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## 40<sup>th</sup> Year Anniversary of ERISA What is the Context?

*by Jeffery Mandell, Esq.*

The year 2016 was the 40 year anniversary of ERISA (signed by President Ford in 1974, effective in 1976). Here is one of many reflections.

There always are never ending countless legal changes and initiatives with ERISA plans. I am referring to regulatory and statutory developments, and case law developed through litigation. Let's look at the words underlying the ERISA acronym. Employee, Retirement, Income, Security. ERISA's objective is unambiguous and direct. It is intended to promote and protect employees' retirement security. Advancing workers' retirement is ERISA's sole purpose (except as somewhat otherwise applicable to ESOPs). When reviewing the merits of new regulations or other legal changes, a compelling question is whether they advance or impede employees' retirement security.

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Many individuals, employers, businesses and institutions have forcefully challenged any number of changes in ERISA throughout its history. I have fought some of those battles, and ERISA is already an overbearing beast without the addition of new requirements. But, let's consider the context. Many small employers hated the top-heavy rules. The Internal Revenue Code's nondiscrimination requirements also sometimes pose great difficulties. However, would employees who otherwise would be left out of the retirement system receive contributions under a plan but for these requirements? How many employees have received employer 3% or matching contributions if the safe harbor testing rules did not require the minimum contributions? The answers are obvious.

Some assert government should not place additional restrictions on employers' plans. That is valid. But, if the employer wants any of the truly one-of-a-kind tax benefits for itself and its employees, then there are rules that are intended to advance policies that are laudable. Like a speed limit.

Some of ERISA's changes have been counter-productive. They discourage rather than encourage plans for some employers. Unfortunately the government sometimes hits the wrong mark even when its intent is reasonable and good. Furthermore, given the wide

diversity of employers and plan objectives, some plan sponsors are winners and others are losers with change. It is not a perfect system.

*When reviewing a legal change to ERISA, ask this – does it advance or impede the objective to increase retirement benefits?*

Many opposed the fairly recent fiduciary section 408(b)(2) and the participant level 404a-5 disclosures. Again, let's consider the context. These initiatives promoted and promote employees' retirement income, for example, by educating the employer, fiduciary and employees so that, in part, lower investment fees could be negotiated. Should employers and employees have this information about fees, expenses and

services, or should they stay in the dark as to exactly what, and why, employers are paying financial institutions and other plan providers? These disclosures helped raise employer, fiduciary and employee awareness which in turn had a positive direct effect on lowering plan investment fees and costs (e.g. lower expense ratios; better share classes).

ERISA, although difficult to digest, was created to help employees retire. When considering the good or bad of a legal change or initiative, such as the hotly contested conflict of interest fiduciary regulations, it is appropriate and necessary to keep ERISA's worthy objective and broader context in mind.

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The ERISA Law Group, P.A. represents clients throughout the United States. Employee Benefit Publications & Seminars, a division of The ERISA Law Group, P.A., publishes, trains, provides forms, educates and speaks about employee benefit issues to the employee benefits community, be it for employers, advisors, fiduciaries, etc.

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## Firm News

The ERISA Law Group is committed to provide the highest available quality of service to our clientele. Toward that end, please note the following:

1. Jeffery Mandell has been inducted as a **Fellow of The American College of Employee Benefits Counsel**. A fellowship in The American College is the highest and most selective award and recognition for an ERISA attorney in the United States. Only employee benefit lawyers who are recognized as maintaining an important national presence in ERISA, along with a long history of exceptional legal achievement, character, ability and professional responsibility, and who have demonstrated the greatest commitment to and leadership in the education and advancement of ERISA, are considered for this honor.

2. **ERISA Now and Then – A Practical Understanding of Its 40 Year Evolution Intended to Strengthen Careers Involving Employee Benefits**

Do not miss Jeff's take on ERISA's history and practical messages for you. Jeff presented the above subject matter at ASPPA's October National Conference in Washington D.C. Jeff's insights are useful, educational and should strengthen careers for anyone who works with retirement plans: fiduciaries; trustees; TPAs; CFOs; executives, plan consultants; in-house counsel; ERISA and non-ERISA attorneys; financial institutions and investment advisors/broker/dealers; HR, benefits and CPAs. To arrange an appearance for your group, please contact us.

3. Jeff continues to serve as **the attorney representing Idaho in the IRS Tax-Exempt and Government Entities Division Pacific Coast Liaison Council** which meets with the Internal Revenue Service and United States Department of Labor, and in his other ERISA national capacities.
  4. Jeff and his partner, John Hughes, continue to manage and create **The 401(k) Advisor**, a widely distributed monthly journal published by Wolters Kluwer.
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