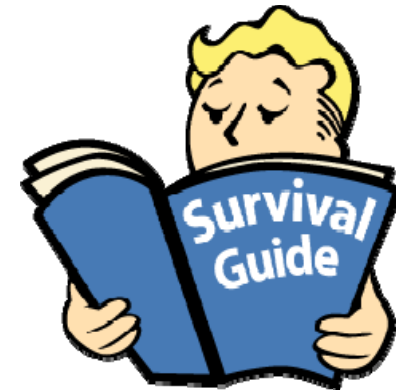


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# A Practical Guide to ERISA Research

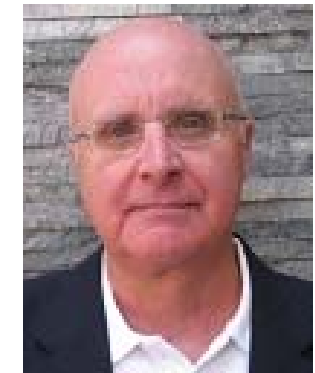


Ilene H. Ferenczy, Esq., CPC, APA  
Timothy McCutcheon, Esq., CPA, MBA



# Your Presenters Today

- Ilene H. Ferenczy, JD, CPC, APA
- Tim McCutcheon, JD, CPA, MBA



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# A Practical Guide to ERISA Research

- Facilitator:  
Chuck Gouge



- Question Board Moderator  
Joanne Pecina



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# During the webinar

- All attendees lines are muted
- Question board available and monitored
  - Please send in questions
  - We will answer as many submitted questions as possible
- Follow up questions and comments can be sent to:
  - [support@erisapedia.com](mailto:support@erisapedia.com)

# Agenda



- Foundations of ERISA law
- How executive guidance gets issued
- Sources available and their reliability
- How to do research
- Don't forget the Plan Document
- Attend for full 50 minutes to receive CE credit
- ***Voluntary*** demo after presentation

# Foundation

- Constitution of the United States
  - Legislative Branch
    - Pass laws
    - Commerce clause
  - Executive Branch
    - Issue regulations and other guidance
  - Judicial Branch
    - Decide cases
    - Marbury v. Madison



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# Government Source v. Editorial

- Government Source
  - All but ‘soft’ guidance must be followed
  - Ignore (even ‘soft’ guidance) at your own peril
- Editorial has no force of law
  - Ilene is smart but government agencies do not need to follow what she says.



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# Foundation - Legislative

- Two main bodies of statutory law:
  - Title I of ERISA – DOL
  - Title II (Internal Revenue Code)
- Title I
  - Concerned primarily with worker rights
- Code
  - Concerned with taxation and non-discrimination





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## Foundation - Legislative

- Code and ERISA have many parallel provisions:
  - Eligibility (Age 21 & one year of service)/Vesting
- And many dissimilar
  - Coverage (410(b)) only in Code
  - Only ERISA allows participant lawsuits
- US Code
  - IRS Title 26 – same numbering
  - DOL Title 29 – different numbering

# Foundation - Legislative

- Ultimate source of all ERISA law
- Don't blame the IRS for the ADP Test
  - Congress enacted Code section 401(k)(3)
  - IRS has power to interpret (and some say misinterpret)



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# Internal Revenue Code

- Section 401 – the ultimate section for tax qualification
- Section 402 – taxation of distributions
- Section 403 – 403(b) plans
- Section 404 – deductions
- Four digit sections – withholding/excise taxes

# ERISA



- Definitions
- Reporting and Disclosure (100s)
- Minimum Eligibility/Vesting Standards (200s)
- Minimum Funding (300s)
- Fiduciary Responsibility (400s)
- Claims Procedure/Civil Penalties (500s)

# Foundation - Executive

- Responsible for carrying out the law
  - Issue regulations to outline how the law works
- Other extensively vetted guidance
  - IRS Revenue Rulings
  - DOL Advisory Opinions
- “Soft” guidance
  - Website Q&A
  - Newsletters



## Foundation - Judicial

- Marbury v. Madison. “It is emphatically the province and duty of the Judicial Department to say what the law is.”
- Non-constitutional cases may be legislatively overturned.
- Mostly Title I cases
- May see more Code cases with no FDLs



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## Foundation - Judicial

- Lowest level: Tax Courts and District Courts
  - Decisions are not precedential (binding)
- Next level: Courts of Appeal
  - Geographic jurisdiction
  - Precedent (binding) in that jurisdiction, possibly persuasive in other jurisdictions
- The highest authority: Supreme Court
  - Precedent (binding) for all lower courts

