The Evolving Practice of Employee Benefits Law and Related Ethics Issues

ABA Tax Section Employee Benefits Committee
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Overview

The evolving practice of employee benefits law over the last 30 years has been marked by:

• Increased complexity
• More uniformity in processes and documentation
• Less formality in advice
• Access to and retention of data
• Changes in billing structures
• Increased diversity
• Increased mobility and platforms for practice
Overview

Good, ethical employee benefits lawyering always adapts and is guided by:

• ABA Model Rules of Professional Conduct (and similar state bar requirements)
• Circular 230
• Firm policies (often based on requirements imposed by malpractice insurance carriers)
• Common sense and personal integrity
ABA Model Rules of Professional Conduct

The Model Rules address a variety of ethical issues relevant to employee benefits attorneys, including scope of representation, fees, confidentiality, conflicts of interest, representing an organization as a client, statements to third parties, and attorney supervisory responsibilities.
ABA Model Rules of Professional Conduct

Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
ABA Model Rules of Professional Conduct

Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer (Continued)

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
ABA Model Rules of Professional Conduct

Model Rule 1.5: Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;
Model Rule 1.5: Fees (Continued)

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.
ABA Model Rules of Professional Conduct

Model Rule 1.5: Fees (Continued)

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
ABA Model Rules of Professional Conduct

Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
ABA Model Rules of Professional Conduct

Model Rule 1.6: Confidentiality of Information (Continued)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
ABA Model Rules of Professional Conduct

Model Rule 1.6: Confidentiality of Information (Continued)

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
ABA Model Rules of Professional Conduct

Model Rule 1.6: Confidentiality of Information (Continued)

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
ABA Model Rules of Professional Conduct

Model Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
ABA Model Rules of Professional Conduct

Model Rule 1.7: Conflict of Interest: Current Clients (Continued)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.
Model Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
ABA Model Rules of Professional Conduct

Model Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
ABA Model Rules of Professional Conduct

Model Rule 1.13: Organization as Client (Continued)

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
Model Rule 1.13: Organization as Client (Continued)

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
ABA Model Rules of Professional Conduct

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.
ABA Model Rules of Professional Conduct

Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer (Continued)

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Circular 230

Circular 230 defines “practice” and who may practice before the Internal Revenue Service (IRS), describes a tax professional’s duties and obligations while practicing before the IRS, authorizes specific sanctions for violations of the duties and obligations, and describes the procedures that apply to administrative proceedings for discipline.
Circular 230

In describing an employee benefits attorney’s duties and obligations, Circular 230 addresses issues such as diligence as to accuracy, requirements for written advice, fees, conflicts of interest, supervisory obligations and limits on practice for former government employees.

• Of course, Circular 230 has seen its own evolution over the years (remember those disclaimers?)
Practice before the IRS includes “all matters connected with a presentation to the [IRS] . . . relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the [IRS].”

• Such presentations include, but are not limited to, “preparing documents; filing documents; corresponding and communicating with the [IRS]; rendering written advice with respect to any entity, transaction, plan or arrangement . . . and representing a client at conferences, hearings, and meetings.” Section 10.2(a)(4).
Section 10.32: Diligence as to Accuracy

(a) *In general.* A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.
Section 10.32: Diligence as to Accuracy (continued)

(b) Reliance on others. Except as modified by §§10.34 [relating to standards with respect to tax returns and documents, affidavits and other papers] and 10.37 [relating to requirements for written advice], a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.
Circular 230

Section 10.37: Requirements for Written Advice

(a) Requirements.

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners’ professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section.
Circular 230

Section 10.37: Requirements for Written Advice (Continued)

(2) The practitioner must—

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;
(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;
Circular 230

Section 10.37: Requirements for Written Advice (Continued)

(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.
Pursuant to Section 10.37(d), a “Federal tax matter” is any matter concerning the application or interpretation of---

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.
Circular 230

Limits on Practice for Former Government Employees

Section 10.25 of Circular 230 imposes rules on former government employees, including:

• Lifetime ban on former government employees “who personally and substantially participated in a particular matter involving specific parties . . . [from subsequently] represent[ing] or knowingly assist[ing], in that particular matter, any person who is or was a specific party to that particular matter.”

