BCG Retirement News Roundup

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Boomershine Consulting Group (BCG) provides this monthly news roundup of highlighted significant articles from the retirement industry – for clients and friends. Retirement plan news has become increasingly pertinent for many audiences these days, including:

- Retirement Plan Sponsors – addressing both private and public sector issues
- Employers – dealing with complicated decision making for their plans
- Employees – educating the Boomer generation that is nearing retirement
- Industry Practitioners - helping to understand and resolve today's significant challenges

We review numerous industry news services daily and will include a collection of timely and significant articles each month concerning compliance, actuarial plan costs (including assumption debates), plan design change issues and benefit trends, as well as other related topics.

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Public Sector/Government Plans

Balto. Co. could owe more than $19 million in pension case

Baltimore County may have to pay more than $19 million back to thousands of retirees and employees who for years contributed to a pension system that courts have ruled discriminated against beneficiaries on the basis of age.

The U.S. Supreme Court recently refused to hear the county's appeal in the case, effectively ending its legal challenge. Now, the task becomes figuring out how much the county must pay back, and to whom — a process that could take several years.

In a memo sent to County Council members late last week, council attorney Thomas Bostwick warned that the financial impact of the case could be "sizable" and that determining damages would be a daunting task.

"If you thought the liability aspect was complicated, imagine the difficulty in going through a mountain of retiree files and determining what their contribution amounts were, what they should have been, based on the Court's ruling, and what they perhaps may be due in a refund," Bostwick wrote to the council's seven members.

The U.S. Equal Opportunity Employment Commission sued the county in 2007, alleging that its pension system violated the Age Discrimination in Employment Act because older workers had to pay more toward retirement than younger workers.

The county has maintained that the payment structure did not break discrimination laws. After a federal judge's decision in 2012, officials with County Executive Kevin Kamenetz's administration vowed to fight the agency aggressively and took the case all the way to the U.S. Supreme Court, which decided last month not to hear the case.

According to Bostwick's memo, county officials estimate damages could total $17 million to $19 million, "but that number could be higher eventually."

In an email to The Baltimore Sun on Tuesday, EEOC attorney Maria Salacuse said that the next phase in the case will be to determine damages in U.S. District Court, but she declined to comment further, saying it would be premature.

In federal court filings, lawyers for the Kamenetz administration have said that determining damages could take at least two years and involve 10,000 paper retirement files, as well as electronic files, plus analysis by actuarial experts.

EEOC lawyers have disputed the notion that the damages phase would be so lengthy or involve so many paper files.

The EEOC lawsuit was filed on behalf of employees hired before 2007, which is when the county changed its pension system so that workers hired after July 1 of that year contributed to the retirement system at a flat rate not based on their age at hiring. When the lawsuit was filed, the retirement system covered 9,500 active employees and 6,600 retirees.

Through a spokeswoman, Kamenetz declined Tuesday to comment on the Supreme Court's decision and referred questions to the county's Office of Law.

County Attorney Mike Field gave an estimate of up to $19 million to the County Council's lawyers, but told The Sun that was a "back-of-the-envelope" calculation and he didn't want to pin down a specific amount of what he thinks the county might owe.

"We're so far away from that, I'm loath to predict anything," he said.

Field acknowledged that the payout could be millions of dollars to thousands of employees who participated in the pension plan when it was deemed to be discriminatory. He expects that the EEOC will hire actuaries to calculate payouts for each employee, but declined to say if the county would hire its own experts.

The county hired an outside law firm to assist with appealing the case to the Supreme Court, a contract worth up to $42,000 that was approved by the council. Field said the county's own legal staff will handle the case moving forward.

There are three possible ways that employees and retirees could be paid back, Field said: from county taxpayers, from its pension adviser, or from pension plan participants themselves through adjustments to their contributions.

Field said the details of the court's decision could determine how the employees are paid.

Asked if the county will lean on its consulting firm to pay the bill, Field said: "We're exploring all of our options for how to move forward."

Members of the County Council were informed of the court's decision in recent days, a month after the Supreme Court decided not to hear the case. Field said his office simply forgot to tell the council.

Councilwoman Vicki Almond said she was disappointed that the county was on the losing end of potentially expensive litigation, and that council members were not kept in the loop.

She pointed to other court cases the county has lost. Earlier this year, the county paid the police union about $228,000 in interest accrued while the county fought court rulings in a separate court case involving retiree health insurance.

"It concerns me that we continue to take these cases to court," said Almond, a Democrat from Reisterstown. "We keep losing, but we keep taking them on and we're wasting taxpayer money and we end up having to pay anyway,"

State gives final OK to Detroit 'grand bargain' payment

Detroit's two pension funds are expected to receive the state's "grand bargain" bankruptcy contribution of $194.8 million on Feb. 9 after a state panel gave final approval to the payments on Monday.

The three-member Michigan Settlement Administration Authority approved the payments after board members were advised all legal claims against the state related to the largest municipal bankruptcy in the nation's history had been dismissed.

The authority — made up of Treasurer Kevin Clinton, Budget Director John Roberts, and Huntington Woods attorney William Cohen — is not expected to meet again. Its sole function was to oversee payment of the state's contribution to a grand bargain that helped settle the bankruptcy. The Legislature approved the payments last May.

The state's contribution is part of more than $800 million raised from foundations, private donors and the Detroit Institute of Arts to shore up city pension funds and protect a sell-off of the DIA's collection of artwork during Detroit's Chapter 9 proceedings, which ended this month.

Steven Howell of the Dickinson Wright law firm, a special assistant attorney general, said the money will be paid Feb. 9, which is 60 days after the end of the bankruptcy case.

The money will go into the investment funds of the two pension funds.

The state is financing the payments from a fund established from money it received through the settlement of a multi-state lawsuit against tobacco companies.

Spiotto Offers Defense for Illinois Pension Reforms

Unsustainable and unaffordable pension obligations that crowd out funding for essential services and infrastructure necessary for the health, safety and welfare of Illinois' citizens shouldn't override constitutional mandates on a government's purpose, said municipal restructuring expert James Spiotto.

The balancing of provisions in the state's constitution that protect public pensions and underscore the responsibilities and purposes of state government is at the heart of an article arguing the legal favor of the state's 2013 pension reform package now before the Illinois Supreme Court.

"The Illinois Pension Clause does not specifically state that pension obligations shall be paid under all circumstances even to the exclusion of the full funding of necessary services for the health, safety and welfare of the people," said municipal restructuring expert James Spiotto.

"Reasonable adjustments to make pension benefits sustainable and affordable are not a diminishment or impairment, but rather are the recognition of reality of the limited revenues," continued Spiotto, a managing director at Chapman Strategic Advisors LLC, a consulting firm Spiotto helped establish after retiring from Chapman and Cutler LLP.

State employees, retirees, and their unions successfully argued at the lower court level that the reform package approved by lawmakers in December 2013 that cut cost-of-living increases, raised the retirement age for some, and capped pensionable salaries violated the state constitution.

Sangamon County Circuit Court Judge John Belz last month voided the pension legislation, finding the cuts violated the state constitution's clause that protects pension benefits from impairment or diminishment under an enforceable contract. The opinion cited a recent state Supreme Court ruling applying those protections to state retiree health benefits.

The appeal went directly to the high court and it has agreed to expedite its review. The state's initial brief is due Jan. 12 with the unions' brief due Feb. 16. In turn, the state's reply is then due Feb. 27 and oral arguments will be scheduled for the March 2015 term of the court.

In his ruling, Belz rejected the state's defense that it acted within its police and sovereign powers to alter its contract with retirees due to the state's fiscal emergency. Belz said the state did not make the case that such powers were sufficient - or that they even existed - to ignore the "plain language" of the pension clause protecting annuities. Belz made permanent a temporary injunction banning the state from implementing the changes aimed at trimming $145 billion off state payments over next three decades.

Belz cited language in state supreme court rulings that assert the plain language of the constitution cannot be rewritten. In making his case for balancing provisions of the state constitution, Spiotto noted the state constitution's preamble that states: "The purpose of the constitution, for which the other clauses are established, is to provide for the health, safety and welfare of the people."

Article VIII provides that the state budget shall be balanced and appropriations for any fiscal year shall be no greater than the estimate of funds available and that the appropriations for a fiscal year shall not exceed the funds estimated by the General Assembly to be available for that year.

"These provisions of the constitution cannot be ignored in favor of the Pension Clause. The terms of the constitution must be interpreted to give meaning to each provision," Spiotto argued. "Accordingly, unsustainable and unaffordable pension obligations, which crowd out the funding of essential governmental services and infrastructure necessary for the health, safety and welfare of the state's citizens, cannot alter or override the mandate for the existence of the government."

Employees, retirees, and their unions argue the state has shorted the pension system while employees paid their mandated share and so the state must shoulder the burden for making good on a constitutionally protected commitment.

A spokesman for the union coalition, We Are One, said in a recent statement: "We will make our case that the constitutional pension clause is absolute and that the circuit court's ruling should be upheld," said Anders Lindall.

Spiotto raised concerns over the negative impact raising taxes and cutting services could have on the populace that, in turn, would make it all the harder to stabilize the state's pension system through higher payments alone.

"To raise taxes and reduce services to fund that which is unaffordable only causes corporate and individual taxpayers to leave the state with resulting reduction of tax revenues and the ultimate death spiral of the government," he warns in the piece recently published on MuniNetGuide.com, an online resource specializing in municipal-related research that he co-owns.

Spiotto also argued that it's not an unwillingness on the state's part to fund but an inability to fund without a devastating impact on state services.

"The failure to address this underfunding issue now will have dire consequences the longer dealing with the problem is delayed," he argued.

Unions have countered similar assertions made by lawmakers in the preamble to the pension reform legislation that the pension system's woes were long in the making and the state cannot now argue that it lacks the funding to meet a commitment.

Spiotto tackled the "contract" argument in citing U.S. Supreme Court rulings "permitting reasonable adjustment of a contract in order to balance the overriding mandate of a higher public interest against a claim of impairment of contract."

Lawmakers trimmed employee contributions hoping the courts might find that reasonable "consideration" for altering its pension contract with employees and retirees.

"The wisdom of the U.S. Supreme Court cases should reinforce the appropriate interpretation of the Illinois Pension Clause that unaffordable pension benefits whose funding would interfere with the appropriate funding of governmental services and infrastructure must be reasonably adjusted for the sake of all concerned," Spiotto said.

Spiotto highlighted widespread action across the country on pension reform. More than 40 states between 2010 and 2012 undertook pension reform. Elements of the Illinois package have been upheld elsewhere although most of those states lack the same firm language as the Illinois constitution.

If the lower court ruling holds, it will fall on Gov.-elect Bruce Rauner, a Republican, and a Democratic led General Assembly to find a new fix for a pension system that's just 39.3% funded and saddled with $111 billion of unfunded obligations.

The state, knowing a legal challenge loomed, didn't build any savings on pension contributions from the pension into its fiscal 2015 budget that runs through June 30, so there's no immediate fiscal impact.

Illinois' pension woes have driven deep declines to the state's bond ratings, now at the A-minus and A3 level, the lowest among states. All three rating agencies assign a negative outlook.

Rating agencies have said the state's weak credit rating could stabilize if the pension changes are upheld and the state shores up its budget. Investors have penalized the state for its credit woes by demanding steep yield penalties.

In a recent weekly outlook piece, Municipal Market Advisor offered a bleak assessment if the state's high court agrees with the lower court, warning it "would have widespread financial and societal consequences including lower government employment, higher taxes, reduced social services, lower education spending, constrained investment in infrastructure, etc."

Bondholders would pay a price. "Negative rating and price implications would likely follow for bondholders of the state and perhaps other Illinois municipal issuers," the piece warned.

Governments Likely to Focus on Reducing OPEB Costs

In 2014, 61% of state and local government human resource executives responding to a national workforce survey answered that they had made changes to retiree health benefits over the past year, up from 45% in 2011, according to a report from the Center for State and Local Government Excellence.

Fourteen percent of respondents shifted health care costs from the employer to retirees, 8% set funds aside to cover future retiree health costs, and 1% eliminated retiree health care benefits altogether.

For fiscal year 2013, state other postemployment benefits (OPEB) unfunded actuarial accrued liabilities (UAAL) were nearly $498 billion. The Center notes that the size of a state's unfunded OPEB liability is a function of its funding strategy, the generosity of the benefit, and demographics.

The median average state OPEB UAAL is $2 billion, and the mean average is $10 billion. However, the aggregate state OPEB UAAL is nearly half of one-trillion dollars, and more than 75% of the total is carried by the top ten states.

The Center found disparity in the funding discipline for state OPEB benefits, as measured by the annual required contribution (ARC). The average percentage of the OPEB ARC contributed by states for the fiscal year 2013 period was 55%. However, the weighted average amount contributed was lower, at approximately 46%. The states with larger UAALs and ARC requirements were among the lowest contributors.

Prior published reviews of state OPEB finances have identified a growing number of states who have elected to set aside assets to prefund retiree health benefits, the Center noted. For fiscal years 2009 through 2011, 18 states reported holding OPEB assets; for the 2012 fiscal year, the number of states grew to 25. For 2013, 33 states held approximately $33 billion in OPEB assets.

However, the Center says that, given the size of the unfunded OPEB liability in some states, it is likely that state governments will continue to address these issues by reforming benefits or taking other actions. The Center's report notes that legal protections for OPEB benefits are lower than protections for pension benefits, although this is not the case in every state. The Center pointed out that in July, the Illinois Supreme Court ruled that the state constitution prevents the reduction of health care benefits for retired employees.

States may have other means of cutting OPEB costs outside of the legislative process, the Center suggests—public health insurance exchanges. While this practice has yet to be adopted by any state governments, some local governments, including Detroit, as of March 1, 2014, and Chicago, as part of a phased approach which will conclude by

2016, are taking advantage of the exchanges as an alternative means of providing health care to their pre-Medicare eligible retirees.

Hatch to push pension reform for public employees

The incoming Republican majority in the Senate plans to pass laws that allow state and local governments to turn over their pension plans to the private sector.

Sen. Orrin Hatch, who will take command of the Senate Finance Committee, intends to adopt a "free market" approach to public employee pensions when Congress returns next year.

The basic plan would be for pension trustees to purchase a deferred fixed-income life annuity contract each year for each employee rather than the current practice of putting the funds into a public pension plan. That would ensure a guaranteed contribution rate, Hatch argues, rather than the variable payments made by trustees. State and local governments have sometimes opted to cut back or even stop paying into funds when they are financially squeezed — a situation that has contributed to shortfalls.

"Why life insurance annuity contracts? Well, lifetime income is a form of life insurance," the Utah Republican said in a speech to the Financial Services Roundtable, a trade association that represents banks, insurance companies and others in the financial sector. "It only makes sense to encourage the use of annuities to provide retirement security."

Hatch has been pushing the idea for years. But now, as Finance Committee chairman, he will have the platform to build momentum for it, his office says. He has dubbed it the Secure Annuities for Employee (SAFE) Retirement Act.

"It is important to note that the SAFE Act would not take over state and local plans. The SAFE Act is a new plan that covers future service only. No plan will be taken over and no assets in an existing pension plan will be transferred to an insurance company," said Aaron Fobes, a spokesman for Hatch.

A June study by the Pew Center on the States estimated that state and local public employees had earned $4 trillion in owed payments but the funds had only $3 trillion in assets to meet those obligations.

Diana Furchtgott-Roth, a senior fellow at the free-market think tank Manhattan Institute, said the changes would mean pension recipients would receive less than they are currently owed but more than they would get in reality than if they stuck with their existing plans.

"A lot of people have realized they won't get what they have been promised, so they're trying to ensure that they can get the most that they can," she said.

Richard Johnson, a senior fellow with the liberal-leaning Urban Institute, says the approach would address a key problem with public-sector plans: the tendency of state and local governments to put off pension investments in lean years.

"Unlike cash balance and traditional plans, it prevents governments from underfunding their retirement benefits, because insurance companies won't accept IOUs when issuing deferred annuities," he said in releasing a study last week for the institute.

Not everyone likes the approach. The National Conference on Public Employees Retirement Systems, which disputes that the funding problem is as severe as Pew's findings indicate, called Hatch's plan "a solution in search of a problem" in a statement posted on its website.

Opposition to such approaches may be weakening in Congress, though. Furchtgott-Roth said the inclusion of reforms to multi-employer pension plan reform in the omnibus spending bill passed over the weekend suggests there is growing support for reforms, even among liberal organizations and labor unions that have traditionally opposed them.

Hatch's bill also would create a new 401(k) retirement savings plan, called a "Starter 401(k)" that would allow workers to save more than traditional Individual Retirement Accounts — up to $8,000 a year — and would not require the employer to administrate the plans.

Private Sector

2014 in Review — Defined Benefit Plan Issues

In 2014 there were several major DB policy developments, including a significant extension of MAP-21 funding relief, new mortality tables and the finalization of the hybrid plan regulations on “market rate of return.” In addition, the year-end federal spending deal included ERISA section 4062(e) legislation. In this article we review these developments, beginning with the legislation Congress just passed.

Year-end federal spending legislation — 4062(e) reform

The year-end federal spending bill included detailed provisions intended to address the multiemployer plan funding crisis, reform the rules under ERISA section 4062(e) and clarify the definition of normal retirement age.

The language on ERISA section 4062(e) is identical to that included in S. 2511, introduced earlier this year by Senators Harkin (D-IA) and Alexander (R-TN). We discussed the ERISA section 4062(e) issue and the provisions of S. 2511 in detail in our earlier article Fixing ERISA section 4062(e). Very briefly, the new legislation:

Clarifies the 4062(e) triggering event and exempts many transactions where there is no true or permanent cessation of operations.

Exempts “well-funded” plans, defined as plans that are at least 90% funded (based on the fair market value of plan assets and liabilities as determined under the variable-rate premium rules).

Provides an alternative method of satisfying “4062(e) obligations,” by making additional contributions that (oversimplifying a lot) fund the plan’s shortfall attributable to the affected participants over 7 years.

