



# 31st Annual Benefits Compliance Conference

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Scheduled in 2 Hour Segments during  
November 2020 Produced Virtually via Zoom

## SESSION 1: Hot Topics for Retirement Plan Compliance Issues

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Introduction: **Mark Bodron**, Partner, Baker Botts LLP

Speaker: **James R. Griffin**, Partner, Scheef & Stone, LLP



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# Our 45<sup>th</sup> Annual Conference

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**SW BA** SouthWest BENEFITS Association | 45th ANNUAL CONFERENCE

## Benefits Safari

May 19 - 21, 2021  
Kalahari Resort / Round Rock, Texas

**Kalahari**  
RESORTS & CONVENTIONS



# CE Update

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- Please be sure to answer the poll questions today – 1 question per session
- **Check the Chat Box to download (word doc) your Attendance Record**
- **Submit your Attendance record to [registration@swba.org](mailto:registration@swba.org) after Thursday**
- TX Dept of Insurance, TX MCLE, OK MCLE – With your name and Bar/License#  
we will be able to submit your hours online
- Actuaries – Please send your recommendations re Core, Non-Core and No Credit Sessions
- All others – CPE, HRCI, SHRM, Other States, etc. –  
we will send you a certificate of attendance



# Today's Speaker

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**Jim Griffin** works with clients on 401(k) plans and other retirement plans, as well as tax issues involving health plans, Section 125 cafeteria plans and Section 409A deferred compensation plans. Jim helps clients fix broken plans and work through audits by the Internal Revenue Service and Department of Labor. For more than 30 years, Jim has been helping clients solve their employee benefit problems. Jim's clients count on him to bring practical solutions with a common sense explanation. Jim enjoys helping clients break down barriers to get positive results in the important area of employee benefits and executive compensation.



# HOT TOPICS FOR RETIREMENT PLAN COMPLIANCE ISSUES

SWBA Benefits Compliance Conference  
November 18, 2020



**SCHEEF & STONE**  
SOLID COUNSEL



## Jim Griffin, Partner Scheef & Stone, LLP



[Jim.griffin@solidcounsel.com](mailto:Jim.griffin@solidcounsel.com)

214-706-4209

[www.linkedin.com/in/jimgriffinerisalawyer](http://www.linkedin.com/in/jimgriffinerisalawyer)

- Practicing attorney for more than 34 years
- Former chair of the ERISA Committee of the State Bar of Texas Tax Section
- Selected Community Service: UT Southwestern Medical School, KCBI, MATA
- Leadership Dallas
- SMU Dedman School of Law
- Texas Tech University
- Married to Sheila



**SCHEEF & STONE**  
SOLID COUNSEL

# IRS

1. SECURE Act
2. CARES Act
3. COVID-19 Flexibility
4. Other





# 1.1 Long-Term Part-Time Workers

- 401(k) plans may not require an employee complete a period of eligibility service greater than 3 consecutive 12-month periods with at least 500 hours of service during each 12-month period.
- Employee must reach 21 by the end of the 3 consecutive year period.
- Start counting 12 month periods for eligibility on January 1, 2021.
- Vesting service is counted for all years based on completion of 500 hours of service.



## 1.2 Penalty Increases

- Increases IRS penalty for failure to timely file Form 5500
  - FROM \$25 per day up to \$15,000 per plan year
  - TO up to \$250 per day up to \$150,000 per plan year
- Increases IRS penalty for failure to timely file Form 5310-A
  - FROM \$25 per day up to \$15,000 per plan year
  - TO up to \$250 per day up to \$150,000 per plan year
- Effective for returns and statements required to be filed after December 31, 2019.



## 1.3 Faster Post-Death Distributions

- Distributions after the death of the participant must be made by the end of the 10<sup>th</sup> calendar year following the year of death.
  - Life expectancy distributions are permitted if the designated beneficiary is:
    - A surviving spouse
    - A disabled or chronically ill individual
    - A beneficiary no more than 10 years younger than the participant
    - A minor child of the participant (until the child reaches the age of majority)
    - Age 70-1/2 is replaced with age 72 for all tax-qualified plans, including DB and DC
- 
- Effective for deaths after December 31, 2019.



