



30th Annual Client Symposium

Wednesday

October 21, 2020

9:00 a.m. - 12:00 p.m.

Virtual



Actuarial Benefits & Design Company
30th Annual Client Symposium
Wednesday, October 21, 2020
9:00 a.m. – 12:00 p.m.
Agenda

- 9:00 a.m. **Welcome**
Lisa Germano, President & General Counsel
Actuarial Benefits & Design Company
- 9:05 a.m. **Predictions for Post-Election-What Will Impact Pending Legislation?**
Mark Peterson, Executive Vice President
American Institute of CPAs
- 9:50 a.m. **Cyber Insurance Coverage, Exclusions and Litigation**
Robert Rosenzweig, Senior Vice President
Risk Strategies Company
- 10:25 a.m. **Quick Hello from Your AB&D Team - Short Break to move to Break Outs**
- 10:35 a.m. **Cares Act Employment Tax Rules and Update-**Breakout Session #1****
Deb Walker, National Director, Compensation & Benefits
Cherry Bekaert LLP
- 10:35 a.m. **Partial Plan Terminations: What Happens?- **Breakout Session #2****
Patrick Blanchard, Managing Director
Alvarez & Marsal Taxand, LLC
- 11:15 a.m. **Employee Benefits Litigation and Settlement Update: Best Practices**
Robert Ellerbrock, Partner
FisherBroyles, LLP
- 11:55 a.m. **Managing Former Participants: Preventing and Finding Unresponsive Participants**
Lisa Germano, President
Angel Newman, CEO
Lorrie Eyles, Executive Assistant
Crystal Barrett, Senior Associate-Operations
Sarah Pernell, Administrative Assistant
Actuarial Benefits & Design Company
- 12:00 p.m. **Closing Remarks**
Lorrie Eyles, Executive Assistant
Actuarial Benefits & Design Company

Actuarial Benefits & Design Company



Lisa Germano, JD, CPA, CGMA. President and General Counsel, Actuarial Benefits & Design Company – an organization that assists business owners and key executives to establish and monitor retirement income goals, maintain retirement plan compliance with federal tax law, satisfy proper reporting and disclosure to government agencies and retirement plan design intended to meet compensation objectives for executives and employees. Lisa co-founded AB&D in 1989 with Debbie D. D. Coyner, JD, CPA.

Lisa is **admitted to the Bars of Virginia and Ohio** and is licensed as a **Certified Public Accountant** by the Commonwealth of Virginia. She is a Principal in the law firm of Coyner & Germano, located in Charlottesville, Virginia, a boutique law firm serving executives, small business owners, professional athletes and horse enthusiasts.

Lisa is immediate past **Chair of the Board of the Virginia Society of CPAs**, serving on its Executive Committee. She has served multiple years on the board of directors and has chaired numerous high level committees for the **American Institute of Certified Public Accountants, Virginia Society of Certified Public Accountants** and the **Internal Revenue Service** (appointed committee member by Commissioner Shulman). She is currently serving on the faculty committee for the Internal Revenue Service EP/EO 2016 Joint Council meeting, co-chairs the **IRS Mid-Atlantic Liaison Group** and is the 2015 Tax Chair of the AICPA National Employee Benefits Conference. She is a Senior Advisor to the **AICPA National Financial Literacy Commission**.

In November, 2015, Lisa received the Arthur J. Dixon Memorial Award from the American Institute of CPAs, the highest award given the field of tax. In September, 2012 Lisa received the **National Multiple Sclerosis Women on the Move** award for her demonstrated commitment to her profession and the Greater Richmond Community. In 2008 Lisa co-founded the **Joan Grossmann Fegely Foundation** for Ovarian Cancer, Education & Research a nonprofit that raised more than \$85,000 to find early detection methods for ovarian cancer, provide awareness of its quiet symptoms and support patients and their families. In 2011 Lisa co-founded **Rapids Baseball, Incorporated** a nonprofit dedicated to youth development, education and self-sustaining community events to fund high school non-academic activities.

In 2011, Lisa was inducted as a Fellow into the **American College of Employee Benefits Counsel** for her contributions in the employee benefits field and received the inaugural **AICPA Sustained Contribution Award** for her contributions to the CPA profession. In 1996 Lisa received the *Hammer Award* from Vice President Gore for her regulatory work with the Pension Benefit Guaranty Corporation. Each year from 2001 to 2013 when the survey ended, Lisa has been nominated by her peers as a *Super CPA* by *Virginia Business Magazine*.

Lisa is a frequent speaker at national conferences and professional organizations. She is often quoted in local and national publications. In addition to speaking on these topics, Lisa is the author of numerous retirement planning articles relating to pension law and its administration as well as leadership, entrepreneurship and financial literacy. She has been a contributing Editorial Board Member of the *Journal of Pension Benefits* and is a former editor of the monthly publication, the *Pension Plan Administrator*.

Lisa contributed to the 2012 book *Save Happily, Spend Wisely: Real Stories About Money and How to Thrive from Trusted Advisors*. She writes a monthly newsletter and maintains an app for AB&D to help other professionals and business owners keep updated on current relevant topics.



Debra D. D. Coyner, JD, CPA. Executive Vice President. Debra D.D. Coyner, JD, CPA founded Actuarial Benefits and Design Company with Lisa C. Germano. Debbie is admitted to the Bar in Virginia. She is also a Certified Public Accountant in the Commonwealth of Virginia and a Principal in the firms of Coyner Associates and Coyner & Germano. Debbie received her B.S. in Commerce, University of Virginia, and J.D., University of Richmond. She was an Accountant with the firm of Robert M. Musselman, CPA, 1979-1986. She was appointed member of the **American Institute of Certified Public Accountants** Business Law Subcommittee from 1991-1997 and Vice Chair of the committee from 1996-1997. She is a member of the Virginia Society of Certified Public Accountants, the Charlottesville-Albemarle Bar Association, and the Charlottesville Chamber of Commerce. Debbie has lectured on different tax matters of various professional organizations.



Brenda L. Will, ERPA. Senior Associate. Brenda joined Actuarial Benefits & Design Company in 1992 as an Associate and she was promoted to Senior Associate in 1996. Brenda has a BS in Accounting from Virginia Commonwealth University. She is a **Certified Pension Consultant**. Brenda enjoys working with plan design, specializing in cash balance plans. She was an instructor for ASPPA courses during 1993-1996 and is responsible for the pension education classes offered at Actuarial Benefits & Design. Brenda has more than 32 years' experience in qualified plan compliance and consulting.



Goldie C. Marks, QPA, CPC, ERPA. Senior Associate. Goldie joined Actuarial Benefits & Design Company as an Associate in 1989 and was promoted to Senior Associate in 1996. She is a **Qualified Pension Administrator, Certified Pension Consultant and an Enrolled Retirement Plan Agent**. Goldie is a member of the **American Society of Pension Professionals and Actuaries**. She was a co-instructor for ASPPA courses in 1996 and annually provides training in administration software and technical applications. Goldie performs compliance testing, valuations and feasibility analysis of 401(k) and other defined contribution plans and is responsible for client relationships and consulting. She has more than 30 years' experience in qualified plan compliance, including actuarial computations and valuations, with special expertise in related technology and its use for retirement plan and design.



Mary S. Blankenship, QPA, ERPA. Senior Associate. Mary joined Actuarial Benefits & Design Company as an Associate in 1989 and was promoted to Senior Associate in 1996. She earned the designation of **Qualified Pension Administrator** from the **American Society of Pension Professionals and Actuaries** and is a member of that organization. Mary is also an Enrolled Retirement Plan Agent with the IRS, allowing her to negotiate directly with them on behalf of the plan sponsor. She heads up the government relations group by working with the Department of Labor and IRS as they audit the retirement programs sponsored by our clients. Mary has more than 30 years of experience in drafting documentation for qualified retirement plans, with 25 of those years working in qualified plan compliance, consulting and working with the IRS and the DOL regarding their correction programs.



Angel K. Newman. CEO. Angel joined Actuarial Benefits & Design Company as Controller in 2004. In May 2010, she was promoted to CEO, and is responsible for Human Resources, Finance, Accounting, developing strategies for growth and advancement at AB&D, including its corporate culture. After receiving a BA degree in Business from Asbury College in Wilmore, KY, Angel worked in the Accounting Group at a major financial institution in Richmond for eighteen years. Her last position there was as Vice-President and Cost Accounting Manager. Angel is instrumental in maintaining AB&D's vision for corporate leadership.



Anna M. Steidle, QKA. Consulting Associate. Anna joined Actuarial Benefits & Design Company in 1996 as a Staff Associate. She was promoted to Associate in 1998 and Consulting Associate in 2006. Anna has an AA degree in Accounting and Business Management from the Altoona School of Commerce, Altoona, PA. Anna is a **Qualified 401(k) Administrator** and a member of the **American Society of Pension Professionals and Actuaries**. She oversees the relationship with our recordkeeping partnerships. Anna performs compliance testing, valuations and feasibility analysis of 401(k) and other defined contribution plans and is responsible for client relationships and consulting for their ongoing needs. Anna also performs quality review of internal projects. Prior to joining Actuarial Benefits & Design Company, Anna performed various accounting functions within different types of industries.



Carmen E. Conrad, QKA. Associate. Carmen joined Actuarial Benefits & Design Company in 1996 and is an Associate with the firm. She has a BS degree in Business Administration with emphasis in Human Resources from Virginia Commonwealth University. Carmen is a **Qualified 401(k) Administrator** and a member of the **American Society of Pension Professionals and Actuaries**. Carmen performs compliance testing, valuations and feasibility analysis of 401(k) and other defined contribution plans and is responsible for client relationships and consulting for their ongoing needs. This includes balanced forward and daily recordkeeping plans. She also supports the review of distributions.



Cheri L. Smith, QKA. Associate. Cheri joined Actuarial Benefits & Design Company in 1997 as a Trust Accountant. She was promoted to Staff Associate in 2003. Cheri is a **Qualified 401(k) Administrator** and a member of the **American Society of Pension Professionals and Actuaries**. She performs compliance testing, valuations and feasibility analysis of 401(k) and other defined contribution plans and is responsible for client relationships and consulting for their ongoing needs. Cheri has had experience in accounting functions since 1989 and has worked with various types of retirement plans since 1997.



Crystal R. Barrett. Front Office Manager. Crystal joined Actuarial Benefits & Design Company in 2000 as a File Clerk while attending Monacan High School. After completing high school in 2002, Crystal joined Actuarial Benefits & Design full time and supports all our departments in the fulfillment of communication material and plan valuations. She was promoted to Front Office Manager in 2010. Crystal's duties include new client transitions and conversions, data collection, and accounts receivable.



