

# TABLE OF CONTENTS

Introduction . . . . .	iii
Acknowledgments. . . . .	vii

## CHAPTER 1

### ERISA Fiduciary Responsibilities

§ 1.01	Introduction . . . . .	1-6.6
§ 1.01A	ERISA and Health Benefits at Fifty . . . . .	1-6.8
	[1] Developments that Led to ERISA and the Pre-ERISA State of U.S. Pension Law . . . .	1-6.8
	[2] Principal Drafters of ERISA . . . . .	1-6.9
	[3] Why are Title I and Title II of ERISA So Much Alike?. . . . .	1-6.9
	[4] Who Came Up With The Name “Employee Retirement Income Security Act”? . . . . .	1-6.10
	[5] Value of Independent Fiduciaries to Avoid Conflicts . . . . .	1-6.10
	[6] Great Emanating Idea of ERISA . . . . .	1-6.10
	[7] Basic Structure of ERISA . . . . .	1-6.11
	[8] Responsibilities of Companies in Running Retirement and Health Benefit Plans . . . . .	1-6.11
	[9] Impact of ERISA on Workers and Retirees . . .	1-6.12
	[10] Types of Health Plans Subject to ERISA. . . .	1-6.12
	[11] Subsequent Legislation . . . . .	1-6.13
	[a] Retirement Plans . . . . .	1-6.13
	[b] Health Benefit Plans . . . . .	1-6.13
	[i] Consolidated Omnibus Budget Reconciliation Act of 1985. . . . .	1-6.14
	[ii] Health Insurance Portability and Accountability Act of 1996. . . . .	1-6.14
	[iii] Newborns’ and Mothers’ Health Protection Act of 1996. . . . .	1-6.14

**HEALTH CARE BENEFITS LAW**

	[iv]	Generic Information Nondiscrimination Act of 2008 . . . . .	1-6.14
	[v]	Mental Health Parity Act of 1996 and Mental Health Parity and Addiction Equity Act of 2008 . . . . .	1-6.15
	[vi]	Patient Protection and Affordable Care Act of 2010 . . . . .	1-6.15
	[vii]	Consolidated Appropriations Act of 2021 . . . . .	1-6.15
	[12]	Conclusion . . . . .	1-6.16
§ 1.02		Identifying the ERISA Fiduciary . . . . .	1-6.17
	[1]	Responsibility Determines Status . . . . .	1-6.17
	[2]	Directors as Fiduciary . . . . .	1-6.18
	[3]	Third Party Administrator As Fiduciary . . . . .	1-6.18
	[a]	Discretionary Authority . . . . .	1-8
	[b]	Control Over Assets . . . . .	1-8
	[c]	Administrative Service Contracts . . . . .	1-8
	[4]	Company Not <i>De Facto</i> Co-Administrator . . . . .	1-9
	[5]	ERISA Liability for Nonfiduciary Advisers . . . . .	1-10
§ 1.03		Rules Prohibiting Transactions Between Plan and Party-in-Interest . . . . .	1-11
	[1]	Parties-in-Interest . . . . .	1-11
	[2]	Internal Revenue Service’s Disqualified Person Definition . . . . .	1-11
	[3]	Prohibited Transactions . . . . .	1-12
	[4]	Adoption and Expansion of the DOL Voluntary Fiduciary Correction Program (“VFCP”) . . . . .	1-13
	[a]	2002 Guidance to VFCP . . . . .	1-13
	[b]	2005 Guidance to VFCP . . . . .	1-14.1
§ 1.04		Particular Plan Requirements . . . . .	1-14.4
	[1]	Introduction . . . . .	1-14.4
	[2]	Mandatory Plan Requirements . . . . .	1-14.4
	[a]	Named Fiduciaries . . . . .	1-14.4
	[b]	Funding Procedure . . . . .	1-14.4
	[c]	Plan Operation . . . . .	1-15
	[d]	Plan Amendment Procedure and Payment Basis . . . . .	1-15
	[e]	Voluntary Requirements . . . . .	1-15
	[3]	Mandatory Trust Requirements . . . . .	1-15
	[a]	Exemption of Certain Plans or Plan Assets . . . . .	1-16
	[b]	Authority and Discretion of the Trustee . . . . .	1-17
	[c]	Delegation of Authority to the Investment Manager . . . . .	1-17

**TABLE OF CONTENTS**

	[4] Plan Assets Must Be Held for the Exclusive Benefit of Participants . . . . .	1-17
§ 1.05	Fiduciary Standards . . . . .	1-39
	[1] Prudent-Man Rule . . . . .	1-39
	[2] Adherence to Plan Documents. . . . .	1-40
	[3] Allocating Fiduciary Responsibility . . . . .	1-41
	[a] Cofiduciary Responsibility . . . . .	1-41
	[b] Categorizing Fiduciary Responsibility. . . . .	1-42
	[i] Fiduciaries Not Named . . . . .	1-42
	[ii] Trustees . . . . .	1-42
	[iii] Named Fiduciaries . . . . .	1-43
	[c] Limiting Responsibility . . . . .	1-43
§ 1.06	[4] Providers Must Pass Along Discounts. . . . .	1-44
	Claims Procedure. . . . .	1-45
	[1] Filing a Claim for Benefits . . . . .	1-45
	[2] Failure to Process Claims Promptly . . . . .	1-45
	[3] Misrepresentation by Third Party Claims Administrator . . . . .	1-46
	[4] Misrepresentation by Employee . . . . .	1-46
	[5] Duty to Notify . . . . .	1-47
	[6] Failure to Provide Complete And Accurate Information To Beneficiary. . . . .	1-47
	[7] Failure to Notify Plan of Termination . . . . .	1-48
	[8] Denial of Benefits . . . . .	1-49
	[a] Written Notice Of Claims Denial . . . . .	1-49
	[b] Authority to Reject Claims Upheld. . . . .	1-50
	[c] Good Faith Duty Applies . . . . .	1-50
	[d] Conflicting Interests . . . . .	1-51
	[e] Insurance Policy Ambiguity . . . . .	1-51
	[f] Review Procedure. . . . .	1-52
	[g] DOL Guidance on Claims Processing Regulations . . . . .	1-52
	[h] Claims Procedure Final Regulations. . . . .	1-52.1
	[i] Structure and Scope of the Final Regulation . . . . .	1-52.1
	[ii] Claim Determinations and Appeals . . . . .	1-52.4
	[iii] Content of Notices of Adverse Benefit Determinations . . . . .	1-52.9
	[iv] Preemption of State Law . . . . .	1-52.10
	[i] DOL Proposes Rules on Review of Disability Benefit Denials . . . . .	1-52.11
	[i] Background . . . . .	1-52.12
	[ii] Overview of Proposed Regulation . . . . .	1-52.13
	[iii] Statute of Limitations. . . . .	1-52.20

**HEALTH CARE BENEFITS LAW**

	[j]	Contractual Periods in ERISA Plans. . . . .	1-52.21
	[i]	<i>Heimeshoff v. Hartford Life &amp; Accident Insurance Co.</i> . . . . .	1-52.21
	[ii]	<i>Moyer v. Metropolitan Life Insurance Company.</i> . . . . .	1-52.24
	[k]	Forfeiture of Right to More Favorable Judicial Review Standard. . . . .	1-52.27
	[i]	Background . . . . .	1-52.27
	[ii]	Decision . . . . .	1-52.28
	[l]	Untimely Claim Denial Decision Results in <i>De Novo</i> Review . . . . .	1-52.33
	[i]	Background . . . . .	1-52.34
	[ii]	Decision . . . . .	1-52.36
	[m]	Kentucky District Court Upholds Arbitrary and Capricious Standard of Review. . . . .	1-52.41
	[i]	Background . . . . .	1-52.41
	[ii]	Decision . . . . .	1-52.43
§ 1.07		Litigation Standard of Review. . . . .	1-53
	[1]	Why Written Criteria Are Important . . . . .	1-53
	[a]	Discretionary Authority . . . . .	1-54
	[b]	Evaluation Standards . . . . .	1-54
	[c]	Expert Testimony . . . . .	1-55
	[d]	Denial Must Conform to Plan. . . . .	1-55
	[2]	Exclusions Unenforceable . . . . .	1-56
	[3]	Clinical Trial Not Excluded. . . . .	1-57
	[4]	Experimental Treatment Not Covered. . . . .	1-57
	[5]	<i>In Vitro</i> Not Covered . . . . .	1-58
	[6]	Vicarious Liability . . . . .	1-59
	[7]	Conflict of Interest. . . . .	1-60
	[a]	Background. . . . .	1-60
	[b]	Legal Standard . . . . .	1-60
	[c]	Opinion . . . . .	1-60.1
	[i]	Medical and Claims History. . . . .	1-60.1
	[ii]	Decision was Arbitrary and Capricious. . . . .	1-60.4
§ 1.08		Plan Procedures Litigation. . . . .	1-61
§ 1.09		Litigation Involving Medical Service Providers . . . . .	1-64
	[1]	Claims by Medical Service Providers . . . . .	1-64
	[a]	Standing Under ERISA. . . . .	1-64
	[i]	<i>Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.</i> . . . . .	1-64
	[ii]	<i>Advanced Orthopedics and Sports Medicine v. Blue Cross and Blue Shield of Massachusetts</i> . . . . .	1-67

**TABLE OF CONTENTS**

	[iii] <i>Neuroaxis Neurosurgical Associates, PC v. Costco Wholesale Co.</i> . . . . .	1-69
	[b] Scope of Assignment. . . . .	1-70
	[i] <i>Sanctuary Surgical Center, Inc. v. UnitedHealthcare, Inc.</i> . . . . .	1-70
	[ii] <i>North Jersey Brain and Spine Center v. Aetna Inc.</i> . . . . .	1-70
[2]	Claims Against Medical Service Providers . . . . .	1-74
	[a] Statutory Standing Under ERISA. . . . .	1-74
	[i] Characterization of Relief Sought Can Be Determinative . . . . .	1-74
	[ii] Service Providers With Fiduciary Status Can Sue On Behalf of Plan . . . . .	1-78
	[iii] Associational Standing. . . . .	1-82
[3]	Lapse of Policy for Non-Payment of Premiums . . . . .	1-88
	[a] Background. . . . .	1-88
	[b] Class Allegations. . . . .	1-88.1
	[i] Breach of Fiduciary Duty. . . . .	1-88.1
	[ii] Failure to Adequately Monitor Other Fiduciaries. . . . .	1-88.2
	[iii] Relief Requested . . . . .	1-88.3
[4]	Failure to Complete Appeals Process . . . . .	1-88.3
	[a] Background. . . . .	1-88.4
	[i] The Accident and Policy Terms . . . . .	1-88.4
	[ii] Administrative Record. . . . .	1-88.4
	[iii] Procedural History. . . . .	1-88.5
	[b] Decision . . . . .	1-88.5
	[i] The AD&D Plan Requires Exhaustion. . . . .	1-88.5
	[ii] Hartford’s Conduct Did Not Excuse the Exhaustion Requirement . . . . .	1-88.6
	[iii] Fuhrer Failed to Exhaust Her Administrative Remedies . . . . .	1-88.7
[5]	UPS Health Care Plan Required to Pay for Spinal Surgery. . . . .	1-88.7
	[a] Background. . . . .	1-88.7
	[b] Decision . . . . .	1-88.9
§ 1.10	Litigation Involving Prescription Drug Overcharging. . . . .	1-89
	[1] <i>Mohr v. UnitedHealth Group Inc.</i> . . . . .	1-89

**HEALTH CARE BENEFITS LAW**

	[a]	Facts . . . . .	1-89
	[b]	Defendants Are Fiduciaries And Parties In Interest . . . . .	1-99
	[c]	Defendants ERISA Fiduciary Duties. . . . .	1-100
		[i] The Duty of Loyalty. . . . .	1-100
		[ii] The Duty of Prudence . . . . .	1-101
		[iii] The Duty to Inform . . . . .	1-101
		[iv] Co-Fiduciary Liability . . . . .	1-101
		[v] The Duty Not To Discriminate . . . . .	1-101
		[vi] Non-Fiduciary Liability . . . . .	1-102
	[d]	Defendants Breached Their Duties. . . . .	1-102
	[e]	Allegations . . . . .	1-104
		[i] Violations of ERISA § 502(a)(1)(B) . . . . .	1-104
		[ii] ERISA § 502(a)(3) for Violations of ERISA § 406(a)(1)(C) . . . . .	1-104
		[iii] ERISA § 502(a)(2) and (3) for Violations of ERISA § 406(b) . . . . .	1-105
		[iv] ERISA § 502(a)(2) and (3), for Violations of ERISA § 404 . . . . .	1-106
		[v] ERISA § 502(a)(3) for Violations of ERISA § 702 . . . . .	1-106
		[vi] ERISA § 502(a)(3) for Violations of ERISA § 405(a) . . . . .	1-108
[2]		<i>Negron v. Cigna Corp.</i> . . . . .	1-109
	[a]	Facts . . . . .	1-109
	[b]	Defendants Are Fiduciaries And Parties In Interest . . . . .	1-118
	[c]	Defendants ERISA Duties. . . . .	1-119
		[i] The Duty of Loyalty. . . . .	1-119
		[ii] The Duty of Prudence . . . . .	1-120
		[iii] The Duty to Inform . . . . .	1-120
		[iv] Co-Fiduciary Liability . . . . .	1-120
		[v] The Duty Not To Discriminate . . . . .	1-120
		[vi] Non-Fiduciary Liability . . . . .	1-122
	[d]	Defendants Breached Their Duties. . . . .	1-122
	[e]	Allegations . . . . .	1-123
		[i] For Violations of ERISA § 502(a)(1)(B) . . . . .	1-123

**TABLE OF CONTENTS**

- [ii] ERISA § 502(a)(3) for Violations of ERISA § 406(a)(1)(C) . . . . . 1-123
- [iii] ERISA § 502(a)(2) and (3), for Violations of ERISA § 406(b) . . . . . 1-124
- [iv] ERISA § 502(a)(2) and (3) for Violations of ERISA § 404 . . . . . 1-125
- [v] ERISA § 502(a)(3) for Violations of ERISA § 702 . . . . . 1-126
- [vi] ERISA § 502(a)(3), for Violations of ERISA § 405(a) . . . . . 1-128
- [3] *Lewandowski v. Johnson & Johnson* . . . . . 1-129
  - [a] Summary . . . . . 1-130
  - [b] Factual and Legal Background . . . . . 1-130.3
    - [i] Prescription-Drug Plans and Fiduciary Duties under ERISA . . . . . 1-130.3
    - [ii] Management and Administration of Prescription-Drug Plans . . . . . 1-130.5
    - [iii] Pharmacy Benefit Managers and Brokers . . . . . 1-130.6
    - [iv] Specialty Drugs . . . . . 1-130.13
    - [v] Formulary Management: Brand v. Generic . . . . . 1-130.15
  - [c] Defendants Breached Their Fiduciary Duties . . . . . 1-130.16
    - [i] Defendants Mismanaged the Plans' Specialty-Drug Program . . . . . 1-130.16
    - [ii] Defendants Mismanaged Other Aspects of Their Prescription-Drug Program . . . . . 1-130.22
    - [iii] Defendants' Fiduciary Violations. . . . . 1-130.24
    - [iv] Prudent Decision-Making Process Would Have Prevented Defendants' Fiduciary Breaches . . . . . 1-130.25
  - [d] Additional Facts Regarding Named Plaintiff. . . . . 1-130.26
  - [e] Causes of Action . . . . . 1-130.28
    - [i] Count One: Breach of Fiduciary Duties - ERISA §§ 404(a), 502(a)(2) . . . . . 1-130.28

**HEALTH CARE BENEFITS LAW**

	[ii]	Count Two: Breach of Fiduciary Duties - ERISA §§ 404(a), 502(a)(3) . . . . .	1-130.29
	[iii]	Count Three: Failure to Provide Plan Documents - ERISA 502(c) . . . . .	1-130.30
	[f]	Defend for Judgment. . . . .	1-130.30
§ 1.11		Litigation Involving Disability Benefits . . . . .	1-130.32
	[1]	Legal Secretary Wins Disability Benefits Suit . . . . .	1-130.32
	[a]	Background. . . . .	1-130.32
	[b]	Decision on Abuse of Discretion Analysis . . . . .	1-131
	[i]	Material and Substantial Duties . . . . .	1-132
	[ii]	Consideration of Medical Evidence . . . . .	1-137
	[iii]	Procedural Unreasonableness. . . . .	1-138
	[iv]	Conflict of Interest . . . . .	1-140
	[2]	Fifth Circuit Rules for Insurer in ERISA Disability Benefits Dispute. . . . .	1-142
	[a]	Factual and Procedural Background . . . . .	1-143
	[b]	Decision . . . . .	1-145
	[3]	Executive Loses Benefits Suit Over Jail Stay. . . . .	1-147
	[a]	Summary. . . . .	1-148
	[b]	Findings of Fact . . . . .	1-149
	[c]	Conclusions of Law . . . . .	1-154
	[4]	Short-Term Disability Benefits Plan Exempt from ERISA. . . . .	1-158
	[a]	Summary. . . . .	1-158
	[b]	Background. . . . .	1-158.1
	[c]	Challenge to Regulatory Payroll Practices Exemption. . . . .	1-158.2
	[d]	Findings of Fact . . . . .	1-158.2
	[e]	Analysis. . . . .	1-158.3
	[i]	ERISA Framework. . . . .	1-158.3
	[ii]	“Payroll Practice” Exemption . . . . .	1-158.4
	[iii]	Viability of Payroll Practices Exemption . . . . .	1-158.8
	[iv]	Conclusion . . . . .	1-158.10
	[5]	Termination of Disability Benefits for Former Employee after Twenty Years. . . . .	1-158.10
	[a]	Summary. . . . .	1-158.11
	[b]	Background. . . . .	1-158.12
	[c]	Decision . . . . .	1-158.15

**TABLE OF CONTENTS**

[6]	Interplay Between Physical and Mental Health Disabilities. . . . .	1-158.17
	[a] Summary. . . . .	1-158.17
	[b] Sixth Circuit Decision. . . . .	1-158.20
	[i] Background . . . . .	1-158.20
	[ii] Reliance’s Appeal. . . . .	1-158.22
	[iii] McEachin’s Cross-Appeal . . . . .	1-158.26
§ 1.12	Puerto Ricans Not Entitled to Social Security Insurance Disability Benefits . . . . .	1-159
	[1] Background . . . . .	1-159
	[2] Opinion . . . . .	1-160
	[3] Dissenting Opinion . . . . .	1-162
§ 1.13	Tribal ERISA Health Plan Litigation. . . . .	1-166
	[1] Background . . . . .	1-167
	[a] Federal Law Regulating Tribal Healthcare Plans. . . . .	1-167
	[b] The Tribe’s Contract Health Services Program . . . . .	1-169
	[c] The Tribe’s Contracts with Blue Cross Blue Shield of Michigan . . . . .	1-170
	[d] Procedural History . . . . .	1-170
	[2] Decision. . . . .	1-172
	[a] Contract Health Services and Medicare-Like Rates . . . . .	1-172
	[b] The Remaining Legal and Factual Disputes . . . . .	1-176
§ 1.14	Litigation Involving Mental Health Benefits and Substance Use Disorder Treatment. . . . .	1-178
	[1] Ninth Circuit Decides United Behavioral Health Does Not have to Reprocess Claims. . . . .	1-178
	[a] Procedural Background. . . . .	1-179
	[b] Ninth Circuit Opinion . . . . .	1-180
	[i] Factual Background . . . . .	1-180
	[ii] Decision . . . . .	1-183
	[2] Tenth Circuit Unreceptive to United Behavioral Health Benefits Suit . . . . .	1-192
	[a] Utah District Court Decisions. . . . .	1-192
	[i] Factual Background . . . . .	1-193
	[ii] Venue Decision. . . . .	1-193
	[iii] Procedural Decision . . . . .	1-196
	[b] DOL Amicus Brief . . . . .	1-196
	[i] Factual Background . . . . .	1-197
	[ii] Procedural History . . . . .	1-197
	[iii] Summary of the Argument. . . . .	1-199
	[3] Morgan Stanley Medical Plan Administrators Prevail In Parity Act Litigation. . . . .	1-209

**HEALTH CARE BENEFITS LAW**

	[a]	Summary . . . . .	1-210
	[b]	Background . . . . .	1-210
	[c]	Discussion . . . . .	1-210.6
		[i] Claim for Recovery of Benefits Under ERISA . . . . .	1-210.7
		[ii] Parity Act Claims . . . . .	1-210.16
[4]		Ninth Circuit Overturns a California District Court Dismissal of a Lawsuit . . . . .	1-210.24
	[a]	Summary . . . . .	1-210.24
	[b]	Ninth Circuit Opinion . . . . .	1-210.25
		[i] Background . . . . .	1-210.26
		[ii] Discussion . . . . .	1-210.27
		[iii] Conclusion . . . . .	1-210.32
[5]		District Court Dismisses Wilderness Therapy Benefits Class Action . . . . .	1-210.32
	[a]	Summary . . . . .	1-210.32
	[b]	Background . . . . .	1-210.33
	[c]	Decision . . . . .	1-210.35
		[i] Cigna’s Motion to Dismiss . . . . .	1-210.35
		[ii] The Plans’ Motions to Dismiss . . . . .	1-210.42
		[iii] Conclusion . . . . .	1-210.43
§ 1.15		Litigation Involving Gender Confirmation Surgery . . . . .	1-210.44
	[1]	Background . . . . .	1-210.44
		[a] Statutes Prohibiting Sex-Based Discrimination . . . . .	1-210.44
		[b] 2016 Rule . . . . .	1-211
		[c] 2020 Rule and Bostock Decision . . . . .	1-216
		[d] Present Lawsuit . . . . .	1-218
		[e] Jurisdiction and Standing under Section 1557 . . . . .	1-219
	[2]	Title VII . . . . .	1-220
		[a] Ripeness . . . . .	1-221
		[b] Mootness . . . . .	1-221
		[c] Summary of Jurisdictional Holdings . . . . .	1-221
		[i] Summary Judgment . . . . .	1-221
		[ii] Injunctive Relief . . . . .	1-222
		[iii] Summary of Holdings . . . . .	1-222
	[3]	Subsequent Developments . . . . .	1-222
		[a] HHS . . . . .	1-222
		[b] EEOC . . . . .	1-224
	[4]	Decision . . . . .	1-225
		[a] Standing . . . . .	1-225
		[b] Associational Standing . . . . .	1-225
		[c] Standing: Section 1557 . . . . .	1-226
		[d] Standing: Title VII . . . . .	1-231

