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WHAT'S INSIDE

TAFT-HARTLEY REPORT

Facebook Posts Are Protected Activity under the NLRA

Recently, an Administrative Law Judge in Laborers Union Local 91, No. 03-CB-163940 held that Facebook posts by a journeyman that alleged his Union was treating apprentices unfairly was protected activity under the National Labor Relations Act ("NLRA"). In 2015, a Union member posted comments on Facebook which criticized the Union's leadership and stated that the Union was unfairly treating apprentices. Specifically, the Union member posted about a candidate for Mayor obtaining a journeyman's book without going through the Union's apprentice program. In response, the Business Manager filed internal charges against the Union member arguing that the comments damaged his ability to run the Union. The executive board found the member guilty on the charges brought against him, fined him $5,000.00, and suspended his membership for 24 months. Additionally, the Union removed the member from its out-of-work list. The Union member appealed the decision of the executive board to the International Union. In addition, the Union member filed an unfair labor practice charge against the Union alleging a violation of Section 8(b)(1)(A) of the NLRA. Section 8(b)(1)(A) states that "it shall be an unfair labor practice for a labor organization, or its agents to restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act." Section 7 provides that "employees shall have the right to…engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Administrative Law Judge held the Facebook posts were protected activity under the NLRA and therefore, the Union's actions violated Section 8(b)(1)(A) of the NLRA. The decision by the Administrative Law Judge represents a number of decisions handed down by the National Labor Relations Board ("NLRB") in which the NLRB has found against an employer and/or labor union for disciplining an employee or union member for posts on social media websites.

IRS Delays Deadline for Furnishing 1095 Forms

On November 18, 2016, the Internal Revenue Service ("IRS") issued Notice 2016-70, which extends the deadline for furnishing to individuals the 2016 Form 1095-B and 1095-C from January 31, 2017 to March 2, 2017. The extension provides more time to applicable large employers ("ALEs"), health insurance carriers, and self-insured group health plans to complete and distribute the forms.

Sections 6055 and 6056 were added to the Internal Revenue Code by the Affordable Care Act ("ACA"). Section 6055 requires health insurance carriers, self-insured group health plans, and other providers of minimumessential coverage ("MEC") to file an annual report with the IRS and issue annual statements to covered individuals indicating the calendar months in a given year in which individuals were enrolled in MEC. The reported information will be used by the IRS to determine a taxpayer's compliance with the individual mandate, and the corresponding statements will be used by the individual to complete their tax returns.

Section 6056 requires ALEs that are subject to the ACA's employer shared responsibility rules to file information returns with the IRS and provide statements to their full-time employees about the health insurance coverage the employer offered. The purpose of these filings is to assist the IRS with the determination of an employee's eligibility for premium assistance and tax credits. It will also enable the IRS to assess the employer shared responsibility penalty to those ALEs that did not offer affordable, minimum value coverage to their full-time employees and dependents.

According to the Department of Treasury and the IRS, a substantial number of applicable large employers, health insurance carriers, and other providers of MEC needed additional time beyond the January 31, 2017 deadline to gather the required information and prepare the 2016 Forms 1095-B and 1095-C.[1] Based on this determination, the IRS extended the original deadline for furnishing these annual statements to individuals by 30 additional days. However, the IRS encouraged employers and other coverage providers to furnish the statements to individuals as soon as they are able.

