

A Trap For The Unwary: Employee Benefit Plans And The Fiduciary Exemption To The Attorney-Client Privilege

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In the article entitled, "A Trap For The Unwary: Employee Benefit Plans And The Fiduciary Exemption To The Attorney-Client Privilege," published in the July/August 2014 issue of *The Metropolitan Corporate Counsel*, partner [Richard Chargar](#) discussed the fiduciary exception to the attorney-client privilege and how an increasing number of cases have seen plan fiduciaries precluded from asserting the privilege. The article explains the circumstances where the exception can be invoked such as in the context of employee benefit plans structured by the Employee Retirement Income Securities Act (ERISA) where an employer acting in the capacity of an ERISA fiduciary cannot assert the privilege against plan beneficiaries on matters of plan administration. It highlights two conditions where the exception does not apply: the settlor exemption and the liability exemption, where the courts distinguish how interests between the fiduciary and beneficiary align before and after a claim decision. Noting that ERISA fiduciaries should be aware that not all communications with attorneys regarding employee benefit matters will be privileged, it provides some guidance on how communications with attorneys should be framed.