**TABLE OF CONTENTS**

xviii.i

[i] Ripeness . . . . . 1-232

[ii] Irreparable Harm . . . . . 1-233

§ 1.16 Blue Cross Denied Dismissal of LGBTQ Fertility  
Treatment Bias . . . . . 1-235

[1] Background . . . . . 1-236

[2] Legal Standard . . . . . 1-238

[3] Discussion . . . . . 1-238

§ 1.17 Eleventh Circuit Finds Trans Health Ban  
Violates Title VII. . . . . 1-242

[1] Factual and Procedural Background . . . . . 1-242

[2] Decision . . . . . 1-244

[a] Title VII Facial  
Discrimination . . . . . 1-244

[b] Title VII Liability . . . . . 1-246

[c] Permanent Injunction . . . . . 1-247

[3] Dissent . . . . . 1-248

**CHAPTER 2**

**Tax Treatment of Health Benefits**

§ 2.01 Introduction . . . . . 2-4.1

§ 2.02 General Rules for Health Plans . . . . . 2-4.2

[1] Exclusion From Taxation of Premiums  
and Benefits. . . . . 2-4.2

[2] Eligible Medical Expenses . . . . . 2-4.2

[3] Employer Tax Deduction . . . . . 2-4.3

[4] Federal Tax Withholding . . . . . 2-4.3

[5] Disability Income Benefits Taxed as  
Deferred Compensation . . . . . 2-4.3

[a] Facts . . . . . 2-4.4

[b] Decision . . . . . 2-4.5

§ 2.03 Health Plan Qualification Requirements . . . . . 2-5

[1] Written Plan . . . . . 2-5

[2] Employees vs. Self-Employed Individual . . . . . 2-5

[3] Coverage of Dependents . . . . . 2-6

[a] Old Rule . . . . . 2-6

[b] New Rule . . . . . 2-6

§ 2.04 Nondiscrimination Tests for Health Plans . . . . . 2-7

[1] Identification of Self-Insured  
Arrangement . . . . . 2-7

[2] Highly Compensated Individuals . . . . . 2-8

[3] Eligibility Testing . . . . . 2-8

[a] Applying the Tests . . . . . 2-9

[b] Plan Aggregation. . . . . 2-9

[4] Nondiscriminatory Benefits . . . . . 2-9

**HEALTH CARE BENEFITS LAW**

	[a]	Type of Benefits . . . . .	2-10
	[b]	Amount of Benefits . . . . .	2-10
	[c]	Nondiscriminatory Operation . . . . .	2-10
	[d]	Special Rule for Retirees . . . . .	2-10
	[5]	Taxation of Excess Reimbursements Under a Discriminatory Health Plan . . . . .	2-10
§ 2.05		Cafeteria Plans . . . . .	2-12
	[1]	Qualification Requirements . . . . .	2-12
	[a]	Written Plan . . . . .	2-13
	[b]	Participation by Employees Only . . . . .	2-15
	[c]	Use-It-or-Lose-It Rule . . . . .	2-16
	[d]	Period of Coverage . . . . .	2-20.1
	[e]	Election Procedures . . . . .	2-20.1
	[f]	Permissible Reimbursements . . . . .	2-22
	[g]	IRS Relaxes Rules for Cafeteria Plan Mid-Year Election Changes . . . . .	2-23
	[2]	Flexible Spending Accounts . . . . .	2-24
	[a]	Type of Reimbursements . . . . .	2-24
	[b]	Period of Coverage . . . . .	2-24.1
		[i] Grace-Period Requirements . . . . .	2-24.1
		[ii] Run-Out Period Requirements . . . . .	2-25
	[c]	Uniform Coverage . . . . .	2-25
	[d]	Claims Substantiation . . . . .	2-26
		[i] Health FSAs . . . . .	2-26
		[ii] Dependent Care Assistance Plans (DCAPS) . . . . .	2-26
	[e]	Experience Gains . . . . .	2-27
	[f]	Smart Cards and Terminal-Restricted Debit Cards . . . . .	2-27
	[g]	Dependent Care Assistance Programs . . . . .	2-27
	[3]	Nondiscrimination Tests . . . . .	2-27
	[a]	Highly Compensated Individual . . . . .	2-28
	[b]	Eligibility . . . . .	2-29
	[c]	Benefits and Contributions . . . . .	2-29
	[d]	25 Percent Concentration Test . . . . .	2-30
	[e]	Key Employee Concentration Test . . . . .	2-30
	[f]	Safe Harbors . . . . .	2-30
	[g]	Other Rules . . . . .	2-31
	[h]	Taxation Under a Discriminatory Cafeteria Plan . . . . .	2-31
	[4]	Effect of the Family and Medical Leave Act on the Operation of Cafeteria Plans . . . . .	2-31
	[a]	Introduction . . . . .	2-31
	[b]	Obligation to Offer Coverage During FMLA Leave . . . . .	2-32

**TABLE OF CONTENTS**

xviii.iii

	[c]	Responsibility for Making Cafeteria Plan Premium Payments When an Employee on FMLA Leave Continues Group Health Plan Coverage . . . . .	2-32.1
	[d]	Payment Options Required or Permitted While on Unpaid FMLA Leave . . . . .	2-32.2
		[i] In General . . . . .	2-32.2
		[ii] Exceptions . . . . .	2-32.4
		[iii] Voluntary Waiver of Employee Payments . . . . .	2-32.4
		[iv] Example . . . . .	2-32.4
	[e]	Payment of Premiums by Employees on Paid FMLA Leave . . . . .	2-32.5
	[f]	Restrictions Applicable to Contributions When an Employee’s FMLA Leave Spans Two Cafeteria Plan Years. . . . .	2-32.5
	[g]	Special Rules Concerning Employees Taking FMLA Leave Who Participate in Health FSAs Offered Under a Cafeteria Plan . . . . .	2-32.6
		[i] In General . . . . .	2-32.6
		[ii] Coverage . . . . .	2-32.6
		[iii] Examples . . . . .	2-32.7
	[h]	Entitlement to Non-Health Benefits on FMLA Leave . . . . .	2-32.9
	[5]	IRS Modifies FSA “Use-or-Lose” Rule . . . . .	2-32.9
		[a] Purpose of IRS Notice 2013-71 . . . . .	2-32.9
		[b] Background . . . . .	2-32.10
		[c] Further Modification of “Use-or-Lose” Rule . . . . .	2-32.11
		[d] Written § 125 Cafeteria Plan . . . . .	2-32.13
		[e] IRS Examples . . . . .	2-32.13
§ 2.06	Health	Reimbursement Accounts . . . . .	2-32.16
	[1]	Basic Design and Rules . . . . .	2-32.16
	[2]	Advantages of HRAs . . . . .	2-35
	[3]	Disadvantages of HRAs . . . . .	2-37
	[4]	Design Considerations . . . . .	2-37
		[a] Coverage Under an HRA . . . . .	2-38
		[b] COBRA Issues . . . . .	2-38

*(Text continued on p. xix)*

**TABLE OF CONTENTS**

	[c]	Coordination Between an HRA and a Cafeteria Plan . . . . .	2-38
	[d]	Priority of Payments from HRA and an FSA. . . . .	2-39
	[e]	Code Section 105 Nondiscrimination Rules. . . . .	2-39
[5]		Other Important Considerations . . . . .	2-40
	[a]	HIPAA Issues . . . . .	2-40
	[b]	ERISA Issues . . . . .	2-40
	[c]	Domestic Partner Coverage . . . . .	2-41
	[d]	Funding . . . . .	2-41
	[e]	Accounting Treatment of HRAs . . . . .	2-41
	[f]	IRS Guidance on Substantiation of Medical Expenses . . . . .	2-42
[6]		Private Letter Rulings . . . . .	2-44
[7]		Summary . . . . .	2-44.3
§ 2.07		Health Savings Accounts . . . . .	2-45
	[1]	IRS Guidance. . . . .	2-45
	[a]	Eligibility for HSAs . . . . .	2-45
		[i] Definition of “High-Deductible Health Plan” (HDHP) . . . . .	2-45
		[ii] Special Rules for Determining Whether a Health Plan That is a Network Plan Meets the Requirements of an HDHP. . . . .	2-46
		[iii] Other Health Coverage Makes an Individual Ineligible . . . . .	2-47
	[b]	Establishing an HSA . . . . .	2-47
	[c]	Contributions to HSAs . . . . .	2-48
	[d]	Distributions from HSAs . . . . .	2-52
	[e]	Discrimination Rules . . . . .	2-54
[2]		DOL Guidance. . . . .	2-59
[3]		Interaction of Health Savings Accounts with Other Employer-Provided Health Reimbursement Plans . . . . .	2-60
	[a]	Situations Examined by Revenue Ruling 2004-45. . . . .	2-61
	[b]	IRS Analysis . . . . .	2-62
		[i] Limited-Purpose Health FSA or HRA or Suspended HRA. . . . .	2-64
		[ii] Post-Deductible Health FSA or HRA . . . . .	2-65
		[iii] Retirement HRA. . . . .	2-66
	[c]	Revenue Ruling 2004-45 Holdings Regarding Situations Examined. . . . .	2-66
[4]		The Tax Relief and Health Care Act of 2006 . . . . .	2-67

**HEALTH CARE BENEFITS LAW**

	[a]	FSA and HRA Terminations to Fund HSAs . . . . .	2-68
	[b]	Repeal of Annual Deductible Limitation on HSA Contributions . . . . .	2-68
	[c]	Modification of Cost-of-Living Adjustment . . . . .	2-68
	[d]	Contribution Limitation Not Reduced for Part-Year Coverage. . . . .	2-68
	[e]	Exception to Requirement That Employers Make Comparable Health Savings Account Contributions . . . . .	2-68
	[f]	One-Time Distribution from Individual Retirement Plans to Fund HSAs . . .	2-69
	[g]	Implications. . . . .	2-69
	[5]	Employer Comparable Contributions to Health Savings Accounts and the Requirement of Filing Return for the Excise Tax—IRS Regulations. . . . .	2-69
	[a]	Introduction. . . . .	2-70
	[b]	Explanation of Provisions. . . . .	2-71
§ 2.08		Defense of Marriage Act (DOMA) Supreme Court Decision . . . . .	2-74
	[1]	Introduction . . . . .	2-74
	[a]	Effect On Health Care Benefit Plans. . .	2-75
	[b]	Open Questions. . . . .	2-76
	[c]	Action Steps for Employers . . . . .	2-77
	[2]	Background . . . . .	2-77
	[3]	Majority Decision . . . . .	2-78
	[a]	Jurisdictional Holding. . . . .	2-78
	[b]	Decision on the Merits . . . . .	2-80
	[4]	Dissenting Opinions. . . . .	2-83
	[a]	Scalia Dissent . . . . .	2-83
	[b]	Roberts Dissent. . . . .	2-86
	[c]	Justice Alito and Justice Thomas Dissenting Opinions. . . . .	2-87
§ 2.09		All Legal Same-Sex Marriages Recognized for Federal Tax Purposes . . . . .	2-90
	[1]	Introduction . . . . .	2-90
	[2]	Details of Revenue Ruling 2013-17 . . . . .	2-90
	[a]	Issues Considered . . . . .	2-90
	[b]	Law and Analysis . . . . .	2-90
	[i]	Background . . . . .	2-90
	[ii]	Recognition of Same-Sex Marriages. . . . .	2-92
	[iii]	Martial Status Based on the Laws of the State Where a Marriage is Initially Established. . . . .	2-95

## TABLE OF CONTENTS

xxi

[iv]	Registered Domestic Partnerships, Civil Unions, or Other Similar Formal Relationships Not Denominated as Marriage . . .	2-96
[c]	Holdings . . . . .	2-96
[d]	Prospective Application . . . . .	2-97

## CHAPTER 3

### Health Benefit Plans and ERISA Preemption

§ 3.01	Introduction . . . . .	3-2.1
§ 3.02	ERISA Preemption . . . . .	3-3
§ 3.03	Court Decisions Interpreting Preemption . . . . .	3-5
	[1] State-Mandated Benefits . . . . .	3-5
	[a] Insured Plans . . . . .	3-5
	[b] Application of State-Mandated Laws . . . . .	3-6
	[c] Self-Insured Plans . . . . .	3-7
	[d] State Insurance Statute Preempted . . . . .	3-7
	[e] ERISA Preemption Upheld . . . . .	3-8
	[2] Plan Administration . . . . .	3-9
	[a] Damages that Involve Benefits Disputes . . . . .	3-9
	[b] “Bad Faith” Denial . . . . .	3-10
	[c] Elective-Surgery Dispute . . . . .	3-10
	[d] Removal From State to Federal Court . . . . .	3-11
	[e] Subrogation Claims . . . . .	3-12
	[i] Preemption to State Antisubrogation . . . . .	3-12
	[ii] State Statute Not Preempted . . . . .	3-13
	[3] Workers’ Compensation Statute Preempted . . . . .	3-14
	[4] State Surcharges Not Preempted . . . . .	3-14
§ 3.04	Health Plan Funding Alternatives and Preemption . . . . .	3-17
	[1] Conventional Insurance . . . . .	3-17
	[2] Minimum Premium Plans . . . . .	3-17
	[a] Advantage of a Minimum Premium Plan . . . . .	3-18
	[b] Meaning of “Premium” . . . . .	3-19
	[3] Self-Insurance . . . . .	3-19
	[a] Administrative-Services-Only Arrangements . . . . .	3-20

**HEALTH CARE BENEFITS LAW**

	[b] Administration and Services . . . . .	3-20
[4]	Stop-Loss Coverage . . . . .	3-21
	[a] Stop-Loss Preemption Upheld . . . . .	3-22
	[b] Exception to Stop-Loss Preemption . . . . .	3-22
	[c] State Cannot Regulate Stop-Loss Levels . . . . .	3-23
§ 3.05	U.S. Supreme Court: ERISA Preempts Vermont Law Requiring Health Data Reporting . . . . .	3-24
	[1] Summary . . . . .	3-24
	[2] District Court Opinion . . . . .	3-26
	[a] Overview . . . . .	3-26
	[b] Opinion . . . . .	3-27
	[i] Standing . . . . .	3-30
	[ii] Preemption . . . . .	3-31
	[3] Second Circuit Opinion . . . . .	3-39
	[4] Supreme Court Decision . . . . .	3-44
§ 3.06	State Law Claims of Fraud and Misrepresentation Not Preempted by ERISA . . . . .	3-47
	[1] Summary . . . . .	3-47
	[2] Background . . . . .	3-48
	[a] Factual Background . . . . .	3-48
	[b] Procedural History . . . . .	3-49
	[3] ERISA Claims . . . . .	3-50
	[a] Breach of Fiduciary Duty Claim . . . . .	3-50
	[i] Discretion over Plan Management . . . . .	3-51
	[ii] Control over Plan Assets . . . . .	3-54
	[b] Prohibited Transaction Claim . . . . .	3-56
	[i] Restitution . . . . .	3-58
	[ii] Disgorgement . . . . .	3-59
	[4] State Law Claims . . . . .	3-59
	[a] Preemption . . . . .	3-59
	[i] Express Preemption . . . . .	3-59
	[ii] Conflict Preemption . . . . .	3-61
§ 3.07	ERISA Does Not Preempt State's Unfair Trade Practices and Mental Health Parity Laws . . . . .	3-63
	[1] Summary . . . . .	3-63
	[2] Background . . . . .	3-63
	[3] Decision . . . . .	3-64
§ 3.08	Solicitor General Says Seattle Benefits Rule Not Trumped by ERISA . . . . .	3-68
	[1] Summary . . . . .	3-68
	[2] Background . . . . .	3-69
	[3] Analysis . . . . .	3-71
	[a] Section 514(a) Of ERISA Does Note Preempt the Ordinance . . . . .	3-71

**TABLE OF CONTENTS** xxiii

[i]	The Ordinance Does Not Make an Impermissible “Reference to” ERISA Plans . . . . .	3-71
[ii]	The Ordinance Does Not Have an Impermissible “Connection with” ERISA Plans . . . . .	3-74
[b]	The Question Presented Does Not Warrant The Supreme Court Review . . . . .	3-75

**CHAPTER 4**

**Employer Liability in Managed Care**

§ 4.01	Introduction . . . . .	4-2
	[1] Elements of Managed Care . . . . .	4-3
	[a] Plan Design . . . . .	4-3
	[b] Health Care Delivery Systems . . . . .	4-3
	[i] Health Maintenance Organizations . . . . .	4-3
	[ii] Preferred Provider Organizations . . . . .	4-3
	[iii] Point-of-Service Plans . . . . .	4-4
	[iv] Employer Direct Contracting . . . . .	4-4
	[v] Utilization Review . . . . .	4-4
§ 4.02	Theories of Liability Arising from Managed Care . . . . .	4-5
	[1] Liability Arising from Selection or Retention of Health Care Providers . . . . .	4-5
	[a] Actual Agency . . . . .	4-5
	[b] Ostensible or Apparent Agency . . . . .	4-6
	[c] Corporate Negligence . . . . .	4-7
	[d] Contract and Warranty Claims . . . . .	4-9
	[e] Ambiguous Contract Terms . . . . .	4-9
	[f] Liability Arising from Utilization Review or Case Management . . . . .	4-10
	[g] Improper Provider Incentives . . . . .	4-11
	[h] Liability Arising From Negligence of Utilization Review Personnel . . . . .	4-11
§ 4.03	Impact of ERISA on Employer Liability for Managed Care . . . . .	4-13
	[1] Preemption of State Laws . . . . .	4-13
	[2] Limitation of the Preemption Doctrine . . . . .	4-15
	[3] Impact of ERISA on Potential Damage Awards . . . . .	4-16

**HEALTH CARE BENEFITS LAW**

§ 4.04	Potential Employer Liability Under ERISA . . . . .	4-17
	[1] Plan Requirements . . . . .	4-17
	[2] Employer Guidelines . . . . .	4-17
	[3] Communication of Plan Provisions . . . . .	4-18
	[4] Employer Guidelines . . . . .	4-18
	[5] Claims Procedures . . . . .	4-19
	[a] Employer Guidelines . . . . .	4-19
	[b] Standard of Review . . . . .	4-20
	[6] Fiduciary Standards . . . . .	4-20
	[a] Prudent Selection of Managed Care Providers . . . . .	4-21
	[b] Prohibited-Transaction Rules . . . . .	4-22
	[c] Remedies . . . . .	4-22
§ 4.05	Employer Contracting Strategies to Avoid Liability . . . . .	4-23
	[1] Selecting and Contracting with a Managed Care Vendor . . . . .	4-23
	[a] Selecting a Managed Care Entity . . . . .	4-23
	[b] Contracting With a Utilization Review Organization . . . . .	4-24

**CHAPTER 5****Plan Administration**

§ 5.01	Auditing Claims Administration Performance . . . . .	5-5
	[1] Introduction . . . . .	5-5
	[2] Defining Audit Objectives . . . . .	5-6
	[a] Focused Audits . . . . .	5-6
	[b] Comprehensive Audits . . . . .	5-6
	[3] Auditing Claims . . . . .	5-6
	[a] Accuracy and Timeliness . . . . .	5-7
	[b] Audit Steps . . . . .	5-7
	[c] Elements of a Sample Claim Review . . . . .	5-9
	[d] Standards of Performance . . . . .	5-10
	[e] Computerized Audit Checks . . . . .	5-11
	[4] Assessing the Claims Office and Reviewing Procedures . . . . .	5-11
	[a] Location of Claims Offices . . . . .	5-11
	[b] Size and Experience Levels of Staff . . . . .	5-11
	[c] Organizational Structure . . . . .	5-12
	[d] Coordination with Vendors of Adjunct Services . . . . .	5-12
	[e] Effective Integration . . . . .	5-12
	[f] Flexibility and Responsiveness . . . . .	5-13
	[g] Quality Control and Security . . . . .	5-13

## TABLE OF CONTENTS

xxv

	[5]	Evaluating Claims Systems . . . . .	5-14
		[a] Input . . . . .	5-14
		[b] Adjudication Capabilities . . . . .	5-15
		[c] Output . . . . .	5-15
		[d] Other Items . . . . .	5-16
	[6]	Managed Care Program Integration. . . . .	5-16
		[a] Utilization Review . . . . .	5-16
		[b] Specialty Utilization Review . . . . .	5-17
		[c] Preferred Provider Organizations . . . . .	5-17
		[d] Employee Assistance and Wellness Programs . . . . .	5-17
	[7]	Improving Administrator Performance . . . . .	5-18
		[a] Financial Recovery . . . . .	5-18
		[b] System Changes and Reprogramming . . . . .	5-18
		[c] Retraining . . . . .	5-18
		[d] Specialized Audits and Reports . . . . .	5-18
		[e] Coordinating Vendors . . . . .	5-18
		[f] Follow-up Reviews . . . . .	5-18
		[g] Performance Contracts . . . . .	5-19
		[h] Changing Administrators . . . . .	5-19
§ 5.02		Negotiating Administrative-Services-Only Contracts . . . . .	5-20
	[1]	Introduction . . . . .	5-20
		[a] Important Issues . . . . .	5-20
		[b] Overview of Administrative- Services-Only Contracts. . . . .	5-20
	[2]	ERISA Considerations . . . . .	5-21
		[a] Prudent-Man Rule. . . . .	5-21
		[b] Value of Services. . . . .	5-22
		[c] Determining Fees . . . . .	5-23
		[d] Fixed-Dollar Amount . . . . .	5-23
		[e] Fixed Amount Per Claim . . . . .	5-24
		[f] Fee for Service . . . . .	5-24
	[3]	Common Provisions in Administrative- Services-Only Contracts . . . . .	5-24
		[a] Services (Obligations). . . . .	5-24
		[b] Appeals . . . . .	5-25
		[c] Other Services. . . . .	5-25
		[d] Banking/Payment of Claims . . . . .	5-26
		[e] Financial Stability. . . . .	5-26
		[f] Overdrafts . . . . .	5-27
		[g] Costs and Fees. . . . .	5-27
		[h] Record Maintenance and Examination . . . . .	5-28
		[i] Indemnification . . . . .	5-28
		[j] Plan Prohibition . . . . .	5-28

