LEGISLATIVE AND REGULATORY UPDATE

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LOUISVILLE EMPLOYEE BENEFITS COUNCIL
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<u>Court rejects 'church plan' status for tax-exempt hospital's pension plan</u>: A pension plan established by a church-affiliated hospital is not a "church plan" exempt from ERISA, a federal court in California has ruled, paving the way for a participant to pursue claims for losses resulting from ERISA noncompliance (***Rollins v. Dignity Health*** **(N.D. Cal. Dec. 12, 2013)**). In this closely watched case, the court held that only a plan established by a church qualifies for ERISA's church plan exemption — an interpretation at odds with a long history of IRS rulings on church-plan status. Though not binding on other parties, the court's decision may trigger an increase in ERISA claims against church-affiliated hospital systems, colleges, and charities.

Court decision at odds with IRS rulings

The lawsuit is one of at least five pending class actions challenging the church-plan status of pension plans established and maintained by church-affiliated hospitals. While the tax-exempt hospitals don't claim to be churches, their plans typically are maintained by a pension committee controlled by (or associated with) a church. This structure can create a church plan under Code Section 414(e)(3)(A), according to a series of IRS private letter rulings (PLRs) issued during the last 30 years (see, for example, PLR 200023057, March 20, 2000). Concurring with the IRS analysis, the Labor Department also has concluded that plans maintained by church-affiliated entities meet the church plan definition under ERISA Section 3(33)(C) (see, for example, ERISA Advisory Opinion 2000-05A, May 17, 2000).

No deference to IRS interpretation. The IRS's reasoning didn't fly with the *Rollins* court, which interpreted the statutory "church plan" definition much more narrowly — in essence, saying only a church may set up, or "establish," a valid church plan. According to the court, the statute was never meant "to be so broad as to permit any church-affiliated agency to start its own plan and qualify for ERISA exemption as a church plan." The court also rejected several other courts' analyses of ERISA's church plan exemption. By denying the hospital's motion to dismiss, the court allowed the plaintiff to proceed with claims for make-whole relief that would require the plan to conform to ERISA's requirements. The decision probably will be appealed to the 9th US Circuit Court of Appeals.

No decision on constitutional claim. The court didn't rule on plaintiff's claim that ERISA's church plan exemption violates the First Amendment's prohibition against any law "respecting an establishment of religion." That claim fell by the wayside once the court concluded this plan didn't qualify as a church plan.

Implications for other church-affiliated entities. The *Rollins* decision isn't binding on any other parties or courts but could spur new lawsuits or influence the outcome in the other pending class actions. This line of cases bears watching by all church affiliates that run their own retirement plans — separate from any church-established plan — and rely on ERISA's church plan exemption. Affected employers may include health care providers, nursing homes, educational institutions, publishers, social services agencies, and the like. (The court rulings may have implications for some health and welfare plans too.)

Consequences of losing church plan status

If the *Rollins* interpretation prevails, church affiliates sponsoring pension plans potentially would be subject to the full panoply of ERISA obligations, such as:

- Satisfying minimum funding standards
- Paying PBGC premiums
- Filing Form 5500
- Sending participant notices, such as an annual funding notice or 204(h) notice of reduction in future benefit accruals
- Conforming to ERISA's minimum participation rules and vesting standards (including anti-cutback rules)
- Providing spousal protections
- Complying with ERISA's fiduciary standards and prohibited transaction rules

Another major concern is the potential for penalties for past noncompliance.

Tax treatment also jeopardized. Noncompliance with ERISA may jeopardize a plan's tax treatment under the Code, with adverse consequences for plan sponsors and participants under Sections 402(b) (nonexempt trusts), 457(f) (nonqualified deferred compensation for employees of tax-exempt organizations), and 409A (nonqualified deferred compensation). Negotiating a closing agreement with the IRS may be one — potentially costly — avenue for relief.

On the other hand, church-affiliated employers that obtained favorable PLRs confirming the church-plan status of their pension plans have a safety cushion of sorts on the tax side. A favorable PLR generally protects a plan from retroactive disqualification under the Code, even if it doesn't necessarily hold sway with courts hearing ERISA claims. (A PLR shouldn't be confused with an IRS determination letter, which doesn't address church-plan status.) However, a PLR may be relied on solely by the taxpayer who requested it. Since 2011, plan sponsors seeking church plan rulings have had to give 30 days' notice to participants and other interested parties.

