriages" under federal law.
  - "In determining the meaning of [federal law], the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."
  - In conjunction with ERISA pre-emption, this sharply limits the extent to which employers may grant same-sex couples equal rights under employee benefit plans.



## Federal Laws Governing Rights of Same Sex Couples

ERISA pre-emption

- Employee benefits are a matter of exclusive federal concern; laws that "relate to" benefit plans generally are pre-empted.
- Insurance laws are excepted from the general rule of pre-emption.
- State insurance laws don't apply to self-insured benefit plans



## What is the legal status of benefits for same-sex couples?

Pension benefits

- Safest course is to treat same-sex couples as though they are not married for qualified pension plan purposes
- Many benefits of marriage can be achieved through other means (e.g., beneficiary designations); other benefits are lost (e.g., DB plan survivor benefits, rollover rights for surviving spouse)
- Fix ambiguous plan language, especially in states that recognize same-sex marriage
- Ensure clarity of employee communications



## What is the legal status of benefits for same-sex couples?

### Health and Welfare Plans

- State insurance laws may require coverage for same-sex spouses and/or domestic partners
- Self-insured plans need not cover same-sex partners, but may choose to do so (consider 105(h) issues)
- Benefits provided to same-sex partners are taxable for federal income tax purposes; state tax treatment varies



## A very brief overview of 409A

- Enacted in 2004 with little debate
- Applies to “nonqualified deferred compensation plans” (broadly defined)
- Punitive penalties for non-compliance (though the IRS has provided correction procedures for some operational errors)
- Transition relief to expire at end of 2008
- Unless you are a tax/benefits expert, you need assistance from outside counsel to comply with 409A.



## 5. 409A



## Scope of 409A

- Applies to “nonqualified deferred compensation plans”
  - This term includes any plan that provides for deferral of compensation, unless an exception applies
  - Most common exceptions are:
    - Qualified retirement plans
    - Bona fide vacation leave, sick leave, compensatory time, or disability plans
    - 2 ½ month exception (covers most year-end bonuses)
    - Some fringe benefits
  - 409A can apply to non-employees





## Scope of 409A

- Examples of arrangements that may be subject to 409A:
  - Deferred compensation plans
  - Executive retirement plans
  - Equity compensation (stock options, et al.) and “phantom stock” plans
  - Incentive compensation plans
  - Severance arrangements
  - Employment/consulting agreements (including offer letters)
  - Change-in-control agreements



## 409A– Transition Relief

- Compliance deadline is December 31, 2008, and is not expected to be extended.
  - “Good faith” compliance OK for earlier periods, but the IRS has gradually tightened what this means
  - Unwritten plans must be put in writing by December 31, 2008
- Plans in existence prior to 2005 are only subject to 409A if a “material modification” is made to such plans.
  - Any added right or benefit is likely a “material modification”
  - Consider splitting plans to avoid inadvertent modification of rules governing pre-2005 deferrals



## 6. Investing Retirement Assets



### Investing Retirement Plan Assets

- Fiduciary Duties under ERISA: a brief overview:
  - A fiduciary is anyone who:
    - Exercises “discretionary authority” over plan assets, or
    - Provides investment advice for a fee
  - “Prudent expert” standard of care
  - Strong presumption in favor of diversification
  - Custody of assets
    - Trustee is responsible, unless there is a proper delegation of authority to a qualified “investment manager”
    - With some exceptions, indicia of ownership must remain in U.S.



## Investing Retirement Plan Assets

- Different Plan Designs Present Different Issues
  - Defined Benefit Pension Plans
    - Plan sponsor (employer) bears risk of investment losses
    - Need diversified portfolio that takes into account short-term and long-term needs for growth and cash flow
  - 401(k) and other Defined Contribution Plans
    - Participants bear risk of investment losses
    - Most plans allow participants to control investment decisions.
    - Even if participants control investment decisions, plan sponsor must prudently select investment options



## Investing Retirement Plan Assets

### Defined Benefit Plans

- Trustee may be discretionary or directed
- Delegation of authority to investment managers
  - Delegation must be made by a named fiduciary.
  - Manager must be a bank, insurance company, or registered investment adviser; and
  - Manager must acknowledge fiduciary status in writing.
  - Improper delegation means trustee or named fiduciary is vicariously liable for negligence/wrongdoing of manager!
- Delegation should state specific instructions for management of that particular piece of the portfolio.
- Delegation does not relieve named fiduciary of responsibility to monitor the manager's performance.



## Investing Retirement Plan Assets

### Defined Contribution Plans

- Plans with employer-directed investments face issues similar to DB plans
- Plans with participant-directed investments need to comply with Section 404(c)
- Part of 404(c) compliance is prudent selection of investment alternatives
  - Broad range of investment alternatives
  - Opportunity for diversification
  - Ongoing fiduciary duty to monitor investment options
- Consider hiring outside advisor (about \$40k/yr)
  - Review arrangements with administrator (including fee-sharing)
  - Monitor investment performance



## 7. Service Provider Selection



## Service Provider Selection= Fiduciary Liability Mitigation Opportunity

- Selecting a service provider for an ERISA plan is typically a fiduciary duty of the Plan Administrator and/or Trustees
- With lawsuits, Congress and DOL all looking at whether fees on 401(k) and other types of plans are reasonable, proper selection process is key.
- DOL in conducting audits reviews whether the process used by fiduciaries to make decisions demonstrates good faith in their actions.



