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RECENT LEGISLATIVE ACTIVITY

Preview of the 114th Congress

On January 6, the U.S. Senate and the U.S. House of Representatives swore in new members for the 114th Congress. Republicans now control both houses, with 54 Republicans and 44 Democrats (with 2 Independents, who align themselves with the Democrats) in the Senate and a 246-to-188 ratio of Republicans to Democrats in the House.

With the start of the 114th Congress, all Senate committees are now under new leadership as a result of the change in control and there have been significant changes in certain House committees as well. Below are some of the key changes.

U.S. Senate
With a new Republican majority, the Senate in the 114th Congress stands in stark contrast to its predecessor, though the Republicans lack the 60 members needed for a "supermajority" able to invoke cloture on a filibuster and thereby end debate and move to a vote. Regardless, the Republican control of the committees and the floor schedule gives them a much greater capacity to direct Senate actions.

Several significant changes within the committees are likely to affect employee benefit issues:

- ***Senate Finance Committee:*** Previous Ranking Member and now Chairman of the Finance Committee, **Senator Orrin Hatch (R-UT)**, has consistently been vocal on the need to examine retirement policy and tax reform and has stated he will address these issues as chairman. Hatch has also had a strong interest of public plans as well as in the private sector and in expanding coverage. His bill, the Secure Annuities for Employee (SAFE) Retirement Act (S. 1270) [official summary], includes provisions facilitating greater use of electronic communication and automatic enrollment, automatic escalation and open multiple-employer plans (MEPs). (The SAFE Retirement Act will be reintroduced in the 114th Congress.) As a high-ranking member of the Finance Committee for decades, Sen. Hatch also has been very influential on health benefit and health tax legislation.

  Hatch recently released a report, Comprehensive Tax Reform for 2015 and Beyond, outlining several issues likely to come up in the effort to reform the tax code. Previous chairman **Sen. Ron Wyden (D-OR)** has taken over as the ranking minority (Democratic) member. Wyden addressed pension and retirement tax incentives in conjunction with tax reform during his tenure as chairman in a recent hearing, although he and Hatch share different views. Both Hatch and Wyden announced the launch of five bipartisan tax working groups within the committee on January 15 in an effort to facilitate congressional comprehensive tax reform. Senators Mike Crapo (R-ID) and Sherrod Brown (D-OH) will co-chair the Savings & Investment working group, which will examine retirement tax policy.

  Other members of the Finance Committee who are likely to weigh in on employee benefits issues include Sen. Johnny Isakson (R-GA) on lifetime income options and Sen. Rob Portman (R-OH) and Sen. Ben Cardin (D-MD), who recently introduced the Retirement Security Preservation Act (S. 2855) to address the inadvertent harmful effects of ERISA's nondiscrimination rules on defined benefit plans that exempt some or all of a plan's existing participants from changes to the. The bill will need to be reintroduced in the 114th Congress.

Notable Finance Subcommittee on Health Care will be chaired by **Sen. Patrick Toomey (R-PA)**, with **Sen. Debbie Stabenow (D-MI)** as Ranking Member.

- ***Senate Health, Education, Labor and Pensions (HELP) Committee:*** **Sen. Lamar Alexander (R-TN)** is the new chairman for the HELP Committee. The HELP committee has jurisdiction over the U.S. Department of Labor and shares oversight of the U.S. Department of Health and Human Services (HHS) and the Pension Benefit Guaranty Corporation (PBGC). **Sen. Patty Murray (D-WA)** will be the new ranking Democratic member. This committee was formerly chaired by Tom Harkin (D-IA), who retired at the end of the last Congress. Harkin had strong interest in retirement and introduced the Universal, Secure, and Adaptable (USA) Retirement Funds Act (S. 1979) during his tenure as chairman.

  The provision to amend defined benefit plan "shutdown" procedures ERISA Section 4062(e), which became law as part of the Consolidated and Further Continuing Appropriations Act (H.R. 83), originated in the committee as S. 2511, a bipartisan bill to address the problem by ensuring that there is no 4062(e) event unless there is a substantial shutdown of operations at a facility relative to the size of the entire employer, ensuring (subject to certain exceptions) that there is no 4062(e) event unless employees lose their jobs, as opposed to going to work for another employer and significantly reducing the scope of an employer's liability if there is a 4062(e) event.