The Notice did not, however, change the deadlines for filing the 2016 Forms 1094-B, 1095-B, 1094-C and 1095-C with the IRS.[2] These forms must still be filed with the IRS no later than February 28th (or March 31st, if filing electronically) of the year following the calendar year to which the return relates.[3] Employers or other coverage providers that do not comply with the due dates for furnishing and filing these forms are subject to penalties for failure to timely furnish and file.[4] According to the IRS, employers and other coverage providers that do not meet the applicable deadline should still furnish and file, and the IRS will take such furnishing and filing into consideration when determining whether to abate any penalties for reasonable cause.[5]

Along with extending the deadline for furnishing annual statements to individuals, the IRS also extended the good faith compliance standard. The final regulations provided transition relief from penalties under Sections 6055 and 6056 to reporting entities that can show they made a good-faith effort to comply with the information reporting requirements.[6] This relief applied only to incorrect and incomplete information reported on the statement or return, and not to a failure to timely furnish or file a statement or return.[7]

Specifically, IRS Notice 2016-70 extended transition relief from penalties under Sections 6721 and 6722 to reporting entities that can demonstrate they have made good-faith efforts to comply with the information reporting requirements under Sections 6055 and 6056 for incorrect or incomplete information reported on the return or annual statement. This relief also applies to missing and inaccurate taxpayer identification numbers and dates of birth, as well as other information.[8]

While President Trump signed an Executive Order addressing the ACA just hours after his inauguration, it is still unclear how the Executive Order will impact Sections 6055 and 6056 reporting. The Executive Order directs the Department of Health and Human Services and other federal agencies that administer and oversee the ACA to "exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision on requirement of the [ACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance . . . ."

Accordingly, until more guidance is issued, employers and other coverage providers should carefully review the requirements for Sections 6055 and 6056 reporting and furnish and file the required documents before the applicable deadlines. For further information regarding Sections 6055 and 6056 reporting, please contact our office.

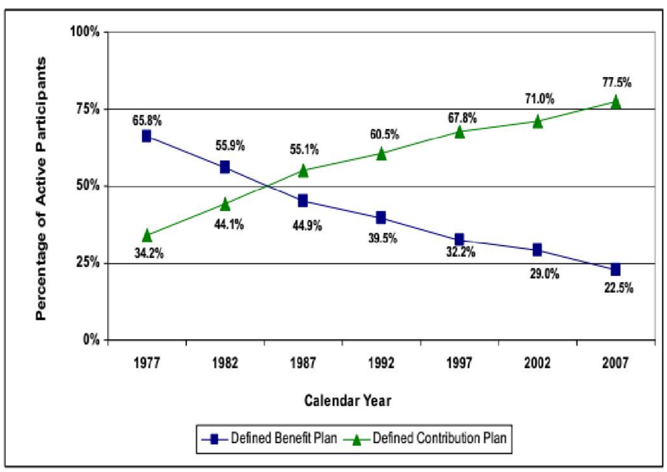
[1] Notice 2016-70.
[2] *Id.*
[3] *Id.*
[4] IRC Section 6722 and 6721.
[5] Notice 2016-70.
[6] *Id.*
[7] *Id.*
[8] *Id.*

The Variable Annuity Plan – A Viable Option for The Taft-Hartley Universe?

Those of us in the Taft-Hartley industry have all grown to love what the Traditional Defined Benefit Pension Plan ("Traditional DB Plan") can do for our participants. The Traditional DB Plan has allowed millions of our participants to retire with the dignity and stability they deserve. However, we've all seen the numbers. An extended period of low interest rates, capital market shocks, plan failures and employer concerns regarding unfunded liabilities have brought about a long slow decline of the Traditional DB Plan.

The U.S. Economy's shift away from the Traditional DB Plan to the Defined Contribution "(DC)" Plan has been underway since the 70's.

Percentage of Active Participants in Employer-Sponsored Retirement Plans by Type of Plan.