**HEALTH CARE BENEFITS LAW**

	[k]	Clauses Will Vary . . . . .	5-29
	[l]	Managed Care Liabilities . . . . .	5-29
	[m]	Erroneous Payments . . . . .	5-30
	[n]	Overpayments . . . . .	5-30
	[o]	Gross Negligence . . . . .	5-31
	[p]	Agency/Fiduciary Status . . . . .	5-31
		[i] Claims Review . . . . .	5-31
		[ii] Claims Processing . . . . .	5-34
	[q]	Defining a Service Provider as a Fiduciary . . . . .	5-34
	[r]	Ministerial Functions . . . . .	5-35
	[s]	Term of Agreement/Termination. . . . .	5-35
	[t]	Guaranteed Rates . . . . .	5-36
	[u]	Managed Care Networks. . . . .	5-36
	[v]	Miscellaneous . . . . .	5-37
	[4]	Less Common Features in Administrative- Services-Only Contracts . . . . .	5-37
		[a] Definitions. . . . .	5-37
		[b] Reports to Employers . . . . .	5-37
		[c] Performance Guarantees and Incentives . . . . .	5-38
		[d] Noninsurer TPAs. . . . .	5-38
		[e] Stop-Loss Insurance . . . . .	5-39
		[f] Right to Audit . . . . .	5-39
		[g] Claims Processing Disruption. . . . .	5-39
		[h] Delegation. . . . .	5-40
		[i] Notice of Litigation or Governmental Inquiry . . . . .	5-40
		[j] Other Provisions . . . . .	5-41
§ 5.03	[Reserved]	. . . . .	5-42
§ 5.04		Auditing Utilization Review and ERISA Compliance . . . . .	5-43
	[1]	Introduction . . . . .	5-43
	[2]	Agency Theory . . . . .	5-43
		[a] Agency Liability . . . . .	5-43
		[b] Ostensible Agency Liability . . . . .	5-43
		[c] Enhanced Risk . . . . .	5-65
		[d] Court Decisions. . . . .	5-65
		[e] Risk Management Steps . . . . .	5-66
	[3]	Corporate Negligence Theory . . . . .	5-67
		[a] Hospital Liability . . . . .	5-67
		[b] Employer Liability . . . . .	5-68
		[c] Risk Management Steps . . . . .	5-68
	[4]	Medical Management Liability . . . . .	5-70
		[a] The Wickline Case . . . . .	5-70
		[b] The Wilson Case . . . . .	5-71
		[c] Risk Management Steps . . . . .	5-71

## TABLE OF CONTENTS

xxvii

	[5] Liability Based on Provider Incentives . . . . .	5-72
	[a] Potential Conflict . . . . .	5-72
	[b] Steps to Reduce Utilization Management Liability . . . . .	5-72
	[6] ERISA Liability . . . . .	5-73
	[a] Fiduciary Liability . . . . .	5-73
	[b] ERISA Claims Denial . . . . .	5-74
	[c] ERISA Preemption and its Application to Managed Care . . . . .	5-74
	[d] Claims that “Relate To” Plan Administration Are Preempted. . . . .	5-74
	[e] Settlor Functions . . . . .	5-76
	[f] Risk Management Steps . . . . .	5-76
	[g] Managed Care Contract . . . . .	5-78
	[h] Managed Care Liability Audit . . . . .	5-78
§ 5.05	Subrogation: The Plan Administrator’s Duty to Recover Plan Assets from Tortfeasors . . . . .	5-82
	[1] Introduction . . . . .	5-82
	[2] The Right of Subrogation: How Health Care Plans Recover from Tortfeasors . . . . .	5-83
	[a] Enforcement of Subrogation and ERISA Plan Reimbursement Claims . . . . .	5-84
	[b] Equitable Lien by Agreement . . . . .	5-84
	[c] Plan Terms Govern ERISA Reimbursement Action Based On Equitable Lien . . . . .	5-85
	[i] Background . . . . .	5-86
	[ii] Plan Arguments . . . . .	5-86
	[iii] Participant Arguments . . . . .	5-87
	[iv] Supreme Court Opinion . . . . .	5-87
	[d] ERISA Equitable Relief Case Involving Dissipated Funds . . . . .	5-88
	[3] Some Practical Issues in a Recovery Program. . . . .	5-90.1
	[a] Identifying Cases Where Recovery Is Possible. . . . .	5-90.1
	[b] Determining When Recovery Is Probable . . . . .	5-90.2
	[c] Estimating Damages and Costs of Recovery . . . . .	5-90.3
	[4] Reasonable Expectations of an Effective Recovery Program . . . . .	5-90.4
	[5] Background on Legal History . . . . .	5-90.5
	[6] Restrictions on Tort Recovery . . . . .	5-90.6
	[a] Contributory Negligence. . . . .	5-90.6
	[b] Partial Comparative Negligence. . . . .	5-90.6

**HEALTH CARE BENEFITS LAW**

	[c]	Pure Comparative Negligence . . . . .	5-90.7
[7]		Restrictions on Subrogation. . . . .	5-90.7
	[a]	The Made Whole Rule . . . . .	5-90.7
	[b]	The Collateral Source Rule. . . . .	5-90.8
	[c]	Anti-Subrogation Statutes. . . . .	5-92
[8]		ERISA and Federal Common Law . . . . .	5-92
[9]		Significance of the Legal Principles . . . . .	5-93
[10]		Well-Designed Plan Language. . . . .	5-94
	[a]	Exclusion of Expenses Paid or Payable by a Third Party . . . . .	5-95
	[b]	Recovery and Subrogation Provisions. . . . .	5-97
	[i]	Provisions Related to Payment Prior to Determination of Responsibility of a Third Party. . . . .	5-97
	[ii]	Provisions Related to Subrogation . . . . .	5-98
	[iii]	Provisions Regarding a Reimbursement and/or Subrogation Agreement. . . . .	5-99
	[iv]	Provisions Relating to Cooperation by Covered Individuals. . . . .	5-100
	[v]	Provisions Stating that All Recovered Proceeds Are to Go Toward Reimbursement of the Plan . . . . .	5-101
[11]		The Reimbursement Agreement . . . . .	5-102
[12]		Are these Plan Provisions Effective?. . . . .	5-103
[13]		A Program for Effective Administration of Third-Party Recoveries. . . . .	5-106
	[a]	Elements of a Cost-Effective Third-Party Recovery Program . . . . .	5-107
	[i]	The First Step: Find Cases that Afford Potential Recovery. . . . .	5-107
	[ii]	The Second Step: The First Contact with the Covered Person . . . . .	5-108
	[iii]	The Third Step: Contact the Third Party's Insurer or Attorney. . . . .	5-111
	[iv]	The Fourth Step: Follow Up, Follow Up, and Follow Up. . . . .	5-111
	[v]	The Fifth Step: Negotiate in Good Faith. . . . .	5-112
	[b]	An Important Reminder: Remember Whose Money Is at Stake. . . . .	5-115

CHAPTER 6

Qualified Medical Child Support Orders

§ 6.01	QMCSO . . . . .	6-2
	[1] Definition . . . . .	6-3
	[2] Required Information . . . . .	6-3
§ 6.02	The Plan Administrator’s Responsibilities . . . . .	6-5
§ 6.03	Rights of Alternative Recipients . . . . .	6-7
§ 6.04	Enforcement. . . . .	6-8
§ 6.05	SSA Amendments Enabling State Enforcement . . . . .	6-9
	[1] Requirements for Insurers . . . . .	6-9
	[2] Requirements for Employers . . . . .	6-10
	[3] Additional Requirements . . . . .	6-10
§ 6.06	Unanswered Questions . . . . .	6-11
	[1] Preexisting Conditions . . . . .	6-11
	[2] Open Enrollment . . . . .	6-11
	[3] Interim Coverage . . . . .	6-11
	[4] COBRA . . . . .	6-12
	[5] Nonparticipating Employees . . . . .	6-12
§ 6.07	What Employers Should Do . . . . .	6-13
§ 6.08	Procedures . . . . .	6-14
	[1] Determining If a Medical Child Support Order Is Qualified . . . . .	6-14
	[a] Receipt of Order . . . . .	6-14
	[b] Parties to Be Notified . . . . .	6-14
	[c] Content of Notice . . . . .	6-15
	[d] Determination of Status of Order . . . . .	6-15
	[e] Requirements for Qualification . . . . .	6-16
	[f] Direct Payment of Benefits . . . . .	6-16
	[g] Modifications and Redeterminations . . . . .	6-17
	[h] Determination by Another Entity . . . . .	6-17
	[i] Application of Plan to Alternate Recipients . . . . .	6-17
	[j] Information Required from Alternate Recipients . . . . .	6-18
	[k] Determinations Binding . . . . .	6-19
	[l] Disputes . . . . .	6-19

CHAPTER 7

COBRA

§ 7.01	COBRA Continuation Coverage . . . . .	7-8.2
	[1] Overview . . . . .	7-8.2
	[2] Penalties for Failure to Comply with COBRA . . . . .	7-8.3

**HEALTH CARE BENEFITS LAW**

§ 7.02	Plans that Are (and Are Not) Subject to COBRA . . . .	7-9
	[1] What is a Group Health Plan? . . . . .	7-9
	[a] Definitions . . . . .	7-9
	[b] Plans Subject to COBRA . . . . .	7-10
	[c] Plans Not Subject to COBRA . . . . .	7-11
	[2] What is a Small-Employer Group Health Plan? . . . . .	7-12
	[3] How Many Plans Does a Plan Sponsor? . . . .	7-13
	[4] “Packaged” Health Care Plans . . . . .	7-14
	[5] COBRA and Cafeteria Plans . . . . .	7-14
	[a] What Cafeteria Plans Are . . . . .	7-14
	[b] COBRA and Cafeteria Choices . . . . .	7-15
	[c] COBRA and Health Care FSAs . . . . .	7-15
	[d] COBRA and Premium Conversion Arrangements . . . . .	7-17
§ 7.03	Qualified Beneficiaries and Qualifying Events . . . .	7-18
	[1] Who Is Entitled to COBRA Continuation Coverage, Why and for How Long . . . . .	7-18
	[2] Employees and 18-Month Qualifying Events . .	7-21
	[3] “Renegade Dependents” and 36-Month Qualifying Events . . . . .	7-22
	[a] Dependents Who Have Their Own Qualifying Events . . . . .	7-22
	[b] The Unique Status of “Renegade Dependents” . . . . .	7-23
	[c] Divorce or Legal Separation as a Qualifying Event . . . . .	7-25
	[4] Multiple Qualifying Events . . . . .	7-27
	[5] Disabled Individuals and 29-Month Qualifying Events . . . . .	7-27
	[a] Disability and COBRA . . . . .	7-27
	[b] The Plan’s Disability Extension as an Alternative to COBRA Continuation Coverage . . . . .	7-28
	[6] Retirees, Bankruptcy and Unlimited COBRA Continuation Coverage . . . . .	7-29
	[7] Dates When the Qualifying Event Occurs and Coverage Ends . . . . .	7-30
§ 7.04	The Charge for COBRA Continuation Coverage . . .	7-32
	[1] Amount of the Charge for COBRA Continuation Coverage . . . . .	7-32
	[2] Determining the Amount Insured Plans May Charge . . . . .	7-33
	[3] Determining the Amount Self-Insured Plans May Charge . . . . .	7-34

**TABLE OF CONTENTS**

xxx.i

	[4] Increases and Decreases of the Amount Charged . . . . .	7-35
	[5] Grace Periods . . . . .	7-36
	[6] Who Loses if the COBRA Participant Does Not Pay the Amount Charged? . . . . .	7-37
	[7] Difference Between the Premium and the Amount Charged . . . . .	7-38
§ 7.05	COBRA and USERRA Notices . . . . .	7-40
	[1] Multiple COBRA Notice Requirements . . . . .	7-40
	[2] The General (or Initial) COBRA Notice . . . . .	7-41
	[a] When and How a General COBRA Notice Must Be Given . . . . .	7-41
	[b] Information in the General COBRA Notice . . . . .	7-43
	[c] Method of Delivery of a General COBRA Notice . . . . .	7-45
	[d] Consequences of Delay or Failure to Give a General COBRA Notice . . . . .	7-46
	[e] Starting a New Employment Relationship with a General COBRA Notice . . . . .	7-46
	[3] The COBRA Election Notice . . . . .	7-47
	[a] When and How a COBRA Election Notice Must Be Given . . . . .	7-47
	[b] Information the COBRA Election Notice Must Contain . . . . .	7-48
	[c] Method of Delivery of a COBRA Election Notice . . . . .	7-52
	[d] Consequences of Delay or Failure to Give a COBRA Election Notice . . . . .	7-52.1
	[e] COBRA Continuation Coverage and Divorce . . . . .	7-52.1
	[i] What COBRA Requires . . . . .	7-52.2
	[ii] Judicial Interpretation of COBRA Requirements . . . . .	7-52.3
	[4] Notice of Unavailability of COBRA Coverage . . . . .	7-52.5
	[5] Notice of Early Termination of COBRA Continuation Coverage . . . . .	7-52.5
	[6] Notice of Termination of COBRA Continuation Coverage at the End of the 18-Month or 36-Month COBRA Period . . . . .	7-52.7
	[7] Other COBRA Notices that the Employer Should Provide . . . . .	7-52.8
	[a] Second Qualifying Event Notices . . . . .	7-52.9

**HEALTH CARE BENEFITS LAW**

	[i]	Why a Second COBRA Qualifying Event Notice May Be Needed . . . . .	7-52.9
	[ii]	Texts of Second COBRA Qualifying Event Notices . . .	7-52.10
	[iii]	Notice When a Child Ceases to Be a Dependent . . . . .	7-52.11
	[iv]	Notice When a Second Qualifying Event is Death, Divorce, Legal Separation or Medicare Eligibility . . . . .	7-52.12
	[b]	Notice of an 11-Month Extension of COBRA Continuation Coverage Due to Disability . . . . .	7-52.13
[8]		COBRA Notices that Plan or COBRA Participants Must Provide . . . . .	7-52.15
	[a]	Why Plan Participants and COBRA Participants Must Provide Notices to the Plan. . . . .	7-52.16
	[b]	Notice of the Plan Participant's or COBRA Participant's Death. . . . .	7-52.16
	[c]	When Those Notices Must Be Provided . . . . .	7-52.17
	[d]	Procedures for Providing Those Notices . . . . .	7-52.18
	[i]	Use of Company Forms . . . . .	7-52.18
	[ii]	Oral Notice . . . . .	7-52.18
	[iii]	Written Notice . . . . .	7-52.20
	[iv]	Notice of a Determination that Disability Has Ended. . . . .	7-52.20
	[v]	What Employers Need to Know to Provide a COBRA Election Notice . . . . .	7-52.21
	[vi]	Dealing with Incomplete Notices from Plan Participants or COBRA Participants . . . . .	7-52.22
	[vii]	Use of Model Notice Forms. . . . .	7-52.22
	[e]	Second COBRA Notice Under the Trade Act of 2002. . . . .	7-52.23
[9]		Judicial Interpretation of COBRA Notice Requirements . . . . .	7-52.23
	[a]	Failure to Give a COBRA Qualifying Event Notice. . . . .	7-52.24
	[b]	Reliance on Incompetent Administrators . . . . .	7-52.26
	[c]	Notices to Disabled Employees . . . . .	7-52.26
	[d]	Notices to Dependent Children. . . . .	7-52.28

**TABLE OF CONTENTS**

xxx.iii

- [e] Termination of COBRA Continuation Coverage for Nonpayment of COBRA Premiums . . . . . 7-52.29
- [10] Dealing with COBRA and USERRA Notice . . . . . 7-52.30
  - [a] Background. . . . . 7-52.30
  - [b] USERRA Rights Notice . . . . . 7-52.30
  - [c] Health Plans Must Provide Extended USERRA Continuation Coverage Under COBRA. . . . . 7-52.31
  - [d] Class Action Litigation: COBRA Election Notice. . . . . 7-52.31
    - [i] COBRA Notice Deficiencies . . . . . 7-52.32
    - [ii] Common Defenses. . . . . 7-52.32
    - [iii] Additional Risks. . . . . 7-52.33
- [11] COBRA Notice Intimidation Litigation. . . . . 7-52.34
  - [a] Background. . . . . 7-52.34
  - [b] Class Action Complaint . . . . . 7-52.34
    - [i] Overview . . . . . 7-52.34
    - [ii] Supporting Law and Factual Allegations . . . . . 7-52.36
    - [iii] Class Claim for Relief . . . . . 7-52.40
- [12] Former Amazon Workers Seek Certification COBRA Notice Suit . . . . . 7-52.40
  - [a] Background. . . . . 7-52.41
  - [b] Overview of Plaintiff’s Claims . . . . . 7-52.41
  - [c] Facts . . . . . 7-52.42
  - [d] Legal Analysis. . . . . 7-52.43
    - [i] Plaintiff and the Putative Class Have Standing . . . . . 7-52.44
    - [ii] Merits of the Claim and Class Certification. . . . . 7-52.45
    - [iii] The Proposed Class is Defined and Readily Ascertainable. . . . . 7-52.45
    - [iv] The Proposed Class Meets the Requirements of Rule 23(a) . . . . . 7-52.45
    - [v] Plaintiff Has Satisfied Rules 23(b)(1)(A)-(B) and 23(b)(3). . . . . 7-52.48
- [13] Citigroup Sued Over COBRA Notices . . . . . 7-52.49
  - [a] Background. . . . . 7-52.49
  - [b] Factual Allegations . . . . . 7-52.51
    - [i] COBRA Notice Requirements. . . . . 7-52.51

**HEALTH CARE BENEFITS LAW**

	[ii]	Defendant's Notice is Inadequate and Fails to Comply with COBRA . . . . .	7-52.53
	[iii]	Plaintiff's First Concrete Injury - Informational Injury. . . . .	7-52.55
	[iv]	Plaintiff's Second Concrete Injury - Loss of Insurance Coverage . . . . .	7-52.55
	[v]	Failure to Explain How to Enroll in COBRA . . . . .	7-52.55
	[vi]	Failure to Provide the Address to Which Payments Should Be Sent . . . . .	7-52.56
	[vii]	Failure to Include Information on Prematurely Losing COBRA Coverage. . . . .	7-52.57
	[viii]	Failure to Include Explanatory Information . . . . .	7-52.57
	[ix]	Failure to Identify Plan Administrator . . . . .	7-52.58
	[x]	Failure to Provide COBRA Notice Written in a Manner Calculated to be Understood by the Average Plan Participant . . . . .	7-52.58
	[c]	Class Claim I for Relief . . . . .	7-52.58
	[d]	Prayer for Relief . . . . .	7-52.59
[14]		Target Enters Into \$1.6 Million COBRA Notice Settlement . . . . .	7-52.60
	[a]	Background and Overview of Settlement. . . . .	7-52.60
	[i]	The Claims and Case Procedural History. . . . .	7-52.60
	[ii]	Defendant's Defenses. . . . .	7-52.61
	[b]	The Proposed Settlement . . . . .	7-52.61
	[i]	The Proposed Settlement Class. . .	7-52.61
	[ii]	Benefits to the Settlement Class and Named Plaintiffs. . .	7-52.62
[15]		Class Action COBRA Litigation Overwhelming Employers . . . . .	7-52.62
	[a]	Mendiola v. Home Depot U.S.A., Inc. . . . .	7-52.62
	[i]	Background . . . . .	7-52.62
	[ii]	Factual Allegations. . . . .	7-52.64
	[iii]	Class Action Allegations . . . . .	7-52.69
	[iv]	Prayer for Relief. . . . .	7-52.70

**TABLE OF CONTENTS**

xxx.v

	[b]	<i>Woods v. The Hershey Company</i> . . . . .	7-52.71
		[i] Background . . . . .	7-52.71
		[ii] Factual Allegations. . . . .	7-52.71
		[iii] Class Claim for Relief . . . . .	7-52.74
		[iv] Prayer for Relief. . . . .	7-52.75
	[c]	<i>Torres v. Starbucks Corp.</i> . . . . .	7-52.75
		[i] Background . . . . .	7-52.75
		[ii] Factual Allegations. . . . .	7-52.76
		[iii] Class Claim for Relief . . . . .	7-52.81
		[iv] Prayer for Relief. . . . .	7-52.81
§ 7.06		Day-to-Day Administration of COBRA	
		Continuation Coverage . . . . .	7-53
	[1]	Basic Day-to-Day Administration . . . . .	7-53
	[2]	Enrollment in COBRA Continuation	
		Coverage . . . . .	7-54
		[a] The Gap Between the Qualifying	
		Event and COBRA Enrollment . . . . .	7-55
		[b] Managing the Gap Between the	
		Qualifying Event and COBRA	
		Enrollment . . . . .	7-55
		[c] Waivers of COBRA Continuation	
		Coverage . . . . .	7-57
	[3]	Billing the Charge for COBRA Continuation	
		Coverage . . . . .	7-57
		[a] Billing for the Initial Payment . . . . .	7-58
		[b] Billing for Monthly Payments . . . . .	7-59
		[c] Increases in the Monthly Charge for	
		COBRA Continuation Coverage . . . . .	7-60
	[4]	Collecting the Charge for COBRA	
		Continuation Coverage . . . . .	7-61
	[5]	Maintaining Rights of COBRA	
		Participants . . . . .	7-61
		[a] Processing Special Enrollments . . . . .	7-62
		[b] Cafeteria Plan Open Enrollments . . . . .	7-62
		[c] Offering COBRA Participants	
		Enrollment in New Health	
		Programs . . . . .	7-63
		[d] Providing the Plan’s Disability	
		Extension . . . . .	7-63
		[e] Conversion Notices When COBRA	
		Continuation Coverage Expires . . . . .	7-64

*(Text continued on p. xxxi)*

**TABLE OF CONTENTS**

xxxi

	[6]	Monitoring COBRA Administration . . . . .	7-65
		[a] Integrating COBRA with Employer- Paid Continuation Coverage . . . . .	7-65
		[b] Monitoring Procedures for Sending COBRA Notices . . . . .	7-67
		[c] Processing Change of Family Status Notices . . . . .	7-67
		[d] Monitoring Social Security Disability Income Benefits Awards . . . . .	7-67
		[e] Tracking COBRA Claim Experience . . . . .	7-69
§ 7.07		COBRA and Alternative or Duplicate Coverage . . . . .	7-70
	[1]	Alternatives to COBRA Continuation Coverage . . . . .	7-70
		[a] Conversion as an Alternative to COBRA Continuation Coverage . . . . .	7-70
		[b] Disability Extension as an Alternative to COBRA Continuation Coverage . . . . .	7-71
	[2]	COBRA and Duplicate Coverage . . . . .	7-72
		[a] Impact of HIPAA . . . . .	7-76
		[b] A Practical Approach to COBRA and Duplicate Coverage . . . . .	7-76
	[3]	Who Pays First When COBRA and Other Coverage Coexist . . . . .	7-77
		[a] COBRA and Other Group Health Coverage . . . . .	7-77
		[b] COBRA and Medicare . . . . .	7-78
§ 7.08		When COBRA Continuation Coverage Ends Early (and When It Doesn't) . . . . .	7-79
	[1]	Terminating Events . . . . .	7-79
	[2]	Termination of All Health Care Plans . . . . .	7-79
	[3]	Failure to Pay the Charge for COBRA Continuation Coverage . . . . .	7-80
		[a] Initial Payment . . . . .	7-80
		[b] Monthly Payment . . . . .	7-82
	[4]	Obtaining Other Group Health Coverage . . . . .	7-83
	[5]	Becoming Entitled to Medicare . . . . .	7-84
	[6]	Termination of Coverage for Cause . . . . .	7-85
	[7]	Ceasing to Be Disabled During the 11-Month Extended COBRA Period . . . . .	7-86
	[8]	Notice Requirements When COBRA Continuation Coverage Ends . . . . .	7-86
		[a] Notices Related to Terminating Events . . . . .	7-86
		[b] Notices When COBRA Continuation Coverage Expires . . . . .	7-88
§ 7.09		COBRA and Purchases and Sales of Businesses . . . . .	7-90

