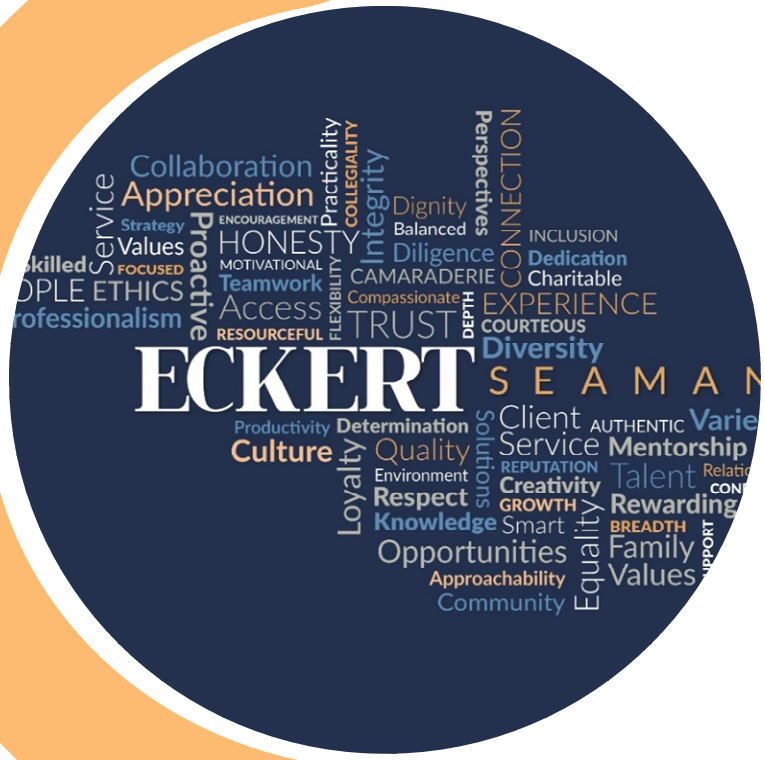

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Hot Topics in Benefits:
SECURE 2.0 & More

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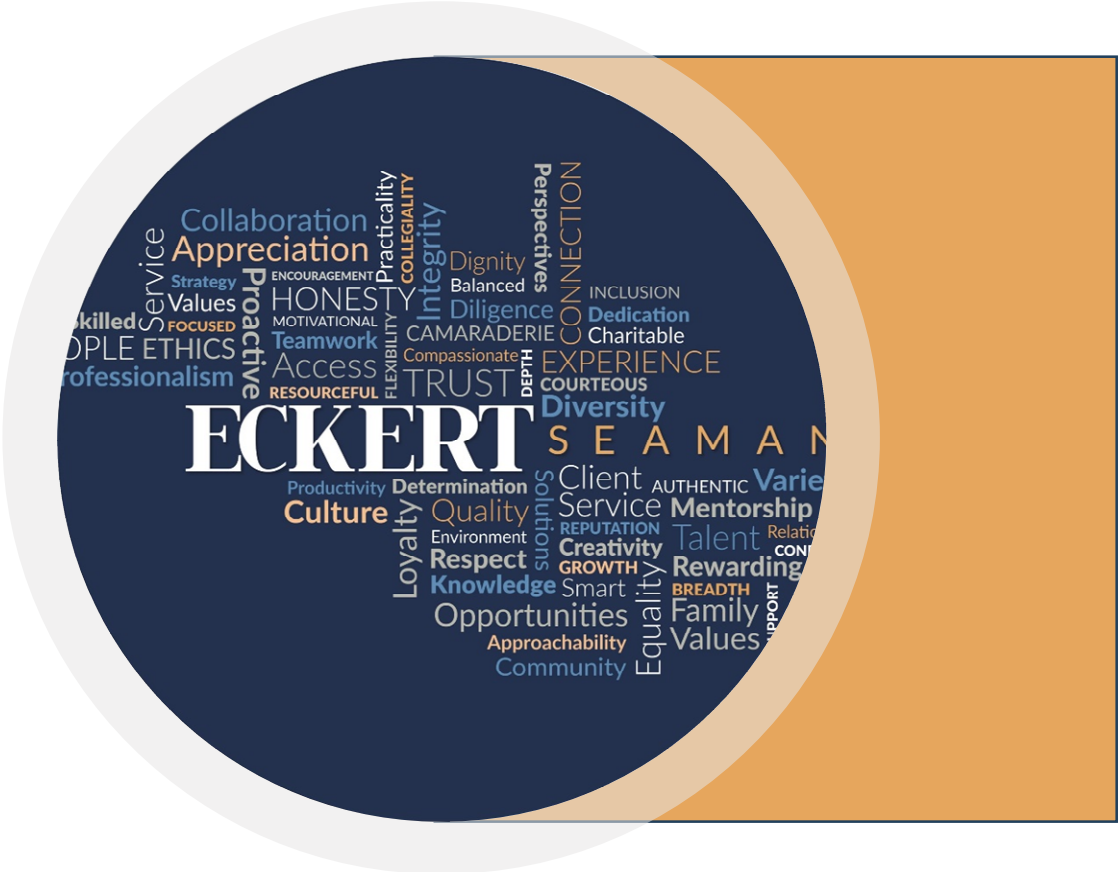
August 7, 2024