Would ERISA's retroactive correction period apply? ERISA generally gives church plan sponsors up to 270 days to fix any defects identified by the IRS or courts (**ERISA § 3(33)(D)**). If applicable, this provision might allay some concerns about retroactive penalties. But an open question is whether this provision applies once a court concludes the plan was never a valid church plan.

Legislative solution?

Unfavorable litigation outcomes could prompt church-related hospitals and other affiliates to seek relief in Congress. Lawmakers may be inclined to look at the bigger picture, particularly if ERISA's funding obligations might create financial hardship for hospitals. But pension rights advocates would vigorously oppose legislation limiting the scope of ERISA's protections. The Pension Rights Center secured a victory last year when the IRS revoked a 2003 church plan ruling for a defunct New Jersey hospital, prompting the PBGC to step in with insurance guarantees for pension plan participants.

Changes to HIPAA, ACA excepted benefits in the works for employer health plans: Employers offering EAPs, dental or vision benefits, or fixed-indemnity coverage should review recent guidance on "excepted benefits" under the Affordable Care Act and other federal laws. Proposed rules waive the need for self-insured dental and vision plans to have separate premiums, flesh out the employee assistance program (EAP) exception, and describe a new "limited wraparound coverage" carve-out. In addition, a January 9 FAQ addresses which fixed-indemnity policies are excepted. Employers may rely on some parts of the proposed rules for 2014 and can submit comments until February 24. FAQs with excepted benefit guidance (Q11) for individual fixed-indemnity insurance (DOL/HHS/IRS, 9 Jan 2014, 10 pages); Full text of proposed rules on excepted benefits (Federal Register, 24 Dec 2013, 11 pages) »

Historical practice may not define 'essential functions' in ADA discrimination cases: Whether writing job descriptions or determining what reasonable accommodation a disabled employee is entitled to under the Americans with Disabilities Act (ADA), employers should focus on the actual work to be accomplished rather than the physical tasks that have been needed to do the job. Tasks historically performed in a job may not be synonymous with the job's "essential function," as that term is defined by the ADA, a federal court recently ruled **(*Dunlap v. Liberty Natural Prods., Inc*. (D. Or. Nov. 25, 2013)**). Therefore, an employee who could no longer lift or carry heavy boxes (physical duties historically required for her job) might be a "qualified individual with a disability" under the ADA if a reasonable fact-finder could determine that the job's actual essential function was simply moving the boxes from one place to another — something the employee claimed she could do with reasonable accommodation. The decision reinforces the need for employers to engage their employees in an "interactive process" to determine whether a reasonable accommodation can be made to assist the employee in accomplishing a job function.

Reasonable accommodation under the ADA

The ADA requires employers to provide reasonable accommodations to "qualified individuals with disabilities" unless doing so causes undue hardship. Reasonable accommodation may involve job restructuring, although employers do not have to eliminate essential job functions. An employee who is unable to perform a job's essential function with or without a reasonable accommodation is not protected under the ADA because he or she is not a "qualified" individual with a disability.

Identifying essential functions

"Essential functions" are defined as "the fundamental duties of the employment position the individual with a disability holds or desires." Whether a particular job function is essential depends on:

- The reason the position exists and the employer's judgment as to which functions are essential
- The number of employees among whom performance of the job function can be distributed (the fewer the employees, the more likely it is an essential function)
- Whether the function is highly specialized and the incumbent was hired for his or her ability to perform it
- Written job descriptions prepared before advertising the job or interviewing applicants
- The amount of time the employee spends performing the function
- The consequences of not requiring the employee to perform the function
- Collective bargaining agreement terms
- Past employees' work experience in the job
- Current employees' work experience in similar jobs

Defining essential functions

Tracy Dunlap, a shipping clerk, sued her employer for disability discrimination under the ADA (among other claims) after her employment was terminated because she could not perform certain duties. Dunlap's primary tasks involved auditing items to be shipped, wrapping and boxing them, and weighing the items and invoicing them for shipping. Each part of the shipping process involved regular lifting. She also had to use a tape gun to construct boxes.