  The committee has also expressed interest in the recent lawsuits over employer wellness programs from the Equal Employment Opportunity Commission (EEOC). In a recent hearing, members of the committee criticized the agency for pursuing litigation in cases where no employee has complained of discrimination and before publishing guidance. The committee has already begun examining health care issues, with a recent hearing on the definition of "full-time" work under the Patient Protection and Affordable Care Act (PPACA), but action on both topics will likely be pending for some time.

- ***Senate Budget Committee:*** New Chairman **Sen. Mike Enzi (R-WY)** is succeeding Sen. Patty Murray (D-WA), and **Sen. Bernard Sanders (I-VT)** is the new ranking Democratic member. Enzi previously served as Chairman and Ranking Member of the HELP Committee and has a good deal of expertise on employee benefit matters. It will be the Budget Committee's responsibility to develop and enforce the annual concurrent resolution on the budget to serve as the framework for congressional action on spending, revenue and debt-limit legislation, which frequently involves unrelated revenue offsets.

- ***Senate Appropriations Committee:*** **Sen. Thad Cochran (R-MS)** is returning to the chairmanship of the Appropriations Committee after holding the gavel during the last Republican majority. The largest committee in the Senate, the Appropriations Committee writes the legislation that allocates federal funds to the numerous government agencies, departments and organizations on an annual basis. The committee can sometimes be used to respond to regulatory initiatives. **Sen. Barbara Mikulski (D-MD)** will serve as ranking Democratic member of the committee.

- ***Senate Special Committee on Aging:*** **Sen. Susan Collins (R-ME)** will be the special committee's new chairwoman, with **Sen. Claire McCaskill (D-MO)** taking over as ranking Democratic member. This committee does not have authority to write legislation, but is a platform for bringing attention to issues affecting older Americans, such as health and retirement policy.

Collins, along with Sen. Bill Nelson (D-FL) on the Finance Committee, recently introduced a bill, the Retirement Security Act of 2015 (S. 266) in the Senate, while Representatives Vern Buchanan (R-FL) and Ron Kind (D-WI) introduced an identical bill (H.R. 557) in the House. The measure is identical to the Retirement Security Act of 2014 (S. 1970), from the 113th Congress. Last year, the bill was referred to the Finance Committee.

U.S. House of Representatives
The House continues to have a Republican majority, the largest since 1928. Below are some key changes in committee leadership that may affect employee benefit issues:

- ***House Ways and Means Committee:*** **Representative Paul Ryan (R-WI)** is the new chairman for the Ways and Means Committee, succeeding the retired Dave Camp (R-MI). The Ways and Means committee is the chief tax-writing body in the House and exercises jurisdiction over revenue and related issues. Certain revenue-related aspects of the Social Security system, Medicare and social services programs also come under the committee's jurisdiction. **Rep. Sander Levin (D-MI)** remains the ranking Democratic member.

  During his tenure as chairman, Camp introduced his tax reform proposal, the Tax Reform Act of 2014 (H.R. 1). Camp released a discussion draft in an effort to further the dialogue on comprehensive tax reform. Camp later reintroduced the bill to serve as a possible starting point for tax reform discussions in the next Congress. Ryan has stated that tax reform is a priority for the committee and that Camp's proposal will serve as a basis of the committee's work on tax reform.

  Previously, as Chairman of the House Budget Committee, Ryan outlined a budget proposal that was adopted as the House's Fiscal Year 2014 budget resolution, House Concurrent Resolution No. 25. The proposal centered on structural changes to federal entitlement programs (Medicare, Medicaid and Social Security) and reductions in discretionary spending while eliminating as much as $4.6 trillion in unspecified tax expenditures to finance a reduction in tax rates. It also assumed full repeal of PPACA, projected to save $1.8 trillion over the next ten years, and contemplated $950 million over ten years through moderately increased PBGC premiums.

