



Employee Benefits

Cutting-edge benefit packages. Rock-solid compliance counsel.

Substantial and effective employee benefit programs and executive compensation packages are critical to business success and profitability. The Spencer Fane Employee Benefits team helps clients create benefit packages that attract and retain top talent while maintaining necessary compliance with laws and regulations governing employee benefits.

Overview

Translating complex benefits issues into understandable decision points

Our service model is premised on understanding our clients' businesses. Members of our Employee Benefits team work directly with HR professionals, C-level executives, and business owners to develop benefits solutions – retirement, health, executive compensation, and other benefit plans – tailored to the client's business needs.

Taking advantage of opportunities while remaining on the right side of the regulations

We advise employers, fiduciaries, Taft-Hartley funds, and benefit service providers (such as consultants, brokers, and record keepers) on the full spectrum of benefit plan issues.

While keeping clients up to date with changes in ERISA, the tax code, and other relevant laws, we offer proactive advice based on emerging trends in highly regulated areas ranging from health care reform to 401(k) plan rules. Our attorneys craft plans that receive favorable tax treatment, while shielding officers and employees from personal liability.

We also provide fiduciary training and risk mitigation that helps clients avoid costly mistakes related to regulatory risks.

Experience

401(k) and Other Defined Contribution Plans

- Devised and negotiated a favorable resolution for the correction of 401(k) plan loan errors affecting nearly 200 plans and 2,100 loans by leveraging the voluntary correction programs offered by both the U.S. Department of Labor and the IRS.
- Helped publicly traded companies add an ESOP component to their traditional 401(k) plans, thereby allowing the companies to claim additional corporate income tax deductions, at the same time that plan participants were given the option of receiving cash distributions of dividends paid on company stock held in the plans.
- Negotiated numerous favorable agreements with the IRS and other regulatory agencies, thereby shielding retirement plan sponsors from both the tax consequences of plan disqualification and the legal consequences of violating other laws.

- Successfully negotiated numerous compliance statements under the IRS' Employee Plans Compliance Resolution System (EPCRS), thereby shielding employers from the consequences of plan disqualification.
- Advised sponsors of tax-qualified retirement plan on compliance with the tax code's nondiscrimination and minimum-coverage requirements, including the special rules applicable to qualified separate lines of business (or QSLOBs).
- Advised 401(k) plan sponsors on the proper implementation of ERISA spending accounts.
- Amended Section 403(b) plans to allow for post-severance employer contributions as an early retirement incentive.
- Advising 401(k) plan sponsors on plan governance and fiduciary issues, including analyzing fee arrangements, negotiating recordkeeping agreements, and drafting investment policy statements.

Benefits Litigation

- Served as lead defense counsel in the successful defense of a lawsuit challenging the denial of COBRA coverage, establishing new, employer-friendly precedent in the process. *Maloney v. Ameristar Casinos*, No. 4:09-cv-00673 (W.D. Mo. 3/9/2010).
- Successfully defeated a class action, breach-of-fiduciary-duty claim that was brought against a Fortune 20 client arising out of the Enron bankruptcy, convincing the federal court to dismiss the matter before discovery was authorized. *Geiler v. Jones*, 37 EBC 1018, 2006 Westlaw 407683 (D. Neb. Feb. 2, 2006).
- Recovered overpayments to participants from both retirement plans and self-funded health care plans, through arbitration and litigation and under both ERISA's civil enforcement provisions and state law.
- Successfully litigated complex ERISA standing and preemption issues.

Executive Compensation

- Represented the boards of large tax-exempt entities in the process of negotiating and drafting employment agreements and special nonqualified retirement arrangements for executives of those entities.
- Created a special type of deferred compensation arrangement for the general manager of a public utility, thereby allowing for fully vested deferrals in excess of the usual Section 457 limits.
- Added qualified supplemental executive retirement programs (QSERPs) to qualified pension plans as a way of allowing executives to receive additional deferred compensation that is fully protected from the claims of their employers' creditors.
- Advised employers on the permissible integration of a 401(k) plan with a nonqualified deferred compensation arrangement, particularly in view of the constraints imposed by Section 409A of the Tax Code.

