The Continuing Evolution of Fiduciary Requirements

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Agenda

- Fiduciary Basics
- DOL Activity
- Case Law Developments
  - Dudenhoeffer v. Fifth Third
  - Fiduciary Process Agreement
  - Scrutiny of Valuation Work/Conflicts of Interest
- Risk Management and Prudent Practices
Plan Governance

- Board of Directors
  - Plan Administrative Committee
    - Settlor Duties
    - Fiduciary Duties
      - ERISA general duties of loyalty and care
      - Diversify investments
      - Follow plan documents
      - Reasonable plan fees
      - Properly process claims
      - Proper selection and monitoring of service providers

- Plan Adoption and Termination
- Plan Design Decisions
- Plan Amendment Authority

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Who is an ERISA Fiduciary?

- **Definitional Fiduciaries**
  - **Title** confers fiduciary status
    - Named Fiduciary
    - Trustee
    - ESOP Committee

ERISA requires that the plan document specify one or more named fiduciaries who separately or jointly have authority to control and manage the operation and administration of the plan.
Who is an ERISA Fiduciary?

• Functional Fiduciaries
  ◦ Actions confer fiduciary status
    • Person who exercises discretionary authority or control over management of plan.
    • Person who exercises discretionary authority or control over management or disposition of plan assets.
    • Person who renders investment advice for a fee or compensation (direct or indirect).
    • Person who exercises discretionary authority or responsibilities in administration of plan.
Fiduciary Act vs. Ministerial Act

- Persons performing only ministerial duties are not fiduciaries if
  - Have no discretion and/or do not in fact exercise discretion

- Fiduciary acts include determinations of
  - Eligibility
  - Benefits
  - Investments

- Ministerial Acts generally include responsibilities as to
  - Explain provisions of the plan to others
  - Maintain records and calculate benefits
  - Prepare communications
Fiduciary vs. Settlor

- Certain functions related to the plan are non-fiduciary but rather are settlor functions, including:
  - Establishing plan;
  - Amendment and termination of plan; and
  - Choosing plan design.

- Investment decisions are always a fiduciary function.

- Administration is only a fiduciary function if there is discretion.
ERISA Fiduciary Duties

• Duty of Loyalty
  – Act solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan

• Duty of Care (Strict Standard of Care)
  – Fiduciaries must carry out their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

• No Best Efforts Rule!!
• Business Judgement Rule does not apply
ERISA Fiduciary Duties (cont.)

• Other Responsibilities
  – Follow plan documents
  – Directed Fiduciary requirements
  – Avoid prohibited transactions
  – Diversification requirement (ESOP exemption)
  – Duty to Monitor appointed fiduciaries
What Standard Are ERISA Fiduciaries Held To?

- ERISA requires fiduciaries to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims
  - Permits employment of professionals, requires fiduciary to monitor them and their work product
  - Requires documenting the process by which decisions are made
  - Holds fiduciaries to the standard of a prudent man in the enterprise being undertaken
    - Plan administration
    - Investment selection and monitoring
What Law Governs?

- Employee Retirement Income Security Act (ERISA)
  - Participant lawsuits
  - Civil penalties
- Internal Revenue Code (Code)
  - Qualified Plan Rules
  - Nonqualified Plan Rules
  - Affordable Care Act
- Health Insurance Portability and Accountability Act (HIPAA)
  - Privacy, Security and Confidentiality
- Plan documents, to the extent not contrary to any of the above
What Plan Documents and Agreements Should an ERISA Fiduciary Be Familiar With?

Fiduciaries must read and understand:

- Plan
- Trust Agreement (qualified plans)
- Investment Manager Agreements
- Service Provider Agreements
- Summary Plan Descriptions ("SPDs")
- Claim Forms
- Committee Charters
Can an ERISA Fiduciary Delegate Duties?

- Fiduciary duties can be delegated if
  - Delegation is done pursuant to terms of governing documents and
  - Delegate acknowledges and accepts fiduciary responsibility

- Fiduciary duties can be delegated to
  - Internal service providers or
  - External service providers

- Residual fiduciary liability remains with delegating fiduciary – duty to monitor
Who Can Delegate?