  Notable Ways and Means subcommittees include the Subcommittee on Health, with **Rep. Kevin Brady (R-TX)** as chairman, and the Subcommittee on Select Revenue Measures (which has jurisdiction over employee benefit tax incentives), led by **Rep. Dave Reichert (R-WA)**.

- ***House Education and the Workforce Committee:*** **Rep. John Kline (R-MN)** is remaining as chairman and **Rep. Bobby Scott (D-VA)** will assume the role of ranking Democratic member. The committee has jurisdiction in education and labor matters generally and also has jurisdiction over the U.S. Departments of Labor, Education, Agriculture and Health and Human Services.

  In the past, this committee has been active in addressing the solvency of multiemployer pension plans. The provisions permanently addressing the funding crisis threatening the multiemployer pension plan system in the Consolidated and Further Continuing Appropriations Act (H.R. 83) originated in this committee. They were added to the measure by Chairman Kline, who had consistently noted the critical condition of multiemployer pensions in a series of the committee's congressional hearings. However, it's likely that the provisions will be open for some amount of modification.

Rep. David P. Roe (R-TN) will continue to serve as chair for the committee's Health, Employment, Labor and Pensions (HELP) Subcommittee.

- ***House Energy and Commerce Committee:*** The committee remains under the leadership of **Rep. Fred Upton (R-MI)**, with **Rep. Frank Pallone (D-NJ)** taking over as the ranking Democratic member. **Rep. Joe Pitts (R-PA)** will continue as the chairman of the Subcommittee on Health.

  The committee has been active in examining health care reform, and approved two measures last year addressing health care policy, including the Employee Health Care Protection Act (H.R. 3522), would essentially allow health insurance issuers to continue offering existing plans even if those plans do not meet certain minimum standards under the Patient Protection and Affordable Care Act (PPACA). The committee also explored health information technology in its 21st Century Cures series of hearings.

- ***House Budget Committee:*** **Rep. Tom Price (R-GA)** is taking over as chairman from Ryan. Price previously served as vice chairman of the committee, which is responsible for drafting an annual concurrent budget resolution that reconciles federal revenue and federal spending, as well as preparing guidelines in the annual budget resolution for cutting programs to meet spending targets. **Rep. Chris Van Hollen (D-MD)** will continue to serve as ranking Democratic member. Van Hollen has recently called for a financial transactions tax as a means of paying for a slew of tax perks for middle class families. This proposal is unlikely to pass the Republican-controlled chambers.

Legislation to Encourage Workplace Retirement Saving Introduced in Senate, House

Lawmakers in the U.S. Senate and House of Representatives have recently introduced legislation to promote employer sponsorship of, and employee participation in, defined contribution plans.

Senators Susan Collins (R-ME), chair of the Senate Special Committee on Aging, and Bill Nelson (D-FL), ranking Democrat on the Aging Committee (and member of the Senate Finance Committee) introduced the Retirement Security Act of 2015 (S. 266) in the Senate, while Representatives Vern Buchanan (R-FL) and Ron Kind (D-WI) introduced an identical bill (H.R. 557) in the House.

The measures are reportedly identical to the version introduced in the Senate in the previous Congress. A detailed summary is available.

Most significantly, the bill includes an alternative safe harbor for automatic enrollment and escalation contributions, effectively raising the level of automatic contributions to defined contribution plans. The alternative safe harbor provides for minimum levels of default contributions, specified matching contributions for non-highly compensated employees, a special tax credit for small employers that adopt the safe harbor, exemption from top-heavy testing and nondiscrimination testing (with respect to pre-tax elective contributions, matching contributions, and after-tax employee contributions) and a simplified notice and disclosure regime.

The bill also eases certain restrictions on multiple employer plans (MEPs) and expands the availability of the Saver's Credit.

S. 266 has been referred to the Senate Finance Committee, while H.R. 557 has been referred to the House Education & the Workforce Committee.

Senate Finance Committee Approves Bill to Exempt Veterans from PPACA Employer Mandate Calculations

In a January 28 mark-up session, the U.S. Senate Finance Committee unanimously approved a revised version of the Hire More Heroes Act (H.R. 22).