## 1.4 Increase in Required Beginning Date

- Age 70-1/2 moves to age 72
  - DB and DC
- Effective starting in 2020 for employees who turn 70-1/2 after December 31, 2019.



## 1.5 Pooled Employer Plans

- DC or IRA based
- Unrelated employers/“Open” multiple employer plan
- Treated as a “single employer” for purposes of ERISA.
  - One 5500/one audit
- May be sponsored by a bank, insurance company or other financial services firm.
- One bad apple rule
- Selection & monitoring responsibility
- Effective after December 31, 2020



## 1.6 Qualified Birth or Adoption Distributions

- Distribution up to \$5,000 from an “eligible retirement plan” made to an individual during the 1 year period that begins when the child is born or adopted.
  - Taxable, but not subject to Section 72(t) 10% penalty
- Eligible retirement plan includes: 401(k), 403(a) & (b), 457(b) and IRAs.
- Effective for distributions after December 31, 2019



## 1.7 Lower Age for In-Service Distribution

- Permissive reduction in minimum age for in-service distributions:
  - Governmental 457(b) plans: 70-1/2 to 59-1/2
  - DB and Money Purchase: 62 to 59-1/2
- Effective for plan years beginning after December 31, 2019





## 1.8 QACA Increases

- Allows automatic enrollment contributions under a QACA to increase to 15% of compensation
  - 10% in the participant's first year.
- Effective for plan years beginning after December 31, 2019



## 1.9 Safe Harbor Plans

- Eliminates participant notice requirement for plan sponsors with a nonelective employer contribution safe harbor plan.
- Nonelective employer contribution safe harbor plan may be adopted retroactively for a year as late as the last day of the following year and subject to a 4% nonelective contribution requirement.
- Effective for plan years beginning after December 31, 2019.



## 1.10 Lifetime Income

- Provides a fiduciary safe harbor for selecting an insurance company that issues a “guaranteed income contract” that is made available under a DC plan.
- Allows a 401(k), 403(b) or 457(b) plan to provide for the distribution of a “lifetime income investment” tied to when the distribution option ceases to be made available under the plan.
- Plan years beginning after December 31, 2019.



## 1.11 Frozen DB Plans

- Provides nondiscrimination, coverage and 401(a)(26) relief with respect to benefit accruals and benefits, rights and features for a closed class of participants under a DB plan that has been closed for new hires.
- Effective for plan years beginning after December 31, 2019.



## 2. CARES Act

- Permits Coronavirus-Related Distributions & Loans
- Delays 2020 Loan Payments
  - IRS Notice 2020-50; June 2020; IRS FAQs; IRS Notice 2005-92
- Waives 2020 Required Minimum Distributions
  - IRS Notice 2020-51; June 2020
- Delays 2020 required contributions to single employer DB plans to January 1, 2021.
  - IRS Notice 2020-61; August 2020



## 3.1 Deadline Extensions

- Joint DOL & IRS Final Rule; April 28, 2020
- EBSA Disaster Relief Notice 2020-1
- Outbreak Period from March 1, 2020 until 60 days after the end of the COVID-19 National Emergency
- Deadline relief, generally subject to “good faith” for:
  - Claims & appeals
  - Required disclosures
  - Plan loan & distribution rules
  - Employee contribution & loan repayment deposit timing rules
  - Blackout notice timing rules



## 3.2 Deadline Extensions

- Notice 2020-35; May 28, 2020
- IRS expanded definitions of “Affected Taxpayers” and “Specified Time-Sensitive Actions”
- IRC Section 7508A—Time Sensitive Actions
  - Funding Waivers
  - Form 5330
  - 403(b) plan remedial amendment period (3/31 moved to 6/30)
  - Preapproved DB plans (4/30 moved to 7/31)
  - EPCRS correction implementation dates (moved to 7/15)





## 3.3 Zoom Notaries

- Notice 2020-42; June 3, 2020
- Temporary relief for 2020 from the physical presence requirement for spousal consent.
- Permits remote notarization if allowed by a state that permits remote electronic notarization.
- Also permits electronic witnessing by a plan representative
- Expires December 31, 2020



## 3.4 Partial Terminations

- IRS FAQ---Coronavirus-Related Relief For Retirement Plans And IRAs
- Q15: Are employees who participated in a business's qualified retirement plan, then laid off because of COVID-19 and rehired by the end of 2020, treated as having an employer-initiated severance from employment for purposes of determining whether a partial termination of the plan occurred? (added July 30, 2020)
- A15. Generally, no.



