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WEB's ***Benefits Insider*** is a bi-monthly member exclusive publication providing the latest developments from Washington, DC, on matters of interest to employee benefits professionals. The content of this newsletter is being provided through a partnership with the American Benefits Council, a premier benefits advocacy organization. To inquire about membership with the Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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RECENT LEGISLATIVE ACTIVITY

'Women's Pension Protection Act' Introduced in Senate

Senator Patty Murray (D-WA), the ranking Democratic member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, has introduced a bill that would expand access to workplace retirement plans, specifically targeting low-wage and part-time workers.

According to a fact sheet released by Murray's office, the Women's Pension Protection Act (S. 2110) would amend the minimum participation standards for long-term, part-time workers to "require employers to allow employees to participate in a plan once they have reached the earlier of the current minimum participation standards (age 21 or the completion of one year of service (generally 1,000 hours of service during a 12-month period)) or once they have completed at least 500 hours of service for three consecutive years." This provision was previously featured in President Obama's Fiscal Year 2016 federal budget proposal.

The measure seeks to "safeguard" retirement savings by extending current defined benefit plan spousal consent protections to defined contribution plans. Under S. 2110, consent would be required from *both* spouses before either may take a distribution or loan from a defined contribution arrangement like a 401(k) plan.

S. 2110 also includes a "financial literacy" component, consisting of two provisions: (1) financial providers "would be required to provide a link to the Consumer Financial Protection Bureau in any offer for the sale of a retirement financial product or service," and (2) the U.S. Department of Labor would provide grants to established community-based organizations to improve the financial literacy of women who are of working or retirement age.

Introduction of S. 2110 follows a report commissioned by Murray earlier this year describing retirement challenges unique to women. The bill has 11 Democratic cosponsors (all women) and has been referred to the HELP committee for future consideration.

Senate Legislation Would Empower Participants in Multiemployer Pension Plans

Senator Rob Portman (R-OH) has introduced a measure that would give multiemployer pension plan participants a greater voice in determining whether benefits will be cut. The Pension Accountability Act (PAA), introduced on October 7, would amend current law as implemented by the Multiemployer Pension Reform Act (MPRA) in 2014.

Under the MPRA, once an application to reduce benefits has been approved (by the Treasury Department, in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor), plan participants and beneficiaries have the right to vote on the proposed benefit changes before they can occur.

The PAA would make the participant vote binding in all situations and change the tabulation of the vote to disregard unreturned ballots.

The introduction of this legislation reflects ongoing concerns with the MPRA and continued attention to multiemployer pension plan issues in the U.S. Senate and House of Representatives. The U.S. House of Representatives Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions heard testimony from employers and union groups in an April 29 hearing to discuss what reforms were still necessary in the wake of enactment of the MPRA.

President Signs ACA Small Employer Reform Bill Into Law

President Obama signed into law the Protecting Affordable Coverage for Employees Act (H.R. 1624) on October 7, amending the Affordable Care Act's (ACA) definition of a "small employer" for the purposes of purchasing group insurance policies. The measure received bipartisan support in the U.S. Senate and House of Representatives.

Specifically, it will now be optional for states to classify businesses with between 51 and 100 employees as "small employers." Under the ACA, small group plans are subject to more stringent coverage requirements. A recent Congressional Budget Office analysis noted that the bill would likely result in lower premiums for small companies.

While H.R. 1624 does not necessarily have direct applicability to large plan sponsor members, its enactment suggests that on certain select matters, Congress and the President may be able to find common ground on the politically-charged topic of the ACA. Since the law's enactment, both political parties (for different reasons) have been reluctant to modify the law. From the Republican perspective, there has been a concern that efforts to improve the law will diminish any effort to repeal it entirely. At the same time, Democrats have been reluctant to pursue changes that could contribute momentum to undoing more significant provisions. Enactment of H.R. 1624 is one of the few notable exceptions over the past few years where both sides have shown a willingness to work together.

RECENT REGULATORY ACTIVITY

Society of Actuaries Revises Mortality Table Improvement Scale

The Society of Actuaries (SOA), a professional organization serving 24,000 actuarial members, released a modified mortality improvement scale, the MP-2015 Mortality Improvement Scale, on October 8.This updated improvement scale can be used to update the RP-2014 base mortality table. Most notably, the SOA's new report is positive step because it updates the mortality improvement scale to reflect the recent SSA data.

The federal government typically considers SOA's calculations in formulating mortality assumptions with respect to pension funding, benefit restrictions, Pension Benefit Guaranty Corporation(PBGC) premiums and lump sum valuations. However, when the

Treasury Department and Internal Revenue Service (IRS) issued Notice 2015-53 on July 31, specifying the updated mortality tables to be used for these purposes, they clarified that the official tables do not reflect the SOA's calculations and will not apply until 2017.

The 2014 SOA reports are controversial and many employers believe they overstate mortality improvement, and would thus inflate funding liabilities, lump sums, and PBGC premiums.

DOL Notice Supports QPAM Exemption from Prohibited Transactions

The U.S. Department of Labor (DOL) appeared to validate the importance of the Qualified Professional Asset Managers (QPAM) exemption to the ERISA prohibited transaction rules in a notice issued on October 2. These rules allow those dealing with funds holding retirement assets to engage in certain investment transactions that would otherwise not be allowed (for example, when an affiliated party has been convicted of criminal wrongdoing).