Lorrie H. Eyles. Executive Assistant. Lorrie joined Actuarial Benefits & Design in 2012 as a part of AB&D's Front Office team providing client and internal staff support as a part time intern and was promoted and became a full time member of the marketing and corporate executive offices in December, 2014. She holds a BS in Mass Communications from Virginia Commonwealth University. Lorrie is responsible for creating and distributing the monthly newsletters as well as coordinating the feasibility analyses and proposals created by staff for our clients.



Luan L. Doniger. Junior Associate. Luan joined Actuarial Benefits & Design Company in 2009. She holds a BS in Chemistry from The United States Naval Academy and served on active duty for 6 years. Luan was at the helm of our Form 5500 team during the transition to EFAST2 electronic filing and set up our internal systems for that function. In 2013 she was promoted to train in the valuation process, performing nondiscrimination testing and other technical services to our clients.



Lynn S. Alford. Human Resources. Lynn joined Actuarial Benefits & Design Company in 2005 as a liaison to our Accounting Department for the human resource accounting necessary to maintain our employee benefit programs. Lynn has past experience in bookkeeping and human resources.



Pamela Thompson. Client Services~AR Administration. Pam joined Actuarial Benefits & Design Company in 2007. She is responsible for administrative support to the Administration Department, assists with organization of the defined benefit plan valuations as well as assists in the fulfillment of the defined contribution plan valuations



Patricia A. Doniger. Manager, Trust Accounting. Pat joined Actuarial Benefits & Design Company in 2004. Pat has twenty years' experience at a law firm where she managed the corporate financial department and the IOLTA trust accounting. In 2008 she was promoted to Manager of the Trust Accounting Department, preparing the annual financial statements for plans and calculating earnings for plans that use the IRS correction programs. In 2011 she also became Manager of the 5500 Department's electronic filing.



Sarah Pernell. Administrative Assistant. Sarah joined Actuarial Benefits & Design Company in 2019 and serves as an Administration Assistant. She provides client and internal staff support. Sarah is currently working on completing her Bachelor's degree in business and the Retirement Plan Fundamentals Certificate.



Stephanie L. Cole. Document Services Assistant. Stephanie joined Actuarial Benefits & Design Company in 2001. She is responsible for preparing and maintaining plan documents, coordinating and tracking special document projects including annual participant notices. She prepares documents and forms for plans correcting under EPCRS and plans filing for compliance with the IRS.



Terri S. Hare. Manager, Distributions Department. Terri joined Actuarial Benefits & Design Company in 1996 as the Communications Distributions Specialist. She consults with plan sponsor's regarding distributions to employees after an event triggering a distribution. Terri previously worked in support positions with various companies in Richmond. Terri oversees the reporting and disclosure for distributions. She supervises staff who assist her with functions relating to the annual and periodic governmental reporting for qualified plans.



Thomas J. Cramton. Actuary. Tom joined Actuarial Benefits & Design Company in 2000 as our Enrolled Actuary. He is responsible for all defined benefit plan calculations and related government reporting and disclosures. Tom also assists with the review of special nondiscrimination testing reports.

Mark Peterson

Executive Vice President – Advocacy



Mark G. Peterson is the Executive Vice President – Advocacy at the American Institute of CPAs (AICPA). In this position, he sets the direction for global advocacy for management and public accounting, CPA and CGMA issues. Peterson works closely with state CPA societies, national governments, US state governments, regulators, legislators and accounting bodies to influence and shape policy decisions impacting the profession. Peterson leads the Congressional & Political Affairs, and State Society Affairs, State Regulatory and Legislative Affairs and Tax Advocacy teams.

Prior to joining the AICPA, Peterson served as Vice President with the Alpine Group, where he was responsible for individualized lobbying work on tax, trade, agricultural, environmental, energy and related issues. He served a diverse group of clients, including major international technology companies, energy companies, financial institutions, manufacturers and trade associations, as well as worked on several major policy coalitions on matters pending before the legislative and executive branches of government.

Peterson has held several other positions in Washington that have included the role of Washington Representative for Toyota Motors North America, Director of Government and Regulatory Affairs for Andersen LLP in Washington and a Special Assistant to Speaker Newt Gingrich in the U.S. House of Representatives.

He earned his bachelor of science degree in history from the University of North Dakota.



Advocacy Update

Mark Peterson, EVP – Advocacy

AB&D Annual Client Symposium
October 21, 2020



CPAs and Accountants in Congress

House



From left to right: Reps. Mike Conaway (R-TX), Brad Sherman (D-CA), Bill Flores (R-TX), Tom Suozzi (D-NY), Steven Palazzo (R-MS), Tom Rice (R-SC), Collin Peterson (D-MN), Brian Fitzpatrick (R-PA)

Senate



From left to right: Sens. Mike Enzi (R-WY) and Ron Johnson (R-WI)

CPAs Running in 2020

2 CPA challengers:

- Michigan's 7th District:
Gretchen Driskell (D)
– Likely will stay in Republican control
- Indiana's 5th District:
Victoria Spartz (R)
– Considered safe Republican



Victoria Spartz



Gretchen Driskell



Agenda

- SCOTUS confirmation
- Continuing resolution, FY2021 funding
- Lame duck session
 - Stimulus?

Business Tax Proposals

Execution of Agenda Depends on Party Control

Policy	Biden	Trump
Corporate Rate	28%	20%
Other Business Tax	Eliminate tax incentives for offshoring 15% minimum tax on book income >\$100M New FTT or fee on large banks Opportunity Zone reforms	“Made in America” tax credits 100% expensing for industries that bring jobs back to US Full meals and entertainment deduction Expand Opportunity Zones
Real Estate	Eliminate like-kind exchanges	
International Taxation	Reduce GILTI deduction from 50% to 25% of income	

Individual Tax Proposals

Execution of Agenda Depends on Party Control

Policy	Biden	Trump
Income Tax	39.6% top rate on income >\$400K Phase out 199A deduction	Extend TCJA individual provisions past 2025
Capital Gains, Dividends	Treat capital gains as normal income for investors > \$1M income	15%
Credits and Deductions	Expansion of CTC, EITC, CDCTC New renter's tax credit New family caregiver tax credit Repeal \$10,000 SALT cap Cap itemized deductions at 28% of income	Expansion of CTC
Social Security	Payroll tax for income > \$400K	Forgive 4 month 2020 payroll tax deferral

Advocating for AICPA Priorities

COVID-Specific Relief



Election Outcomes Will Drive Deal Shape and Timing

“I’d say at this point, getting something done before the election and executing on that would be difficult just given where we are and the level of detail, but we’re going to try to continue to work through these issues.”

Treasury Secretary Mnuchin
October 14, 2020



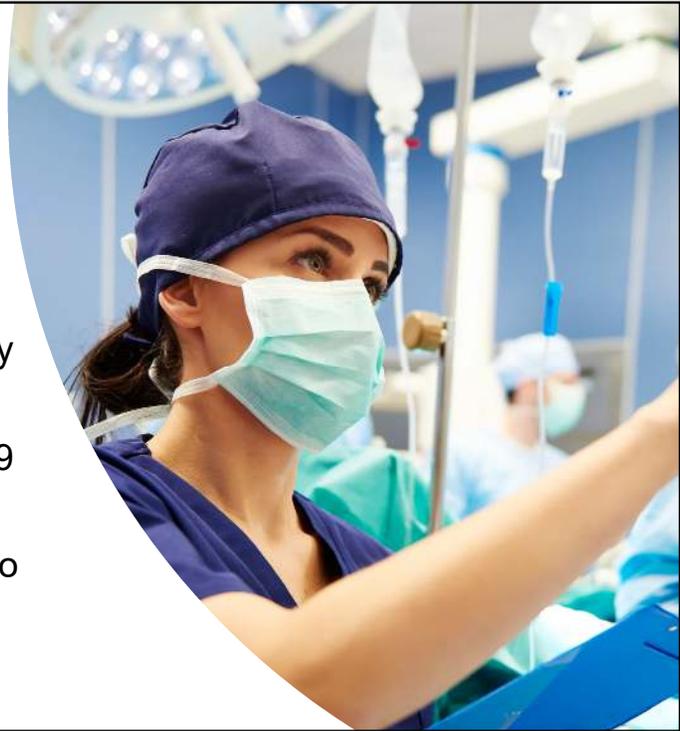
PPP Expense Deductibility Fix

- IRS guidance says expenses related to forgivable loans ineligible for tax deductions
- Guidance is contradictory to congressional intent in CARES Act
- **Profession support for S. 3612, the Small Business Expense Protection Act**



Mobile Workforce and COVID-19

- Long history of pushing legislation on workforce mobility
- Remote work and volunteer arrangements due to COVID-19 have re-energized issue
- Updated mobile workforce bill to address remote worker tax issues



501(c)(6) Organization Inclusion in PPP

Bipartisan, bicameral support for inclusion of 501(c)(6) organizations in PPP



Multiple legislative vehicles open PPP to more non-profits



Deal to include in future stimulus would likely cap the size



More Guidance, Simpler Process: PPP Loan Forgiveness

Months-long push for necessary guidance

Similar push for simplification of loan forgiveness process (ex: SBA should certify third-party calculators)

Hill atmosphere: broad support for “automatic” forgiveness for low-dollar loans (example: \$150,000)

Treasury seems supportive of streamlined forgiveness

- Noted need for fraud protection
- House Committees holding hearings on fraud in PPP



COVID Liability Protections

- Concerns with coronavirus-related lawsuits
- Senate Majority Leader McConnell “Redline”
- Democrats object
- Liability protections vs. state and local funding

Profession Recommendations in Next Round Stimulus

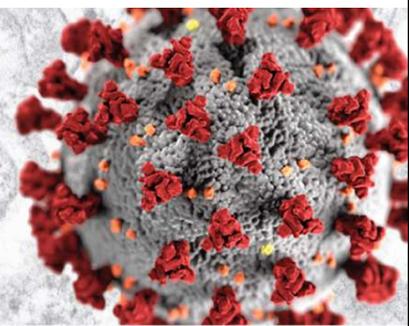
Recommendation	HEROES (House - passed)	HEALS (Senate – on hold)	HEALS “Skinny”	HEROES “Skinny”
PPP Expense Deductibility	✓			✓
“Mobile Workforce”		✓		
501(c)(6) in PPP	✓	✓	✓	✓
Simplified PPP Loan Forgiveness Process		✓	✓	✓
Business Liability		✓	✓	



