Morgan Lewis

BREAKING THE CODE: EMPLOYEE BENEFITS/ EXECUTIVE COMPENSATION

TECHNOLOGY MAY-RATHON

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About Morgan Lewis Tech May-rathon

Morgan Lewis is proud to present Tech May-rathon, a series of programs focused on current issues, trends, and developments that are of key importance to technology industry companies.

This year is our 6th annual May-rathon and we are offering more than 15 in-person and virtual events.

Recordings of all of our Tech May-rathon programs can be found at https://www.morganlewis.com/topics/technology-may-rathon.

Be sure to tweet #ML16MayRathon.

Agenda

- Protection of retirement plans
- Fiduciary pitfalls
- Privacy and cybersecurity issues for plan fiduciaries
- Affordable Care Act (ACA) challenges and HIPAA audits
- Equity plan incentives
- De minimis fringe benefits and taxable perks

SPEAKER: CARLY GREY

PROTECTION OF RETIREMENT PLANS

Overview

- A few hot topics affecting qualified retirement plans:
  - Inadvertent multiple employer plans
  - New corrections options for deferral errors
  - Electronic notice using social media

Inadvertent Multiple Employer Plans – How?

- Multiple Employer Plans (MEPs) – qualified retirement plans maintained by two or more employers who aren't in the same:
  - Controlled group,
  - Affiliated service group, or
  - Trade or business under common control
- Professional Employer Organizations (PEOs) frequently (but deliberately) offer MEPs
- Can inadvertently occur by offering plan to contractors, advisory board members, or directors

Inadvertent Multiple Employer Plans – Compliance

- Employers participating in an MEP are considered together for some requirements, for example:
  - Vesting,
  - Eligibility, and
  - Annual limits
- But separately for others, for example:
  - Annual nondiscrimination tests and
  - Coverage and other testing
- Make sure plan terms are accurate
  - Check with TPA/prototype or volume submitter document provider to confirm it supports MEPs
- Report as MEP on Form 5500

New Correction Options for Deferral Errors – Background

- Traditionally, to correct a failure to implement pretax deferral elections, must make a corrective contribution equal to:
  – 50% of the missed elective deferrals plus
  – Missed match
  – Adjusted for any earnings (or losses) during period of failure
- New safe harbor correction methods for certain failures if correct elections implemented quickly
  – Reduced corrective contributions
  – Participant must be given notice within 45 days after correct deferrals begin

New Correction Options for Deferral Errors – If Corrected Quickly

- If notified of error by the affected employee, then correct deferrals must begin by first payment of compensation on or after last day of month after month notified
- Participants Subject to Automatic Enrollment
  - No corrective contribution for missed deferrals if correct deferrals begin by first payment of compensation made on or after *9½ months after the end of the plan year in which the failure first occurred*
- Participants *Not* Subject to Automatic Enrollment
  - No corrective contribution for missed deferrals if correct deferrals begin by first payment of compensation on or after *three-month period beginning when the failure first occurred* or
  - Only 25% corrective contribution for missed deferrals if correct deferrals begin by first payment of compensation on or after *last day of second plan year following the plan year in which the failure occurred*

Electronic Notice Using Social Media

- Social media does not fit well within Department of Labor (DOL) safe harbor or IRS disclosure rules
- Best used to reinforce plan messaging sent by
  - Mail or
  - Web posting and email – but only to participant:
    - With regular work-based computer access that is integral to his or her job (for DOL documents),
    - With "effective ability to access" the electronic medium being used to provide the notice (for IRS documents), or
    - Who consents to receiving electronic disclosures
      - Different rules for consent depending on what is being sent

SPEAKER: ELIZABETH GOLDBERG

FIDUCIARY PITFALLS:

WHAT ARE TODAY'S FIDUCIARY PITFALLS AND WHAT DO PLAN SPONSORS NEED TO KNOW ABOUT THE NEW FIDUCIARY RULE?

What Are Today's Fiduciary "Pitfalls"?