Fiduciary Advice

- Created a proprietary risk assessment tool that provides a unique way of identifying and measuring fiduciary, plan governance, and operational risk for employers who sponsor a retirement plan. The report generated with this tool serves as a benchmark for process improvement strategies.
- Developed a sophisticated plan governance structure for the qualified plans of a Fortune 100 publicly traded company so as to reduce the risk of ERISA fiduciary liability for its board of directors and officers.
- Conducted a comprehensive review and analysis of the fiduciary processes and procedures used by three multiemployer benefit funds with over \$7 billion in assets.
- Advised a number of 401(k) plan service providers and plan sponsors in connection with 401(k) "excessive fee" issues.
- Advised clients with 401(k) plans that hold company stock about their fiduciary risks and obligations in light of recent stock-drop litigation.
- Assisted employers in making submissions to the Department of Labor under the DOL's Voluntary Fiduciary Correction Program.

- Prepared a comprehensive risk assessment of the employee benefit plans and programs maintained by a large public hospital.
- Assisted employers and plan sponsors in negotiating the resolution and settlement of Department of Labor investigations. In one case, the DOL's demand for over \$2 million in "lost profits" was settled for an additional contribution of only a few hundred dollars.

Health and Welfare Plans

- Advised sponsors of self-funded health plans on the proper design of their employee wellness programs.
- Helped sponsors of self-funded health plans comply with HIPAA's privacy and security requirements, including the drafting of policies and procedures, notices of privacy practices, and plan amendments. Also conducted training, both on-site and via webinars.
- Advised employers on the termination of retiree group health plans and other strategies for reducing future liabilities for retiree health benefits.

Health Care Reform

- Assisted several fast food franchises in analyzing their options under the Affordable Care Act's "play-or-pay" rules, pointing to ways they could avoid having to either offer expensive health coverage to additional employees or pay onerous penalties.
- Helped an employer shield its self-funded retiree health coverage from compliance with expensive ACA mandates by splitting a combined plan into separate active and retiree plans.
- Advised staffing companies on their obligations under the Affordable Care Act's play-or-pay requirements, including special rules that might assist them in their competitive marketplace.
- Helped employers analyze their options under the ACA's "play-or-pay" rules, pointing to ways in which they could avoid having to offer expensive health coverage to additional employees or pay onerous penalties.
- Advised association health plans on their obligations under the Affordable Care Act, including options for avoiding the application of the ACA's small group health insurance community rating requirements.

Pension Plans

- Converted many traditional defined benefit pension plans into cash balance arrangements, thereby increasing employee satisfaction with their pension benefits and shielding employers from the volatility associated with funding traditional defined benefit plans.
- Terminated defined benefit pension plans and shepherded those terminations through the procedures established and enforced by the Pension Benefit Guaranty Corporation (PBGC), thereby eliminating the sponsors' PBGC premium obligations and the administrative and funding obligations associated with those plans.
- Negotiated a refund from the PBGC to an employer of over a half million dollars in premiums.
- Assisted sponsors of defined benefit pension plans in the implementation of lump-sum payment windows, thereby reducing both PBGC premiums and the funding volatility often associated with such plans.

Areas of Focus

ERISA Litigation

Zealous advocates for employers, fiduciaries, trustees, and other benefit providers facing ERISA disputes. Spencer Fane ERISA Litigation attorneys provide clients with innovative and practical solutions that yield significant cost savings and

recoveries while allowing them to move beyond litigation and preserve the integrity of their business.

Our firm's track record includes successful representation of companies in benefits disputes prior to the enactment of ERISA. Our practice has evolved to include the ability to handle:

- **Prosecution and defense of individual and class-action lawsuits** alleging breaches of fiduciary duty and prohibited transaction rules.
- **Challenges to plan denials** of benefit claims.
- **Actions related to the investment of retirement plan assets.**
- **Delinquent contribution and withdrawal liability claims** under multiemployer plans.
- **Claims involving retiree medical obligations.**

Executive Compensation

Creating executive compensation and benefit packages that attract and retain key talent while complying with regulatory requirements. Spencer Fane attorneys strike this important balance by first understanding our clients' business objectives and then designing comprehensive and compliant plans to achieve them.