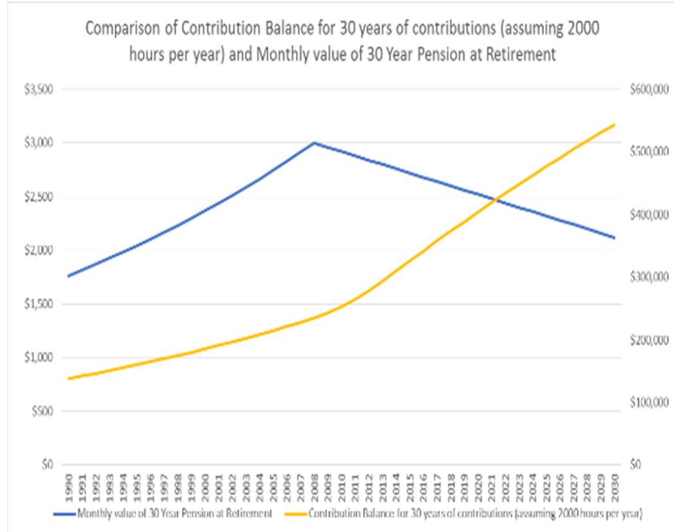


Source: Department of Labor, Employee Benefits Security Administration, January 2010 "Private Pension Plan Bulletin" and February 2009 "Private Pension Plan Bulletin Historical Tables and Graphs."

We are all too familiar with the problems Traditional DB Plans can present. Many of our clients have had to go through Funding Improvement or Rehabilitation Plans imposed by the law. Sadly, many plans out there are going to fail.

In many cases, and even for relatively heathly plans, trustees were forced to reduce benefit accruals while drastically increasing contribution rates. This has resulted in large generational transfers of wealth with younger generations paying much more for less.

The following chart depicts this generational transfer that is relatively commonplace.



In this scenario, the trustees are forced to decrease benefit accruals while contribution rates are dramatically increased. The chart depicts the effect of rising contributions and lower benefit accruals over time. The active participants working through the rehabilitation period in effect subsidize the generations before them.

WHAT ABOUT HEALTHY TRADITIONAL DB PLANS?

The problem facing healthly Traditional DB Plans is what to do with the large contribution rates that were put in place to make them healthy. Many healthy Traditional DB Plans are at or exceeding 100% funding with contribution rates 2-3 times the normal cost of the plan. This means that the contribution rate to the plan is 2-3 times larger than the value of the benefits being accrued on an ongoing basis.

The obvious answer to this problem is to increase benefits. However, many trustees are reluctant to increase benefits for fear of creating unfunded benefits and withdrawal liability. This standoff can be difficult to resolve.

SO WHAT'S THE ANSWER?

Of course there is no absolute need for change. Traditional DB Plans have been around a long time, and if carefully managed, can stay around for an even longer time. However, there's a concern that the same obstacles that plans previously faced may re-appear at a later date. So what other options are out there if you want to do something different?

One option is the Defined Contribution (DC) Plan. However, we are all familiar with the problem of DC Plans. First, participant directed investments typically underperform professionally managed and pooled investments. Second, many participants find it very difficult to resist disapating their DC account balance prior to retirement through hardship or termination provisions. Third, it is very difficult for a participant to figure out how to make a lump sum of money last for the rest of his or her life. The longevity risk is all on them. Finally, human nature makes it very difficult to avoid spending lump sums too quickly.

One alternative option on the horizon is the Composite Plan that the National Coordinating Committee for Multi-Employer Plans (NCCMP) has been working on. However, the NCCMP proposal will require a change of law. Accordingly, until their proposal is adopted, it is not a viable option.