- Key Fiduciary* Pitfalls
  - Plan sponsor process
  - Fees and expenses
  - Employer stock

**Defined Contribution Fiduciaries*

Plan Sponsor Process Traps

- Claims against plan sponsor fiduciaries for imprudent selection of investment options and administrative or investment services, such as:
  - Failure to engage in due diligence when selecting investments or service providers
  - Failure to monitor investments or service providers
  - Failure to disclose paid fees and expenses

- Example: *Tussey v. ABB*
  - Under any standard, court found fiduciary breach for recordkeeping fees
  - ABB was told by an outside consultant that it was substantially overpaying for recordkeeping and that while revenue sharing was paying for recordkeeping, it also subsidized services a recordkeeper provided to the corporation, including as to other health and defined benefit plans
  - Court found ABB fiduciaries did not act on the information or evaluate recordkeeping fees
  - Fiduciary breach holdings against ABB upheld on issue of subsidizing other plan costs with revenue sharing from the 401(k) plan

Plan Sponsor Process: Considerations

- Consider procedural prudence and governance:
  - Document, document, document
  - Evaluate and establish appropriate fiduciary governance structure (committee charters, investment policy statements)
  - Confirm that governance structure reflects corporate culture and evolving landscape
  - Conduct periodic meetings and document committee actions (meeting books, agendas, minutes, fee and expense reviews, and presentations by outside service providers)
  - Conduct fiduciary training for new fiduciaries and refresher trainings for all fiduciaries
  - Maintain adequate liability coverage (insurance, indemnifications, and fiduciary bonds)

Fee and Expense Traps

- In recent years, many claims alleging excessive fees and expenses, and procedural imprudence in selecting/monitoring fees
- Nature of claims have evolved over time:
  - Revenue sharing: Imprudently accounted for, conflicts of interest, excessive fees
  - Retail funds rather than institutional class funds
  - Mutual funds rather than separate accounts or index funds
  - Excessive fees to service providers
  - Unitizing company stock funds
  - “Float” income received by plan recordkeepers

Fee and Expense Litigation: *Tibble v. Edison*

- Example: *Tibble v. Edison*
  - Like many fee and expense cases, *Tibble* involved a claim that plan fiduciaries had breached their duty of prudence by offering retail class mutual funds, among other claims
- Ninth Circuit holding:
  - No per se duty to select the cheapest fee arrangement if there are good reasons not to
  - Although there could be viable theories related to particular retail funds (or their use of revenue sharing)
- Supreme Court holding:
  - An ERISA fiduciary has a "continuing duty to monitor trust investments and remove imprudent ones," and allegations of a breach of this duty may give rise to a timely claim even if the fiduciary's initial selection was before ERISA's six-year statute of limitations
  - Even where there is no "significant change in circumstances" that would have caused the fiduciary to revisit its initial selection

Fee and Expense Considerations

- Consider procedural prudence and governance related to fees
  - Consider which available share class is the least expensive to participants
  - Consider net costs
  - Ask about waivers for eligibility requirements
  - Consider how revenue sharing benefits participants
  - Document, document, document
- Reminder of the importance of intermittent reviews

Employer Stock Traps

- Claims of imprudence related to continuing to offer a company stock fund as an investment option under a 401(k) plan, e.g., "stock drops"
- Example: *Fifth Third Bancorp v. Dudenhoeffer*
  - Holds stock-drop claims based on public information must plead special circumstances, meaning an inefficient market
  - Rejected the "presumption of prudence" of offering employer stock in a plan designated as an ESOP (i.e., a fiduciary was protected in continuing to offer company stock absent extreme events)
  - Most circuits had previously adopted this presumption
- Result is that company stock funds may need to be reviewed differently because no presumption
- But not a "blank check" for plaintiffs in stock-drop cases; court specified conditions plaintiffs must meet

Employer Stock Considerations

- Considerations:
  - Consider limits on investment in company stock funds or role of company stock
  - Consider plan document language
  - Consider the role of an independent fiduciary
  - Consider the composition of the fiduciary committee (and the role of insiders)

The DOL's Redefinition of Fiduciary Investment Advice

- After a nearly six-year saga, the DOL issued its final "conflict of interest" rule on April 6
  - Referred to more commonly as the "fiduciary rule" or the "fiduciary definition"
- By way of brief recap:
  - Rule was initially proposed back in 2010 but withdrawn after extensive criticism
  - Reproposed in April 2015
  - Garnered thousands of comment letters and four days of hearings
  - DOL issued final rule and a number of accompanying exemptions on April 6

The DOL's Redefinition of Fiduciary Investment Advice

- The rule generally:
  - Redefines fiduciary advice to move away from the current five-part test in a way that more activities and more advice likely to be considered fiduciary
  - Includes a new prohibited transaction exemption to allow commonly used compensation practices to continue as long as advice provider acts in the "best interest" of the client
  - Adapts various existing prohibited transaction exemptions to incorporate the "best interest" standard
- While the rule will have broad implications, its most significant effect will be on the IRA marketplace and advice given in connection with rollovers
  - Under a current DOL advisory opinion, advice about plan distributions not fiduciary in nature; that has been repealed
  - Concern about conflict in investment recommendations made to participants rolling amounts out of plans

The DOL’s Redefinition of Fiduciary Investment Advice

So what has changed from the proposal?