- Any fiduciary other than a Trustee as to trustee duties can delegate some or all of their fiduciary duties:
  - Plan Sponsor is ultimate Named Fiduciary (Board of Directors)
  - Plan Sponsor can delegate to a committee (e.g., Plan Administrative Committee) all plan fiduciary duties
  - Plan Administrative Committee may delegate responsibilities to appropriate group(s) or individuals:
    - Trustee duties?
    - Investment responsibility?
    - Claims administration?
    - Human resource function?
What Does Delegation Require?

- Delegation
  - Requires specific in writing delegation and
  - Person being delegated to must specifically, in writing, accept fiduciary responsibility

- Proper delegation sets the standard of review

- Difference between winning and losing
  - If properly delegated – arbitrary and capricious
  - If not properly delegated – de novo

- Any party taking discretionary action on behalf of the Plan Administrative Committee must be delegated such authority and responsibility in writing.
What Is the Responsibility of the Delegating Fiduciary?

- The delegating fiduciary must:
  - Prudently select and monitor the delegate
  - Affirmatively seek information about the delegate and from the delegate after appointment
    - Provide adequate guidance and training
    - Provide and receive necessary information
    - Monitor actual and potential conflicts of interest
Department of Labor (DOL) Activity
DOL Enforcement

- The DOL has an ongoing campaign to address perceived abuses in ESOP transactions

- Two pronged attack:
  - Investigations
  - Litigation

- “Hot Button” Issues
  - Conflicts of Interest – Independence of Trustees, Valuation Advisors
  - Independence of Company’s Board of Directors
  - Qualifications of Trustees and Valuation Advisors
  - Purpose(s) for which Valuation is used
  - Financial Statements
  - Reasonableness of Projections
  - Comparability of “Comparable Companies”
  - Metrics used in valuations
  - Discounts and premiums applied in valuations
  - Valuation Report internal consistency
  - Trustee’s review of Valuation Report
  - Financing, refinancing terms
  - Compensation
  - Incentives
  - Synthetic Equity
  - Repurchase Obligation
DOL Enforcement (cont.)

- The National Enforcement Project for ESOPs is ongoing

**Employee Stock Ownership Plans** - The Employee Stock Ownership Plan (ESOP) project is designed to identify and correct violations of ERISA in connection with ESOPs. ESOPs are designed to invest primarily in employer securities. Due to their unique nature, ESOPs can have distinct violations, as well as violations that might occur in any employee benefit plan. One of the most common violations found is the incorrect valuation of employer securities. This can occur when purchasing, selling, distributing, or otherwise valuing stock. Other issues involve the failure to provide participants with the specific benefits required or allowed under ESOPs, such as voting rights, ability to diversify their account balances at certain times, and the right to sell their shares of stock when received. EBSA will also review the refinancing of ESOP loans following EBSA’s issuance of FAB 2002-1.

See [http://www.dol.gov/ebsa/erisa_enforcement.html](http://www.dol.gov/ebsa/erisa_enforcement.html)

- ESOP valuations have been “an area of chronic problems” and that the DOL is pursuing a “big number” of cases for 2014. ~ Tim Hauser of EBSA at the ABA Conference, February 2014

- “Valuation is the first, second, third, and fourth problem” of ESOP deals. ~ Tim Hauser of EBSA in the WSJ
Valuation Issues – Introduction

Valuation – Know the requirements

- “Adequate Consideration” (“Fair Market Value”)
- The **Trustee** is the responsible party for setting value

Proper Process:

- Proper selection of the valuation advisor
- Provide proper information to the valuation advisor
- Review the report
- Ask questions
- Review the valuation approach(es)
- Review and question methodology used to determine value
- Document the review process
Trustee Role in Valuation

- Assets of trust must be valued at least annually (or more frequently if Plan Document requires it)
- ESOP Trustee engages the valuation advisor
- Valuation advisor reports to the Trustee, not the Company
- ESOP Trustee ultimately determines value
  - Valuation Advisor recommends value to Trustee
- Understand and question Valuation Advisor recommendations and analysis
- Confirming adequacy, accuracy and reasonableness of Company financial data provided to valuation firm
- Understanding ESOP repurchase obligation
- Communication with Board and participants
Board Role in Valuation

