

# Michelle McCarthy

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Michelle McCarthy advises clients of all types – from tax exempt organizations and governmental plans to Fortune 100 companies – regarding every facet of employee benefits law, including the design, structure, implementation, regulatory compliance and administration of retirement, health and welfare benefit plans. With more than 20 years of legal experience specializing in employee benefits and taxation, Michelle advises clients from both the private and public sectors and has served as trustee-appointed counsel to some of the largest and highest-profile pension, health and welfare funds in the nation.

Michelle has vast experience advising plan sponsors in the private sector with respect to the design, implementation and administration of their retirement, health and welfare benefit plans. Michelle's experience in the retirement plan space includes working with defined contribution, defined benefit and hybrid plans. She also counsels clients on all aspects of health and welfare plans, working with her clients to ensure that their health and welfare plans comply with the complicated and ever-changing requirements under the Internal Revenue Code (IRC), Employee Retirement Income Security Act of 1974 (ERISA), the Affordable Care Act (ACA), the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Health Insurance Portability and Accountability Act (HIPAA), the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), the Genetic Information Nondiscrimination Act (GINA) as well as other applicable federal and state law health plan mandates.

Michelle frequently advises plan sponsors and administrators on issues pertaining to plan governance, administration and compliance, has represented numerous of her clients in matters before the Internal Revenue Service (IRS) (including IRS audits and examinations) and has helped clients to obtain determination letters, private letter rulings, closing agreements and compliance statements with respect to corrective filings under the Employee Plans Compliance Resolution System (EPCRS) Voluntary Corrective Program (VCP). Michelle also has represented numerous clients in matters before the Department of Labor (DOL) and Pension Benefit Guarantee Corporation (PBGC) (including audits, examinations and corrective programs) and regularly advises on data privacy and cybersecurity issues relevant to retirement, health and welfare plans.

Specific to governmental plans, Michelle advises on tax and fiduciary issues, plan design, pension and health benefits administration, policy development, federal tax withholding and reporting obligations, Social Security coverage of members, FICA replacement plan requirements, the windfall elimination and governmental pension offset provisions, as well as tax compliance and maintaining tax-exempt status under the IRC, underlying Treasury Regulations, applicable IRS guidance, and relevant case law. Michelle frequently assists governmental plans in the development and drafting of internal policies and procedures,

member notices and communications, and statutory and regulatory amendments required in order to remain compliant with federal tax laws and regulations and has represented governmental plans before the IRS in requests for determination letter requests and compliance statements under EPCRS.

Michelle also has had a strong focus on benefits issues arising for Taft-Hartley multiemployer plans throughout her career, serving as management-appointed fund counsel to numerous multiemployer plans and advising boards of trustees on multiemployer plan governance, administration, and compliance issues. Michelle has represented numerous of her multiemployer plan clients in matters before the IRS, DOL, Social Security Administration (SSA) and PBGC, including audits and examinations as well as voluntary compliance programs. In addition, Michelle advises contributing employers regarding their participation in multiemployer health and pension plans and provides corporate transaction support on multiemployer plan issues, including potential withdrawal liability.

In addition to the numerous publications she has authored, Michelle frequently speaks on employee benefits and tax compliance issues at conferences sponsored by the International Foundation of Employee Benefit Plans, the American Bar Association, the National Association of Public Pension Attorneys, the State Association of County Retirement Systems, the California Association of Public Retirement Systems, the Los Angeles County Bar Association, the Beverly Hills Bar Association, the California Society of Certified Public Accountants and Lorman, among others.

