

# Current Developments with the Affordable Care Act and ERISA Fiduciary Litigation

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Houston Business and Estate Planning Council  
April 28, 2016

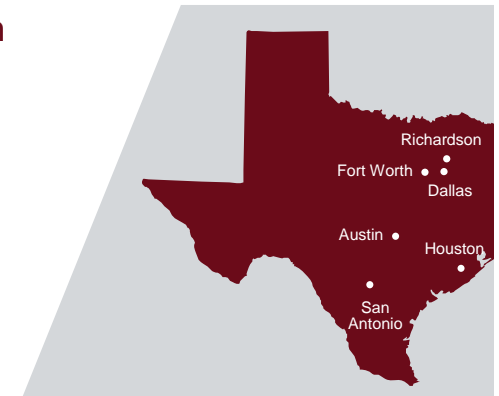
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# AN INTRODUCTION TO HAYNES AND BOONE, LLP



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Haynes and Boone is a corporate law firm with **a national presence and international reach**, and a strong foundation in Texas. We are dedicated to being our clients' most valued advisor and advocate.



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40 MAJOR LEGAL PRACTICE AREAS

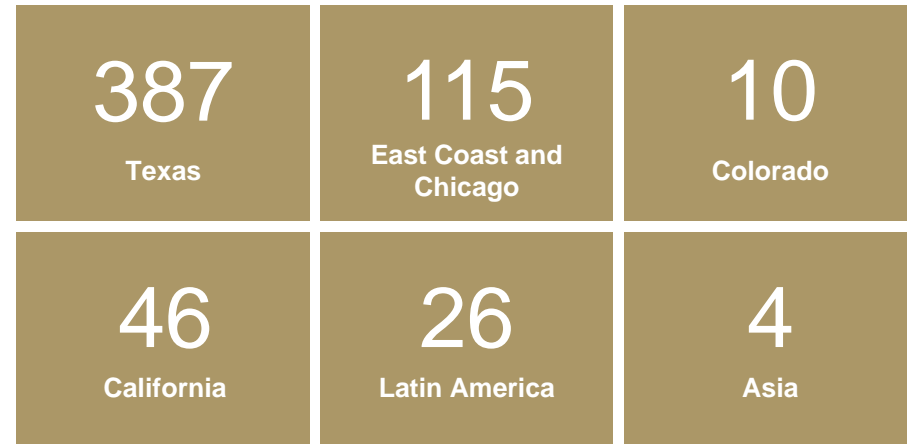
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## WHO WE ARE

### LAWYERS BY SUBSTANTIVE LEGAL PRACTICE



### LAWYERS BY REGION



### CHAMBERS USA – 2015 RANKED PRACTICES

- **Bankruptcy/Restructuring** (Nationwide)
- **Franchising** (Nationwide)
- **Real Estate: Mainly Corporate and Finance** (New York)
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- **Banking & Finance** (Texas)
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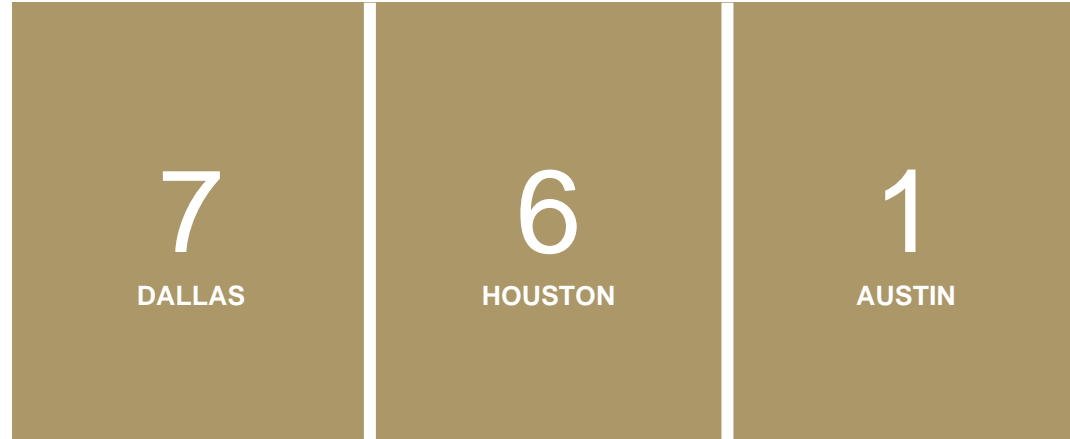
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# Employee Benefits and Executive Compensation Lawyers by office