• Two-year ban if the former government employee had “official responsibility for a particular matter”
Limits on Practice for Former Government Employees (continued)

• One year ban on “communicat[ing] with or appear[ing] before, with the intent to influence, any employee of the Treasury Department in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule the development of which the former Government employee participated in, or for which, within a period of one year prior to the termination of Government employment, the former government employee had official responsibility.”
Circular 230

In addition, certain provisions of Circular 230 are analogous to provisions of the ABA Model Rules (but have some differences). For example:

• Section 10.27 relating to fees also prohibits charging an “unconscionable fee in connection with any matter before the Internal Revenue Service.” Compare ABA Model Rule 1.5.

• Section 10.29 relating to conflicting interests and waivers. Compare ABA Model Rule 1.7.

• Section 10.33(b) relating to supervisory compliance. Compare ABA Model Rule 5.1.
Firm Policies

Most firms have policies in place governing:

• Conflicts Procedures
• Engagement Letters
• Peer Review Requirements
• Opinion Committees
• These policies are often driven by malpractice carrier guidelines
Application of ABA Model Rules and Circular 230 to Employee Benefits Legal Practice Changes

• Form of Advice: From Opinion Letters to Emails
• Plan Administration: From Pension Plans to Self-Directed 401(k) Plans
• Correcting Errors: From Administrative Policy Regarding Sanctions to EPCRS
• Plan Documentation: From Individually Designed to Pre-Approved Plans
• Executive Compensation: From Constructive Receipt to IRC Section 409A Compliance
• Transactions: From Reversions to Reps, Warranties and Due Diligence
Application of ABA Model Rules and Circular 230 to Employee Benefits Legal Practice Changes

• Platforms: From Government to Private Practice
• Platforms: From Outside Counsel to In-House Counsel
• Platforms: From Larger Firm to Smaller Firm Practice
• Billing Practices: From Billable Hours to Alternative Fee Arrangements
Form of Written Advice: From Opinion Letters to Emails

• The form in which written advice is generally provided on employee benefits matters has evolved from more formal opinion letters to less formal emails
• Clients often present very specific questions that need a prompt response
• Regardless of the form of written advice, Section 10.37 of Circular 230 governs tax-related employee benefits advice
Form of Written Advice: From Opinion Letters to Emails (Continued)

Formal opinion letter practice typically includes the necessary elements under Section 10.37, but in framing email advice it is always important to:

• Base the advice on reasonable factual and legal assumptions;
• Use reasonable efforts to identify and ascertain the facts relevant to the advice (see also Section 10.32);
• Avoid unreasonable assumptions;
Form of Written Advice: From Opinion Letters to Emails (Continued)

• Relate the applicable law to the facts; and
• Don’t take into account the likelihood of an audit in your evaluation (even with oral advice)
• Note particular challenges with lengthy email strings and with very specific questions that do not take context into account
From Pension Plans to Self-Directed 401(k) Plans

• The 1990s saw the promulgation of the ERISA Section 404(c) regulations and a large-scale shift to self-directed investments in defined contribution plans

• This shift largely coincided with a shift that had begun a little earlier from pension plans to 401(k) plans
From Pension Plans to Self-Directed 401(k) Plans

The evolution from pension plans to self-directed 401(k) plans has included an increase in ERISA litigation involving plan committees (e.g., employer stock drop cases beginning earlier in the 2000s and fee cases in the 2010s)

• Increased litigation led to a re-examination of how plan committees conducted business and in how attorneys provided advice
• Advising 401(k) plan committees on fiduciary matters (including selection and monitoring of investment options) gives rise to classic “who is the client” privilege concerns under Model Rule 1.6, conflicts concerns under Model Rules 1.7 and 1.9, and organization as client concerns under Model Rule 1.13
According to the Supreme Court’s decision in the *Upjohn* case:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his lawyer and the lawyer’s representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
From Pension Plans to Self-Directed 401(k) Plans (Continued)