The measure would exempt veterans already enrolled in coverage under TRICARE or the U.S. Department of Veterans Affairs (VA) from being taken into account for the purposes of determining if an employer is subject to the employer mandate under the Patient Protection and Affordable Care Act (PPACA). The bill was passed by the U.S. House of Representatives by unanimous vote of 412-0 on January 6.

The PPACA "shared responsibility" employer mandate under Internal Revenue Code Section 4980H requires employers with 50 or more full-time (or equivalent) employees to offer health coverage that satisfies affordability and minimum value requirements to their full-time employees or pay a penalty if even one full-time employee receives a premium tax credit for health coverage obtained through a health insurance exchange. (Under transition relief for 2015 the threshold is 100 employees; after 2015, the threshold is 50 employees.)

In his opening statement, Chairman Orrin Hatch (R-UT) noted the measure's unanimous, bipartisan support, citing the previous House vote. He stated that H.R. 22 will incent employers to hire veterans and help both veterans find employment and the small businesses who want to hire them.

Ranking Democratic member Ron Wyden (D-OR) added that this measure "simply acknowledges current law," as a veteran with health coverage under TRICARE or the VA would never receive subsidies from insurance on the individual market anyway.

Numerous amendments were offered for consideration by the committee, but all were withdrawn. The most notable amendments were:

- The Protecting Volunteer Firefighters and Emergency Responders Act, to exempt emergency services volunteers as well under the shared responsibility requirements contained in the PPACA, was offered as an amendment to H.R. 22 by Senators Patrick Toomey (R-PA) and Mark Warner (D-VA). (The measure was introduced as a stand-alone bill in the Senate in the previous Congress as S. 1798 and was recently introduced in the U.S. House of Representatives as H.R. 33. It passed the House on January 12 by a unanimous vote of 401-0.)

- The Family Coverage Act, a measure to align PPACA with Congressional intent by defining affordable job-based health coverage by what is affordable for a family, not just an individual employee, was offered by Sen. Robert Casey, Jr. (D-PA) and co-sponsored by Sen. Sherrod Brown (D-OH). (Sen. Al Franken introduced the measure as S. 2434 in the previous Congress and garnered 23 Democratic cosponsors.)

- An amendment to prevent small businesses from being penalized for providing monetary assistance to their employees to purchase insurance on the individual market on a pre-tax basis was offered by Sen. Charles Grassley (R-IA).

H.R. 22 now advances to the full Senate for consideration, although broader action has not yet been scheduled.

Senate Committee Hears Testimony on Job-Based Health Insurance, Full-Time Work Week

In a January 22 hearing, the U.S. Senate Health, Employment, Labor and Pensions (HELP) Committee heard testimony from a number of employers on the definition of "full-time" work under the Patient Protection and Affordable Care Act (PPACA) and its impact on employers offering health insurance.

The hearing focused on the Forty Hours is Full-Time Act (S. 30), legislation that would change the PPACA definition of a "full-time employee" from 30 to 40 hours. Introduced in the Senate by Senators Susan Collins (R-ME) and Joe Donnelly (D-IN), the measure is a companion bill to the Save American Workers Act (H.R. 30), which was approved by the U.S. House of Representatives on January 8.

The PPACA "shared responsibility" employer mandate requires employers with 50 or more full-time (or equivalent) employees to offer health coverage that satisfies affordability and minimum value requirements to their full-time employees or pay a penalty if even one full-time employee receives a premium tax credit for health coverage obtained through an insurance exchange. Under PPACA and Internal Revenue Service Notice 2012-58, "full-time employee" is defined generally as a person who works, on average, at least 30 hours per week. Supporters of S. 30 argue that the current 30-hour limit for a full-time workweek encourages employers to cut employee hours to avoid incurring the employer mandate penalty.

In his opening statement, Chairman Lamar Alexander (R-TN) addressed how the current 30-hour limit is already affecting his home state of Tennessee, with employers being forced to hire more workers to work fewer hours, resulting in thousands of employees making less in wages by being limited to working 29 hours. He also stated that women, low-income earners and workers without higher education are disproportionately affected.