CISA
CYBER+INFRASTRUCTURE



**IDENTIFYING
ESSENTIAL CRITICAL
INFRASTRUCTURE
WORKERS**



Public Accounting as an Essential Service

Helping the Hill: CPA + MoC Events

- **Events:** AICPA and State CPA Societies holding “town hall” events with Members
- **Purpose:** Help answer difficult constituent questions about PPP, EIDL, and related tax issues
- **Result:** Forging stronger connections between AICPA, State CPA Societies, and Hill in virtual era
- **Outlook:** With over a dozen successful events completed, we anticipate doing more on 2021



Tax Advocacy Issues in the COVID Era

July 15th Deadline

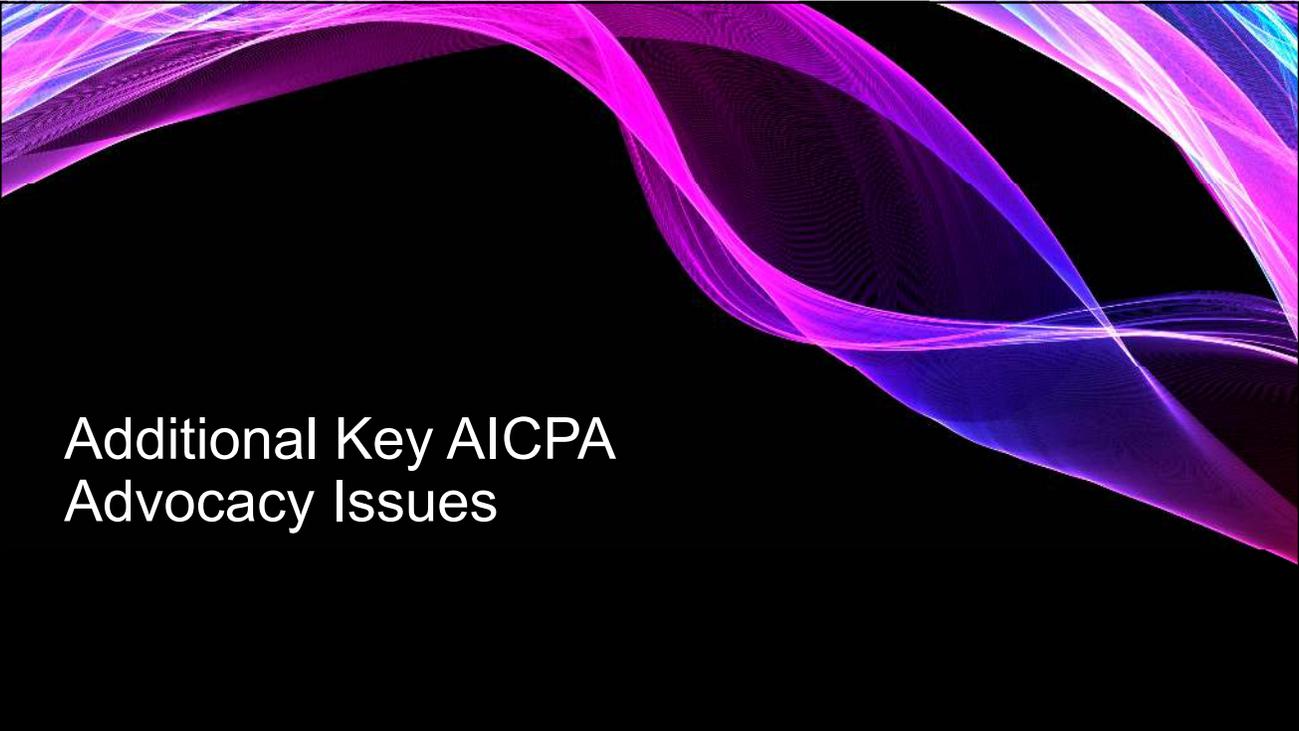
- AICPA advocacy weighed number of factors
- Determined advocating for further postponement would not be productive

Tax Penalty Relief

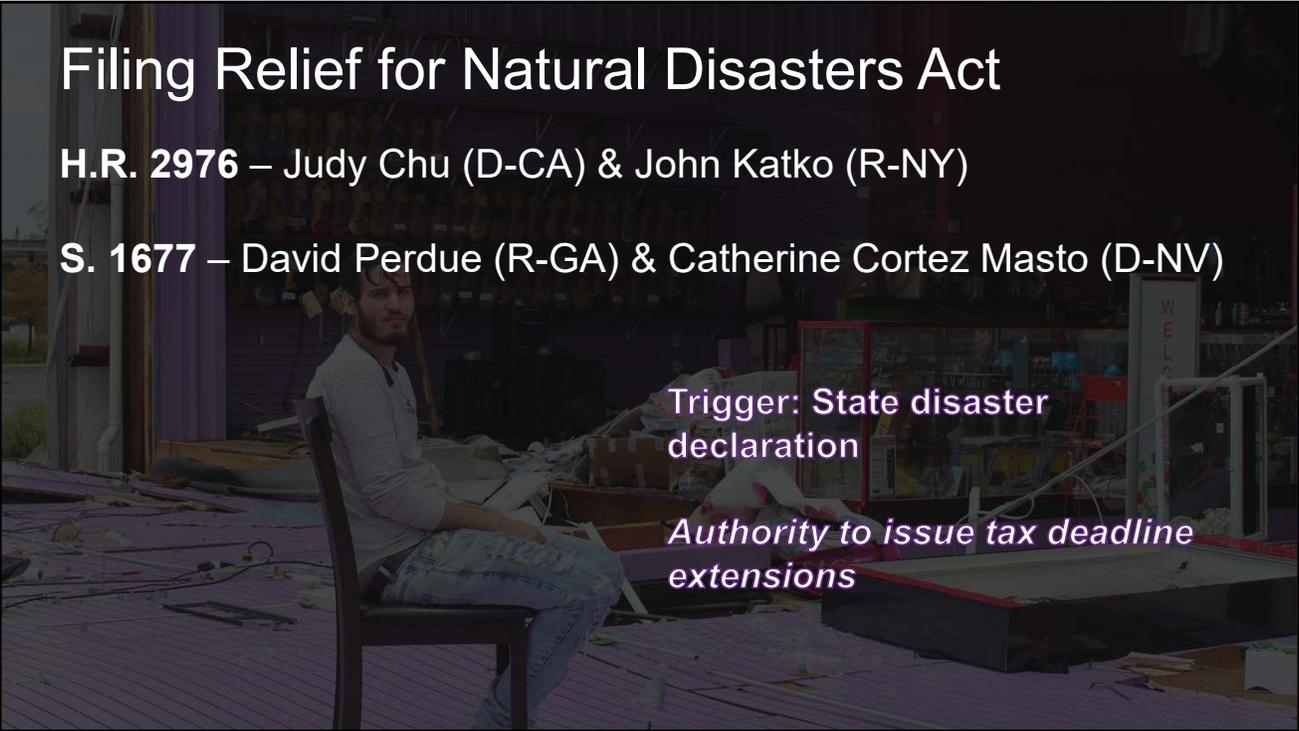
- We requested IRS use existing authority to provide tax penalty relief
- Members of Congress took note and also contacted IRS
- IRS willing to work with those who make effort

Temporary and Permanent E-Signature Relief

- **IRS took key AICPA suggestion on Temporary E-Signature Relief**
- New goal: making temporary relief permanent



Additional Key AICPA Advocacy Issues



Filing Relief for Natural Disasters Act

H.R. 2976 – Judy Chu (D-CA) & John Katko (R-NY)

S. 1677 – David Perdue (R-GA) & Catherine Cortez Masto (D-NV)

Trigger: State disaster
declaration

*Authority to issue tax deadline
extensions*

AICPA Continues to Encourage a *21st Century IRS*

Practitioner Services Division

2019 IRS seeks input

- AICPA actively providing major input from stakeholders
- Offered feedback to IRS in February 2020
- Initiative continues multi-year effort to modernize IRS



Fiscal State of the Nation

- AICPA's "What's at Stake"
- Resolution draws public and policymaker attention to the long-term fiscal picture
- Thought leadership that is non-partisan and timely
- When deficits matter, this initiative matters
- New in 116th Congress: bipartisan Senate resolution



Foreign Issuer Legislation

The Holding Companies Accountable Act

- De-lists for non-compliance after three years
- Passed the Senate
- Included in House NDAA

President's Working Group

- Includes potential co-audit by an accounting firm
- SEC preparing proposals in response
- Transition period until Jan. 1, 2022



Cybersecurity

Congress knows they must act

- *But how to address it?*
- *And, what to move first?*

Ensure legislation does not harm the profession



Independent Standard Setting

Current Expected Credit Loss

- CARES Act delayed CECL
- Additional delay possible in next stimulus
- AICPA urges no Congressional interference in the standard setting process
- September 2020 Treasury report supports the goals of CECL



Future of Work

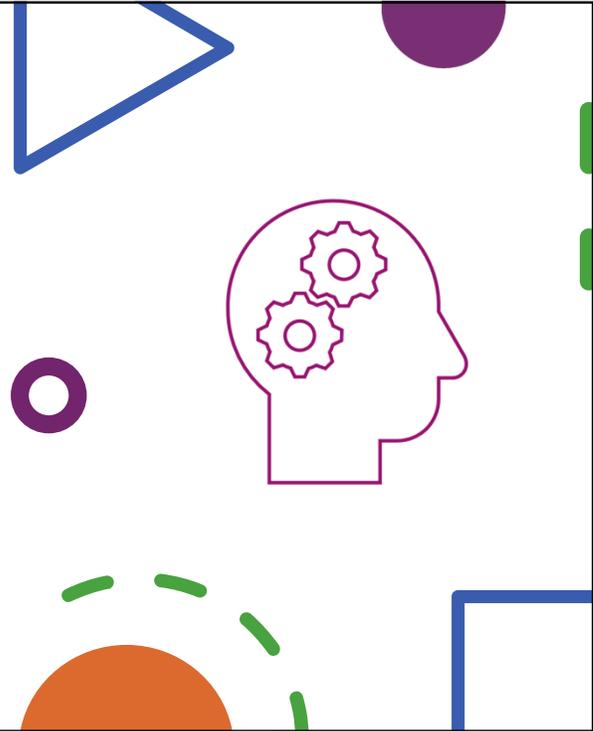
- STEM
- Apprenticeships

Accounting is a STEM field

Utilization of technology is critical to CPA professionals' success

STEM recognition would help build the pipeline of accountants in the U.S.