Dunlap told the company that her elbow was injured from repetitive trauma at work and that she could no longer construct or tape boxes with the tape gun or ship heavy or large orders. Believing Dunlap's injury was temporary, the company asked her co-workers to assemble and tape boxes and handle the heavy orders for her. When the co-workers complained about the physical toll of taking on Dunlap's work, she was reassigned to the customer service department, but was later moved back because she did not interact appropriately with customers.

Dunlap then underwent a physical capacity evaluation, which restricted her from lifting and carrying heavy objects. Two months later, the company's workers' compensation insurer told the company that she was permanently partially disabled. The company terminated Dunlap a day before she received a Preferred Worker Card, which is given to members of a special workers' compensation program that provides benefits to employers who hire permanently disabled workers. Dunlap sued.

Distinguishing between historical practice and essential functions

The company argued that Dunlap was not a qualified individual with a disability under the ADA because she could not lift or carry heavy objects, essential functions of her job. Specifically, the company argued that based on its judgment, lifting and carrying boxes were essential job functions and Dunlap's inability to do these tasks would prevent the company's inventory from shipping. Dunlap countered that the essential function of her job was to move boxes from one point to another — not lift and carry them. She explained that lifting and carrying heavy objects were "merely the historical method[s]" of moving boxes from one point to another.

The court found that although the employer's judgment as to which functions are essential, the historical methods used for a position, and the consequences of not requiring an employee to perform the functions are all evidence of that position's essential functions, they do not "irrefutably establish the essential functions." To illustrate, the court referenced a key regulation describing a fictitious "Sack Handler" position whose essential function is moving sacks from point A to point B, not lifting them.

The court noted that Dunlap had alleged that there were numerous pneumatic assistive devices that would have enabled her to move the boxes despite her physical restrictions. Because the company did not sufficiently explore other accommodations once it learned of Dunlap's physical restrictions, the court determined that a reasonable fact-finder could conclude that the company had not made a good-faith effort to explore possible accommodations — an "interactive process"required by the ADA. Based on its findings, the court denied the company's request for a summary judgment, allowing the case to go to trial.

Employer takeaways

The *Dunlap* opinion underscores the legal nuances and difficulty that can exist in defining an essential job function, which in turn dictates much of what employers are obligated to do under the ADA. To mitigate risk, employers should make every effort to provide reasonable accommodations to qualified disabled individuals. In conducting the analysis, employers may find it easier to focus on the work to be accomplished instead of the tasks historically done to perform that work. For example, working from home may be a reasonable accommodation for a receptionist whose sole responsibility is answering phones (assuming her disability requires such an accommodation) and who has historically done this in the office. But telework would not be a reasonable accommodation for a receptionist whose job is to answer phones, sort mail, and greet office visitors. Employers should also ensure that job descriptions are up-to-date and accurately reflect job duties. Finally, employers should seek legal counsel when navigating ADA obligations, particularly before denying a requested accommodation or terminating employment.
Guidance on reasonable accommodation (EEOC, 22 Oct 2002) »

PBGC proposes simplifying valuation, notice rules for certain multiemployer plans: PBGC has proposed simplifying its valuation and notice rules for certain multiemployer pension plans. The proposed regulations, released Jan. 28, 2014, would permit certain terminated plans to perform valuations every three years, shorten advance notice requirements for mergers that don't involve compliance determinations, and eliminate annual updates to insolvency notices.

Triennial valuations for certain terminated plans. A terminated plan that meets the following criteria could perform actuarial valuations every three years (rather than annually):

- The plan was terminated by mass withdrawal.
- The plan is not insolvent.
- At the most recent required valuation date, the value of vested benefits was no more than $25 million. (Plans could move between triennial and annual valuation requirements as the value of vested benefits changes.)

Advance notice for certain mergers. Sponsors of merging plans could notify PBGC 45 days (rather than 120 days) before the merger date if they aren't seeking a PBGC determination that the merger complies with ERISA Section 4231. But sponsors of plans involved in an assets/liability transfer that is not a merger — as well as sponsors of merging plans seeking a compliance determination — must continue to provide 120 days' advance notice.

Insolvency notice updates. Once a plan that was terminated by mass withdrawal has notified participants, beneficiaries, and the PBGC that it will be insolvent and benefits will be reduced (but not below PBGC guaranteed levels), it would not have to provide updated insolvency notices annually. PBGC has determined from experience that once a terminated plan becomes insolvent, it remains so, and the requirement to provide annual insolvency notice updates only depletes assets that would otherwise be used to pay benefits.