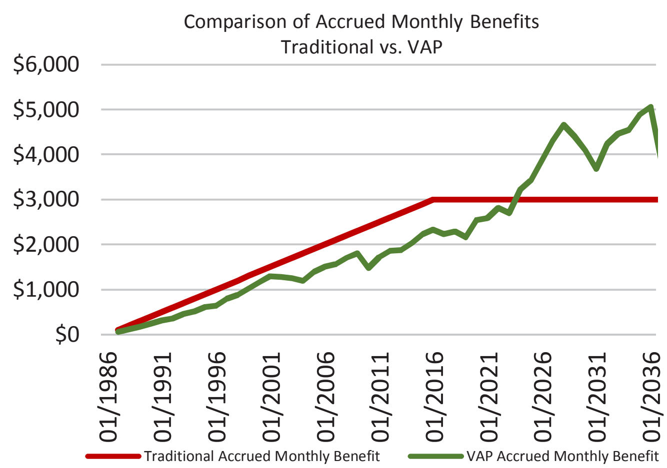
VARIABLE ANNUITY PLANS

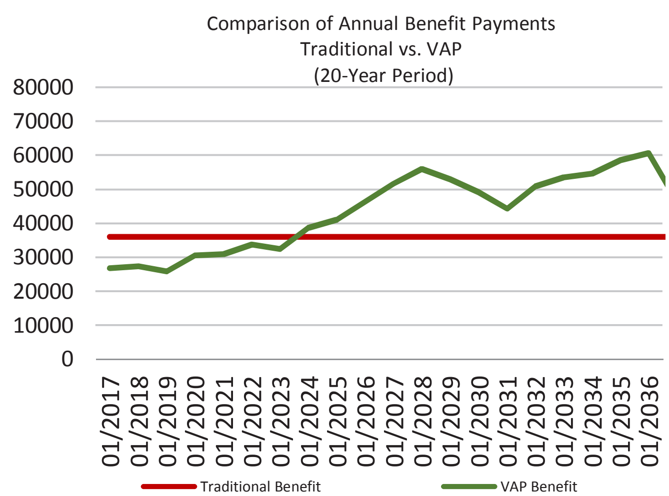
Another option is the Variable Annuity Plan ("VAP"). The VAP essentially adjusts the value of pension benefits based on investment performance.

A basic VAP design uses an assumed rate of annual return around 4%. This becomes what is called a "hurdle rate." Benefits are then adjusted annually to the extent actual market returns are better or worse than the hurdle rate.

In order to demonstrate how a VAP works, we have mocked up a hypothetical comparison of a VAP design vs. a Traditional DB Plan design. For this example, we have constructed a Traditional DB Plan with a $100 annual benefit accrual and a VAP with an annual accrual of $53.33. The VAP's annual accrual is less than the annual accrual for Traditional DB Plans of equivalent cost because it is based on a 4% rate of return instead of the 7.5% rate used for the Traditional DB Plan. However, the VAP's benefit will adjust every year based on actual market performance and the Traditional DB Plan accrual will remain flat.

The following charts reflect the results of a simulation we ran, with some outside help. In order to make the simulation as real as possible, we ran the numbers with actual market returns from 1986 to 2016. We assumed an asset allocation of 55% equity and 45% fixed income. The equity allocation was allocated with 75% of the class in US equities and 25% in International equities. We then only used 83% of those returns so that the annualized 30 year return of the portfolio equaled the 7.5% assumed rate of return of the Traditional DB Plan. Otherwise, the comparison would look unfair to the Tradional DB Plan as it would ignore the probable benefit increases that would result from larger than expected returns. Finally, we extrapolated the 30 year return pattern during the period of 1986 to 2016 to estimate the return from 2017 to 2046 in order to reflect realistic post retirement volatility. The following charts depict the results:





In the simulation, you can see the value of the Traditional DB Plan rises faster and is of course linear up until retirement in 2016. Upon retirement, benefit accruals cease and the pension payment is then flat throughout retirement. Because the VAP continues to adjust post retirement, the monthly value of the VAP pension approaches the value of the Traditional DB Plan about ten years after retirement and then exceeds it throughout the remainder of the simulation.

ADVANTAGES OF THE VAP

- If designed correctly, a VAP will not have unfunded liabilities or withdrawal liability as the liabilities of the plan adjust to the available assets.
- Like the Traditional DB Plan, a VAP's assets are pooled and professionally invested.
- Like the Traditional DB Plan, a VAP's benefits are paid for the life of the participant and thus spread the longevity risk across the participant pool.
- In a VAP, benefits continue to grow over time in normal scenarios past retirement. This greatly reduces the inflation risk normally faced by a retiree in a Traditional DB Plan.
- Each generation of workers will get a benefit commensurate with their contributions. The risk of generational transfers of wealth is eliminated.