Ranking Democratic member Patty Murray (D-WA) voiced concerns that changing the definition would create the problem S. 30 attempts to solve, with employers limiting Americans working 40 hours a week to 39. She also noted the Congressional Budget Office (CBO) projection that H.R. 30 would increase the deficit by $53.2 billion over the next ten years and would eliminate insurance for 1 million Americans.

The committee heard testimony from the following witnesses:

- Betsy Webb, superintendent of Bangor School Department in Maine, stated that the 30-hour definition deprives the school system the flexibility it needs to be successful. She noted concerns about the effects on students' education, especially in the case of substitute teachers, who often work 30 or more hours a week, especially if a teacher is on extended leave. She commented that using one substitute was preferential, as it reduces the disruption for students. However, because the school's limited budget cannot afford to either sponsor health insurance for substitutes or pay the $2,000 employer penalty, they will need to cut hours and use multiple substitutes if the 40 hour work week is not restored.

- Andrew F. Puzder, chief executive officer of CKE Restaurants, commented on the challenge of the 30-hour definition in the restaurant industry, where high competition and mostly part-time workers encourages managers to keep costs down by limiting employees to less than 30 hours. He also noted that it should be a minimal concern if employers would cut employees to less than 40 hours if the definition was changed, since they are already cutting thousands of employees to less than 30.

- Doug Holtz-Eakin, president of the American Action Forum, testified that the 30-hour work week is at odds with labor market data in the U.S., since a majority of Americans work 40 hours or more. He asserted that fewer employees would be at risk of having hours cut to less than 40 than the current number of employees at risk with the 30 hour definition.

- Joe Fugere, founder of Tutta Bella Pizzeria, argued in favor of the PPACA definition. He noted that the restaurant industry will always be mostly comprised of part-time workers, who are usually scheduled no more than 30 hours a week regardless of the threshold and that offering a robust benefits package leads to higher morale, productivity and retention.

In the question-and-answer period, members of the committee asked about the possible effects of changing the definition of "full-time." In response to questions about whether the 30 hour definition prohibits small business growth, Holtz-Eakin stated it was "essentially a tax on the growth of small businesses," limiting small businesses from expanding to more than 50 employees. Fugere responded to questions about whether raising the work week definition would make it much more difficult in such a competitive industry to try and support employees by offering coverage. Puzder noted that workers would prefer the hours and wages earned to the coverage in his experience.

Chairman Alexander closed the hearing by stating that the HELP Committee would be providing input to the Senate Finance Committee, which has jurisdiction over the advancement of S. 30 to the Senate floor.

Senate Hears from Employers on Subject of Workplace Wellness Programs

The Senate Health, Education, Labor and Pensions (HELP) Committee held a hearing on January 29 to discuss employer wellness programs, including the cause and effect of legal action recently undertaken by the Equal Employment Opportunity Commission (EEOC).

While the Senators and witnesses shared varying levels of concern about the potential of voluntary workplace wellness programs to discriminate against people with disabilities, all were united in calling on the EEOC to issue rules as soon as possible addressing the legal treatment of wellness plans under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).

The U.S. District Court for the District of Minnesota recently denied an EEOC request to issue a restraining order and preliminary injunction against Honeywell International Inc.'s wellness program. It was the third lawsuit filed by the EEOC in recent months challenging employer-sponsored wellness programs, alleging that the employers were violating ADA and GINA by imposing penalties on employees who decline participation in the company's biometric screening program.

In opening the hearing, HELP Committee Chairman Lamar Alexander (R-TN) voiced his interest in advancing wellness programs for the 159 million Americans covered by employer-sponsored health insurance. "Wellness programs are turning the table on the health care system, to make it more oriented to the individual. How do we help people be healthy instead of curing them when they're sick?" He referenced the Patient Protection and Affordable Care Act's (PPACA) bipartisan provision to strengthen workplace wellness programs, asking how well it was working, and if the recent EEOC action is disrupting employer adoption of these programs.

