

# PENSION AND PROFIT-SHARING PLAN OVERVIEW AND UPDATE

by  
Richard A. Naegele, J.D., M.A.

Wickens, Herzer, Panza, Cook & Batista Co.  
35765 Chester Road  
Avon, Ohio 44011-1262  
Phone: (440) 695-8074  
RNAegele@wickenslaw.com

## NOTICE TO READERS

These course materials have been prepared solely for continuing education purposes. Since the subject matter has not been considered and acted upon by senior technical committees of The Ohio Society of Certified Public Accountants, it does not represent an official position of the Society.

Applicability of the legal principles discussed in these materials may vary substantially in specific situations. The information contained herein should not be construed as individual legal advice.

## IRS CIRCULAR 230 DISCLOSURE

To ensure compliance with the requirements imposed by IRS Circular 230, we inform you that any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding tax-related penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

*Sponsored by:*

OHIO SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS  
535 METRO PLACE SOUTH  
DUBLIN, OHIO 43017

# Pension and Profit-Sharing Plan Overview and Update

By  
Richard A. Naegele, J.D., M.A.

chapter 1

---

## Overview of Tax Qualified Retirement Plans

I.	TAX QUALIFIED RETIREMENT PLANS.....	1.1
A.	Introduction.....	1.1
B.	Tax advantages of qualified plans:.....	1.2
C.	Comparison of Tax-Qualified Retirement Plan and Non-Qualified Deferred Compensation Plan (NQDC).....	1.3
II.	TYPES OF RETIREMENT PLAN DOCUMENTS.....	1.5
A.	Prototype Plan Documents.....	1.5
B.	Volume Submitter Plan Documents.....	1.6
C.	Individually Designed Plan Documents.....	1.7
D.	Types of Plan Amendments.....	1.7
E.	Adoption Dates for Interim and Discretionary Amendments.....	1.7
F.	Benefits of a Favorable Determination Letter.....	1.8
III.	QUALIFIED PLAN DOCUMENT UPDATES/REMEDIAL AMENDMENT PERIOD. REV. PROC. 2007-44; ANNOUNCEMENT 2008-23.....	1.8
<b>Part I:</b>	<b>Six-Year Cycle for Pre-Approved Plans.....</b>	<b>1.8</b>
A.	Six-Year Cycle for Pre-Approved Plans.....	1.8
B.	Six-year cycle for Pre-Approved Defined Benefit (DB) Plans.....	1.9
C.	Interim Amendments.....	1.9
D.	Non-Timely Amenders.....	1.10
IV.	QUALIFIED PLAN DOCUMENT UPDATES / REMEDIAL AMENDMENT PERIOD.....	1.11
<b>Part II:</b>	<b>Five-Year Cycle for Individually Designed Plans.....</b>	<b>1.11</b>
A.	Five-Year Cycle for Individually Designed Plans.....	1.11
B.	Special Rules for Five Year Cycle/Individually Designed Plans.....	1.11
C.	Cycle-Changing Events.....	1.12
D.	Off-Cycle Filings.....	1.12
E.	Cumulative List.....	1.12
F.	Switch From Individually Designed Plan to Pre-Approved Plan. Form 8905.....	1.13
G.	Switch From Master and Prototype Plan to Individually Designed Plan.....	1.14
V.	FEE DISCLOSURE AND PARTICIPANT REPORTING REQUIREMENTS.....	1.14
A.	Service Provider Fee Disclosure.....	1.14
B.	Participant Disclosure Requirements for Participant-Directed Individual Account Plans.....	1.17
C.	Benefit Statement Requirements for Non-Participant-Directed Plans.....	1.21
D.	Defined Benefit Plan Funding Notice and Annual Reporting Requirements.....	1.22
VI.	TYPES OF QUALIFIED PLANS.....	1.23
A.	Profit-Sharing Plan.....	1.23
B.	401(k) Plan.....	1.24
C.	Roth 401(k) Contributions.....	1.25
D.	Safe Harbor §401(k) Plan.....	1.28
E.	401(k) Automatic Contribution Arrangements: ACAs, EACAs, QACAs.....	1.36
F.	Money Purchase Pension Plan.....	1.38
G.	Employee Stock Ownership Plan (ESOP) and other Plans Investing in Employer Stock.....	1.38
H.	Cross-Tested Profit-Sharing Plan (New Comparability Plans).....	1.40
I.	Target Benefit Pension Plan.....	1.42
J.	Defined Benefit Pension Plan.....	1.42
K.	Cash Balance Pension Plan.....	1.50
L.	Defined Benefit and Cash Balance Plans can provide greater benefits and larger contributions for employees than Defined Contribution Plans.....	1.52
M.	Section 412(e)(3) Plan.....	1.53
N.	Section 403(b) Plan.....	1.54
VII.	OTHER RETIREMENT PLANS.....	1.57
A.	Section 457 Plan.....	1.57
B.	Simplified Employee Pensions (SEP).....	1.58
C.	SIMPLE IRA.....	1.61

CHART 1: Comparison of Types of Tax-Qualified Retirement Plans.....	1.65
CHART 2: Key Ages For Retirement Plans And Social Security .....	1.69
CHART 3: Retirement Plan Dollar and Percentage Limits .....	1.70

chapter 2

---

**Keogh Plans, Top-Heavy Plans and Controlled Groups**

I.	INTRODUCTION .....	2.1
A.	Unincorporated Entities May Establish a Qualified Plan. ....	2.1
B.	Individuals or Entities That May Establish Keogh Plans. ....	2.1
II.	RULES APPLICABLE TO KEOGH PLANS ONLY .....	2.3
A.	Qualification Requirement Applicable to Keogh Plans. ....	2.3
B.	Deduction Requirements. ....	2.3
C.	Life Insurance. ....	2.3
D.	Loans from a Keogh Plan Prior to 2002. ....	2.4
E.	Contributions to a Keogh Plan. ....	2.4
G.	Treatment as Cash or Deferred Arrangement. ....	2.6
H.	401(k) Plan for Unincorporated Employers. ....	2.6
III.	CONTROLLED GROUPS AND AFFILIATED SERVICE GROUPS.	
	I.R.C. §§ 414(b), (c) and (m).....	2.7
A.	Controlled Groups. I.R.C. §§ 414(b) and (c) and 1563(a). ....	2.7
B.	Affiliated Service Groups. I.R.C. § 414(m). ....	2.10
IV.	TOP-HEAVY PLANS .....	2.12
A.	Top-Heavy Plans (Sixty Percent of Accrued Benefits or Account Balances Go to Key Employees). ....	2.12
B.	Key Employees. I.R.C. § 416(i)(1). ....	2.14
C.	Minimum Benefits for Non-Key Employees (Defined Benefit Plans). ....	2.14
D.	Minimum Contribution for Non-Key Employees (Defined Contribution Plans). ....	2.15
E.	Vesting/Participation. I.R.C. § 416(b)(1). ....	2.16