DISADVANTAGES OF THE VAP

- The biggest disadvantage of a VAP is in the title. The benefits are variable. Benefits for participants and retirees go up and down based on market performance. There are, however, ways to mitigate these impacts by creating funding reserves.
- Benefits accrue at a slower pace in a VAP. Thus, conversion from a Traditional DB Plan can pose challenges.
- Conversion from a Traditional DB Plan is really only possible once it is very well funded.
- VAP's are hard to explain and can be difficult for participants to understand.
- You still have to pay PBGC premiums.

CONCLUSION

If you are looking for alternate methods of providing retirement benefits for your participants through a vehicle that combines some of the best attributes of DC and DB plans, you may want to consider the Variable Annuity Plan.

ACA Update – US District Court Enjoins Part of Final ACA Nondiscrimination Rule

On December 31, 2016, the United States District Court for the Northern District of Texas issued a nationwide preliminary injunction against the Department of Health and Human Services' ("HHS") Office of Civil Rights ("OCR") preventing the enforcement of two provisions of OCR's final rule implementing the Patient Protection and Affordable Care Act's ("ACA") prohibition against discrimination (Section 1557).[9] The preliminary injunction enjoins the OCR from enforcing the provisions of the Rule that bar discrimination on the bases of "gender identity" and "termination of pregnancy" as it relates to health care.

ACA Section 1557 provides that an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (race, color, national origin), Title IX of the Education Amendments of 1972 (sex), the Age Discrimination Act of 1975 (age), or Section 504 of the Rehabilitation Act of 1973 (disability), be excluded from participation in, be denied benefits of, or be subjected to discrimination under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an executive agency or any entity established under Title I of the ACA or its amendments.[10] The challenge against the Rule arises from the Rule's use of Title IX.

The Rule, as applied by the Defendant OCR, pursuant to Section 1557, forbids discrimination on the basis of "gender identity" and "termination of pregnancy" under Title IX. The Rule does not define "termination of pregnancy," but defines "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth."[11]

As a result, eight states and three private entities[12] filed suit in federal court, arguing that the Rule forced "them to perform and provide insurance coverage for gender transitions and abortions, regardless of their contrary religious beliefs or medical judgment."[13]

The Court held that the Rule "violates the Administrative Procedure Act ('APA') by contradicting existing law and exceeding statutory authority, and the regulation likely violates the Religious Freedom Restoration Act ('RFA') as applied to Private Plaintiffs."[14]

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[9] *Franciscan Alliance, Inc. v. Burwell*, No. 7:16-cv-00108-O (N.D. Tex. Dec. 31, 2016).
[10] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 96 (May 18, 2016).
[11] 45 C.F.R. § 92.4.
[12] Arizona, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Texas and Wisconsin, joined by Specialty Physicians of Illinois LLC, Christian Medical and Dental Associations, and the Franciscan Alliance, Inc.
[13] *Franciscan*, No. 7:16-cv-00108-O at 1.
[14] *Id*. at 2.

First, the Court stated that the Rule expanded the definition of "sex" under Title IX, and was thus in violation of the APA. Title IX unambiguously defines "sex" as the "biological differences between males and females as acknowledged at or before birth."[15] The Court further explained that in 1972 this was Congress' intent as to how to define "sex," and Congress did not intend to include "gender identity" as part of its definition. Additionally, when passing the ACA in 2010, Congress "did not understand 'sex' to include 'gender identity'" as that same Congress had included the phrase "gender identity" in other legislation passed in 2010.[16]

Secondly, the Court determined that the private plaintiffs have a substantial likelihood of success in alleging that the Rule violates the Religious Freedom Restoration Act. The Court clarified that the "Rule failed to incorporate Title IX's religious or abortion exemption even though it incorporated exemptions of the other three federal nondiscrimination statutes,"[17] and thus imposed a "substantial burden on [the] Private Plaintiffs' religious exercise" when enforcing the Rule.[18] Moreover, the Court determined that other means exist for the government to achieve its desired goal of ensuring nondiscriminatory access to health care, without imposing a substantial burden on the private plaintiffs and their exercise of religion.