The normal retirement age provision generally “clarifies” that a plan that, as of December 8, 2014, defined normal retirement age as the earlier of (1) an (ERISA-permitted) age (e.g., 65) or (2) a number of years of service (not less than 30) did not violate ERISA.

We do not generally cover multiemployer plan issues and will not review that part of the year-end budget deal here.

This legislation (as part of year-end spending legislation) was approved by the House and Senate; the President is expected to sign it.

In the rest of this article we provide a general review of the 2014 retirement policy developments that affected defined benefit plans. For defined contribution retirement policy developments see our article 2014 in review — defined contribution plan issues.

Increased PBGC premiums

We begin our review with legislation enacted at the very end of 2013, the Bipartisan Budget Act of 2013 (signed into law by President Obama on December 26, 2013). BBA 2013 significantly increased Pension Benefit Guaranty Corporation premiums. Dramatically higher premiums challenged many sponsors in 2014 to re-think funding and de-risking policies.

The following table shows new single employer plan premium rates through 2016:

Year	Flat-rate premium	Variable-rate premium (per $1,000 of UVB)	Per-participant cap on variable rate premium
2014	$49	$14	$412
2015	$57	$24	$418
2016	$64	$29	$500

(These numbers are from PBGC and updated through October 2014; the $29 number for the 2016 variable-rate premium is an estimate based on the expected inflation adjustment.)

For some sponsors, the increased premiums will make borrow-and-fund and/or de-risking strategies more attractive, in effect as an alternative to paying the higher PBGC premiums.

In this regard we note the (somewhat counterintuitive) effect on variable-rate premiums of paying out terminated vested participants. Paying out terminated vesteds obviously reduces the PBGC flat-rate premium — fewer participants equals fewer “heads to count.” But the gains are relatively modest — $64 per year per participant in 2016. While less obvious, the gains in reduced variable-rate premiums can be much more significant. Those gains come from the headcount-based cap. The two key variables are (1) how well funded the plan is and (2) the ratio of unfunded vested benefits to the number of participants. We provided an article that went into this calculation in detail.

Ironically — given that PBGC’s 2013 deficit was the pretext for BBA 2013 premium increases — in November 2014 PBGC released its FY 2014 Annual Report, showing a dramatic decrease in its single employer program deficit, from $27.4 billion to $19.3 billion, an $8 billion/ 30% drop. Notwithstanding that those numbers did not reflect the BBA 2013 premium increase, PBGC experienced a $4 billion underwriting gain. At the same time, in 2014 the multiemployer program deficit increased by $34 billion (410%!), to $42.4 billion.

MAP-21 extended

While increased PBGC variable-rate premiums provided an incentive for more funding, in August 2014 Congress provided relief from minimum funding requirements. The Highway and Transportation Funding Act (HATFA) extended “interest rate stabilization” under 2012′s Moving Ahead for Progress in the 21st Century Act (MAP-21) through 2020.

MAP-21 put a “floor” under valuation interest rates. The floor is equal to (1) the average of rates for a 25-year period, (2) reduced by multiplying it by a percentage beginning at 90% in 2012 and “phasing down” to 70% thereafter (we will call this the “phase-down percentage”). HATFA extends this relief by applying the 90% phase-down percentage through 2017.

The following chart compares the old MAP-21 and the new HATFA phase-down percentage rules.

Phase-down %	Applicable year -- current rules	Applicable year -- HTF 2014
90%	2012	2012-2017
85%	2013	2018
80%	2014	2019
75%	2015	2020
70%	After 2015	After 2020

	Age	
Males	25	9.8%
	35	7.9%
	45	5.4%
	55	3.6%
	65	4.5%
	75	9.8%
	85	16.9%
Females	25	11.8%
	35	10.3%
	45	8.3%
	55	6.6%
	65	5.8%
	75	8.0%
	85	10.7%

New mortality tables

In October 2014, the Society of Actuaries published its (new) RP-2014 Mortality Tables and Mortality Improvement Scale MP-2014, related reports and two documents responding to comments on its exposure draft. The RP-2014 tables/improvement scale reflect significant increases in mortality improvement relative to the current regulatory regime (RP-2000 plus mortality improvement Scale AA projection).

Defined benefit plan sponsors will want to consult their actuary as to the application of the new tables to their plan. Generalizing: if (as most believe) IRS adopts the SOA 2014 tables/improvement scale, then the cost of funding and lump sums will go up. The following table projects (based on estimates) the increase in annuity values for minimum funding purposes that would result from the adoption of the RP-2014 mortality tables/improvement scale by IRS for 2016.

Hybrid plan rules finalized

On September 19, 2014, IRS published long-awaited final regulations on a number of issues affecting hybrid plans (generally, cash balance and pension equity plans). The most significant piece of the final regulations was final rules with respect to interest crediting rates permitted under the "market rate of return" standard. Those rules are generally effective in 2016. The final regulations adopt an exclusive list of permitted cash balance plan interest crediting rates. The following chart summarizes the rates permitted:

	Rate	Permitted floor
Maximum fixed rate	6%	NA
Government bond rates + permitted margin	3-month + 175 bps 12-month + 150 bps. 1-year + 100 bps 3-year + 50 bps 7-year + 25 bps. 30-year + 0 bps.	5% annual
Long-term investment grade corporate bond rate	Third segment rate under the minimum funding rules, with or without adjustment for MAP-21 and HATFA	4% annual
Short and mid-term investment grade corporate bonds	First or second segment rate under the minimum funding rules, with or without adjustment for MAP-21 and HATFA	4% annual
Investment-based rates	Actual rate of return on the aggregate or a subset of plan assets; rate of return on a regulated investment company	3% cumulative

Cash balance plans that use investment-based interest crediting rates function very much like defined contribution plans — investment risk (both positive and negative) generally falls on the participant, not the plan sponsor. These plans are, however, subject to a special "capital preservation rule" requiring that the participant's benefit at least equal the sum of her principal credits (pay credits). We provided articles analyzing, generally, the issues the capital preservation rule presents and, specifically, the risk to sponsors under the rule.