AICPA encouraging bill introduction that would recognize accounting as a STEM curriculum



Apprenticeships: Benefits to Employers and Apprentices

Registered Apprenticeships have access to federal and state funding programs:

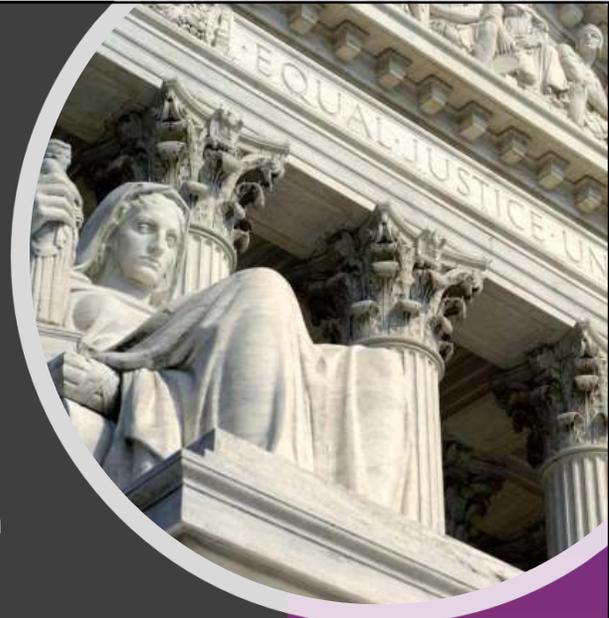
- Veterans can access housing benefits
- Employers may access wage reimbursements
- Some states provide tax credits
- SECURE Act (enacted last December) allows apprentices to use 529 funds for RA expenses

Bills pending in Congress:

- Other bills provide new tax credits for employers and expand RA expense definitions

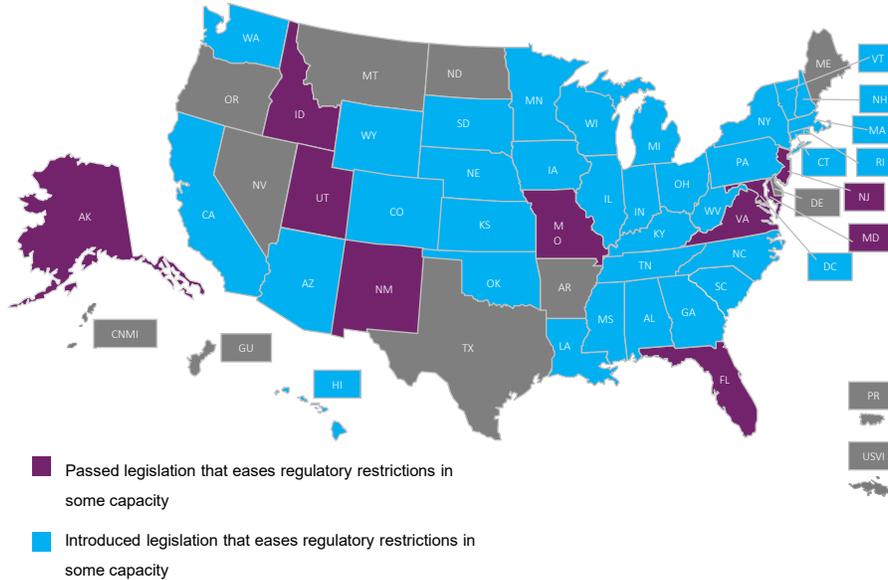
Licensing – Federal Antitrust Legislation

- 2015 SCOTUS decision, *N.C. Dental Board of Examiners v. FTC*, created risk of antitrust suits for licensing boards
- Over 30 active cases in courts
- Seeking Federal solution to limit liability of state boards and allow them to act as intended
- Reps. Jamie Raskin (D-MD) and Mike Conaway (R-TX) are expected to introduce a bill soon



State Issues





Alliance for Responsible Professional Licensing

- *Licensed to Move*, ARPL's interstate mobility report
- Development of resources for state partners ahead of 2021 legislative cycle
- Partnership with National Conference of State Legislatures to promote interstate mobility report
- Ongoing media outreach and counter measures

ARPL Alliance for Responsible Professional Licensing

LICENSED TO MOVE

THE ROADMAP FOR SUCCESSFUL INTERSTATE PRACTICE REFORM:

- RECOGNIZE MOBILITY AND RECIPROcity SYSTEMS THAT ALREADY WORK:** Look to proven mobility and reciprocity models, such as the long-trusted systems for civil engineers, architects, landscape architects, and surveyors. Work with professional associations and state licensing boards to become familiar with existing model laws, including their governing interstate practice systems.
- DEVELOP SUBSTANTIALLY EQUIVALENT REQUIREMENTS FOR EDUCATION, EXAMINATION, AND EXPERIENCE—THE “THREE E’s”:** Substantial equivalency is commonly described as jurisdictions requiring comparable amounts of education, the passage of a uniform national exam, and experience, the “Three E’s.” Substantial equivalency helps ensure all professionals are licensed and regulated equally, regardless of where they practice or who employs them.
- PROVIDE ADEQUATE PUBLIC PROTECTION:** Clearly define enforcement and oversight functions, by ensuring uniformity of qualifications and reducing overlap, oversight, proliferation, licensing barriers, and undue cost/burden. 50% of voters believe consumers are best protected by a system that regulates education, examination, and experience standards—all of which are overseen by a professional licensing board.

COMMON PITFALLS TO AVOID

- FORCING ACCEPTANCE OF OUT OF STATE LICENSES, WITH NO ASSURANCE OF ADEQUATE QUALIFICATIONS:** Include legislative language such as, “applicant has met standards substantially equivalent to or greater than required in this state.” Work with neighboring states when developing requirements to ensure consistency.
- CREATING NEW BARRIERS TO INTERSTATE PRACTICE:** Establish minimum substantially equivalent requirements, such as one year of experience, to ensure in good standing, and resending disciplinary actions – and stop there. Additional requirements unrelated to protecting the health, safety, and welfare of the public are unnecessary and counterproductive.

Licensing done right works. For more information, visit responsiblelicensing.org.

Taxes on Professional Services

States are exploring a more diverse set of options to fill expected budget deficits in the wake of COVID-19

Service taxes offered as a potential solution

Efforts in Montana and Wyoming



Thank You

Mark Peterson, EVP – Advocacy
Mark.Peterson@aicpa-cima.com

Current Cyber Risk Trends

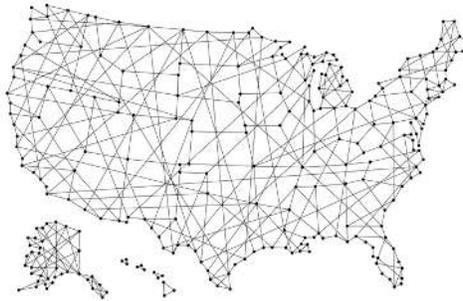
October 21st, 2020



OVERVIEW

RISK STRATEGIES

- Founded in 1997 as a risk management consultancy; transformed to brokerage in 2001.
- Now a Top 20 insurance brokerage in the United States (Business Insurance magazine); 11th largest privately-held U.S. broker with over \$4.5 billion in annual premiums placed.
- Over 90 offices throughout the United States, including major markets such as Boston, New York City, Chicago, Miami, Dallas, Memphis, Atlanta, Los Angeles, San Francisco and Sacramento.



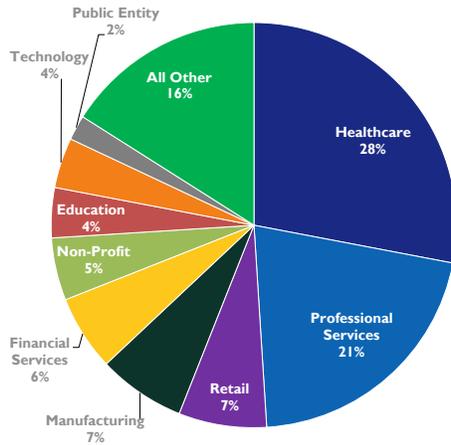
**ROBERT H. ROSENZWEIG-
NATIONAL CYBER RISK
PRACTICE LEADER**

- Rob oversees all of the Risk Strategies cyber professionals
- A published writer and frequent interview subject on cyber liability topics, he is regularly recognized as an industry thought leader



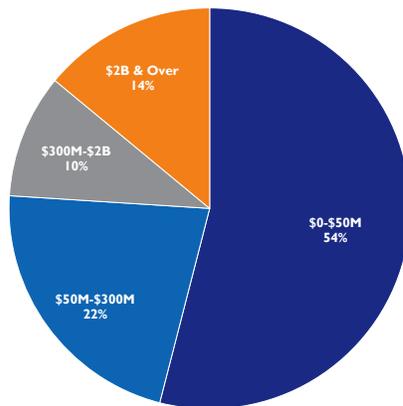
AGENDA

- Threat Landscape
- Regulatory Issues
- Insurance Marketplace Overview



INDUSTRY SECTOR TRENDS
**2015-2019
DATA BREACH
TRENDS**

Source: NotDiligence 2020 Claims Study



BUSINESS SIZE
**2018 DATA
BREACH
TRENDS**

Source: NotDiligence 2019 Claims Study

HEIGHTENED RISK ENVIRONMENT

- Resources from Operations & IT Security diverted elsewhere
- Employees using technology that they are less familiar with
- Using personal devices to connect with company systems and applications
- IT Infrastructure strained
- Increased reliance on technology and outsourced IT vendors in particular
- Less of a focus on everyday initiatives including Cyber Security
- Disconnected workforce makes it challenging to follow established risk management protocols
- Employees have distractions in their home environment that they do not have on premises

COVID-19 EXPLOITS

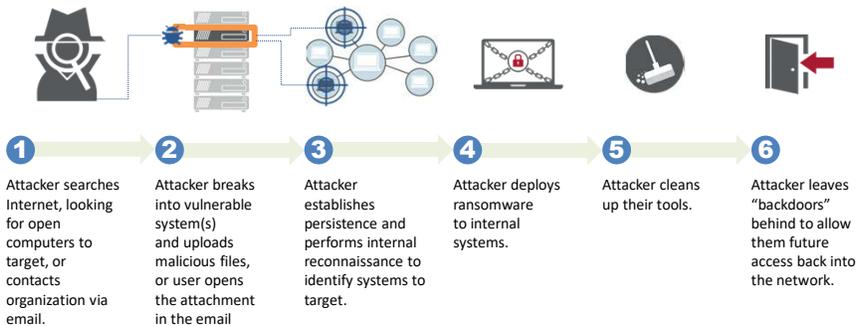
- Sending emails from internal company domains with fake links to work from home policy, procedure documents, or company portals;
- Calls and emails which fake IT or Product Support responses;
- Emails claiming to be alerts from the Center for Disease Control (CDC), the World Health Organization (WHO), or other expert organizations with information about the virus;
- Claims to provide access to government loans, tax refunds, or stimulus payments;
- Messages asking you to provide information for refunds on tuition, events, etc.;
- Newly-registered domains that reference “covid” or “corona” used to create malicious web pages to harvest user data;
- Ransomware embedded in COVID-19 emails, text message, and web sites (drive-by attacks);
- Invoice Manipulation/Diversion threats for companies that are struggling to work with AR/AP remotely.