2024 Joel Lennen Legal Primer

Agenda

- SECURE 2.0 – Effective Provisions for 2025
- Data Privacy Regulation
- Impact of *Loper Bright* on Benefits
- Health Plan Litigation - New Fiduciary Cause of Action?
- Paying Your Unpaid Interns

SECURE 2.0:
What's Coming in 2025



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SECURE 2.0 Provisions Effective in 2025

- Expanding Automatic Enrollment
- Catch-Up Contributions
- Reduction in the Years of Service Requirement for Long-Term Part-Time Workers
- Final Regulations on RMD Rules

Automatic Enrollment

- Mandatory automatic enrollment for new 401(k) and 403(b) plans
  - Beginning in 2025, 401(k) and 403(b) plans ***established after December 29, 2022,*** must automatically enroll employees
- Initial contribution rate must be between 3% and 10%
- Automatic annual escalation by 1% until maxing out at 10% to 15%

Catch-Up Contributions

- Participants can contribute $23,000 per year to 401(k) plans
  - Age 50+ can make “catch-up” contributions over $23,000 limit
- Currently, an extra $7,500 per year ($30,500 total per year)
- For 2025, catch-up contributions limit increases to the greater of:
  - $10,000 per year for participants aged 60 to 63 ($33,000 total per year)
  - 150% of the regular age 50 catch-up contribution limit for the year (at least $11,250 in 2025)
- Beginning in 2026, those earning > $145,000 in FICA wages must make catch-up contributions on a Roth after-tax basis

Reduction in the Years of Service Requirement for Long-Term Part-Time Workers

- Before SECURE Act, plans may exclude employees working less than 1,000 hours per plan year from participating in the plan.
  - As a result, long-term part-time workers would never be eligible to participate
- SECURE Act required 401(k) plans to allow long-term part-time employees to participate after working 500 hours for 3 consecutive plan years
- SECURE 2.0 Act shortens the 3-year period to 2 years

Final Regulations for Required Minimum Distributions

- Background
  - Certain retirement plans (e.g., 401(k) plans, 403(b) plans, IRAs, and eligible 457(b) plans) are generally required to issue distributions from plan accounts once the account holder reaches a specific age and after death.
- Changes under SECURE Act
  - Increased required beginning date ("RBD") from 70-1/2 to age 72
    - Effective for those attaining age 70-1/2 after 2019
  - Replaced 5-year rule for employees who die prior to RBD with 10-year rule
    - Covers all post-death distributions occurring after 2019
    - Excludes certain eligible designated beneficiaries (e.g., surviving spouses; minor children)

Final Regulations for Required Minimum Distributions

- Changes under SECURE 2.0
  - Increased RBD age from 72 to age 73
    - Effective for participants attaining age 72 after 2022
  - Increased RBD age from age 73 to age 75
    - Effective for participants attaining age 73 after 2032
  - Kept 10-Year Rule in Place