## Determining Services

- Consider what services you need for your plan
  - Legal
  - Accounting
  - Actuarial
  - Trustee/Custodial
  - Recordkeeping
  - Investment management
  - Investment education
  - Third-party administrators
  - Plan underwriters or reinsurers



## Selecting Service Providers

### Best Practice: Where appropriate use a Request for Proposals process

- Develop criteria for evaluating the proposals
  - Fees and Expenses (reasonable?)
  - Experience with your type of benefit plan
  - Service quality
  - Can they provide multiple services – bundled services?
  - Need for licensure or bonding
  - References
  - Permit legally permissible access to data and other information for the purposes of oversight and monitoring
  - Will they take fiduciary liability or liability for their actions?
  - DOL evaluation criteria



## Collecting the Information

- Do some background work to invite qualified, reputable providers to respond
- If this is too much for your organization, hire a consultant to assist with the process
- Present each prospective service provider identical and complete information regarding the needs of the plan.
- Ask each prospective provider to be specific about which services are covered for the estimated fees and which are not.



## Section Process

### When you have the information:

- **Compare the information**, including fees and expenses to be charged by the various providers for similar services.
  - Cost does not need to be the only determining factor
- **Evaluate the Service Provider Agreements**
  - understand obligations of parties
  - Review whether the fees and expenses to be charged to plan and/or plan participants are reasonable in light of the services to be provided.
- Receive a commitment from Service Provider to **regularly provide information** regarding the services it provides and that you may need to perform your fiduciary duties.



## Document Selection Process

- **Prepare a written record of the process followed in reviewing potential service providers and the reasons for your selection of a particular provider.**



## Working with Service Provider

- Periodically review Service Provider's Performance
  - To ensure compliance with agreement
    - Review complaints and comments from participants
  - Every few years, do a Request for Information or a market survey to make sure the costs and the services are still reasonable.
  - Review Service Provider's on-going credentialed status
- Have Service Provider provide written documentation on fees to use in completion of the fees section of the new Schedule C for the 5500 form



## 8. 401(k) Fiduciary Issues



## Where Fiduciary Liability May Arise

- **Plan Administration** (*Who, What, When, Where, Why, & How*)
  - Misapplying Plan Rules
    - Eligibility
    - Compensation
  - Timely remittance (contributions & loan repayments)
  - Correcting discrimination test failures
- **Monitoring Service Providers**
  - Ability of internal staff to monitor (training & education)
  - Administrative manual documenting processes & procedures
- **Plan Oversight**
  - Meetings and Confirmation of Intent/Actions (Minutes)
  - Confirmation of “reasonable fees and expenses”



## Administrative Issue: 401(k) Fees

- **Examine plan fees** to make sure fees are not unreasonable relative to the value of services provided. To do so:
  - **Understand the fee structure** of the plan
  - **Demand full disclosure of compensation** received directly or indirectly by service providers.
  - **Ensure expense disclosures are clear and understandable**
- If your company doesn't have the internal expertise, **hire it** internally or externally
- See *Mehling v. New York Life Insurance Co.*, No. 99 Civ 5417 (E.D. Pa) (Court approved a \$14 million settlement in suit where employees alleged company breached fiduciary duty by paying excessive management fees and expenses on funds offered in plan).



## Monitoring: 401(k) Investment Selection

- Continuing to use the prepackaged portfolio of mutual funds provided by your 401(k) provider may not protect you from liability
  - It may not constitute acting in the best interest of the participants
  - These standards are continually evolving.



## Monitoring: Investment Option Selection

- **Develop an investment policy**
  - Include criteria for performance and fees,
  - Have a goal of having an effectively diversified portfolio using best of asset class funds.
- Establish an **investment committee** to be responsible for the investment selection and monitoring.
- If no internal capacity, **hire an unbiased professional investment adviser**
  - to assist the investment committee
  - develop the investment policy and
  - advise on the options available both among 401(k) providers or even within your existing 401(K) structure
    - Be careful not to confuse an investment adviser with a broker representing a bundled, prepackaged investment platform.