RANSOMWARE



- Size of Ransoms demands increasing
 - Attackers are increasing size of ransom demands average size are 20 – 50 Bitcoins
- Negotiating ransoms becoming less successful and generally ends up costing more
- Double ransom strategy is becoming a normal occurrence
- OFAC issues around ransom payments gaining more regulatory attention

HOW RANSOMWARE ATTACKS WORK



LEGAL LANDSCAPE



- **Duties Imposed By...**
- State laws (statute and common law)-
 - CCPA
 - New York DFS
- Federal laws/regulations
 - HIPAA, SOX, GLB/Red Flags, etc.
- PCI
- International (GDPR, etc.)

CCPA

- California Consumer Protection Act effective January 1 2020
- Fines & Penalties up to \$7,500 per intentional violation; \$2,500 per unintentional violation
- Statutory damages of \$100-\$750 per California resident
- Regulation applies to data owners and data processors doing business in California
 - Revenues >\$25M
 - Has over 50,000 records
 - Earns more than half annual revenue from selling customer info
- Broad definition of Personal Information
- Right to opt out of data collection/do not sell my information

INSURANCE MARKETPLACE

- Approximately 500 insurers offer standalone Cyber insurance with the Top 40 writing over \$5M in Gross Written Premium
- Rapidly evolving marketplace with coverage continuing to expand along with valued added service offerings
- Other policies such as Property insurance increasingly excluding claims arising out of Cyber incidents
- Market is seeing average rate increases in Q3 2019 of ~15%
- Ransomware causing some markets to reconsider their stance, especially in the \$1B+ segment

Insurer	Premium Volume
Chubb	\$320,729,113
AXA	\$255,874,528
AIG	\$232,312,591
Travelers	\$112,920,719
Beazley	\$100,860,728
CNA	\$58,324,863
Axis	\$56,408,989
Zurich	\$43,315,425
Hartford	\$39,704,460
BCS	\$39,534,843

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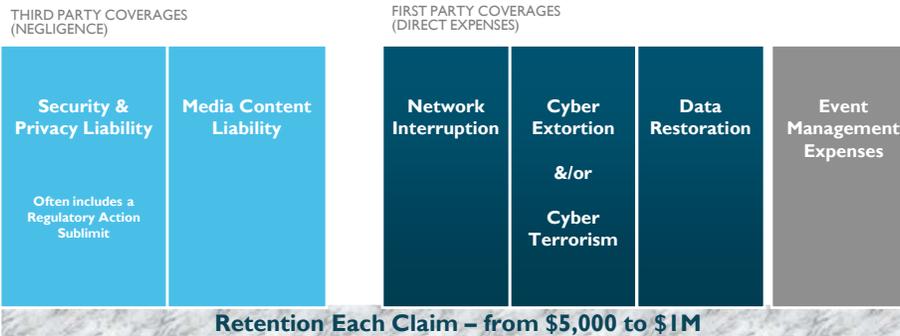
Source: NAIC Admitted Cyber Insurance Market Data

NOT ALL POLICIES ARE CREATED EQUAL

- Coverage purporting to be Cyber Liability
 - Sublimits offered on other policies such as Property, General Liability, Package Policies, and Errors & Omissions policies
- Not all stand alone Cyber Liability policies are created equal
 - Contingent Network Interruption
 - System Failure Network Interruption
 - Cyber Crime
 - Unencrypted Mobile Device Exclusions
 - Claims Handling
 - Prior Acts Coverage
 - Reputational Damage
 - Computer Hardware
 - Loss or theft of Funds

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WHAT IS COVERED?



UNDERWRITING GUIDELINES

- Policies primarily rated on Gross Revenues & Record Count (The Estimated amount of information collected and maintained by your organization)
- Other application questions look at three major factors-
 - People
 - Culture of security
 - Employee training
 - Processes
 - Information governance
 - How is information stored
 - Who has access to personal identifiable information
 - How does your organization dispose of information
 - Technology
 - Infrastructure
 - Firewall
 - Encryption
 - No intrusive audit of IT systems required

CYBER INSURANCE AS A SERVICE

- Risk Transfer/Balance Sheet Protection
- Useful Risk Management Insight from Application Process
- Access to Expert Vendors on Retainer
 - Legal Counsel (Data Breach Coach)
 - Forensics
 - Notification/Credit Monitoring
 - Public Relations
- Leverage complimentary and discounted resources from Insurers to enhance Cyber Infrastructure & Hygiene

PROTECT YOURSELF

1. Educate yourself
2. USE MULTIFACTOR for Exposed Services
3. Be suspicious of everything
 - a. Emails
 - b. Websites
 - c. Apps
4. SECURE YOUR PASSWORD!!!
5. USE MULTIPLE, DIFFERENT PASSWORDS
6. Store information in approved places
8. Don't use Free and open WIFI
9. Don't email passwords and sensitive info
10. Support Security & Compliance Efforts
11. Follow policies and procedures
12. Invest time to understand how to use systems
13. Use the designated storage for information
14. Be careful on Social Media
15. Protect your mobile devices



CYBER RISK PRACTICE

THANK YOU

Risk Strategies Company
Robert H. Rosenzweig
National Cyber Risk Practice Leader
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10/13/2020



Deborah Walker, CPA

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Let's Talk

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Based in the Firm's Washington, DC practice, Deborah is National Director of the Firm's Compensation & Benefits Solutions group. She provides executives and employers guidance on short and long term incentive compensation arrangements, both domestically and internationally; tax controversy issues related to employment taxes and compensation items; qualified retirement plans; health benefits including healthcare reform; and other fringe benefits such as expense reimbursement arrangements concentrating on federal tax consequences and achieving strategic business goals.

Recognized as a trusted advisor with extensive experience beginning in 1976, Deborah also advises clients on compensation deductions in mergers and acquisitions; accounting methods for compensation items; financial statement reporting of compensation; and ESOPs.

Prior to Cherry Bekaert, Deborah was a partner at two Big Four firms and Deputy to the Benefits Tax Counsel in the Office of Tax Policy at the U.S. Treasury Department, developing an extensive understanding in the creation of legislation and regulations. She is the author and co-author of many articles discussing compensation and benefits issues and has recently served as Chair of the AICPA Employee Benefits Conference, an annual conference for CPAs practicing in the employee benefits area.

Education

B.A. in Economics, Magna Cum Laude,
Alfred University

M.B.A., University of North Carolina-Chapel Hill

CPA License

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Specialties/Areas of Expertise

- ▶ Compensation & Benefits
- ▶ Employee Benefit Plans
- ▶ Employment Taxes
- ▶ Healthcare Reform
- ▶ Qualified Retirement Plans, including ESOPs

Professional Involvement

- ▶ Former Chair, IRS Commissioner's Advisory Committee
- ▶ Chair of American Institute of Certified Public Accountants (AICPA) Employee Benefits Tax Resource Panel
- ▶ AICPA Annual Employee Benefits Conference

Community Involvement

- ▶ Chair, Protestant Episcopal Cathedral Foundation Defined Benefit Plan Subcommittee

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10/19/20

COVID -19 Payroll Tax Rules

Deb Walker

National Director
Compensation & Benefits

October 2020



Federal Payroll Tax Relief

Families First Coronavirus Response Act (FFCRA)
Coronavirus Aid, Relief, and Economic Security (CARES) Act

Employee Retention Credit

Mandatory Paid Sick Leave
and FMLA Leave Credits

Employer and Employee Tax
Deferral



Employer Payroll Relief

- ▶ Employers with fewer than 500 employees counting all employees of an integrated employer (FFCRA)
 - Mandated FMLA Leave -- 2 weeks unpaid; 10 weeks paid
 - Mandated Paid Sick Leave – 80 hours
- ▶ All employers (CARES Act)
 - Employee retention pay
 - Payroll tax deferral
 - Employer
 - Employees earning less than \$4000 per biweekly pay period



Federal Employee Retention Credit

Qualified employers (not governments or PPP loan borrowers) can receive a refundable payroll tax credit equal to 50% of qualified wages paid after March 12, 2020 and before January 1, 2021. Credit can reduce payroll tax deposits

- ▶ Maximum credit per employee = \$5,000 based on \$10,000 qualified wages per employee
- ▶ Qualified wages includes qualified health care costs
- ▶ Payments not subject to the employer share of Social Security tax and the employer share of Medicare tax is creditable

Employee Retention Credit

- ▶ Includes wages paid by PEOs and other third parties
- ▶ Excludes wages paid to related individuals (family)
- ▶ Excludes wages for which certain wage tax credits are claimed
- ▶ Excludes wages paid as FFCRA paid FMLA and sick leave
- ▶ Refundable payroll tax credit offsets employer OASDI payments on wages paid to all employees after consideration of other credits
- ▶ Employers can use Form 7200 to claim a refund of credits if payroll tax deposits aren't sufficient to absorb the credits earned

Employee Retention Credit Qualified Employer

- ▶ A trade or business or nonprofit organization in 2020 which
 - Is suspended or partially suspended due to government orders limiting commerce, travel or group meetings due to coronavirus

OR

- Has gross receipts during a quarter in 2020 that are less than 50% of gross receipts for the same quarter in 2019. This provision ends in the quarter following the quarter in which gross receipts are more than 80% of gross receipts for the same quarter in 2019



Employee Retention Credit Qualified Wages

Depends on employer size, determined on an aggregated group An employer includes

- Corporate entities and any more than 50% owned subsidiary
- Brother sister corporations using a 50% ownership threshold
- Partnerships and any more than 50% owned entity
- Partnerships and any brother sister partnership using a 50% ownership threshold
- Sole proprietors and any 50% owned business or any brother sister entity using a 50% ownership threshold
- Affiliated service groups
- Organizations for which management functions are provided



Full-Time Employer Test

< 100 Full Time Employees*

- ▶ All wages paid to employees **
 - during the period the business/nonprofit organization experiences a suspension
 - during a quarter when the business/nonprofit organization experiences a specified drop in gross receipts
- ▶ * averaging 30 hours per week or 130 hours per month
- ▶ ** Exclude wages paid under FFCRA mandated paid leave

100 Full Time Employees*

- ▶ Wages paid to employees not providing services**
 - during the period the business/nonprofit organization experiences a suspension
 - during a quarter when the business/nonprofit organization experiences a specified drop in gross receipts
 - Wages per employee limited to no more than amount ordinarily paid during pay period 30 days before the suspension or decline in gross receipts



Employee Retention Credit Applied

Credit can reduce payroll tax deposits

- ▶ Credit offsets *employer OASDI payments* on wages paid to all employees after consideration of:
 - Credits from mandated FMLA and sick pay leave
 - Start-up company R&D credits and
 - Nonprofits claiming credits for employing veterans
- ▶ All payroll tax deposits can be reduced including:
 - Employees' FIT, OASDI and Medicare taxes
 - Employer's OASDI and Medicare taxes

Credits and Deposits
will be reconciled
quarterly on
Form 941





Mandated Paid Leave

Emergency Paid Sick Leave and FMLA Leave

Which employers must comply?

