Course Description:

This seminar will examine current issues in the federal regulation of employee pension and health benefit plans. Employee rights, fiduciary standards, remedies, federal preemption, funding standards and retirement security, use of employer stock, anti-discrimination and qualified plan requirements, and legislative policy issues will be considered. Controversies to be considered may include: (i) fiduciary duties in management of plans, including scope of judicial review of fiduciary decision-making; (ii) benefit claims, including claims based on conflicts between the plan, published plan descriptions, and oral representations; (iii) use or abuse of plan stock holdings where the interests of plan participants and owners or investors may conflict; (iv) “distress” situations, including treatment of pension and medical plan entitlements in insolvency situations; (v) (while this is not primarily a tax course) standards for tax qualification or disqualification of qualified pension plans; and (vi) certain ethical considerations when a lawyer represents a fiduciary.

Introductory Notes

There is no casebook required for this Seminar, but members of the seminar should purchase the Wolk-Langbein statutory supplement, “Pension and Employee Benefit Statutes and Regulations” (a West Academic Press pamphlet, the 2007 Edition, if available).

Cases will be posted by citation or identified in the Syllabus. Other reading material will either be downloadable from websites identified in the Syllabus or distributed by email or posted on the Seminar's Blackboard web site.

A relatively short paper will be required, on a topic that will also enable the member-author to lead a portion of the seminar’s discussion of that topic.

The first few weeks of the seminar will be devoted to overviews of the benefit plan universe and the laws governing it. Although the Seminar will consider these topics later, item by item,
considerable time will be devoted to introductory overviews because the individual topics are so interrelated. Thus, having some understanding of each topic may appear to be a precondition of understanding the others. For example, federal preemption disputes (a separate topic) may be viewed as quests for the shelter of limited ERISA remedies (a separate topic); similarly battles over “who is a fiduciary” (a separate topic) may be seen as quests for, or attempted escapes from, preemption. Hence, we take these topics up all at once, at the beginning, and then return to them one by one.

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**Wednesday, January 10, 2007 (Class No. 1)**

**Introduction:** An overview and discussion of the employee benefit plan universe.

Consider the following questions:

Health benefit plans: On the assumption that the cost of employer provided health insurance causes a comparable reduction of or restraint on wages, what is the advantage of having an employer provide this benefit directly (rather than, for example, having the employer provide the employee with additional income equal to the current cost of the benefit)? Is there a point where deductibles and co-payments “swallow” the advantage?

Pension plan design: What is the difference between a defined benefit pension plan and a defined contribution pension plan? Why is this difference significant for employee participants? For employers? For Congress?

Retirement plan trends and preferences: There is a trend toward greater reliance on defined contribution pension plans in general, and in particular toward plans qualified (for tax purposes) under section 401(k) of the Internal Revenue Code. What factors do you think best explain this trend? Why would an employer prefer a 401(k) plan to the classical defined benefit pension plan? On the other hand, why would employees prefer a 401(k) plan? Are they misguided or uninformed? Should policymakers care about these choices?

“Funding”: What does it mean for a plan to be “funded”? “Funding” for defined benefit plans depends on actuarial methods and actuarial assumptions, and is subject to complex rules (very recently amended and not yet fully effective) that both require funding and restrict it (because of the cost to the revenues in foregone taxes). There are no similar problems for defined contribution plans. Why not? Recall that in the Enron collapse, one of the particular harms identified was the loss by employees of their retirement savings which had been invested in a 401(k) plan. Was that plan “funded”? What did “funding” mean for that plan? And if it was funded, then what was the problem there? If there was a problem,
what should federal law say about it? Did the extensive revision of ERISA enacted in 2006 alter the risks to employers? To employees? To the government? (a topic to be considered further in a later class dealing with benefits in bankruptcy).

Reading Assignment:

1. NY Times, "Poor at Age 70" (will be posted on Seminar's Blackboard website)
2. "Myths & Realities About Retirement Preparedness" (will be posted on Seminar's Blackboard website)
3. Dallas Salisbury, "The Development of Private Retirement Programs," the first chapter extracted from EBRI, "The Future of Private Retirement Plans" (Dallas L. Salisbury, Ed., EBRI 2000). (This chapter will be posted on the Seminar's Blackboard website): The entire book is downloadable in PDF format from EBRI Web Site at http://www.ebri.org/publications/books/index.cfm?fa=fjprp  Don’t read it all! Please don’t be put off by the size of this document (160 pages)—just take a look at the Executive Summary on pages xvii – xxv; and the first chapter, “The Development of Private Retirement Programs, on pages 3-14 (posted on the Seminar's Blackboard website).

Wednesday, January 17, 2007 (Class No. 2)

Overview:
A "bird's-eye view" of the provisions of the Employee Retirement Income Security Act of 1974 (“ERISA”). This class will be mainly a rapid-fire PowerPoint presentation, covering the whole statute (ERISA) and considering the various controversies that arise under it. (Bring your Statutory Supp./Pamphlet to class.) Most of these issues will be reconsidered in later weeks, topic by topic, as the seminar progresses. The PPT presentation will be posted or distributed for note-taking purposes.

For this overview, however, focus on these questions: Does the Employee Retirement Income Security Act (ERISA) – the predominant and preemptive federal law regulating employee benefit plans – provide “security” against disappointed expectations? Do employees get what they reasonably expect? If not, is the remedy sufficient (sufficient to deter actions undermining security)? Sufficiently tempered to avoid causing sponsors to terminate plans, cut them back, or not create them in the first place?

Reading Assignment:


Wednesday, January 24, 2007 (Class No. 3)

Plan Fiduciaries:

Consider these questions:

1. What makes someone a fiduciary under ERISA? (ERISA § 3(21)(A)). Is this a “prudent expert” rule? If not, is ignorance a defense?

2. What responsibilities are placed on plan sponsors in the creation, management and administration of employee benefit plans? (ERISA § 404). At the upper level, what corporate management functions are or should be exempt from fiduciary duties to plan participants? At the lower lever, are there “ministerial” functions that should be not be subjected to fiduciary responsibilities? (Consider 29 CFR 2509.75-8:(D-2)).

3. What is a "directed trust" or a "directed trustee"? Why allow such arrangements? What becomes of the fiduciary responsibilities of such a trustee?

Reading assignment:

In re WorldCom, Inc. ERISA Litigation, 263 F. Supp. 2d 745 (S.D.N.Y. 2003)
Wednesday, January 31, 2007 (Class No. 4)

Fiduciaries (continued) - Remedies:

What remedies does ERISA allow? Are they too strong? Too weak? What should they be?

Reading assignment:


Varity (Previously considered)

Wednesday, February 7, 2007 (Class No. 5)

Federal Preemption: Scope ("relate to"); insurance exception; “deemer clause”:

American Medical Security, Inc. v. Bartlett, 111 F. 3d 358 (4th Cir. 1996)
Retail Industry Leaders Ass'n v. Fielder, 435 F. Supp. 2d 481 (D. Md. 2006) (appeal pending) (addressing preemption issues in the "pay or play" context) (this controversy will be addressed in greater detail in a later class dealing with health benefit plans)

Wednesday, February 14, 2007* (Class No. 6)

[*NOTE=This class will be rescheduled to a make-up date]

Federal Preemption (continued) – Managed Care: