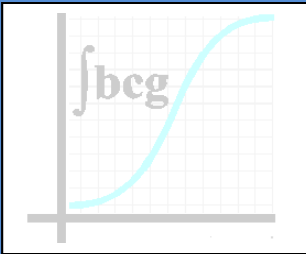

BCG Retirement News Roundup

December 2018 Volume 7, Issue 12

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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. If you would like to discuss any of these issues, please contact us.

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Public Sector/Government Plans

NJ Assembly Passes Secure Choice Bill

The Garden State is one step closer to becoming the latest to create a state-run employment plan for private-sector employees whose employers do not offer a retirement plan. The New Jersey Assembly on Dec. 17 passed a bill that would establish such a system.

In a 52-24 vote, the Assembly approved A 4134, a bill that would establish the New Jersey Secure Choice Savings Program introduced by Assembly members Roy Freiman (D-Hunterdon, Mercer, Middlesex and Somerset), Raj Mukherji (D-Hudson) and Carol Murphy (D-Burlington). The Assembly Financial Institutions and Insurance Committee reported A4134 favorably on Oct. 15, and the Assembly Appropriations Committee followed suit on Dec. 10.

The Senate version, S. 2891, was introduced on Aug. 27. The Labor Committee of the New Jersey Senate approved the bill on Dec. 3 and referred it to the Senate Budget and Appropriations Committee.

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Most Retirees Say Employers Did Nothing to Help With Retirement Transition

Both retirement plan sponsors and employees can learn lessons from the experiences recounted by retirees surveyed by the Transamerica Center for Retirement Studies.

A survey of 2,043 retirees by the Transamerica Center for Retirement Studies (TCRS) shows two-thirds (66%) say their most recent employers did "nothing" to help pre-retirees transition into retirement, and 16% are "not sure" what their employers did. Among the 18% of retirees whose employers helped pre-retirees, the most frequently cited offerings are financial counseling about retirement (6%), seminars and education about transitioning into retirement (5%), the ability to reduce work hours and shift from full- to part-time (5%), and accommodating flexible work schedules and arrangements (5%).

When looking back on their retirement preparations, almost three in four retirees (73%) agree they wish they would have saved more and on a consistent basis. About two-thirds

(67%) say they did as much as they could to prepare for retirement, but almost as many (64%) wish they had been more knowledgeable about retirement saving and investing. Three in ten used a financial adviser before retiring to help them manage their retirement savings or investments.

Many retirees also agree they waited too long to concern themselves with saving and investing for retirement (50%) and that debt interfered with their ability to save as much as they needed for a comfortable retirement (47%).

The survey found 31% of retirees started saving before the age of 40, while 39% started saving in their forties or older. The median age retirees first started saving was 40. Three in ten indicate they did not save for retirement.

For the majority of their working careers, 68% of retirees participated in some form of employer-sponsored retirement benefits, including 49% who participated in a 401(k) or similar plan and 37% who participated in a defined benefit (DB) plan. Thirty-two percent of retirees worked for employers that did not offer any retirement benefits. The majority of retirees (61%) say they saved for retirement outside of work.

Fifty-four percent of retirees had a retirement strategy before they retired; however, only 10% had a written plan, while 44% had a plan but it was not written down. Forty-six percent did not have a retirement strategy.

The retirement experience

Fewer than half of retirees (46%) surveyed by the TCRS agree that they have built a large enough retirement nest egg, of whom only 16% “strongly agree.” Yet, 67% say they are confident that they will be able to maintain a comfortable lifestyle throughout retirement, with 18% being “very confident.”

Since entering retirement, 42% of retirees indicate that their personal financial situation has “stayed the same,” while approximately one in three (36%) indicate it has “declined.” Only 20% of retirees say that their personal financial situation has “improved.”

Since entering retirement, almost six in ten retirees (59%) spend less money each year, compared with when they were working. Thirty-one percent spend the same amount of money each year, and only 6% spend more money each year in retirement.