chapter 3

---

**401(k) Plans**

I.	QUALIFICATION REQUIREMENTS FOR 401(k) PLANS.....	3.1
A.	401(k) Plan Introduction. ....	3.1
B.	General Qualification Requirement. ....	3.1
C.	Special Qualification Rules for 401(k) Plans. ....	3.2
II.	SPECIAL TYPES OF 401(K) PLANS .....	3.2
A.	Roth 401(k) Contributions. ....	3.2
B.	Safe Harbor §401(k) Plan.....	3.7
C.	401(k) Automatic Contribution Arrangements: ACAs, EACAs, QACAs.....	3.13
D.	Deduction Limits.....	3.16
III.	TYPES OF CONTRIBUTIONS AND NON-DISCRIMINATION TESTING OF LEVEL OF CONTRIBUTIONS .....	3.18
A.	Types of Contributions. ....	3.18
B.	Actual Deferral Percentage Test (ADP). I.R.C. § 401(k)(3)(A).....	3.19
C.	Actual Contribution Test (ACP).....	3.27
D.	Aggregation Rules. ....	3.29
E.	Inclusion for FICA. ....	3.30
IV.	MISCELLANEOUS QUALIFICATION ISSUES .....	3.30
A.	Impact of Top-Heavy Rules. ....	3.30
B.	Distributions Based on Hardship.....	3.30
C.	Trust Accounting Rules. ....	3.32
D.	Definition of Compensation for I.R.C. § 415 Limitations. ....	3.33
V.	SIMPLE 401(k) PLAN (SAVINGS INCENTIVE MATCH PLAN FOR EMPLOYEES). I.R.C. § 401(k)(11).....	3.33

**Distribution Planning for Qualified Retirement Plans and IRAs**

I.	PENSION PROTECTION ACT OF 2006 (PPA) CHANGES AFFECTING DISTRIBUTIONS .....	4.1
A.	Rollovers by nonspouse beneficiaries.....	4.1
B.	Direct rollovers from retirement plans to Roth IRAs. IRC §408A(e).....	4.1
C.	Missing Participants. ERISA §4050.....	4.2
D.	Phased Retirement.....	4.2
E.	Extension of Notice and Election Period.....	4.2
F.	Expansion of Hardship Distribution Rules to Include Primary Beneficiaries.....	4.3
G.	Distributions for Public Safety Employees.....	4.3
H.	Changes to Interest Rate Assumptions for Calculation of Lump Sum Distributions.....	4.3
I.	50% and 75% QJSA Options.....	4.4
II.	DISTRIBUTIONS FROM QUALIFIED PLANS BEFORE SEPARATION FROM SERVICE.....	4.4
A.	Taxation Treatment.....	4.4
B.	Distribution from a Plan During Employment.....	4.4
III.	DISTRIBUTION REQUIREMENTS .....	4.6
A.	Timing of Distributions.....	4.6
B.	Spousal Consent.....	4.6
C.	Involuntary Cash-Out Rule/Mandatory Distributions.....	4.6
D.	Terminated Plans.....	4.8
E.	Other Required Distribution Rules.....	4.9
F.	Waiver of Benefit Not Permitted.....	4.9
IV.	SPECIAL TAX TREATMENT OF CERTAIN DISTRIBUTIONS.....	4.9
A.	Rollover Treatment.....	4.9
B.	Tax Treatment of Net Unrealized Appreciation on Employer Securities Distributed from Qualified Plan.....	4.12
V.	DISTRIBUTIONS TAXED AS ORDINARY INCOME. I.R.C. §72.....	4.15
A.	Distributions Paid in Installments or Annuity Form.....	4.15
B.	Lump-Sum Distributions are Taxable as Ordinary Income.....	4.15
C.	Basis Recovery Rule for IRA Distributions.....	4.15
D.	Annuity Rules Apply to Distributions of Voluntary Nondeductible Contributions.....	4.15
E.	If Annuitant Dies Before Full Recovery.....	4.16
F.	Simplified Method of Determining Basis.....	4.16
VI.	MINIMUM DISTRIBUTION RULES. I.R.C. §§401(a)(9), 4974; TREAS. REG. §1.401(a)(9).....	4.17
A.	Overview.....	4.17
B.	Calculation of Life Expectancy.....	4.18
C.	Determination of Beneficiary.....	4.20
D.	A Trust as the Beneficiary.....	4.21
E.	Post-Death Distributions for Death Before the Required Beginning Date.....	4.23
F.	Post-Death Distributions for Death After the Required Beginning Date.....	4.27
G.	Summary:.....	4.29
H.	Sanction for Failure to Comply.....	4.30
I.	TEFRA §242(b) Grandfather Election.....	4.30
VII.	INCOME IN RESPECT OF DECEDENT (IRD).....	4.30
A.	Gross income of a decedent.....	4.30
B.	According to the IRS:.....	4.31
VIII.	PREMATURE DISTRIBUTION RULES. I.R.C. §72(t).....	4.32
A.	Additional Tax Imposed on Premature Distributions from Qualified Plans, IRAs and 403(b) Annuities.....	4.32
B.	Rules Do Not Apply to Any Benefit Distribution Covered by a “TEFRA Grandfather Designation.”.....	4.34
C.	Determination of Substantially Equal Periodic Payments.....	4.34
D.	Distributions Following Death of Participant.....	4.35
E.	Distributions Pursuant to Disability of Participant.....	4.35
F.	SIMPLE IRA or SIMPLE §401(k) Plan.....	4.35
IX.	DIRECT ROLLOVER AND WITHHOLDING RULES. I.R.C. §§401(a)(31), 402, 522, 3405, REG. §1.401(a)(31).....	4.35
A.	Qualified Plan Distributions Are Eligible for Direct Transfer to IRAs or Other Qualified Plans.....	4.35

