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Pension & Benefits Reporter™

Pension Rights Center

Joe Lustig of Bloomberg BNA asked Karen Ferguson about the effect of the passage of ERISA in September 1974. Ferguson is director of the Pension Rights Center and a long-serving member of the Benefits Practice Center Pension & Benefits Advisory Board.

ERISA Has Protected Participants, but Challenges Remain

BBNA: What has been the biggest achievement under the Employee Retirement Income Security Act in terms of protecting the interests of retirement plan participants and beneficiaries?

Ferguson: ERISA's principal objective was to protect the reasonable expectations of the 34 million workers covered by private retirement plans at the time—to put an end to broken pension promises. The law's biggest achievement was the extraordinary degree to which it achieved that goal for those workers.

No longer can a company deny a pension to an employee solely because he is unable to work until his 65th birthday. Nor will a retiree lose her entire lifetime pension because her pension plan has terminated without sufficient funding to pay promised benefits. And it is far less likely that workers whose retirement plans are plundered will lose all of their money.

ERISA also paved the way for important laws in the 1980s that made retirement plans more fair for widows, divorced spouses, shorter-service, lower-income and older workers.

BBNA: What issues, if any, regarding participant and beneficiary rights should the courts and the Department of Labor be paying more attention to?

Ferguson: One of the shortcomings of ERISA was its failure to task any of the government agencies with responsibility for protecting the retirement rights of participants and beneficiaries. As a consequence, measures to help individuals enforce their rights have been given relatively low priority by the agencies over the years. At the Labor Department, such measures include rules relating to the retention of documents; pension claims; pension benefit statements; discriminatory discharges; protection of whistleblowers; misrepresentations by employers, and recovery of overpayments.

In some instances, this lack of guidance has resulted in court decisions that appear to be directly contrary to congressional intent. Examples are rulings on attorneys' fees, statutes of limitations, equitable remedies, responsibilities of plan fiduciaries, standards for judicial review, and the ability of plan participants to rely on their summary plan descriptions. The Department has filed amicus briefs in many of these cases, but that is very different from issuing regulatory guidance that could have forestalled the courts from issuing these decisions in the first place.

BBNA: What are some challenges facing the private pension system under ERISA in the next five to 10 years?

Ferguson: While ERISA did much to end broken pension promises in the 20th century, the system faces new types of broken pension promises in the 21st. Today, many retirees are outraged at what they call "pension stripping." They had counted on continuing to receive PBGC-guaranteed pensions for the rest of their lives. Now their former companies have off-loaded their pension liabilities onto insurance companies, which have only the limited backing of State Guaranty Associations. Other retirees have been cruelly disappointed when the promise of lifetime PBGC-guaranteed pensions has been broken by a "church plan" conversion. Similarly, older workers are learning only near the end of their careers that their subsidized early retirement benefits have been forfeited solely because a new owner has taken over their company, or because their plan trustees have implemented "red zone" cutbacks.

But by far the biggest challenge of the next five to ten years will be to figure out how to move 401(k)s back to their original role as supplemental savings plans. Pending measures that would require lifetime income disclosure and default annuities, and put an end to conflicted advice will improve these plans but they will remain structurally flawed. Employees typically get nothing from these plans unless they contribute first; those who contribute the most benefit disproportionately in both retirement and tax benefits; and too much of the money is cashed out before retirement.

BBNA: What is the outlook for traditional and hybrid pension plans under ERISA?

Ferguson: Unless the ever-escalating practice of ''de-risking'' is stopped, the outlook for traditional single-employer pension plans in the private sector is bleak. However, the prospect for hybrid plans, particularly new designs is encouragingly bright. In some of the new designs, such as the variable annuity plan, employers continue to have a modest level of risk and responsibility, and employees have PBGC protections. In others, such as target benefit plans (also known as collective defined contribution plans) employers are relieved of almost all obligations and employees and retirees collectively assume investment and longevity risks. What all of these designs share are the essential elements of a pension plan: pooled professional investment (no investment choices by employees), money locked in until retirement, and lifetime payouts, typically in the form of an annuity (with protections for surviving spouses).

BBNA: What are the prospects for multiemployer pension plans under ERISA?

Ferguson: Despite the current ''sky is falling'' rhetoric, most multiemployer plans are well-funded, and the prospects for those plans are very good. They provide an efficient way for smaller unionized firms to deliver retirement benefits to their employees. The problems of financially distressed plans must be addressed, but not, as has been proposed, by cutting the benefits of retirees. Industry-specific solutions need to be adopted to preserve the most troubled plans, and premiums must be raised to shore up the PBGC's multiemployer plan program. At the same time, guarantees for participants must also be raised.

BBNA: Are changes needed to ERISA to help workers attain a more secure retirement?

Ferguson: A great many changes to ERISA are needed to help workers attain a more secure retirement, starting with realistic measures to expand retirement plan coverage—an issue not addressed by ERISA other than by its modest provision for IRAs. Fortunately, encouraging efforts are underway in the states, and at the national level, thanks to the introduction of Senator Tom Harkin's (D-Iowa) USA Retirement Funds Act (S. 1979).

There is also a need to expand the U.S. Administration on Aging's Pension Counseling and Information Program nationwide. The 21-year-old program has secured more than $190 million in benefits for individuals in 30 states, but individuals in the remaining 20 states are often unable to find help in obtaining the retirement benefits they have earned. In addition, to ensure that the agencies are alerted to the concerns of retirement plan participants and beneficiaries, there is a need for Participant Advocate Offices to be established in the Labor Department and the Internal Revenue Service. In the alternative, the PBGC's recently-created Participant and Plan Sponsor Advocate's office could be expanded to these agencies.

By Joe Lustig

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