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# Presentation Overview

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- Affordable Care Act
  - Overview of Employer Shared Responsibility
  - ACA and Contingent Workers
- ERISA Fiduciary Litigation
  - Overview of ERISA and Fiduciary Requirements
  - ERISA Fiduciary Litigation Trends

# Affordable Care Act

Overview of Employer Shared Responsibility

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# Who Is Subject to Employer Shared Responsibility?

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- Large employers are subject to employer shared responsibility.
- Large employer is defined as an employer with 50 or more full-time employees (“Full-Time Employees”) and full-time equivalent employees in the preceding calendar year.
  - Full-Time Employees: average 30 hours of service per week or 130 hours of service per month
  - Full-Time Equivalent Employees: Add each part-time employee’s hours of service (up to 120) for the month and divide by 120 to get the “Full-Time Equivalents” for the month
  - Count all hours for which an employee is paid or is entitled to pay for the performance of duties or paid leave
    - Hourly employees: Count actual hours
    - Salaried/non-hourly employees: May use equivalency (8 hour per day / 40 hours per week) *but not to understate hours.*
- Common law employees of *all entities in a controlled group* are counted for determining large employer status.

# What Does Employer Shared Responsibility Mean?

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- To avoid penalty, must offer “minimum essential coverage” to 95% of Full-Time Employees
- “Affordable coverage” if employee’s cost of self-only coverage does not exceed 9.5% of employee’s household income
  - Form W-2 safe harbor: Employee cost does not exceed 9.5% of wages reported in Box 1 of Form W-2
  - Rate of pay safe harbor: Employee cost does not exceed 9.5% of hourly rate of pay times 130 hours per month (For non-hourly employees use monthly salary)
  - Federal poverty line safe harbor: Employee cost does not exceed 9.5% of federal poverty line for a single person
- “Minimum value” if the plan’s share of the total cost of benefits is 60% or greater (on average) for a standard population
  - Minimum value calculator
  - Design-based safe harbors
  - Actuary certification

# What Is the Penalty for Noncompliance?

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- No Coverage Penalty
  - Do not offer “minimum essential coverage” to at least 95% of Full-Time Employees and their dependents, and
  - At least one Full-Time Employee is receiving a premium assistance tax credit for coverage purchased on an exchange.
  - Penalty Amount: \$2,000 x (All Full-Time Employees minus 30)
- Inadequate Coverage Penalty
  - Offer “minimum essential coverage” to at least 95% of Full-Time Employees and their dependents, but
  - At least one Full-Time Employee is receiving a premium assistance tax credit
    - The Full-Time Employee is in the group not offered coverage
    - Coverage is “unaffordable” or does not provide “minimum value”
  - \$3,000 x each *affected* Full-Time Employee capped at the No Coverage Penalty amount
  - Dependent includes child up to 26 (not step-child or foster child); no liability for failure to offer coverage to spouse.

# Two Methods for Determining Full-Time Employees

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- Monthly Measurement Method
  - Determine who is supposed to be covered during a month based on the actual hours for that month.
  - Don't know who has to be offered coverage until the month is over.
  - Works best with stable-hour workforces with individuals who always work more than (or less than) 30 hours.
- Look-Back Measurement Method
  - Employer may determine the status of an employee as a Full-Time Employee for a future period (referred to as the **stability period**) based on hours of service of the employee in a prior period of the same length (referred to as the **measurement period**).
  - The employer may include an optional **administrative period** between the measurement period and the stability period to perform administrative tasks such as calculating who was a Full-Time Employee during the measurement period and notifying employees of their status..

