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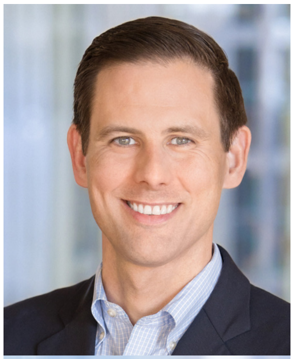
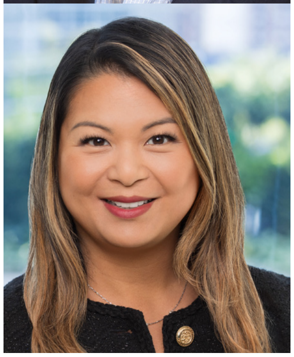
BENEFITS REPORT

A Closer Look at Arbitration Provisions in ERISA Breach of Fiduciary Duty Claims





BRIAN D. MURRAY and ANGEL L. GARRETT

DECEMBER 2023

As plan sponsors increasingly look to arbitration provisions to avoid costly class action litigation, courts across the nation have weighed in on whether plan-wide claims for breach of fiduciary duty under ERISA § 502(a)(2) can be subject to mandatory arbitration.

ERISA § 502(a)(2) provides that a civil action for breach of fiduciary duty may be brought for the benefit of the plan as a whole. While every circuit court to consider the issue — the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits — has recognized that claims under ERISA are generally arbitrable, there is a split in the courts on whether plan-wide claims for breach of fiduciary duty under ERISA § 502(a)(2) can be forced into arbitration. In determining whether to enforce arbitration clauses, courts generally examine one or both of the following questions: First, did the plan (on whose behalf a claim for breach of fiduciary duty under ERISA § 502(a)(2) is brought) consent to the arbitration agreement? Second, does the arbitration agreement abrogate substantive rights under ERISA?

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Cases Holding Arbitration Agreements Unenforceable

Prospective Waiver of Statutory Remedies Unenforceable

The Third, Seventh and Tenth Circuits have refused to enforce arbitration clauses that purported to prospectively waive statutory remedies available under ERISA. *In Smith v. Bd. of Directors of Triad Mfg., Inc.*,[1] the Seventh Circuit refused to enforce an arbitration/class action waiver provision in an employee stock ownership plan (ESOP). The provision precluded the arbitrator from "providing additional benefits or monetary or other relief to anyone other than Claimant." The court held that the provision was unenforceable because it prospectively waived statutory remedies available under ERISA. The court made clear that it only took issue with the waiver of substantive statutory remedies—*not* the waiver of the procedural right to bring a class action. Likewise, in *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*,[2] the Tenth Circuit held that the arbitration provision in an ESOP was invalid because it prevented the plaintiff from effectively vindicating his right to pursue plan-wide remedies under ERISA. In *Henry v. Wilmington Trust NA*,[3] the Third Circuit similarly refused to enforce an arbitration provision because it purported to prospectively waive participants' rights to seek remedies expressly authorized by ERISA.

ERISA Claims Outside the Scope of Arbitration Provision

Some courts have refused to compel arbitration of plan-wide ERISA claims on the ground that the claims were not within the scope of the arbitration provisions at issue. In *Cooper v. Ruane Cunniff & Goldfarb Inc.*,[4] the defendant moved to compel arbitration of plaintiff's plan-wide ERISA § 502(a)(2) claims based on an arbitration provision contained in the plaintiff's individual employment agreement, which covered "[a]ll legal claims arising out of or relating to employment." The Second Circuit held that the ERISA claims were outside the scope of the arbitration provision because they did not "relate to" plaintiff's employment.

Likewise, in *Hawkins v. Cintas Corporation*,[5] the Sixth Circuit held that former employees' plan-wide ERISA § 502(a)(2) claims fell outside the scope of arbitration agreements contained in the employees' individual employment agreements because the plan — on whose behalf the claims were brought — did not consent to arbitration. Rather, only plaintiffs (in their individual capacities) did.

Cases Holding Arbitration Agreements Enforceable

On the other hand, the Ninth Circuit and some district courts in other circuits, have enforced the arbitration of claims seeking plan-wide relief under ERISA.

In *Dorman v. Charles Schwab Corp.*,[6] a former Schwab employee and participant in Schwab's 401(k) plan filed a putative class action on behalf of the plan, alleging fiduciary breaches under ERISA and seeking plan-wide relief. The defendants moved to compel individual arbitration based on an arbitration/class action waiver provision in the plan document. The Ninth Circuit held that the arbitration provision was enforceable because the plan (to which the § 502(a)(2) claim ultimately belonged) consented, even though the provision was added to the plan after Plaintiff filed suit. *Dorman* therefore stands in contrast to the Ninth Circuit's prior decision in *Munro v. University of Southern California*,[7] where the court held that arbitration provisions in individual employment agreements did not bind the plan because the plan never consented to arbitration.

In *Holmes v. Baptist Health S. Fla., Inc.*,[8] the United States District Court for the Southern District of Florida, which is in the Eleventh Circuit, enforced a mandatory arbitration and class action-waiver provision in a defined contribution 403(b) plan. The arbitration provision precluded relief that provides "additional benefits or monetary relief to any person" other than the claimant. Because, the court reasoned, a waiver of the right to bring a class action is permissible, the concomitant waiver of remedies associated with class actions is also permissible.

More recently, in *Merrow v. Horizon Bank*,[9] the United States District Court for the Eastern District of Kentucky, which is in the Sixth Circuit, held that an arbitration provision in an ESOP was enforceable because the plan consented. There, the arbitration provision broadly provided that, "[i]n exchange for participation in this Plan, each Claimant agrees to arbitrate and be bound by the final and binding arbitration result of any dispute, claim or controversy arising hereunder." The ESOP also contained a class action waiver. The court rejected the plaintiffs' argument that these provisions prospectively waived statutory rights and were thus invalid. The court reasoned that the provisions did not place limitations on the recovery available under ERISA, only the manner in which plaintiffs' rights would be processed.

Supreme Court Declines to Address the Issue

The U.S. Supreme Court recently declined to weigh in on whether plan-wide ERISA § 502(a)(2) claims can be subject to arbitration. Specifically, in October 2023, the Court declined to review the Third and Tenth Circuits' decisions in *Henry* and *Harrison*, in which those courts held arbitration provisions were unenforceable because they prospectively waived remedies available under ERISA, thereby preventing participants from effectively vindicating their rights under the statute. In January 2023, the Court also declined to review the Sixth Circuit's decision in *Hawkins*, in which the Sixth Circuit affirmed the district court's holding that the plan did not consent to arbitration provisions in individual employment agreements. Thus, for the time being, the question of whether plan-wide ERISA claims can be subject to arbitration will be left to a patchwork of different federal court decisions.

Practical Considerations

Plans and plan sponsors deciding whether to include an arbitration provision in their plans should weigh the possible pros and cons carefully. On the one hand, arbitration provisions with class action waivers may make it more difficult for plaintiffs to seek plan-wide relief, as plaintiffs will need to bring multiple individual arbitrations rather than one class or collective action. Additionally, arbitration is often viewed as a more efficient forum than federal court by employers, as arbitrations typically resolve more quickly, and appeal rights are significantly more limited than in federal court.

On the other hand, defending against multiple individual arbitrations may be burdensome and inefficient. There is also the risk of inconsistent decisions by different arbitrators, as well as the risk that a particular arbitrator might grant equitable relief, which includes reformation or removal of fiduciaries. Moreover, the difficulty in overturning an arbitrator's decision (except in rare circumstances), coupled with the risk that an arbitrator may not be an expert in the nuances of ERISA, could ultimately backfire.

Once the decision to add an arbitration provision is made, plan sponsors should include the arbitration provision in the plan document itself, as courts have held arbitration provisions in individual employment agreements are generally unenforceable in the context of plan-wide claims for relief. Further, plan sponsors should consider not including language that prospectively waives statutory remedies available under ERISA.

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1 13 F.4th 613 (7th Cir. 2021).

2 59 F.4th 1090 (10th Cir.), *cert. denied sub nom. Argent Trust Co., et al. v. Harrison*, No. 23-30, 2023 WL 6558426 (U.S. Oct. 10, 2023).

3 72 F.4th 499 (3d Cir.), cert. denied, No. 23-122, 2023 WL 6797729 (U.S. Oct. 16, 2023).

4 990 F.3d 173 (2d Cir. 2021).

5 32 F.4th 625 (6th Cir. 2022), cert. denied, 143 S. Ct. 564, 214 L. Ed. 2d 335 (2023).

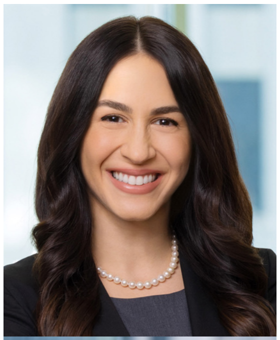
6 780 Fed.Appx. 510 (9th Cir. 2019).

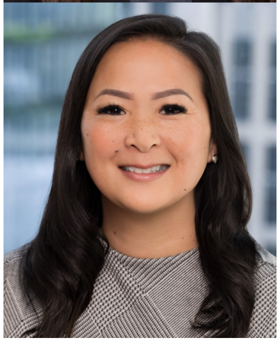
7 896 F.3d 1088 (9th Cir. 2018).

8 No. 21-22986-CIV, 2022 WL 180638 (S.D. Fla. Jan. 20, 2022).

9 No. 22-cv-123, 2023 WL 7003231 (E.D. Ky. Oct. 24, 2023).

Self-Correction of Plan Failures Made Easier—At Least For Now





ADRINE A. CARGILL and JOELLE TAVAN

DECEMBER 2023

Since 1990, the Internal Revenue Service (IRS) has provided plan sponsors with programs and related mechanisms to correct plan qualification failures (or "defects") and avoid significant penalties for their failures to comply with certain of the tax-qualification requirements under section 401(a) of the Internal Revenue Code ("Code"). In response to requests by practitioners, in 1998, the IRS modified and consolidated its remedial guidance for qualified plans under the Employee Plans Compliance Resolution System (EPCRS). The IRS has since periodically updated and modified EPCRS and its component correction programs. EPCRS was most recently revised and restated in Revenue Procedure 2021-30 (Rev. Proc. 2021-30).

In its current form, EPCRS continues to offer the following three programs for plan sponsors to use in correcting plan failures, thereby avoiding the consequences of plan disqualification (i.e., the immediate and retroactive loss of all favorable tax treatment extended to tax-qualified plans under the Code[1]):

Self-Correction Program (SCP), which permits plan sponsors to correct certain plan failures without seeking IRS approval or paying a fee;

Voluntary Correction Program (VCP), which permits plan sponsors to disclose to the IRS plan defects and proposed methods of correction through the filing of a written application and payment of a relatively modest application fee (the application must be filed before the plan is under examination), and obtain IRS written approval of agreed-upon corrective actions;

Audit Closing Agreement Program (Audit CAP), which permits plan sponsors to pay a negotiated monetary sanction.

In this article, we focus on the expansion of the SCP rules under the SECURE 2.0 Act of 2022 ("SECURE 2.0"), and IRS Notice 2023-43 ("Notice").

I. SCP Under the Current Version of EPCRS (Rev. Proc. 2021-30)

Rev. Proc. 2021-30 sets forth EPCRS for sponsors of qualified plans, 403(b) plans, SEPs, and SIMPLE IRA plans that have failed to satisfy the requirements of Code sections 401(a), 403(a), 403(b), 408(k), or 408(p) of the Code. In addition to setting forth the requirements of SCP, VCP and Audit CAP, EPCRS provides correction principles, rules of general applicability, and certain IRS-approved correction methods.

EPCRS provides that, under SCP, a plan sponsor of a qualified plan or a 403(b) plan generally may self-correct insignificant operational failures at any time (even if they are discovered on examination) — and may self-correct certain significant operational failures and plan document failures by the last day of the third plan year following the plan year in which the failure occurred.

To be eligible for SCP, EPCRS requires that a plan sponsor have established practices and procedures designed to promote and facilitate overall compliance with applicable Code requirements. In addition, to be eligible for correction of significant plan failures under SCP, a qualified plan or a 403(b) plan must, as of the date of correction, be the subject of a favorable letter.[2]

Importantly, under SCP, a plan sponsor must self-correct a failure in accordance with the principles and rules of general applicability described in EPCRS. Certain failures (i.e., certain plan document and participant loan failures, and employer eligibility and demographic failures) are not eligible for correction under SCP and, therefore, can be corrected in accordance with EPCRS only through the filing of an application under VCP. EPCRS sets forth permitted correction methods for loan failures and identifies the loan failures that may not be corrected under SCP.

II. Expansion of SCP Under SECURE 2

SECURE 2.0 provides that, except as otherwise provided in the Code, regulations, or other IRS guidance of general applicability, any "eligible inadvertent failure" to comply with applicable Code requirements is eligible for self-correction under EPCRS,[3] as long as 1) the failure is not first identified by the IRS prior to any actions that demonstrate a "specific commitment" to correcting such failure, and 2) the self-correction is completed within a reasonable period after the failure is identified.

A. Eligible Inadvertent Failure Defined

SECURE 2.0 broadly defines an eligible inadvertent failure as a failure that occurs notwithstanding the plan sponsor's practices and procedures. An eligible inadvertent failure does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

B. Period to Correct Eligible Inadvertent Failures

SECURE 2.0 sets no deadline for self-correcting an eligible inadvertent failure (provided the failure is corrected before it is identified by the IRS and within a reasonable period after it is identified by the plan sponsor), and specifically provides that the correction period "is indefinite and has no last day" except as otherwise provided in the Code, regulations, or other IRS guidance of general applicability. Thus, eligibility for self-correction is driven by when an error is discovered, rather than when it occurred.

C. Upcoming Revisions to Rev. Proc. 2021-30

In SECURE 2.0, Congress instructs the IRS to revise Rev. Proc. 2021-30, or any successor guidance, to include these new provisions regarding the self-correction within 2 years after the date SECURE 2.0 was enacted (i.e., by December 29, 2024). Congress also instructs the IRS to issue specific guidance on the correction methods for eligible inadvertent failures, including general principles of correction if a specific correction method is not specified by the IRS.

III. IRS Notice 2023-43 – Interim Guidance

On May 25, 2023, the IRS issued Notice 2023-43, which provides interim guidance on the expansion of self-correction under SECURE 2.0, pending SECURE 2.0 and other updates to EPCRS. The Notice provides that if certain conditions are satisfied, a plan sponsor may self-correct an eligible inadvertent failure before the IRS updates Rev. Proc. 2021-30.

The Notice does not address the other sections of SECURE 2.0 that relate to plan corrections, including the recovery of plan overpayments and correction of automatic contribution errors. Further, the Notice does not address any elements over which the Department of Labor has authority. Plan sponsors may rely on the Notice until the next version of EPCRS is published, and may apply a good faith, reasonable interpretation of the SECURE 2.0 Act changes for any self-correction completed on or after December 29, 2022, and before the issuance of the Notice.

TRUCKER HUSS COMMENT: Plan sponsors need not worry about unwinding any self-corrections completed after SECURE 2.0 was enacted, but before the Notice was issued, if such corrections were based on a good faith, reasonable interpretation of SECURE 2.0.

A. Failures That May Be Self-Corrected

A plan sponsor may self-correct eligible inadvertent failures before the IRS updates EPCRS, if the following conditions are satisfied:

(i) The IRS does not identify the failure prior to any actions demonstrating a specific commitment to implement a self-correction of that failure;

(ii) The plan sponsor completes the self-correction within a reasonable period after the failure was identified;

(iii) The failure is not egregious, does not directly or indirectly relate to an abusive tax avoidance transaction, and does not relate to the diversion or misuse of plan assets; and

(iv) The self-correction satisfies all of the provisions applicable to self-correction set forth in Rev. Proc. 2021-30, including that:

- The plan sponsor must have established practices and procedures reasonably designed to promote and facilitate overall compliance with applicable Code requirements;
- The plan sponsor must apply the correction principles and rules of general applicability set forth in Rev. Proc. 2021-30;
- The plan sponsor may, but is not required to, self-correct using a safe harbor correction method set forth in Rev. Proc. 2021-30; and
- The plan sponsor may not use a correction method that is prohibited under Revenue Procedure 2021-30.

B. Failures That May Not Be Self-Corrected

Plan sponsors may not self-correct the following eligible inadvertent failures before the IRS updates Rev. Proc. 2021-30:

(i) A failure to initially adopt a written plan for a Code Section 401(a) qualified plan, 403(a) qualified annuity plan, 403(b) plan, 408(k) SEP or 408(p) SIMPLE IRA plan, including the failure to timely adopt a written 403(b) plan document to meet the requirements of the 2007 IRS final regulations under Section 403(b);

(ii) A failure in an orphan plan;

(iii) A significant failure in a terminated plan;

(iv) A failure that involves excess contributions to a SEP or SIMPLE IRA plan and that is corrected by permitting the excess contributions to remain in an affected participant's IRA;

(v) A demographic failure that is corrected using a method other than a method set forth in Treasury Regulations Section 1.401(a)(4)-11(g);

(vi) An operational failure that is corrected by a plan amendment that conforms the terms of the plan to the plan's prior operations in a manner that is less favorable for a participant or beneficiary than the original terms of the plan;

(vii) A failure occurring in a SEP with a plan document that does not consist of either a valid Model Form 5305-SEP or 5305A-SEP or a prototype SEP;

(viii) A failure occurring in a SIMPLE IRA plan with a plan document that does not consist of either a Model Form 5305-SIMPLE or 5304-SIMPLE or a prototype SIMPLE IRA plan; and

(ix) A failure in an ESOP that involves Code Section 409 (qualification requirements for tax credit ESOPs) in which tax consequences other than plan disqualification are associated with the failure.

C. Certain Provisions of Rev. Proc. 2021-30 Do Not Apply

Pending IRS updates to EPCRS, the following provisions of Rev. Proc. 2021-30 do not apply to the self-correction of an eligible inadvertent failure:

(i) The requirement that a qualified plan or a Code Section 403(b) plan be the subject of a favorable letter from the IRS;

(ii) The prohibition of self-correction of demographic failures and employer eligibility failures;

(iii) The prohibition of self-correction of significant failures under SEPs and SIMPLE IRA plans;

(iv) The prohibition of self-correction of certain loan failures;

(v) The provisions relating to self-correction of significant failures that have been substantially completed before the plan or plan sponsor is under examination by the IRS; and

(vi) The requirement that the correction of a significant failure must be completed or substantially completed by the end of a specified correction period (generally, the last day of the third plan year following the plan year in which the failure occurred).

D. Demonstration of Commitment to Implement SCP and Completion of Correction Within a Reasonable Period: A Facts and Circumstances Test

Until the IRS updates EPCRS, once the plan or plan sponsor comes under examination, the eligible inadvertent failure is no longer eligible for self-correction unless the plan sponsor has, before the plan or plan sponsor comes under examination, demonstrated a specific commitment to implement a self-correction of the eligible inadvertent failure. A determination as to whether actions taken by a plan sponsor demonstrate a specific commitment to implement the self-correction of an identified eligible inadvertent failure will be made based on all the facts and circumstances. The plan sponsor's actions must generally demonstrate that the plan sponsor is actively pursuing correction of the specific identified failure. Note that the mere completion of an annual compliance audit or adoption of a general statement of intent to correct failures when they are discovered are not actions demonstrating a specific commitment to implement the self-correction of an identified failure.

Similarly, pending updates to EPCRS, for purposes of ascertaining whether the self-correction of an eligible inadvertent failure has been completed within a reasonable period after it has been identified by the plan sponsor, a "reasonable period" will be determined by considering all relevant facts and circumstances.

Except with respect to an employer eligibility failure, a failure that has been corrected by the last day of the 18th month following the date the plan sponsor identifies the failure will be treated as having been completed within a reasonable period after it has been identified. A self-correction of an eligible inadvertent failure that is an employer eligibility failure will be treated as having been corrected within a reasonable period after it has been identified by the plan sponsor only if the plan sponsor ceases all contributions to the plan as soon as reasonably practicable after the failure is identified and no later than the last day of the 6th month following the date the failure is identified.

E. No Additional Recordkeeping Requirements

Section 305 of SECURE 2.0 does not provide any new IRS recordkeeping requirements with respect to the self-correction of an eligible inadvertent failure. However, current IRS recordkeeping requirements continue to apply. Accordingly, if the IRS so requests upon an examination of the plan, a plan sponsor must be able to provide documentation that:

(i) Identifies the failure, including the years of occurrence;

(ii) Explains how the failure occurred and demonstrates that there were established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance which were in effect when the failure occurred;

(iii) Identifies and substantiates the correction method and the date of the completion of the correction; and

(iv) Identifies any changes made to those established practices and procedures to ensure that the same failure will not recur.

TRUCKER HUSS COMMENT: Plan sponsors must ensure they have practices and procedures in place reasonably designed to facilitate compliance with the qualified plan rules. Failure to do so will prevent the plan from being eligible for SCP. Additionally, plan sponsors who take advantage of the expansion of self-correction should be careful to properly document the dates when defects were discovered, all corrective actions taken, and when they occurred.

Conclusion

The expansion of the self-correction rules of plan failures under SECURE 2.0 is a welcome relief to plan sponsors. Additionally, the Notice provides much-needed guidance on which plan sponsors can rely until EPCRS is updated. Plan sponsors should take this opportunity to address and correct any outstanding failures as soon as possible. Because of the limited, non-comprehensive nature of the guidance, however, plan sponsors should continue to work closely with their advisors before relying on the new guidance for any self-correction method that is not currently permitted by EPCRS and specifically addressed in the Notice.

Lastly, we note that the expansion of self-correction under EPCRS follows a proposal by the Department of Labor to expand corrections under its Voluntary Fiduciary Correction Program. In November 2022, the Department of Labor proposed a rule that would permit fiduciaries to self-correct errors related to the repayment of loans and delayed investment of employee contributions. Our Newsletter Article on the Department of Labor's proposed rule can be found here.

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1 Favorable tax treatment includes the current deductibility of contributions to the retirement plan by the employer, the deferral of income tax on the earnings on plan assets, and no current taxation to the employees based on the contributions made on their behalf, as well as the ability to further defer taxation by rolling over the benefits to another qualified plan or an IRA.

2 A favorable determination letter is issued by the IRS in response to a request by a plan sponsor as to the qualified status of its retirement plan; it expresses the IRS's opinion regarding the form of the plan (based on applicable IRS-issued Cumulative and Required Amendments Lists); and it applies only to the employer and the plan participants on whose behalf the determination letter was issued.

3 This also includes eligible inadvertent failures relating to a loan from a plan to a participant, which may be self-corrected according to the rules of Rev. Proc. 2021-30, including the provisions related to whether a deemed distribution must be reported on Form 1099-R.

FIRM NEWS

On November 4, **Clarissa Kang** was inducted as a 2023 Fellow of The American College of Employee Benefits Counsel (ACEBC). Clarissa is the eleventh Trucker Huss attorney to be inducted into the ACEBC.

The ACEBC is an invitation-only organization of nationally recognized employee benefits legal experts with twenty or more years of experience. Selection as a Fellow reflects the Board's judgment that a nominee has made significant contributions to the advancement of the employee benefits field.

On December 7, **Dylan Rudolph** co-paneled a webcast for The Knowledge Group: *What's Next in ESG Investments and ERISA's Fiduciary Duties?* This on-demand webcast discusses trends and key features of the new ERISA Fiduciary Rule and best compliance practices.

On February 23–24, Dylan will be a participant at the TIPS 48th Annual Midwinter Symposium on Employee Benefits, ERISA, Life, Health & Disability Insurance, and Insurance Regulation to be held in San Diego. Dylan will participate in a discussion on the impact of Artificial Intelligence on Insurance and the impact of AI on fiduciary responsibilities under ERISA plans.

On December 11, **Stephanie Lao** joined Trucker Huss as an associate based in our Los Angeles office. She is a graduate of Northeastern University and Emory University School of Law. Welcome, Steph!

On December 20, **Mary Powell** and **Alaina Harwell** will present a webinar, *Family-Forming Benefit Plans — ERISA and Tax Considerations,* on behalf of the ABA's Joint Committee on Employee Benefits. Topics will include:

- Types of family-forming benefits subject to ERISA
- Compliance obligations under the Affordable Care Act (ACA) and the Consolidated Appropriations Act (CAA)
- Federal tax treatment of benefits provided under these plans
- Recent court cases

In January 2024, **Robert Gower** will present on the proposed new fiduciary rule and cybersecurity at the FIS Advanced Pension Conference.

In January, Robert will also present on the proposed new fiduciary rule for ABA-JCEB.

In February 2024, Robert will present on fiduciary best practices at the Institutional Investor Retirement Plan Investor Conference in Orlando.

The Trucker ✦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of Benefits Report are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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