**HEALTH CARE BENEFITS LAW**

	[1]	COBRA Continuation Coverage When Businesses Are Sold . . . . .	7-90
	[2]	Basic Principles When Businesses Are Sold . . . . .	7-91
	[3]	When the Seller Goes Out of Business . . . . .	7-92
	[4]	When the Seller Remains in Business . . . . .	7-93
	[a]	Transactions Relevant to Sales of Businesses . . . . .	7-93
	[b]	Parties Relevant to Sales of Businesses . . . . .	7-93
	[c]	Summary of Responsibilities for Providing COBRA Continuation Coverage . . . . .	7-94
	[d]	Seller's Employees Hired by the Buyer . . . . .	7-95
§ 7.10		How COBRA Affects Multiemployer Plans and Interacts with Other Laws . . . . .	7-96
	[1]	COBRA and Multiemployer Plans . . . . .	7-96
	[a]	Small and Large Employers Contributing to Multiemployer Plans . . . . .	7-96
	[b]	Cessation of Contributions by an Employer . . . . .	7-97
	[2]	FMLA (Family and Medical Leave Act) and COBRA . . . . .	7-98
	[a]	When a COBRA Qualifying Event Occurs . . . . .	7-98
	[b]	Practical Approach to the Interaction of COBRA and the FMLA . . . . .	7-100
	[3]	USERRA (Uniformed Services Employment and Reemployment Rights Act) and COBRA . . . . .	7-100
	[4]	State Continuation of Coverage Laws . . . . .	7-101
	[a]	State Laws Covering Overlapping Periods and Qualifying Events . . . . .	7-101
	[b]	Notices if COBRA and State Continuation Coverage Laws Overlap . . . . .	7-102
	[c]	Giving the Person a Choice of State or COBRA Coverages . . . . .	7-102
	[d]	State Laws With Longer Periods for Divorced or Widowed Spouses . . . . .	7-103
	[e]	State Laws with Longer Periods for Employees or Dependents . . . . .	7-105
	[f]	Notices When Coverage State- Mandated Coverage Is Required After COBRA . . . . .	7-107

## TABLE OF CONTENTS

xxxiii

§ 7.11	COBRA Election and Enrollment Deadlines Extended During COVID-19 “Outbreak Period” . . . . .	7-108
[1]	Summary . . . . .	7-108
[2]	Duration of “Outbreak Period” . . . . .	7-108
[3]	Planning for Longer Special Enrollment Periods . . . . .	7-109
[4]	Planning for Longer COBRA Election Periods . . . . .	7-109

## CHAPTER 8

### ERISA Reporting and Disclosure

§ 8.01	Requirements in General . . . . .	8-3
§ 8.02	Covered Plans . . . . .	8-4
[1]	Statutory Exemptions . . . . .	8-4
[2]	Practices and Arrangements . . . . .	8-4
[3]	Trust Requirement . . . . .	8-5
[4]	Limited Exemptions . . . . .	8-5
[a]	Small, Unfunded Welfare Benefit Plans . . . . .	8-6
[b]	Group Insurance Arrangements for Small Plans . . . . .	8-6
[c]	Unfunded Plans for Management or Highly Compensated Employees . . . . .	8-7
§ 8.03	Reporting to Government Agencies . . . . .	8-9
[1]	Filing the SPD with the DOL . . . . .	8-9
[a]	General Format . . . . .	8-9
[b]	Eliminate Jargon . . . . .	8-9
[c]	Contents of the Summary Plan Description . . . . .	8-10
[2]	Filing Form 5500 with the DOL . . . . .	8-12
[a]	Related Schedules and Forms . . . . .	8-13
[i]	Pre-1999 . . . . .	8-13
[ii]	1999 and Later . . . . .	8-14
[iii]	Schedule F, Fringe Benefit Plan Annual Information . . . . .	8-15
[b]	Annual Reports . . . . .	8-15
[c]	Penalty for Failure to File . . . . .	8-17
[d]	Reasonable Cause . . . . .	8-18
[e]	Special Event Reporting . . . . .	8-18
[f]	Voluntary Correction Program of IRS for Late or Non-Filers . . . . .	8-18.1
§ 8.04	Disclosure to Participants . . . . .	8-19
[1]	Administrator Obligations . . . . .	8-19

**HEALTH CARE BENEFITS LAW**

	[a]	Mail Distribution . . . . .	8-19
	[b]	Electronic Notices . . . . .	8-20
	[c]	Rules for Examining Documents . . . . .	8-22
	[d]	Other Plans . . . . .	8-22
	[e]	Participants Covered Under the Plan . . . . .	8-23
	[f]	Disclosure Requirements . . . . .	8-23
	[2]	Automatic Disclosure of SPD . . . . .	8-24
	[a]	Multiple Classes of Participants . . . . .	8-24
	[b]	Health Maintenance Organizations . . . . .	8-25
	[3]	Automatic Disclosure of SMM . . . . .	8-25
	[4]	Automatic Disclosure of Summary Annual Report . . . . .	8-25
	[5]	Other Automatic Disclosures . . . . .	8-26
	[6]	Written Explanation of Claim Denial . . . . .	8-26
	[7]	Disclosure Upon Request . . . . .	8-26
	[8]	Disclosure Upon Examination . . . . .	8-26.1
	[9]	Charges for Documents . . . . .	8-26.1
	[10]	Who Can Examine Plan Documents . . . . .	8-26.2
	[11]	Where Documents Must Be Made Available . . . . .	8-26.2
§ 8.05		Liability for Inaccurate Disclosure . . . . .	8-26.4
	[1]	Potential Liability . . . . .	8-26.4
	[2]	Disclaimer as Protection . . . . .	8-26.4
	[3]	Other Trouble Spots . . . . .	8-27
	[4]	Employee Communication Guidelines . . . . .	8-28
	[5]	Disclosure of Usual and Customary Fee Schedules . . . . .	8-28
§ 8.06		Claims Procedures for Employee Benefit Plans . . . . .	8-31
	[1]	Who May Represent a Claimant . . . . .	8-32
	[2]	Structure and Scope of the Final Regulation . . . . .	8-33
	[a]	Structure . . . . .	8-33
	[b]	Obligation to Establish and Maintain Reasonable Claims Procedures . . . . .	8-33
	[3]	Limitations on Arbitration and Multiple Appeals . . . . .	8-36
	[4]	Claim Determinations and Appeals . . . . .	8-38
	[a]	Overview . . . . .	8-38
	[b]	Urgent Care Claims . . . . .	8-39
	[c]	Concurrent Care Claims . . . . .	8-39
	[d]	Pre-Service Claims . . . . .	8-40
	[e]	Post-Service Claims . . . . .	8-41
	[f]	Disability Claims . . . . .	8-42
	[5]	Content of Notices of Adverse Benefit Determinations . . . . .	8-43
	[a]	Initial Health Care or Disability Benefit Claim Determinations . . . . .	8-43

## TABLE OF CONTENTS

xxxv

	[b] Notification of Benefit Determination on Review . . . . .	8-43
	[6] Preemption of State Law . . . . .	8-44
§ 8.07	Retention of Records Under ERISA for Employee Benefit Plans . . . . .	8-46
	[1] Statutory Provisions . . . . .	8-46
	[2] Records Retention Generally . . . . .	8-47
	[3] Electronic Records Retention . . . . .	8-48

## CHAPTER 9

### Retiree Medical Benefits

§ 9.01	Postretirement Health Care . . . . .	9-4.3
	[1] Overview of Retiree Benefits . . . . .	9-4.4
	[2] Integration with Medicare . . . . .	9-5
	[a] Coordination of Benefits . . . . .	9-6
	[b] Maintenance of Benefits . . . . .	9-7
	[c] Carveout . . . . .	9-7
	[d] Charges Not Eligible for Medicare . . . . .	9-8
	[3] Financial Accounting Standards Board's Standard . . . . .	9-9
	[4] Valuation of Retiree Medical Benefits . . . . .	9-9
	[5] Funding . . . . .	9-9
	[a] Direct Funding . . . . .	9-9
	[i] 401(h) Plans . . . . .	9-9
	[ii] 501(c) Trusts . . . . .	9-10
	[b] Indirect Funding . . . . .	9-10
	[i] Defined Benefit Pension Plans . . . . .	9-10
	[ii] Company-owned Life Insurance . . . . .	9-11
	[6] Future Plan Designs End Benefits . . . . .	9-11
	[a] Defined-Dollar Plans . . . . .	9-11
	[b] Defined Contribution Plans . . . . .	9-11
	[c] Long-Term Care . . . . .	9-12
§ 9.02	Postretirement Health Benefits Obligation . . . . .	9-13
	[1] Statement of Financial Accounting Standards No. 106: Overview of Issues . . . . .	9-13
	[a] Summary of the Rules . . . . .	9-13
	[b] Liability Buyouts . . . . .	9-14
	[c] Application of the Rules . . . . .	9-14
	[2] Recognizing and Measuring Liability . . . . .	9-15
	[3] Transition Rules . . . . .	9-16
	[4] Funding the Plan . . . . .	9-16
	[5] Insured Liability Buyouts . . . . .	9-17
	[6] Disclosure Requirements . . . . .	9-17

**HEALTH CARE BENEFITS LAW**

§ 9.03	Measuring the Postretirement Obligation . . . . .	9-20
	[1] Ongoing Issues After Adopting Statement of Financial Accounting Standards No. 106. . . . .	9-20
	[a] Determining the Substantive Plan. . . . .	9-20
	[b] Measurement of Obligations and Periodic Cost . . . . .	9-21
	[c] Health Care Claims. . . . .	9-21
	[d] The Ongoing Impact of Transition . . . . .	9-22
	[2] Analysis of Actuarial Assumptions . . . . .	9-23
	[a] Health Care Cost Trend Assumption. . . . .	9-23
	[b] Discount Rate . . . . .	9-24
	[c] Assess Other Assumptions . . . . .	9-24
	[3] Measuring the Obligation . . . . .	9-25
	[4] SOP 94-6 Adds New Benefits-Related Disclosures . . . . .	9-26
	[5] Accounting for Plan Events. . . . .	9-26
	[a] Plan Amendments . . . . .	9-27
	[b] Curtailments . . . . .	9-27
	[c] Difference Between Curtailments and Plan Amendments. . . . .	9-27
	[d] Measuring the Impact of a Curtailment . . . . .	9-28
	[e] Special Termination Benefits . . . . .	9-28
	[f] Settlements . . . . .	9-29
	[6] Auditing Considerations . . . . .	9-29
§ 9.04	Prefunding Postretirement Health Plans . . . . .	9-31
	[1] Informal Funding Vehicles. . . . .	9-31
	[a] Pay-as-You-Go Arrangements . . . . .	9-31
	[b] Corporate-Owned Life Insurance . . . . .	9-32
	[c] Rabbi Trusts . . . . .	9-32
	[d] Timing of the Deduction. . . . .	9-32
	[i] Multiple Payments . . . . .	9-33
	[ii] Multiple Years . . . . .	9-33
	[e] Deduction Rules in General . . . . .	9-33
	[i] Deferred Benefits . . . . .	9-34
	[ii] Funded vs. Unfunded. . . . .	9-34
	[f] Unfunded, Uninsured Deferred Benefits. . . . .	9-34
	[i] Deferred Compensation . . . . .	9-34
	[ii] Medical Benefits. . . . .	9-35
	[iii] Determining the Proper Tax Year. . . . .	9-35
	[g] Unfunded, Insured Arrangements. . . . .	9-36
	[i] Qualified Nonguaranteed Contracts . . . . .	9-37
	[ii] Premium Stabilization Reserves. . . . .	9-38

**TABLE OF CONTENTS**

xxxvii

		[iii] Unfunded, Partially Insured Arrangements . . . . .	9-39
[2]		Formal Funding Vehicles . . . . .	9-39
	[a]	Differences in Formal Approaches . . . .	9-40
	[b]	Voluntary Employee Beneficiary Association . . . . .	9-40
	[c]	Accounts Held Pursuant to Regulations . . . . .	9-41
		[i] Certain Retired Lives Reserves . . . . .	9-41
		[ii] Certain Administrative-Services-Only Arrangements . . . . .	9-41
		[iii] Arrangements Involving a Contractual Refund Right Based Solely on the Employer's Experience . . . . .	9-42
		[iv] Other Arrangements . . . . .	9-42
	[d]	401(h) Accounts . . . . .	9-42
	[e]	Taxable Trusts, Corporations, Joint Ventures, and Partnerships . . . . .	9-43
		[i] Taxable Trusts . . . . .	9-43
		[ii] Corporations . . . . .	9-44
		[iii] Joint Ventures and Partnerships . . . . .	9-44
§ 9.05		Tax and Other Prefunding Considerations . . . . .	9-45
	[1]	Tax Deductions for Contributions to Formal Funds . . . . .	9-45
		[a] Qualified Cost . . . . .	9-46
		[b] Qualified Direct Costs . . . . .	9-46
		[c] Additions to a Qualified Asset Account . . . . .	9-47
		[i] Account Limit . . . . .	9-47
		[ii] Incurred but Unpaid Claims . . . . .	9-48
		[iii] Retiree Medical Benefits . . . . .	9-48
		[iv] Actuarial Assumptions and Certifications . . . . .	9-49
		[v] Safe-Harbor Limits . . . . .	9-50
		[vi] Collectively Bargained Plans . . . . .	9-50
		[vii] Employee-Pay-All Plans . . . . .	9-51
	[d]	Plans Exclusively for Retirees . . . . .	9-51
	[e]	Key Employee Separate Account Requirements . . . . .	9-52
	[f]	Income Taxes on Excess Reserves . . . . .	9-53
	[g]	Unrelated Business Income Taxes . . . . .	9-53
	[h]	Deemed Unrelated Income . . . . .	9-53
	[i]	Excise Taxes on Disqualified Benefits . . . . .	9-54
		[i] Key Employees . . . . .	9-54

**HEALTH CARE BENEFITS LAW**

	[ii]	Discriminatory Benefits . . . . .	9-54
	[j]	Employer Reversions . . . . .	9-54
	[k]	Employee Pay-All Plans . . . . .	9-54
	[2]	Prefunded Plans . . . . .	9-54
	[a]	Tax Benefits . . . . .	9-55
	[b]	Earnings and Balance Sheet Benefits. . . . .	9-55
	[c]	Increased Flexibility and Reduced Risk . . . . .	9-55
	[d]	Financial Benefits . . . . .	9-56
	[e]	Human Resources Benefit. . . . .	9-57
	[3]	Court Decisions Affecting Plan Termination . . . . .	9-57
	[a]	Importance of Plan Document . . . . .	9-57
	[b]	Ensuring Plan Flexibility . . . . .	9-59
§ 9.06		Modifying or Terminating Retiree Medical Benefits . . . . .	9-60
	[1]	Factors Influencing Changes in Retiree Health Benefits . . . . .	9-60
	[a]	Employer Reaction to Increased Costs . . . . .	9-60
	[b]	Federal Court Decisions . . . . .	9-61
	[2]	Legal Context of Retiree Medical Plans . . . . .	9-61
	[a]	ERISA . . . . .	9-61
	[b]	Written Documents . . . . .	9-62
	[c]	Standard of Review. . . . .	9-62
	[d]	ERISA Preemption . . . . .	9-63
	[e]	Statutes Giving Rise to Retiree Complaints . . . . .	9-63
	[3]	Contract Analysis Under ERISA Plans . . . . .	9-63
	[a]	General Rule . . . . .	9-63
	[b]	Ambiguous Language . . . . .	9-64
	[c]	“Status Benefits” or Vesting Theory . . . . .	9-65
	[d]	Retiree Benefits in Nonbargaining Cases . . . . .	9-66
	[e]	Retiree Benefits in Collectively Bargained Plans . . . . .	9-67
	[4]	Interpretation of Ambiguous Contract Provisions . . . . .	9-67
	[a]	Representations by the Employer . . . . .	9-68
	[b]	Bilateral Contract Claims . . . . .	9-69
	[5]	ERISA Fiduciary Claims . . . . .	9-71
	[6]	Special Circumstances Affecting Plan Modification or Termination . . . . .	9-72
	[a]	Multiemployer Plans. . . . .	9-72
	[b]	Plant Dispositions and Bankruptcies . . . . .	9-72
	[c]	Successor Employer’s Obligations . . . . .	9-73
	[7]	Position of the Courts on Retirees’ Right to Benefits . . . . .	9-75

## TABLE OF CONTENTS

xxxix

	[a] Reservation of Rights Provision . . . . .	9-75
	[b] Commitment to Vest Benefits Must Be Clearly Expressed . . . . .	9-76
[8]	Sixth Circuit Clarifies Prior Decisions . . . . .	9-77
[9]	Supreme Court Rejects Yard-Man Inference Under “Ordinary Principles of Contract Law” . . . . .	9-89
	[a] Summary . . . . .	9-89
	[b] Sixth Circuit Decision . . . . .	9-90
	[c] Supreme Court Decision . . . . .	9-98
	[i] Majority Opinion . . . . .	9-98
	[ii] Concurring Opinion . . . . .	9-107
[10]	District Court Rules Johnson Controls Retirees Not Entitled to Lifetime Health Benefits . . . . .	9-108
	[a] Summary . . . . .	9-108
	[b] Decision . . . . .	9-109
	[i] Background . . . . .	9-109
	[ii] The Agreements . . . . .	9-110
	[iii] Procedural Background . . . . .	9-116
	[iv] Vesting of Welfare Benefits . . . . .	9-116
	[v] Interpreting the Language of the CBAs . . . . .	9-123
	[c] Subclasses B and F . . . . .	9-130
[11]	District Court Rules Honeywell Retirees Entitled to Lifetime Health Benefits . . . . .	9-131
	[a] Facts . . . . .	9-131
	[i] Pre-2000 CBAs . . . . .	9-132
	[ii] 2000-2003 CBA . . . . .	9-133
	[iii] 2000-2003 CBA Retiree Healthcare Provision . . . . .	9-135
	[b] Decision . . . . .	9-135
	[i] 2003 and 2008 Negotiations. . . . .	9-139
	[ii] 2011 Negotiations . . . . .	9-142
	[iii] Post-2014 Course of Conduct. . . . .	9-144
	[iv] Conclusion of Law . . . . .	9-145
[12]	General Electric Wins Retirees’ Challenge of Termination of Health Benefits Coverage . . . . .	9-146
	[a] Background . . . . .	9-146
	[b] Discussion . . . . .	9-147
	[c] Decision . . . . .	9-149
[13]	Michigan District Court Rejects Retirees’ Claim for Lifetime Healthcare Benefits . . . . .	9-149
[14]	Sixth Circuit Decision on Retiree Medical Coverage After Tackett . . . . .	9-150

**HEALTH CARE BENEFITS LAW**

	[a]	Background . . . . .	9-150
	[b]	Decision . . . . .	9-151
[15]		U.S. Supreme Court Rejection of Sixth Circuit Decision . . . . .	9-156
	[a]	Background . . . . .	9-157
	[b]	Supreme Court Decision . . . . .	9-158
[16]		Weyerhaeuser Wins Class Action Over Retiree Benefit Cuts . . . . .	9-160
	[a]	Background . . . . .	9-160
	[b]	Discussion . . . . .	9-161
		[i] Claim for Contractually Vested Healthcare Benefits . . . . .	9-161
		[ii] Claim for Promissory Estoppel . . . . .	9-165
[17]		Gerdau Ameristell Reaches \$16M Settlement with Retirees Over Health Care Cuts . . . . .	9-165
	[a]	Background . . . . .	9-165
	[b]	Key Terms of the Proposed Settlement . . . . .	9-166
		[i] Class Members who are age 65 or Older . . . . .	9-166
		[ii] Class Members who are younger than age 65 and eligible for Medicare due to disability . . . . .	9-166
		[iii] Class Members Who are Younger than Sixty-five and Not On Medicare Due to Disability . . . . .	9-167
		[iv] Open Enrollment . . . . .	9-167
		[v] Lump Sum Payment . . . . .	9-168
		[vi] Life Insurance . . . . .	9-168
		[viii] Attorneys' Fees . . . . .	9-168
[18]		FreightCar America To Pay Retirees \$30M To Settle Health Care Benefits Dispute . . . . .	9-168
	[a]	Background . . . . .	9-169
	[b]	Settlement Agreement . . . . .	9-169
[19]		Ohio District Court Approves Retiree Class Action Settlement . . . . .	9-172
	[a]	Background . . . . .	9-172
	[b]	Settlement Terms . . . . .	9-172
[20]		Honeywell Cannot Cut Retiree Health Benefits in Minnesota for Now . . . . .	9-173
	[a]	Background . . . . .	9-173
		[i] Factual History . . . . .	9-174
		[ii] Procedural History . . . . .	9-178
	[b]	Decision . . . . .	9-179