- Narrowed the definition of what constitutes a “recommendation” for purposes of fiduciary investment advice
- Resolved the controversial proposal regarding the distinction between investment education (nonfiduciary) and investment advice (fiduciary) to permit 401(k) investment education tools to name specific investment options
- Expanded the so-called “seller’s exception” to allow recommendations to certain sophisticated fiduciaries to avoid fiduciary status
- Numerous revisions to the Best Interest Contract Exemption (BICE)
  - Sought to address practical issues of industry raised in comments

What Do Plan Sponsors Need to Know About the New Fiduciary Rule?

Potential implications for 401(k) plan sponsors

- Will change how your recordkeepers handle rollovers (may be viewed as positive by many sponsors)
- May change status of your advisors from nonfiduciary to fiduciary (and perhaps a cost increase to go along with it)
- May require documentation updates
- Will change the landscape for investment advice services, at least at the individual/small plan level

What Is Next for New Fiduciary Rule?

- Effective date—April 2017 (rather than eight months from publication; longer phase-in period for BICE)
- There will be FABs etc.

SPEAKER: MATTHEW HAWES

PRIVACY AND CYBERSECURITY ISSUES FOR PLAN FIDUCIARIES

Privacy and Cybersecurity for Plan Fiduciaries

- Common misconceptions:
  - *My IT department deals with cybersecurity; it isn't a benefit plan issue.*
  - *I am compliant with HIPAA and HITECH. I don't need to worry about this.*
  - *I have reputable vendors administering my plans. They store the plan data, so it is their responsibility to worry about data security.*
- Data breaches are real.
- Data breaches are expensive.
- Data privacy and cybersecurity cannot be ignored.

Privacy and Cybersecurity for Plan Fiduciaries

- Retirement plans are an extensive source of valuable personal data about participants and beneficiaries
  - Social Security numbers
  - Addresses
  - Dates of birth
  - Bank account information, etc.

This collection of information presents an attractive and potentially exploitable opportunity for criminals.

Privacy and Cybersecurity for Plan Fiduciaries

- Patchwork of Data Privacy Laws and Rules
  - Fair Credit Reporting Act – governs collection and dissemination of personal information by "consumer reporting agencies"
  - Fair and Accurate Credit Transactions Act – mandates certain actions by consumer reporting agencies in the event of reported fraud or identity theft
  - Gramm-Leach Bliley Act (GLBA) – protects nonpublic personal information maintained by covered financial institutions such as banks, mortgage brokers, credit unions, financial advisors, auto dealers, and other creditors. The GLBA has resulted in extensive regulations and enforcement actions by SEC and FINRA
  - State Laws – 47 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have enacted some form of data security law, requiring (for example):

    "reasonable security procedures and practices appropriate to the nature of the information to protect the personal information from unauthorized access, destruction use, modification or disclosure"—Ark. Code Ann. § 4-110-104(b)

No comprehensive federal law governing data privacy or cybersecurity at the retirement plan level.

Privacy and Cybersecurity for Plan Fiduciaries

- Fiduciary Duty of Loyalty:

  ERISA requires that plan fiduciaries act

  - Solely in the interest of participants and beneficiaries
  - For the exclusive purpose of providing benefits and defraying reasonable expenses

- Fiduciary Standard of Care
  - Strict (and high) standard of care – fiduciaries must carry out their duties 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*
  - This is the so-called "prudent expert standard"
  - A breach can occur from both action and inaction

Privacy and Cybersecurity for Plan Fiduciaries

- *Personal liability* for fiduciary breaches and losses stemming from breaches (no exculpatory provisions)
- Obligation to restore profits
- Other equitable and remedial relief (e.g., removal from fiduciary position)
- Additional penalties
  - Monetary penalties of 20% of recovery amount
  - Criminal penalties for willful violations of reporting requirements or fraud, force, or violence

Privacy and Cybersecurity for Plan Fiduciaries

Key elements to understanding and managing obligations:

- Identify sources of data privacy risk and create a project plan
- Prepare plan administration
- Evaluate service providers as part of initial selection and ongoing monitoring
- Create a comprehensive information and data security breach plan

Plan fiduciaries should be proactive and reactive to ever-changing data security threats.

