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## Q&A With McDermott Will & Emery's David Rogers

*Law360, New York (June 11, 2009)* -- David E. Rogers is a partner in the Washington, D.C., office of McDermott Will & Emery LLP and head of the firm's employee benefits and European labor department. His practice is concentrated in the area of employee benefit matters, including all areas of qualified and nonqualified retirement plans, health and welfare plans, and executive compensation and executive employment agreements.

Rogers' area of expertise includes working with the Internal Revenue Service, the U.S. Department of Labor and the Pension Benefit Guaranty Corp. in obtaining rulings, advisory opinions and other matters.

### **Q: What is the most challenging case you've worked on, and why?**

A: One of the most challenging cases that I am currently working on involves the interpretation of recent changes to the Internal Revenue Code regarding deferred compensation plans maintained by foreign corporations.

We have advised our clients through the legislative process, and now the regulatory process, to assist them with these significant changes.

While Treasury is quickly attempting to draft guidance in this area, the effective date of the legislation, as well as the various types of plans subject to the new rules, have made it challenging to provide advice to a large client with tens of thousands of employees here and abroad.

### **Q: What accomplishment as an attorney are you most proud of?**

A: We are quite proud of a matter for a client that involved the termination of a pension plan by a bankruptcy trustee and the standards of care owed to the plan participants in connection with the termination.

A union in the case sued the trustee for breach of fiduciary duty in connection with the process of the plan termination. This union suggested that the plans be merged into the union plan. Rather than merging the debtor's pension plan (which was overfunded) into a severely underfunded union plan, the trustee terminated the plan.

The matter went to the United States Supreme Court where we prevailed in a 9-0 decision. The court held that the decision to terminate or merge was a settler decision and not a fiduciary decision and that the trustee, therefore, could not have breached his fiduciary decision.

**Q: What aspects of law in your practice area are in need of reform, and why?**

A: The complexity of the funding rules attributable to defined benefit pension plans and the recent changes to these rules prior to the economic recession have made it difficult to advise clients on how to continue to offer defined benefit pension plans without huge cash flow concerns.

Congress, Treasury and the PBGC are focusing on these issues but change and guidance are needed now. We have seen an uptick by clients in seeking minimum funding waivers or exploring what alternative options are available including plan freezes, change to plan formulas or even bankruptcy.

It is the confluence of significant drops in plan asset values, low interest rates and changes to the funding rules that collectively have made it extremely expensive, from a cash flow standpoint, to maintain these types of plans.

**Q: Where do you see the next wave of cases in your practice area coming from?**

A: From an ERISA-litigation standpoint, our practice has seen a large number of stock drop cases and excessive fee allegations in connection with qualified retirement plans.

We also expect to see an increase in the number of fiduciary liability claims as well. The economic recession has exasperated these issues as the value of company stock and plan assets have decreased.

**Q: Outside your own firm, name one lawyer who's impressed you and tell us why.**

A: Mark Iwry, who was recently appointed to a newly created position at the Department of Treasury, has been in and out of public and private benefits practice for over 30 years.

His judgment, intellect and creative thinking in the area of employee benefits has always been impressive both in the private and public sector.

**Q: What advice would you give to a young lawyer interested in getting into your practice area?**

A: Employee Benefits is a diverse and interesting practice area that suits many different types of attorneys. At its core, however, to be successful and to enjoy the area, one must focus on the technical areas.

There is a constant stream of new regulatory guidance and, nearly every year or so, significant legislative changes. While the changes are welcoming and helps to keep the area of the law interesting, it is, at times, difficult to keep up with changes.

One of my partners, Steve Pavlick, starts every day in the same way (and probably has for 30 years), he heads to the library to read the Daily Tax Reporter. It is this type of discipline that helps to make a successful attorney in this area.