# Affordable Care Act

ACA and Contingent Workers

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# DOL Misclassification Initiative

The screenshot shows the Wage and Hour Division (WHD) website page for "Employee Misclassification as Independent Contractors". The page features a navigation menu on the left with links for "For Workers", "For Employers", "For States", "How to File a Complaint", "News Room", "About WHD", "Contact Us", and "E-mail Alerts". The main content area includes a "Quick Links" box with links to "IRS MOU", "Misclassification News Room", and "Resources". A map of the United States is displayed below the text, with several states highlighted in blue, indicating the focus of the initiative. The highlighted states include Washington, Oregon, California, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York, Vermont, New Hampshire, and Maine.

# DOL Misclassification Initiative

AGREEMENT  
BETWEEN  
THE U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION  
AND  
The State of Texas - Texas Workforce Commission

This Agreement is made and entered into this 15th day of February, 2015, by and between The United States Department of Labor's Wage and Hour Division (hereinafter referred to as "WHD" or "Department") and the Texas Workforce Commission (hereinafter referred to as "TWC"), together collectively referred to herein as "the agencies" or "the parties".

WHEREAS, in connection with such enforcement, the parties' areas of jurisdiction and activities may overlap, making it desirable for the parties to share resources and enhance one another's enforcement of the law by sharing information and/or conducting coordinated investigations consistent with applicable law; and

WHEREAS, the parties also share the specific and mutual goals of providing clear, accurate, and easy-to-access information to employers, employees, and other stakeholders; and

WHEREAS, the parties desire to enter into this Agreement to set forth the terms of this partnership in furtherance of these mutual interests and goals.

THEREFORE, IT IS MUTUALLY AGREED THAT:

**Purpose of Agreement**

The agencies recognize the value of establishing a collaborative relationship to promote compliance with state and federal laws in the areas of employment and the regulated community in

# ACA and Contingent Worker Misclassification

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- Identify whether contingent worker is (1) independent contractor, (2) common law employee of the company, or (3) common law employee of the agency.
- Reasons why this identification is important:
  - Whether employer is “large employer” subject to employer shared responsibility.
  - Whether qualifying coverage is being offered to 95% of Full-Time Employees.
  - Whether worker’s coverage on health insurance exchange will trigger a penalty.
  - Amount of the No Coverage Penalty and cap on the Inadequate Coverage Penalty.
    - No Coverage Penalty Amount: \$2,000 x (all Full-Time Employees minus 30)
    - Inadequate Coverage Penalty Amount: \$3,000 x all affected Full-Time Employees capped at no coverage penalty amount.
- Company with contingent workers can comply with shared responsibility:
  - Company offers coverage to contingent workers through its group health plan; OR
  - Staffing agency offers coverage to the contingent workers through its group health plan AND the company is billed separately and pays an additional fee to the staffing agency for each employee who elects coverage



# Who is a Common Law Employee?

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- For ACA purposes, use the test in Treas. Reg. §31.3401(c)-1(b): “. . . the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.”
- Exclude leased employees, sole proprietors, partners in a partnership, 2-percent S corporation shareholders, workers described in Code section 3508.
- Keep in mind that “[t]he fact that a staffing contract designates which party is the employer is not dispositive of the issue, as taxpayers may not by agreement designate one party to be an employer when that party fails to meet the federal criteria for status as an employer.” IRS Chief Counsel Memorandum 200017041.

# Traps for Employers with Contingent Workers

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- Contingent workers are misclassified as not being common law employees resulting in less than 95% of all full-time employees being offered coverage
- Staffing agency offers coverage to the contingent workers but does not charge a separate additional fee for each employee who elects coverage
- Staffing agency refuses to share data of contingent worker citing privacy requirements
- Staffing agency group health plan coverage is inadequate or unaffordable
- Nondiscrimination concerns for self-funded health plans and Section 125 cafeteria plans
- Review new and existing employment arrangements for compliance
  - Identify common law employer of workers provided by agency
  - If workers to be covered under group health plan, amend plan if necessary
  - If covered by agency plan, negotiate health coverage premium to pay to agency