SPEAKER: SAGE FATTAHIAN

AFFORDABLE CARE ACT (ACA) CHALLENGES AND HIPAA AUDITS

SECTION 01

ACA CHALLENGES

Overview

- Lots of unexpected and counterintuitive wrinkles under the last few years of guidance
- Need to examine:
  - HRAs
  - Health FSAs
  - Pricing approaches
  - Credits
  - Opt-out payments
  - Reimbursement practices
- Failing to meet ACA mandates can subject an employer to excise tax under IRC Section 4980D of $100 per pay, per participant
  - General cap of $500,000 per year per entity
    - Note, for many, FAR more expensive than the Shared Responsibility excise tax—and applies regardless of employer size . . .

HRA Design

- In order to avoid ACA problems, HRAs must be integrated with an ACA-compliant group health plan
  - In other words, stand-alone HRAs are dead for employees
    - Still some room for stand-alone designs in the context of retiree-only arrangements such as post-65 "Exchange" plans that contain individual Medicare supplemental policies and HRAs to help pay for individual premiums and out-of-pocket expenses
  - To be "integrated," HRAs must:
    - Require enrollment in both HRA and group health plan
      - Be careful with "family" HRA but self-only health coverage
  - Cannot be used to purchase individual coverage
  - Could limit HRAs to only excepted benefits (vision, dental, etc.)
  - Can continue to use HRAs once participation in underlying health plan ends
  - Limits must be imposed by terms—not merely by operation

HFSA Design

- HFSAs are only exempt from ACA mandates if they are a HIPAA excepted benefit that:
  - Is offered in conjunction with a health plan
    - So no stand-alone HFSAs
  - Limits true employer contributions to $500
    - Or employer matching contributions at $-for-$ rate

Pricing Approaches

- Employers with 50 or more FTEs are subject to ACA Shared Responsibility excise tax exposure if health coverage is not (among other things):
  - Minimum essential coverage
  - Minimum value
  - Affordable (9.66% of household income for 2016, with 3 optional safe harbor approaches)
    - Measured by least expensive single employee health coverage
    - Employee price tags only part of the equation—must also consider wellness programs, credits, opt-out payments
      - As a consequence, ACA Shared Responsibility exposure can be created by pricing approaches that tip coverage into unaffordability
        - Nothing prevents using these approaches, but be careful that their Shared Responsibility and Form 1095-C reporting consequences are clearly understood!

Pricing Approaches

- Pricing can be straightforward
  - Employee premium of $x
  - Employer subsidy is the difference (and unstated) balance of the full cost of the coverage (basically, the remainder of the COBRA premium)
  - Depicted simply as flat $ amount per month for the least expensive single employee coverage
    - This flat $ amount is used, along with one of three permissible safe harbors, to determine whether the coverage is affordable for Shared Responsibility purposes and also reported on Line 15 of Form 1095-C
      - Example: least expensive single employee coverage equals $92 per month

Pricing Approaches

- Pricing can be more complicated
  - Full cost of least expensive single employee coverage = $500 per month
  - Employer credit of $408 per month
  - Employee premium = $92
- The objective of this more complicated approach can be to:
  1. Highlight the level of employer support for the cost of coverage (the major principle underlying consumer-driven design)
     - May also represent employer HRA/HFSA/HSA credits or contributions
  2. Allow “spending” of the credit on other tax-free benefits (after all, employees know best whether they need health coverage or more highly prize other benefits)
  3. Permit extracting the employer credit in the form of cash or taxable benefits
- These approaches directly impact affordability for Shared Responsibility purposes

Credits

- If a flex credit is treated as a “health flex contribution,” then it makes the least expensive single employee price tag cheaper
- A health flex contribution is a sum that:
  - Cannot be received as a taxable benefit
  - May be used to purchase MEC
  - Can only be used for premiums or the HFSA
    - Example: $130 monthly premium, $500 annual employer flex credit = $88 cost, even if all of the flex credit goes to HFSA
- Note that this is not a traditional credit—it cannot be used within the broader confines of a cafeteria plan for life insurance or a dependent care FSA and cannot be taken as taxable $
- Clearly not a traditional “full flex” plan design
  - More like a mere informational approach/limited by HFSA rules (see above)

Credits

- A related design may be a $130 monthly price tag with a $500 annual contribution to an HRA (HRA $ cannot be driven by employee elections)
  - HRA contributions also impact affordability (and, hence, reporting) if amounts can be used for plan premiums
    - Treated as made ratably on a monthly basis
    - Practically, makes underlying least expensive single employee coverage more "affordable" for Shared Responsibility purposes
    - Results in the same monthly $88 cost as above
- HSA $ does not impact affordability since HSA balances cannot (generally) be used for premiums
- Limited 2016 transition relief for plans that do not satisfy health flex contribution rules
  - Adopted on or before 12/16/2015 and no "substantial increase" in credits after 12/16/2015