Ranking Democratic member Patty Murray (D-WA), in her opening statement, also touted the value of wellness programs and preventive care, but expressed concern about stories of workers "being pressured to share personal health information, or losing coverage."

The committee heard testimony from the following witnesses:

- Dr. Catherine Baase, Chief Medical Officer for The Dow Chemical Company, testifying on behalf of her organization as well as the American Benefits Council, emphasized the essential role that employers play in improving societal health. She also echoed the recommendation in the Council's recently released strategic plan, which stated that "a critical component of encouraging employers to offer meaningful wellness programs is consistent federal policy that promotes the health of Americans and is aligned across multiple agencies and Congress."

- Gary W. Loveman, president and chief executive officer of Caesars Entertainment Corporation (testifying on behalf of the Business Roundtable), recounted the challenge presented by health care cost increases that were outpacing company growth and described how his company's "Wellness Rewards" program yielded six consecutive years of stable health care costs.

- Dr. David C. Grossman, medical director for population and purchaser strategy for the Group Health Research Institute, offered his perspective as a pediatrician, as a health coverage provider and as an employer. He urged additional research on wellness program outcomes, with the goal of providing hard evidence on the necessity and effectiveness of incentives.

- James Matthew Abernathy, a wellness program participant, described how his company's program and professional health coaches helped him to lose 62 lbs. and reduce his risk factors for chronic disease.

- Jennifer Mathis, an attorney for the Bazelon Center for Mental Health Law, defended EEOC's recent legal action, voicing concern that certain wellness program designs could be used to discriminate against people with disabilities. However, she also called upon the EEOC to issue final guidance to provide certainty for employers and employees.

- Eric S. Dreiband, a partner with the law firm of Jones Day and former EEOC General Counsel, described the legal history of the EEOC's approach toward wellness programs and associated incentives. He was strongly critical of the commission for initially endorsing the HIPAA standard, then withdrawing its endorsement without issuing new rules.

Asked by Alexander during the question-and-answer period what the appropriate solution was, Dreiband asserted that if EEOC will not act, Congress should enact a legislative fix. To a later question from Sen. Tim Scott (R-SC), Dreiband called the EEOC's current approach "patently unfair."

Alexander also asked the panel if the EEOC actions were discouraging employers from adopting wellness programs. Loveman agreed that the current legal environment "has given us pause." Baase added that the EEOC lawsuits have had a "dampening effect."

In response to a question from Sen. Johnny Isakson (R-GA), about other ways to reduce costs besides wellness programs, Baase cited collaboration with health care providers, reforms to payment policies to better align cost and quality, and community outreach as helpful measures for reducing costs.

At the close of the hearing, Murray said she had been assured that EEOC would be issuing new regulations very shortly, and she hoped the witnesses and other members of the public would provide comments.

RECENT REGULATORY ACTIVITY

White House Outlines Retirement Reform Proposals

In connection with President Obama's State of the Union speech on January 20, the White House released a fact sheet previewing President Obama's tax reform and budget proposals, including changes to certain retirement plan tax incentives.

President Obama has previously used the State of the Union speech to announce retirement proposals, including the 2014 unveiling of the *my*RA program, an executive branch program to expand workplace retirement savings. The U.S. Department of the Treasury formally launched the *my*RA program in December 2014.

The latest release outlined new proposals with the stated goal of expanding savings opportunities for workers, paid for by "closing retirement tax loopholes for the wealthy." The proposals would:

- **Automatically enroll Americans without access to a workplace retirement plan in an Individual Retirement Account (IRA).** Employers with more than 10 employees that do not currently offer a retirement plan would be required to automatically enroll employees in an IRA. Employees would have the option to opt out.

- **Provide tax credits for auto-IRA adoption, as well as for small businesses that choose to offer employer plans or switch to auto-enrollment.** Employers with 100 or fewer employees would receive a $3,000 tax credit for offering an auto-IRA. The proposal would also increase the existing "start-up" credit to $4,500 for small employers who begin offering a retirement plan. Additionally, small employers who already offer a plan and add auto-enrollment would get a $1,500 tax credit. These credits are intended to minimize administrative burdens on small employers.