## 3.5 Safe Harbor Plans

- IRS Notice 2020-52; July 2020.
- Provides relief to plan amendments that are adopted between March 13, 2020 and August 31, 2020, that reduce or suspend Safe Harbor Matching or Safe Harbor Nonelective Contributions.



# 4.1 Hardship Withdrawal Amendments

- Revenue Procedure 2020-09; December 12, 2019
- Plan amendments required by 2019 401(k) regulations:
  - remove a plan provision suspending an employee's contributions following a hardship distribution of elective deferrals
  - requiring an employee's representation relating to his or her need for a hardship distribution, if the plan does not already provide for such a representation.
- These required amendments must be effective for hardship distributions made on or after January 1, 2020 (although a required amendment may be implemented as early as the first day of the plan year that begins after December 31, 2018).



## 4.2 Pre-Approved DC Plans

- Announcement 2020-7; June 1, 2020
- IRS announced that it intended to issue opinion letters on or about June 30, 2020, for plans submitted in the third six year remedial amendment cycle.
- An employer adopting a newly approved plan will be required to adopt the plan document by July 31, 2022.



## 4.3 Service Counting For Leased Employees

- CCA 202019018; May 8, 2020
- 4-month period of work under leasing arrangement must be counted for purposes of minimum participation and vesting under the qualified retirement plan of a company that used a staffing agency to hire workers through a leasing arrangement that ultimately became full-time employees
  - Even if the common law employees never satisfied requirements to be leased employees.



## 4.4 Qualified Plan Loan Offsets

- Proposed Regulations; August 20, 2020
- Tax Cuts and Jobs Act of 2017
- Allows any portion of QPLO to be rolled over by the participant's tax return due date (including extensions) for the year in which the offset is treated as a distribution.
- QPLO exists due to:
  - Plan termination
  - Default due to severance from employment





## 4.5 User Fees Going Up

- IRS Announcement 2020-14; August 12, 2020
- Increases to 5300, 5307 and 5310 user fees
- Effective January 4, 2021



## 4.6 Missing Participants

- Revenue Ruling 2020-24: Distributions from a qualified plans to a State's unclaimed property fund are subject to withholding, unless an exception applies.
- Revenue Procedure 2020-46: Adding a 12<sup>th</sup> self-certification reason so that a financial institution may accept a late 60 day rollover in the case of distribution that was made to a State's unclaimed property fund, modifying Revenue Procedure 2016-47.
- October 16, 2020



# DOL

1. DC Plans and Private Equity Investments
2. ESG Investing
3. Proxy Voting
4. Fiduciary Rule
5. Lifetime Income Illustrations
6. E-Disclosure



# 1. DC Plan and Private Equity Investments

- DOL Information Letter; June 2020
- Allows plans to offer participants a professionally managed asset allocation fund with a private equity component as an investment option.
  - Structured as collective investment trust with liquid component to manage participant-directed deposits and withdrawals.
- Letter does not address direct investments by DC plan participants.



# 1. DC Plan and Private Equity Investments

- Appropriateness—balancing longer time horizon, liquidity restrictions and increased complexity with participants' ages, normal retirement age, anticipated employee turnover and contribution and withdrawal patterns.
- Valuation issues
- Disclosure issues
  - Liquidity Risk



## 2. ESG Investing

- DOL Proposed Regulations; July 2020
- Selection of plan investments must be based on risk-adjusted economic valuations and not non-pecuniary considerations.
- ERISA investment goal is optimization of economic returns.
- Plan fiduciaries are not permitted to sacrifice investment return or take on additional risk to promote non-pecuniary benefits or any other non-pecuniary goals.



## 3. Proxy Voting

- DOL Proposed Regulation; September 2020
- New approach—A plan fiduciary must not vote a proxy unless the plan fiduciary prudently determines that the matter to be voted on would have an economic impact on the plan.
- Relevant factors include:
  - Size of the plan’s investment in the issuer as a percentage of plan assets and as a percentage of the issuer.
  - Costs of researching how to vote.