We pride ourselves on providing executive compensation and benefits advice to clients that is clear, concise, and business-driven. By evaluating plans through the filter of the law, we present the best business options available to for-profit businesses and tax-exempt organizations of all sizes.

Our attorneys have broad and extensive experience:

- **Establishing nonqualified deferred compensation programs for executives and other key employees** that comply with, or are exempt from, Code Section 409A. These include long- and short-term incentive programs, SERPs, Code Section 457(b) and 457(f) arrangements, and equity-based plans.
- **Designing plans for executives of higher education institutions and tax-exempt organizations.**
- **Drafting, negotiating, and defending** severance arrangements, change of control (or golden parachute) agreements, phantom stock and equity compensation plans, and rabbi trusts.

Group Health and Welfare Plan Benefits

Enhancing employee recruitment and retention while reducing the risk of costly audits and penalties. Spencer Fane Employee Benefits attorneys speak the technical language of the tax code and ERISA when needed, but our focus is on translating those details into practical business advice.

In plain language, our attorneys present human resources leaders and employee benefits specialists with options and guide them to the solution that best meets the unique needs of their business or organization.

We provide counsel to entities in nearly every industry, advising on:

- **Ongoing compliance** related to their health and welfare benefits programs, including the facilitation of open enrollment periods and plan design changes.
- **Drafting communication materials and required notices** and filing government reports.
- **Navigating one-off situations**, ranging from day-to-day COBRA administration issues to managing a HIPAA privacy or security breach.

We work with employers, third-party administrators, and insurers to explain changes in regulatory requirements and identify opportunities for cost savings and efficiency.

Multiemployer Benefits Plans

Collaborating with boards, plan administrators, and other plan professionals on day-to-day matters and long-range strategy. The Spencer Fane Employee Benefits team represents Taft-Hartley welfare and retirement plan clients in all areas of legal compliance.

Our services include:

- **Drafting and amending** plan documents and trust agreements.
- **Assisting in plan interpretation, claims, and appeals.**
- **Drafting participant forms and notices.**
- **Advising on withdrawal liability** and funding and disclosure rules.
- **Collecting delinquent employer contributions.**
- **Assisting retirement funds in “endangered” or “critical” status** with the development of funding improvement or rehabilitation plans.
- **Providing full-scope compliance services for welfare plans** to ensure the requirements of ERISA, HIPAA, COBRA, and other applicable laws are satisfied.
- **Guiding clients through DOL and IRS audits,** to satisfactory results.

Additionally, we understand the complexities of collective bargaining and the requirements of the Taft-Hartley Act, which is essential to the success of multiemployer plans.

Qualified Retirement Plans

Guiding public, private, and tax-exempt employers in creating, implementing, and operating compliant retirement plans. Spencer Fane Employee Benefits attorneys advise employers on the full range of tax-qualified retirement plans. Members of our team:

- **Design, draft, and maintain** client-appropriate 401(k), profit-sharing, employee stock ownership, pension, and cash balance plans, including both individually designed and preapproved plans.
- **Advise on federal compliance and regulatory needs,** including obligations under ERISA and federal tax law.
- **Guide clients through amendments, restatements, and mergers.**
- **Assist clients with self-audits** for tax qualification issues.
- **Help clients correct errors** in the administration of their plans through programs such as EPCRS and VFCP.
- **Conduct fiduciary compliance training.**
- **Advise on using qualified plans in early retirement incentive programs.**
- **Have experience with special-use plans,** including multiemployer and single-employer collectively bargained plans, 403(b) plans for tax-exempt organizations, governmental employers, and public schools, and 457 plans.

Clients. We represent employers sponsoring qualified retirement plans and third-party administrators that provide services to retirement plans as well as investment providers and other service providers.