# Executive Guidance

- Order of importance:
  - Regulations
  - Other vetted guidance
  - “Soft” Guidance





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# Executive Guidance

- Regulations - Administrative Procedure Act (APA):
  - publication of the proposed rules in a notice of proposed rulemaking (NPRM)
  - a period for comments and participation in the decisionmaking, and
  - adoption and publication of the final rule, via the Federal Register

---

## Executive Guidance - Preamble

- When regulations are published in the Federal Register, the government agency will also publish extensive explanatory language known as the 'Preamble.'
- Good place to look for clarification.
- Links found at bottom of regulations in EP issued after 1993. E.g., Treas. Reg. 1.415(c)-1:
  - [T.D. 9319, [72 FR 16911](#), Apr. 5, 2007]

# Vetted Executive Guidance - IRS

- What you can/can't do:
  - Revenue Rulings – most authoritative but in practice you must also heed Notices and Announcements
  - Notices
  - Announcements
- How you do it - Revenue Procedures



# Soft Guidance - IRS

- Private Letter Rulings
  - Only applicable to taxpayers involved
- Technical Advice Memoranda (TAM)
  - TAM 9735001 – Timing of amendments – guidance to IRS agents in the field
- Other IRS internal memos
- Web site
- Publications
- Industry Q&As



# Vetted Executive Guidance - DOL

- What you can and can't do:
  - Advisory Opinions - Binding only on the DOL and the applicant in relation to that ruling
  - Field Assistance Bulletins – Guidance to DOL investigators in the field
- How to do it:
  - Voluntary Fiduciary Correction Program
  - Delinquent Filer Voluntary Compliance Program



# Soft Guidance - DOL

- Web site
- Publications
- Industry Q&As



# Government Source v. Editorial

- All of the preceding is referred to government source material.
- Interpretations and explanations of government source material can be found in editorial material - Consider:
  - Quality of author
    - Even experts can – ahem – not be ‘clear’
  - Citations, Citations, Citations



# Editorial Material

- Never trust a blanket statement – look for citations to government source material.
  - A plan sponsor can do X and Y
  - vs.
  - According to Treas. Reg. 1.401(k)-3(a), a plan sponsor can do X and Y.
- You still need to read Treas. Reg. 1.401(k)-3(a) to see if it really says what the author claims it says.



# Editorial Material

- The Internet – use it for recipes
  - Source – it could be your newest employee
  - Citations - rarely
- Curated, paid services
  - ERISApedia.com
  - ERISA Outline Book
  - Answer Books
- You get what you pay for



# How to Do Research

- 1. Get the Facts
- 2. Define the Goal
- 3. Spot the Issues
- 4. Frame Your Question
- 5. Start looking
- 6. Repeat