## 3. Proxy Voting

- Role of proxy advisory firms or proxy service providers.
- Plans must have proxy voting policies and/or guidelines.
- Review every other year.
- Must make proxy voting policies and/or guidelines available to participants
- Retain records sufficient to demonstrate the basis for the exercise of shareholder rights.





## 4. DOL Fiduciary Rule

- Various actions; July 2020
- Restore 5 part test for investment advice fiduciaries
- Proposed new class exemption with “impartial conduct standards”, including:
  - a best interest standard
  - a reasonable compensation standard
  - A requirement to make no materially misleading statements about recommended investment transactions and other relevant matters.



## 5. Lifetime Income Illustrations

- Interim Final Rule; August 2020
- Implements SECURE Act requirement to provide lifetime income illustrations to help participants understand how their accounts may translate into an income stream in retirement.
- Lifetime income illustrations must be provided annually to all participants as part of the participant benefit statements.



# 5. Lifetime Income Illustrations

- Inputs:
  - Based on current value of participant account balance (assumed to be 100% vested and including loan balances; disregarding any projected future increases)
  - 2 payment starting dates:
    - Immediately
    - Age 67 (or actual age, if older than 67), regardless of the participant's actual age
  - 2 forms of payment
    - Lifetime income stream for participant only
    - Lifetime stream for participant and spouse of same age (and same amount)



## 6. E-Disclosure

- Final Regulations; May, 2020
- Permits default delivery of plan disclosures by:
  - Website posting (Notice of Internet Availability is required)
  - Email
  - Text
- Applies only to ERISA “pension benefit plans”
- Applies only to covered disclosures, such as SPDs, SMMs, SARs, annual funding notice, fee disclosures, quarterly benefit statements, blackout notices and claims & appeals.



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## **SESSION 2:** **Multiple Employer Plans, Pooled Employer Plans and other SECURE Act Issues**

Introduction: **Stefan Smith**, Partner, Locke Lord

Speakers: **Farrah Fielder**, Chief Legal Officer, Slavic 401(k)

**Laura Warshawsky**, IRS Office of Associate Chief Counsel

**Pamela Kinard**, IRS Office of Associate Chief Counsel



# Today's Speakers

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**Farrah Fielder** serves as Chief Legal Officer for Slavic401k, a recordkeeper and third-party administrator specializing in the PEO multiple employer plan (MEP) space. Prior to joining Slavic401k, Farrah was General Counsel for National Association of Professional Employer Organizations (NAPEO), where she focused on federal legislation and regulation, including the IRS PEO certification program, retirement and healthcare issues, workers' compensation policy, and other matters affecting the professional employer organization industry. She also was General Counsel for several national PEOs. Before entering the PEO and retirement industry, Farrah defended corporate clients with regard to employment matters, medical malpractice and products liability during her tenure at Ledbetter, Cogbill, Arnold & Harrison, LLP. She is admitted to practice law in Arkansas, Oklahoma, and Georgia.

**Laura Warshawsky** is Branch Chief of Qualified Plans Branch 1 in the IRS Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). She is the reviewer on recent and current guidance projects involving the rules for required minimum distributions under the SECURE Act and the CARES Act. Prior to joining the Office of Chief Counsel in 2015, she managed a Rulings Group in the IRS Tax Exempt and Government Entities Division. She received her law degree from the University of Chicago and her BA from Yale University.

**Pamela Kinard** is currently a Special Counsel in the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). She is the reviewer of several guidance projects, including regulations on governmental plans, application of the normal retirement age requirements to governmental plans, qualified plan loan offsets, multiple employer plans, a notice on remote notarization for spousal consent, and several SECURE Act provisions, including qualified birth or adoption distributions. She received her LL.M. degree in taxation from Georgetown Law School in 1997, a law degree from Cornell Law School in 1993, and a BA in Political Science from American University. She was Managing Editor of the Cornell Law Review in 1993. Her note, "Women in the Crossfire: Should the Court Allow It?" was published in 78 Cornell Law Review, 252 (1993).