Of course, in the practice of employee benefits, there is the so-called “fiduciary exception”

- Under this exception, attorney-client privilege cannot be asserted where an attorney is providing advice to a fiduciary in the execution of fiduciary duties
- Plan beneficiaries become the real client
- May warrant separate counsel for plan sponsor and plan
- The fiduciary exception itself is evolving exceptions
Correcting Errors: From Administrative Policy Regarding Sanctions to EPCRS

- The early 1990s saw an easing in how the IRS handled insignificant operational issues discovered on exam
- The Administrative Policy Regarding Sanctions (APRS) permitted plan corrections that would allow a plan to maintain its qualified status without imposing a monetary sanction on the employer
- In subsequent years, the IRS instituted Audit CAP, VCR, Walk-in CAP and the Administrative Policy Regarding Self-Correction (APRSC)
Correcting Errors: From Administrative Policy Regarding Sanctions to EPCRS (Continued)

• In 1998, the IRS consolidated these programs into the Employee Plans Compliance Resolution System (EPCRS), which included the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and Audit CAP

• EPCRS is updated and expanded on a periodic basis and applies to qualified plans and 403(b) plans

• Because SCP is generally limited to corrections made within two years (if the errors are significant), there is an advantage to promptly proactively identifying and resolving errors and having an updated plan document that helps qualify for SCP
Correcting Errors: From Administrative Policy Regarding Sanctions to EPCRS (Continued)

• This evolution of IRS correction programs now places a premium on plan sponsors (and their counsel) being proactive when errors are discovered.

• Of course, advice on whether or not to correct and whether to correct under EPCRS raises not only privilege issues but implicates Circular 230 (including Section 10.32 relating to diligence in how information is presented to the IRS and Section 10.37 relating to written advice).
Plan Documentation: From Individually Designed to Pre-Approved Plans

• IRS pre-approved plan documents (e.g., prototype and volume submitter plans) have existed for decades alongside individually designed retirement plans, primarily in the small- to mid-size employer market

• However, the declining universe of non-401(k) type plans (including the effective end of money purchase pension plans), has reduced the prevalence of individually designed plans, as has the suspension of new determination letters for existing, individually designed plans

• Pre-approved plans have lead to more uniformity in plan language, but not necessarily fewer operational errors since familiarity with plan terms also may be affected
Plan Documentation: From Individually Designed to Pre-Approved Plans (Continued)

Interestingly, the newly limited ability of existing individually designed plans to obtain a new IRS determination letter has given rise to an increase in opinion letters on plan document compliance

• Such opinion letters would be covered by Circular 230’s diligence (Section 10.32) and written advice (Section 10.37) provisions

• In addition, Model Rule 5.1 would be implicated depending on the process used to issue such letters
Plan Documentation: From Individually Designed to Pre-Approved Plans (Continued)

Finally, the move from plan drafting and completing determination letter applications in the case of individually designed plans to “filling in blanks” in pre-approved plans does raise questions regarding how the next generation of employee benefits attorneys is being trained, at least as to qualified plans

• Is this type of training being replaced by drafting executive compensation agreements or transactional work relating to reps, warranties and due diligence?
Executive Compensation: From Constructive Receipt to IRC Section 409A Compliance

• Nonqualified deferred compensation and other forms of executive compensation saw some limits in the 1990s, but there was more of sense of the “Wild West” and much greater disparities in the aggressiveness with which employee benefits attorneys advised clients (notwithstanding IRS Rev. Proc. 92-65 regarding the IRS advance ruling position on constructive receipt)

• Employee benefits attorneys were sometimes placed in conflict types of situations under the Model Rules when company executives wanted to push the envelope on concepts of constructive receipt and stock option backdating
Executive Compensation: From Constructive Receipt to IRC Section 409A Compliance (Continued)

• The early 2000s saw the Enron scandal and a move to curb perceived abuses relating to executive compensation with the passage of Section 409A