The OCR will be enjoined from enforcing these two provisions of the Rule until the matter is heard on the merits and a final determination on the constitutionality of these provisions is made. The Rule, which took effect on January 1, 2017, continues to apply, but in accordance with the preliminary injunction. J&K will continue to monitor this matter in the coming months. For further information, please contact our office.

Officers and Shareholders Face Prison Time over Double-Breasted Operation

On January 19, 2016, two owner-operators of a double-breasted construction operation and their two companies (the "defendants") were indicted on eighteen counts of mail fraud, one count of theft or embezzlement from the Massachusetts Laborers' Benefit Fund (the "Fund"), and eighteen counts of making false ERISA statements. Most recently, on September 13, 2016, the United States District Court for the District of Massachusetts upheld the indictment. The court's holding illustrates new criminal consequences for officers and shareholders who improperly run a double-breasted operation. The government alleged that the defendants paid employees for union work from the non-union shop's payroll because it was "generally financially advantageous," and to avoid having to make contributions on covered work to the Fund.[19]

While the court discussed the legitimacy of a double-breasted operation, that legitimacy disappears when the double-breasted operation is actually a fiction being used by a single employer to escape its obligations under a CBA, and, if the government can establish criminal intent, the employer's owners could face prison time. The indictment states that the defendants were conducting a fraudulent scheme (rather than a lawful double-breasted operation), under which the union and non-union companies were a single company with the same location, workforce, equipment, and management.

IRS Greenlights Easier Retirement Rollovers

In August 2016, the Internal Revenue Service ("IRS") issued Internal Revenue Ruling 2016-47, which provides new guidance regarding the 60-day rollover requirement for retirement plan distributions as set forth in §§ 402(c)(3) and 408(d)(3) of the Internal Revenue Code ("Code"). Sections 402(c)(3) and 408(d)(3) of the Code allow a taxpayer to exclude from their income any amount distributed from a qualified plan or IRA, provided that the amount is transferred to an eligible retirement plan no later than the 60th day following the day of receipt. Traditionally, if the taxpayer missed this window to roll over a retirement plan or IRA distribution, the contribution would be subject to taxation. Internal Revenue Ruling 2016-47 offers alternatives to taxpayers who were otherwise forced to obtain a private letter ruling from the IRS if they missed this 60-day rollover period for certain reasons, which stands as a costly process requiring the taxpayer to pay a fee of $10,000.00 to the IRS as of 2016.

Internal Revenue Ruling 2016-47, which took effect on August 24, 2016, allows employees who missed their 60-day rollover window to self-certify to their plan administrator, IRA trustee, custodian, or issuer that they are eligible for a waiver under §§ 402(c)(3)(B) or 408(d)(3)(I) if they missed their rollover deadline in certain common circumstances. In such instances, the plan administrator may rely on the employee's self-certification in order to accept and report receipt of a rollover contribution.

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15 *Id*. at 3.
16 *See* 18 U.S.C. § 249(a)(2)(A); 42 U.S.C. § 13925(b)(13)(A).
17 *Franciscan*, No. 7:16-cv-00108-O at 36.
18 *Id*. at 40.
19 *United States v. Thompson,* No. 16-10014-PBS, 2016 U.S. Dist. LEXIS 124113 (D. Mass. Sep. 13, 2016).

Provided that the IRS has not previously denied a waiver request as to a rollover for all or part of a distribution from which the contribution arises, the IRS has recognized 11 reasons for missing the 60-day rollover deadline which may be claimed through the self-certification process. These reasons include errors made by the financial institution receiving the contribution or making the distribution, postal errors, misplaced distribution checks that were never cashed, severe damage to the taxpayer's principal residence, incarceration, deaths, and serious illnesses within the taxpayer's family.

