

NEWSLETTER



Shannon Main
CFP®, AIF®

Principal,
PensionMark

President's Message:

I hope you enjoyed the Holidays with your families and friends. For many, it was a time to reconnect with loved ones near and far and get back to enjoying family traditions or creating new ones. In addition to spending time with our family, my husband and I went to the Rose Bowl on New Year's Day. We were disappointed with the outcome (Go Utes!), but it was an exciting game and wonderful experience. Now, on to tackling those New Years resolutions!

Thanks to our Program Co-Chairs, Mindy Marburger and Michael Flatebo, and volunteer member Aksana Munoz, we have some great events coming up. On January 20th, "Tiger Lawyer" Sherrie Boutwell and "Big Plan Rescue" Auditor Diane Takahashi will go head to head and share their audit war stories. Be sure to register for the 14th Annual ABC's of Pension which will be held on January 25th, if you or your colleagues are new to the industry or want to brush up on your skills.

You will hear from a great lineup of industry experts and earn up to 5 hours of CE credits. Our February Breakfast Forum will feature a panel who will share what Plan Sponsors need to know in 2022.

While I have enjoyed seeing everyone in person over the past few months at our monthly Breakfast Forums, we feel it is prudent to pivot back to virtual meetings until the Omicron surge has passed. We are monitoring this very fluid situation and will get back to in-person meetings as soon as we feel confident that we can provide a safe environment for our members and speakers.

I wish you a Happy New Year with health, prosperity, and success in 2022!

Best Regards,

Shannon Main, Principal, Pensionmark
Orange County Chapter President

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Sherrie Boutwell

Since graduating from the UCLA School of Law in 1983, Sherrie has focused her law practice in the area of ERISA and employee benefits. With her extensive experience, Sherrie is a highly sought-after speaker, writer, and advisor. She frequently speaks for legal and benefits trade associations such as the Western Pension & Benefits Council, the National Institute of Pension Administrators, NAMWOLF, the Orange County Bar Association, and the California Lawyers Association.

Ask the Expert!

Employee Retention Bonus Plans – ERISA or Non-ERISA? by Sherrie Boutwell

As we begin 2022, employers of all sizes and industries are grappling with a severe labor shortage. Many are considering (and adopting) “employee retention bonus plans” that are designed to entice employees at all levels to stick around to receive a bonus. Some of these bonuses are paid out upon hiring, with a claw back if the employee leaves prior to completing the vesting period. Others are paid out only if the employee does not quit prior to a specified date. But are such plans subject to Title I of ERISA? As is often the case, the answer is: “it depends”.

Why does this matter? Whether or not a plan is subject to ERISA has far ranging implications. If it is subject to ERISA, then an entire regulatory scheme applies, and state law is for the most part preempted. If it is not subject to ERISA, one avoids ERISA’s regulatory protections but state law (which may in fact provide for more and more onerous remedies) applies.

ERISA Coverage - the Basics

The Employee Retirement Income Security Act of 1974 applies to both “pension plans” and “welfare benefit plans”. But not every employee benefit is a “plan”. To have a “plan” that is subject to ERISA, there must be an ongoing administrative scheme.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). For example: “we will pay you \$1,000 in a lump sum when you leave the company” is deferred compensation but does not require any ongoing administration so is not likely a “plan”.

If there is a “plan,” then to be subject to ERISA, it must be a type of plan that is covered by Title I of ERISA, which applies to “pension” plans and to “welfare benefit” plans. Pension plans are plans that provide for retirement benefits or deferral of income to termination of employment and beyond. ERISA Section 3(2). Welfare plans are plans providing “(i) medical, surgical, or hospital care or benefits, or benefits in the event of

or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. ERISA Section 3(1).

Other types of plans fall outside of these definitions - these include payroll practices, certain “voluntary plans”, most equity-based plans and most “bonus plans.” But not every bonus plan falls outside of ERISA, there are situations where such plans have been found to be pension plans and therefore subject to ERISA.

What is a Bonus Plan?

For purposes of Title I of ERISA, the terms “employee pension benefit plan” and “pension plan” do not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees. DOL Reg. § 2510.3-2(c). These standards apply to the plan both in form and in operation.

The purpose expressed in the plan is critical but not determinative. “Whether the primary purpose of the plan is to provide deferred compensation or other retirement benefits” is a “paramount consideration” in determining whether a plan is a pension plan or exempt bonus plan). See Rich v. Shrader, 823 F.3d 1205, 1210 (9th Cir. 2016).

Courts generally uphold treatment as a bonus plan where payments are intended as incentives and are not systematically deferred to termination of employment. See, e.g., the discussion in Vincenzo v. Hewlett-Packard Co., No. Case No.: 3:12-cv-03480-JCS, 2012 BL 267514, 54 EBC 2386, 2012 US Dist Lexis 146161, 2012 WL 4838442 (N.D. Cal. Oct. 10, 2012).