- ▶ Public employers with at least one employee
- ▶ Private employers with fewer than 500 employees
- ▶ Healthcare providers and emergency responders exempted by their employer
- ▶ Businesses with less than 50 full time employees and health care providers may be exempt



Paid Leave Exemptions

- ▶ Small businesses with fewer than 50 employees when an officer represents that the imposition of the requirements would jeopardize business as going concern
 - Payment of sick leave would result in financial obligations exceeding revenues and cause organization to cease operating at a minimal capacity
 - Absence of employees requesting leave would entail substantial risk to the organization because of specialized skills, knowledge or responsibilities, or
 - Not sufficient workers to perform work of persons requesting leave and services needed to operate at a minimal capacity
- ▶ Healthcare providers and emergency responders exempted by their employer



Emergency Paid Sick Leave

Payable to employees unable to work or telework due to

- Mandated Isolation or Quarantine due to COVID-19
- Self-quarantine if advised by a health care provider
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis
- Caring for an individual described above
- Caring for a child if school is closed or child care provider unavailable, due to COVID-19 precautions
- Experiencing another substantially similar condition as specified by Dept. of Health & Human Services



Emergency Paid Sick Leave

How much to pay employees?

- ▶ 10 days pay (80 hours) based on the greater of the regular pay rate or minimum wage, but not to exceed,
 - \$511/day and \$5,110 total for isolation, quarantine, self-quarantine, and experiencing symptoms
 - \$200/day and \$2,000 total for caring for others
- ▶ Employer cannot require employee to use other leave first

Tax Credit for Employers

How much tax credit can be generated?

- Emergency paid sick leave wages
- + Emergency paid FMLA leave wages
- + Qualified health plan expenses allocable to employees during period claiming emergency paid sick leave and FMLA leave
- + Employer share of Medicare tax paid on these wages
- = Total tax credit

Tax Credit for Employers

How does an employer claim the credits?

- ▶ Reduce tax deposits by amount of anticipated tax credits
- ▶ Excess tax credits are refundable using Form 7200

Other items to note:

- ▶ No income tax deduction for paid leave amounts offset by tax credits claimed
- ▶ Employers can elect out of tax credit provisions
- ▶ Tax credits not available to government employers



Payroll Tax Deferral

Employer Tax Deferral

- ▶ Payments of *Employer share* of OASDI tax (not Medicare tax) due between March 27, 2020 and December 31, 2020 can be deferred
 - 50% of deferred amount is due by 12/31/2021
 - 50% of deferred amount is due by 12/31/2022
- ▶ Employer directs 3rd party payor not to pay and will be solely responsible for payment of the deferred amount
- ▶ Employers wanting to prepay amounts can make a deposit for the quarter for which the tax was deferred. This will be reflected in the tax transcript.



Employee Tax Deferral

Withholding and remittance of *Employee share* of OASDI tax (not Medicare tax) due between September 1, 2020 and December 31, 2020 can be deferred until January 1, 2021 through April 30, 2021

- ▶ Executive Order
- ▶ Notice 2020-65
- ▶ Deferral of 6.2% of employee Social Security tax for employees paid < \$4,000 per biweekly pay period or equivalent (\$104,000 annual wages)
- ▶ Optional by the employer
- ▶ Employers liable for tax, interest and penalty on amounts not repaid before May 1, 2021



Employee Tax Deferral

- ▶ Repayment of deferred tax is in addition to tax withholding on regular wages paid in 2021
- ▶ Eligible employees are considered on a pay period basis
- ▶ Employer may make unspecified “arrangements” to collect the deferred SS tax from an employee
- ▶ Revised Form 941 issued 8/28/2020



Employee Tax Deferral Example

- ▶ Employee1’s annual wage is \$50,000 (Gross biweekly wage = \$1,923)
- ▶ Employee2’s annual wage is \$75,000 (Gross biweekly wage = \$2,884)
- ▶ Employee3’s annual wage is \$90,000 (Gross biweekly wage = \$3,461). Employee3 receives commission on 9/30 of \$20,000

	Employee1	Employee2	Employee3
Wages per pay period	\$1,923	\$2,884	\$3,461
EE SS Tax (6.2%)	\$119	\$178	\$214
Total Tax Deferral	\$952	\$1,424	\$1,498*

* Employee3 not eligible for tax deferral on earnings in 9/30 pay period since >\$4,000



Should you implement the Employee payroll tax deferral?

Pros & Cons

- Short-term deferral for employee – extra cash flow
- Potential forgiveness of tax
- It is voluntary by the Employer

- May require changes to payroll systems
- Monitoring of eligible employees on pay period basis
- Employer liable for failure to pay over amounts
- Repayment by the employee in early 2021
- Compliance risks – W2s, etc.

Common Pitfalls/Takeaways

- ▶ Payroll provider/PEO issues with claiming credits
- ▶ Improper calculation of retention credit
- ▶ Inaccurate or incomplete Form 941
- ▶ Check to be sure you are taking advantage of the proper payroll credits for 2020

What Questions Do You Have?

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Managing Liquidity in Turbulent Times

October 21, 2020

ALVAREZ & MARSAL



1. Forfeitures

- a. Forfeit certain unvested amounts – In certain circumstances, plan sponsors can forfeit unvested amounts (e.g., 5 consecutive BIS) even though a participant has not taken a distribution. Short-term
- b. Cash out small balances (i.e., under \$5k) – Many plan documents will force-out small balances, but plan sponsors may not process those force-outs regularly. Plan sponsors may consider processing another round of force-outs, which may generate additional forfeitures. Mid-term
- c. Current forfeiture balance – Consider drawing down the current forfeiture balance even though the normal process may be to do so near year-end. Short-term and long-term

2. Current Matching and Non-elective Contributions

- a. Consider suspending or eliminating those contributions. Short-term to mid-term
 - i. Notice Requirements.
 - ii. Plan Document Amendments.
 - iii. Accrued benefits.
 - iv. Issues specific to safe harbor plans.

- b. Delaying the funding of contributions may be permissible under the terms of the plan document. Short-term

3. Partial Plan Terminations

- a. When is it determined that a partial plan termination has occurred? Until that date, you can process forfeitures normally and utilize those amounts. Short-term

- b. Monitor turnover rate or perform a mid-year projection to understand if/when 20% threshold is crossed and make strategic decisions on future RIFs. Mid-term

4. Pension Funding

- a. 2020 funding relief; however, there may be unintended consequences such as interest and/or variable rate PBGC premiums. Mid-term to Long-term

5. Vendor Fees

- a. If a competitor vendor search has not been undertaken recently, plan sponsors should consider undertaking one. Such processes often result in reducing the fees being paid without sacrificing the services being provided. Long-term
- b. Determine what plan expenses are being paid directly by the employer even though they are permitted to be paid by the plan's trust (e.g., out of forfeitures). Paying those expenses out of the trust conserves cash on hand. Mid-term
- c. Determine what plan expenses are paid out of forfeitures rather than passed through to participants. Passing the expenses through to participants may change the party that incurs the final cost of such expenses. Mid-term

Patrick Blanchard

Managing Director

- Patrick Blanchard is a Managing Director with A&M Taxand, LLC in Denver. He assists clients with a variety of issues related to qualified retirement plans.
- Mr. Blanchard's experience includes performing nondiscrimination testing with a particular emphasis on complex controlled groups and unique testing conditions (e.g., subsequent to M&A activity); representing plan sponsors in Internal Revenue Service (IRS) and Department of Labor (DOL) examinations; assisting plan sponsors to identify and correct operational failures under the IRS and DOL correction programs; and assisting employers throughout the process of adopting or making significant changes to retirement programs.
- Additionally, Mr. Blanchard assists clients with their non-qualified deferred compensation plans and other compensation programs to ensure compliance with all applicable statutes and guidance.
- Prior to joining A&M, Mr. Blanchard was a Managing Director with Compensation & Benefit Solutions, a leading provider of compensation and benefit services based in Denver.
- Mr. Blanchard earned a bachelor's degree in general business from Southwestern University, a law degree from the Case Western Reserve University School of Law, and an LLM in Taxation from the University of Denver. While attending the University of Denver, he represented low-income taxpayers before the IRS as a part of the Low Income Taxpayer Clinic. Mr. Blanchard is currently an adjunct professor of Qualified Pension & Profit Sharing Plans in the University of Denver's Graduate Tax Program and frequently speaks on qualified retirement plan compliance and administration.



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Bob Ellerbrock focuses his practice on executive compensation, employee benefits, and ERISA. He regularly advises clients concerning qualified retirement plans (401(k), defined benefit, 403(b)), non-qualified plans, fringe benefits, health and welfare benefits, Affordable Care Act compliance, and executive compensation issues. Bob worked as a consultant in the retirement plan industry prior to practicing law and is able to draw on this experience when counseling clients to come up with practical solutions to their problems.

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**2020 STATUS OF ERISA
LITIGATION**

Take Steps to Avoid

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CURRENT LITIGATION TRENDS

- Plan Litigation
 - 401(k)
 - 403(b)
 - Defined Benefit
- Protection of Plan Data
- Cyber-Security Issues
- Fiduciary Failures



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401(K) LITIGATION



Generally, the lawsuits claim

- Excessive fees for record-keeping and administration of the plans;
- The use of retail instead of institutional mutual funds (retail funds typically have much higher fees); and contained obscure fees
- Asset-based recordkeeping fees funded by revenue sharing.