## EXPERIENCE

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- Advised an association of governmental employers in the development and design of a benefit plan to provide health benefits to their employees. Advised governmental plans on federal tax withholding and reporting obligations, Social Security coverage of members, FICA replacement plan requirements, the windfall elimination and governmental pension offset provisions.
- Assisted 3 governmental plans in the development and drafting of internal policies and procedures, member notices and communications, and statutory and regulatory amendments required in order to remain compliant with federal tax laws and regulations.
- Represented governmental plans before the IRS in requests for determination letter requests and compliance statements under EPCRS.
- Advised numerous California-based public pension systems on compliance with the new required minimum distribution rules under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and SECURE 2.0 Act, and corresponding changes under California state law, and assisted in the development of the systems' internal policies and procedures to comply with the minimum distribution requirements under Section 401(a)(9) of the Internal Revenue Code (IRC), as amended by the SECURE Act and SECURE 2.0.
- Advised large multinational private sector employer with over 200,000 U.S.-based employees on issues related to the administration, management and oversight of its defined contribution, defined benefit, health and welfare, vacation, and severance plans with the Employee Retirement and Income Security Act of 1974 (ERISA) and the IRC, represented the employer in the submission of a voluntary compliance program (VCP) application with the IRS and voluntary fiduciary correction program (VFCP) application with the DOL, assisted in the redesign and amendment of its defined contribution, health, vacation and severance plans, represented the employer in a matter before the DOL, provided fiduciary trainings, and assisted with the termination and use of excess assets held in a Voluntary Employee Benefits Association (VEBA) so as to avoid income and excise taxes.
- Advised Boards for largest, highest-profile U.S. media and entertainment multiemployer pension and health plans on fiduciary and governance issues, including conducted new fiduciary trainings, as well as drafted and revised Boards' codes of fiduciary conduct and plans' internal fiduciary, governance and administrative policies and procedures.
- Served as lead counsel in confidential ERISA-based DOL investigation of large multiemployer plan involving fiduciary breaches, Voluntary Employee Benefits Association (VEBA) registrations and propriety of investments.
- Served as lead counsel in the representation of two large multiemployer funds in connection with a major DOL investigation that involved analysis of the plan sponsor's governance activities, the propriety of payments made to beneficiaries under the plan, the retention of executive staff, investment managers, record keepers and other vendors, as well as the appropriateness of fees charged by those entities.

- Served as lead counsel in the representation of a large multiemployer health and welfare fund in connection with a DOL investigation of allegations related to plan governance. This matter involved questions of plan registration protocols and ensuing financial responsibility of plan fiduciaries.
- Served as lead counsel in the representation of a large multiemployer health and welfare fund in connection with a DOL investigation concerning allegations of fiduciary breaches related to COVID-19 expense reimbursements and plan's alleged failure to comply with the MHPAEA.
- Represented the largest and highest-profile U.S. media and entertainment multiemployer health fund in merger negotiations with another high-profile multiemployer health fund. Prepared merger documents, resulting multiemployer health plan document and summary plan description, participant communications regarding merger and new health plan policies and procedures. Assisted plan staff with compliance issues arising from health plan merger.
- Represented multiemployer health plan in negotiations with the Centers for Medicare & Medicaid Services, related to plan's interpretation of Medicare Secondary Payer Rules.
- Prepared Non-Quantitative Treatment Limitation Analyses report for large multiemployer health plan.
- Represented an employer association in the maritime industry, in the negotiation, drafting, implementation and amendment of a multiemployer paid sick leave plan, benefiting over 30,000 union members up and down the coast. Preparation of the tax exemption application for the associated VEBA.
- Represented a multiemployer plan trust in an ERISA litigation regarding a disability claim denial.
- Represented an institutional trustee with respect to ongoing fiduciary matters and legal compliance requirements, including assisting the trustee in the review of valuation reports, providing counsel regarding the conduct of "pass-through" votes on major corporate transactions and representing trustee in IRS and DOL investigation.

## INSIGHTS

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### PUBLICATIONS

Co-Author, "Federal Court Rejects States' Challenge to DOL's ESG Investing Rule," *Nossaman eAlert*, 09.25.2023

Podcast Co-Host, "Cybersecurity Risk Management for Pension Plan Administrators: Tips for Staying Ahead of the Hackers," *Pensions, Benefits & Investments Briefings*, 08.02.2023

Podcast Co-Host, "Secure 2.0 Brings Big Changes to Retirement Plans," *Pensions, Benefits & Investments Briefings*, 03.16.2023

Author, "Considerations for Employers and Employer Plan Sponsors Related to Potential Changes in the Effect of *Roe v. Wade*," *LawFlash*, 05.06.2022

Author, "A Survival Guide to DOL Group Health Plan Mental Health Parity Audits," *LawFlash*, 10.22.2021

Author, "IRS FAQs: A Potential Shield for Taxpayers—Not a Sword for the Service," *LawFlash*, 10.20.2021

Author, "Relaxed IRS Self-Correction Rules a Boon for Plan Sponsors—and an Opportunity to Correct Failures Now, Practical Guidance," *LawFlash*, 08.24.2021

Author, "Relaxed IRS Self-Correction Rules a Boon for Plan Sponsors—and an Opportunity to Correct Failures Now," *LawFlash*, 07.28.2021

Author, "Employers May Continue to Defer Payroll Taxes Even After Paycheck Protection Loan Forgiveness," *LawFlash*, 06.10.2020