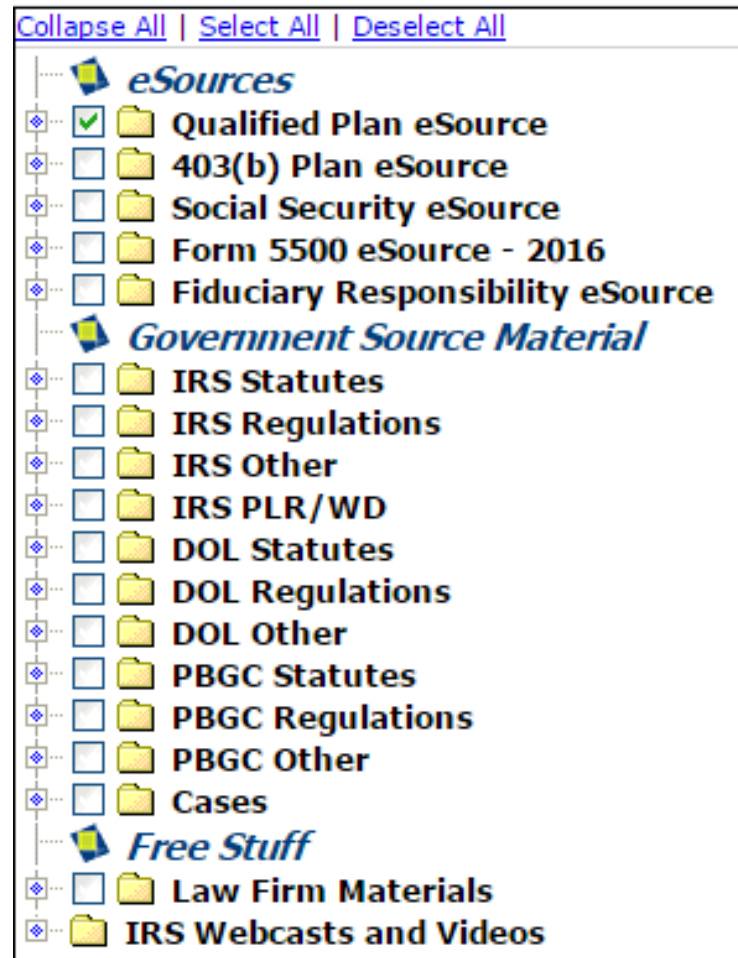


# Research Tools – What to Look For

- Speed of access
  - Number of clicks to content
- Organization
  - Clear separation of Government Source v. Editorial
- Coverage
  - Editorial and government source
  - ERISApedia.com has over 9,000 searchable documents
- Customer service



# Speed/Organization/Coverage



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# Search Feature v. Table of Contents

- The search bar is not always the first place to look.
- A well-organized table of contents can get you to content quickly.
  - Forest to trees



# Table of Contents - Forest

[Collapse All](#) | [Select All](#) | [Deselect All](#)

-  **eSources**
-  **Qualified Plan eSource**
-  **01 Types of Plans/General Qualification Requirements**
-  **02 Part I Common Definitions/Spouse/Hours of Service/Elapsed time/Multiple Employer Plans/Multiemployer plans**
-  **02 Part II Definition of Employer (e.g. Controlled Groups/Affiliated Service Groups)**
-  **03 Minimum Participation Requirements**
-  **04 DC Allocations/Limitations on Benefits (415, 402(g), Catch-up)/Disparity**
-  **05 Minimum Vesting Requirements**
-  **06 Distributions/Rollovers/Withholding/RMDs**
-  **07 Hardship/In-Service Withdrawals/Loans**
-  **08 Administrative Procedures/Claims**
-  **09 Top-Heavy**
-  **10 General Testing Principles (HCEs/Compensation)**
-  **11 Coverage Testing**
-  **12 Nondiscrimination Testing of Allocations**
-  **13 Other Nondiscrimination (BRF/Amendments and Terminations/Service Crediting/Corrective Amendments)**
-  **14 401(k) & Matching Rules and ADP/ACP Testing**
-  **15 Plan Document Qualification/411(d)(6)/Merger-Spinoff/Termination**
-  **16 403(b) Plans/Governmental and Church Plans**
-  **17 Deductions for Contributions to Qualified Plans**
-  **18 Reporting, Disclosure and Recordkeeping Requirements**
-  **19 Fiduciary Issues/Prohibited Transactions**
-  **20 Mergers and Acquisitions**
-  **21 Plan Correction**
-  **Appendix**



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# Table of Contents - Trees



[Collapse All](#) | [Select All](#) | [Deselect All](#)

- eSources**
- Qualified Plan eSource**
- 01 Types of Plans/General Qualification Requirements**
- 02 Part I Common Definitions/Spouse/Hours of Service/Elapsed**
- 02 Part II Definition of Employer (e.g. Controlled Groups/Affiliat**
- 03 Minimum Participation Requirements**
  - TABLE OF CONTENTS
  - INTRODUCTION/PLANS SUBJECT TO REQUIREMENTS
  - MINIMUM AGE AND SERVICE CONDITIONS
    - In General
    - Maximum Age Conditions
    - Faster Participation Allowed
    - Participation Requirements for Different Accounts
    - Waiver of Age and Service Requirements
    - Two Years of Service/100% Vesting
    - Tax Exempt Educational Organizations
    - Other Conditions on Participation May Apply
    - Voluntary Waiver of Participation (Opt Out)
    - Misclassification of Employees
    - Imposing Age/Service Requirements Through Other Plan Provisions
    - Amendment to Plan's Age and Service Conditions
  - YEAR OF SERVICE
  - DETERMINATION OF AGE
  - ENTRY DATES
  - SERVICE TAKEN INTO ACCOUNT
  - BREAKS IN SERVICE
  - QUALIFIED MILITARY SERVICE



# Where Do I Start?

- If you know the Code section that covers your topic, you may be able to start your search in that section or look for guidance relating to that section.
  - For example, suppose I want to know something about amending a 401(k) safe harbor plan. I know that I can start by reviewing the portion of the Code and the regulations that deal with safe harbor plans (e.g., Code sections 401(k)(12), 401(k)(13); Treas. Reg. 1.401(k)-3).