**TABLE OF CONTENTS**

	[i]	Irreparable harm . . . . .	9-179
	[ii]	Likelihood of Success . . . . .	9-182
	[iii]	Balance Between Harm and Injunctive Relief; Public Interest . . . . .	9-189
[21]		Union and Retirees Unable to Challenge Benefit Cutback Decision . . . . .	9-189
	[a]	Background . . . . .	9-189
	[b]	Plaintiffs’ Standing to Bring ERISA Claim . . . . .	9-190
	[i]	UMWA Associational Standing . . . . .	9-190
	[ii]	Retiree-Plaintiffs’ standing . . . . .	9-190.2
[22]		Ninth Circuit Finds No Vested Rights Under Orange County Retiree Medical Plan . . . . .	9-190.4
	[a]	Summary . . . . .	9-190.4
	[b]	Background . . . . .	9-190.6
	[c]	Decision . . . . .	9-190.7
[23]		HRA Not Commensurate with Promised Lifetime Retiree Health Benefits . . . . .	9-190.10
	[a]	Summary . . . . .	9-190.11
	[b]	Background . . . . .	9-190.11
	[c]	Discussion . . . . .	9-190.13
	[i]	Judicial Estoppel . . . . .	9-190.13
	[ii]	Comparability of the New Plan . . . . .	9-190.18
	[iii]	Plaintiffs’ ERISA § 502(a)(3) Claim is Barred . . . . .	9-190.19
	[d]	Decision . . . . .	9-190.20
[24]		Kraft Heinz Claims Plan Claims Procedure Trumps Retiree Benefit Grievance . . . . .	9-190.20
	[a]	Summary . . . . .	9-190.21
	[b]	Factual Background . . . . .	9-190.22
	[i]	Kraft Heinz Health Reimbursement Arrangement . . . . .	9-190.23
	[ii]	Employment with Kraft Heinz. . . . .	9-190.24
	[iii]	Grievance and Arbitration Demand . . . . .	9-190.25
	[iv]	Union Claim Not Substantively Arbitrable . . . . .	9-190.25
	[c]	Declaratory Judgment . . . . .	9-190.25
	[d]	Injunctive Relief . . . . .	9-190.26
	[e]	Relief Requested . . . . .	9-190.26
§ 9.07		Retiree Drug Subsidy Program . . . . .	9-190.27
§ 9.08		Reimbursement of Retiree Health Premiums or Expenses Utilizing a § 401(h) Account . . . . .	9-191
	[1]	Facts . . . . .	9-191

**HEALTH CARE BENEFITS LAW**

[2]	Rulings Requested . . . . .	9-194
[3]	Legal Analysis . . . . .	9-194
[4]	Conclusion . . . . .	9-196

**CHAPTER 10****Health Maintenance Organization Act**

§ 10.01	Development of HMOs . . . . .	10-1
§ 10.02	Implications for Employers . . . . .	10-3
[1]	Mandatory Dual Choice . . . . .	10-3
	[a] Two Classes of HMOs . . . . .	10-3
	[b] Open Enrollment Period Required . . . . .	10-5
[2]	Community Rating . . . . .	10-5
	[a] Rating by Class . . . . .	10-6
	[b] Adjusted Community Rating . . . . .	10-6
	[c] Adjusted Community Rating vs. Experience Rating . . . . .	10-7
[3]	Employer Contributions . . . . .	10-7
[4]	State Insurance Laws . . . . .	10-8

**CHAPTER 11****Medicare Secondary Payer Issues**

§ 11.01	Medicare Secondary Payer (MSP) Laws . . . . .	11-4.1
	[1] Employer Responsibilities Under MSP . . . . .	11-4.2
	[2] Medigap Policies . . . . .	11-4.3
§ 11.02	Enforcement of Medicare Secondary Payer Laws . . . . .	11-5
	[1] Private Cause of Action . . . . .	11-5
	[2] Excise Tax for Nonconforming Group Health Plans . . . . .	11-5
	[a] Aggregation Rules . . . . .	11-5
	[b] Disabled Employees . . . . .	11-5
	[3] Prohibition of Financial Incentives Not to Enroll in a Group Health Plan . . . . .	11-6
§ 11.03	Identifying Secondary Payer Situations . . . . .	11-7
§ 11.04	Health Coverage Data Bank . . . . .	11-9
§ 11.05	Recovery of Conditional Payments . . . . .	11-10
	[1] State Laws Do Not Limit Recovery . . . . .	11-12
	[2] Private Claims-Filing Requirements Do Not Limit Recovery . . . . .	11-12

## TABLE OF CONTENTS

xlii.i

[3]	Recovery from Third-Party Administrators . . . . .	11-13
[4]	Third-Party Administrators Not Liable . . . . .	11-14
[5]	Problem of Double Liability . . . . .	11-15
[6]	Restrictions on Governmental Rights of Recovery . . . . .	11-15
[7]	Supreme Court Decision Regarding Subrogation Question . . . . .	11-16
§ 11.06	Medicare + Choice: New Alternatives in Medicare . . . . .	11-16.2
[1]	Introduction . . . . .	11-16.2
[2]	Types of Medicare + Choice Plans . . . . .	11-16.2
[a]	Coordinated Care Plans . . . . .	11-16.3
[b]	HMO . . . . .	11-17
[c]	POS . . . . .	11-17
[d]	PPO . . . . .	11-17
[e]	PSO . . . . .	11-17
[f]	Medical Savings Accounts . . . . .	11-18
[g]	Private Fee-for-Service Plans . . . . .	11-18
[h]	Religious Fraternal Benefit Plans . . . . .	11-18
[3]	Medigap . . . . .	11-19
[4]	Eligibility and Enrollment . . . . .	11-19
[a]	Limitations on Enrollment . . . . .	11-19
[b]	Enrollment Requirements . . . . .	11-20
[i]	Coordinated Open Enrollment . . . . .	11-20

*(Text continued on p. xliii)*

**TABLE OF CONTENTS**

xliii

		[ii] Lock-In . . . . .	11-21
		[c] Beneficiary Education . . . . .	11-22
[5]	Benefits . . . . .		11-22
		[a] Additional Benefits . . . . .	11-23
		[b] Supplemental Benefits . . . . .	11-23
		[c] Premiums . . . . .	11-23
		[i] Premiums for MSA Enrollees . . . . .	11-24
		[ii] Calculation of Benefits . . . . .	11-24
		[d] Cost Sharing . . . . .	11-24
		[e] Point-of-Service (POS) Benefits . . . . .	11-25
		[f] Coordination of Benefits . . . . .	11-25
[6]	Beneficiary Protections . . . . .		11-25
		[a] Access . . . . .	11-25
		[b] Access to Services Under a Medicare + Choice Private Fee-for-Service (PFFS) Plan . . . . .	11-26
		[c] Confidentiality . . . . .	11-26
		[d] Prohibited Medicare + Choice Interference . . . . .	11-27
		[e] Grievances and Appeals . . . . .	11-27
		[f] Quality Assurance . . . . .	11-28
		[i] Agreement with Review Organization . . . . .	11-28
		[ii] Deemed Quality . . . . .	11-28.1
[7]	Relationships with Providers . . . . .		11-28.1
[8]	Payments to Plans . . . . .		11-28.2
[9]	Risk Adjustment . . . . .		11-28.3
[10]	Adjusted Community Rates . . . . .		11-28.3
[11]	Declining Enrollment Rates in Medicare + Choice Plans . . . . .		11-28.4
[12]	Provide Accurate Information Directly (PAID) Act . . . . .		11-28.5
		[a] Background . . . . .	11-28.5
		[b] The Problem of Medicare Advantage and Part D Plans . . . . .	11-28.6
		[c] The PAID Act . . . . .	11-28.6
		[d] PAID Will Change Dynamics of Claims-Settling Process . . . . .	11-28.7
§ 11.07	Health Care Insolvency . . . . .		11-28.8
		[1] Introduction . . . . .	11-28.8
		[2] Executory Contracts . . . . .	11-29
		[a] Definition of Executory Contract . . . . .	11-29
		[b] Provider Agreements as Executory Contracts . . . . .	11-29
		[i] Cases Holding That Provider Agreements Are Executory Contracts . . . . .	11-30

**HEALTH CARE BENEFITS LAW**

	[ii]	Cases Holding That Provider Agreements Are Not Executory Contracts . . . . .	11-30
	[c]	Assumption/Rejection of Provider Agreements . . . . .	11-31
	[i]	Cases Requiring Explicit Court Approval . . . . .	11-31
	[ii]	Effect of Acceptance of Payments by Provider . . . . .	11-32
	[iii]	When a Default Need Not Be Cured . . . . .	11-33
	[iv]	Injunctive Relief from Provider Agreement . . . . .	11-33
[3]		The Automatic Stay and Setoff/Recoupment of Prepetition Overpayments . . . . .	11-34
	[a]	Setoff . . . . .	11-34
	[b]	Recoupment . . . . .	11-35
	[i]	Recoupment of Overpayments Not Authorized . . . . .	11-36
	[ii]	Recoupment of Overpayments Authorized . . . . .	11-38
[4]		Protection Against Discrimination by Governmental Units . . . . .	11-39
	[a]	Protections Against Discriminatory Treatment . . . . .	11-39
	[b]	Application of Section 525(a) to Medicare and Medicaid Providers. . . . .	11-40
[5]		Absolute Priority Rule . . . . .	11-40
[6]		Jurisdiction . . . . .	11-42
[7]		Eligibility Issues in Health Care Bankruptcies . . . . .	11-43
	[a]	When HMOs Are Eligible for Relief Under the Bankruptcy Code . . . . .	11-44
	[b]	HMOs as Domestic Insurers . . . . .	11-45
	[c]	Other Considerations . . . . .	11-45
§ 11.08		Public Funding of Medical Services and Drugs and Its Impact on the Private Sector . . . . .	11-46
	[1]	Primary Public Programs That Support Medical Services . . . . .	11-46
	[2]	How Federal Programs, Especially Medicare, Influence Private Insurance . . . . .	11-46
	[3]	Overview of Medicare and Medicaid . . . . .	11-46
	[a]	Medicare . . . . .	11-47
	[i]	Overview . . . . .	11-47
	[ii]	Who Qualifies? . . . . .	11-47
	[iii]	Funding . . . . .	11-47

**TABLE OF CONTENTS**

- [iv] Premiums, Deductibles and Co-insurance . . . . . 11-48
- [v] What is Not Covered—Drugs . . . . . 11-48
- [b] Medicaid . . . . . 11-48
  - [i] State Participation . . . . . 11-48
  - [ii] Eligibility . . . . . 11-49
  - [iii] Prescription Drug Benefits and Rebate Program . . . . . 11-49
- [4] Administration of Medicare and Medicaid . . . . . 11-49
  - [a] Medicare . . . . . 11-49
  - [b] Medicaid . . . . . 11-49
- [5] Hospital Payments Under Medicare . . . . . 11-50
  - [a] Cost Reimbursement System (Pre-1983) . . . . . 11-50
  - [b] Prospective Payment System (PPS) . . . . . 11-50
- [6] Doctors Under Medicare . . . . . 11-51
- [7] Drugs Under Medicare and Medicaid . . . . . 11-52
  - [a] Medicare—Limited Drug Benefits . . . . . 11-52
  - [b] Medicaid . . . . . 11-52
    - [i] Outpatient Drugs . . . . . 11-52
    - [ii] Inpatient Drugs . . . . . 11-52
  - [c] Medicare Modernization Act . . . . . 11-53
    - [i] Employer or Union Coverage . . . . . 11-53
    - [ii] Limited Incomes and Resources . . . . . 11-54
    - [iii] Automatic and Facilitated Enrollment . . . . . 11-55
    - [iv] Dual-Eligible Beneficiaries with Retiree Drug Coverage . . . . . 11-55
- [8] Anti-Kickback and Anti-Referral Laws . . . . . 11-58
  - [a] Anti-Kickback Laws . . . . . 11-58
    - [i] Scope of Anti-Kickback Law . . . . . 11-58
    - [ii] Safe Harbor Regulation—In General . . . . . 11-59
    - [iii] Marketing and Advertising—Personal Services Safe Harbor . . . . . 11-59
  - [b] Stark Anti-Referral Provision . . . . . 11-63
- [9] Carrier Responsibilities—Review of Services and Payment for Services . . . . . 11-63
  - [a] Coverage . . . . . 11-64
    - [i] Part A Versus Part B . . . . . 11-64
    - [ii] Overutilization . . . . . 11-64
    - [iii] Fraudulent Billing . . . . . 11-65

**HEALTH CARE BENEFITS LAW**

**CHAPTER 12**

**Family and Medical Leave Act**

§ 12.01	Overview .....	12-2
§ 12.02	Coverage .....	12-4
§ 12.03	Eligibility for Leave.....	12-5
	[1] Eligibility Requirements .....	12-5
	[2] Qualifying Events for FMLA Leave .....	12-6
	[3] Adoption and Foster Care .....	12-6
	[4] Domestic Partners .....	12-6
	[5] Family Care .....	12-6
	[6] Serious Health Condition.....	12-6
	[7] Doctor Visits or Therapy .....	12-7
	[8] Voluntary or Cosmetic Treatments .....	12-7
	[9] Substance Abuse .....	12-8
	[10] Continuing-Treatment Requirement .....	12-8
	[11] Inability to Perform the Job.....	12-8
	[12] Support for Leave Request for Family Care.....	12-9
	[13] Intermittent or Reduced Leave Schedule for a Serious Health Condition.....	12-9
	[14] Health Care Provider .....	12-10
§ 12.04	Definition of “Leave” .....	12-11
	[1] Working Spouses.....	12-11
	[2] Reduced Workweek or Intermittent Leaves.....	12-11
	[3] Transfer to an Alternative Position .....	12-12
	[4] Calculation of Leave Taken.....	12-12
§ 12.05	Paid Leave .....	12-13
	[1] Paid Family Leave.....	12-13
	[2] Paid Vacation or Personal Leave .....	12-13
	[3] Using Paid Leave for FMLA Purposes .....	12-14
	[4] Qualifying Reason Needed to Grant Leave.....	12-14
	[5] Designating FMLA Leave .....	12-15
§ 12.06	Benefits Coverage .....	12-16
	[1] Same Benefits Required.....	12-16
	[2] When Coverage Ceases .....	12-16
	[3] Payment of Premiums .....	12-17
	[4] Methods of Payment .....	12-17
	[5] Multiemployer Plans .....	12-18
	[6] Failure to Make Timely Premium Payments .....	12-18
	[7] Recovering Employer Premiums.....	12-19
	[8] Medical Emergency Exceptions .....	12-19
	[9] Guidelines for Recovering Premiums .....	12-20

## TABLE OF CONTENTS

xlvii

	[10] Employee's Rights on Returning to Work . . . . .	12-21
	[11] Protection of Employees . . . . .	12-21
§ 12.07	Notice. . . . .	12-23
	[1] Posting Requirements . . . . .	12-23
	[2] Employee Notice . . . . .	12-23
	[3] Actions Taken Against Employees . . . . .	12-24
	[4] Medical Certification . . . . .	12-24
	[5] Required Information. . . . .	12-24
	[6] Second and Third Opinions . . . . .	12-25
	[7] Employee Status Reports. . . . .	12-25
	[8] Fitness-for-Duty Report. . . . .	12-26

## CHAPTER 13

### ADA's Impact on Employee Benefit Plans

§ 13.01	Statutory and Regulatory Framework . . . . .	13-4
	[1] Terms and Definitions . . . . .	13-4
	[2] Discrimination . . . . .	13-5
	[3] EEOC's Interim Enforcement Guidelines . . . . .	13-6
	[a] Burden Shifts to Employers . . . . .	13-6.1
	[b] Subterfuge Analysis . . . . .	13-6.1
	[4] Application to Employee Health Benefits Plans . . . . .	13-6.1
§ 13.02	General Standards for Insured and Self-Insured Plans . . . . .	13-6.2
	[1] Family Health Coverage Not An ADA Issue . . . . .	13-6.2
	[2] Curtailing Coverage. . . . .	13-6.2
	[3] Denial of Experimental Treatment Violates ADA . . . . .	13-7
	[4] Similarities to the Age Discrimination in Employment Act . . . . .	13-8
	[5] Interpreting "Bona Fide" and "Subterfuge" in the ADA . . . . .	13-9
	[6] Insured Plans and Risk Classifications . . . . .	13-9
	[7] Discrimination in Benefits. . . . .	13-10
	[8] Equal Employment Opportunity Commission Interpretation. . . . .	13-11
§ 13.03	Determining the Meaning of "Subterfuge" . . . . .	13-13
	[1] Cost Justification . . . . .	13-13
	[2] Business Purpose . . . . .	13-13
	[3] Data Collection . . . . .	13-14
	[a] Question of Cost . . . . .	13-14

**HEALTH CARE BENEFITS LAW**

	[b]	A Key Example . . . . .	13-14	
	[c]	Time Limitation Not Discriminatory . . .	13-15	
§ 13.04		Enforcement . . . . .	13-16	
	[1]	Time Limits . . . . .	13-16	
	[2]	Attorney Fees . . . . .	13-16	
	[3]	Dispute Resolution . . . . .	13-16	
§ 13.05		EEOC Regulations on ADA and GINA		
		Compliance for Wellness Programs . . . . .	13-17	
	[1]	Introduction . . . . .	13-17	
		[a]	Application of the ADA to Wellness Programs . . . . . 13-18	
		[b]	Application of Title II of GINA to Wellness Programs . . . . . 13-19	
	[2]	ADA Final Wellness Regulation . . . . .	13-19	
		[a]	Definition of Employee Health Program . . . . . 13-19	
		[b]	Employee Health Program Must be “Voluntary” . . . . . 13-20	
		[c]	Qualification as an Employee Health Program . . . . . 13-21	
		[d]	Reasonable Design . . . . . 13-21	
		[e]	Voluntary Participation and Notice . . .	13-22
		[f]	Confidentiality of Medical Information . . . . . 13-23	
		[g]	Incentive Limits . . . . . 13-23	
		[h]	Limit Applies to Stand-Alone Wellness Programs and Wellness Programs that are Part of Group Health Plan . .	13-25
		[i]	“Employee Health Programs” Involving a Disability-Related Inquiry or Medical Examination Are Subject to the final regulation . .	13-25
		[j]	Application to Tobacco Cessation Programs . . . . . 13-26	
		[k]	Employers Must Satisfy Certain Notice Requirements . . . . . 13-26	
	[3]	GINA Final Wellness Regulation . . . . .	13-26	
		[a]	Employer May Offer Inducement to Employee for Employee’s Spouse to Provide Information About Spouse’s Manifestation of Disease or Disorder as Part of HRA . . . . .	13-26
		[b]	GINA Regulation Applies Broadly to Wellness Programs, Whether or Not Offered as Part of a Group Health Plan . . . . . 13-27	

**TABLE OF CONTENTS**

- [c] GINA Subject Programs Must Satisfy a Reasonable Design Requirement . . . . . 13-27
- [d] Confidentiality, Notice and Authorization . . . . . 13-27
- [e] GINA-Subject Programs Must Limit Incentives (Maximum Incentive Limitations Mirror ADA). . . . . 13-28
- [f] GINA-Subject Programs Cannot Deny Access to Group Health Plan Coverage (or a Particular Benefits Package Within a Group Health Plan) Solely for Failure to Complete an HRA . . . . . 13-28
- [g] GINA-Subject Programs Cannot Provide Any Financial Incentives for Use with Child HRAs. . . . . 13-28
- [h] GINA-Subject Programs Cannot Provide Financial Inducement for Spouse to Provide His or Her Genetic Information, Including Genetic Tests . . . . . 13-29
- [i] Information Regarding Tobacco Use Is Not Genetic Information . . . . . 13-29
- [j] Authorization Requirement Applies to Spouses. . . . . 13-29
- [k] GINA-Subject Programs Cannot Condition Receipt of Inducement on Waiver of Confidentiality Protections . . . . . 13-29
- [4] Applying ADA, GINA AND HIPAA/ACA Incentive Limits . . . . . 13-29
- § 13.06 District Court Rules that Wellness Program Health Risk Assessment Does Not Violate the ADA. . . . . 13-31
  - [1] Summary . . . . . 13-31
  - [2] Background . . . . . 13-32
  - [3] Decision. . . . . 13-34
  - [4] Legal Analysis . . . . . 13-35
    - [a] Safe Harbor Provision. . . . . 13-35
    - [b] Voluntary Examination and Inquiry . . . . . 13-40
    - [c] Retaliation and Interference Claims . . . . . 13-41
- § 13.07 Yale University Sued Over Workplace Wellness Penalties . . . . . 13-43
  - [1] Summary . . . . . 13-43
  - [2] Background . . . . . 13-44
    - [a] General . . . . . 13-44

**HEALTH CARE BENEFITS LAW**

	[b]	The ADA’s “Voluntary” Requirement for Employee Wellness Programs . . .	13-44
	[c]	GINA’s “Voluntary” and Nondisclosure Requirements for Employee Wellness Programs . . . . .	13-45
	[d]	2016 EEOC Regulations Governing Employee Wellness Programs under the ADA and GINA . . . . .	13-45
	[3]	Allegations . . . . .	13-46
	[4]	Causes of Action . . . . .	13-48
	[a]	Violation of the ADA . . . . .	13-48
	[b]	Violation of GINA. . . . .	13-49
	[5]	Relief Requested . . . . .	13-49
	[6]	District of Columbia District Court Vacates the Penalty and Incentive Provisions of the 2016 EEOC Rules as Arbitrary and Capricious . . . . .	13-50
	[a]	Summary of 2017 Decision . . . . .	13-50
	[b]	Background of 2017 Decision . . . . .	13-51
	[c]	2016 EEOC Rules . . . . .	13-52
	[i]	The ADA Rule . . . . .	13-53
	[ii]	Consistency with HIPAA . . . . .	13-54
	[iii]	Current Insurance Rates . . . . .	13-55
	[iv]	Failure to Consider Relevant Factors . . . . .	13-56
	[v]	The GINA Rule . . . . .	13-57
§ 13.08		New Direction Taken by EEOC for Regulation of Corporate Wellness Programs Under the ADA . . .	13-60
	[1]	Summary . . . . .	13-60
	[2]	The EEOC’S Retreat From The ACA/HIPPA Wellness Regulation Deference To A General <i>De Minimus</i> Standard . . . . .	13-63
	[3]	Initial Hurdles For The EEOC Proposal To Apply the ADA Safe Harbor As An Exception to General De Minimus Inducement Limitations . . . . .	13-65
	[4]	Resurrection Of The ADA Healthcare Plan Safe Harbor As The Basis For An Exception To The General Rule, Without Application Of Safe Harbor Standards Or Constraints . . . . .	13-68
	[5]	The Inherently Voluntary Nature Of ACA/HIPPA Regulated Outcome-Based Wellness Programs . . . . .	13-72
	[6]	A Powerful Combination For A Principled Outcome-Based Wellness Program Exception Interrelated. . . . .	13-75

## TABLE OF CONTENTS

li

[7]	Practical Guidance In A Time of Regulatory Uncertainty For Prudent Outcome-Based Wellness Program Design And Administration . . . . .	13-76
[8]	Material Areas of Regulatory and Compliance Risk . . . . .	13-78
[9]	Conclusion . . . . .	13-80