De-risking

In addition to the incentive to de-risk that the PBGC premium increases provided, increases in 2013 year end interest rates made 2014 a "less expensive" year (than 2013) to pay out lump sums. In the first part of the year, IRS released four Private Letter Rulings holding that in certain circumstances the payment of lump sums to retirees currently receiving annuities did not violate Tax Code minimum distribution rules.

Those rulings dealt with an important issue in de-risking transactions involving retirees. Subsequently, however, IRS indicated that it would not issue more of these rulings. The suspension of rulings on this issue reflects the considerable push back on this trend. In this regard there were also attempts at the state level to limit de-risking transactions.

The "frozen plan issue"

There appears to be bipartisan support for relief for the DB "frozen plan issue." That issue is (briefly): when a defined benefit plan is frozen to new entrants (a "soft freeze"), the group covered under the plan may become discriminatory over time because of, for instance, higher non-highly compensated employee turnover rates and pay increases that, in effect, turn non-highly compensated employees into highly compensated employees. Absent relief many sponsors are likely to terminate benefits for the frozen plan group rather than risk disqualification. In December 2013 IRS released Notice 2014-5, providing temporary relief on this issue for 2014 and 2015 for plans that meet certain conditions.

It looked like, at one point, 2014 year-end "tax-extenders" legislation might include a proposal on this issue. After the President threatened to veto (on unrelated issues) that legislation, however, it was dropped, and there will be no fix before year-end.

We will continue to follow these issues in 2015.

Treasury Finalizes Rules For New Retirement Savings Account: The myRA

A new retirement savings vehicle, the myRA (my retirement account), is now one step closer to being available after the Department of the Treasury's final regulations became effective December 15, 2014. The myRA was first announced earlier in 2014 by President Obama in his State of the Union Address. The myRA is touted as a no-cost to employer and no fee investment option for employees who lack an employer sponsored retirement savings plan. However, the exact details of the savings program remained unclear until the Treasury Department's newly adopted regulations. As such, a quick overview of the new regulations is warranted in order to better understand this new option for Americans looking to save for retirement.

The Treasury Department authorized a new "nonmarketable, electronic retirement savings bond" that will only be available to participants in the myRA. The bond will provide a principal protected investment while earning interest at the same rate available in the Government Investment Fund (G-Fund) of the Federal Thrift Savings Plan. The G-Fund type of government bond was previously unavailable to anyone outside of the Thrift Savings Plan. While this is a very secure investment, offering very little risk to the participant, the returns are also very low compared to the historical returns from equity investments. This could be a concern for younger participants, as they should be taking on more risk within their retirement investments.

Additionally, the new regulations state that the myRA is going to be treated as a Roth IRA. This means all of the interest growth inside the myRA on the new electronic savings bond will come out tax free if certain holding period and trigger events are satisfied. By treating the myRA as a Roth IRA, the Treasury Department also helped exclude myRA account balances from required minimum distribution requirements after age 70 ½. This could be a big benefit for some individuals looking for tax and investment class diversification.

The myRA is going to have a maximum balance limitation of $15,000 or 30 years of participation, whichever occurs first. It is also interesting to note that the entire account balance cannot exceed $15,000, interest and contributions included. This means that participants need to spread out their contributions and not contribute too much up-front. For instance, if you contribute $14,000 over the next three years, you could only enjoy $1,000 of growth in the account before being forced to transfer the entire account balance to a new investment. This highlights the idea that the myRA is designed to be a starter savings vehicle and not designed to replace traditional retirement plans. Once a participant reaches the maximum threshold, the account balance will need to be transferred out of the myRA and into another account. Because the myRA is going to be treated as a Roth IRA, the entire account will be transferable directly to a Roth IRA with a financial services provider that can offer a much wider array of investment products, including higher rates of return.

According to the new rules, the same limits for contributions that apply to all other Roth IRA contributions will also apply to contributions for the myRA. This means that in 2015 an individual will only be able to contribute a maximum of $5,500 in aggregate to all of his or her IRA accounts, including the myRA. Additionally, an individual's adjusted gross income phase-out range for a single taxpayer making contributions to a Roth IRA will be $116,000 to $131,000 and $183,000 to $193,000 for a married individual filing jointly for 2015. This means if someone makes more than the upper end of the phase-out limit they will be unable to contribute to a myRA.

While the new Treasury Department regulations push the myRA ahead, there are still questions remaining. For example, will there be widespread adoption and use of the myRA? Will individuals be able to make contributions without the involvement of their employer? Additionally, the maximum account balance rules and limited low return investment options place significant limitations on the myRA, potentially limiting its overall impact. However, in some ways, the most significant benefit of the myRA might be the behavioral impact of introducing employees to a low cost way to start saving for retirement at an early age. While the myRA will not solve all of the retirement planning issues in the United States by itself, its creation is still a step in the right direction by creating a vehicle for more access to low cost retirement savings options for employees.

IRS Issues 2014 Cumulative List, Extends DB Plan Approval Period

In Notice 2014-77, the Internal Revenue Service (IRS) has provided the 2014 Cumulative List of Changes in Plan Qualification Requirements to be used by plan sponsors and practitioners submitting determination letter applications for plans during the period beginning February 1, 2015, and ending January 31, 2016.

Plans using this Cumulative List will primarily be single employer individually designed defined contribution plans and single employer individually designed defined benefit plans that are in Cycle E. Generally, an individually designed plan is in Cycle E if the last digit of the employer identification number of the plan sponsor is 5 or 0, or if the plan is a § 414(d) governmental plan (including governmental multiemployer or governmental multiple employer plans) for which an election has been made by the plan sponsor to treat Cycle E as the second remedial amendment cycle for the plan.

In addition, in Announcement 2014-41, the IRS has extended to June 30, 2015, the deadline for submitting on-cycle applications for opinion and advisory letters for pre-approved defined benefit plans for the plans' second six-year remedial amendment cycle. This announcement also provides a two-day extension (from Saturday, January 31, 2015, to Monday, February 2, 2015) for Cycle D on-cycle submissions (primarily individually designed plans including multiemployer plans).