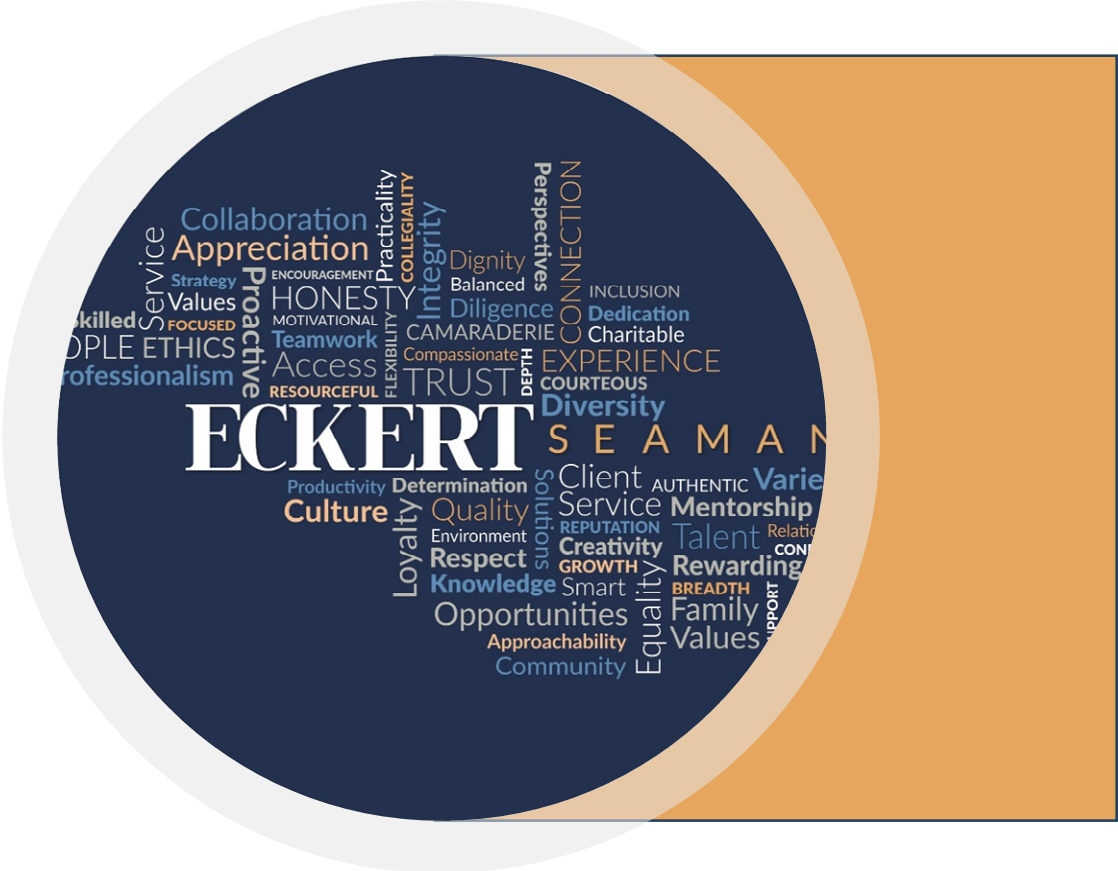
Final Regulations for Required Minimum Distributions

- 10-Year Rule
  - Prior to 10-year rule, post-death distributions could generally be spread over remaining life expectancy of designated beneficiary (i.e., if participant designated a younger beneficiary, RMD amount would be lower each year since younger beneficiary has a longer life expectancy). [A *Stretch* Account]
  - New 10-Year Rule does away with Stretch Accounts
    - Requires accounts to be paid out over 10-year period following death
    - Exceptions for certain beneficiaries, such as surviving spouse or minor children

Final Regulations for Required Minimum Distributions

- 10-year rule is effective for deaths occurring after 2019.
- IRS provided penalty transition relief for calendar years 2021 to 2024
- Final regulations generally apply in 2025
  - 10-year period for deaths occurring after 2019 was not extended by IRS (i.e., RMDs for an account owner who died in 2020 expire at the end of 2030, not 2034.)