Comment deadline. Comments on the proposal are due by March 31, 2014.

President creates workplace retirement plan, hits 'upside-down' tax incentives: The Treasury Department will soon create a new workplace-based retirement savings program known as "MyRA" (my Retirement Account), President Obama announced in his Jan. 28 State of the Union address. The president is using his executive authority to create the **MyRA** program, meaning the initiative probably will go forward without congressional action. Obama hopes to work with Congress on several other retirement-related priorities, including establishing automatic IRAs and "removing retirement tax breaks for the wealthiest." The administration's FY2015 budget plan, slated for release in March, is expected to include these proposals.

"Starter" savings plan will invest in federally backed bonds

Treasury will start rolling out MyRAs in late 2014. In the meantime, here are some basic points to know about MyRAs, based on a just-released Treasury fact sheet and FAQs:

- The accounts are intended for savers who either don't have access to an employer-sponsored plan or are looking to supplement a current plan.

- The accounts will be workplace-based — employers can make MyRAs available to employees but won't be required to do so. The Obama administration is expected to encourage employers without tax-favored plans to automatically enroll workers in the MyRA program (unless the workers opt out). Participating employers would not make contributions or take on any administrative duties, apart from payroll deduction.
- The accounts will be structured as Roth IRAs, which means employees'contributions will be made on an after-tax basis. Contributions can be withdrawn tax-free at any time; investment earnings can be withdrawn tax-free after age 59-1/2. Roth IRA contribution limits and income caps will apply. So MyRAs will be available to individuals with income under $129,000 (couples with household income under $191,000).
- The program will accept direct deposits of small investments, as low as $25 initially and $5 each payday.
- The accounts won't be limited to a single employer; they will be portable.
- Contributions will be invested in instruments backed by the federal government, similar to US savings bonds. "MyRA guarantees a decent return with no risk of losing what you put in," the president said. Interest will be pegged to the variable rate of a government securities option in the federal employees'Thrift Savings Plan. Employees will pay no investment fees.
- As accounts grow, some savers may prefer to transfer their funds to other investments, so Treasury will allow MyRAs to be rolled over to Roth IRAs at any time. A rollover will be mandatory once a worker's MyRA account reaches $15,000 or has been in place 30 years.

Employees already can purchase US savings bonds via payroll deduction through TreasuryDirect, so the president may be using that "hook" to launch MyRAs without congressional approval. It's unclear whether lawmakers will challenge the president's authority to proceed without legislation, given the tax implications of MyRAs.

The president asserts"many private sector providers do not offer retirement savings options tailored to small balance savers" and sees MyRAs as a solution. The new option may be welcomed by workers lacking access to low-cost investment opportunities, but it adds yet another item to the already-confusing menu of tax-favored savings programs (401(k), 403(b), 457(b), IRA, Roth IRA, SEP, SIMPLE, and the like).

That menu would grow even longer if the president can persuade Congress to enact "auto-IRAs" — a longstanding proposal promoted in the State of the Union address and likely reappear in Obama's FY2015 budget proposal. The president's 2014 budget would have required every employer —except very small or new ones — to offer auto-IRAs if it either doesn't sponsor a qualified plan or has a plan that excludes significant groups of employees. This proposal isn't likely to be enacted, however, given Republicans' opposition to an employer mandate.

Retirement tax incentives for the 'wealthiest' in the crosshairs

Though the president is prepared to "go it alone" on MyRAs, he will need legislation to implement his other retirement-related priorities —including his bid to shift retirement tax incentives away from the "wealthiest" and toward "middle-class Americans." In the president's view, tax reform initiatives should revamp "upside-down retirement tax incentives." As proposed last year, the administration wants to limit the tax savings associated with employee contributions to defined contribution plans and IRAs to 28% of the contribution. For example, a taxpayer in the 33% bracket who contributes $100 to a 401(k) plan would save only $28 in taxes, not $33. (Affected taxpayers' tax basis would be adjusted to reflect the additional tax imposed.)