## CHAPTER 14

### DOL Worker Classification Regulations

§ 14.01	Introduction . . . . .	14-2
§ 14.02	Economic Realities Test . . . . .	14-3
§ 14.03	Determining Employee and Independent Contractor Classification under the FLSA . . . . .	14-4
[1]	Independent Contractors Are Not Employees Under the Act . . . . .	14-4
[2]	Economic Dependence as the Ultimate Inquiry . . . . .	14-4
[3]	Determining Economic Dependence . . . . .	14-4
[4]	Economic Reality Factors . . . . .	14-4
[a]	The Nature and Degree of Control Over the Work . . . . .	14-4
[b]	The Individual's Opportunity for Profit or Loss . . . . .	14-5
[c]	The Amount of Skill Required for the Work . . . . .	14-5
[d]	The Degree of Permanence of the Working Relationship Between the Individual and the Potential Employer . . . . .	14-5
[e]	Whether the Work is Part of an Integrated Unit of Production . . . . .	14-6
[f]	Additional Factors . . . . .	14-6
§ 14.04	Examples of Analyzing Economic Reality Factors . . . . .	14-7
[1]	Nature and Degree of Control Over the Work . . . . .	14-7
[a]	Example . . . . .	14-7
[b]	Application . . . . .	14-7
[2]	Individual's Opportunity for Profit or Loss . . . . .	14-7
[a]	Example 1 . . . . .	14-7
[b]	Application 1 . . . . .	14-8
[c]	Example 2 . . . . .	14-8
[d]	Application 2 . . . . .	14-8

**HEALTH CARE BENEFITS LAW**

[3]	Degree of Permanence of the Working Relationship Between the Individual and the Potential Employer. . . . .	14-8
[a]	Example . . . . .	14-8
[b]	Application . . . . .	14-8
[4]	Whether the Work is Part of an Integrated Unit of Production. . . . .	14-9
[a]	Example 1 . . . . .	14-9
[b]	Application 1. . . . .	14-9
[c]	Example 2 . . . . .	14-9
[d]	Application 2. . . . .	14-9
§ 14.05	The Five Factor Test Adopted by the Final Regulations . . . . .	14-10
§ 14.06	Independent Contractors May be Offered Benefits . . . . .	14-12
§ 14.07	What Should Employers Do Now? . . . . .	14-13

**CHAPTER 15**

**Regulation of Multiple Employer Welfare Arrangements**

§ 15.01	Introduction . . . . .	15-2.1
§ 15.02	The Basis for MEWAs. . . . .	15-3
§ 15.03	Federal Regulation. . . . .	15-4
[1]	Fully Insured Plans . . . . .	15-4
[2]	Plans Not Fully Insured . . . . .	15-4
[3]	Non-ERISA Plans . . . . .	15-4
§ 15.04	Department of Labor Involvement . . . . .	15-5
§ 15.05	Defining the Scope of Federal Preemption . . . . .	15-6
[1]	Taft-Hartley Plans . . . . .	15-6
[2]	Single Employer Plans. . . . .	15-7
§ 15.06	Compliance with State Insurance Law . . . . .	15-8
[1]	Reserves. . . . .	15-8
[2]	DOL's Deference to States. . . . .	15-9
§ 15.07	Compliance with ERISA . . . . .	15-11
§ 15.08	IRS Compliance. . . . .	15-13
§ 15.09	Compliance with COBRA. . . . .	15-14
§ 15.10	ERISA and Workers' Compensation. . . . .	15-15
§ 15.11	Expanded Reporting Requirements. . . . .	15-16
[1]	DOL Rule. . . . .	15-16
[2]	What a MEWA Is. . . . .	15-17
[3]	How MEWAs Are Regulated. . . . .	15-18
[4]	Information to Be Disclosed on DOL Form M-1 . . . . .	15-19
[a]	Disclosure Requirements . . . . .	15-19

**TABLE OF CONTENTS**

- [b] Guidance on Compliance with the Filing Requirements . . . . . 15-19
- [c] Demonstrating a Good Faith Effort to Comply . . . . . 15-19
- [d] Consequences that Flow From Completion of the Form . . . . . 15-20
- § 15.12 DOL Finalizes Association Health Plan Rule . . . . . 15-21
  - [1] Background . . . . . 15-21
  - [2] Overview of the Final Rule . . . . . 15-25
    - [a] Continued Availability of “Bona Fide Group or Association of Employers” . . . . . 15-25
    - [b] Bona Fide Groups or Associations of Employers under the Final Rule . . . . . 15-26
      - [i] Purpose of the Association . . . . . 15-27
      - [ii] The Group or Association Must Have an Organizational Structure . . . . . 15-28
      - [iii] Participating Employer Control Over the Group or Association and the AHP . . . . . 15-28
      - [iv] Definition of Eligible Participant . . . . . 15-29
      - [v] Health Insurance Issuer Cannot Sponsor an AHP . . . . . 15-29
      - [vi] Commonality of Interest . . . . . 15-30
      - [vii] Nondiscrimination . . . . . 15-30
    - [c] Working Owner Provision . . . . . 15-31
      - [i] Treatment of Working Owners as Employers and Employees . . . . . 15-31
      - [ii] Working Owner Definition and Verification of Owner Status . . . . . 15-32
    - [d] Application of ERISA Group Health Plan Requirements to AHPs . . . . . 15-33
    - [e] ERISA Fiduciary Status and Responsibilities of AHP Sponsors . . . . . 15-33
  - [3] DOL Final Rule Adopts New Regulation . . . . . 15-35
- § 15.13 District Court Rules that DOL AHP Regulations Are An Unreasonable Interpretation of ERISA . . . . . 15-43
  - [1] Summary . . . . . 15-43
  - [2] Background . . . . . 15-44
    - [a] ERISA and the ACA . . . . . 15-45
    - [b] Association Health Plans and the Final Rule . . . . . 15-45
    - [c] Procedural History . . . . . 15-47

**HEALTH CARE BENEFITS LAW**

[3] Decision . . . . . 15-47

    [a] The Chevron Framework Applies to  
        DOL’s Interpretation of ERISA . . . . . 15-48

    [b] DOL’s Regulatory Interpretation of  
        ERISA Is Not Reasonable . . . . . 15-49

        [i] ERISA Is Limited to Employee  
            Benefit Plans Arising from  
            Employment Relationships. . . . . 15-49

        [ii] ERISA Extends the Definition  
            of Employer Only to  
            Associations Acting in the  
            Interest of Employers . . . . . 15-50

        [iii] The Final Rule’s Expansive  
            Test for Bona Fide  
            Associations is Not  
            Reasonable. . . . . 15-51

        [iv] The Final Rule’s Expansion of  
            “Employer” to Include  
            Working Owners without  
            Employees Is Not  
            Reasonable. . . . . 15-57

**CHAPTER 16**

**Health Insurance Portability and  
Accountability Act of 1996**

§ 16.01 Statute Policy . . . . . 16-6.4

§ 16.02 Group Health Plan Portability, Access and  
        Health Status Nondiscrimination . . . . . 16-7

    [1] General Restrictions on Preexisting  
        Condition Exclusions . . . . . 16-7

    [2] “Creditable Coverage” Defined . . . . . 16-8

    [3] “Excepted Benefits” . . . . . 16-8

    [4] Certifications of Creditable Coverage . . . . . 16-8

    [5] 63-day Breaks in Creditable Coverage . . . . . 16-8

    [6] Standard and Alternative Methods for  
        Crediting Prior Coverage . . . . . 16-9

    [7] No Preexisting Condition Exclusions for  
        Newborns and Adopted Children . . . . . 16-9

    [8] No Preexisting Condition Exclusions for  
        Pregnancy . . . . . 16-10

    [9] Special Enrollment Periods Due to Loss of  
        Other Coverage . . . . . 16-10

    [10] Special Enrollment Periods for  
        Dependents . . . . . 16-10

**TABLE OF CONTENTS**

	[11] HMO Affiliation Periods . . . . .	16-10
	[12] Health Status Nondiscrimination. . . . .	16-11
	[13] New Participant Disclosure Deadlines for Material Reductions in Group Health Plans . . . . .	16-11
	[14] Additional Information That Must Be Included in Plan Documents and SPDs. . . . .	16-12
	[15] Guaranteed Renewability in Multi-Employer Plans and MEWAs . . . . .	16-12
	[16] MEWA Reporting Requirement. . . . .	16-12
	[17] State Flexibility and Preemption . . . . .	16-12
	[18] Effective Dates. . . . .	16-12
	[19] Penalties. . . . .	16-13
	[20] Implications . . . . .	16-13
§ 16.03	Group Health Insurer Requirements . . . . .	16-16
	[1] Guaranteed Issue Not Required in the Large Group Market . . . . .	16-16
	[2] Guaranteed Issue in the Small Group Market. . . . .	16-16
	[3] Insurers May Use Certain Underwriting Requirements to Deny Coverage . . . . .	16-16
	[4] Denial of Coverage May Result in a Suspension of New Business Activity in a Service Area . . . . .	16-17
	[5] Guaranteed Renewal Requirements. . . . .	16-17
	[6] Rules Regarding a Health Insurer’s Exit from a Market . . . . .	16-17
	[7] Disclosure Requirements. . . . .	16-18
	[8] Special Rules Regarding Association Coverage. . . . .	16-18
	[9] Study of Conditions in the Large Group Market. . . . .	16-18
	[10] Preemption/State Flexibility . . . . .	16-19
	[11] Penalties. . . . .	16-19
	[12] Implications . . . . .	16-19
§ 16.04	Individual Health Insurer Requirements . . . . .	16-20
	[1] Guaranteed Issue to Eligible Individuals. . . . .	16-20
	[a] Eligible Individuals. . . . .	16-20
	[b] Guaranteed Renewal . . . . .	16-20
	[2] Coverage Requirements. . . . .	16-20
	[3] Optional State Programs/State Flexibility . . . . .	16-22
	[4] Discontinuation of Health Coverage/Exit from the Market . . . . .	16-22
	[5] Federal Preemption of State Insurance Laws . . . . .	16-22
	[6] Penalties. . . . .	16-23
	[7] Implications . . . . .	16-23

**HEALTH CARE BENEFITS LAW**

§ 16.05	COBRA Amendments . . . . .	16-24
	[1] Disability May Arise Within First 60-Days of COBRA Continuation. . . . .	16-24
	[2] Any Disabled Qualified Beneficiary May Become Entitled to Up to 29 Months COBRA Continuation . . . . .	16-24
	[3] Newborns and Adopted Children Are Qualified Beneficiaries . . . . .	16-24
	[4] Coverage Under Another Group Health Plan . . . . .	16-25
	[5] Medicare Entitlement Followed by Qualifying Event. . . . .	16-25
	[6] Effective Dates. . . . .	16-25
	[7] Penalties. . . . .	16-26
	[8] Implications . . . . .	16-26
§ 16.06	Long-Term Care . . . . .	16-28
	[1] Federal Tax Treatment of Long-Term Care Clarified. . . . .	16-28
	[a] What is a “Qualified Long-Term Care Insurance Contract”? . . . . .	16-28
	[b] What Are Qualified Long-Term Care Services? . . . . .	16-29
	[i] Per Diem Limitations. . . . .	16-29
	[ii] Taxation of Payments in Excess of the Per Diem Limits . . . . .	16-29
	[c] Treatment of Long-Term Care Services as Medical Care for Federal Tax Purposes . . . . .	16-30
	[2] Long-Term Care Insurance Not Permitted Under Cafeteria Plans or Flexible Spending Accounts . . . . .	16-30
	[3] COBRA Exclusion. . . . .	16-30
	[4] Long-Term Care Insurance Coverage Provided by a Rider to a Life Insurance Contract. . . . .	16-30
	[5] Treatment of Certain State-Maintained Plans . . . . .	16-31
	[6] Annual Reporting Requirement for Long-Term Care Benefits Payers . . . . .	16-31
	[7] Long-Term Care Study . . . . .	16-31
	[8] Consumer Protection Provisions . . . . .	16-31
	[9] Life Insurance Company Reserves . . . . .	16-31
	[10] Effective Dates. . . . .	16-32
	[11] Penalties. . . . .	16-32
	[12] Implications . . . . .	16-32
§ 16.07	Administrative Simplification . . . . .	16-34

**TABLE OF CONTENTS**

[1] National Standards for Electronic  
Transmission of All Health Care  
Coverage Information . . . . . 16-34

[2] Individual Health Identifiers . . . . . 16-34

[3] Electronic Authentication of Signatures . . . . . 16-35

[4] Coordination of Benefits . . . . . 16-35

[5] Protection of Privacy . . . . . 16-35

[6] Effect of State Law . . . . . 16-35

[7] Penalties . . . . . 16-35

[8] Implications . . . . . 16-36

[9] HIPAA Administrative Enforcement  
Regulations to Conform to the  
HITECH Act . . . . . 16-36

[a] Introduction . . . . . 16-36

[b] Statutory and Regulatory  
Background . . . . . 16-36.1

[c] The Final Rule . . . . . 16-36.4

[10] Significant Financial Penalties Imposed  
by the Department of Health and  
Human Services . . . . . 16-36.7

[a] Civil Penalties Imposed on Covered  
Entities . . . . . 16-36.7

[b] Expanded Enforcement for Business  
Associates . . . . . 16-36.8

[c] HHS Reduces Maximum Penalty  
Amounts for Certain HIPAA  
Violations . . . . . 16-36.8

[i] Background . . . . . 16-36.9

[ii] Revised Maximum Penalty  
Amounts . . . . . 16-36.9

§ 16.08 Health Care Fraud and Abuse . . . . . 16-37

[1] Federal Initiative to Combat Health  
Care Fraud in Public and  
Private Health Plans . . . . . 16-37

[2] Expulsion from Medicare and Medicaid  
for Health Care Fraud . . . . . 16-37

[3] National Fraud Data Bank . . . . . 16-37

[4] Medicare Beneficiary Incentive Program . . . . . 16-38

[5] Intermediate Sanctions on  
Medicare HMOs . . . . . 16-38

[6] Exception to Anti-Kickback Penalties for  
Medicare HMOs' Risk-Sharing  
Arrangements . . . . . 16-38

[7] Advisory Opinions Required Under  
the Medicare/Medicaid  
Anti-Kickback Law . . . . . 16-39

[8] Penalties . . . . . 16-39

**HEALTH CARE BENEFITS LAW**

	[9]	Fraud Against “Federal Health Care Programs” . . . . .	16-39
	[10]	Implications . . . . .	16-40
§ 16.09		Accelerated Death Benefits . . . . .	16-41
	[1]	Terminally Ill Insureds. . . . .	16-41
	[2]	Chronically Ill Insureds . . . . .	16-41
	[3]	Qualified Accelerated Death Benefit Riders Treated as Life Insurance . . . . .	16-42
	[4]	Viatical Settlement Agreements. . . . .	16-42
	[5]	IRS Reporting Requirements. . . . .	16-43
	[6]	Penalties. . . . .	16-43
	[7]	Implications . . . . .	16-43
§ 16.10		Medical Savings Accounts . . . . .	16-44
	[1]	Tax-Favored MSA Available to the Self-Employed and to Employees of Small Employers. . . . .	16-44
	[2]	A High-Deductible Health Plan Must Accompany an MSA. . . . .	16-44
	[3]	No Income Tax on MSA Earnings or Distributions for Medical Expenses . . . . .	16-44
	[4]	Limited Number of MSAs Permitted During Four-Year Experiment . . . . .	16-45
	[5]	HMOs May Offer MSA-Related Products. . . . .	16-45
	[6]	Penalties. . . . .	16-45
	[7]	Implications . . . . .	16-46
§ 16.11		Interim Final Rules Under the Health Insurance Portability and Accountability Act of 1996 . . . . .	16-47
	[1]	In General . . . . .	16-47
	[2]	Preexisting Condition Exclusion . . . . .	16-48
	[a]	Limitations on Preexisting Condition Exclusions . . . . .	16-48
	[b]	Length of Preexisting Condition Exclusion Period . . . . .	16-49
	[c]	Reduction of Preexisting Condition Exclusion by Prior Coverage . . . . .	16-50
	[d]	Elimination of Preexisting Condition Exclusion for Pregnancy and for Certain Children. . . . .	16-50
	[e]	Notice of Preexisting Condition Exclusion . . . . .	16-50
	[f]	HMO Affiliation Period as Alternative to Preexisting Condition Exclusion . . . . .	16-50
	[3]	Excepted Plans and Excepted Benefits . . . . .	16-51
	[a]	Very Small Plans. . . . .	16-51
	[b]	Excepted Benefits . . . . .	16-51
	[4]	Rules Relating to Creditable Coverage . . . . .	16-53

**TABLE OF CONTENTS**

	[a]	Method of Crediting Coverage . . . . .	16-53
	[b]	Standard Method . . . . .	16-53
	[c]	Alternative Method . . . . .	16-54
	[d]	Determination Period Under Both Methods . . . . .	16-55
[5]		Certificates and Disclosure of Previous Coverage . . . . .	16-55
	[a]	Form of Certificate . . . . .	16-55
	[b]	Information in Certificate . . . . .	16-55
	[c]	Certification Events and Timing . . . . .	16-56
	[d]	Responsibilities of Plans and Issuers . . . . .	16-57
	[e]	Other Entities Issuing Certificates . . . . .	16-58
	[f]	Dependent Coverage Information . . . . .	16-58
	[g]	Information for Alternative Method of Counting Creditable Coverage . . . . .	16-59
	[h]	Demonstration of Coverage if Certificate is Not Provided . . . . .	16-59
	[i]	Notice to Individual of Determination of Period of Preexisting Condition Exclusion . . . . .	16-60
[6]		Special Enrollment Periods . . . . .	16-60
	[a]	Special Enrollment for Loss of Other Coverage . . . . .	16-61
	[b]	Special Enrollment for New Dependents . . . . .	16-62
	[c]	Additional Special Enrollment Rights, Notice and Disclosure Obligations for Group Health Plans . . . . .	16-62
[7]		Nondiscrimination in Eligibility . . . . .	16-62.2
[8]		Preemption of State Laws: State Flexibility . . . . .	16-64
[9]		Expansion of ERISA Reporting and Disclosure Requirements . . . . .	16-65
	[a]	SPD Content Requirements . . . . .	16-65
	[b]	Accelerated Disclosure . . . . .	16-66
	[c]	Alternative Delivery Methods . . . . .	16-66
[10]		Post-Interim Rules on Guidance Under HIPAA and Related Laws . . . . .	16-66
	[a]	Flexible Health Spending Accounts (FSAs) . . . . .	16-66
	[b]	HIPAA and Health FSA Plans . . . . .	16-67
	[c]	HIPAA Special Enrollment Rights and COBRA . . . . .	16-68
§ 16.12		Mental Health Parity and Minimum Maternity Stay Benefits . . . . .	16-77
	[1]	Mental Health Parity . . . . .	16-77
	[a]	Exemptions . . . . .	16-78

**HEALTH CARE BENEFITS LAW**

	[b]	Effective Date . . . . .	16-79
	[2]	Implications . . . . .	16-79
	[3]	Amendments to Mental Health Parity Provisions . . . . .	16-80
	[4]	Minimum Maternity Stay Benefits . . . . .	16-81
	[a]	Special Notice Requirement . . . . .	16-82
	[b]	Preemption . . . . .	16-83
	[c]	Effective Date . . . . .	16-83
	[d]	Implications. . . . .	16-83
	[5]	The Effect on Employers of ERISA’s Mandated Welfare Benefits . . . . .	16-84
	[6]	What Might Be Next? . . . . .	16-85
§ 16.13		Temporary Regulations Under the Mental Health Parity Act . . . . .	16-86
	[1]	Introduction . . . . .	16-86
	[2]	Increased Cost Exemption. . . . .	16-86.1
	[3]	Penalties for Noncompliance. . . . .	16-86.2
§ 16.13A		The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) . . . . .	16-86.3
§ 16.14		Interim Rules Governing the Newborns’ and Mothers’ Health Protection Act of 1996. . . . .	16-87
	[1]	Introduction . . . . .	16-87
	[a]	Background. . . . .	16-87
	[b]	Application . . . . .	16-88
	[2]	The General Rule for Hospital Lengths of Stay . . . . .	16-89
	[3]	Prohibitions . . . . .	16-91
	[4]	Construction. . . . .	16-92
	[5]	Notice Requirements Under ERISA and the PHS Act. . . . .	16-94
	[6]	Applicability in Certain States. . . . .	16-95
§ 16.14A		Final Rules Governing the Newborns’ and Mothers’ Health Protection Act of 1996 . . . . .	16-96
	[1]	Generally . . . . .	16-96
	[2]	Hospital Length of Stay . . . . .	16-96
	[a]	Generally. . . . .	16-96
	[b]	Definition of Attending Provider . . . . .	16-96
	[c]	Authorization and Precertification . . . . .	16-96.1
	[3]	Notice Requirements Under ERISA and the Public Health Services (PHS) Act. . . . .	16-96.1
	[a]	Notice Requirements Under ERISA . . . . .	16-96.2
	[b]	Notice Requirements for Nonfederal Governmental Plans . . . . .	16-96.2
	[c]	Notice Requirements for Health Insurance Issuers in the Individual Market . . . . .	16-96.3
	[4]	Applicability in States . . . . .	16-96.3
	[5]	Applicability Date . . . . .	16-96.3

## TABLE OF CONTENTS

lxi

§ 16.15	Compliance with Privacy Requirements Protecting Personal Medical Records Under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) . . . . .	16-96.4
	[1] Effective Dates . . . . .	16-97
	[2] Covered Entities and Related Definitions . . . . .	16-98
	[a] Covered Entity . . . . .	16-98
	[b] Excepted Benefits . . . . .	16-98
	[c] Health Care Provider . . . . .	16-98
	[d] Health Plan . . . . .	16-99
	[e] Group Health Plan . . . . .	16-99
	[f] Health Care Clearinghouse . . . . .	16-100
	[g] Health Information . . . . .	16-100
	[h] Business Associate . . . . .	16-100
	[3] Disclosure of Protected Health Information . . . . .	16-100
	[a] What is Protected? . . . . .	16-100
	[b] De-Identified Information . . . . .	16-101
	[c] Permitted Uses and Disclosures . . . . .	16-101
	[d] Minimum Necessary Standard . . . . .	16-101
	[e] Required Disclosures . . . . .	16-102.4
	[f] Consent versus Authorization . . . . .	16-102.4
	[i] General Rule for Consents . . . . .	16-102.4
	[ii] General Rule for Authorizations . . . . .	16-103
	[g] Representatives . . . . .	16-105
	[h] Access, Amendment, and Accounting . . . . .	16-105
	[i] Right to Request Additional Protection of PHI . . . . .	16-105
	[j] Notice of HIPAA Privacy Rule Rights . . . . .	16-105
	[k] Psychotherapy Notes . . . . .	16-105
	[l] Directories, Marketing, and Fundraising . . . . .	16-106
	[m] Business Associates . . . . .	16-106
	[n] Disclosure to Employers and Other Plan Sponsors of Group Health Plans . . . . .	16-107
	[o] Disclosure to Worker’s Compensation Carriers and Other Non-Covered Entities . . . . .	16-107
	[p] Research . . . . .	16-108
	[4] Mergers and Acquisitions . . . . .	16-109
	[5] Enforcement/Penalties . . . . .	16-109
	[6] State Law Preemption . . . . .	16-109
	[7] Compliance with Other Federal Laws . . . . .	16-110
	[8] HIPAA Compliance Action Plan . . . . .	16-112
§ 16.16	Final Modifications to HIPAA Privacy Rule . . . . .	16-115

