

UNIVERSITY OF MISSISSIPPI  
SCHOOL OF LAW

EMPLOYEE BENEFITS LAW  
Professor Secunda

FINAL EXAM

Date: December 10, 2005

Time Allowed: 3 Hours, 30 minutes

Instructions

1. This is an open book examination. You may refer to any materials and you may use a calculator.
2. Please "sign" the following pledge by writing your examination number on the line after the pledge. DO NOT write your name on this examination or on any bluebook.

By the act of submitting my examination, I do pledge, on my honor, that I have neither given nor received any improper assistance and that I will report any improper assistance given or received by others of which I am aware.

Exam No. \_\_\_\_\_

3. No examinations may leave the examination room. Return your examination to the front of the room at the end of the examination.
4. The first thirty (30) minutes of the examination is recommended for the purpose of reading over the examination and organizing your thoughts.

GOOD LUCK AND HAVE A GREAT WINTER HOLIDAY!

**DO NOT TURN TO THE NEXT PAGE UNTIL INSTRUCTED**

### THREE QUESTIONS (100 Points)

#### QUESTION ONE (5 Short Answers, 12 minutes each, 7 points each (35 points total))

- A. Secunda Associates is a small physicians group. The company has a total of 5 employees, consisting on three physicians (earning salaries of \$250,000, \$150,000, and \$100,000, respectively, in annual compensation), a billing coordinator (who makes \$50,000 annually on an hourly basis), and a receptionist (who makes \$20,000 annually on an hourly basis). Secunda Associates also has one independent contractor who cleans the office and makes \$10,000 a year on an hourly basis.

Secunda Associates sponsors a Money Purchase Pension Plan and has made a top-paid group election. Assume that all employees have satisfied the Plan's minimum age and service requirements for eligibility and vesting purposes, none are in a union, and none are nonresident aliens.

The Secunda MPP Plan provides that only salaried employees of Secunda Associates who have satisfied the minimum age and service requirements are participants in the plan. Does the Plan satisfy the minimum coverage rules for nondiscrimination under Code Section 410(b)? Does your answer change if the receptionist is a "leased employee" who has worked full time for Secunda Associates for two years?

- B. Jack Nowlin works for Waterstone Manufacturing and had creditable coverage under Waterstone's health insurance plan for 12 months before his employment is terminated. Five months before Jack was terminated, he suffered a broken leg for which he immediately received medical care and treatment.

Jack is subsequently hired by Davis Demolition, and enrolls in Davis' group health plan on the sixty-second day after his last day of coverage under Waterstone's plan. Davis' Plan has a twelve-month preexisting condition exclusion period. Under these facts, can the Davis Plan impose a preexisting condition coverage exclusion with regard to Nowlin's leg injury?

- C. Mississippi has just passed a law which requires all insurance companies who insure employer-provided health insurance plans in Mississippi to include coverage for fertility treatments. Is this Mississippi law preempted by ERISA? Does your answer change if an employer self-insures, uses a third-party administrator to run its health plan, and acquires stop-loss insurance?
- D. Can an ERISA fiduciary engage in social investing (also called economically targeted investing) consistent with the duties imposed on fiduciaries under ERISA?

- E. Farish Percy applies for a \$1 million supplemental life insurance policy through her employer, Myers Real Estate Emporium. Farish completes the application form for the insurance and submits it to the human resources manager, Poindexter Barnes. Farish names her husband, Grey, as the beneficiary of the policy.

Unfortunately, Poindexter negligently fails to file Farish's application form with the insurance company in a timely manner. As a result, the insurance does not come effective until September 1, 2005. Farish dies of a massive brain aneurysm on August 20, 2005. Briefly discuss the claim and remedies Grey, as the named beneficiary, has under ERISA. (Assume there is **NEITHER** a notice-prejudice rule in the applicable state jurisdiction **NOR** an *Elfstrom*-type precedent).

**QUESTION TWO** (Fact Pattern; One Hour; 35 points)

Cochran Industries, a manufacturer and distributor of federal courts and constitutional law text books with 30 employees, runs a defined benefit pension plan for all of its employees. Cochran Industries also acts as the plan administrator of the pension plan. Foreseeing a pension fund surplus for the coming years and wishing to down-size its operations, Cochran sets up an early retirement plan for its employees under which they will receive increased pension benefits.

Chip Brower, a long time employee of Cochran Industries, wishes to take advantage of the early retirement program, but is concerned because he fears that an even more generous program will be available for employees in the near future. Chip takes his concerns to Larry Pittman, the Vice President of Human Resources and the Plan Administrator for the pension plan. Larry tells Chip that he does not foresee any more generous retirement plans in the near future being offered (even though he knows that a more generous plan is under serious consideration when he talks to Chip). Based on this advice, Chip decides to take the early retirement benefit, but is upset six months later when a more generous early retirement benefit program is offered to remaining eligible employees.

Once Chip's final day is determined, Larry provides Chip, within the applicable time periods, the option of purchasing COBRA benefits for 18 months. On the 75th day after being offered COBRA benefits, Chip finally sends in the paperwork to Larry. Larry refuses to commence the health continuation coverage for Chip at that time.

Finally, while Chip was still employed with Cochran Industries, he was forced to miss work as a result of undergoing a procedure, in which his uvula was excised, in order to help cure his extremely loud snoring. Chip filed a claim under the health insurance policy, insured by the Massive Insurance Co. Larry, as the claims administrator under the Plan, promptly denies Chip's claim for reimbursement claiming that the procedure was not medically necessary. Rather than appealing Larry's decision to the Executive Vice President of Operations as the health insurance policy requires, Chip files a claim

directly in state court claiming that he is owed benefits under various state law causes of action.

- A. You represent Cochran Industries. Please advise the company what claims Chip may have against the company, under what theories, and the defenses the company has to these theories of recovery. As part of your answer, please discuss what procedural actions the company may take. Finally, regardless of how you come out on any of the claims, you **MUST** discuss what remedies are available to Chip if he is successful on his claims.
- B. As a general matter, may a non-fiduciary service provider be liable if it engaged in an ERISA prohibited transaction with a fiduciary? If so, under what section of ERISA would it be liable and to whom would the service provider be liable?

**QUESTION THREE** (Policy Question; One Hour; 30 points)

Comment critically on the following statement:

"Courts should interpret ambiguous sections of ERISA by starting with an examination of the common law of trusts and only depart from the common of law trusts to the extent that the principles espoused therein are inconsistent either with the structure of ERISA or the policy concerns animating ERISA."

Integrate cases and policy arguments in supporting your answer. In answering, please first state what the current law *is* with reference to **at least two separate areas in two different chapters** we discussed in class, and then argue what the law *should be* in these areas of employee benefits law.