# Multiple Employer Plans, Pooled Employer Plans and Other SECURE Act Issues

Stefan P. Smith, Partner, Locke Lord

Pamela R. Kinard, Special Counsel, IRS Office of Associate Chief Counsel (EB, EO and ET)

Laura B. Warshawsky, Branch Chief, Qualified Plans Branch 1, IRS Office of Associate Chief Counsel (EB,  
EO and ET)

Farrah L. Fielder, Chief Legal Officer, Slavic 401(k)



# Professional Employer Organizations

- Provide HR services to small and medium sized businesses, enabling clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers' compensation.
- Enable PEO clients to focus on their core competencies to maintain and grow their bottom line.

# What Specifically Do PEOs Do?

- Pay wages to their clients' worksite employees and remit taxes on those wages on the PEO's EIN
- Provide HR guidance and compliance assistance to clients
- Provide access to health, dental and life insurance
- Provide workers' compensation coverage
- Provide access to 401(k) plans

# What Do PEOs Not Do?

- PEOs do not own their clients' businesses.
- They also do not run the day-to-day business operations of their clients.
- PEOs do not take on more responsibility than is decided with the client and reflected in a client service agreement.

# Certified Professional Employer Organizations

- The CPEO program is a voluntary certification program for PEOs within the Internal Revenue Service.
- Certification as a Certified Professional Employer Organization (CPEO) affects the employment tax liabilities of both the CPEO and its clients.
- To become and remain certified under the CPEO program, CPEOs must meet tax status, background, experience, business location, financial reporting, bonding and other requirements described in the statute and regulations.

# More on CPEOs

- Employers may enter into a service contract with a certified professional employer organization (CPEO) in which the CPEO agrees to take over some or all of the employer's federal employment tax withholding, reporting and payment responsibilities and obligations.
- Generally, the CPEO is solely liable for paying the client's employment taxes, filing returns, and making deposits and payments for the taxes reported with regard to remuneration it pays to worksite employees.

# PEO MEP Clarification

- On July 29, 2019, the Department of Labor released a final rule clarifying when “bona fide” groups or associations of employers and PEOs can be permitted to sponsor single defined contribution MEPs.
- This allows PEOs to act “in the interest” of their client employers in relation to a retirement savings plan.
- The rule does not address PEO health plans.

# “Bona Fide” PEO Requirements

1. PEO must perform substantial employment functions on behalf of its clients
2. PEO must have substantial control over functions and activities of the MEP (as plan sponsor, 3(16) plan administrator, and a named fiduciary)
3. PEO must ensure each client in the MEP has at least one employee participant in the MEP (other than the owner)
4. PEO must ensure that MEP participants are current and former employees of the PEO and of clients (and their beneficiaries)

# PEO MEPs and Fiduciary Obligations

- The PEO MEP is subject to Title 1 of ERISA applicable to employee pension benefit plans.
- This means fiduciary responsibility and prohibited transaction provisions apply.
- PEO MEP sponsors assume and retain responsibility for the operation and administration of the MEP, including compliance.



# More on Fiduciary Obligations

- The PEO would be responsible for reporting, disclosure, fiduciary obligations generally, and selecting and monitoring service providers of the MEP.
- The clients would have the responsibility to choose and monitor the arrangement and to forward contributions to the MEP.

# So, What's a PEP?

- A pooled employer plan, or PEP, comes from the SECURE Act, which created a new MEP that is treated as a single retirement plan under ERISA.
- PEPs are distinct in that they allow for unrelated employers to band together as part of a MEP.
- These PEPs must be administered by a pooled plan provider (PPP).

# PPP Registration

- A pooled plan provider can operate a PEP as of January 1, 2021, but the PPP must register with the Department of Labor and the Treasury Department first.
- This registration is achieved electronically through the EFAST system.
- The Treasury Department considers this DOL EFAST PPP registration to satisfy the SECURE Act requirement to register with Treasury.

# More on the Actual PPP Registration

- PPPs will register using EBSA Form PR. This is a brand new form.
- PPP registration opens November 25, 2020.
- Although PPP registration is electronic, EBSA is making available an informational version of FORM PR with instructions.
- PPPs must register before operations commence.

# Final PPP Registration Filing Requirements

1. Initial registration reporting information on the PPP,
2. A plan commencement filing,
3. A supplemental filing for specified reportable events,  
and
4. A final filing when a PPP has terminated or ceased operating all PEPs.

Any questions?

Thank you!