Data Privacy Regulation



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Cybersecurity

- Given the large amount of data necessary to operate an employee benefit plan, plan sponsors should take cybersecurity seriously
- By statute, ERISA does not include any provisions covering cybersecurity, but it does impose broad fiduciary duties
- DOL audits of retirement plans now include looking into cybersecurity practices
- Participants have begun to file lawsuits for breach of fiduciary duty based on cybersecurity incidents

Cybersecurity

- The DOL has provided cybersecurity guidance for retirement plans.

  The guidance is related to:

  - Hiring service providers
  - Cybersecurity program best practices
  - Online security tips

Cross-Border Transfers of Sensitive Data

- Executive Order 14117, issued by President Biden earlier this year, addresses the efforts of certain countries of concern to access Americans' sensitive personal information and government-related data.
  - Seeks to protect Americans’ sensitive data by restricting access when such access would pose a national security risk.
  - Recognizes that data brokerages, third-party vendor agreements, employment agreements, investment agreements, and other such agreements can provide direct and unfettered access to Americans’ bulk sensitive data.
  - Instructs federal agencies to issue regulations and guidance to address the risks of cross-border transfers of sensitive data.
- **Benefit plans contain the bulk amounts of sensitive, personal data, including bank account information, that this EO seeks to protect.**

Cross-Border Transfers of Sensitive Data

- DOJ issued an Advance Notice of Proposed Rulemaking on March 5, 2024.
  - Would entirely prohibit “highly sensitive data transactions” when they involve countries of concern or covered persons (including data-brokerage transactions and bulk transfers of human genomic or biospecimen data).
  - Would require transactions involving countries of concern or covered persons to adhere to certain security requirements (i.e., vendor, employment, and investment agreements)
  - Considers adding as countries of concern: China, Russia, Cuba, Iran, Venezuela, and North Korea
- Next, we can expect DOJ to issue a Notice of Proposed Rulemaking, taking into account the public comments received as a result of the Advance Notice.
- **Plan sponsors may soon be subjected to new guidelines, regulations, policies, and/or procedures regarding cybersecurity.**
  - Neither the EO nor DOJ Advanced Notice impose any immediate new legal obligations, but it is important for plan sponsors to be aware of and remain current with these new regulations as they are issued.