- **Expand access to employer-sponsored retirement plans for long-term, part-time employees.** The proposal would require employers who offer retirement plans to allow employees who have worked at least 500 hours per year for 3 years or more to make voluntary contributions to the plan.

- **Limit contributions to and accruals of benefits in tax-preferred retirement plans and IRAs.** The President's plan would limit contributions to and accruals of additional benefits in tax-preferred retirement plans and IRAs to "about $3.4 million," under the rationale that "loopholes in the tax system have let some wealthy individuals convert tax-preferred retirement accounts into tax shelters."

The proposals will be described in more detail in the president's forthcoming Fiscal Year 2016 budget proposal. It is unlikely that all the proposals will receive serious consideration in the newly Republican-controlled Congress.

DOL Finalizes Defined Benefit Plan Model Annual Notice Requirements

The U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) released **final regulations** on January 30 amending the annual funding notice requirement for defined benefit plans under ERISA Section 101(f). DOL also issued a fact sheet on the proposed regulations.

The final regulations become effective on March 4 and are applicable to notices for plan years beginning on or after January 1, 2015.

Section 101(f), as amended by the Pension Protection Act of 2006 (PPA) and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), generally requires the administrators of single- and multiemployer defined benefit plans to furnish an annual funding notice to the Pension Benefit Guaranty Corporation (PBGC), participants, beneficiaries, labor organizations representing participants or beneficiaries and, in the case of multiemployer plans, each contributing employer. The final regulations provide guidance regarding compliance with these changes.

Most notably, the PPA extended the notice requirement to single-employer defined benefit plans (in addition to multiemployer plans), shortened the time frame for providing funding notices and enhanced the notice content requirements. A funding notice must include, among other information, the plan's funding target attainment percentage or funded percentage (i.e., how well the plan is funded), as applicable, over a period of time, as well as other information relevant to the plan's funded status. This document also contains proposed conforming amendments to other regulations under ERISA, such as the summary annual report regulation, also required by PPA.

The final regulations are generally similar to the proposed regulations issued in November 2010. According to the DOL fact sheet, some changes were made to simplify the disclosure and reduce cost burdens on plans, including the adoption of narrow exemptions and alternative methods of compliance. The final regulation also reflects changes made to Section 101(f) by the Multiemployer Pension Reform Act of 2014.

These rules work in tandem with DOL Field Assistance Bulletin (FAB) 2015-1, issued on January 14, that updates the annual funding notice requirements for single-employer defined benefit plans under the Highway and Transportation Funding Act of 2014 (HATFA).

PBGC Requests Input on Proposed Changes to Reportable Events Forms

On January 22, the Pension Benefit Guaranty Corporation (PBGC) issued a notice of its intention to revise the forms used by defined benefit pension plans under the reportable events regulation and is requesting comments on the proposed changes. The notice also requests approval from the Office of Management and Budget (OMB) for an extension of the current information collection request (ICR) which is due to expire on March 31.

The PBGC issued [proposed regulations]() on defined benefit plan reportable events – events that indicate potential problems and may signal the possible future underfunded termination of a plan – on April 2, 2013. Under the rule, defined benefit plans must report to the agency such events as missed contributions to a plan, a drop in plan funds to a level insufficient to pay benefits and large payouts and such "sponsor events" as loan defaults and controlled group changes. The proposed rule would exempt most companies from reporting events that would not likely put their pension plans at risk and instead would target companies based on their "financial soundness."

Because OMB approval of the current ICR will expire before the final rule is published, the PBGC is requesting an extension of the ICR. The notice also indicates the PBGC's intent to revise the current forms and instructions to:

- Require that additional supporting information be provided (e.g., event date, notice due date, filing date, and why a filing is late, if applicable).

- Require more description of the pertinent facts relating to an event (e.g., reason for a late contribution).

- Add an information requirement included in the regulation to Forms 10 and 10-A (for change in contributing sponsor or controlled group event).

- Provide enhanced instructions on the type of actuarial information required to be submitted.

- Include a note in the Form 10-A instructions stating that PBGC typically asks for additional information (which will be specified) to be submitted within seven days (or sooner, in some cases).