Internal Revenue Ruling 2016-47 further provides that the contribution subject to the self-certification process must be made to the plan or IRA "as soon as practicable" after one of the 11 specified reasons occurrs; to the IRS, this means that the contribution must be made "within 30 days after the reason or reasons no longer prevent the taxpayer from making the contribution."[20] The taxpayer's success in proceeding with the process as set forth in Internal Revenue Ruling 2016-47 also requires that the plan administrator has no actual knowledge of any facts or circumstances that would contradict the self-certification.

Internal Revenue Ruling 2016-47 also includes a model self-certification form in its appendix for the convenience of the taxpayer. Although a plan administrator is not required to accept a self-certification, the process allows for flexibility and leniency in certain scenarios that may be beyond the control of a participant. The self-certification option also presents an easier and streamlined alternative to more time-intensive private letter rulings, which is expected to reduce the burden on IRS resources.

Treasury Approves First MPRA Plan

On December 16, 2016, the Iron Workers Local 17 Pension Fund in Cleveland, Ohio received permission from the Treasury Department to cut vested benefits for participants, including retirees, as part of a proposed rescue plan under the Multiemployer Pension Reform Act of 2014 ("MPRA"). MPRA, also known at the Kline-Miller Act, allows trustees of deeply underfunded multiemployer pension plans to reduce vested benefits provided they can show: (1) the plan is headed for insolvency within 15 years; and (2) the trustees have exhausted all other means to avoid insolvency. The Iron Workers Local 17 Pension Fund, which without the pension cuts was projected to become insolvent in 2024, was the first application approved by the Treasury Department under MPRA. Four prior MPRA applications have been rejected by the Treasury, either for faulty assumptions or because the proposed cuts did not sufficiently avoid insolvency.

The Treasury decision has retirees in underfunded plans across the country worried that their pension benefits may be reduced. Many retirees worry the floodgates will open now that the Treasury Department has given the green light to the Iron Workers Local 17 Pension Fund. Currently, five more multiemployer plans are waiting to hear if their MPRA applications will be approved by the Treasury and approximately 60 more have submitted notice that they are in "critical and declining" status, which makes them eligible to consider applying for benefit reductions under MPRA, although not all may qualify.

Now that the application for the Iron Workers Local 17 Pension Fund has been approved by the Treasury, the proposed benefit reduction will proceed to a vote by participants and beneficiaries. The vote will be administered by the Treasury under the rules set forth under MPRA. Those voting against the cuts will have their work cut out for them. In most voting scenarios, only those who vote get counted. That's not so under MPRA. Under MPRA, a proposed benefit reduction is deemed approved unless it is rejected by a majority of all plan participants. As a result, Local 17 participants who don't vote or fail to return their ballots by the deadline will be counted as voting in favor of the proposed benefit cuts. Under these voting rules, it is possible that a majority of those submitting ballots will vote to reject the proposed benefit cuts, but the reductions will be approved anyway because the vote to reject isn't a majority of all eligible participants.

Any MPRA-approved benefit cuts may not reduce the benefit below 110% of the Pension Benefit Guaranty Corporation's guaranteed benefit amount, which is approximately $13,000 per retiree per year. At the time of the filing, the Iron Workers Local 17 Pension Fund was in "critical and declining" status and had approximately $85 million in assets and $225 million in liabilities, creating a funding ratio of less than 40%.

Update: On January 20, 2017, the participants in the Iron Workers Local 17 Pension Fund voted to approve the benefit reductions. Out of 1,938 eligible voters, only 936 cast votes, with 616 voting in favor of the cuts and 320 voting against the cuts. The benefit reductions were scheduled to be implemented as early as February 1, 2017.

[20] Internal Revenue Ruling 2016-47: Waiver of the 60-Day Rollover Requirement. Rev. Proc. 2016-47.