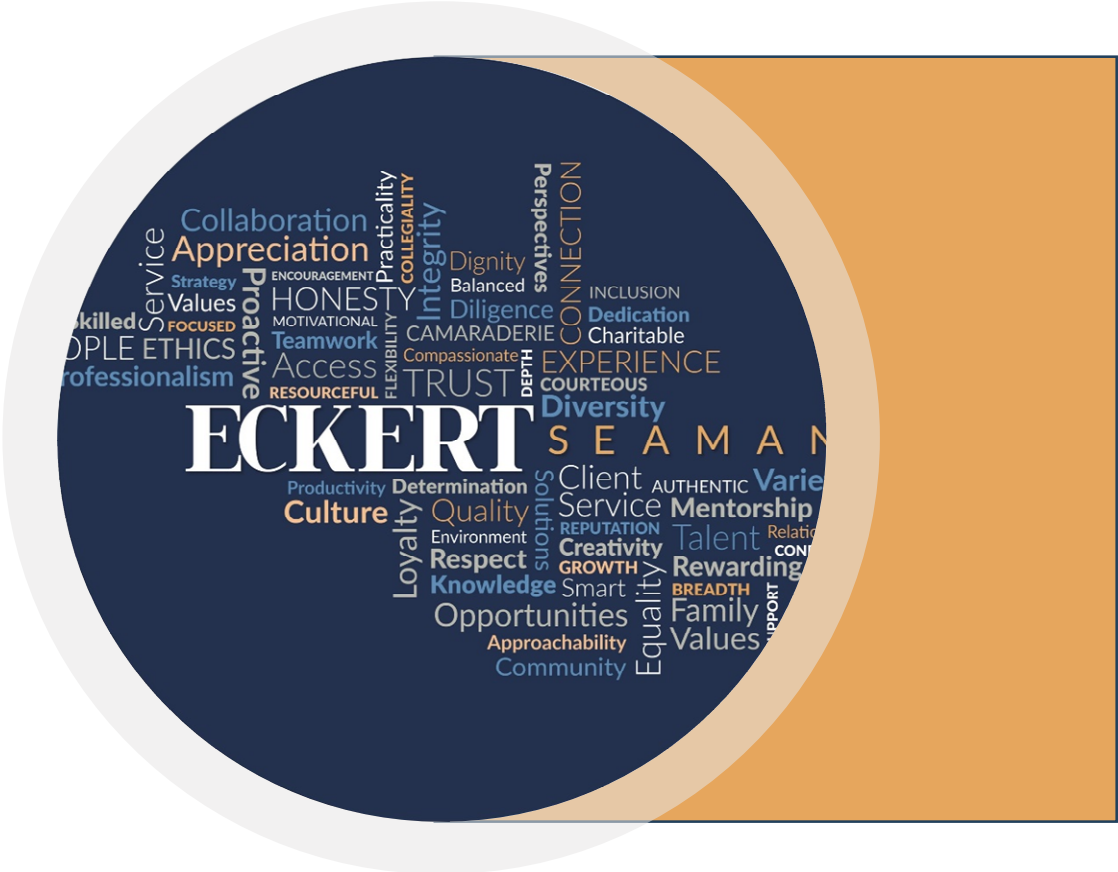
Tracking Technologies

- HHS released guidance on use of tracking technologies by HIPAA covered entities and business associates.
  - Tracking technologies (e.g., cookies) collect information about visitors to websites & mobile apps.
- Transfer of tracking data that includes Protected Health Information may lead to HIPAA concerns.
- Guidance addresses how HIPAA applies to tracking on user-authenticated webpages, unauthenticated webpages, and mobile apps.
  - Lists compliance obligations for regulated entities using tracking technologies, such as:
    - Ensuring that disclosures of PHI to tracking technology vendors are permitted by the Privacy Rule
    - Disclosing only the minimum necessary PHI to achieve the intended purpose
    - Establishing a Business Associate Agreement with tracking technology vendors
    - Implementing safeguards in accordance with the Security Rule
    - Providing breach notifications as required.

Tracking Technologies

- On June 20, 2024, a Texas federal judge vacated the guidance, stating that HHS lacked authority to issue it.
- Plan sponsors should review their vendors and vendor agreements for HIPAA compliance in preparation for future HHS action.

Impact of *Loper Bright* on Benefits



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Loper Bright Enterprises v. Raimondo

- On June 28, 2024, the U.S. Supreme Court overturned its 1984 decision in *Chevron.*
- For four decades, courts were required to give deference to agencies' interpretations of statutes when Congress had not spoken directly to the issue and the court found the agency's interpretation to be reasonable.
- The Court held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