B.	Definition of Eligible Rollover Distribution. I.R.C. §402(c)(4).....	4.36
C.	Eligible Rollover Amounts Not Transferred Directly to IRA or Other Qualified Plans Subject to Twenty Percent Withholding Tax. I.R.C. §3405(c).....	4.37
D.	Plan Administrator Must Provide Recipients with a Written Explanation of Rollover and Withholding Rules. I.R.C. §402(f). IRS Notice 2009-68.....	4.39
E.	Reporting and Deposit Requirements for Retirement Plan Distributions.....	4.40
CHART:	Uniform Distribution Table Applicable During Lifetime*.....	4.41
CHART:	Single Life Table.....	4.42
CHART:	Joint & Last Survivor Table.....	4.43
CHART:	Rollover Chart.....	4.44
CHART:	Exception to 10% Additional Tax.....	4.45

chapter 5

---

**Individual Retirement Accounts: A User's Guide to the Varied World of IRAs**

I.	INTRODUCTION.....	5.1
A.	Eligibility for Establishing Individual Retirement Accounts.....	5.1
B.	Active Participant Status Not Attributed to Spouse.....	5.2
C.	Active Participant Defined. IRS Notice 87-16. I.R.C. § 219(g)(5).....	5.2
II.	EGTRRA CHANGES TO IRAs.....	5.3
A.	Changes in Contribution Limitations.....	5.3
B.	Deemed IRAs Under Employer Plans. Rev. Proc. 2003-13.....	5.3
C.	Rollovers of Retirement Plan and IRA distributions.....	5.3
III.	ROTH IRAs. I.R.C. § 408A.....	5.5
A.	In order for the Roth IRA rules to apply, an IRA must be designated as a Roth IRA at the time of its establishment. I.R.C. § 408A(b).....	5.5
B.	Contribution Limits.....	5.5
C.	Contributions Are Nondeductible.....	5.6
D.	Rollover/Conversion to a Roth IRA.....	5.6
E.	Recharacterization of Conversions, Rollovers or Contributions to Roth IRAs.....	5.8
F.	Distributions from Roth IRA.....	5.9
G.	10% Tax on Early Distributions / 5 Year Holding Period. IRC §408A(d)(3)(F)(i).....	5.10
H.	Minimum Distribution Rules Do Not Apply Before Death.....	5.11
IV.	CONTRIBUTIONS TO AN IRA.....	5.11
A.	General Rule.....	5.11
B.	Timing and Calculation of Contribution.....	5.13
V.	LIMITATIONS ON AN IRA.....	5.14
A.	Penalty for Excess Contributions.....	5.14
B.	Additional Taxes Attributable to IRAs Are Reported on IRS Form 5329.....	5.14
C.	Applicability of Prohibited Transaction Rules.....	5.14
VI.	ROLLOVERS FROM QUALIFIED PLANS.....	5.16
A.	Participant or Surviving Spouse May Rollover to an IRA or Qualified Plan.....	5.16
B.	Eligible Rollover Distributions May Be Rolled Over. I.R.C. § 402(c)(4).....	5.16
C.	Rollover Treatment Must Be Elected Within Sixty Days After the Distribution. I.R.C. § 402(c)(3).....	5.17
D.	A Rollover Is Permitted for an Individual Who Has Attained Age 70½.....	5.17
E.	Property May Be Rolled Over to an IRA as Long as an IRA Is Permitted to Hold That Type of Property.....	5.17
F.	Nondeductible Employee Contributions May Be Rolled Over to an IRA. I.R.C. § 402(c)(2). Effective for distributions after December 31, 2000.....	5.17
G.	Rollover to Same IRA.....	5.17
H.	Conduit IRA.....	5.17
VII.	DISTRIBUTIONS FROM AN IRA.....	5.18
A.	No Penalties for a Distribution Made on Account of Disability.....	5.18
B.	Distributions Must Begin by April 1 Following the Year in Which the Participant Attains Age 70½ (the Required Beginning Date). I.R.C. § 408(a)(6).....	5.18
C.	I.R.C. § 72(t) Ten Percent Additional Tax on Early Distributions from IRA.....	5.19
VIII.	SIMPLIFIED EMPLOYEE PENSIONS (SEP).....	5.20
A.	SEP Requirements. I.R.C. § 408(k).....	5.20
B.	Salary Reduction Simplified Employee Pensions (SARSEPS). I.R.C. § 408(k)(6).....	5.22
C.	SEP Establishment and Contribution Deadlines. IRS Publication 560.....	5.23

IX.	SIMPLE IRA. I.R.C. § 408(p).....	5.23
A.	Savings Incentive Match Plans for Employees (SIMPLE Plans).....	5.23
B.	Employees May Contribute by Salary Reduction Up to \$11,500 of Compensation Per Year (Up to 100% of Earned Income or Compensation).....	5.23
C.	Employer Must Satisfy One of Two Contribution Formulas.....	5.23
D.	Compensation Limited to \$245,000 (adjusted) for Two Percent Non-Elective Contributions (But Not for Matching Contribution). § 408(p)(2)(B)(ii).....	5.24
E.	Eligibility Requirements.....	5.24
F.	Contributions Are 100% Vested.....	5.24
G.	Overall Elective Deferral Limitation Applies to SIMPLE.....	5.24
H.	Two-Year Grace Period.....	5.24
I.	Sixty-Day Election Period.....	5.25
J.	Twenty-Five Percent Additional Tax for Early Withdrawals.....	5.25
K.	Timetable for Elective Deferrals.....	5.25
L.	Reporting Requirements.....	5.25
M.	Automatic Contribution Arrangement (ACA) in a SIMPLE-IRA.....	5.25
N.	Note re: SIMPLE-IRA.....	5.26
	CHART: State-By-State Analysis Of Individual Retirement Accounts As Exempt Property.....	5.27

