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PENSION & BENEFITS WEEK

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HIGHLIGHTS

PBGC Amends FOIA Regs to Incorporate Statutory Changes. PBGC has issued final regs amending its Freedom of Information Act (FOIA) regs to incorporate changes made by the FOIA Improvement Act of 2016 and the Open Government Act of 2007. The final regs provide for an electronic reading room for records, expand the categories of records in the reading room, update the standard for disclosure, require additional notice to requesters about FOIA resources, extend the appeal deadline, and place restrictions on fees.

Plaintiff in Fiduciary Breach Lawsuit Had Burden of Proving that the Alleged Breach Caused Plan Losses. The Tenth Circuit has joined the majority of circuit courts of appeal in holding that the plaintiff in a breach of fiduciary duty lawsuit bears the burden of proving that the alleged breach caused a plan to suffer losses.

Are Roth Contributions the Answer to Retirement Savings? In this *Practitioner to Practitioner* article, Will Hansen discusses the future of retirement savings, focusing on the implications of a significant shift to Roth contributions.

DOL's Lawsuit Against Plan Fiduciaries Moves Forward in Partial Victory. A district court has permitted DOL's $7 million claim to advance against plan fiduciaries for failure to properly monitor plan investments. However, citing the protections of ERISA § 405(d)(1)'s safe harbor, the court dismissed DOL's claims against the fiduciaries for failure to properly invest plan assets, and for co-fiduciary liability.

No Bankruptcy Exemption for IRA that was Funded When Debtors Had No Earned Income, and Deposit of Funds Did Not Constitute a Rollover. An IRA did not qualify for an exemption from the debtors' bankruptcy estate, where the debtors were ineligible to make a deductible IRA contribution because they had no earned income, and the deposit of funds into the IRA did not constitute a qualified rollover.

ESOP Disqualified, Based on Stock Allocation to Officer Who Drew No Salary. The Eighth Circuit has upheld IRS's disqualification of an employee stock ownership plan (ESOP), finding that the plan's allocation of stock to a corporate officer's account exceeded the contribution limits under Code Sec. 401(a)(16), because the officer hadn't received any compensation from the corporation that year.

Proposed Severance Options for Laid-Off State Employees Would Create a CODA that Would Disqualify Pension Plan. In a private letter ruling, IRS has held that proposed severance options, given either as a voluntary severance benefit or a lump-sum cash payment, to public hospital employees affected by a lay-off or privatiza-

lump sums, one for PBGC payments (see Table I) and one for private-sector payments (see Table II). For discussion of the final regs, see Pension & Benefits Week at ¶ 4.

TABLE I

LUMP SUM INTEREST RATES FOR PBGC PAYMENTS (PBGC Reg. Part 4022, Appendix B)

Rate set	For plans with a valuation date: On or after	Before	Immediate annuity rate (percent)	Deferred annuities (percent): i(1)	i(2)	i(3)	n(1)	n(2)
285	7-1-17	8-1-17	1.00	4.00	4.00	4.00	7	8

TABLE II

LUMP SUM INTEREST RATES FOR PRIVATE-SECTOR PAYMENTS (PBGC Reg. Part 4022, Appendix C)

Rate set	For plans with a valuation date: On or after	Before	Immediate annuity rate (percent)	Deferred annuities (percent): i(1)	i(2)	i(3)	n(1)	n(2)
285	7-1-17	8-1-17	1.00	4.00	4.00	4.00	7	8

TABLE III

BENEFIT VALUATIONS (PBGC Reg. Part 4044, Appendix B)

For valuation dates occurring in the month of--	The values of i(t) are: i(t)	for t =	i(t)	for t =	i(t)	for t =
July-September 2017	.0244	1-20	.0274	>20	N/A	N/A

PBGC updates these interest rates on or about the 15th of every month and has the information recorded on its telephone "hotline." The number is 202-326-4041. The rates are also posted on PBGC's website at: h t t p : / / www.pbgc.gov.

PRACTITIONER TO PRACTITIONER

Are Roth Contributions the Answer to Retirement Savings?

Will Hansen

"Only Roth contributions allowed." Is that the future of retirement savings? If so, the current pre-tax deferral of funds into defined contribution plans will become obsolete. And any significant shift to Roth contributions, without analysis on how this change would impact retirement savings, could be detrimental to millions of Americans' ability to retire comfortably.

The idea of shifting to Roth contributions is not "good" policy, rather, the shift is necessary to satisfy Congressional budget rules. Congress must follow certain budget rules, such as utilizing a ten-year budget window to determine revenues and expenditures of legislative proposals, and can ignore the fact that a legislative proposal may have a negative fiscal impact outside of the ten-year budget window.

For example, several creative legislative proposals that impact retirement plans have been debated and even implemented through the years to raise revenue within the ten-year budget window to pay for another unrelated policy. A number of these proposals are related to the financial accounting of defined benefit plans and PBGC premium payments (e.g., the Budget Act of 2015 increased PBGC premiums to pay for an unrelated program)—and we can call them what they are, budget gimmicks.

The most recent focus has Congress looking to eliminate the pre-tax deferral of funds into retirement accounts as a way to pay for a decrease of the individual tax cut rates, all to satisfy a revenue neutral tax reform proposal

within the ten-year budget window. But, this shift in policy will negatively impact the government coffers outside of the ten-year window, when the government fails to recoup taxes upon distribution of the Roth accounts when workers retire decades down the road.

Do elected officials really believe a significant shift to Roth contributions will boost retirement security? No. But, the fact that this change in policy will achieve a greater legislative victory—a reduction in the individual tax rates—means that the elected officials will look for any shred of evidence that Roth contributions will be more successful than pre-tax contributions in providing a secure retirement.

Recently, I've heard the argument that a transition to all Roth contributions (by eliminating pre-tax deferral) would be simpler to understand than the current system of choosing between Roth contributions and pre-tax deferrals, thus increasing participation in retirement accounts. I fail to understand how steering away from a decades old system of pre-tax deferrals, which has been successful in providing retirement security to tens of millions of Americans, would simplify retirement accounts.

Americans already understand how their retirement account operates and that deferrals reduce their tax burden—in fact, I believe tax deferral is one of the primary reasons individuals contribute to their retirement plans. Yes, it is true that a switch to all Roth contributions would be simple, but that is merely because the switch would limit the contribution options to just Roth plans. It would probably take years (maybe more than the ten-year budget window) to alter the psychological behavior of individuals (i.e., their spending and savings habits) due to such a change in the taxation of retirement contributions. When it comes to saving for retirement, any decrease in savings habits over a year or two due to the policy shift to Roth contributions, would multiply over time, reducing the likelihood of a secure retirement. All for the sake of satisfying a Congressional budget rule.

Further, a switch to Roth contributions will not increase participation in retirement accounts. An individual who already has access to an employer provided retirement plan will not all of a sudden have a desire to save for retirement if there is no longer a choice between pre-tax and Roth contributions. And, a switch to Roth contributions will not drive employers who do not offer a Roth plan to suddenly provide a Roth plan to employees.

Currently, retirement plans, specifically employer-sponsored plans, are effectively enabling millions of Americans to save for retirement. Let's not break something that works for the sake of a political victory. Instead, let's roll up our sleeves and have a real discussion on retirement security in this country.

Will Hansen is the Senior Vice President of Retirement and Compensation at The ERISA Industry Committee (ERIC). ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels.

THE COURTS

Tenth Circuit Rules that Plaintiff in Fiduciary Breach Lawsuit Had Burden of Proving that the Alleged Breach Caused Plan Losses

The Tenth Circuit has joined the majority of circuit courts of appeal in holding that the plaintiff in a breach of fiduciary duty lawsuit bears the burden of proving that the alleged breach caused a plan to suffer losses. (*The Pioneer Centres Holding Company Employee Stock Ownership Plan and Trust and its Trustees v. Alerus Financial, N.A. (2017, CA10) 2017 WL 2415949*)

Background. Pioneer Centres Holding Company owned and operated several car dealerships in Colorado and California, including Land Rover, Audi, and Porsche. In 2001, Pioneer established an employee stock ownership plan (ESOP), which had three trustees, one of whom was Jack Brewer, Pioneer's founder and owner.

In 2009, the plan's trustees proposed a stock transaction, under which the ESOP would become the 100% owner of Pioneer by purchasing Brewer's shares in Pioneer. Because the trustees' interests in the transaction were adverse to those of the plan, the plan hired Alerus Financial as an independent "transactional trustee." Alerus's job was to determine whether, and on what terms, the plan should purchase Brewer's shares. As a condition for any change in ownership, however, Land Rover—pursuant to its dealership agreement with Pioneer—had to approve the proposed transfer before the transaction could be completed.