**HEALTH CARE BENEFITS LAW**

	[1]	Patient Consent . . . . .	16-115
		[a] Limitation on Obtaining Consent . . . . .	16-115
		[b] Facilitation of PTO . . . . .	16-115
	[2]	Written Acknowledgment of Privacy Notice’s Receipt . . . . .	16-116
	[3]	Modification of Minimum Necessary Requirement . . . . .	16-117
		[a] Incidental Uses or Disclosures . . . . .	16-117
		[b] Authorization Not Subject to Minimum Necessary Standard . . . . .	16-117
	[4]	Business Associate Contracts . . . . .	16-117
		[a] Deferral of Contract Deadline. . . . .	16-117
		[b] Sample Contract Language. . . . .	16-118
	[5]	Marketing. . . . .	16-118
		[a] Authorization Necessary for Disclosure. . . . .	16-118
		[b] Clarification of Marketing Definition . . . . .	16-118
	[6]	Disclosure of a Minor’s PHI . . . . .	16-119
	[7]	Research Use and Disclosure. . . . .	16-119
		[a] Institutional Review Board Requirement . . . . .	16-119
		[b] Research in Connection with Treatment . . . . .	16-120
		[c] Transition Procedures . . . . .	16-120
		[d] Revocation of Authorization after Commencement of Research . . . . .	16-120
	[8]	Authorization Forms: Core Elements and Other Requirements . . . . .	16-121
	[9]	De-Identification of Protected Health Information . . . . .	16-121
	[10]	Other Clarifications . . . . .	16-121
	[11]	2005 HIPAA Regulations Regarding Notice and Creditable Coverage. . . . .	16-122
§ 16.17		Employer Obligations to Protect the Privacy of Medical Records Under Group Health Plans . . . . .	16-123
	[1]	Consequence of Non-Compliance with HIPAA. . . . .	16-124
	[2]	Comparison of GHP Requirements Based on Type of Group Health Plan . . . . .	16-125
	[3]	Exchange of Information Between the GHP and the Employer . . . . .	16-127
	[4]	Implementation . . . . .	16-129
	[5]	Organized Health Care Arrangements (“OHCAs”) . . . . .	16-131
	[6]	Employer as Covered Entity and GHP Sponsor. . . . .	16-133
	[7]	Conclusion. . . . .	16-133

**TABLE OF CONTENTS**

§ 16.18 HIPAA Security Standards. . . . . 16-134

    [1] Introduction . . . . . 16-134

    [2] Security Requirements and Implementation  
        Features. . . . . 16-134

    [3] Implementation of a HIPAA Security  
        Compliance Plan. . . . . 16-135

    [4] Civil and Criminal Penalties for HIPAA  
        Security Noncompliance. . . . . 16-135

    [5] Conclusion. . . . . 16-136

§ 16.19 Final Rules on Health Plan Nondiscrimination. . . . . 16-137

    [1] Background . . . . . 16-137

    [2] Clarifications . . . . . 16-137

    [3] Wellness Programs. . . . . 16-138

    [4] Relationship with Other Laws . . . . . 16-139

§ 16.19A Genetic Information Nondiscrimination Act. . . . . 16-140

    [1] Title I: Genetic Nondiscrimination in  
        Health Insurance . . . . . 16-140

    [2] Title II: Prohibiting Employment  
        Discrimination on the Basis of Genetic  
        Information . . . . . 16-141

    [3] EEOC Proposed Regulations Under GINA’s  
        Employment Nondiscrimination  
        Requirements . . . . . 16-142

        [a] Definitions. . . . . 16-142

            [i] Employee . . . . . 16-142

            [ii] Covered Entity . . . . . 16-142

            [iii] Family Member . . . . . 16-142

            [iv] Family Medical History . . . . . 16-143

            [v] Genetic Information . . . . . 16-143

            [vi] Genetic Monitoring . . . . . 16-143

            [vii] Genetic Services. . . . . 16-144

            [viii] Genetic Test . . . . . 16-144

            [ix] Manifestation or Manifested . . . . . 16-144

        [b] Prohibited Practices . . . . . 16-145

        [c] Acquisition of Genetic Information . . . . . 16-145

        [d] Confidentiality. . . . . 16-147

        [e] Limitations on Disclosure. . . . . 16-147

        [f] Relationship to HIPAA Privacy  
            Regulations. . . . . 16-148

        [g] Relationship to Other Laws Regarding  
            Discrimination or Genetic  
            Information. . . . . 16-148

        [h] Relationship to Other Federal Laws  
            Governing Health Coverage. . . . . 16-148

        [i] Medical Information . . . . . 16-149

§ 16.20 Part 7 Audits . . . . . 16-150

    [1] General Investigative Powers . . . . . 16-150

**HEALTH CARE BENEFITS LAW**

	[a]	ERISA Section 504 . . . . .	16-150
	[b]	ERISA Section 104 . . . . .	16-150
	[2]	Investigations of Health and Welfare Plans— DOL Compliance Project . . . . .	16-150
	[3]	Who to Investigate . . . . .	16-151
	[4]	Steps in the Investigation Process . . . . .	16-151
	[a]	Initial Document Request . . . . .	16-151
	[b]	On-Site Review . . . . .	16-152
	[c]	DOL Interview . . . . .	16-153
	[d]	Voluntary Compliance Notice Letter . . . . .	16-153
	[e]	Settlement Agreement . . . . .	16-153
	[5]	Part 7 Self-Compliance Assistance . . . . .	16-153
§ 16.21		DOL and HHS Guidance on Cybersecurity Risks for Healthcare and Welfare Plans . . . . .	16-154
	[1]	DOL Guidance . . . . .	16-154
	[a]	Summary . . . . .	16-154
	[b]	DOL Compliance Assistance Release No. 2024-01 Cybersecurity Guidance Update . . . . .	16-155
	[i]	Tips for Hiring a Service Provider with Strong Cybersecurity Practices . . . . .	16-155
	[ii]	Cybersecurity Program Best Practices . . . . .	16-157
	[iii]	Online Security Tips . . . . .	16-163
	[2]	HHS Guidance . . . . .	16-165
	[a]	Summary . . . . .	16-165
	[b]	October 2024 OCR Cybersecurity Guidance . . . . .	16-166
	[i]	Social Engineering: Searching for Your Weakest Link . . . . .	16-166
	[ii]	Conclusion . . . . .	16-171
§ 16.22		Health Infrastructure Security and Accountability Act . . . . .	16-172
	[1]	New Security Requirements Related to Cybersecurity Risks . . . . .	16-172
	[2]	Risk Assessment, Audits, and Reporting Requirements . . . . .	16-173
	[3]	Penalties and Fees . . . . .	16-173
	[4]	Medicare Assistance . . . . .	16-174
	[5]	Impact of HIPAA . . . . .	16-174
	[6]	Summary of Health Infrastructure Security and Accountability Act . . . . .	16-174
	[a]	Background . . . . .	16-174
	[b]	Solution . . . . .	16-174

CHAPTER 17

Welfare Benefits Provided by PEOs

§ 17.01	Introduction . . . . .	17-2
	[1] The PEO Industry . . . . .	17-2
	[2] Why PEOs Cause Concern . . . . .	17-4
	[3] Overview . . . . .	17-4
§ 17.02	Welfare Benefits. . . . .	17-6
§ 17.03	Who is the Employer? . . . . .	17-7
	[1] Co-Employment Under Agency Principles. . . . .	17-9
	[2] Co-Employment Under the Code . . . . .	17-11
	[3] Microsoft III. . . . .	17-12
§ 17.04	Federal Tax Issues . . . . .	17-15
	[1] Excludability of PEO-Provided Welfare Benefits . . . . .	17-15
	[2] Welfare Benefits Nondiscrimination Rules . . . . .	17-16
	[3] “Leased Employees” . . . . .	17-18
	[4] METs, MEWAs and VEBAs . . . . .	17-22
	[5] Section 419 Deduction Issues . . . . .	17-22
	[a] Qualified Non-Guaranteed Insurance Contracts . . . . .	17-25
	[b] Ten or More Employer Plans . . . . .	17-25
	[c] Employee Pay-All Plans . . . . .	17-27
	[6] VEBAs. . . . .	17-27
	[7] Taxation of Non-Exempt Trusts and Exempt VEBAs. . . . .	17-31
	[8] VEBA and Non-Exempt Trust Reporting Requirements . . . . .	17-32
	[9] Proposed PEO Legislation. . . . .	17-33
§ 17.05	PEO Welfare Benefits Under ERISA. . . . .	17-36
	[1] Whether a Worker Is Entitled to Welfare Benefits Under a Client Company’s Plan . . . . .	17-36
	[a] Welfare Benefit Plan Language. . . . .	17-37
	[b] Waiver of ERISA Rights. . . . .	17-42
	[2] Potential Client Company Liability Under ERISA for Interference With Rights Under a Welfare Plan. . . . .	17-43
	[3] Welfare Plan Amendments. . . . .	17-46
	[4] ERISA-Covered Welfare Plan ERISA Obligations . . . . .	17-50
	[a] Requirements Under ERISA Part I. . . . .	17-50
	[b] Requirements Under ERISA Part IV . . . . .	17-51
	[c] Requirements Under ERISA Part V . . . . .	17-52
	[5] Whether PEOs Maintain Single-Employer	

**HEALTH CARE BENEFITS LAW**

	Welfare Benefit Plans . . . . .	17-52
	[a] A Group or Association of Employers . . . . .	17-54
	[b] Could a PEO's Welfare Benefit Plan Be an ERISA-Covered Plan? . . . . .	17-58
	[6] Whether a Client Company Establishes or Maintains an ERISA-Covered Welfare Plan . . . . .	17-60
	[7] MEWAs and State Insurance Laws . . . . .	17-64
	[a] Scope of ERISA Preemption. . . . .	17-65
	[b] State Regulation of MEWAs. . . . .	17-66
§ 17.06	COBRA and HIPAA . . . . .	17-71
	[1] COBRA . . . . .	17-71
	[a] Impact of a PEO Arrangement . . . . .	17-73
	[b] Proposed Legislation. . . . .	17-75
	[2] HIPAA . . . . .	17-76
	[a] Application of HIPAA Requirements to a PEO Arrangement . . . . .	17-78
	[b] MEWA Reporting . . . . .	17-79
§ 17.07	Conclusion . . . . .	17-81

**CHAPTER 18**

**Bankruptcy Abuse Prevention and Consumer  
Protection Act of 2005—Title XI Health Care  
and Employee Benefits**

§ 18.01	Introduction . . . . .	18-1
§ 18.02	Disposal of Patient Records . . . . .	18-3
§ 18.03	Appointment of Ombudsman to Act as Patient Advocate . . . . .	18-4
§ 18.04	Duty of Trustee to Transfer Patients . . . . .	18-5
§ 18.05	Administrative Expense Claim for Costs of Closing a Health Care Business and Other Administrative Expenses . . . . .	18-6
§ 18.06	“Health Care Businesses”—Definition . . . . .	18-8
§ 18.07	Exclusion from Program Participation Not Subject to Automatic Stay . . . . .	18-9
§ 18.08	Miscellaneous Changes to Health Care Laws . . . . .	18-10
	[1] Health Savings Accounts . . . . .	18-10
	[2] Unsecured Benefit Plan Contributions. . . . .	18-10
	[3] Duties of Debtor That is a Plan Administrator . . . . .	18-10
	[4] Restrictions on Modifying Retiree Benefits . . . . .	18-10
§ 18.09	Conclusion . . . . .	18-11

CHAPTER 19

[Reserved]

CHAPTER 20

**2010 Health Care Reform:  
The Patient Protection and Affordable Care Act &  
The Health Care and Education Reconciliation Act**

§ 20.01	Introduction to 2010 Legislation . . . . .	20-8.4
	[1] Generally . . . . .	20-8.4
	[2] Timeline of Changes . . . . .	20-9
	[a] Effective During 2010 . . . . .	20-9
	[b] Effective in 2011 . . . . .	20-10
	[c] Effective in 2012 . . . . .	20-10
	[d] Effective in 2013 . . . . .	20-11
	[e] Effective by 2014 . . . . .	20-11
	[f] Effective in 2015 . . . . .	20-13
	[g] Effective in 2016 . . . . .	20-13
	[h] Effective by 2017 . . . . .	20-13
	[i] Effective by 2018 . . . . .	20-13
	[j] Effective in 2019-2020 . . . . .	20-14
§ 20.02	Small Employer Health Insurance Expense Tax Credit . . . . .	20-15
	[1] Generally . . . . .	20-15
	[2] Employers Eligible for Section 45R Tax Credit . . . . .	20-15
	[3] Calculation of Section 45R Tax Credit . . . . .	20-17
	[4] Claiming a Section 45R Tax Credit . . . . .	20-18
	[5] Transitional Relief for Taxable Years Beginning in 2010 . . . . .	20-19
	[6] Issues Not Addressed by IRS Notice 2010-44 . . . . .	20-19
§ 20.03	Early Retiree Reinsurance Program . . . . .	20-20
§ 20.04	Health Care Reform’s Impact on Hospitals . . . . .	20-20.1
§ 20.05	Regulations to Implement the Affordable Care Act . . . . .	20-20.3
	[1] Generally . . . . .	20-20.3
	[2] Required Coverage of Adult Children to Age Twenty-Six . . . . .	20-20.3
	[a] Generally . . . . .	20-20.3
	[b] IRS Notice 2010-38 . . . . .	20-20.5
	[c] Interim Final Regulations . . . . .	20-21
	[d] Tax Consequences in Certain States . . . . .	20-21

**HEALTH CARE BENEFITS LAW**

[3]	Status as a Grandfathered Health Plan. . . . .	20-22
	[a] Definition of Grandfathered Health Plan Coverage . . . . .	20-23
	[i] Maintenance of Grandfather Status . . . . .	20-23
	[ii] Adding New Employees . . . . .	20-25
	[iii] Health Insurance Coverage Maintained Pursuant to a Collective Bargaining Agreement. . . . .	20-25
	[b] Rules Applicable to Grandfathered Plans. . . . .	20-25
[4]	Prohibition on Preexisting Condition Exclusions, Lifetime and Annual Dollar Limits on Benefits, Restrictions on Rescissions, and Patient Protections. . . . .	20-26
	[a] Prohibition on Preexisting Condition Exclusions . . . . .	20-26
	[b] Lifetime and Annual Limits . . . . .	20-27
	[c] Prohibition on Rescissions . . . . .	20-27
	[d] Patient Protections . . . . .	20-28
[5]	Coverage for Preventative Services. . . . .	20-28
	[a] Recommended Preventative Services Subject to Cost-Sharing Limitations . . . . .	20-28
	[b] Preventative Services Not Required to Be Covered. . . . .	20-29
[6]	Internal Claims and Appeals and External Review Processes (PHS Act Section 2719) . . . . .	20-30
	[a] Internal Reviews and Appeals Processes . . . . .	20-39
	[b] External Review Process. . . . .	20-40
	[i] State Standard for External Review. . . . .	20-41
	[ii] Federal External Review Process. . . . .	20-42
	[c] Culturally and Linguistically Appropriate Notices . . . . .	20-42
[7]	Health Insurance Coverage of College and University Students. . . . .	20-43
	[a] Proposed Definition of “Student Health Insurance Plan” . . . . .	20-44
	[b] Provisions of the PHS Act and ACA Inapplicable to Student Health Insurance Plans. . . . .	20-45
	[i] Guaranteed Availability and Guaranteed Renewability . . . . .	20-46

**TABLE OF CONTENTS**

	[ii]	Annual Limits . . . . .	20-46
	[iii]	Coverage of Preventive Services . . . . .	20-47
	[c]	Notice . . . . .	20-47
[8]		Final Regulations on ACA’s Summary of Benefits and Coverage . . . . .	20-47
[9]		DOL FAQs on Summary of Benefits and Coverage . . . . .	20-49
[10]		DOL Rules on ACA’s Medical Loss Ratio Provision . . . . .	20-49
[11]		DOL Responds to Questions on ACA . . . . .	20-50
[12]		Agencies Issue New Guidance on Mental Health Parity Requirements . . . . .	20-51
[13]		DOL Proposes New Enforcement Procedures and Reporting Requirements for MEWAs . . . . .	20-52
	[a]	Proposed Regulations . . . . .	20-52
	[b]	Final Rules . . . . .	20-52.1
§ 20.06		Changes to Tax-Favored Arrangements Under ACA . . . . .	20-53
	[1]	Generally . . . . .	20-53
	[2]	Changes to Definitions of “Medical Expenses” for FSAs and HRAs for 2011 . . . . .	20-53
	[3]	Changes to Definition of “Qualified Medical Expenses” for HSAs and Archer MSAs for 2011 . . . . .	20-54
	[4]	Use of Health FSA and HRA Debit Cards for Over-the-Counter Drug Expenses . . . . .	20-54
	[5]	Transition Rule for Cafeteria Plan Amendments . . . . .	20-55
	[6]	Revenue Ruling 2003-102 Obsolete . . . . .	20-55
	[7]	Notice 2013-54—Application of Market Reform and other Provisions of the ACA to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements . . . . .	20-55
	[a]	Background . . . . .	20-56
		[i] Health Reimbursement Arrangements . . . . .	20-56
		[ii] Employer Payment Plans . . . . .	20-56
		[iii] Health Flexible Spending Arrangements (Health FSAs) . . . . .	20-56
		[iv] Affordable Care Act Guidance . . . . .	20-57
	[b]	Department Guidance . . . . .	20-58.2
§ 20.07		Shared Responsibility for Employers Regarding Health Coverage . . . . .	20-58.3

**HEALTH CARE BENEFITS LAW**

[1]	Guidance on Determining Whether Worker is “Full-Time Employee” . . . . .	20-58.13
[a]	Overview . . . . .	20-58.14
[b]	Background . . . . .	20-58.15
	[i] Notice 2011-36 . . . . .	20-58.17
	[ii] Notice 2011-73 . . . . .	20-58.17
	[iii] Notice 2012-17 . . . . .	20-58.18
[c]	Determining Full-Time Status of Employees . . . . .	20-58.19
	[i] Ongoing Employees: Safe Harbor . . . . .	20-58.19
	[ii] Ongoing Employees: Option to Use Administrative Period Under Safe Harbor . . . . .	20-58.20
	[iii] New Employees: Reasonably Expected to Work Full-Time . . . . .	20-58.21
	[iv] New Employees: Safe Harbor for Variable Hour and Seasonal Employees . . . . .	20-58.21
[2]	Calculating an Employee’s Hours of Service . . . . .	20-58.25
[3]	Ninety-Day Waiting Period Limitation . . . . .	20-58.31
[a]	Overview . . . . .	20-58.32
[b]	Guidance . . . . .	20-58.32
	[i] “Waiting Period” Defined . . . . .	20-58.33
	[ii] Application to Variable Hour Employees When a Specified Number of Hours of Service Per Period is a Plan Eligibility Condition . . . . .	20-58.33
[c]	Examples . . . . .	20-58.34
[4]	Method for Determining Whether an Employer is an “Applicable Large Employer” for a Calendar Year . . . . .	20-58.35
[5]	Reporting by Applicable Large Employers on Health Insurance Coverage Under Employer-Sponsored Plans . . . . .	20-58.36
[a]	Background . . . . .	20-58.36
	[i] Reporting to the IRS . . . . .	20-58.36
	[ii] Reporting to Employees . . . . .	20-58.37
[b]	Notice 2012-33 . . . . .	20-58.37
[c]	Final Regulations on Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans . . . . .	20-58.38

**TABLE OF CONTENTS**

- [i] Background . . . . . 20-58.38
- [ii] Information Reporting to the  
IRS. . . . . 20-58.41
- [6] Minimum Value of an Employer-Sponsored  
Health Plan . . . . . 20-58.45
  - [a] Overview. . . . . 20-58.45
  - [b] Actuarial Value of Existing  
Employer-Sponsored Plans . . . . . 20-58.47
  - [c] Statutory Background . . . . . 20-58.47
  - [d] HHS Intentions with Respect to  
Actuarial Value for Qualified  
Health Plans . . . . . 20-58.48
  - [e] Assumptions to Be Used in the  
Minimum Value Determination . . . . . 20-58.49
    - [i] Standard Population and  
Utilization . . . . . 20-58.50
    - [ii] Treatment of HSAs and HRAs  
in Calculating Minimum  
Value . . . . . 20-58.51
  - [f] Options for Determining Minimum  
Value. . . . . 20-58.51
    - [i] AV and MV Calculators . . . . . 20-58.51
    - [ii] Design-Based Safe Harbor  
Checklists . . . . . 20-58.52
    - [iii] Actuarial Certification . . . . . 20-58.52
- [7] Individual and Employer Mandates. . . . . 20-58.53
  - [a] Repeal of Individual Mandate. . . . . 20-58.53
  - [b] Employer Mandate Remains in Force . . . . . 20-58.53
  - [c] “Cadillac Tax” Delayed Until 2022. . . . . 20-58.54
  - [d] ACA Out-of-Pocket Limit and PCORI  
Fee Announced . . . . . 20-58.54
    - [i] OOP Limits . . . . . 20-58.54
    - [ii] PCORI Fees . . . . . 20-58.55
- [8] Notice to Employees About Health Insurance  
Exchanges . . . . . 20-58.55
  - [a] Application . . . . . 20-58.55
  - [b] Required Information . . . . . 20-58.55
  - [c] Model Notice . . . . . 20-58.56
  - [d] Who Must Receive the Notice . . . . . 20-58.56
  - [e] Due Date . . . . . 20-58.56
- [9] IRS Final Regulations on Employer Shared  
Responsibility Requirements . . . . . 20-58.56
  - [a] Overview. . . . . 20-58.56
  - [b] Coverage of Dependents. . . . . 20-58.58
    - [i] Transitional Relief Extended  
for 2015 Plan Year . . . . . 20-58.58

