McKONLY & ASBURY

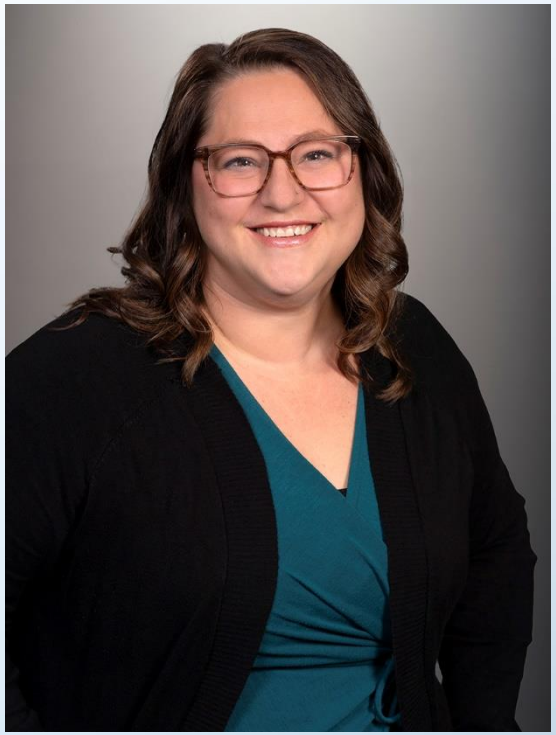
Employee Benefit Plans Industry Update

macpas.com

Introductions

Danielle Guinter, CPA, MAcc
Partner

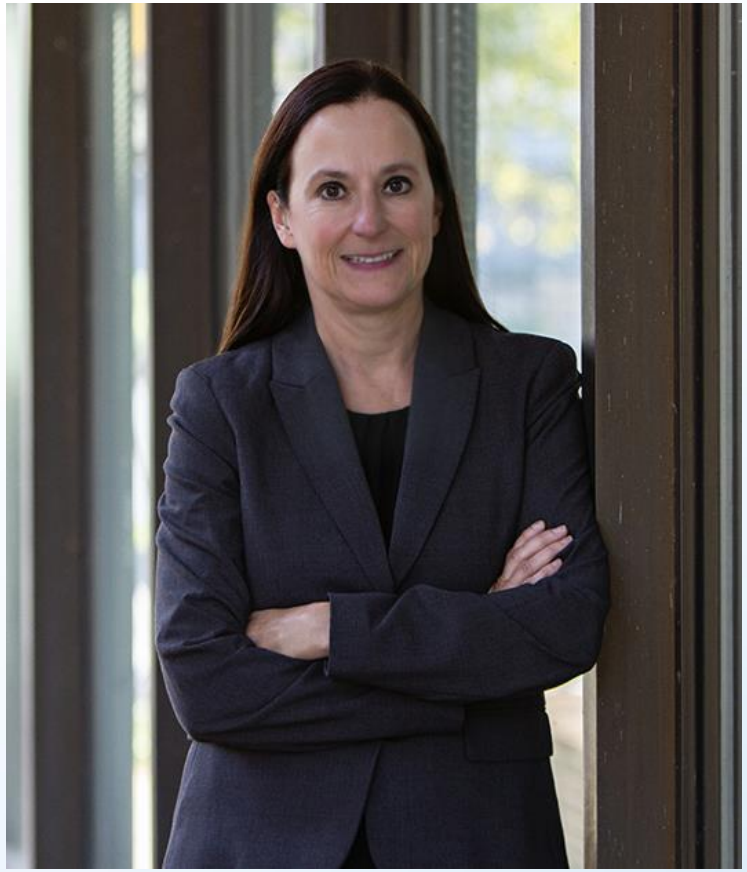
Director of ERISA Services



Shalane Cohen, CPA
Director

Member of the Employee Benefit Plans Team

Introductions: Guest Speaker



Renée Lieux
McNees Wallace & Nurick LLC

Renée is Chair of the Employee Benefits & Executive Compensation Group. Clients seek her assistance with the establishment, compliance, and administration of pension plans, welfare benefit plans, and fringe benefit plans, including defined contribution plans, defined benefit plans, profit sharing plans, 401(k) plans, employee stock purchase plans, ESOPs, governmental plans, Taft-Hartley multiemployer pension and welfare plans, municipal pension plans, 457(b) and (f) plans, 403(b) plans, cafeteria plans, flexible spending accounts, HRAs, VEBAs, and insured and self-insured welfare plans.