Opt-out Payments

- A simpler variant of a full flex plan with credits is to provide employees with taxable $ if they opt out of health plan coverage
  - Example: $88 monthly premium, $500 annual opt-out credit = $130 cost
    - Not “affordable” under the federal poverty line safe harbor
    - Practically, make the least expensive single employee premium MORE expensive for affordability purposes
- Treasury will propose generally prospective regulations
  - Anticipate also addressing conditional opt-out credits such as proof of other coverage
  - Anticipate that regulations WILL apply to any opt-out credits adopted after 12/16/2015
    - Requires employers to report opt-out credits NOW if adopted after 12/16/2015 and there are no conditions on the opt-out credit

SECTION 02

HIPAA PHASE 2 AUDITS

When Will Audits Begin?

- Phase 2 currently underway
- Focus on covered entities and business associates
- OCR identifying audit pool (how?)
  - Communication sent via email
  - Spam – no excuse!
  - Sample email letter
    - 14-day response time frame
    - Link in letter leads to online questionnaire
    - Failure to respond does not shield against audit

How Will the Audits Be Conducted?

- OCR will conduct desk and on-site audits
- First set of audits will be desk audits
  - First round, covered entities
  - Second round, business associates
  - Examine compliance with specific requirements
  - Auditee will be notified of subject(s) of audit in a document request letter
  - All desk audits completed by end of December 2016
- Third round of audits will be on-site
  - Examine broader scope of HIPAA compliance
  - Some desk auditees may also be subject to on-site audits

What Is the Audit Process?

- Entities selected for an audit will receive an email notification
  - Asked to provide documents and other data
  - Documents submitted online via a new secure audit portal on OCR website
    - Within 10 business days
  - Auditor will share findings
  - Auditee will have opportunity to respond to findings
    - Within 10 business days
  - All written auditee responses will be included in the final audit report
    - Within 30 business days
- On-site audits expected to take 3 to 5 business days

Next Steps

- Ensure that OCR’s emails are not being sent to junk or spam email box
- Prepare list of business associates
- Review compliance with substantive areas expected to be focus of Phase 2 audits
  - Periodically conducting HIPAA Security Rule risk analysis
  - Developing HIPAA policies and procedures
  - Developing breach notification procedures
  - Updated Notice of Privacy Practice
  - Encryption
  - Maintaining an inventory of information systems
  - Implementing a physical security plan for each location that maintains PHI
  - Providing timely access to PHI
  - Training

Next Steps

- Identify your audit response team
- Consider self-audit

SPEAKER: DAVID ZELIKOFF

EQUITY PLAN INCENTIVES

Common Types of Equity Awards

- Stock options
  - Nonqualified stock options
  - Incentive stock options
- Stock awards
- Restricted stock units

Nonqualified Stock Options

- Provide fixed exercise price for a specified number of shares
- Taxed on exercise
- IRC Section 409A considerations
  - Service recipient stock
  - Fair market value (FMV)
  - No deferral feature

Nonqualified Stock Options – IRC Section 409A Considerations

- Service recipient stock
  - Common stock
  - Stock cannot be subject to any preferences as to dividends, liquidation rights, nonlapse put or call rights, or mandatory repurchase obligations based on a value other than the FMV of the stock
  - Common stock of a parent corporation may qualify as service recipient stock with respect to individuals who perform services for a subsidiary

Nonqualified Stock Options – Determination of Fair Market Value

- The exercise price of the options can never be less than the FMV of the underlying stock on the grant date
  - Stock readily tradable on established securities market
  - Stock not readily tradable on established securities market
    - A value determined by the reasonable application of a reasonable valuation method
    - Presumption of reasonableness
      - A valuation established by an independent appraisal as of a date not more than 12 months prior to the relevant grant date;
      - A valuation formula based on the tax principles governing the valuation of shares subject to nonlapse restrictions, and used for all compensatory and noncompensatory valuations of the stock; or
      - A written valuation that takes into account certain specific valuation factors that is prepared for a start-up corporation that has been in existence for less than ten years, which valuation report is prepared by a person with significant experience and is qualified to perform such valuations, provided there is no reasonable anticipation of a change in control within 90 days or an IPO within 180 days of the valuation

Incentive Stock Options

- Exercise price cannot be less than FMV on grant date
- Can only be granted to employees
- $100,000 per year limitation
- Term cannot exceed 10 years from date of grant
- Limited period to exercise following termination of employment
- 10% stockholder rules
- AMT considerations at exercise
- Shareholder approval of the equity incentive plan within 12 months of adoption
- Not subject to IRC Section 409A