chapter 6

---

**Loans from Tax Qualified Retirement Plans**

I.	INTRODUCTION.....	6.1
A.	Availability of Loans.....	6.1
II.	I.R.C. § 72(p) LOAN REQUIREMENTS.....	6.2
A.	Failure to Follow Requirements.....	6.2
B.	Enforceable Agreement.....	6.2
C.	Terms of Loan.....	6.2
D.	Loans Outstanding Before August 13, 1982.....	6.3
E.	Limitation on Loan Amounts.....	6.3
F.	Timing of Loan Payments.....	6.4
G.	Interest Deduction Issues.....	6.4
H.	Trustee-to-Trustee Transfer of Loans.....	6.4
III.	CONSEQUENCES OF LOAN NOT COMPLYING WITH I.R.C. § 72(p) OR CONSTITUTING A PROHIBITED TRANSACTION.....	6.4
A.	A Loan in Violation of I.R.C. § 72(p) Limitations Will Be Considered a Distribution.....	6.4
B.	Effect of a Loan Constituting a Prohibited Transaction. I.R.C. § 4975.....	6.6
IV.	IMPACT ON LOANS BY THE RETIREMENT EQUITY ACT—SPOUSAL CONSENT.....	6.9
A.	A Loan Can Be Secured by the Participant's or the Beneficiary's Accrued Benefit or Account Balance.....	6.9
B.	Spousal Consent Required.....	6.9
C.	Offsetting an Accrued Benefit Upon Default.....	6.9
D.	Spousal Consent Rules.....	6.9
V.	IMPACT ON LOANS BY THE BANKRUPTCY ABUSE PREVENTION IN CONSUMER PROTECTION ACT OF 2005 ("BANKRUPTCY ACT").....	6.9
A.	Pre-Bankruptcy Act Law.....	6.9
B.	Bankruptcy Act Application to Participant Loans.....	6.10
VI.	DEPARTMENT OF LABOR REGULATIONS ON PLAN LOANS. 29 C.F.R. § 2550.408b-1.....	6.10
A.	Reasonably Equivalent Basis.....	6.10
B.	Highly Compensated Employees.....	6.11
C.	Specific Plan Provisions.....	6.11
D.	Reasonable Rate of Interest.....	6.11
E.	Adequate Security.....	6.12
VII.	TRUTH IN LENDING DISCLOSURES.....	6.12
VIII.	CONSIDERATIONS AND RECOMMENDATIONS.....	6.12
A.	When Loan Provisions Can Be Removed.....	6.12
B.	Plan Administrator and Trustee Must Take Great Care to Assure that Participant Loans Are Adequately Secured.....	6.13

**Spousal Rights and Tax-Qualified Retirement Plans**

I.	INTRODUCTION .....	7.1
A.	REA Significantly Impacted Spousal Survivorship Benefits .....	7.1
B.	REA Amended ERISA to Permit Accrued Benefits to Be Taken into Account in Divorce Settlements .....	7.1
II.	IMPACT OF REA ON ELIGIBILITY AND VESTING REQUIREMENTS .....	7.1
A.	REA Lowered Age Requirement for Eligibility. I.R.C. § 410(a)(1) .....	7.1
B.	REA Lowered Age Requirements for Years Taken into Consideration for Vesting. I.R.C. § 411(a)(4) .....	7.1
C.	REA Impacts Years to Be Counted for Breaks in Service. I.R.C. § 410(a)(5) .....	7.1
III.	SPOUSE'S RIGHTS TO RETIREMENT BENEFIT AND ANNUITY REQUIREMENTS .....	7.3
A.	Introduction .....	7.3
B.	Qualified Pre-Retirement Survivor Annuity (QPSA) I.R.C. § 417(c) .....	7.4
C.	Qualified Joint and Survivor Annuity (QJSA) .....	7.6
D.	Prenuptial Agreements .....	7.6
E.	Spousal Beneficiaries and Divorce .....	7.7
IV.	QUALIFIED DOMESTIC RELATIONS ORDERS. I.R.C. § 414(p); ERISA § 206(d)(3) .....	7.8
A.	Pension Protection Act of 2006 ("PPA") Clarification of QDRO Issues .....	7.8
B.	ERISA Preempts State Domestic Relations Laws .....	7.10
C.	Limitations on a QDRO .....	7.11
D.	QDRO and the Applicability of Conflicting Rules .....	7.12
E.	Section 401(a)(9) Rules Applicable to QDROs .....	7.13
F.	Procedures for Dealing with a QDRO .....	7.13
G.	Dealing with a "Sham Divorce". <i>Brown v. Continental Airlines, Inc.</i> , 647 F.3d 221 (5th Cir. 2011) .....	7.15
H.	Tax Effect of a QDRO Distribution .....	7.16
I.	The Effect of Bankruptcy on a QDRO .....	7.17
	QDRO Requirements Checklist I.R.C. § 414(p) .....	7.18
	Qualified Domestic Relations Order Administrative Procedures .....	7.19
	Model QDRO For Defined Contribution Plan .....	7.21
	Model QDRO For Defined Benefit Pension Plan .....	7.26

**Plan Correction Methods — Internal Revenue Service and Department of Labor Voluntary Compliance Programs**

	INTRODUCTION .....	8.1
I.	EPCRS OVERVIEW .....	8.1
II.	PLAN DISQUALIFICATION .....	8.4
A.	Advantages of a qualified plan .....	8.4
B.	Consequences of plan disqualification .....	8.4
III.	THE INTERNAL REVENUE SERVICE AUDIT CLOSING AGREEMENT PROGRAM: AUDIT CAP .....	8.5
A.	Audit CAP .....	8.5
B.	Audit CAP Sanction .....	8.5
IV.	VOLUNTARY CORRECTION PROGRAM (VCP): CORRECTION WITH IRS APPROVAL .....	8.7
A.	Overview of VCP .....	8.7
B.	VCP .....	8.7
C.	VCP Fees .....	8.10
D.	Operational Failures and Correction Methods .....	8.12
E.	Rev. Proc 2008-50 New Items .....	8.13
F.	Nonamender Failures .....	8.16
V.	SELF-CORRECTION PROGRAM (SCP) .....	8.17
VI.	VCP CORRECTION FOR SIMPLIFIED EMPLOYEE PENSIONS (SEPs) AND SIMPLE IRA PLANS .....	8.20
A.	Correction for SEPs and SIMPLE IRA Plans Generally .....	8.20
B.	Special Correction for SEPs and SIMPLE IRA Plans .....	8.20
C.	Correction of Failure to Satisfy Deferral Percentage Test .....	8.21