- Remove information requirements that PBGC no longer needs or can gather from public sources.

The PBGC is soliciting comments through March 24.

NTIS Extends Comment Deadline on Proposed Certification for Access to Death Master File

On January 23, the National Technical Information Service (NTIS) released a notice to extend the period for public comment on proposed regulations to provide access to the Death Master File (DMF). The period for public comment is extended from January 29 to March 30.

On December 30, 2014, the NTIS published a [proposed rule and request for comments]() on a proposed certification program to provide access to the DMF. The DMF is a list of deceased individuals maintained by the Social Security Administration and distributed through the Commerce Department. These records, updated weekly, contain the full name, Social Security number, date of birth and date of death for listed decedents. Defined benefit and defined contribution plans commonly use these files for administrative purposes, such as determining when benefits to a deceased participant should be terminated or when a payment should be made to a surviving beneficiary.

Under the Bipartisan Budget Act enacted in December 2013 (and effective as of March 26, 2014), the Secretary of Commerce must restrict access to the information in each individual's DMF for a three-year period beginning on the date of the individual's death, except to persons who are certified under a program to be established by the Secretary of Commerce.

The new proposed rule would create a permanent certification program to (1) provide immediate access to a "Limited Access DMF" to those users who demonstrate a legitimate fraud prevention interest or a legitimate business purpose for the information and (2) otherwise delay the release of the DMF to all other users to reduce opportunities for identity theft and restrict information sources used to file fraudulent tax returns.

Comments on the proposal are now due on March 30.

PBGC Updates Forms for Standard/Distress Terminations, Missing Participants

The Pension Benefit Guaranty Corporation announced on January 30 that the White House Office of Management and Budget (OMB) has approved revisions to the standard and distress termination forms and instructions.

The new forms and instructions can be found on the Plan Terminations page of PBGC's website. Under the revisions, a plan administrator of a plan terminating in a standard termination (or a distress termination that closes out in the private sector) must submit with the post-distribution certification the most recent plan document and proof of benefit distributions for lump sums paid and annuities purchased.

Plan administrators must provide this information with any post-distribution certification filed on or after March 1, 2015. Filers may contact standard@pbgc.gov or distress@pbgc.gov for more information.

RECENT JUDICIAL ACTIVITY

Supreme Court Invalidates Special Inference of Retiree Health Benefit Vesting

On January 26, the U.S. Supreme Court ruled unanimously against a special inference that retiree health care benefits are "vested for life" and should continue indefinitely in the absence of specific language to the contrary in a plan document or collective bargaining agreement.

The ruling of M&G Polymers USA, LLC v. Tackett invalidated what is known as the "Yard-Man inference," a judicial inference previously applied by the U.S. Court of Appeals for the Sixth Circuit (and named after the first such case) to find that retiree health care benefits are vested for life if the plan document or collective bargaining agreement does not have specific language to the contrary.

The unanimous Supreme Court opinion by Justice Clarence Thomas ruled that courts should first "review the agreements under ordinary principles of contract law" in determining whether union retirees have vested lifetime health care benefits, rather than special inferences or presumptions.

Justice Ruth Bader Ginsburg filed a concurring opinion but also noted that "when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties," including the parties' bargaining history.

In 2013, the U.S. Sixth Circuit Court of Appeals upheld a permanent injunction ordering that retirees be reinstated in the M&G Polymers health plan. The Sixth Circuit affirmed that the "retirees had [the] vested right to no-cost health care" under the prevailing collective bargaining agreement (CBA) and "certain side agreements between union and various employers that purported to limit retiree health care coverage did not apply to [the] plant that employed retirees." In this and similar cases, the Sixth Circuit applied the Yard-Man inference that union retiree benefits are intended to be vested in the absence of specific plan or bargaining agreement language to the contrary. Other appeals courts, including the Second, Third and Seventh Circuits, had ruled that retiree health benefits are not vested without specific durational language.

M&G Polymers petitioned the Supreme Court for review of the appellate court decision, and the court granted review in May 2014.