Stock Awards

- Grant of stock for consideration or no consideration
- Can be granted with vesting schedule
- Voting and dividend rights
- Taxed at vesting
  - Unless Section 83(b) election is made
- Not subject to IRC Section 409A

Restricted Stock Units

- Restricted Stock Units are phantom rights convertible to stock or cash on a redemption date
- Divided equivalents may be granted
- Can be granted with a vesting schedule
- Redemption date is when Restricted Stock Units are converted
- No Section 83(b) election is permitted
- IRC Section 409A implications
  - Deferrals may be permitted subject to IRC Section 409A compliance

Public Company Considerations for Equity

- Stock exchange requirements
- ISS considerations
- IRC Section 162(m)
- IRC Section 409A
  - Six-month delay for payments on separation from service

SPEAKER: PATRICK REHFIELD

DE MINIMIS FRINGE BENEFITS AND TAXABLE PERKS

Gross Income from All Sources Taxable

- IRC Section 61 – gross income generally includes all income from whatever source derived
- Value of a fringe benefit can be excluded from the computation of employees' gross income if there is a specific exception
- What about gifts to employees – gift cards, certificates, or even iPads?
- Is there a dollar amount employers should not exceed?

What Items May Be Excludable

- IRC Section 132 – Gross income shall not include any fringe benefits that qualify as a:
  - No-additional-cost service
  - Qualified employee discount
  - Working condition fringe
  - De minimis fringe

De Minimis Fringe Benefit

- IRC Section 132 – Defines a de minimis fringe benefit as any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.
  - What does this mean?
  - Does the IRS provide examples?

Gift Best Practices

- Do not hand out gift certificates that are AMEX or VISA certificates—they work like cash
- Try to keep gift certificates to small amounts (e.g., under $50)
- Do not have prize programs or frequent gift programs that are broadly adopted
- Adopt a policy that makes it clear how in-kind benefits and noncash benefits are taxed above a set value
- Consider gifts of items with company logo as they sometimes will reduce the value

Company Cafeteria

- Does your employer have a company cafeteria?
- Does it provide snacks or meals?
- Are the snacks or meals free or subsidized?
- Is the value of the snacks or meals taxable?
- Could the snacks or meals be considered a de minimis fringe?

Company Cafeteria

- Look to see if the eating facility qualifies under IRC Section 132(e)—look to operating costs:
  - The value of meals provided in an "employer-operated eating facility" qualifies as an excludable de minimis fringe benefit if "(a) such facility is located on or near the business premises of the employer, and (b) revenue derived [or deemed to be derived] from such facility normally equals or exceeds the direct operating costs of such facility."
  - In determining revenue, an employer may treat employees "as having paid an amount" equal to the "direct operating costs" attributable to all qualifying IRC Section 119 meals (i.e., the "deemed revenue" rule).
- Is the cafeteria operated "for the convenience of the employer" under IRC Section 119—look to see if substantial noncompensatory business reason of employer to provide

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QUESTIONS?

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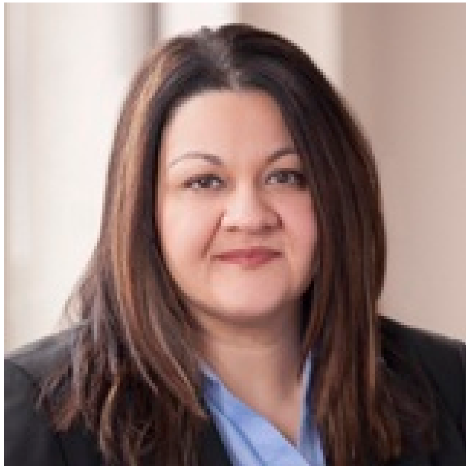
Biography



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Saghi (Sage) Fattahian counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

Sage also consults with clients to design and implement innovative, cost savings designs, such as high-deductible health plan/health savings account (HDHP/HSA) combinations, health reimbursement arrangements (HRAs), and health flexible spending accounts (FSAs). Sage represents health and welfare plan clients facing federal agency audits and helps them to limit their liability through comprehensive legal review.

Biography

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Elizabeth S. Goldberg advises clients on ERISA matters with a focus on fiduciary responsibility provisions, prohibited transaction rules and exemptions, and the management of employee benefit plan assets. She negotiates investment-related agreements on behalf of plans and financial services providers; designs, implements, and administers employee benefit plans; and counsels clients on US Department of Labor (DOL) investigations, plan fiduciary governance structures, ERISA reporting and disclosure obligations, ERISA litigation, and general benefit plan compliance considerations.