	D.	Treatment of Undercontributions to a SEP or SIMPLE IRA Plan.....	8.21
	E.	Treatment of Excess Amounts under a SEP or a SIMPLE IRA Plan.....	8.22
VII.		DELINQUENT FILER VOLUNTARY COMPLIANCE PROGRAM (DFVC).....	8.23
	A.	Penalties For Improper Filing or Non-Filing of IRS 5500 Series Forms.....	8.23
	B.	Who is Eligible for DFVC.....	8.24
	C.	Program Criteria.....	8.24
	D.	Penalty Structure.....	8.24
	E.	Simplified Procedures.....	8.25
	F.	IRS and PBGC Penalty Relief.....	8.25
VIII.		DEPARTMENT OF LABOR VOLUNTARY FIDUCIARY CORRECTION PROGRAM (VFC).....	8.26
	A.	Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans.....	8.27
	B.	Loan at Fair Market Interest Rate to a Party in Interest.....	8.28
	C.	Loan at Below Market Interest Rate to Party in Interest.....	8.28
	D.	Loan at Below Market Interest Rate to a Person Who Is Not a Party in Interest.....	8.29
	E.	Loan at Below Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest.....	8.29
	F.	Participant Loans Failing to Comply with Plan Provisions for Amount, Duration or Level Amortization.....	8.30
	G.	Participant Default Loans.....	8.30
	H.	Purchase of an Asset by the Plan from a Party in Interest.....	8.30
	I.	Sale of an Asset Including Real Property by the Plan to a Party in Interest.....	8.31
	J.	Sale and Lease Back of Real Property to the Employer.....	8.32
	K.	Purchase of an Asset by a Plan from a Person Who Is Not a Party in Interest with Respect to the Plan at a Price More Than Fair Market Value.....	8.32
	L.	Sale of an Asset by a Plan to a Person Who Is Not a Party in Interest with Respect to the Plan at a Price Less Than Fair Market Value.....	8.33
	M.	Holding of an Illiquid Asset Previously Purchased by a Plan.....	8.33
	N.	Payments of Benefits Without Properly Valuing Plan Assets on Which Payment Is Based.....	8.33
	O.	Duplicative, Excessive or Unnecessary Compensation Paid by a Plan.....	8.34
	P.	Expenses Improperly Paid by a Plan.....	8.35
	Q.	Payment of Dual Compensation to a Plan Fiduciary.....	8.35
IX.		CONCLUSION.....	8.36
	Appendix I:	Web Resources and IRS Contact Information	
	Appendix II:	VCP Appendix F	
		Appendix F, Schedule 1	
		Appendix F, Schedule 2	

chapter 9

---

**Responsibilities of Qualified Plan Fiduciaries and Staying Out of Trouble: Prohibited Transactions**

	<b>Part I:</b>	<b>Responsibilities of Qualified Plan Fiduciaries.....</b>	<b>9.1</b>
I.		WHO IS A FIDUCIARY? ERISA §3(21)(A).....	9.1
	A.	Broad Definition.....	9.1
	B.	Categories of Fiduciaries.....	9.1
	C.	Functional Test.....	9.1
	D.	Ministerial Functions May Not Be Fiduciary Functions.....	9.2
II.		FIDUCIARY DUTIES. ERISA §404.....	9.2
	A.	General ERISA Fiduciary Duties.....	9.2
III.		PLANS COVERED BY ERISA FIDUCIARY RESPONSIBILITY RULES.	
		ERISA §§4; 401.....	9.3
	A.	Covered Plans.....	9.3
	B.	Exempt Plans.....	9.3
IV.		FEE DISCLOSURE.....	9.4
	A.	Overview.....	9.4
	B.	Revised Form 5500 Schedule C: Reporting of Direct and Indirect Compensation to Service Providers.....	9.4
	C.	Service Provider Fee Disclosure.....	9.8
	D.	Participant Disclosure Requirements for Participant-Directed Individual Account Plans.....	9.11