Firm Overview

Helping You Thrive!

McKonly & Asbury

M&A is a team of CPAs and Business Advisors serving clients from our offices in Camp Hill, Lancaster, Bloomsburg, and Philadelphia.

accountingTODAY 2024 Best Firms to Work For

accountingTODAY 2024 Best Firms for Young Accountants

accountingTODAY 2024 Best Firms for Women

BEST PLACES to work in PA 2024

Services Provided

- Advisory & Business Consulting
- Audit & Assurance
- Tax
- Entrepreneurial Support & Outsourced Accounting
- SOC & Technology Consulting

Industries Served

- Affordable Housing
- Architecture, Engineering, and Construction (AEC)
- Entrepreneurial
- Family-owned Business
- Franchises
- Healthcare
- Manufacturing & Distribution
- Nonprofit
- Public Companies

Agenda

- Accounting and Audit Update
- Legal Update
- Lessons Learned from Recent ERISA Court Cases

SECURE Act 2.0

Mandatory/Optional Provisions

- Mandatory – 2024
  - Increase in age for RMD's and eliminates Roth contribution sources from RMD consideration
  - Part-time workers – provides eligibility if worked more than 500 hours for 3 consecutive years
- Mandatory – 2025
  - Auto enrollment – if Plan established in 2023 or later
  - Part-time workers – reduces 3 consecutive years of 500 hours to 2
- Mandatory – 2026 and later
  - Catch-up contributions – must be Roth, unless compensation is 145K or less
- Optional? - Catchup contribution - greater of 10K or 50% more than regular catch-up for participants 60-63
- Optional: Student loan payments, PLESAs, ER Roth contributions, mandatory distributions thresholds

Plan Sponsor Fiduciary Responsibility

Self-Correcting Common Plan Errors

IRS Employee Plans Compliance Resolution System (EPCRS)

- Self-correct operational failures such as –
  - Failure to follow the terms of the plan
  - Excluding eligible participants
  - Not making contributions promised under the plan terms
  - Loan failures

SECURE 2.0 Expands Self-Correction of Plan Errors

- IRS provides interim guidance in IRS Notice 2023-43 and IRS Notice 2024-02
- Established a permanent self-correction safe harbor for automatic enrollment failures

Self-Correcting Common Plan Errors

Plan Sponsor must be able to provide documentation substantiating the self-correction if requested upon examination.

*****Document, Document, Document*****

*****Find it before the IRS / DOL*****

DOL Self-Correction

Effective March 17, 2025

May submit a SCC Notice instead of filing a VFCP application

Two types of errors

- **Delinquent Participant Contributions and Loan Repayments to Pension Plans if earnings are less than $1,000**
  - **Calculate earnings using DOL calculator**
  - **Cure within 180 days of when the contribution should have been made**
  - **Pay penalties, late fees, and other changes**
- **Eligible Inadvertent Participant Loan Failures**

DOL Self-Correction

Eligible Inadvertent Participant Loan Failures

- Non-compliance with plan terms regarding the amount, duration, or level amortization of the loan;
- Loans that defaulted due to a failure to withhold from the participant's wages;
- Failure to obtain spousal consent for a loan; or
- Allowing a loan that exceeds the number of loans permitted under the plan.

DOL Lost and Found Database

- SECURE 2.0 Act directed EBSA to establish the database to help missing participants and their beneficiaries find their retirement benefits.
- Database started accepting data on November 18, 2024.
- Retirement plan administrators and authorized third parties, may submit information. Recordkeepers and service providers must have authorization from a responsible fiduciary of each plan whose information is being submitted.
- Launched to the public on December 27, 2024.