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401(K) LITIGATION



- Cross-Selling has been targeted
- Participant data is a plan asset
- Participant data should not be used for non-plan purposes
- Plan Sponsors have a duty to protect plan data

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SMALLER PLANS GETTING IN ON THE ACTION

- Historically only large plans were targeted
- Small plans have been recently targeted
 - Small plans being a relative term
 - Last year we saw a plan as low as 52 million in assets
- Generally follow same format as large plan litigation
 - Share classes
 - Expenses

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403(B) LITIGATION

- Excessive fees for recordkeeping and administration of the plans
- Too many investment options, many of which were duplicative, unnecessary, and confusing to participants, and contained obscure fees
- The use of retail instead of institutional mutual funds (retail funds typically have much higher fees)
- Asset-based recordkeeping fees funded by revenue sharing
- Failure to adequately monitor the plans

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DEFINED BENEFIT LITIGATION

- Challenging the use of outdated
 - Mortality tables
 - Interest rates
- IRS does not require a specific interest rate or mortality table
- Should review and be able to justify
 - Some have this as part of their annual review
 - Think “*Tibble*”

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Fiduciaries have the duty to monitor expenses to ensure that their actions and decisions are in the best interest of the plan participants and beneficiaries.

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GOOD PRACTICE

- Selecting and managing your vendors has a significant impact on your benefits costs and liability
- Go through an RFP (or RFI) process to choose all vendors – items to consider
 - Track record
 - Representative clients
 - All fees
 - Remember – nothing is free
- Ensure that the vendor knows its role and the expectations you have for it



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GOOD PRACTICE

- Companies have a fiduciary duty to monitor their service providers to ensure that their actions and decisions are in the best interest of the plan, participants and beneficiaries
- Committee should
 - Hold regular meetings as outlined in the committee charter
 - Review service provider performance
 - Review service agreements
 - Review reports provided
 - Review fees to ensure appropriateness
 - Adopt policies and procedures for the programs

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CYBER SECURITY

Increasing Number of Attacks Against Retirement
Plans

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PARTICIPANT DATA

- Is participant data a plan asset
- Service providers typically require participant data
- Participant data
 - Name
 - Age
 - Address
 - Date of hire
 - Compensation
 - Social security number
 - Plan balances

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CLAIMS INVOLVING PARTICIPANT DATA

- *Included in the university litigation claims*
 - *Divane v. Northwestern*
 - *Cassell v. Vanderbilt University*
- *Prohibition on the use included in other settlements*
 - *Many of the settlements included language to prohibit the use of data*
 - *All of the settlements were prior to Divane appeal being decided*
- *Is this the right course*

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CLAIMS INVOLVING PARTICIPANT DATA

- *Harmon v. Shell Oil Co.*
- In addition to standard claims
 - Fees, Expenses, Fund performance...
- Claimed the Shell allowed Recordkeeper to improperly use participant data
 - "... Defendants allowed the Defendants to use Plan participants' highly confidential data, including social security numbers, financial assets, investment choices, and years of investment history to aggressively market lucrative non-Plan retail financial products and services, which enriched Fidelity Defendants at the expense of participants' retirement security;"

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CLAIMS INVOLVING PARTICIPANT DATA

- *Divane*
 - *Plaintiffs tried to add a cross-marketing claim towards the end of discovery*
 - *District Court rejected the addition*
 - *Should have been raised earlier*
 - *Also provided the following as to why it would not go anywhere*
 - *It is not imprudent to allow the recordkeeper to have access to this kind of participant information.*
 - *Disclosure of such information to the recordkeeper does not implicate ERISA fiduciary functions.*
 - *Not a single court has held that releasing confidential information or allowing someone to use confidential information is a breach of fiduciary duty, and "[t]his Court will not be the first, particularly in light of Congress's hope that litigation would not discourage employers from offering plans."*
 - *Court was not convinced the data is a plan asset*
 - "property the plan could sell or lease"

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CLAIMS INVOLVING PARTICIPANT DATA

- Plaintiff appeals
 - Seventh Circuit affirmed
 - In addition to being too late and with no precedent
 - Most importantly provided
 - “We agree.” that the proposed data claim “fails to state a claim for relief.”
- Sure plaintiff’s counsel will continue to try to pursue this issue
 - Due to willingness to settle
 - Only one court’s decision

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CLAIMS INVOLVING PARTICIPANT DATA

- Cassell alleges fiduciaries breached their fiduciary duties
 - allowing a service provider “to use its position as the plan’s recordkeeper to obtain access to participants, gaining valuable, private and sensitive information including participants’ contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement, among other things.”
 - allowing the service provider to use this valuable and confidential information to sell the recordkeepers’ products and wealth management services to the plan’s participants and “failed to even attempt to determine the value of this marketing benefit.”
- Settled
 - 14.5 million
 - Prohibition on use of participant data

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WHAT TO DO NOW

- *Divane* - not “property the plan could sell or lease”
 - There is a huge market
 - Privacy policies
- Information should be protected
 - Maybe not plan asset
 - Still privacy issues
- Be aware of contract language
- Negotiate if appropriate

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CYBER SECURITY

Increasing Number of Attacks Against Retirement
Plans

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CYBER-SECURITY

- Cyberattacks on both retirement plans and participant accounts are increasing.
- target 401(k) or pension information
 - Phishing
 - information-stealing malware
- hands-off nature of 401(k) plans may make them an attractive target for cybercriminals
 - Quarterly Statements
 - Designed to be hands-off

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LITIGATION

- *Naomi Berman v. Estee Lauder Inc.* (USDC, W.D. Cal.) Case No. 3:19-cv-06489, filed Oct. 9, 2019.
 - Fraudulent distributions
 - Complaint claimed numerous security lapses by the plan administrator and the employer
 - Settled
- *Barnett v. Abbott Laboratories*, Illinois Northern District Court, 1:20-cv-02127, filed April 3, 2020.
 - Complaint claims customer service provided an unknown user with personal information.
 - Unknown person accessed the participant's account online
 - changed the password
 - initiated a transfer to a new bank account

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LITIGATION

- *Leventhal v. MandMarblestone Grp. LLC*,
 - Fraudulent withdrawals
 - Court found TPA and Custodian responsible
 - TPA respond with counter claims against Plan Sponsor
 - Plan sponsor was negligent in allowing participants to work from home
 - Permitting them to use personal computers
 - Such actions allowed the cyber-fraud to occur
 - As such liable for some of the contribution

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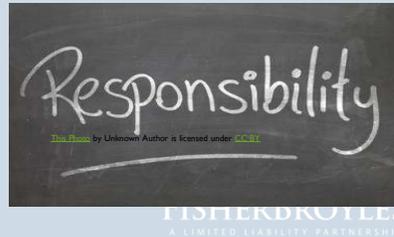
PLAN SPONSOR

- Generally, under privacy and data-security laws, responsibility for proper collection, storage, and use of plan participants' personally identifiable information rests with the entity that ultimately controls the decisions regarding such activities (the "data controller")
- Retirement Plans
 - Plan Sponsor
 - Trustees (Multi-employer plan)

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SHIFTING THE RESPONSIBILITY

- Transfer to a service provider
 - Contractual indemnification
- Plan Sponsor maintains liability and is responsible
 - Vendor selection
 - Monitoring services



WHAT TO DO NOW

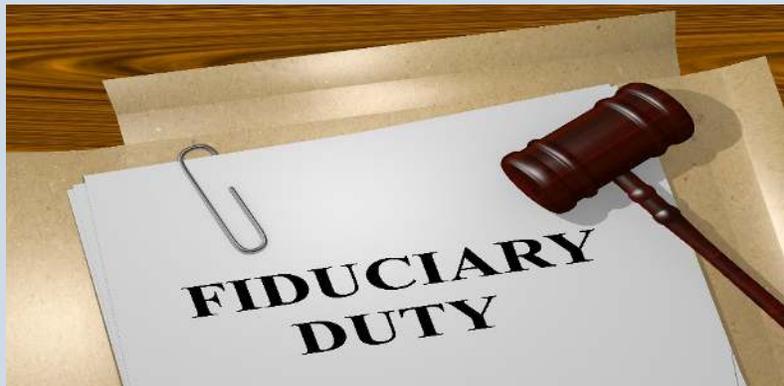
- Question service providers about
 - Cybersecurity policies and procedures
 - Cybersecurity capabilities and the safeguards
 - How are the controls created
 - Are the controls tested
 - Have they ever been compromised
 - Participant accounts
 - How do they limit and verify access
 - Do they have multifactor authentication
- Request verification of service provider's insurance coverage

WHAT TO DO NOW

- Educate participants
 - Do not share login information
 - Change login information
 - Log in occasionally to check on account
- Do not assume that it is the responsibility of the service providers
- Know what the contracts say
- Create and follow internal policies and procedures regarding cyber-security

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FIDUCIARY FAILURES



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WHO IS A FIDUCIARY?