Elizabeth's work experience includes several years at the DOL's Office of the Solicitor. Elizabeth came to Morgan Lewis after more than six years at the DOL's Office of the Solicitor, where she worked most recently as a senior trial lawyer litigating fiduciary breach actions under Title I of ERISA. While at the DOL, Elizabeth worked on numerous large ERISA fiduciary enforcement actions that dealt with the law's fiduciary provisions, prohibited transaction rules, ESOP transactions, and trustee duties. She also spearheaded and ran an agency pro bono program that received the 2009 Federal Agency Pro Bono Leadership Award.

Biography

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Carly E. Grey counsels employers on employee benefit and executive compensation matters. She advises on qualified and nonqualified retirement plans, health and welfare plans, and executive compensation arrangements. She also counsels clients on the legal issues arising under ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA, COBRA, and securities laws. In addition to helping employers resolve day-to-day compliance issues, Carly advises on complex employee benefits and executive compensation matters.

Carly negotiates and drafts service provider agreements for health and retirement plans. She also develops compliance programs and resources for employers, preparing government filings when appropriate. When designing and amending benefit plans and employee communications, she uses a holistic approach.

Carly uses her comprehensive knowledge of employee benefits when advising on corporate transactions and structuring executive compensation arrangements. She also prepares change of control calculations for assessing potential excise tax liability under US Internal Revenue Code Section 280G and for securities disclosure purposes. In addition, Carly prepares securities filings for public companies.

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Matthew H. Hawes helps clients navigate every aspect of employee benefits, executive compensation, and equity compensation, including the drafting and design of qualified pension and profit-sharing plans, health and welfare arrangements, deferred compensation plans, and employee agreements. He also performs employee benefits due diligence reviews in the mergers and acquisitions context, and he advises companies on regulatory compliance with the US Internal Revenue Code, ERISA, COBRA, and HIPAA.

Previously, Matt was a law clerk for Judge Susan P. Graber of the US Court of Appeals for the Ninth Circuit. He also worked as a tax associate in a New York-based law firm, where he advised clients on US federal tax issues, including the consequences of capital markets transactions, private equity investments, and mergers and acquisitions. In that capacity he represented clients in tax controversy matters before the IRS and US federal courts.

Before earning his law degree, Matt spent more than four years serving in the United States and abroad as an officer in the United States Navy, earning the rank of lieutenant. His duties included service onboard the USS Inchon (MCS-12) as the weapons officer, assistant first lieutenant, and combat information center officer; service with the 5th Battalion, 10th Marines, 2d Marine Division as a naval gunfire liaison officer assigned to Weapons Company, 1st Battalion, 6th Marines, 24th Marine Expeditionary Unit; and service as an artillery liaison officer.

Biography

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Patrick Rehfield focuses on matters related to executive compensation, payroll tax, and employee fringe benefits. He advises private and public companies on designing and implementing nonqualified retirement plans, equity compensation plans, and executive compensation arrangements. He also counsels publicly traded companies on reporting and compliance matters involving the SEC, with a focus on proxy and disclosure issues, executive compensation, and corporate governance. He advises public and private companies on employee benefit issues in mergers and acquisitions, including executive compensation matters for senior management.

Patrick also advises companies of all sizes on the design and implementation of employment agreements, retention agreements, and change in control agreements. He represents senior management teams in leveraged buyouts, and senior-level executives in compensation package negotiations. He has particular experience in the application of sections 162(m), 280G, and 409A of the Internal Revenue Code.

Patrick also maintains an active payroll tax and fringe benefit practice that focuses on corporate and payroll tax audits, penalty abatements, refund claims, IRS ruling requests, and multistate tax and withholding issues.

Biography

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David B. Zelikoff represents and counsels clients in a range of matters related to employee benefit plans and executive compensation agreements. He advises on the design and implementation of tax-qualified, nonqualified deferred compensation, equity compensation, and health and welfare plans, and he helps clients draft and negotiate executive employment agreements, severance arrangements, and change-in-control arrangements. David's clients include tax-exempt organizations and public/private Fortune 500 and emerging growth companies in the technology and life sciences fields.

David also represents benefit plan sponsors in audit and corrective action matters before the IRS, counsels plan sponsors and committees on ERISA fiduciary matters, and advises on matters related to the IRS code (IRC), including Section 409A.

In mergers and acquisitions (M&A) and other major transactions, he helps negotiate employee benefit and equity terms, and advises on the application of Section 280G of the IRC. He also works with public companies in connection with the disclosure and approval of their equity and executive compensation programs, including issues related to Section 162(m) of the IRC.