Common Errors in Financial Statements

- Certification
- Party-in-Interest Disclosure
- 5500 Reconciliation
    - Receivables
    - Excess Contribution Payable
    - Fair Value of Stable Value / Common Collective Trust Funds

5500 Updates – 2024 and 2023

2023 Updates

- Small Plan Audit Participant Counting Methodology
- Plan Characteristics – Code 3D updated to include pre-approved 403(b) plans
- Administrative Expenses Transparency
- Schedule R Compliance Questions
    - Non-discrimination testing
    - Pre-approved plan letters

5500 Updates – 2024 and 2023

2024 Updates for Defined Contribution Plans

- **Form 5558 – Starting on January 1, 2025, an extension may be filed either electronically through EFAST2 or via paper form**
- **New Plan Characteristic Code for pension-linked emergency savings accounts**
- **Administrative Penalties**

- Up to $2,670 a day for each day a plan fails or refuses to file a complete and accurate report ($2,586 a day for 2023)

No Deference to Regulators

Loper Bright Enterprises v. Raimondo

- **Supreme Court overturned the Chevron Doctrine which gave deference to federal agency's interpretations of law**
- **Has encouraged many lawsuits challenging agency's regulations and guidance:**
  - **Secretary of Labor v. Macy's, Inc. – Macy's challenged the DOL's interpretation related to tobacco surcharges**
  - **Purl v. United States Department of Health and Human Services- Provider sued arguing that the 2024 HIPAA rules prohibited her from complying with Texas laws**

NQTL Analysis

- Analysis is used to demonstrate compliance with the Mental Health Parity and Addiction Equity Act
- Regulations finalized in fall of 2024
- New certification:
  - Plan fiduciary must certify that they have engaged in a prudent process to select a qualified service provider to perform a non-quantitative treatment limitation comparative analysis and that they are actively monitoring the service provider to ensure compliance with the regulations

Gag Clause Prohibition FAQs

Issued January 14, 2025

Prohibited contract provisions (not an exhaustive list):

- Limiting access to a statistically significant or the "minimum necessary" number of deidentified claims;
- Limiting the scope of access to the data to specific, narrow purposes (such as limiting access to the context of an audit);
- Unreasonably limiting the frequency of claims reviews (e.g., no more than once per year);
- Limiting the number and types of de-identified claims that a plan or issuer may access;
- Restricting the data elements of a de-identified claim that a plan or issuer may access; and
- Providing access to de-identified claims data only on the TPA's or service provider's physical premises

Forfeiture Lawsuits

Hutchins v HP Inc.

- Plaintiff alleges that a failure to use forfeited contributions to pay administrative costs is always a violation of ERISA.
- Defendant notes it has discretionary authority and control on how forfeited amounts may be used to "reduce employer contributions, to restore benefits previously forfeited, to pay Plan expenses, or for any other permitted use."
- Court concluded the case should be dismissed, with the Plaintiff being allowed file an amended complaint that addressed the deficiencies the court found in the original complaint.

https://casetext.com/case/hutchins-v-hp-inc

Perez-Cruet v. Qualcomm Incorporated

- Plaintiff alleges that the defendants violated ERISA by choosing to reduce employer contributions rather than defraying administrative expenses of the Plan.
- All agree that the written terms of the Plan permit the Defendants to make either choice, Plaintiff alleges that overarching principles of ERISA and the Defendants' fiduciary duties under ERISA leave only one choice: defray the administrative costs of the Plan.
- Qualcomm's motion to dismiss was denied.

https://casetext.com/case/perez-cruet-v-qualcomm-inc

Poor Investment Selection

Snyder v. UnitedHealth Group (UHG)

- Alleges UHG violated fiduciary duties under ERISA by imprudently and disloyally selecting, retaining and monitoring poorly performing target date funds (Wells Fargo Target Fund suite)
- Investment advisor (Mercer) recommended in 2014 they evaluate alternative products prior to the class action period (2015 and beyond).
- Despite WF not initially being selected as one of 3 finalists, WF was chosen, stating the other finalists were either too aggressive or the fees were too high.
- After 3+ year case – UHG agreed to pay $69 Million to settle the class action suit – awaiting court approval