- Basically, any person who:
 - Exercises any discretionary authority or control concerning the management of the plan
 - Exercises any authority or control over the management or disposition of the plan's assets
 - Renders investment advice with respect to plan funds for a fee or other compensation (investment professional/advisor)
 - Has discretionary authority or responsibility in the administration of the plan
- Discretion is key – one who exercises discretion concerning the plan will be a fiduciary



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MAIN FIDUCIARY DUTIES UNDER ERISA

1. Act Prudently
2. Diversification rule
3. Exclusive benefit rule
4. Act in accordance with plan documents
5. Ensure Plan expenses are reasonable

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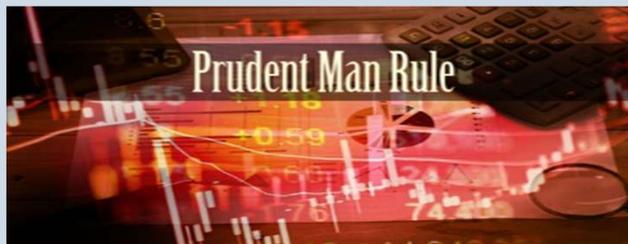
WHAT IS PRUDENT

- Fiduciaries must carry out all duties with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use
 - If fiduciaries act prudently in selecting and monitoring the investment funds, this will generally fulfill their fiduciary obligations
- Not concerned with results, but whether the fiduciary's actions were prudent
 - Actions showing procedural prudence should be documented

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WHAT IS PRUDENT

- DO NOT ENGAGE IN PROHIBITED TRANSACTIONS!!
- AVOID SELF-DEALING



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DIVERSIFICATION RULE

- Fiduciaries should diversify plan assets to minimize the risk of large losses, unless it is clearly prudent not to do so
- Select a broad range of investment options
- Each investment must be prudently selected
- Avoid investing in a single security or securities dependent upon the success of one enterprise

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EXCLUSIVE BENEFIT RULE (DUTY OF LOYALTY)

- Fiduciary duties must be performed for the sole purpose of providing plan benefits to participants and their beneficiaries while limiting reasonable plan expenses
- Plan assets must not be used for fiduciary's own benefit, even if such use benefits plan participants
- Conflicts of interest must be avoided

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ACT IN ACCORDANCE WITH PLAN DOCUMENTS

- Fiduciaries must follow the terms and provisions of the plan document and other documents governing plan administration
- Fiduciaries should be familiar with the terms of the plan documents
- May hire outside counsel to assist with this requirement, but duty still remains with fiduciary

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ENSURE PLAN EXPENSES ARE REASONABLE

- Fiduciaries should determine the services needed by the plan and fees related to these services
 - Accounting services
 - Legal services
 - Recordkeeping
 - Compliance
- Service agreements with providers must disclose these fees
- Ensure these fees are reasonable
- Are services adequate
- **Plan committees must engage in a prudent process to evaluate these issues**

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ENSURE PLAN EXPENSES ARE REASONABLE

- Helpful items
 - Request for proposals (RFP)
 - Benchmarking
 - Nature, quality and quantity of services
 - Negotiate costs and compensation
 - Share classes
 - Expense recapture accounts

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AVOID IN ENGAGING IN PROHIBITED TRANSACTIONS

- Fiduciaries must not engage in any prohibited transactions under ERISA
 - Certain transactions between the plan and certain parties are prohibited, even if it would benefit the plan
 - Prohibits various transactions between a plan and party-in-interest
 - Sale, exchange or lease
 - Lending money or other extension of credit
 - Furnishing goods, services or facilities
 - Transfer of plan assets to party-in-interest
 - Also prohibits any self-dealing—dealing with plan assets for own account, acting on behalf of party adverse to plan or participants, or receiving consideration for transaction involving plan assets

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MISCELLANEOUS

- Benefit issues due to leaves granted in 2020
 - Confirm legal compliance for benefits during different leaves
- **Confirm that language in insurance certificates, plan documents, and employee handbook is consistent with practice**
- Confirm life insurance conversion notices given timely
- Confirm accurate communications with employees and insurance carriers and payroll

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BEST PRACTICES

- Monitor Service Providers
 - Review service provider performance
 - Review service agreement
 - Review reports provided
 - Review fees charged
 - Ask about policies and practices
 - Follow up on participant complaints
 - Review SAS 70 of recordkeeper and/or custodian
 - Document everything

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BEST PRACTICES

- Review plan investments and policies statements and document such review
- Hold regular meetings with Retirement Plan Committee or Investment Committee or those charged with plan governance and document accordingly
- Document
- Document
- Document

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ACTUARIAL BENEFITS & DESIGN COMPANY

*Redefining Professional
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Services since 1989.*

*The Case of
the
Missing
Participant*

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How do participants get lost?

It is an interesting dichotomy. Plan trustees want to give former employees who participated in their retirement program the benefits that they are due. You would think these individuals would be at their doorstep. Some just do not respond to a letter; crazy, but true. Some participants do not realize that their former employer cannot find them and they have moved away, forgetting about their account in the plan. The more time that passes after an employee terminates employment, the more difficult it is to find them.

When does it become important to find lost participants?

Finding lost participants becomes even more critical in the event that the retirement plan is terminated due to merger, acquisition or dissolution of the company. In the event of unresponsive participants, or former employees that you can not currently locate, fiduciary responsibility mandates due diligence to locate these participants and pay them their account balance. This can delay closing the deal. Purchasers will not want to buy this liability.

Who cares about a plan sponsor finding lost participants?

The Department of Labor enforces fiduciary responsibility. It issued Field Assistance Bulletin 2014-01 which provides insight into how the Department of Labor believes fiduciaries should properly discharge their obligations to these missing or lost participants. The DOL looks seriously at the due diligence used to find these participants. When the value of the account is high, the fiduciary responsibility intensifies – for, as long as there is an account, the plan trustee and other fiduciaries are responsible to the participant for required notices among other annual events such as required minimum distributions. The participant has an ongoing claim for as long as there is an account balance that is not distributed. Further, lost participants are counted as to whether the plan may need an independent CPA audit for plans with more than one-hundred participants.

What are the ways benefits get left in the plan?

Your plan document dictates the rules for processing distributions from your plan. Generally, profit sharing plans allow for the following:

Accounts valued at \$1,000 or less can be distributed without the consent of the participant. This is referred to as a cash-out distribution. For accounts valued from \$1,001 up to \$5,000, the trustee can transfer the funds to an Individual Retirement Account (IRA) established by the plan trustee for the benefit of the plan participant. This is sometimes called an automatic rollover distribution. If the value of the account in the Plan is \$5,001 or greater, then the participant must consent to the distribution.

What process does AB&D recommend to plan trustees for plan distributions?

Every participant should be given the opportunity to make an election about how to receive plan benefits as they leave employment - even if they must wait to receive their benefit; have them sign an election form so their wishes are communicated. The Plan sponsor should continue to follow up to ensure that former employees are paid as soon as possible following termination of employment. Each year, review the list of participants who are eligible to receive a distribution but have not requested one. Be proactive. Work with your service providers. Be creative and persistent. Your service providers will not be as persistent as a fiduciary should be unless you engage them to be part of the solution and you monitor their progress. Follow a process that creates an environment of accountability.

What is the appropriate procedural prudence in seeking lost participants?

These steps should be documented to find a missing or lost participant:

1. Mail. Send a benefit election form with an explanation letter to the participant at their last known address.

- a. If the letter is returned, keep the envelope as evidence that the mailing was attempted.
- b. If the letter was delivered, but no response is received, send a second letter via Certified Mail. If the return receipt is signed and returned, then the address is likely valid. You then must determine your next course of action as you have "found" your participant. Perhaps cash them out?

2. Beneficiary contact, personnel records and benefit providers.

- a. Write or call anyone listed as an emergency contact.
- b. Check beneficiary designations for relatives who may be able to help.
- c. Check with other benefits providers to see if they have a different address on file.
- d. Post a notice in the workplace and talk to people that worked closely with the employee to see if anyone has kept in touch.
- e. Verify with the plan's recordkeeper that there is no more current address than what you have for the participant. See if they can determine whether the participant has logged on – you may be able to send a message that way.

3. Internet search

- a. Google or other search engine
- b. Social media (Facebook, Twitter, LinkedIn, etc.)
- c. Obituaries, or legacy internet sites
- d. Public Record Databases (real estate, licenses, mortgage liens)

4. Commercial locator services

- a. Intelius.com/people-search.html
- b. PBinfo.com.
- c. whitepages.com.

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The Department of Labor specifically says that Plan fiduciaries must make reasonable use of Internet search tools that do not charge a fee to search for a missing participant. Also, the DOL states that if you complete a due diligence search, but do not find the missing participant, the duties of prudence and loyalty require any ERISA fiduciary to consider if additional search steps are appropriate.

A trustee should consider the size of a participant's account balance compared to the cost of any additional search in deciding whether to pay for a search. As a result, the specific additional steps that a plan fiduciary takes to locate a missing participant vary depending on the facts and circumstances. Such costs can be charged to the participant's account, if reasonable and communicated in advance.

What are best practices to minimize the risk of having lost participants?

The best cure is prevention. Instituting procedures that minimize the risk for any successful fiduciary breach of duty claim will be beneficial, such as:

1. Ensure your plan allows the cost of any reasonable search to be charged to the participant.
2. In your employee termination package, include instructions for requesting a distribution from your retirement plan with information about your plan's investment advisor. Explain what happens if they do not claim their benefit, including costs to find them or cash them out, rollover to an IRA.
3. Follow up 90-days following distributable periods or the same time each year for all eligible participants, to see if a distribution has been requested or processed.
4. Instruct your custodian to cash out small balances if your plan document allows.
5. Ask your plan investment platform about their automatic rollover option.
6. Review the report that shows each participant's account balance in the plan and ask your investment advisor to reach out to terminated employees to assist them in transferring their balance to an IRA.

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What is the preferred form of distribution for a missing participant?

The Department of Labor states that Section 404(a) of ERISA requires plan fiduciaries to consider distributing missing participant benefits into an IRA because it is more likely to preserve funds for retirement than any other option. A distribution that qualifies as an eligible rollover distribution and moved into an IRA will avoid immediate taxation, defers income tax, avoids mandatory income tax withholding, and avoids any excise tax for pre-age 59-1/2 distributions. These criteria were cited for the DOL preference towards depositing funds into an IRA where they continue to grow tax-free until funds are withdrawn.

When can the account be turned over to unclaimed property?

If, after consideration of the facts and circumstances, you have determined that an IRA is not the best choice, you have two options:

- 1) Open an interest-bearing and federally insured bank account in the name of the missing participant, or
- 2) Transfer the account balance to a state unclaimed property fund.

In Virginia, there are no fees to maintain an account under the state's unclaimed property laws as there are for many bank accounts. Before making such a decision, however, you must prudently conclude that such a distribution is appropriate despite potential adverse tax consequences to the plan participant and potential loss of investment earnings. The value of the participant's account, fees that would reduce the value of the account – even in an IRA rollover situation - should be compared to moving the account to unclaimed property when you are not able to find a plan participant.

The Department of Labor guidance states – referencing unclaimed property transfers: *“A prudent and loyal fiduciary would not voluntarily subject a missing participant's funds to such negative consequences in the absence of compelling offsetting considerations. In fact, in most cases, a fiduciary would violate ERISA Section 404(a)'s obligations of prudence and loyalty by causing such negative consequences rather than making an individual retirement plan rollover distribution”.*

Ideal solutions are customized to fit the circumstances. Remember this advice if you feel enticed by an easy election offered by your plan's custodian – you, not they, own the responsibility for prudence and duty of loyalty to the plan participant.

Our Mission is to help employers design the most effective customized retirement plan and maintain compliance with legislative and regulatory changes that provide the framework for the tax incentives which are the foundation of these programs.

Our commitment to our clients, and their advisors, is to constantly review, refine and enhance how we deliver our services. This includes maintaining a strong continuing professional education requirement for all staff, and to educate our clients so we develop a strong compliance-based partnership.



**Thank you to our 2020 Symposium
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