V.	PARTICIPANT DIRECTION OF RETIREMENT PLAN INVESTMENTS.	
	ERISA §404(c).....	9.15
	A. §404(c) Relief From Some ERISA Standards.....	9.15
	B. Compliance Not Mandatory; Failure to Comply with Section 404(c).....	9.15
	C. No Standard for Other Fiduciary Decisions.....	9.15
	D. Section 404(c) Requirements. 29 CFR §2550.404c-1.....	9.15
	E. Retained Fiduciary Duties.....	9.16
	F. Default Investments.....	9.16
	G. Section 404(c) Coverage During Conversion Blackouts and Mapping.....	9.18
	H. Investment Advice to Plan Participants.....	9.18
	I. Sarbanes-Oxley Act of 2002 (SOA).....	9.19
VI.	ALLOCATION OF ADMINISTRATIVE EXPENSES BETWEEN PLAN AND EMPLOYER. DOL ADVISORY OPINION 2001-O1A; DOL FIELD ASSISTANCE BULLETIN 2003-3.....	9.20
	A. Plan Assets May Be Used to Pay Reasonable Administrative Expenses. ERISA §404(a)(1)(A).....	9.20
	B. Early Department of Labor Rulings.....	9.20
	C. Department of Labor opinions.....	9.20
	D. Allocation of Expenses to Former Employees.....	9.22
	<b>Part II: Staying Out of Trouble: Prohibited Transactions</b> .....	9.23
I.	PARTIES IN INTEREST.....	9.23
II.	EXPRESS PROHIBITIONS FOR PARTIES IN INTEREST. ERISA §406(A).....	9.23
	A. Sale, exchange or leasing of any property between the plan and a party-in-interest. ERISA §406(a)(1)(A);.....	9.23
	B. Lending of money or other extension of credit between a plan and a party-in-interest. ERISA §406(a)(1)(B);.....	9.27
	C. Furnishing of goods, services or facilities between the plan and a party-in-interest. ERISA §406(a)(1)(C);.....	9.29
	D. Use of plan assets by party-in-interest. ERISA §406(a)(1)(D).....	9.30
III.	PARTICIPANT-DIRECTED ACCOUNTS NOT EXEMPT FROM PROHIBITED TRANSACTION RULES.....	9.31
IV.	FIDUCIARY PROHIBITED TRANSACTIONS. ERISA §406(B).....	9.31
V.	PROHIBITED TRANSACTIONS ARE PER SE VIOLATIONS.....	9.38
VI.	CORRECTION OF PROHIBITED TRANSACTION.....	9.38
	A. Correction of a prohibited sale to the disqualified person (Treas. Reg. §53.4941(e)-1(c)(2)).....	9.38
	B. Correction of a prohibited sale to the plan (Treas. Reg. §53.4941(e)-1(c)(3)).....	9.39
	C. Correction of a prohibited loan or lease to disqualified person (Treas. Reg. §53.4941(e)-1(c)(4)).....	9.39
	D. Correction of a prohibited loan or lease to plan (Treas. Reg. §53.4941(e)-1(c)(5)).....	9.40
	E. Correction of an excess compensation transaction (Treas. Reg. §53.4941(e)-1(c)(6)).....	9.41
	F. Correction within 14 days (IRC §4975(d)(23) and ERISA §408(b)(20).....	9.41
VII.	EXCISE TAX ON PROHIBITED TRANSACTIONS. IRC §4975.....	9.42
VIII.	TREATMENT OF IRAS WITH PROHIBITED TRANSACTIONS.....	9.44
	A. IRC §4975(e)(1) defines the term "plan" for purposes of applying the prohibited transaction rules under IRC §4975.....	9.44
	B. IRA ceases to be an IRA if owner engages in prohibited transaction.....	9.44
	C. Deemed distribution of IRA assets.....	9.44
	D. Is the IRA required to be fully distributed if it loses its tax-exempt status?.....	9.44
	E. No excise tax on IRA owner when IRA ceases to be an IRA.....	9.45
	F. Excise taxes still applicable to other disqualified persons.....	9.45
	G. Status of deemed IRA accounts.....	9.45
	H. Loss of Status as IRA May Result in Loss of Creditor Protection for Assets of (Former) IRA.....	9.45
IX.	PERMITTED ACTIVITIES. ERISA §408(C).....	9.46
	A. ERISA does not prohibit fiduciaries from:.....	9.46
X.	PROHIBITED TRANSACTION STATUTORY EXEMPTIONS. ERISA §408(B); IRC §4975(D).....	9.46
XI.	PROHIBITED TRANSACTION EXEMPTIONS UNDER PENSION PROTECTION ACT OF 2006.....	9.47

**Employee Stock Ownership Plans (ESOP)**

I.	INTRODUCTION .....	10.1
A.	ESOP Is a Stock Bonus Plan Where the Employer Uses Stock as a Financing Vehicle.....	10.1
B.	Pension Protection Act of 2006 Requirement of Diversification of Investments in Employer Stock.....	10.1
C.	In Addition to Benefiting Employees, ESOPs Can Be Used to Benefit Employers and Shareholders.....	10.2
D.	ESOP as Shareholder Exit Strategy.....	10.3
II.	REQUIREMENTS OF AN ESOP .....	10.4
A.	I.R.C. Definition Is More Restrictive Than Under ERISA.....	10.4
B.	“Primarily” Invested in Employer’s Securities Means More Than Fifty Percent.....	10.4
C.	Special Controlled Group Rules Apply in Testing QES Definition.....	10.4
D.	ESOP cannot consist of preferred stock unless the preferred stock is at all times convertible into common stock which constitutes QES. I.R.C. § 409(l)(3).....	10.4
E.	Leveraged ESOP Assets Must Be Held in a Suspense Account.....	10.4
F.	Participants Generally Must Have the Right to Receive Their Distributions in the Form of Stock.....	10.4
G.	Participants of ESOPs of banks or companies whose stock ownership is substantially restricted by law or by charter.....	10.4
H.	Participants in S Corporation ESOPs Do Not Have the Right to Receive Distributions in Stock.....	10.5
I.	Prohibited Transaction Exemption.....	10.5
J.	Certain Voting Rights Must Be Passed Through the ESOP to the Participants.....	10.5
K.	Put Option to Receive Cash in Lieu of Stock for Leveraged ESOP If Stock Is Not Publicly Traded.....	10.5
L.	Payment upon exercise of put option.....	10.5
M.	Trust Investment in Employer Securities Exception.....	10.6
N.	An ESOP Cannot Be Integrated with Social Security or be Cross-Tested.....	10.6
O.	An ESOP Must Meet All of the Other Requirements of a Qualified Plan as Applicable.....	10.6
P.	Conversion of Existing Plan into an ESOP.....	10.6
III.	DEFERRING TAXES FROM THE SALE OF STOCK TO AN ESOP BY PURCHASING QUALIFIED REPLACEMENT PROPERTY. I.R.C. § 1042, § 4978.....	10.7
A.	I.R.C. § 1042 Requires an Election to Be Made.....	10.7
B.	Rollover Must Be from the Sale of Qualified Securities and the Purchase of Qualified Replacement Property.....	10.7
C.	ESOP Must Meet Certain Requirements for § 1042 Treatment to Apply.....	10.8
D.	Miscellaneous Requirements.....	10.9
IV.	OTHER ISSUES RELATING TO ESOPs .....	10.9
A.	Upon Disposition of QES by a Participant, an Employer or the ESOP May, But Need Not, Have a Right of First Refusal If.....	10.9
B.	Deductibility of Dividends Paid on ESOP Stock. § 404(k).....	10.10
C.	No Deduction Limitation on Contribution to Plan to Pay Interest on a Loan Used to Purchase QES.....	10.10
D.	Allocating the Stock of a Closely Held Corporation or Stock Which Is Not Traded on the Open Market.....	10.10
E.	Professional Corporations.....	10.11
F.	Distribution Requirements (Applies to Stock Acquired by the ESOP After December 31, 1986). I.R.C. § 409(o)(1).....	10.12
G.	Investment Diversification Rules (Effective for Stock Acquired After December 31, 1986). I.R.C. § 401(a)(28)(B); § 409(h)(7).....	10.13
V.	S CORPORATION ESOPs (SESOPs).....	10.14
A.	ESOPs and S corporations.....	10.14
B.	Section 1042 treatment not available.....	10.14
C.	Deduction limit is 25% of compensation.....	10.14
D.	Non-access to I.R.C. § 404(k) corporate dividend deductions.....	10.14
E.	S Distributions.....	10.15
F.	SESOPs not subject to UBTI.....	10.15
G.	SESOP entitlement to distribute cash rather than stock.....	10.15
H.	EGTRRA Limitations on S Corporation ESOPs.....	10.15