- Under ERISA, the Board has a duty to:
  - Select and appoint a qualified trustee or trustees
  - Monitor the actions of the ESOP trustee (and any other plan fiduciaries it appoints)
  - Confirm process is adequate
  - If necessary, take corrective action
Case Law Developments
Fifth Third Bancorp v. Dudenhoeffer

- An ESOP is designed to invest primarily in shares of company stock
- Exclusion from the general diversification rule
- “Moench” presumption that Company Stock is a prudent investment no longer exists

In our view, the law does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP’s holdings. – Supreme Court (2014)

- Court Finding: no such presumption exists in the Law
  - The single ERISA prudent investment standard that the Court found does not apply to ESOP’s is the requirement to diversify investments against large losses. § 1104(a)(2).
  - The Court determined that all other standards fully and equally apply to ESOP’s.
The DOL Fiduciary Process Agreement

The DOL Fiduciary Process Agreement has been in effect since mid-2014. While it expressly relates only to ESOP transactions, it offers useful guidance for annual valuations.
The DOL Fiduciary Process Agreement

• **What is it?**
  
The DOL Fiduciary Process Agreement

- Formally, binds only the DOL and GreatBanc Trust Company, **BUT**
- In a Press Release dated June 30, 2014, DOL Assistant Secretary of Labor for Employee Benefits Security Phyllis Borzi said, “[o]thers in the Industry would do well to take notice of the protections put in place by this agreement.”
How has the ESOP Community responded to the Fiduciary Process Agreement?

The response has been positive. Major Institutional Trustees and Valuation Advisors have adopted much of the process set forth in the Agreement in connection with ESOP transactions.
The DOL Fiduciary Process Agreement

- **Does the Fiduciary Process Agreement apply to Annual Valuations?**
- It applies only to transactions in which an ESOP is purchasing or selling employer securities that are not publicly traded.
- **However,** external and internal Trustees and Valuation Advisors can opt to follow aspects of the process set forth in the Agreement in connection with annual valuations.
The DOL Fiduciary Process Agreement

- Which aspects of the Fiduciary Process Agreement can serve as guidance in Annual Valuations?
  - Selection of Valuation Advisor
  - Oversight of Valuation Advisor
  - Financial Statements
  - Projections
  - Fiduciary Review Process
Areas of Focus: DOL Fiduciary Process Agreement in Annual Updates

- Appraiser Independence & Qualifications
- Vetting Forecast
- Adjustment—Historical Financials and Forecast Financials
- Documenting Process
Application of the DOL Fiduciary Process Agreement in Annual Updates

- Annual due diligence on valuation advisor’s qualifications, not just at initial engagement
- Involving the ESOP Trustee in document request to the company—if the ESOP Trustee believes that additional things should be requested, they are added to the list
- Encouraging ESOP Trustee to attend management interviews
Application of the DOL Fiduciary Process Agreement in Annual Updates

- Documenting/ascertaining where in the valuation report a metric mentioned in the DOL Fiduciary Process Agreement is found
- If internal ESOP trustee is involved in producing the forecast, reasonableness checks done by another party at the plan sponsor company
- Ensuring appropriate documentation of appraisal review process
Continued Scrutiny of Valuation Work/Conflicts of Interest

- Understand relationships between fiduciaries
  - “Two hats” doctrine
  - Understand corporate structure, roles, and responsibilities
  - Conflicts of interest (real or perceived) may “color” decisions
  - A individual participating in a fiduciary action may be a fiduciary, regardless of title/intent

- Understand when one is acting as an ERISA fiduciary
- Put appropriate safeguards in place and respect the requirements of such safeguards
Continued Scrutiny of Valuation Work/Conflicts of Interest

- The annual valuation must be undertaken/determined pursuant to a prudent process which requires:
  - Engaging an appropriate Valuation Advisor
    - Qualifications?
    - Independent?
    - Criminal history?
    - Directed and controlled by only the Trustee?
  - Investigation of the information provided for the valuation
    - Projections?
    - Risk factors?
    - Economic conditions?
  - The Trustee reviewing the valuation have sufficient authority and responsibility to question the information provided and understand the valuation process
Risk Management and Prudent Practices
Know the Trustee Status

- Inside vs. Institution/Independent Trustee
- Directed Trustee
  - ERISA Fiduciary Issues
  - Governing documents
    - Are there any items/actions on which the trustee is discretionary?
    - Is the trustee subject to the direction of a named fiduciary who is not a trustee?
      - Is direction being provided by the right person/group?
      - Is direction contrary to the plan, contrary to ERISA, or plainly imprudent?
      - “Prudent Man” standard and “best interest” test still apply.
- Partially Directed Trustee
  - Common areas for discretion.
  - Must determine extent of authority as authorized by the relevant documents
  - Standards for following directions are the same as a “directed” trustee.
  - Always prudent to document process.
- Fully Discretionary Trustee
What Should an ERISA Fiduciary Look Out For?

- Compliance with law
- Tax qualification
- Consistency between SPD and Plan
- Distribution and updating of SPDs
- Filing of annual reports and
- Allocation of both fiduciary and ministerial responsibilities – everyone knows what their job is
- Privacy and Confidentiality
Investment Issues/Plan Expenses

- **401(k) and “Combo” plans**
  - Understand all expenses – especially those taken from plan assets (KSOPs, for example)
  - Special scrutiny on vendor fees
    - 408(b)(2)
    - 404(a)(5)
    - And now, the BIC exemption
  - All designed to inform the plan sponsor and company fiduciaries of how much they are paying for services – because they have ERISA duties!
Law Suits, Investigations, Complaints...

- Who Gets Sued?
  - ESOP Fiduciaries
    - Trustee
    - Fiduciary Committees (and members)
    - Appointing Fiduciaries
    - Functional Fiduciaries
  - Recordkeeper
  - Company Directors and Officers
  - Other Service Providers

- Who Sues ERISA Fiduciaries?
  - Participant actions
  - Plaintiffs must report lawsuits to Department of Labor (DOL)
  - DOL actions
  - Successor Trustee actions

- Government Investigations
  - Department of Labor investigations/IRS audits
  - Disgruntled employees/plan participants may file complaints with DOL
  - DOL ESOP Task Force
Types of Claims

- **Law Suits**
  - ESOP Transaction Claims
  - Valuation Claims
  - Misrepresentation/Omission Claims

- **Department of Labor Actions:**
  - Broad subpoena and investigatory powers
  - Standing is not an issue
    - ERISA grants Secretary of Labor standing to sue
  - Can lead to criminal indictments in addition to civil penalties
    - Willful violation of ERISA reporting and disclosure requirements – up to $5,000 in fines per individual, $100,000 for entities, and possible 1 year imprisonment
    - Knowingly making false statements or concealing or failing to disclose any fact needed to prepare ERISA reports - $10,000 fine, 5 years imprisonment, or both
  - Statute of Limitations
    - May be suspended under Tolling Agreement
Types of Claims

Remedies Sought:

- Recovery of money due Plan
- Equitable remedies
- Attorney Fees
- Statutory penalties
  - $110/day for reporting violations
  - 502(l) penalty for fiduciary breach; 20% of recovery amount
- DOL may seek removal of trustees and bar orders
- Report to IRS
Practices to Avoid Litigation and Defend Claims

- More formalized corporate governance structures to eliminate possible conflicts of interest
  - Outside directors
  - Independent trustees/fiduciaries
  - Pro-active management and monitoring
  - Board committees to delineate roles and responsibilities
    - Audit, Compensation, Corporate Governance, ESOP, Investment, and Nominating Committees

- Have and use competent service providers
  - Attorneys
  - Financial Advisors
  - Valuation Advisors
  - Third-Party Administrators
  - Compensation Consultants
  - Independent Fiduciary
ESOP document permits the “Company” (acting through its board of directors) to delegate “powers, duties, or responsibilities of the Plan Administrator…."

- Absent formal delegation, the board of directors retains these obligations
- Amendment authority is retained by the board of directors

The Plan Administrative Committee is administering the ESOP and other benefit arrangements

- Formal delegation may need to be documented
Fiduciaries should meet regularly, keep minutes, and read plan documents

- Document decisions to show prudence, exercised skill and care, conducted investigation and analysis, and acted solely in the interest of plan participants and beneficiaries.

- Develop and follow written policies

- Regular fiduciary training

- Ensure all parties engaged in plan administration know their duties and perform their duties
Practices to Avoid Litigation and Defend Claims

- Properly Appoint Fiduciaries
  - Carefully evaluate candidates and document the selection process
  - Verify that candidates’ qualifications are consistent with their duties
  - Require that those to whom responsibility has been formally delegated assume an active role and exercise that responsibility
  - Provide training to internal fiduciary candidates
If you are an Appointed Fiduciary – Know your Fiduciary Duties

- Follow the Plan documents
- Avoid:
  - Conflicts of Interest
  - Self-Dealing
- Prudent investment of Plan assets
- Proper disclosure to participants
Practices to Avoid Litigation and Defend Claims

- Meet regularly with appointed fiduciaries to
  - Review performance
  - Review fees and costs
  - Review conflicts of interest and related party transactions
  - Significant events
  - Document monitoring of appointed fiduciaries
  - Replace non-performing fiduciaries
Practices to Avoid Litigation and Defend Claims

Valuation - Know the requirements

- “Fair Market Value”
- The **Trustee** is the responsible party for setting value
- Prudent Process:
  - Review the report
  - Ask questions
  - Review the valuation approach(es)
  - Review and question methodology used to determine value
  - Document the review process
Choosing a Service Provider

- Subject to the Duty of Care and Duty of Loyalty
- Investigate multiple service providers and provide a meaningful comparison of services and costs
- Among the factors a fiduciary should consider when selecting a third-party service provider:
  - The service provider’s experience
  - The quality of the service provider’s services
  - Know the professionals who will be handling the plan’s account
  - Know recent litigation or allegations levied against the provider
  - Understand the service provider’s business practices
- Review contract provisions and expense requirements and regularly monitor and review the provisions
- DOCUMENT THE PROCESS
  - Selection
  - Ongoing
Practices to Avoid Litigation and Defend Claims

Results versus Process (“Prudence, not Prescience”)

- Courts are concerned with **Process**
- Proof of process is often the key component of a winning case
  - “Fair market value” a matter of opinion – a good faith determination is required
  - Investigation
  - Prudent Process vs. End Result
- Document the process
  - Document all decisions, including steps taken to make decisions
  - Develop and follow written investment policy
  - Take minutes of meetings
Fiduciary Protection

- Protecting ERISA Fiduciaries
  - “Hold Harmless” provisions are void under ERISA
  - Indemnification agreements can be valid if properly structured and drafted
  - Indemnification Agreements
    - Review structure
    - Review parties
    - Review legal fee advancement provisions
    - Review limitations
    - Review Board authorization
    - Review for compliance with ERISA
Indemnification

• Against Indemnification:
  ◦ *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009) (Agreement that indemnifies an ESOP fiduciary is generally a matter of state contract law, but state law is preempts when the agreement indemnifies for violation of ERISA-imposed duties.)
  ◦ *Fernandez v. K-M Industries Holding Co.*, 646 F. Supp. 2d 1150 (N.D. Cal. 2009) (Trustee cannot be indemnified by the company whose stock is held in the ESOP, even if the trust agreement contains a provision requiring indemnification.)

• Indemnification Permissible
  ◦ *Perez v. GreatBanc Trust Co.*, (16-cv-1448, C.D. Cal., March 15, 2013) (Assets of operating company are not assets of plan; no basis to treat defense indemnity payments of 100% ESOP company as coming from plan itself.)
Indemnification

• Contribution
  ◦ What happens when multiple fiduciaries are sued?
  ◦ More-culpable fiduciary….less-culpable fiduciary?
  ◦ ERISA requires personal liability for a fiduciary’s breach of fiduciary duty but does not provide that a breaching fiduciary may be liable to another fiduciary
  ◦ Appropriate equitable relief?
    • Allocation of fiduciary responsibilities permitted
    • Allocation and limitation of culpability follows?
  ◦ Contribution claims may be permissible
    • Difference in experience, authority, control, and knowledge among the fiduciaries
    • Relative knowledge of the fiduciaries
Fiduciary Protection

What if a claim cannot be avoided?

INSURANCE!
Fiduciary Protection

- Directors & Officers (D&O) Liability
  - What is it?
    - Written primarily to protect the personal assets of a company’s directors & officers (and company assets to the extent that it indemnifies the directors/officers)
  - What types of claims does it cover?
    - Claim alleging a breach of duty:
      - Duty of Care
      - Duty of Loyalty
      - Duty of Obedience
  - What is not covered in a D&O policy:
    - misconduct claims (dishonest acts, fraud, criminal behavior, etc.)
    - insured versus insured claims (one director suing another director)
    - Claims arising from data breaches
    - ERISA claims and ERISA (ESOP) Plan fiduciaries
Fiduciary Protection

- Fiduciary (ERISA) Liability Insurance - What is it?
  - Intended to protect the personal assets of ERISA (ESOP) Plan fiduciaries and the Company’s assets to the extent that it indemnifies the plan fiduciaries
  - Also can protect the Plan from administrative errors

- When does Fiduciary Liability coverage respond?
  - Claim alleging a plan fiduciary breached its duty, as defined by ERISA:
    - Duty of Loyalty
    - Duty of Diversification
    - Duty of Non-Deviation
    - Duty to comply with plan documents

- Be aware:
  - Coverage does not respond to dishonest or criminal acts such as fraud
  - Most Fiduciary Liability Insurance policies are silent on non-indemnifiable loss, but Fiduciary Liability Insurance policies should be written to expressly cover non-indemnifiable loss
  - Common Exclusions found in Fiduciary Liability Insurance policies
Fiduciary Protection

- Fidelity Bond
  - ERISA requirements for each plan
  - Marketable securities = $1,000,000
When a Claim is Made

- Contact Attorney Immediately
- Promptly Notify insurance carrier of Claim/Suit
- Issue Litigation-Hold Memorandum
- Communications Issues
- Multiple Defendants Issues
Ted Becker is a partner in the Drinker Biddle & Reath LLP law firm. He has a national practice with more than 25 years of experience in litigation and dispute resolution. He has represented companies that sponsor ESOPs and other benefit plans, their directors and officers, external and internal plan fiduciaries, administrators, investment advisors, and service providers in lawsuits and investigations by regulatory agencies. He represents clients along the entire dispute continuum, from litigation avoidance and pre-litigation planning through pre-trial motions, discovery, trial, and appeal. He practices before the U.S. Supreme Court, federal and state trial and appeals courts, and bankruptcy courts, as well as before administrative and regulatory agencies including the Department of Labor, and in arbitration, mediation, and alternative dispute resolution proceedings. He has successfully represented clients ranging from individuals and small companies to the largest financial institutions and multinationals. He earned his law degree with highest honors at Northwestern University, and was a fellow at Yale Law School, where he taught.
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Allison focuses her ESOP practice on the design and implementation of ESOP transactions and provides ongoing legal counsel to ESOP-owned companies. She has been involved in hundreds of transactions, including leveraged buyouts, mergers, acquisitions, and the structuring and financing of ESOPs using private equity. She has advised employers on the implementation of nonqualified plans and executive compensation arrangements that complement the employee ownership structure and culture inherent in an ESOP-owned company. Allison also represents independent fiduciaries in their role as purchaser in an ESOP transaction as to their legal duties with respect to their representation of ESOP participants and beneficiaries.

Allison further focuses her practice on compliance issues and the Internal Revenue Code related to employee benefits, including qualified plans, nonqualified plans, and executive and deferred compensation. Allison provides relevant guidance as to administrative and operational matters, and assists clients with various benefit plan correction programs offered by the Department of Labor (DOL) and Internal Revenue Service (IRS).

Allison received her legal degree from the University of Texas at Austin, graduating with honors in 2002.
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Lance is a veteran ERISA fiduciary with a practice that includes ESOP trustee (both privately held and publicly traded), plan asset management and prohibited transaction avoidance engagements. Lance received his J.D. degree from The University of Alabama School of Law where he served as an editor of both The American Journal of Tax Policy and The Law & Psychology Review. He is a member of The ESOP Association and the National Center for Employee Ownership and frequently speaks on ERISA and ESOP fiduciary issues.
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