What is not a Bonus Plan?

Although a plan may be drafted to be a bonus plan, it may still be a pension plan in operation. According to the ***Continue reading on p. 3***

Employee Retention Bonus Plans – ERISA or Non-ERISA?

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Department of Labor, a Plan can be “viewed by the Department as a pension plan as a result of surrounding circumstances. Based on the facts provided, the Plan might be regarded as a pension plan as a result of surrounding circumstances if it is administered in a manner that has the effect of providing retirement income to employees, if it results in a deferral of income by employees extending to termination of covered employment or beyond, or if communications to Plan participants suggest that the Plan is established or maintained for the purpose of providing retirement income or to defer income to the termination of covered employment or beyond. For example, if an employer or any person acting directly or indirectly in the interest of an employer prevents or discourages participants’ requesting or receiving a distribution of their property or reselling stock acquired under the arrangement, the Department may view the arrangement as a pension plan within the meaning of section 3(2)(A) of ERISA.” DOL Advisory Opinion 90-17A.

More from the DOL: “[T]he manner in which bonus percentages are negotiated by employees yearly may allocate the economic benefits earned in a year disproportionately to retirees and participants reaching retirement age; and payments may not be made under

the plan often enough or within a reasonable time to avoid their actually serving as retirement income. Furthermore, if the plan is communicated to participants in a manner that causes them to act under the Plan so as to result in their deferring receipt of income until retirement, it may be deemed a pension plan.” DOL Advisory Opinion 98-02A.

Where the circumstances result in deferral of income to termination of employment, a plan will be found to be a pension plan and not a bonus plan. See, e.g., Bingham v. FIML Natural Res., LLC, Civil Action No. 13-cv-00167-CMA-KMT., 2013 BL 160845, 56 EBC 2232 (D. Colo. June 18, 2013)(bonus plan was a pension plan where a portion of the bonus could not be paid until termination of employment) and Kaufman v. S & A Restaurant Corp., where the court denied a motion to dismiss and found that although a phantom stock plan was designed to be an incentive plan, because the Plan only provided a chance to redeem 40% of vested points, and only once every 2 years, the plan systematically deferred payment until termination of employment. Kaufman v. S & A Restaurant Corp., CIVIL ACTION NO. 3:06-CV-2192-G ECF., 2008 BL 113325, 44 EBC 2589, 6 EXC 82, 2008 Us Dist Lexis 43029, 2008 WL 2242621 (N.D. Tex. May 30, 2008), Court Opinion (05/30/2008).

In other cases where deferred compensation plans were argued to be bonus plans, but the facts did not support that characterization, the courts have found such plans to be pension plans under ERISA. See, Tolbert v. RBC Capital Mkts. Corp., 758 F.3d 619, 2014 EXC 10092, 58 EBC 2037 (5th Cir. 2014)(deferred compensation plan not a bonus plan) and Wilson v. Safelite Grp., Inc. 930 F. 3d 429 (6th Cir 2019)(plan does not qualify as a bonus plan, even though withdrawals could be made during employment because it was designed to be a deferred compensation plan rather than bonus plan).

Conclusion

Employee retention bonus plans are growing in popularity and in general should be exempt from ERISA. However, to qualify as a bonus plan that is exempt from ERISA, it is important that the plan be both written properly (e.g., recite that it is intended as an incentive tool) and designed and operated in such a way that income is not systematically deferred until termination of employment.

War Stories: Tiger Lawyer vs. Big Plan Rescue

Thursday, January 20, 2022

8:00 am – 9:45 am PST



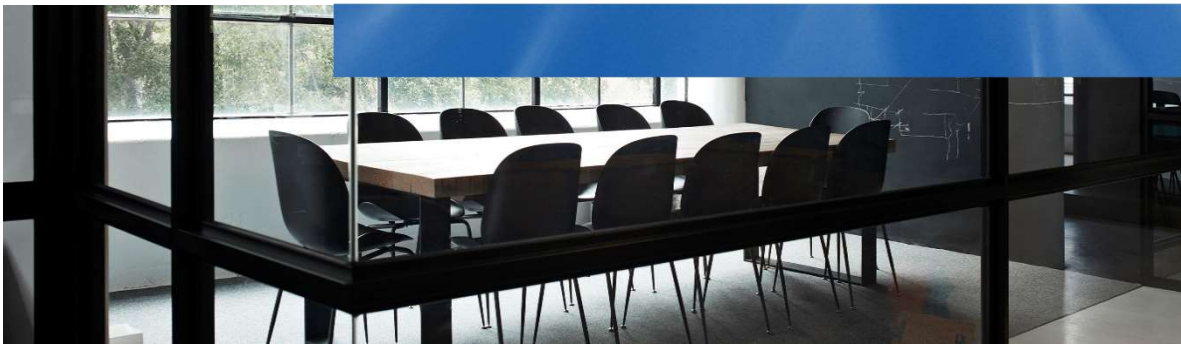
This lawyer vs. accountant session will cover the trials and tribulations of an ERISA lawyer and an ERISA plan auditor as they share their war stories of working through struggles with annual plan audits.