Author, "Insight: 100 Payroll Tax and Fringe Benefit Questions for the IRS on COVID-19 Measures," *Bloomberg Law*, 04.17.2020

Author, "COVID-19 Measures: 100 Payroll Tax and Fringe Benefits Questions for the IRS," *LawFlash*, 04.17.2020

Author, "COVID-19: LA City Council Approves Ordinances on Sick Leave and Retail and Delivery Workers," *LawFlash*, 03.21.2020

Author, "HIPAA Privacy Rule Still Applies for Employers Amid 2019 Novel Coronavirus Outbreak," *LawFlash*, 02.28.2020

## **SPEAKING ENGAGEMENTS**

Panelist, "Employment & Employee Benefits Law Update: Staying Compliant in 2024," Nossaman Webinar, 11.16.2023

Speaker, "The MOVEit Hack: Lessons Learned," State Association of County Retirement Systems Fall Conference, Rancho Mirage, CA, 11.08.2023

"Exempt Organizations & Governmental Plans Subcommittee Update," ABA Virtual Fall 2023 Tax Conference, 10.19.2023

"The MOVEit Hack: Lessons Learned and Compliance Refresher from the Biggest Hack of 2023," California Association of Public Retirement Systems Attorney's Roundtable, 10.17.2023

Speaker, "Tax Updates for Public, Non-Profit and Private Pension and Health & Welfare Plans," Nossaman's 2023 Pensions, Benefits & Investments Fiduciaries' Forum, San Francisco, CA and Los Angeles, CA, 10.05.2023 and 10.30.2023

"Required Minimum Distribution Rules Applicable under the Internal Revenue Code and California Law," California Association of Public Retirement Systems Attorney's Roundtable, 09.08.2023

Speaker, "Smarter, Greener, Better? Defined Contribution and Hybrid Plans Catch-Up on Secure 2.0 and ESG Investing," National Association of Public Pension Attorneys' 2023 Legal Education Conference, San Antonio, TX, 06.27.2023 – 06.30.2023

Speaker, "Required Minimum Distribution (RMD) Rules Applicable under the Internal Revenue Code (IRS) and County Employees Retirement Law (CERL)," State Association of County Retirement Systems Spring Conference, San Diego, CA, 05.10.2023

Speaker, "Top of Mind Benefits Issues for Employers," Technology Industry Employers Roundtable, 05.18 - 05.20.2022

Speaker, "Attorney Misconduct Case Studies," International Foundation of Employee Benefit Plans Annual Conference 2021, 10.19.2021

Speaker, "Top of Mind Benefits Issues for Employers," Technology Industry Employers Roundtable, 05.19.2021

Speaker, "National ERISA Litigation Trends Against Employers," ERISA Litigation Virtual Roundtable: For Plan Sponsors, 10.20.2020

Speaker, "Responding to the 2019 Novel Coronavirus: Top-of-Mind Employee Benefits Questions for Employers," 03.23.2020

Speaker, "Hot Topics in Employee Benefits: What We're Seeing," 03.19.2020

Speaker, "Responding to the 2019 Novel Coronavirus: Top-of-Mind Questions for Employers," Labor and Employment Employer Roundtable, 03.12.2020

Speaker, "Employee Benefits 2020 – Hot Topics and Trends," Employee Benefits Employer Roundtable, 11.21.2019

Speaker, "International Foundation of Employee Benefit Plans – Health Plan Mergers," 11.11.2019

## **COMMUNITY & PROFESSIONAL**

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American Bar Association, Exempt Organizations and Governmental Entities Subcommittee, Vice-Chair

State Bar of California, Employee Benefits and Executive Compensation Subcommittee, Member and Former Chair

Los Angeles County Bar Association, Tax Section, Member and Former Chair

International Foundation of Employee Benefit Plans, Member

National Association of Public Pension Attorneys, Tax Section, Member  
Women's Lawyers Association of Los Angeles, Member  
Free Arts for Abused Children, Board Member

## HONORS

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Recognized in *Best Lawyers in America*, Employee Benefits (ERISA) Law, Los Angeles, 2020-2023

## PRACTICES

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Pensions, Benefits & Investments  
Compensation & Benefits  
Retirement & Welfare Plan Benefits  
Fiduciary  
Taxation  
Litigation  
Health Law

## INDUSTRIES

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Government & Public Sector  
Healthcare

## EDUCATION

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University of California, Riverside, B.A., 1995, *cum laude*  
University of San Diego School of Law, LL.M., 1999  
University of San Diego, J.D., 1998

## ADMISSIONS

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California