The Employee Benefits Committee: An Increasing Focus of the Tax Section

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The Section of Taxation turns 75 in 2014; the Employee Retirement Income Security Act of 1974 (ERISA) turns 40; and the Employee Benefits Committee turns almost 50. The interrelationship among these three events deserves attention as we look back at the history of the Section.

We don’t know exactly when the Employee Benefits Committee was first organized, but it was first listed in the 1965 Bluebook Directory. A lot was happening in the pension world in the early 1960s. In 1961, President John F. Kennedy created the President’s Committee on Corporate Pension Plans; Congress enacted the Self-Employed Individuals Tax Retirement Act of 1962 (a.k.a. “Keogh Act”), which made it possible for owner-employees of unincorporated businesses and other self-employed persons to be covered under a qualified retirement plan; and Studebaker, an automobile manufacturer, closed its plant in 1963 leaving many participants in its pension plan with only ten cents on the dollar of the value of their pension benefits. Thus, the interest of the Tax Section and its members began to focus on these issues. As with other Section committees, membership was small and limited to those who practiced in the area.

Prior to the enactment of ERISA, the 1954 Code and prior tax laws provided tax benefits to “qualified retirement plans.” Tax exemption status was first granted to both stock-bonus and profit sharing plans and pension trusts in the revenue acts enacted in 1921 and 1926, respectively. Although these tax laws were amended numerous times, abuses continued to exist both in union pension plans (self-dealing) and in corporate pension plans (favoring executives over lower paid employees), but the general tax benefits of qualified plans continued—tax deductions for employer contributions, exclusion of the contributions from the employee’s income until distribution, and earnings in the pension trust continued to be tax exempt. Thus, as Congress turned to pension reform in the mid and late 1960s and qualified plans became available to self-employed lawyers, the interest of the Tax Section in these tax issues increased.

The passage of ERISA significantly revised how private and union retirement plans were regulated—both by amending the Code by adding eligibility, vesting, and minimum funding requirements for “qualified plan” status and by adding substantial reporting, disclosure, fiduciary duties, with

enforcement by the Department of Labor and by the creation of the Pension Benefit Guaranty Corporation (PBGC). The Tax Section took the lead in the ABA in addressing these issues. Its history of reviewing legislation and regulations and providing comments to the Hill staffs and the Treasury were exemplified by the Employee Benefits Committee.

Although the Employee Benefits Committee remained small during the 1970s, the practice was expanding exponentially. Treasury regulations for the new qualified plan requirements began to be proposed in 1976, and the Committee began its long history of preparing comments on the proposals and having conversations with the staffs at the Treasury, the Service, and the Joint Committee on how to make the rules more effective and efficient.

By the early 1980s a number of ABA Sections had committees which focused on employee benefits, including in addition to Tax, Business Law, Labor and Employment, Real Property, Probate and Trust Law, and General Practice. A number of employee benefits lawyers in the ABA proposed establishing a separate Section on Employee Benefits Law. The Tax Section opposed this but recognized the need to coordinate the activities of the various Sections not only as to internal ABA positions but also as to ABA’s relations with the various Federal agencies which have authority to regulate different aspects of employee benefits law. In 1981, a meeting was organized by Sherwin P. Simmons, a past chair of the Section, to establish a committee of representatives from each of the ABA Sections that then had employee benefits committees resulting in the Joint Committee on Employee Benefits (JCEB) being formally approved and established at the 1981 ABA Annual Meeting. The JCEB was organized to facilitate the exchange of information so that each member Section will know what the other Sections are doing in the employee benefits area and so that desirable coordination can be more easily effected; to establish meetings on an annual basis with government officials; and to have an annual joint program at each ABA Annual Meeting.

The Tax Section’s Employee Benefits Committee assumed the primary role in the structuring of the JCEB and its Committee Chair, Bill Sollee, became the first Chair of the JCEB. The Section has continued its participation and its leadership role in the JCEB through today. Each year, the JCEB presents extensive high quality continuing legal education programs in the employee benefits area, including approximately fifteen annual teleconferences on various up-to-the-minute benefits topics, a number of in-person national institutes on employee benefits and executive compensation topics, and over the past few years, on health care reform, and coordinates Annual Meetings with various federal agencies which have oversight of employee benefits law and regulations. Currently the JCEB has representatives from six ABA Sections: Business Law; Health Law; Labor and Employment Law; Real Property, Trust and Estate Law; Taxation; and Tort Trial and Insurance Practice.

Throughout the 1980s and 1990s the Code was amended numerous times in ways that affected employee benefits practice, and as the pension law expanded into new areas, the Employee Benefits Committee met these
challenges by creating subcommittees to focus on these issues—executive compensation, fiduciary requirements, 401(k) plans, ESOPs, defined benefit plan special issues, mergers and acquisitions, bankruptcy, etc.

These changes in the law and the issuance of proposed regulations were reviewed by the Employee Benefits Committee, and in most cases the Committee submitted comments on the substantive and technical issues raised by these changes. As Congress began to focus on the tax issues in health plans, it amended the Code by enactment of section 89 as part of the 1986 Code, which would have required certain nondiscrimination rules on employer provided health care plans and group life insurance. Over the next two years section 89 and the proposed regulations were debated in both the commercial and legal communities as imposing a large burden on employers and administratively too complicated. The Employee Benefits Committee was active in the debate. Ultimately, in 1989, Congress repealed section 89.

From time to time the Code has been used to implement social change in the executive compensation area—first with the enactment of section 280G imposing a 20% excise tax on golden parachute payments received by certain executives and the loss of the employer’s compensation deduction if certain thresholds were exceeded; next with the enactment of section 162(m) imposing a loss of deduction on compensation paid to certain executives of public companies which exceed $1 million unless specific performance criteria are met; and finally and most importantly the enactment of section 409A in 2004 providing specific requirements for deferred compensation arrangements, which if not met results in an additional 20% income tax and an interest penalty on the service provider or employee. Again the Employee Benefits Committee was very active in reviewing proposed regulations and providing comments to the Treasury and the Service as the guidance was being developed. (Section 409A has resulted in over 200 pages of regulations, and guidance is continuing to be issued ten years after enactment.)

In the mid to late 2000s, the passage of two laws has required the Committee to be extremely active in providing comments; the Pension Protection Act in 2006 added complexity to the Code’s rules for qualified plans and the Affordable Care Act rewrote the way health care will be provided. These two laws required close attention by the Employee Benefits Committee and its Health Care Subcommittee. Both laws are complex and require substantive and significant changes in the way private employers provide pensions and health care coverage to their employees.

Over the years the Employee Benefits Committee grew from a small very specialized committee to one of the Section’s largest and most complex committees. Currently it has 700-plus members and 23 subcommittees and is a model for large committee administration in the Section. Not only do these subcommittees focus on substantive areas of law, but they also focus on plan administration and include a New Employee Benefits Attorney Forum and an Employee Benefits Corporate Counsel Forum. The Committee typically
submits the greatest number of comments on legislation and regulations on behalf of the Section.

As a prior Chair of the Section and of the Employee Benefits Committee, I have watched the Committee develop and expand its jurisdiction to become one the Section’s most active committees. This has been an exciting period for the development of the tax law and an expanding area of employee benefits practice. From a committee that 40 years ago used to meet around a table in a large ballroom to the current six hours of Committee meetings over two days and 15 to 18 Subcommittee meetings at each meeting of the Section, the Employee Benefits Committee has come of age and is an extremely important part of the work of the Section of Taxation.