VI.	ROBS – ROLLOVER AS BUSINESS START-UPS.....	10.16
VII.	SUMMARY.....	10.17
	A. Which Companies Are Best Suited for ESOPs?.....	10.17
	B. A Company with the Following Characteristics Should Be More Cautious About Implementing an ESOP:.....	10.17
	C. The Benefits Available to a Company Contemplating an ESOP Include:.....	10.18
VIII.	ESOP ISSUES TO CONSIDER.....	10.18
	A. Advantages.....	10.18
	B. Disadvantages.....	10.19
	C. Additional Issues for Non-Publicly Traded Corporations.....	10.19
	CHART: Typical ESOP Structure.....	10.21

chapter 11

---

**Multi-Employer Pension Plan Withdrawal Liability**

I.	OVERVIEW OF WITHDRAWAL LIABILITY.....	11.1
II.	DETERMINATION OF WHETHER A WITHDRAWAL HAS OCCURRED.....	11.2
	A. Complete Withdrawal. ERISA § 4203(a).....	11.2
	B. Partial Withdrawal. ERISA § 4205.....	11.2
	C. Special Rules for Construction Industry. ERISA § 4203(b).....	11.3
	D. Special Rules for Trucking Industry. ERISA § 4203(d).....	11.3
	E. Definition of an “Employer” for Withdrawal Liability Purposes. ERISA § 4001(b)(1).....	11.4
	F. Mass Withdrawal Liability.....	11.5
III.	CALCULATION OF WITHDRAWAL LIABILITY.....	11.6
	A. Methods for Computing Withdrawal Liability. ERISA § 4211.....	11.6
	B. Presumptive Method. ERISA § 4211(b).....	11.6
	C. Reduction Under the de Minimis Rule. ERISA § 4209.....	11.7
	D. Partial Withdrawal. ERISA § 4206.....	11.8
IV.	PAYMENT OF WITHDRAWAL LIABILITY.....	11.8
	A. Information to Be Furnished by Employer. ERISA § 4219(a).....	11.8
	B. Notice and Collection of Withdrawal Liability by Plan Sponsor. ERISA § 4219(b)(1).....	11.8
	C. Payment Schedule Formula. ERISA § 4219(c)(1)(C).....	11.8
	D. Length of Payments: Twenty-Year Payment Cap. ERISA § 4219(c)(1)(B).....	11.9
	E. Commencement of Withdrawal Liability Payments. ERISA §§ 4219(c)(2) and (3).....	11.9
	F. Prepayment of Withdrawal Liability. ERISA § 4219(c)(4).....	11.10
	G. Default. ERISA § 4219(c)(5).....	11.10
	H. Deductibility of Withdrawal Liability Payments. I.R.C. § 404(g).....	11.10
	I. Refund of Withdrawal Liability Overpayments. ERISA § 403(c)(2)(A)(ii).....	11.10
V.	RESOLUTION OF DISPUTES CONCERNING WITHDRAWAL LIABILITY.....	11.11
	A. Request for Review of Plan Sponsor’s Determinations. ERISA § 4219(b)(2).....	11.11
	B. Arbitration Proceeding. ERISA § 4221.....	11.11
	C. Payments During Arbitration Period. ERISA §§ 4221(b)(1) and (d).....	11.12
	D. Preservation of Rights by Employer.....	11.12
VI.	LIABILITY FOR WITHDRAWAL LIABILITY.....	11.12
	A. Common Control.....	11.12
	B. Personal Liability.....	11.13
	C. Voluntary Assumption of Withdrawal Liability by Purchaser of Assets. ERISA § 4204.....	11.14
	D. Potential Liability of Purchaser of Assets.....	11.15
	E. Employer Sale of Assets Limitation. 29 U.S.C. §1405(a).....	11.16
	F. Employer Insolvency Limitation.....	11.16
	G. Statute of Limitations.....	11.16
VII.	THE PENSION PROTECTION ACT OF 2006 (“PPA”): CHANGES TO MULTI-EMPLOYER PENSION PLANS.....	11.17
	A. PPA Modified the Funding Provisions of ERISA for Pension Plans.....	11.17
	B. Withdrawal Liability Changes.....	11.19
	Model Letter Requesting Amount of Withdrawal Liability.....	11.20

**An Overview of Form 5500 Filing Requirements**

I.	5500 SERIES FORMS.....	12.1
A.	Form 5500-EZ.....	12.1
B.	Form 5500 / Form 5500SF.....	12.2
C.	Schedules.....	12.4
D.	Revised Form 5500 Schedule C: Reporting of Direct and Indirect Compensation to Service Providers (beginning with 2009 Plan Year).....	12.7
E.	Small Plan Audit Requirements.....	12.11
II.	FILING DEADLINES.....	12.13
III.	PLANS WHICH MUST FILE FORM 5500'S.....	12.14
IV.	PLANS NOT REQUIRED TO FILE FORM 5500'S.....	12.15
A.	Pension Benefit Plans.....	12.15
B.	Welfare Benefit Plans.....	12.15
C.	Fringe Benefits.....	12.16
D.	Unfunded Welfare Plans.....	12.16
V.	DOL GUIDANCE FOR FORM 5500.....	12.17
A.	Once You File Your Return/Report (taken from the EBSA's Troubleshooters Guide to Filing the ERISA Annual Report – Form 5500).....	12.17
B.	Potential Filing Errors and How to Avoid Them.....	12.18
VI.	PENALTIES FOR NON-COMPLIANCE.....	12.19
A.	IRS Penalties.....	12.19
B.	DOL Penalties.....	12.19
C.	Delinquent Filer Voluntary Compliance Program ("DFVC").....	12.20
D.	Penalty Structure.....	12.21
VII.	EMPLOYER ID NUMBER vs TRUST ID NUMBER.....	12.22
A.	The Employer ID Number (EIN) should be used for the following filings:.....	12.22
B.	The Trust ID Number (TIN) should be used for the following filings:.....	12.23
C.	All identification numbers can be obtained from the Service Center by filing Form SS-4 or by calling the Teletin Unit.....	12.23
VIII.	PLAN NUMBERS AND PLAN NAMES.....	12.23