The extension to June 30, 2015, applies to pre-approved defined benefit mass submitter lead and specimen plans, word-for-word identical plans, master and prototype minor modifier placeholder applications, and defined benefit non-mass submitter lead and specimen plans. The submission period for these applications is scheduled to expire on February 2, 2015.

This extension applies to all on-cycle pre-approved defined benefit plan submissions. In general, plans submitted in accordance with this extension will continue to be reviewed for qualification items based on the 2012 Cumulative List.

The IRS also said it expects to modify Revenue Procedure 2011-49 to expand the preapproved program to include defined benefit plans containing cash balance features and defined contribution plans containing employee stock ownership plan (ESOP) features. In addition, the IRS is developing tools, which will be available before June 30, 2015, to assist plan sponsors in drafting these plans.

"Cromnibus Act" Changes for Multiemployer and Single-Employer Defined Benefit Pension Plans

The Consolidated and Further Continuing Appropriations Act, 2015 (the so-called "Cromnibus Act"), enacted into law last week, is not just a $1.1 trillion spending bill that keeps most of the federal government open through September 2015. The Cromnibus Act also addresses several critical issues impacting multiemployer and single-employer pension plans and the Pension Benefit Guaranty Corporation (PBGC) and makes other changes affecting defined benefit plans.

Changes for multiemployer pension plans are most sweeping, including:

- Authorization to suspend benefits for active and retired participants where multiemployer plans in "critical and declining status" meet detailed requirements.
- Doubling of PBGC premiums for multiemployer plans.
- Repeal of the "sunset" provisions of the Pension Protection Act (PPA) multiemployer funding rules.
- Disregard of PPA surcharges and certain other contributions when calculating withdrawal liability.
- Expansion of PBGC authority to approve plan partitions and facilitate plan mergers.
- Clarification of PPA and Internal Revenue Code (Code) rules impacting multiemployer plans.

Additionally, the Cromnibus Act:

- Amends ERISA Sec. 4062(e) to limit the circumstances in which the PBGC can seek "downsizing liability" from single-employer pension plan sponsors.
- Permits a new definition of "normal retirement age" for pension plans.
- Details of these amendments are discussed below.

Suspension of Benefits in Multiemployer Plans in Critical and Declining Status

The Cromnibus Act seeks to ameliorate the funding issues faced by many multiemployer pension plans as well as the looming insolvency of the PBGC multiemployer program.

The PPA required greater contributions to underfunded multiemployer plans, with surcharges on contributing employers and reductions of benefits. Despite these reforms, one out of 10 multiemployer plans faces insolvency. Moreover, as indicated in our earlier WorkCite article, the PBGC's 2014 Annual Report revealed a fivefold increase in its multiemployer program deficit.

The Cromnibus Act permits multiemployer plan trustees to suspend pension benefits if the plan is in "critical and declining status" under specific criteria and procedures, notwithstanding ERISA Sec. 204(g) and Code Sec. 411(d)(6), which generally prohibit plan amendments that cut back accrued benefits.

A plan is in "critical and declining status" if:

- It meets the PPA criteria for "critical status" (which includes having a funded percentage less than 65 percent); and
- It is projected to become insolvent within 15 plan years (20 plan years if the plan's ratio of inactive to active participants exceeds two to one or if the funded percentage of the plan is less than 80 percent).

To suspend benefits, a multiemployer plan in critical and declining status must comply with the following:

- Retiree Representative : Plans with 10,000 or more participants must select a participant in pay status as a "retiree representative" to advocate for retired and deferred vested participants, with reasonable expenses paid by the plan.
- Actuarial Certification: The plan actuary must certify that the plan is projected to avoid insolvency until the suspension of benefits expires.
- Insolvency Determination: The plan trustees must determine that the plan is projected to become insolvent unless benefits are suspended.
- Limits on Suspension :
    - The monthly benefit of any participant cannot be reduced below 110 percent of the monthly benefit guaranteed by the PBGC on the date of suspension.
    - Suspensions are limited for participants who have attained age 75 or older but not age 80 on the effective date of the suspension and are prohibited for participants age 80 and older on that date.
    - No suspensions of disability benefits are permitted.

  - Suspensions must be equitably distributed based on: (i) life expectancy; (ii) time in pay status; (iii) amount and type of benefit; (iv) extent of subsidized benefit; (v) extent of post-retirement benefit increase; (vi) history of benefit increases; (vii) years to retirement for active employees; (viii) whether active participants will withdraw support for the plan, accelerating employer withdrawals; and (ix) the extent to which benefits are attributed to service with an employer that failed to pay withdrawal liability.
- Notice Requirements : Trustees must give detailed notice of a proposed suspension to the Treasury Department, participants, employers and unions.
- Approval by Treasury : The Secretary of the Treasury (Secretary) must find that the suspension satisfies all requirements.
- Ratification by Participants : The proposed suspension must be submitted to a vote of participants. Except for "systemically-important plans" (those for which the PBGC financial assistance would exceed $1 billion), the suspension would go into effect unless a majority of all participants voted to reject it. However, for systemically-important plans, not later than the end of the 90-day period beginning on the date the results of an adverse vote were certified, the Secretary would either have to permit the implementation of the suspension as proposed by the plan sponsor or permit the implementation of a modification by the Secretary of such suspension (so long as the plan is projected to avoid insolvency under that modification).
- Judicial Review: Available for denial or approval of benefit suspensions.

Other Changes to ERISA and the Code Impacting Multiemployer Plans

The Cromnibus Act makes the following technical changes to ERISA and the Code:

- Repeal of Sunset of PPA Funding Rules: These funding rules, including requiring rehabilitation plans for plans in critical status and funding improvement plans for plans in endangered status, had been scheduled to expire for plan years beginning on or after Jan. 1, 2015.
- Election to Be in Critical Status : A multiemployer plan may elect to be in critical status effective for the current plan year if the plan was projected to be in critical status in any of the succeeding five plan years. If elected, the election year would be treated as the plan's first year of being in critical status, regardless of the date the plan first satisfied the critical-status requirements of ERISA and the Code.
- Clarification of Rule for Emergence From Critical Status : A plan will emerge from critical status when the plan actuary certifies that (i) the plan did not qualify as a plan in critical status as of the beginning of the plan year; (ii) the plan is not projected to have an accumulated funding deficiency for the plan year or any of the nine succeeding plan years, without regard to the use of the shortfall method

but taking into account any extension of certain amortization periods; and (iii) the plan is not projected to become insolvent within any of the next 30 plan years.