**HEALTH CARE BENEFITS LAW**

	[ii]	Exclusions for Stepchildren, Foster Children and non-U.S. Citizens . . . . .	20-58.58
	[c]	Contingent Worker Issues . . . . .	20-58.59
	[d]	Calculation of Employer Shared Responsibility Payment . . . . .	20-58.60
	[i]	Assessable payments under Code section 4980H(a) . . . . .	20-58.60
	[ii]	Assessable payments under section 4980H(b) . . . . .	20-58.61
	[e]	IRS Questions and Answers on ACA Employer Shared Responsibility Provisions . . . . .	20-58.61
	[i]	Basics of the Employer Shared Responsibility Provisions . . . . .	20-58.62
	[ii]	Which Employers Are Subject to the Employer Shared Responsibility Provisions . . . . .	20-58.62
	[iii]	Identification of Full-Time Employees . . . . .	20-58.64
	[iv]	Liability for the Employer Shared Responsibility Payment . . . . .	20-58.65
	[v]	Calculation of the Employer Shared Responsibility Payment . . . . .	20-58.67
	[vi]	Making an Employer Shared Responsibility Payment . . . . .	20-58.68
	[vii]	Transition Relief . . . . .	20-58.68
	[viii]	Basics for Small Employers . . . . .	20-58.72
	[ix]	Premium Tax Credit . . . . .	20-58.73
	[f]	ACA Out-of-Pocket Limit and PCORI Fee Announced . . . . .	20-58.74
	[i]	OOP Limits . . . . .	20-58.74
	[ii]	Patient-Centered Outcomes Research Institute Fees . . . . .	20-58.74
§ 20.07A		ACA Employer Wellness Program Provisions . . . . .	20-58.75
	[1]	Background . . . . .	20-58.75
	[2]	Categories of Wellness Programs . . . . .	20-58.76
	[a]	Participatory Wellness Programs . . . . .	20-58.76
	[b]	Health-Contingent Wellness Programs . . . . .	20-58.77
	[3]	Standards Applicable to Health-Contingent Wellness Programs . . . . .	20-58.77
	[4]	Compliance with Other Laws . . . . .	20-58.80
	[a]	Background . . . . .	20-58.80
	[b]	ERISA . . . . .	20-58.80
	[c]	COBRA Continuation Coverage . . . . .	20-58.81

**TABLE OF CONTENTS**

	[d]	HIPAA Privacy and Security Rule . . . .	20-58.81
	[e]	Americans with Disabilities Act (ADA) . . . . .	20-58.81
	[f]	Internal Revenue Code (Code) . . . . .	20-58.81
[5]		EEOC Proposed Rule on Worksite Wellness Programs Using Financial Incentives . . . . .	20-58.82
	[a]	Background. . . . .	20-58.82
	[b]	The Proposed Rule . . . . .	20-58.83
	[i]	Laws Relevant to the Proposed Rule . . . . .	20-58.84
	[ii]	Summary of Proposed Revisions . . . . .	20-58.89
[6]		EEOC Litigation Against Employer Wellness Programs . . . . .	20-58.92
	[a]	EEOC v Orion Energy Systems, Inc. . . . .	20-58.92
	[b]	<i>EEOC v. Flambeau Inc.</i> . . . . .	20-58.93
	[c]	<i>EEOC v. Honeywell International, Inc.</i> . . . . .	20-58.94
	[i]	Overview . . . . .	20-58.94
	[ii]	Statement of Facts . . . . .	20-58.95
	[iii]	EEOC Complaint . . . . .	20-58.96
	[iv]	Prayer for Relief. . . . .	20-58.97
	[v]	Decision . . . . .	20-58.98
§ 20.08		Patient Protection and Affordable Care Act in the Courts . . . . .	20-58.99
	[1]	Generally . . . . .	20-58.99
	[2]	Court Cases Considering the PPACA . . . . .	20-58.100
	[a]	Sixth Circuit Court of Appeals . . . . .	20-58.100
	[b]	Eleventh Circuit Trial Court Decision . . . . .	20-64
	[c]	Eleventh Circuit Court of Appeals . . . . .	20-92
	[i]	Medicaid Expansion. . . . .	20-92
	[ii]	Individual Mandate and Severability . . . . .	20-95
	[d]	Fourth Circuit Court of Appeals . . . . .	20-107
	[e]	Third Circuit Trial Court Decision . . . . .	20-109
	[f]	District of Columbia Circuit Court of Appeals. . . . .	20-110
	[3]	Practicality of the PPACA Assuming Severability . . . . .	20-118
	[4]	Supreme Court Accepts Appeal. . . . .	20-120
	[5]	Supreme Court Upholds Affordable Care Act . . . . .	20-121
	[6]	Challenges to ACA Contraceptive Mandate. . . . .	20-126
	[a]	Appeals Court Faults Birth-Control Mandate . . . . .	20-126

**HEALTH CARE BENEFITS LAW**

	[b]	ACA Accommodation for Religious Organizations Places Substantial Burden on Exercise of Religion . . . . .	20-126.3
	[c]	Supreme Court Grants Review . . . . .	20-126.5
	[d]	Supreme Court Decision . . . . .	20-126.5
		[i] Facts of the Case . . . . .	20-126.6
		[ii] Opinion of the Court . . . . .	20-126.6
[7]		Constitutionality of Subsidies for Federally-Run Health Insurance Exchanges . . . . .	20-126.15
	[a]	Background . . . . .	20-126.16
	[b]	King v. Burwell . . . . .	20-126.17
	[c]	Halbig v. Burwell . . . . .	20-126.22
[8]		U.S. Supreme Court To Decide	
		Constitutionality of ACA . . . . .	20-126.28
	[a]	Background . . . . .	20-126.29
		[i] Individual Mandate . . . . .	20-126.29
		[ii] Severability Analysis . . . . .	20-126.30
	[b]	Questions Presented . . . . .	20-126.31
	[c]	Practical Impact . . . . .	20-126.32
[9]		Government Urges D.C. Circuit to Uphold \$1.1 Million In ACA Penalties. . . . .	20-126.32
	[a]	Background . . . . .	20-126.33
	[b]	Nature of the Case and Course of Proceedings in the District Court . . . . .	20-126.33
	[c]	Relevant Facts . . . . .	20-126.34
		[i] Exactions Under I.R.C. § 4980H . . . . .	20-126.34
		[ii] The I.R.C. § 4980H(a) Liabilities Proposed Against Optimal . . . . .	20-126.35
	[d]	Proceedings in the District Court . . . . .	20-126.35
		[i] Summary of Argument . . . . .	20-126.37
		[ii] Government's Argument . . . . .	20-126.37
	[c]	Three Prior Decisions Support the District Court's Holding . . . . .	20-126.41
		[i] Halbig v. Sebelius . . . . .	20-126.41
		[ii] <i>Hotze v. Burwell</i> . . . . .	20-126.43
		[iii] <i>Northern Arapaho Tribe v. Burwell</i> . . . . .	20-126.44
	[d]	The District of Columbia Circuit Should Not Follow the Contrary Decisions on Which Optimal Relies . . . . .	20-126.44
		[i] <i>Liberty University, Inc. v. Lew</i> . . . . .	20-126.44
		[ii] <i>Korte v. Sebelius</i> . . . . .	20-126.47
	[e]	Optimal's Remaining Arguments Fail . . . . .	20-126.50

**TABLE OF CONTENTS**

- [i] The Jurisdictional Nature of the Anti-Injunction Act Is Irrelevant To Whether I.R.C. § 4980H(a) Exactions Should Be Considered Taxes . . . . . 20-126.50
- [ii] Applying the Anti-Injunction Act to I.R.C. § 4980H(a) Exactions Would Not Create An Anomaly . . . . . 20-126.52
- [iii] Optimal’s New Arguments Have Been Waived . . . . . 20-126.53
- [iv] The Purpose of Optimal’s Suit is to Restrain the Assessment and Collection of the Tax Imposed by I.R.C. § 4980H(a). . . . . 20-126.55
- [v] No exception to the Anti-Injunction Act Applies . . . . . 20-126.57
- § 20.09 DOL’s ACA Self-Compliance Tool Kit . . . . . 20-127
  - [1] Determining Grandfather Status Under ACA. . . . . 20-127
    - [a] Generally. . . . . 20-127
    - [b] DOL Questions . . . . . 20-128
  - [2] Determining Compliance with the Affordable Care Act Extension of Dependent Coverage of Children to Age 26 Provisions. . . . . 20-132
    - [a] Generally. . . . . 20-132
    - [b] DOL Questions . . . . . 20-132
  - [3] Determining Compliance with ACA Rescission Provisions. . . . . 20-134
    - [a] Generally. . . . . 20-134
    - [b] DOL Questions . . . . . 20-134
  - [4] Determining Compliance with ACA Prohibitions on Lifetime Limits and Restrictions on Annual Limits . . . . . 20-135
    - [a] Generally. . . . . 20-135
    - [b] Lifetime Limits—DOL Questions . . . . . 20-135
    - [c] Annual Limits—DOL Questions . . . . . 20-137
  - [5] Determining Compliance with the ACA Prohibition on Preexisting Condition Exclusion for Individuals Under 19. . . . . 20-138
    - [a] Generally. . . . . 20-138
    - [b] DOL Questions . . . . . 20-138

**HEALTH CARE BENEFITS LAW**

	[6]	Determining Compliance with the ACA Provisions Regarding the Provision of the Summary of Benefits and Coverage (SBC) and Uniform Glossary . . . . .	20-139
		[a] Generally . . . . .	20-139
		[b] Transitional Relief Providing Flexibility and Emphasizing Good Faith Progress Towards Compliance . . . . .	20-139
		[c] DOL Questions . . . . .	20-140
	[7]	Determining Compliance with the Patient Protection Provisions of the Affordable Care Act . . . . .	20-143
		[a] Choice of Healthcare Professional . . . . .	20-143
		[b] Coverage of Emergency Services . . . . .	20-146
	[8]	Determining Compliance with ACA Coverage of Preventive Services Provisions. . . . .	20-148
	[9]	Determining Compliance with the Affordable Care Act Provisions Regarding Internal Claims and Appeals and External Review . . . . .	20-151
		[a] Internal Claims and Appeals . . . . .	20-151
		[b] External Review . . . . .	20-156
§ 20.10		Risks to Realigning a Workforce . . . . .	20-159
	[1]	ERISA 510 Claims and Work Force Structuring. . . . .	20-159
		[a] Background . . . . .	20-159
		[b] ERISA 510 Claims . . . . .	20-159
	[2]	ACA Retaliation Protections . . . . .	20-159
		[a] Background . . . . .	20-159
		[b] Who is Protected? . . . . .	20-160
		[c] Burden of Proof. . . . .	20-161

*(Text continued on p. lxxv)*

## TABLE OF CONTENTS

lxxv

§ 20.11	Report on ACA Employer Mandate . . . . .	20-163
	[1] Summary . . . . .	20-163
	[2] Employer Shared Responsibility	
	Determinations . . . . .	20-164
	[a] Applies to All Employers . . . . .	20-164
	[b] Potential Employer Penalty	
	Requirements . . . . .	20-164
	[c] Large Employers, Shared Responsibility	
	Provisions, and Potential Penalty	
	Determinations . . . . .	20-165
	[d] Large Employer Status: Determined	
	by Full-Time Equivalent	
	Calculation . . . . .	20-165
	[e] Employers Such as Franchise Owners	
	or Multiple Business Owners . . . . .	20-166
	[f] Independent Contractors . . . . .	20-166
	[g] Temporary Staffing Firm Workers . . . . .	20-167
	[h] Calculating Large Employer Status	
	When the Firm Employs Workers	
	Covered by TRICARE or Veterans	
	Assistance . . . . .	20-167
	[i] Calculating Large Employer Status	
	When the Firm Employs Seasonal	
	Workers . . . . .	20-167
	[3] Potential Penalties on Large Employers . . . . .	20-167
	[a] Large Employers Determined to Not	
	Offer Health Coverage . . . . .	20-168
	[b] Large Employers Determined to Offer	
	Health Coverage . . . . .	20-168
	[c] How to Determine an Employee's	
	Full-Time Status . . . . .	20-169
	[d] Ongoing Employees . . . . .	20-169
	[e] New Employees Reasonably Expected	
	to Work Full-Time . . . . .	20-170
	[f] Full-Time Status Determination of	
	Variable Hour Work and Seasonal	
	Workers . . . . .	20-170
	[i] Variable Hour Employees . . . . .	20-170
	[ii] Seasonal Workers . . . . .	20-171
	[iii] Determining Full-Time Worker	
	Status for Seasonal	
	Workers . . . . .	20-171
	[g] Full-Time Status Determination of	
	Adjunct Faculty, Employees with	
	Layover Hours or On-Call Hours,	
	Employees with Difficult to Identify	
	or Track Hours . . . . .	20-171

**HEALTH CARE BENEFITS LAW**

[h]	Exclusions from Definition of Hour of Service: Volunteers, Student Workers in Certain Types of Employment, and Members of Religious Orders. . . . .	20-172
	[i] Volunteers (Including Some Volunteer Firefighters). . . . .	20-172
	[ii] Student Workers . . . . .	20-172
	[iii] Religious Orders. . . . .	20-172
[4]	Health Insurance Coverage Requirements for Employer Plans . . . . .	20-173
	[a] Dependent Coverage: Children Under 26 but Not Spouse. . . . .	20-173
	[b] Affordable Coverage. . . . .	20-173
	[c] Adequate Coverage (Minimum Value). . . . .	20-173
[5]	Implementation and Transition Relief Through 2015 . . . . .	20-174
	[a] Measurement Period . . . . .	20-174
	[b] Dependent Coverage. . . . .	20-174
	[c] Employers with Fewer Than 100 FTEs . . . . .	20-175
	[d] Limited Workforce Size . . . . .	20-175
	[e] Maintenance of Workforce and Aggregate Hours of Service. . . . .	20-175
	[f] Maintenance of Previously Offered Health Coverage. . . . .	20-175
[6]	Employer Reporting and Other Requirements . . . . .	20-176
[7]	ACA Outlook for 2016 and Beyond . . . . .	20-177
	[a] Cadillac Tax Delay . . . . .	20-177
	[b] Repeal of Automatic Enrollment . . . . .	20-177
	[c] Pace Act . . . . .	20-178
	[d] Section 4980H – Employer “Play-or-Pay” Mandate To Become Fully Effective . . . . .	20-178
	[e] Recordkeeping Requirements. . . . .	20-180
[8]	IRS Releases ACA Affordability Rates for 2017. . . . .	20-181
	[a] Overview. . . . .	20-182
	[b] Revenue Procedure 2016-24. . . . .	20-182
	[i] Employer Shared Responsibility . . . . .	20-182
	[ii] Individual Mandate . . . . .	20-183
	[iii] Premium Tax Credit. . . . .	20-183
[9]	IRS Issues ACA Reporting Extension and Transition Relief . . . . .	20-183

## TABLE OF CONTENTS

lxxvii

[a]	Background . . . . .	20-184
[b]	Transition Relief . . . . .	20-186
	[i] Extension of Due Date for Furnishing to Individuals under Sections 6055 and 6056 for 2016 . . . . .	20-186
	[ii] Extension of Good Faith Transition Relief from Section 6721 and 6722 Penalties for 2016 . . . . .	20-187
	[iii] Future Years . . . . .	20-188

## CHAPTER 21

### The Coronavirus Aid, Relief, and Economic Security (CARES) Act

§ 21.01	Introduction to Legislation . . . . .	21-2.2
§ 21.02	Overview . . . . .	21-3
§ 21.03	Business Provisions . . . . .	21-4
	[1] Government Loans for Struggling Industries & Related Transparency Measures . . . . .	21-4
	[2] Other Aviation Industry Provisions . . . . .	21-5
	[3] Payroll Tax Credit . . . . .	21-5
	[4] Other Business Provisions . . . . .	21-5
	[5] Small Business Assistance . . . . .	21-6
	[6] Paid Leave . . . . .	21-7
§ 21.04	Unemployment . . . . .	21-8
	[1] Unemployment Insurance . . . . .	21-8
	[2] Short-Time Compensation . . . . .	21-8
§ 21.05	Cash to Americans through Direct Payments and Retirement Provisions . . . . .	21-9
	[1] Direct Payments to American Workers . . . . .	21-9
	[2] Retirement Accounts . . . . .	21-9
§ 21.06	Health Care . . . . .	21-10
	[1] “Marshall Plan” for Health Care Systems . . . . .	21-10
	[a] COVID-19 Testing . . . . .	21-10
	[b] Reauthorization of Programs . . . . .	21-10
	[2] Medicare and Medicaid Provisions . . . . .	21-10
	[a] Medicare . . . . .	21-10
	[b] Medicaid . . . . .	21-11
§ 21.07	Education Provisions . . . . .	21-12
	[1] Education . . . . .	21-12
	[2] Student Loans . . . . .	21-12

§ 21.08	Miscellaneous CARES Act Provisions . . . . .	21-13
	[1] State and Local Expenditures Fund . . . . .	21-13
	[2] Postal Service. . . . .	21-13
§ 21.09	Emergency Discretionary Appropriations . . . . .	21-14
§ 21.10	Applicable Sections of the Final COVID-19 Stimulus Package . . . . .	21-16
§ 21.11	COBRA Election and Enrollment Deadlines Extended During COVID-19 “Outbreak Period”. . . . .	21-26
	[1] Introduction . . . . .	21-26
	[2] Statutory Periods . . . . .	21-26
	[3] Duration of “Outbreak Period” . . . . .	21-26
	[4] Planning for Longer Special Enrollment Periods . . . . .	21-27
	[5] Planning for Longer COBRA Election Periods . . . . .	21-27
§ 21.12	CARES Act Provisions Impacting Employer-Sponsored Group Health Plans . . . . .	21-29
	[1] Summary . . . . .	21-29
	[2] Telehealth and HDHPs. . . . .	21-29
	[3] COVID-19 Diagnostic Testing Without Cost Sharing . . . . .	21-29
	[4] COVID-19-Related Preventive Services . . . . .	21-29
	[5] Over-the-Counter Products and Medications . . . . .	21-30
	[6] Planning for “Outbreak Period” Extended Deadlines . . . . .	21-30
	[a] Applicable to Welfare Plan Participants and Beneficiaries . . . . .	21-30
	[b] Applicable to Welfare Plans . . . . .	21-31
§ 21.13	Legal Issues in COVID-19 Vaccine Development and Deployment . . . . .	21-32
	[1] Summary . . . . .	21-32
	[2] Background . . . . .	21-33
	[3] FDA Law Considerations: Bringing a New Vaccine to Market. . . . .	21-35
	[a] Clinical Trials of Investigational New Drugs . . . . .	21-35
	[i] Using Clinical Trials to Collect Substantial Evidence . . . . .	21-35
	[ii] Submitting an Investigational New Drug Application to FDA. . . . .	21-37
	[iii] Institutional Review Board Review and Approval . . . . .	21-38
	[iv] Clinical Trial Phases. . . . .	21-38

**TABLE OF CONTENTS** Ixxix

	[v] Considerations for Congress . . .	21-40
	[b] FDA Approval and Options for Bringing a New Vaccine to Market Faster . . . . .	21-41
	[i] Shortening the Development and Review Processes . . . . .	21-41
	[ii] Emergency Use Authorizations Before Approval . . . . .	21-45
	[iii] Considerations for Congress . . .	21-47
[4]	Patent Rights in COVID-19 Vaccines: Incentives, Access, and Affordability . . . . .	21-48
	[a] Patent Basics . . . . .	21-50
	[b] Patent Rights in Inventions Made with Federal Assistance . . . . .	21-53
	[c] Governmental Compulsory Patent Licenses . . . . .	21-56
	[i] March-In Rights Under the Bayh-Dole Act . . . . .	21-56
	[ii] Governmental Use Rights . . . . .	21-57
	[d] Targeted Legislation and the Takings Clause . . . . .	21-58
[5]	State and Federal Authority to Mandate Vaccination . . . . .	21-60
	[a] State and Local Authority to Mandate Vaccination . . . . .	21-62
	[b] Federal Authority to Mandate Vaccination . . . . .	21-65
	[i] Executive Branch Authority to Mandate Vaccination . . . . .	21-65
	[ii] Congress’s Authority to Mandate Vaccination . . . . .	21-67
[6]	Liability and Compensation for COVID-19 Vaccine Injuries . . . . .	21-70
	[a] The Public Readiness and Emergency Preparedness Act . . . . .	21-71
	[i] Scope of Immunity from Liability . . . . .	21-71
	[ii] The Willful Misconduct Exception . . . . .	21-74
	[b] The Countermeasures Injury Compensation Program . . . . .	21-76
	[c] The COVID-19 PREP Act Declaration . . . . .	21-77
§ 21.14	EEOC Issues Guidance on Employer Vaccination Programs . . . . .	21-79
	[1] Mandatory Vaccination Policies . . . . .	21-79
	[2] Accommodations . . . . .	21-79

**HEALTH CARE BENEFITS LAW**

	[3]	Information About Employee Vaccination Status . . . . .	21-80
	[4]	Vaccination Incentives . . . . .	21-80
	[5]	Direct Threat of Unvaccinated Individuals. . . . .	21-80
	[6]	Interactive Accommodation Process . . . . .	21-81
	[7]	Pre-Screening Questions: General. . . . .	21-82
	[8]	Pre-Screening Questions: No GINA Issues . . .	21-82
	[9]	Voluntary Vaccine Offers to Only Some Employees. . . . .	21-82
	[10]	Reasonably Accommodating Fully-Vaccinated Employees . . . . .	21-82
	[11]	Reasonably Accommodating Religious Objections. . . . .	21-83
§ 21.15		American Rescue Plan Act of 2021 Provides Temporary Free COBRA Coverage for Certain Employees . . . . .	21-84
	[1]	Assistance Eligible Individuals . . . . .	21-84
	[2]	Special Enrollment Rules . . . . .	21-84
	[3]	Duration of Premium Assistance . . . . .	21-85
	[4]	Notice Requirements . . . . .	21-85
	[a]	Modifications to Existing COBRA Notices. . . . .	21-85
	[b]	Notices to AEIs Entitled to COBRA Continuation Coverage Before April 1, 2021. . . . .	21-86
	[c]	Notice of Expiration of the Premium Assistance Period . . . . .	21-86
	[d]	Employer Action Steps . . . . .	21-86
	[5]	Changes to the Employee Retention Tax Credit Under the American Rescue Plan Act. . . . .	21-87
	[a]	Time Periods Covered by Each Act . . .	21-87
	[b]	Amount of Credit . . . . .	21-87
	[c]	Eligibility Requirements for the Credit . . . . .	21-87
	[d]	Maximum Credit Amount. . . . .	21-88
	[e]	Credit Eligibility Whether or Not an Employee is Working . . . . .	21-89
	[f]	Paycheck Protection Program (PPP) Loans . . . . .	21-89
	[g]	Government Entities. . . . .	21-89
	[h]	Monetizing the Credit . . . . .	21-90
	[i]	Enforcement . . . . .	21-91
		<b>TABLE OF ABBREVIATIONS . . . . .</b>	<b>TA-1</b>
		<b>INDEX . . . . .</b>	<b>I-1</b>