David represents ERISA plan and public pension plan sponsors investing in private equity and hedge funds or in direct co-investments in portfolio companies. He also advises on prohibited transaction rules related to IRA investments in alternative investment vehicles.

In private equity buyouts, he negotiates the terms and conditions of executive management team equity and employment agreements. He also negotiates the terms and conditions of employment and separation from employment agreements on behalf of individual executives.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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Beijing
Boston
Brussels
Chicago
Dallas
Dubai
Frankfurt
Hartford
Houston
London
Los Angeles
Miami
Moscow
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Santa Monica
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Singapore
Tokyo
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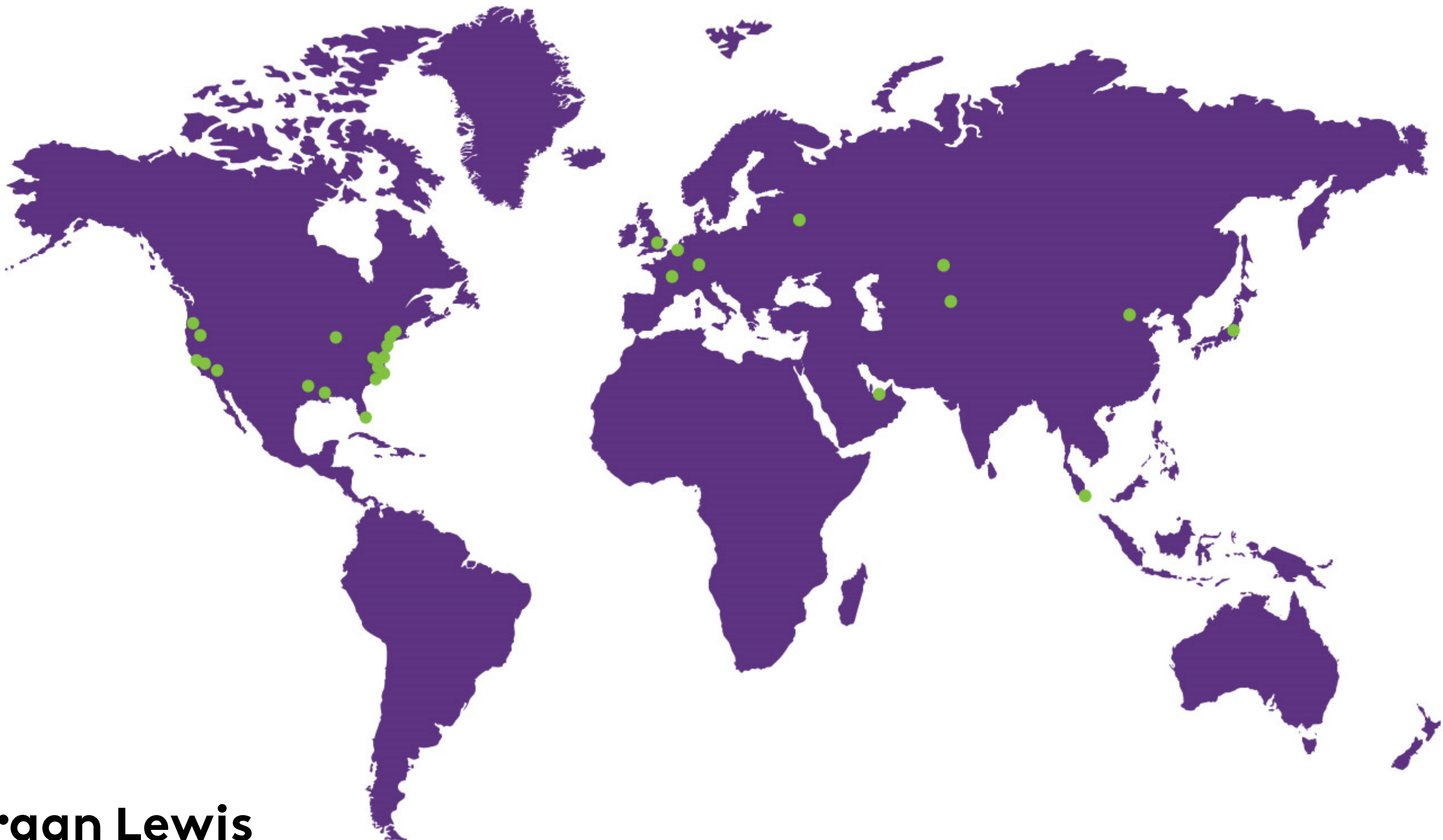

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