- Endangered Status Not Applicable if No Additional Action Were Required : A plan will not be in endangered status if its funded status is projected to improve on its own. If a plan would be in endangered status but for this provision, the PBGC notification requirements would apply.
- Endangered Status Funding Improvement Plan Target Funded Percentage : The Cromnibus Act clarifies that (i) a plan's funded percentage as of the close of the funding improvement period should equal or exceed the percentage of the plan's funded percentage as of the first plan year for which the plan is certified as being in endangered status (instead of "the beginning of such period"); and (ii) no accumulated funding deficiency will occur during the last year of the funding improvement period (instead of "any plan year" during the funding improvement period).
- Corrective Plan Schedules When Parties Fail to Adopt Contribution Schedule : Where parties fail to adopt, through bargaining, a contribution schedule consistent with a multiemployer plan's funding improvement plan (for a plan in endangered status) or a plan's rehabilitation plan (for a plan in critical status), upon the expiration of a collective bargaining agreement (CBA): ◦If a CBA in effect when the plan entered endangered (or critical) status expired, and the bargaining parties failed to adopt a contribution schedule consistent with the funding improvement plan or rehabilitation plan, then the plan sponsor would have to implement a schedule under ERISA Sec. 305(c)(1)(B)(i)(I) or 305(e)(3)(1)(B)(i).
    - If a CBA in accordance with a funding improvement plan (or rehabilitation plan) expired while the plan was still in endangered (or in critical) status, and the bargaining parties failed to adopt a contribution schedule consistent with the updated funding improvement plan (or rehabilitation plan), then the contribution schedule applicable under the expired CBA would have to be implemented by the plan sponsor on the date that is 180 days after the date on which the CBA expired.
- Withdrawal Liability: PPA surcharges and contribution increases (except for increases due to increased work levels, employment or periods for which compensation is provided) pursuant to funding improvement plans or rehabilitation plans are generally disregarded when calculating withdrawal liability.
- Guarantee of Pre-retirement Survivor Annuities Under Multiemployer Pension Plans : PBGC will guarantee preretirement survivor annuities retroactively as to benefits payable on or after Jan. 1, 1985 (except where the surviving spouse died before Cromnibus Act's enactment).
- Required Disclosure of Multiemployer Plan Information : The ERISA provision requiring the disclosure of information to participants, employee representatives

and contributing employers has been expanded to require the disclosure of the following additional information: ◦The plan document.

- The latest summary plan description.
- The trust agreement.
- If requested by a contributing employer, any employer participation agreement relating to the employer's participation during the current or any of the five immediately preceding plan years.
- The plan's annual report (Form 5500).
- The plan's annual funding notice.
- Audited financial statements.
- For a plan in critical or endangered status, the rehabilitation plan or latest funding improvement plan, as applicable, and the related contribution schedules.

- PBGC Merger Facilitation : PBGC gains authority to facilitate plan mergers, including training, technical assistance, mediation, communication with stakeholders, support with related requests to other governmental agencies, and financial assistance.
- Partitions of Eligible Multiemployer Plans : ERISA and the Code provisions are amended to facilitate partitions of eligible multiemployer plans.
- PBGC Insurance Premium Increases for Multiemployer Plans : The PBGC insurance premium for multiemployer plans is doubled, from $13 to $26 per participant, beginning in 2015, with increases in later years based on the changes in the Social Security national average wage index.
- Additional Changes
- The Cromnibus Act also makes the following changes affecting defined benefit plans:
- Revision of ERISA Sec. 4062(e)
- ERISA Sec. 4062(e) applies where an employer ceases operations at a facility and more than 20 percent of active plan participants are separated from employment. Under PBGC's former interpretation of Section 4062(e), employers could face substantial "downsizing liability" requiring significant additional funding to the pension plan, even where the plan was otherwise properly funded under ERISA and IRS rules.
- Aggressive PBGC enforcement of Sec. 4062(e) has given rise to significant compliance challenges and large unexpected liabilities for many companies that engage in normal business transactions. In July of this year, the PBGC announced a moratorium, until the end of 2014, on the enforcement of Sec. 4062(e) cases.
- Under amendments to Sec. 4062(e) made by the Cromnibus Act:

  - There is no Sec. 4062(e) event unless there is a substantial shutdown of operations at a facility relative to the size of the entire employer.
  - Subject to certain exceptions, there is no Sec. 4062(e) event unless employees actually lose their jobs, as opposed to going to work for another employer.
  - The employer's liability, if a Sec. 4062(e) event occurs, is substantially reduced.
- Revision of Definition of "Normal Retirement Age"

ERISA and the Code had defined "normal retirement age" (NRA) as the earlier of (i) the time a plan participant attains normal retirement age under the plan; or (ii) the later of (a) the time a plan participant attains age 65, or (b) the fifth anniversary of the time a plan participant commenced participation in the plan.

The Cromnibus Act amends ERISA and the Code to permit a definition of NRA in a defined benefit plan on Dec. 8, 2014, as the earlier of (i) an age otherwise permitted under the current definition of NRA in ERISA and the Code or (ii) the age at which a participant completes the number of years (not less than 30 years) of benefit accrual service specified by the plan. A plan that did not have such a definition of NRA on that date can be amended to add such a definition, but only as to persons who (i) were participants in the plan on or before Jan. 1, 2017; or (ii) were employed by a sponsor of the plan on or before Jan. 1, 2017 and who became participants thereafter.

Year-End Update From The DOL

The Department of Labor (DOL) keeps a full plate on their retirement regulatory agenda and research projects each year. Now that the end of 2014 is closing, the DOL recently provided some insight of where they stand on some of these items. In early November, the ERISA Advisory Council presented their final recommendations of this year's research projects. The DOL also provided a bit of an update, too, in regards to their retirement regulatory agenda at this meeting.