According to the opinion letter from U.S. District Judge Tunheim:

- "There are genuine disputes of material fact as to whether United breached its duties of prudence and loyalty under the Employee Retirement Income Security Act ("ERISA") by investing its employees' 401(k) savings in underperforming Wells Fargo ("Wells") funds for more than a decade and allowing United's business relationship with Wells to influence that allegedly imprudent retention."
- "There was a large, two-way business relationship between United and Wells. United generated between $50 and $60 million in revenue from 2014-2017 as Wells's health insurance provider. On the other side of the ledger, Wells provided United with substantial banking services. And United was Wells's largest client and lifeline in the TDF industry. In the balance between the two companies, the Plan constituted around 45% of the business flowing from United to Wells. "

Plan Advisor Article
Opinion Letter

Disberry v. Employee Relations Committee of Colgate-Palmolive Co.

- Plaintiff alleged Colgate-Palmolive Co. (Colgate) and its plan recordkeeper, Alight Solutions (Alight) breached their fiduciary duties when $750,000 was stolen from a form employee's 401(k) account. The custodian bank was also included in the suit but was dismissed from the case.
- Plaintiff claimed a person was able to access her retirement account, change her password and personal information and request a cash distribution in the amount of her entire account.
- Plaintiff asserted the defendants missed several red flags such as 1) her phone number and email address were in one country and her mailing address was in another; 2) requested an immediate cash distribution instead of a rollover distribution resulting in a 10% penalty even though the plaintiff was not 59 ½; 3) there were numerous attempts to access Plaintiff's account via telephone and online, many of which were unsuccessful.
- Case was settled for an undisclosed settlement and without a court conclusively opining on fiduciary process or whether any party is responsible for restoring assets stolen from a participant's 401(k) plan account.

https://casetext.com/case/disberry-v-emp-relations-comm-of-the-colgate-palmolive-co

ESG Investments

Spence vs American Airlines

- In 2022 the DOL rule allowed plan fiduciaries to consider ESG factors in selecting investments and relaxed the "tie-breaker" rule for comparable competing funds
- The first lawsuit over ESG in a 401k plan was filed in 2023
- The participants alleged breach of duties of loyalty and prudence under ERISA

  - The inclusion of ESG-focused funds let to underperformance compared to non-ESG counterparts, citing these funds are more expensive, underperform, and engage shareholder activism.

  - Investments are managed by investment companies (BlackRock) that pursue ESG policy

Result: January ruling states that American Airlines violated federal law by including ESG principles into its pension plan. Judge states that AA breached duty of loyalty, but not fiduciary duty of prudence since AA acted in accordance with prevailing practices similar to other fiduciaries in the industry. Damages to be determined.

- ERISA's duty of loyalty: plan fiduciaries shall discharge his duties with respect to a plan "'solely in the interest of the participants and beneficiaries' and for the 'exclusive purpose' of benefitting them."
- Duty of Prudence: A fiduciary must discharge its duty "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."
- "ERISA does not permit a fiduciary to pursue a non-pecuniary interest no matter how noble it might view the aim," O'Connor wrote, adding that the airline's "incestuous relationship with BlackRock and its own corporate goals disloyally influenced administration of the Plan."

https://www.reuters.com/business/aerospace-defense/american-airlines-focus-esg-401k-plan-is-illegal-us-judge-rules-2025-01-10/