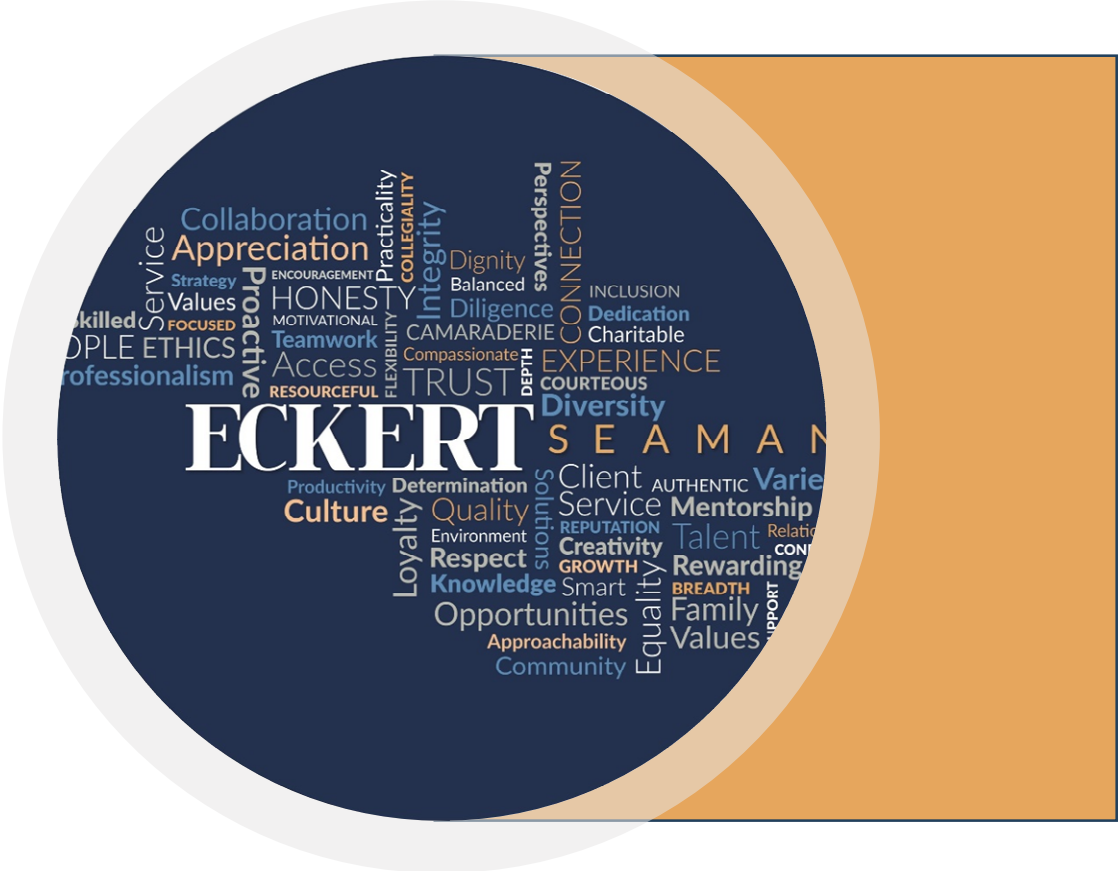
Loper Bright Enterprises v. Raimondo

- The Court announced a return to *Skidmore* Deference, which permits courts to "seek aid from [agencies'] interpretations" of the statutes those agencies are tasked with implementing.
- Cases settled under *Chevron* will not be overturned simply because *Chevron* has been overturned.
  - Previous decisions based on *Chevron* are vulnerable if challengers can establish similar, but different, facts to bring forth litigation.
  - Another recent decision removes the statute of limitations for challenging federal agency regulations
- *Loper Bright* also stands to prevent significant reversals in regulatory policy whenever a new executive administration changes.

Loper Bright Impact on Benefits

- *Loper Bright* does not immediately change anything for employee benefit plan sponsors
- Regulations and guidance from federal agencies, such as the Department of Labor and IRS, could be face more challenges.
  - **Fiduciary Rule**
    - On July 25, 2024, a federal judge in Texas blocked the Fiduciary Rule, finding that it “conflicts with ERISA in several ways[.]”
    - The judge cited *Loper Bright* and stated that the court did not owe deference to the DOL’s interpretation of ERISA.
  - **ESG Rule**

Health Plan Litigation – New Fiduciary Cause of Action?