Sherrie Boutwell & Diane Takahashi will be sure to keep you engaged with their upcoming webinar.

Click here to register:

<https://wpbcorangecounty.org/event-4591130>





Member Profile: Phuong Jennings

Describe what services your business provides. Plan design, compliance, actuarial and third-party administration for qualified and non-qualified retirement plans

Why do you support WP&BC OC? In this industry, you need to be continuously learning. I love that WP&BC OC provides a place for retirement professionals, rookies or seasoned, to learn and grow our knowledge in this evolving industry. Even those like myself that's been in the industry for decades can "sharpen our axe" as we learn from others and network.

What changes have you seen in the retirement plan marketplace over the past 5-10 years? There have been SO many changes in just the last few years. From rules and regulations to mergers / acquisitions and consolidations with key players in our industry, it's ever changing still. However, the most impactful and the one that's near to my TPA heart is the retroactive adoption of Profit Sharing and Pension plans from the SECURE Act. For TPA sales, this was a game changer! It's been years since I've been able to take time off at year end to enjoy the holidays with my family. I'm usually "crazy mom" in December. Hence, why I was able to take the last 2 weeks of December off!

What new directions do you see the industry taking? I do think there will be continuous consolidation in the next few years, more than before. There will be more retirement plans opportunity as these state mandated plans like CalSavers are implemented in the other parts of the country. The MEP/PEP space will continue to grow due to this. Many exciting things to come!

What do you perceive as some of the biggest obstacles to plan sponsors or those servicing plans? They don't know what they don't know. Most plan sponsors don't have a dedicated HR department or team to run their 401(k) administrative functions. So when a small company sets up a new 401(k) plan, they are oblivious to the roles and responsibilities and fiduciary liability they took on as a plan sponsor. Oh, and good luck with contribution remittance with

no payroll integration. Oh, and good luck with contribution remittance with no payroll integration. Most business owners don't want to do this extra work. They need to focus on running their business and not being bogged down with the extra responsibilities or not knowing what they need to do. That's why I think the outsourced 3(16) Fiduciary Service model will continue to be a hot commodity for plan sponsors and I have certainly seen an uptick of engagement for these services.

What do you think we can do as an industry to help overcome those obstacles? Education and communication! Since we are the industry professionals, we need to set realistic expectation and effectively educate these plan sponsors . It is also important to have the right (good) team working with them - Advisor, Recordkeeper, TPA, CPA, Payroll. A "dream team" can help provide the education, good communication and help streamline processes that can bring a lot of relieve and take the burden off the plan sponsor. Importantly, they can help plan sponsors avoid pitfalls of being out of compliance which are sometimes expensive mistakes.

How did Covid affect the way you do business? Covid has effected by business in a very positive way. I've definitely grown my business with the power of Zoom so more gets done vs. sitting in traffic trying to go from one meeting to another. I can't say I don't miss the live human connection as my extrovert side was dying inside. However, the efficiency in time has allowed for business growth and some more family time.

What is your favorite restaurant in Orange County? There are so many! Water Grill is up there since I'm a seafood girl.

If you had a day off what would you like to be doing? What I'd like to do is *nothing* with a "do not disturb" sign, but my kids would never comply. So in reality, my day off would be hanging out and doing something fun with them.



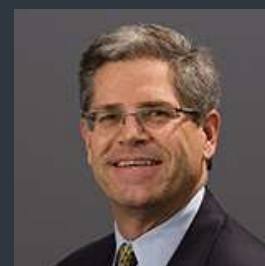
Phuong Jennings, QKA
Regional Vice President, EGPS



Join Phuong on January 25th at the 14th Annual ABCs of Pension Plans

Click here to register today!

<https://wpbcorangecounty.org/event-4572324>



Member Profile: John Lessley

Describe what services your business provides.

Dimensional Fund Advisors is a Money Manager providing services to Institutional Investors and Register Investment Advisors.

Why do you support WP&BC-OC?

WP&BC-OC has created a welcoming environment, a group of professionals looking to learn and share ideas and best practices.

What changes have you seen in the retirement plan marketplace over the past 5-10 years?

The DC business is becoming more focused and specialized with the consolidation among recordkeepers and consultants. Fiduciaries are focusing on participant outcomes.

What new directions do you see the industry taking?