## 9. Limitations on 404(c) or when to appoint an investment committee



### Limitations on 404(c) Protections

- **Do not apply to**
  - Investment Options that are outside of the plan limits or would jeopardize the plan's tax qualified status
  - Investment options that would result in a loss in excess of the participant's account balance (i.e., margin trading, options)
  - Company stock for which relevant information is not provided to participants
  - Welfare plans
    - If you are setting up any post-employment healthcare plans
    - Self-direction does not protect plan sponsor

29 CFR 2550.404(c)



### 404(c) Protections Generally

- Apply only to Pension Plans
- Offering Individual Accounts
- Participant can and does exercise control over assets
- Fiduciaries are not liable for losses under such exercise of control
  - 29 CFR 2550.404(c)



### What to do when no 404(c) protection

- Establish investment committee
- Disable individual control of accounts
  - Thus limit participant investment decisions which could lead to losses



## 10. Best Practices



### Best Practices

- Recognize ERISA is extraordinarily complex
- Always consider whether an action is that of a fiduciary
- Consult knowledgeable advisors
  - Outside ERISA counsel (both IRS and DOL)
  - Actuarial service



### Best Practices (Continued)

- Use online compliance assistance
  - IRS
  - DOL
  - Resource List
- Develop an interdisciplinary approach
  - Involve your HR, finance and legal teams
- Document, document, document

**Top 10 ERISA Compliance Issues  
Resource List**

**General Resources**

Department of Labor – Employee Benefits Security Administration Compliance: [http://www.dol.gov/ebsa/compliance\\_assistance.html](http://www.dol.gov/ebsa/compliance_assistance.html)  
 Employee Benefit Research Institute: <http://www.ebri.org/>  
 Employee Benefits Institute of America: <http://www.ebia.com/>  
 ERISA Industry Group: <http://www.eric.org/public/who/overview.htm>  
 Joint Committee on Taxation: <http://www.house.gov/jct/>  
 Senate Finance Committee: <http://www.senate.gov/~finance/>  
 House Ways & Means Committee: <http://www.senate.gov/~finance/>  
 IRS--Employee Benefits Site: <http://www.irs.gov/businesses/small/article/0,,id=101065,00.html>  
 IRS--Business Site: <http://www.irs.gov/businesses/index.html>  
 IRS--Retirement Community Site: <http://www.irs.gov/retirement/index.html>  
 Treasury Department Health Savings Accounts Site: <http://www.ustreas.gov/offices/public-affairs/hsa/>  
 DOL ERISA Home Page: <http://www.dol.gov/dol/topic/health-plans/erisa.htm>  
 Benefitslink: <http://www.benefitslink.com>  
 PriceWaterhouseCoppers 2008 ERISA guide to reporting & disclosure: <http://www.pwc.com/extweb/pwcpublications.nsf/docid/716CCC680410B8EA85257434006D0AA8>  
 Pension Protection Act Resource Center: <http://potteranderson.com/practices-66.html>  
 Hewitt: <http://www.hewittassociates.com/Intl/NA/en-US/KnowledgeCenter/ArticlesReports/Articles.aspx>  
 Towers Perrin: <http://www.towersperrin.com/tp/thought-leadership.jsp?country=global>  
 AHIP: <http://www.ahip.org/>  
 American Benefits Council: <http://www.americanbenefitscouncil.org/>  
 ACLI: <http://www.acli.com/ACLI/DefaultNotLoggedIn.htm>  
 ACC: <http://www.acc.com>

**Blogs, Newsletters and Newsfeeds**

Benefits Blog: <http://www.abajournal.com/blawgs/benefits-blog/>  
 Boston ERISA and Insurance Blog: <http://www.bostonerisalaw.com/>  
 ERISA Rules and Regulations: <http://www.erisarulesandregulations.com/>  
 --Jones Day  
 ([http://www.jonesday.com/services/services\\_pubs.aspx?AdvancedServices=04e62b2d-ec53-4c31-9cb1-de7deef6bb5b](http://www.jonesday.com/services/services_pubs.aspx?AdvancedServices=04e62b2d-ec53-4c31-9cb1-de7deef6bb5b));  
 --Kilpatrick Stockton (<http://www.kilpatrickstockton.com/publications/newsletters.aspx>);  
 --Alston Bird: (<http://www.alston.com/resources/>);  
 --Groom: <http://www.groom.com/library/index.html>  
 --Ivin Phillips & Barker: <http://www.ipbtax.com/CM/Custom/TOCArticles.asp>  
 --Ogletree Deakins: <http://www.ogletreedeakins.com/publications/index.cfm>

--Pillsbury: <http://www.pillsburylaw.com/publications>  
 --Pierce Atwood: <http://www.pierceatwood.com/articles.asp?Show=1>  
 --Seyfarth Shaw: <http://www.seyfarth.com/index.cfm/fuseaction/publications.publications/publications.cfm>  
 --DLA Piper: <http://www.dlapiper.com/global/newsinsights/>  
 --Gibson Dunn: <http://www.gibsondunn.com/publications/Pages/default.aspx>  
 --Sidley Austin: <http://www.sidley.com/newsresources/highlights/>  
 --Proskauer Rose: [http://www.proskauer.com/news\\_publications/newsletters/erisa/2008\\_03\\_31/res/id=saPDF/16030-040008-ERISA%20Litigation%20Newsletter.pdf](http://www.proskauer.com/news_publications/newsletters/erisa/2008_03_31/res/id=saPDF/16030-040008-ERISA%20Litigation%20Newsletter.pdf)  
 ACC Employment and Labor Law Committee Listserv