**Is Your Retirement Plan Really Safe? Protecting Qualified Plans and IRAs From Creditors**

I.	INTRODUCTION.....	13.1
II.	THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 ("BAPCPA").....	13.1
A.	Key Points of BAPCPA for Retirement Plan Assets.....	13.1
B.	Further Analysis Under BAPCPA.....	13.3
C.	Inherited IRAs.....	13.4
III.	ERISA AND INTERNAL REVENUE CODE ANTI-ALIENATION PROVISIONS.....	13.6
A.	ERISA.....	13.6
B.	Internal Revenue Code.....	13.7
C.	Exceptions.....	13.7
D.	ERISA Preemption.....	13.11
E.	Supreme Court Acknowledgment Outside of Bankruptcy.....	13.11
F.	General Creditors of the Sponsoring Employer.....	13.11
IV.	ADDITIONAL ANALYSIS.....	13.12
A.	Patterson v. Shumate.....	13.12
B.	Yates v. Hendon.....	13.12
C.	Owner-Only Plans Are At Risk Outside of Bankruptcy.....	13.13
D.	403(b) Plans May Not Be Protected Outside of Bankruptcy.....	13.14
E.	ERISA Protections Do Not Apply to Funds After Distribution From Retirement Plan (But Bankruptcy Protections May Apply).....	13.14
F.	Impact of Bankruptcy on a Qualified Domestic Relations Order.....	13.14
V.	INDIVIDUAL RETIREMENT ACCOUNTS.....	13.15
A.	IRAs in Bankruptcy – 2005 Bankruptcy Act (BAPCPA).....	13.15
B.	IRAs in State Law (Non-Bankruptcy) Creditor Actions.....	13.15
C.	Ohio Law.....	13.17
D.	Treatment of IRAs with Prohibited Transactions.....	13.18
	CHART: State-By-State Analysis Of Individual Retirement Accounts As Exempt Property.....	13.21

## Cafeteria Plans, Employee Fringe Benefits And COBRA

I.	IRC §125 CAFETERIA PLANS.....	14.1
I.	IRC §125 CAFETERIA PLANS.....	14.1
A.	Introduction.....	14.1
B.	Qualified Benefits.....	14.1
C.	Cash Benefits.....	14.2
D.	Plan Participants.....	14.2
E.	Plan Contributions.....	14.2
F.	Taxation of Employee.....	14.3
G.	Electing Benefits.....	14.3
H.	FICA and FUTA Tax.....	14.4
I.	Deferral of Compensation.....	14.5
J.	Vacation Days.....	14.5
K.	Qualified Cash or Deferral Arrangement.....	14.6
L.	Formal Plan Requirements.....	14.6
M.	Flexible Spending Arrangements.....	14.7
N.	Non-Discrimination Rules.....	14.8
O.	Regulations.....	14.10
P.	Effect of the Family and Medical Leave Act on the Operation of Cafeteria Plans.....	14.10
Q.	Simple Cafeteria Plans. Code §105(b), as amended by Reconciliation Act Section 1004(d).....	14.11
II.	EMPLOYEE FRINGE BENEFIT QUALIFICATION AND NON-DISCRIMINATION RULES.....	14.12
A.	In General.....	14.12
B.	Group-Term Life Insurance.....	14.12
C.	Accident and Health Plans.....	14.15
D.	Dependent Care Assistance Programs. IRC §129.....	14.17
E.	Educational Assistance Programs. IRC §127.....	14.19
F.	Qualified Group Legal Services Plan. IRC §120.....	14.19
G.	Other Employee Fringe Benefits.....	14.19
III.	HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 ("HIPAA").....	14.20
A.	Statutory Provisions.....	14.20
B.	Disclosure Requirements. HIPAA - DOL Regulations: 65 Federal Register 70225 (November 21, 2000); 67 Federal Register 17263 (April 9, 2002). §102.....	14.24
C.	Sanctions for Failing to Comply with HIPAA. IRC §4980D.....	14.26
D.	No Discrimination on the Basis of Genetic Information (GINA).....	14.27
IV.	MEDICAL SAVINGS ACCOUNTS IRC §220.....	14.28
V.	HEALTH SAVINGS ACCOUNTS. IRC §223.....	14.34
A.	Introduction.....	14.34
B.	What are HSAs and Who Can Have Them?.....	14.34
C.	How can an HSA be established?.....	14.34
D.	HSA Contributions.....	14.35
E.	Distributions from HSAs.....	14.35
F.	Employer Contributions.....	14.36
VI.	COBRA GROUP HEALTH PLAN CONTINUATION COVERAGE UNDER IRC §4980B.....	14.37
A.	Changes Made to COBRA and Ohio Continuation Coverage as a Result of The American Recovery and Reinvestment Act of 2009.....	14.37
B.	Overview and Affected Plans.....	14.37
C.	Qualifying Events.....	14.37
D.	Period of Coverage.....	14.38
E.	Premium Payments.....	14.39
F.	No Requirement of Insurability.....	14.39
G.	Election Period.....	14.39
H.	Notice Requirement.....	14.39
I.	Penalties and Non-Compliance.....	14.40
J.	Recent Case Law.....	14.41
K.	Pre-Existing Condition Clauses.....	14.43
L.	Ohio Group Health Plan Continuation Coverage Requirements. Ohio Revised Code §3923.38.....	14.43

M.	Effect of the Family and Medical Leave Act (FMLA) on COBRA Continuation Coverage.....	14.45
N.	Uniformed Services Employment and Reemployment Rights Act. 38 USC §4317.....	14.46
	CHART: Comparison of COBRA and Ohio Health Plan Continuation Coverage Requirements.....	14.47
	Model Continuation Coverage Election Notice Continuation Coverage Election Form	
	U.S. Department of Labor Fact Sheet: COBRA Premium Reductions, April 26, 2010	
	Ohio Department of Insurance: Revised Guidance Effective April 20, 2010	
	Bulletin No. 2010-01 — Temporary Extension of State Continuation Coverage to Take Advantage of Federal Premium Subsidy, Effective February 26, 2010	