Lewandowski v. Johnson & Johnson

- Plaintiff claims her employer, Johnson & Johnson (J&J), breached its fiduciary duty under ERISA by overpaying for prescription drugs. Plaintiff alleges that failed to demand lower prices from its Pharmacy Benefit Manager (PBM) when establishing the group-medical plan. The higher drug prices have resulted in lower wages and higher health insurance costs for J&J Employees.
- The Complaint alleges in three different places that ERISA's duty of prudence compels fiduciaries "to seek the lowest level of costs for the services to be provided, and to continuously monitor plan expenses to ensure that they remain reasonable under the circumstances."
- J&J sponsors the Salaried Medical Plan and Salaried Retiree Medical Plan. All or most of the Plans' expenses are paid from the Johnson and Johnson Medical VEBA, which is an employer-sponsored trust established under IRC 501(c)(9) for the payment of medical benefits under the Plans.
- Defendants are J&J, the Pension & Benefits Committee of J&J, Peter Fasolo –EVP and Chief Human Resource Officer, Warren Luther – VP of HR, and Lisa Blair Davis, member of the Pension & Benefits Committee and is a fiduciary of the Plans.
- J&J moved to dismiss the lawsuit. According to the motion, the plaintiff received al the benefits she was contractually entitled to receive – prescription drug benefits at the cost established in the Plan documents and J&J claims out-of-pocket expenses would not have changed even if her prescription drugs through the Plan cost nothing.
- The case is currently pending.

Excessive Fees

Davis et al. v Magna International of America

Suit alleged that:

- **Plan oversight responsibilities were left to the plan trustee (Principal), opening the door to conflicts of interest by giving the Trustee latitude to fill it with their own (or affiliate) funds. (17 of 20 funds were Principal funds)**
- **Defendants did not act in the best interest of participants**
- **Failed to have a proper system of review**
- **Plan retained MF investments that were more expensive than necessary**
  - **~$73 annually for recordkeeping services compared to expert witness benchmark of $30 per participant**
  - **Not utilizing lower cost share classes (institutional vs investor classes)**
- **Failed to leverage the size of the Plan ($1.6 billion) to negotiate lower fees (expense ratios & administrative fees)**

Result: Court approved cash settlement of $2,900,000 in early 2025

A 1998 study conducted by the Department of Labor ("1998 DOL Study") reflected that as the number of participants grow, a plan can negotiate lower recordkeeping fees:

Number of Participants	Avg. Cost Per Participant
200	$42
500	$37
1,000	$34

Filing claims that given the trend in recordkeeping fees per participant, the fees should be lower today.

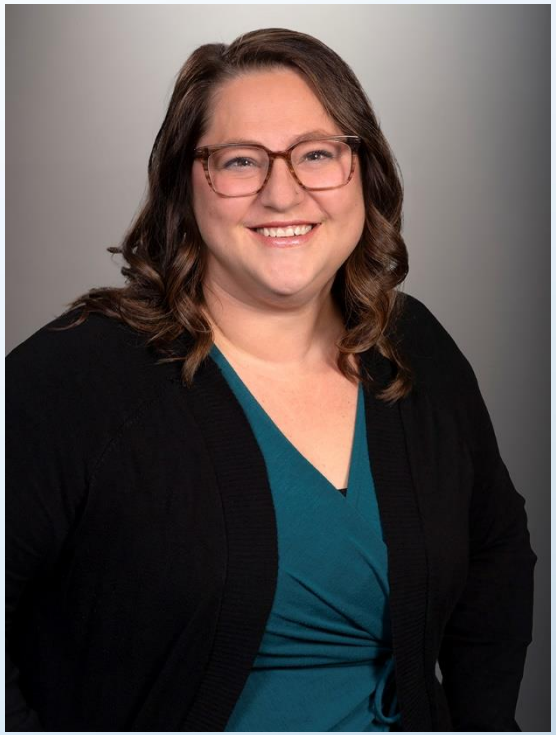
https://www.asppa-net.org/news/2024/8/another-401k-excessive-fee-settlement-struck/#:~:text=The%20suit%20alleged%20that%20Magna,and%2For%20its%20affiliates.%E2%80%9D

Contact Information

Danielle Guinter, CPA, MAcc
Partner

dguinter@mapcas.com

717-972-5734



Shalane Cohen, CPA
Director

scohen@macpas.com

717-972-5783

McKONLY & ASBURY

Upcoming Events

February 13 Webinar

Healthcare Industry: Emerging Issues Around Tax, Compliance, IT, and Risk Management

REGISTER NOW

McKonly & Asbury

macpas.com

February 27 Webinar

SOX: Are You Still Testing Too Many Controls

REGISTER NOW