The pandemic has shined a light on the importance of financial wellness for employees to meet their goals, as many tapped into their retirement savings just to survive. A focus on financial wellness will mean a greater emphasis on technology that can offer tools, education, and advice tailored to participants' unique needs and objectives. Additionally, as Millennials become a larger part of the workforce, the concept of investing in line with your values will continue to grow.

What do you perceive as some of the biggest obstacles to plan sponsors or those servicing plans?

The constantly evolving regulatory landscape is in some ways a distraction from what should be the key objective: helping participants achieve better outcomes. Additionally, going back to financial wellness, the competition to recruit/retain employees is fierce, so plan sponsors will have to start offering a more comprehensive financial wellness programs as a key pillar in their retirement programs.

What do you think we can do as an industry to help overcome those obstacles?

Provide plan sponsors with the tools and fiduciary education they need to meet their obligations and educate plan participants for better retirement outcomes which is the main tenet of ERISA.

How did Covid affect the way you do business?

I learned what Zoom is and forgot where my office is located!

What is your favorite restaurant in Orange County?

Market Broiler

If you had a day off what would you like to be doing?

Skiing, bodysurfing, hiking or biking

John Lessley

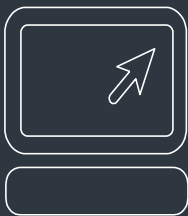
Vice President,
Dimensional Fund
Advisors



[WP&BC Orange County Chapter - Membership \(wpbcorangecounty.org\)](https://wpbcorangecounty.org)

Advantages of Membership

- ❖ The best topics
- ❖ The best speakers
- ❖ The best opportunities to add to business relationships
- ❖ The most CE credits



Webinar Update

Due to the influx of Omicron cases in Orange County, we have decided to meet online. We look forward to seeing you in person soon.



Upcoming Events

- **War Stories: Tiger Lawer vs. Big Plan Rescue**

January 20, 2022 Webinar from 8:00am-9:45am PST

This lawyer vs. accountant session will cover the trials and tribulations of an ERISA lawyer and an ERISA plan auditor as they share their war stories of working through struggles with annual plan audits. Featuring **Sherrie Boutwell** and **Diane Takahashi**.

- **14th Annual ABCs of Pension Plans, an all day webinar**

January 25, 2022 Webinar from 8:00am-3:30pm PST

This special program has been designed to provide a basic foundation of pension knowledge to those new to this field. **Join our experts in this all day webinar!**

- **2022 Plan Administration & Beyond**

February 17, 2022 Location: TBD 8:00am-9:45am PST

It's a new year and a great opportunity to discuss what plan sponsors need to pay close attention to in 2022. You would have an opportunity to hear from an advisor, auditor, and recordkeeper on important topics related to retirement plan administration. **Join our informative panel discussion!**

- **PEPs and Cal Savers**

March 17, 2022 Location: TBD 8:00am-9:45am PST

Join Katie Selenski and Ted Schmelzle in the discussion this spring!



Breakfast Forum – October 28, 2021

Andy Hermann, Rick Unser, Scott Harrison, Peter Stephan



Breakfast Forum – November 11, 2021

Michael Flatebo, Taylor Pluss, Jordan Schroeder



14th Annual ABCs of Pension Plans Webinar

Topics Include

- Law Basics
- Types of plans
- ERISA
- Plan administration
- Plan funding and fiduciary responsibilities
- Plan design and requirements
- Employer obligations & concerns
- Auditing a qualified plan

Our Instructors

Hitz Burton, JD, Partner, AON

Phuong Jennings, QKA, Regional Vice President, EGPS, Inc.

Mark Murphy, CPA, Managing Partner/Audit Partner, LTSP, Inc.

Tina Schackman, CFA, CFP, Principal, Benefit Financial Services Group (BFSG)

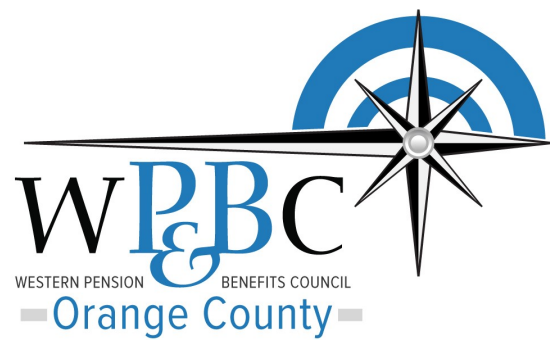
Register Today!

**January 25, 2022
8:30am-3:30pm PST**

***\$125 for WP&BC members
\$175 for non-members
\$30 GrubHub lunch credit included***

Continuing Education
5 credit hours ASPPA, CEBS, CPA (CA), ERPA,
MCLE, NIPA, AIF (pending), CFP (pending)

For further details, contact us
info@wpbcorangecounty.org
www.wpbcorangecounty.org



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