The FY2015 budget plan may resurrect a proposal to place a dollar limit on an individual's accumulated benefits in IRAs and tax-favored workplace plans, which might include pension, 401(k), 403(b), and governmental 457(b) plans. Last year's Treasury "Greenbook" explained that an individual's retirement accumulations would be capped at an amount sufficient to fund a $205,000 annual lifetime benefit, payable at age 62 in the form of a joint and 100% survivor annuity (the Code Section 415 maximum for pension plans). This equates to a total value of about $3.2 million today, according to a White House fact sheet.

Business groups counter that current incentives are working well and warn that limiting tax-deferred plan contributions actually would actually decrease future tax revenues while reducing overall savings and plan sponsorship. **Fact sheet: Opportunity for All: Securing a Dignified Retirement for All Americans (White House, 29 Jan 2014, 2 pages); Fact sheet: myRA: A Simple, Safe, Affordable Retirement Savings Account (Treasury, 29 Jan 2014, 1 page); FAQs about myRA (Treasury, 29 Jan 2014, 2 pages) »**

Key senator proposes universal retirement coverage: Many employers would have to auto-enroll workers in privately run USA Retirement Funds, under legislation proposed by Sen. Tom Harkin, D-IA, chairman of the Senate Health, Education, Labor and Pensions Committee. At the heart of the proposal is a universal coverage mandate: Every employer with at least 10 workers would have to provide automatic access to a USA Retirement Fund unless the employer already offers a defined benefit (DB) pension or a defined contribution (DC) plan with auto-enrollment and a lifetime income option.

Universal coverage with pooled, professionally managed funds

The Universal, Secure, and Adaptable (USA) Retirement Funds Act of 2014 builds on Harkin's 2012 report about the US "retirement crisis." Here are the key features of a USA Retirement Fund, as described in Harkin's bill snapshot, summary, and FAQs (bill text isn't available yet):

- Employees would be auto-enrolled at 6% of pay, but they could increase, decrease, or stop their contributions. Pretax employee contributions would be capped at $10,000 (but it isn't clear whether employees could make additional after-tax contributions). Lower-income workers may qualify for a refundable saver's credit.

- Employers could choose to make uniform contributions of up to $5,000 a year for each employee. Employer contributions would be optional.
- Employers wouldn't have the fiduciary obligations that normally accompany plan sponsorship, such as the duty to exercise care in selecting or managing the fund. Employers' obligations would be limited to enrolling employees and processing payroll deductions.
- Contributions would be pooled in professionally managed USA Retirement Funds. Employees could select among funds but couldn't otherwise direct investments. These funds could be set up by nonprofits, employer associations, employee organizations, financial institutions, or other organizations. Market forces would determine the number of USA Retirement Funds that become available.
- Each fund would have to get Department of Labor approval and have a board of independent trustees representing employees, retirees, and employers. As fiduciaries, the trustees would have a duty to act prudently and in participants'best interest. Participants would have the right to comment on fund administration, petition trustees to remove vendors, and approve trustee compensation. Citing a recent research report, Harkin estimates these risk-pooling arrangements "will reduce the cost of retirement by up to 50%."
- Retirement benefits would be paid as lifetime income, with the same spousal protections as DB plans and no preretirement withdrawals. Partial lump sum distributions would be allowed under very limited circumstances. Benefits would be portable when workers change jobs.

USA Retirement Funds are not intended to supplant existing DB and DC plans, and employers could offer the funds as a supplement to those plans. While USA Retirement Funds may be attractive to some small business owners, the universal coverage mandate may be unpopular with large segments of the business community.

To avoid the USA Retirement Fund mandate, some plan sponsors might need to beef up their existing plans — for example, by adding an auto-enrollment feature or a lifetime income option. Without bill text, it isn't clear whether employers would have to provide a minimum level of meaningful benefits in their pension or 401(k)-type plans to avoid the mandate, as Harkin suggested in an earlier description of his proposal. Nor is it clear whether plan sponsors would have to auto-enroll employees in USA Retirement Funds if the employees are excluded from plan coverage because of a waiting period, job classification, or employment by a nonparticipating division or subsidiary.

Other aspects of the Harkin proposal

The USA Retirement Funds proposal is part of a larger package of reforms for employer-sponsored DB and DC plans, but details won't be known until Harkin releases bill text. Possible topics might include:

- Relief for cash balance and other hybrid plans
- Lifetime income options in DC plans
- DB sponsors' PBGC obligations after a facility closing or other "4062(e) event"
- Fiduciary protections for participants

Legislative outlook

One of Congress' leading retirement legislators, Harkin is retiring at the end of his term this year and is intent on improving Americans' retirement security before leaving office. Harkin's bill isn't expected to advance as a whole this year, given Republicans' general opposition to employer mandates. However, Harkin may be willing to modify some elements to draw bipartisan support.