ERISA Advisory Council

The ERISA Advisory Council consists of 15 members appointed by the Secretary of Labor. Three members represent employee organizations, three represent employers and three others represent the general public. The remaining six members each come from a different field of expertise. One member each comes from insurance, corporate trust, actuarial counseling, investment counseling, investment management and accounting.

Every year the Council decides on three or four issues to research that focus on topics important to ERISA administration. This past year the Council focused on two topics relevant to the retirement world and one non-retirement related topic. The retirement topics, discussed here, concern facilitating lifetime plan participation and outsourcing of employee benefit plan services.

Facilitating Lifetime Plan Participation — Trends show there has been a recent movement of participant assets out of retirement plans, and into retirement accounts not covered by ERISA, such as IRAs or other savings accounts, or as plan distributions. The Council examined some of the factors leading participants to leave their assets in or move them out of the plan.

Although more recent trends are beginning to show a desire among plan sponsors' to prevent leakage in their plans, the Council found a reluctance by some employers to provide guidance to terminating employees due to confusion or fear about incurring fiduciary liability. The Council recommended that the DOL "provide education and outreach to participants and plan sponsors on the considerations and benefits to participants of retaining assets within the employer-sponsored system."

Among "education and outreach" suggestions were for the DOL to develop model communication materials for employers to give to employees. The Council also suggested the DOL provide plan sponsors with guidance regarding certain plan design features which might encourage balances to stay in the plan. One example cited was to allow the continuation of loan repayments after separation from employment. The DOL requested the Council to consider developing such model communications in its next year of activity.

Outsourcing of Employee Benefit Plan Services — Management and administration of employee benefit plans is increasingly complex. Through outsourcing, plan sponsors can gain access to expertise and technology, achieve economies of scale and reduce costs. In addition, there appears to be an emerging trend toward outsourcing functions that have traditionally been exercised by plan sponsors. There also have been trends towards using multiple employer plan (MEP) structures as a mechanism to "outsource" the provision of retirement plan benefits.

For both plan sponsors and outsourcing service providers, a key question is the allocation of legal responsibilities and risk for activities of the service provider on behalf of the plan. As of today, there is no uniform analytical framework for understanding outsourcing, particularly in the context of fiduciary services.

In regards to the outsourcing project, the Council recommended the following:
Educate plan sponsors on current industry practices, including the kinds of services and providers available and common practices for contracting for those services;
Clarify the legal framework under ERISA for delegating responsibility to service providers to lessen confusion about fiduciary liability;

Update existing guidance on insurance coverage and ERISA fidelity bonding; and
Facilitate the use of MEPs as a way of encouraging the formation of benefit plans.

DOL Regulatory Update
At the November meeting, the DOL reported that the request for information on brokerage windows will close on November 19. This project grew out of Q&A guidance issued by the DOL in 2012. The project stems from the interplay of the participant fee disclosure regulations and brokerage windows in the Q&A, which the DOL eventually withdrew. The DOL indicated that there are no particular next steps in mind other than to review the comments and proceed from there.

They also stated that the comment period on a proposed regulation to require electronic submission of notices and statements for top hat plans and apprenticeship and training plans is still open and will close December 29. Generally, top hat plans are pension plans for select groups of management or highly compensated employees. Under the current law, these plans, as well as apprenticeship and training plans, file paper statements and notices with the DOL.

Lastly, the DOL said they are continuing to work on their proposal to redefine the “fiduciary” definition with an expected completion in January 2015. That is consistent with their prior reports. This long-delayed proposal would amend the DOL’s rules to expand the scope of advisory activities deemed to be “investment advice” subject to fiduciary rules.

Most Retirees Need to Take Required Retirement Plan Distributions by Dec. 31

The Internal Revenue Service today reminded taxpayers born before July 1, 1944, that they generally must receive payments from their individual retirement arrangements (IRAs) and workplace retirement plans by Dec. 31.

Known as required minimum distributions (RMDs), these payments normally must be made by the end of 2014. But a special rule allows first-year recipients of these payments, those who reached age 70½ during 2014, to wait until as late as April 1, 2015 to receive their first RMDs. This means that those born after June 30, 1943 and before July 1, 1944 are eligible for this special rule. Though payments made to these taxpayers in early 2015 can be counted toward their 2014 RMD, they are still taxable in 2015.

The required distribution rules apply to owners of traditional IRAs but not Roth IRAs while the original owner is alive. They also apply to participants in various workplace retirement plans, including 401(k), 403(b) and 457(b) plans.

An IRA trustee must either report the amount of the RMD to the IRA owner or offer to calculate it for the owner. Often, the trustee shows the RMD amount on Form 5498 in Box 12b. For a 2014 RMD, this amount was on the 2013 Form 5498 normally issued to the owner during January 2014.

The special April 1 deadline only applies to the RMD for the first year. For all subsequent years, the RMD must be made by Dec. 31. So, for example, a taxpayer who turned 70½ in 2013 (born after June 30, 1942 and before July 1, 1943) and received the first required payment on April 1, 2014 must still receive the second RMD by Dec. 31, 2014.

The RMD for 2014 is based on the taxpayer's life expectancy on Dec. 31, 2014, and their account balance on Dec. 31, 2013. The trustee reports the year-end account value to the IRA owner on Form 5498 in Box 5. Use the online worksheets on IRS.gov or find worksheets and life expectancy tables to make this computation in the Appendices to Publication 590.

For most taxpayers, the RMD is based on Table III (Uniform Lifetime) in the IRS publication on IRAs. So for a taxpayer who turned 72 in 2014, the required distribution would be based on a life expectancy of 25.6 years. A separate table, Table II, applies to a taxpayer whose spouse is more than 10 years younger and is the taxpayer's only beneficiary.

Though the RMD rules are mandatory for all owners of traditional IRAs and participants in workplace retirement plans, some people in workplace plans can wait longer to receive their RMDs. Usually, employees who are still working can, if their plan allows, wait until April 1 of the year after they retire to start receiving these distributions. See Tax on Excess Accumulations in Publication 575. Employees of public schools and certain tax-exempt organizations with 403(b) plan accruals before 1987 should check with their employer, plan administrator or provider to see how to treat these accruals.