• The increased complexity of Section 409A compliance, along with the need to address noncompliance, has resulted in more uniformity in practice but also has required more written advice subject to Circular 230 and related considerations

• Complexity also raises issues regarding the heightened need for attorney supervision under Model Rule 5.1 and peer review
Transactions: From Reversions to Reps, Warranties and Due Diligence

The late 1980s saw Congress curb perceived abuses relating to transactions involving pension fund “raiding” through the excise tax on reversions imposed under IRC Section 4980

• As an aside, one of the earlier cases on the fiduciary exception to attorney-client privilege involved a plan reversion (*Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 543 F. Supp. 906 (D.D.C. 1982))

• The 1990s and 2000s saw just a fraction of the previous number of pension reversions (along with a decrease in overall pension funding)
Transactions: From Reversions to Reps, Warranties and Due Diligence (Continued)

Elimination of the “same desk rule” under EGTRRA in 2001 gave much more flexibility in permitting 401(k) distributions as part of a transaction by switching to a “severance from employment” standard from the more restrictive “separation from service” standard.

• The net result was that company buyers no longer needed to maintain target company 401(k) plans
Transactions: From Reversions to Reps, Warranties and Due Diligence (Continued)

Of course, even in a world “safer” for transactions including an employee benefits component:

• Transactions involving opposing counsel implicate Model Rule 4.1 (regarding truthfulness in statements to third parties) and Model Rule 5.1 (regarding supervision of other attorneys)

• Privilege issues may also arise between pre- and post-transaction entities

• Circular 230’s accuracy (Section 10.32) and written advice (Section 10.37) provisions are also implicated on tax-related issues and Section 409A and the ACA have complicated reps, warranties and due diligence
Platforms: From Government to Private Practice

• There likely are more former government attorneys practicing employee benefits law now than at any other time

• As with any other change in platform that includes a change in clients, the Model Rules and Circular 230 become relevant

• Former government attorneys moving to private practice must comply with the confidentiality provisions of Model Rule 1.6 and the conflicts rules for former clients under Model Rule 1.9
Platforms: From Government to Private Practice (Continued)

• In addition, under Section 10.25 of Circular 230, former government employees have potential lifetime, two-year or one-year bans on particular matters for specific parties that they personally and substantially participated in or had responsibility for, or if they participated in or had official responsibility for rulemaking.

• Former government attorneys should also be prepared to face more sophisticated compliance procedures imposed by private firms.
Platforms: From Outside Counsel to In-House Counsel

• The Model Rules apply to employee benefits attorneys whether they are acting as outside or in-house counsel.

• While outside counsel may often feel more comfortable in determining who the client is when dealing with in-house counsel, in-house counsel may need to apply a more detailed analysis of Model Rule 1.13 when an organization is a client.

• Similarly, Circular 230 applies to employee benefits practice even as in-house counsel to an entity.
Platforms: From Larger Firm to Smaller Firm Practice

- Larger firms tend to have rather sophisticated ethics and conflicts procedures in place (often due to malpractice carrier requirements)
- Attorneys moving to smaller firms or solo practices will need to implement appropriate procedures that comply with the Model Rules and Circular 230
- Systems should also be implemented to ensure confidentiality of client information under Model Rule 1.6(c)
- Conflicts check procedures should be documented under Model Rule 1.7
Billing Practices: From Billable Hours to Alternative Fee Arrangements

• As various portions of employee benefits law practice become increasingly commoditized (e.g., completion of prototype documents, determination letter applications, standard types of EPCRS submissions, due diligence in M&A transactions, even routine advice), clients have become less willing to simply accept an hourly fee-based system for billing and have pushed for alternative fee arrangements.

• Types of alternative fee arrangements include project-based fees, fee caps and monthly fees not directly tied to time spent.
Billing Practices: From Billable Hours to Alternative Fee Arrangements (Continued)

• In addition to affecting legal practice economics, alternative fee arrangements implicate Model Rule 1.5 and Circular 230 Section 10.27 relating to reasonableness of fees