Summary of USA Retirement Funds Act (Senate HELP Committee, 30 Jan 2014, 2 pages) »;

Snapshot of USA Retirement Funds Act (Senate HELP Committee, 30 Jan 2014, 1 page)

FAQs on USA Retirement Funds Act (Senate HELP Committee, 30 Jan 2014, 4 pages)

Press release on USA Retirement Funds Act (Sen. Harkin, 30 Jan 2014, 3 pages) »

Senate passes bill to give certain charities, cooperatives pension funding flexibility: Multiple-employer pension plans sponsored by eligible charities and cooperatives that have delayed Pension Protection Act (PPA) compliance dates would get funding flexibility under a bill passed by the Senate on January 29 **(S 1302)**.

Cooperative and small employer charity (CSEC) plans. True multiple-employer plans (which treat employers under common control as one employer) would get a new permanent funding regime and would be exempt from PPA's funding-based benefit restrictions. The new regime mirrors pre-PPA funding rules but eliminates the deficit reduction contribution (DRC). In the past few years, the DRC has caused many eligible charity plans with delayed PPA effective dates to have higher funding requirements than they would have had under PPA rules, leading to the call for changes.

CSEC plans would have to get annual funded status certifications from their actuaries, and special rules would apply to plans less than 80% funded (based on the actuarial value of assets and liabilities measured at the plan's funding interest rate). The sponsor would have to establish a funding restoration plan designed to reach 100% funding in seven years (or, if longer, the "shortest amount of time practicable"). The sponsor could not adopt any plan amendments improving benefits unless the resulting liability increase was immediately funded.

A plan meeting the CSEC definition would automatically come under the new funding regime in 2014 unless the sponsor elected by the end of the 2014 plan year not to be treated as a CSEC. Sponsors electing not to be treated as CSECs would be treated like other eligible charity plans.

The Senate-passed bill drops earlier language that would have exempted CSEC plans from post-2013 PBGC premium hikes and given frozen plans more time to make up funding shortfalls.

Other eligible charity plans. Sponsors of eligible charity plans that don't meet the new CESC definition, including many tax-exempt hospitals, health care systems, universities, and other 501(c)(3) organizations, could elect to determine minimum pension contributions using PPA rules — and to comply with PPA's funding-based benefit restrictions — starting with the 2014 (instead of 2017) plan year. Sponsors making this election could also opt to determine amortization installments as if they had elected 15-year amortization relief for the 2010 and 2011 plan years under the Pension Relief Act of 2010.

Next steps. Supporters now hope to convince the House to approve the measure this year.

Press release on Senate Health, Education, Labor and Pensions Committee passage of S 1302 (Senate HELP Committee, 30 Oct 2013, 2 pages) »

New FAQs address ACA implementation and mental health parity: Recent Affordable Care Act (ACA) FAQs cover a grab bag of issues, such as when preventive services must include breast cancer drugs and when mental health parity applies to individual and small-group policies. Other FAQs permit dividing the ACA's annual cost-sharing limit among different benefits and give expatriate plans another year of ACA relief. Wellness program sponsors may limit opportunities to enroll in a tobacco-cessation program and help shape alternative standards suggested by a physician. The guidance also explains a new excepted benefit for individual fixed-indemnity insurance.
http://www.dol.gov/ebsa/healthreform

http://www.cciio.cms.gov/resources/factsheets/index.html

Senate bill would promote small-business MEPs, add new 401(k) safe harbor: Unrelated small businesses could band together to offer 401(k) benefits in a multiple-employer plan (MEP), under bipartisan legislation proposed by Sens. Susan Collins, R-ME, and Bill Nelson, D-FL. The **Retirement Security Act of 2014 (S 1970)** also proposes several other changes, including a new 401(k) safe harbor design (exempt from ADP/ACP testing, including ACP testing of after-tax employee contributions) that "nudges" employees to save 10% of pay.