# Where Do I Start?

- If you know the Code section that covers your topic, you may be able to start your search in that section or look for guidance relating to that section (cont.).
  - I can also search within the “IRS Other” section for references to the Code or regulations sections, to find additional guidance
  - Or, I can look in the eSource under the 401(k) section to see what it says about other guidance

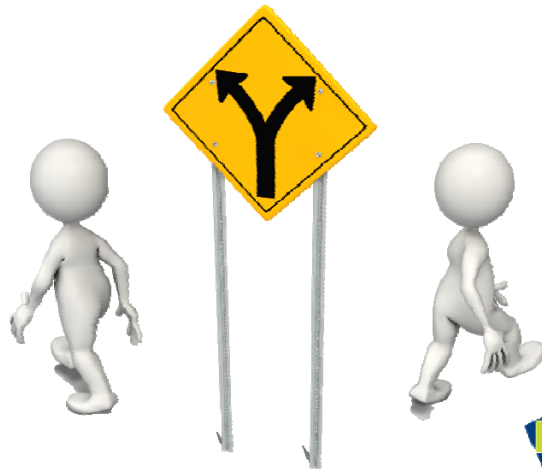
# Where Do I Start?

- If I have no idea where an issue appears in the law, I can start searching in the eSource.
  - For example, a client asks me about whether participants have a right to divest the employer securities in their account.
  - I have no idea if this is a Code rule, a DOL rule, or even a rule at all.
  - I go into the E-Source and type a search for “right to divest employer securities” – and am directed to Chapter 18, which discusses this in detail.



# Where Do I Start?

- If I have no idea where an issue appears in the law, I can start searching in the eSource.
  - From the eSource, I can link to both the ERISA sections (which deal with the fact that employees need to be advised of their divestiture rights) and the Code section (under which the right to divest exists).

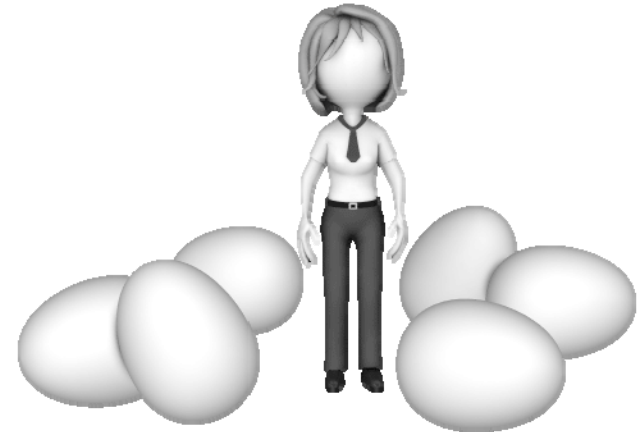


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# Searching

- Search is never a magic bullet. It takes time and practice – Don't give up!
- Iterative Process
  - Start with a broad search of relevant editorial materials
  - Look at the first several results and look for other possible search terms to narrow the search
  - Repeat with narrower search term and include more relevant material



# Using Search Results

- Results should be listed in order of relevancy. No need to look at them all – except as a last resort.
- Common issues:
  - Too few results.
  - Too many results.



# Too Few Results

- Too few results likely means:
  - The search term is too narrow – try more broader terms.
  - Terminology used by government agencies is often not the same as common usage – look at results to find synonyms and include in future search terms.
  - Not enough material found - look at results to see what original source is found and add the original source to search.

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# Too Many Results

- Too many results likely means:
  - Searching too much content
  - Terms too broad
- Example:
  - A search for ‘trustee’ in all of ERISApedia.com yields 1,836 results.
  - A search for ‘trustee fiduciary duties’ in the Qualified Plan eSource yields 21 results – mostly in Chapter 19.

# Getting Used to the System

- The more you use a system, the more you get used to how it is laid out and what phrasing it uses in discussing certain issues.
  - For example, it is common for different texts to use different terms for 401(k) salary deferrals
    - Salary deferrals
    - Employee deferrals
    - Elective contributions
    - 401(k) contributions
  - Getting used to the system's phrasing makes you better able to search.



---

# Sample Search Process

- 'Hands-on' example



# Plan Document

- Most overlooked source of answers
- Should be first place to look
- You may/must follow the rules in the document
- Document may provide rules not specified in government source materials
- Document may limit options that are otherwise legally available



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# Questions?



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# CE Credit

- ERPA/ASPPA/NIPA
  - Will receive certificate by email in a day or two
- Any questions email [support@erisapedia.com](mailto:support@erisapedia.com)

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# Contact Information

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