Prohibited Transaction Exemption (PTE) 2015-14 specifically allows QPAMs associated with Credit Suisse AG to continue to manage retirement plan assets provided certain requirements are met, effective November 18, 2015 (the first date following the last day of temporary relief provided under PTE 2014-11) through November 20, 2019. The exemption is structured to insulate the Credit Suisse QPAMs from Credit Suisse AG considering that the latter has not acted as a QPAM for ERISA-covered plans or IRAs. This will allow Credit Suisse AG's retirement plan asset managers to continue to manage retirement assets despite the Zurich-based bank's criminal conviction on conspiracy to violate U.S. tax laws.

Tom Reeder Confirmed as PBGC Director

The U.S. Senate voted on October 8 to approve W. Thomas Reeder Jr. as the new director of the Pension Benefit Guaranty Corporation (PBGC), the quasi-governmental entity tasked with providing benefits to participants of defined benefit pension plans that terminated with insufficient assets. Alice Maroni had been serving as the agency's acting director since the departure of Joshua Gotbaum in August 2014.

Reeder most recently served as health care counsel at the Internal Revenue Service, following stints as senior benefits counsel for the Senate Finance Committee and in various counsel positions in the U.S. Treasury Department's Office of Tax Policy.

The PBGC is expected to release its annual report within the next several weeks, stating the agency's financial status. The agency recently issued its Fiscal Year 2014 Projections Report, revealing that the financial condition of the single-employer pension insurance program continues to improve, while problems continue to persist in the multi-employer insurance program.

RECENT JUDICIAL ACTIVITY

Health Plan Victorious in Seventh Circuit Decision

On October 1, the U.S. Seventh Circuit Court of Appeals ruled in favor of a health plan in the case of *Pennsylvania Chiropractic Association et al. v. Independence Hospital Indemnity Plan (formerly known as Independence Blue Cross)*, holding that the chiropractor plaintiffs were not beneficiaries as ERISA uses that term and thus not entitled to the claims procedures established by ERISA Section 1133 and U.S. Department of Labor regulations. The dispute concerned amounts that the chiropractors received under their participating-provider contracts with Independence Blue Cross.

The ruling reverses a U.S. District Court for the Northern District of Illinois (Eastern Division) ruling for the plaintiff chiropractors, which held that a payment of money for medical services covered in the relevant insurance plans constituted a 'benefit' under ERISA and that the providers should be considered beneficiaries because the plan expressly designates them to receive payment directly, and those payments constitute ERISA benefits.

High Court Declines to Review Two ERISA Cases

United Healthcare v. Spinedex

On October 13, the U.S. Supreme Court declined to review *United Healthcare v. Spinedex*, a Ninth Circuit appeals court decision holding that a third-party claims administrator could be sued for ERISA benefits.

The litigation was initiated by Spinedex, a provider of chiropractic services, which brought ERISA claims challenging the sufficiency of payments made to it by a self-funded health plan. Spinedex sued the plan and UnitedHealth Group, the plan's claims administrator. The federal district court dismissed the claims against United on the grounds that it had no obligation to pay benefits and thus could not be named as a defendant in a claim for benefits. The U.S. Court of Appeals for the Ninth Circuit reversed and held that an administrator with discretionary authority concerning the payment of benefits was a proper defendant in a claim for ERISA benefits.

This is a troubling development since the decision of the Supreme Court not to hear the case, leaves in place the Ninth Circuit's ruling – at least with regard to suits brought in courts within the states that comprise the Ninth Circuit – Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

United Refining Company v. Cottillion

The U.S. Supreme Court has also announced that it will not hear the case *United Refining Company v. Cottillion*, in which a plan sponsor attempted to recover pension plan distributions erroneously paid through a misinterpretation of plan documents that was subsequently corrected.

The request for a rehearing resulted from the March 18 U.S. Appeals Court for the Third Circuit ruling, which will now stand. According to the facts of the case, when the plan sponsor attempted to recover overpayments – to maintain qualified status after a Voluntary Correction Program (VCP) filing with the Internal Revenue Service – the plaintiffs sued, alleging the company violated ERISA's anti-cutback provisions by seeking to retroactively reduce accrued early retirement benefits. The earlier Third Circuit court decision declined to weigh in on the matter of the legal deference which should be provided to the plan administrator, concluding that "no amount of deference" could overcome the facts of the case and that the reinterpretation of the plan document was actually a plan amendment that violated the anti-cutback rules.

Under the law of the Second, Seventh, Ninth and D.C. Circuits, employers may offer to their employees retirement benefits without assuming the risk that mistakes by the plan administrator will be irreversible. In the Third and Sixth Circuits, however, an employer who chooses to offer retirement benefits can become bound — in perpetuity —to a plan administrator's mistaken interpretation. Employers offering retirement programs extending across multiple circuits continue to face substantial uncertainty as to the governing law.

Making the administrator's interpretive mistakes irreversible not only imposes a wholly unpredictable risk on employers, but constrains the administrator's ability to make routine financial management decisions and limits the ability to act in the best interests of plan beneficiaries. Furthermore, if offering voluntary benefits such as retirement plans exposes an employer to such uncertainty and unpredictable liability, it may decide to cease offering such benefits, or may opt not to implement new programs in the future.