Multiple-employer plans encouraged. The bill aims to encourage small-business plan sponsorship by allowing employers to share administrative costs. Toward that end, the bill would waive the ERISA requirement that small businesses have some connection, or nexus, with each other to participate in the same defined contribution MEP. Only businesses with fewer than 500 employees would qualify for the waiver. (Businesses outgrowing the 500-employee threshold

would have a five-year grace period to exit the MEP.) Participating employers would retain fiduciary duties to select and monitor the plan's named fiduciary and to manage assets held in their employees' accounts to the extent that authority isn't delegated to another fiduciary. A recent proposal by Sen. Tom Harkin, D-IA, takes a similar approach but doesn't have a 500-employee cap (***see above for discussion of Harkin proposal***).

Like the Harkin proposal, the Collins-Nelson bill would authorize, but not require, the Department of Labor (DOL) to simplify reporting and audit requirements for some MEP arrangements. DOL has rigidly interpreted those requirements in the past. The bill also would direct the IRS to eliminate the MEP "bad apple" rule, so a disqualifying failure by one plan adopter won't taint the entire plan's qualification for tax purposes. The bad-apple provision doesn't cover ERISA violations (which may differ from Code violations) but seems to cover both defined benefit and defined contribution MEPs.

New 401(k) safe harbor. The bill would create a new 401(k) auto-enrollment safe harbor, called a "secure deferral arrangement," similar to House and Senate proposals last year. The initial default contribution rate would be at least 6% of pay (and no more than 10%). The contribution rate would escalate over time to at least 10% of pay but could go higher. Adopting employers would have to match at least 100% of the first 1% contributed, 50% of the next 5% contributed, plus 25% of the next 4% contributed. This formula yields a total 4.5% match, which is higher than the match under existing safe harbors. Employers would have to match every dollar contributed up to 10% of pay (that is, they couldn't bottom-load the match), and the match would vest after two years of service. Press release on the Retirement Security Act of 2014 (Sen. Collins, 29 Jan 2014, 3 pages) »

Further pension funding stabilization proposed in Senate unemployment benefit bill: A new proposal from Senate Democratic leaders to renew federal unemployment benefits would delay the phase out of MAP-21 stabilized pension discount rates by four years, tighten restrictions on lump sums while the sponsor is in bankruptcy, and clarify how segment rates apply for certain small plans. The Senate is set to take up the bill within days, but the outlook is unclear. Many Republicans back the idea of extending jobless aid but prefer other ways to pay for it.

Delayed phase out of interest-rate stabilization. MAP-21 reduced pension contributions starting in 2012 by stabilizing the segment discount rates used to determine the funding target and target normal cost. MAP-21 limited each segment rate to a corridor within 10% of the segment's 25-year average value in 2012, 15% in 2013, 20% in 2014, 25% in 2015, and 30% for plan years after 2015. The Senate bill (S 1845) would use a 10% corridor for 2012–2016, widening to 15% in 2017, 20% in 2018, 25% in 2019, and 30% thereafter. Employers could elect to stick with the MAP-21 corridor for the 2013 plan year, but the new corridor would apply starting in 2014. Annual funding notices sent to participants through the 2018 plan year would have to include information on interest rate stabilization.

The bill would raise 2014 discount rates by roughly 0.7% and 2016 rates by more than 1%:

Plan year	Segment rates under current law			Segment rates under S 1845		
	1st	2nd	3rd	1st	2nd	3rd
2013	4.94%	6.15%	6.76%	5.23%	6.51%	7.16%
2014	4.43%	5.62%	6.22%	4.99%	6.32%	6.99%
Projected 2015	3.9%	5.1%	5.7%	4.7%	6.1%	6.8%
Projected 2016	3.4%	4.6%	5.6%	4.4%	5.9%	6.7%

Lump sum restrictions for sponsors in bankruptcy. The bill would prohibit pension plans from paying lump sums or other accelerated distributions while the sponsor is in bankruptcy, unless an enrolled actuary certifies that the AFTAP is at least 100% using non-stabilized interest rates. This provision would apply for plan years beginning after 2014, with a one-year delay for collectively bargained plans. Sponsors would have anti-cutback relief for timely adopted plan amendments implementing this restriction.

Clarification for small plans. The bill would also clarify how segment rates apply for small plans (100 or fewer participants) using valuation dates other than the first day of the plan year.

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