# ERISA Fiduciary Litigation

Overview of ERISA and Fiduciary Requirements

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# About ERISA

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- Employee Retirement Income Security Act of 1974
  - Jointly enforced by the U.S. Department of Labor (DOL) and U.S. Department of the Treasury (Treasury)
  - Agencies responsible for administering and enforcing ERISA include: Internal Revenue Service (IRS), Employee Benefits Security Administration (EBSA), and Pension Benefit Guaranty Corporation (PBGC)
- Employee benefit plans subject to ERISA
  - Welfare benefit plans (e.g., group health plan, flexible benefits plan)
  - Qualified pension benefit plans (e.g., pension plans, 401(k) plans, employee stock ownership plans)
- Plans and benefits not subject to ERISA
  - Health coverage through an exchange; governmental plans; non-electing church plans; and non-plans (e.g., bonuses and payroll practices)
  - Non-qualified pension benefit plans called “top-hat plans” that cover a select group of management or highly compensated employees are exempt from ERISA’s fiduciary provisions.

# ERISA Fiduciary Duties

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- Duty of Loyalty
  - . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—for the exclusive purpose of: providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan
- Duty of Prudence
  - . . . 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
- Duty to Diversify
  - . . . by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so
- Duty to Follow Plan Terms
  - . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I and Title IV of ERISA]

# ERISA Fiduciary Litigation

ERISA Fiduciary Litigation Trends

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# ERISA Fiduciary Trends – 2015 Year in Review

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- DOL Criminal Investigations – Fiscal year 2015
  - DOL closed 275 criminal investigations which led to the indictment of 61 persons
- Civil Lawsuits
  - 10 largest ERISA settlements in 2014 totaled **\$1.3 billion**
  - 10 largest ERISA settlements in 2015 totaled **\$926.5 million**
- Notable 2015 Settlements
  - Lockheed Martin (Excessive 401(k) Plan Fees) \$62 million
  - Boeing (Excessive 401(k) Plan Fees) \$57 million
  - AIG (Imprudent or Inflated Employer Stock) \$40 million
  - Novant Health (Offering Retail Class Shares) \$32 million
  - Northern Trust (Mismanaged Investments) \$36 million
  - Meriter Health Services (Improper Pension Calculations) \$82 million
  - FreightCar America (Elimination of Retiree Health Benefits) \$33 million
  - UAW (Elimination of Retiree Health Benefits) \$354.5 million
  - Boeing (Elimination of Bridge Health Benefits and Pension) \$90 million

# Litigation Trends

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- Excessive Fees
- Improper Share Class
- Imprudent Investment Alternatives
- Employer Stock
- Retiree Health Benefits
- Pension Derisking



## Recent Supreme Court Cases

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- *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 935 (2015)
  - No presumption of vesting for retiree health benefits
- *Tibble v. Edison Int'l*, 135 S Ct 1823 (2015)
  - Ongoing duty to monitor plan investments
- *Amgen, Inc. v. Harris*, No. 15-278 (Jan. 25, 2016)
  - Complaint must allege whether fiduciary in the same circumstances could have viewed decision as more likely to harm than help fund
- *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, No. 14-723 (Jan. 20, 2016)
  - Attachment of nontraceable funds is not equitable relief
- *Gobeille v. Liberty Mut. Ins. Co.*, No. 1-181 (Mar. 1, 2016)
  - ERISA preempts Vermont's state health care database law

## ***Tibble v. Edison Int'l***

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- **Ongoing Duty to Monitor Plan Investments**
- Legal duty to monitor and remove imprudent investments is separate from the duty to initially select prudent investments.
  - No intervening event is required to implicate the duty to perform a full and comprehensive review of investment alternatives.
  - The Supreme Court punted back to the Ninth Circuit to decide whether the retention of retail class investments was imprudent in this instance: “We express no view on the scope of [Edison's] fiduciary duty in this case.” (*i.e.*, stay tuned for more.)
- ERISA statute of limitations would not apply to duty to monitor as long as the investment continues to be imprudent. Fiduciary will not avoid potential liability if it selects and imprudent investment and waits out the six-year ERISA statute of limitations.
- Similarly, once a prudent investment is selected the fiduciary’s duty to monitor applies even if there is no material change in circumstances.

# Questions?

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