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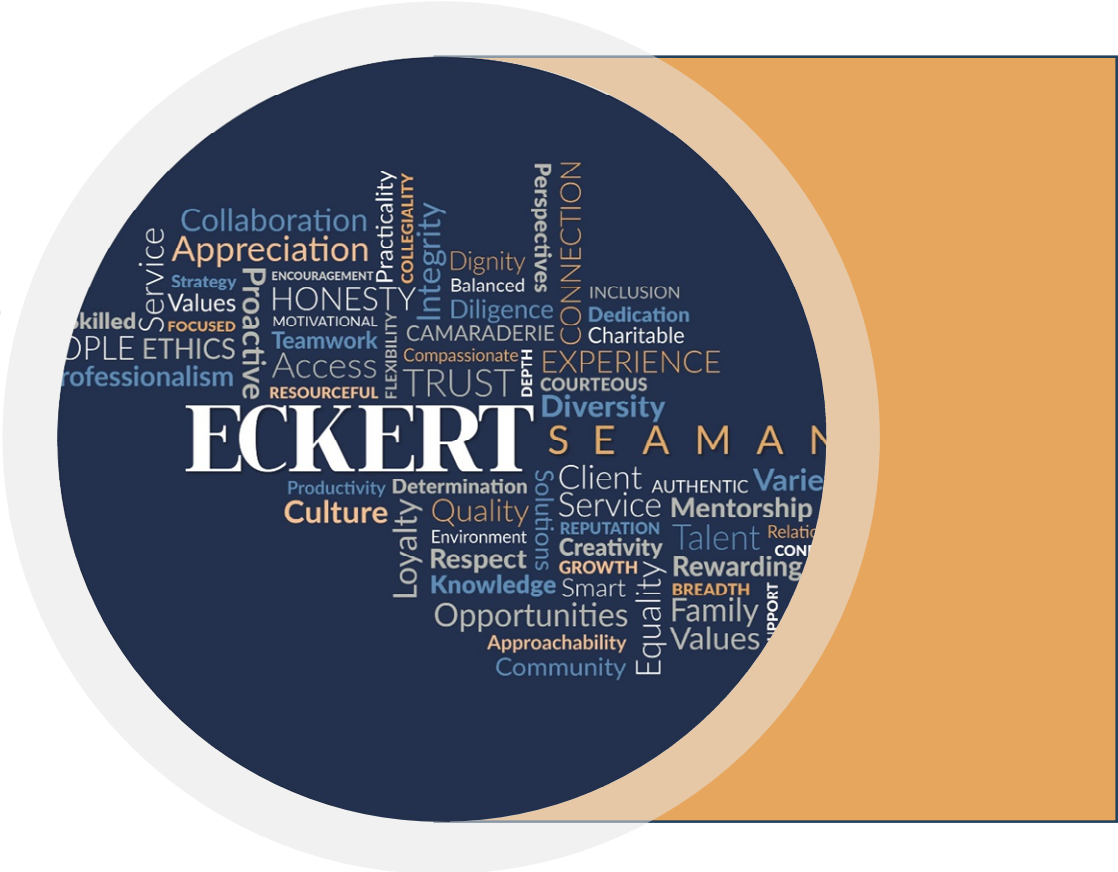
Health Plan Litigation

- Focus on self-funded health plans
- Transparency in Coverage rules require disclosure of information, intended to be used by plan fiduciaries to negotiate lower fees.
  - However, this information may be scrutinized, serving as basis for lawsuits alleging excessive fees or prohibited transactions.
- Potential Causes of Action:
  - Does Health Plan charge too much for services?
  - Do Participants pay too much for coverage?
    - Look at other similar plans to determine if these amounts
- Defense – Participants still received benefit they were promised. Like a defined benefit pension fund, the benefits are fixed, and, as a result, if all promised benefits are received, then there is no injury claim.

Paying Your Unpaid Interns



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Paying Your Unpaid Interns

- **You may want to pay your unpaid interns that did a great job this summer, but there are some important risks to evaluate.**
  - **Employment Concerns:** Providing a W-2 could suggest that the intern was an employee, and that employment would be subject to various requirements imposed by employment laws. Providing a 1099 could suggest that the intern was an independent contractor, which could raise misclassification issues.
  - **Employee Benefits Concerns:** Should your intern have been eligible for health plan and retirement plan benefits?
  - **Tax Concerns:** *You cannot escape tax requirements*.
    - Issuing a W-2 or a 1099 would put the IRS on notice of the payment, which can lead to some of the above risks materializing.
    - By issuing a one-time payment of $600 or more, the employer would be required to issue a Form 1099, putting the IRS on notice of the payment.
    - Any payment of at least $400 would require your intern to file a tax return – reporting that payment as self-employment income.
    - Even if a payment falls under the $400 threshold, it is still considered taxable income – but does not require tax reporting by either party, provided that the intern does not earn self-employment income from other sources, which would put the intern over the $400 threshold, and that the intern is not obligated to file a tax return for another reason.
- **Note: Gift cards are treated similarly as cash equivalents.**

Questions?

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