Retirees cite diverse sources of income, but Social Security is the primary source of income for most retirees. The survey found nearly all retirees (96%) receive income from

Social Security. Sixty-six percent of retirees indicate that Social Security will be their primary source of income over the course of their retirement. Twenty-one percent cite retirement accounts and personal savings, including a 401(k) or similar accounts, IRAs (10%) and other savings and investments (11%). One in 10 retirees cite a DB plan as their primary source of income.

The survey confirms that retiring later is not the best retirement strategy, as it found more than half of retirees (56%) retired sooner than they had planned. Among those, more than half (54%) cite employment-related reasons, including job loss (24%), organizational changes at their place of employment (22%), unhappiness with their job (15%), and/or took a retirement incentive or buyout (11%). Forty-seven percent cite health and/or family-related reasons, including their own ill health (28%), family responsibilities (15%), and/or their spouse/partner retired. Only 11% of retirees retired sooner than planned because of financial ability, including they had saved enough and could afford to retire (10%) and/or they received a financial windfall (1%).

Among the small proportion (9%) of retirees who retired later than planned, 75% cite financial-related reasons, including needing the income (54%), they hadn't saved enough for retirement (27%), general anxieties about their financial situation (23%), Social Security less than expected (18%), needing health benefits (12%), and/or recovering from a major financial setback (8%). Sixty-four percent of retirees who retired later than planned cite healthy aging-related reasons, including enjoying their work (43%), staying active (42%), and keeping their brain alert (27%). Ten percent indicate that their employer requested that they stay longer, and 5% indicate their spouse/partner retired sooner than planned.

TCRS' survey report, "A Precarious Existence: How Today's Retirees Are Financially Faring in Retirement," includes many other findings about the retiree experience, as well as tips for pre-retirees and retirement policy recommendations.
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Kentucky Supreme Court strikes down pension reform law

The Kentucky Supreme Court ruled Thursday that a contentious pension reform law backed by Gov. Matt Bevin is unconstitutional since it violated a state law requiring legislation to be read three times before passage.

SB 151, which was signed into law in April by Mr. Bevin, included provisions that enrolled new teachers into a cash balance plan instead of the existing defined benefit

plan overseen by the $18.1 billion Kentucky Teachers' Retirement System, Frankfort. Language related to pension changes was included in the bill, though it was titled as a wastewater services bill, the higher court ruled.

"Upon review, we conclude that the passage of SB 151 did not comply with the three readings requirement … and that the legislation is, therefore, constitutionally invalid and declared void," the court's 44-page opinion said.

"In the House, it received two readings as a bill, in substance and title, pertaining to local wastewater services, and then it received a final 'reading' in the House, still designated by title as a bill pertaining to local wastewater service but with its textual content relating exclusively to public pension reform. Consequently, SB 151 was never 'read' in either chamber by its title as an act relating to retirement and public pensions," the ruling later said.

Shortly after the law was passed in April, Attorney General Andy Beshear's office filed a lawsuit in Franklin County Circuit Court over the matter.

Before the case was moved to Kentucky's Supreme Court, a lower circuit court struck down the law in a June ruling, prompting Mr. Bevin to quickly file an appeal.

Other changes under the law include a reset of the 30-year amortization period to pay off the unfunded liabilities of the $17.4 billion Kentucky Retirement System, Frankfort; a change to the way unfunded liabilities are paid off (using a level-dollar amortization method rather than a percentage of payroll); and a prohibition on putting unused sick days toward retirement. KRS employees also would have been able to choose between participating in their existing cash balance plan or a new 401(a) plan.

In October 2017, Mr. Bevin's office listed total unfunded liabilities for KRS, KTRS and the $327 million Kentucky Judicial Form Retirement System, Frankfort, at $64 billion.
On Thursday, Mr. Bevin in a statement called the recent ruling an "unprecedented power grab by activist judges."

"By striking down SB 151 based on process, rather than merit, the Kentucky Supreme Court has chosen to take for itself the law-making power that the constitution grants to the legislature. This is very dangerous. In the long term, this will erode the rule of law that is the foundation of our government, but more immediately, this will destroy the financial condition of Kentucky," he said.

Meanwhile, Mr. Beshear issued a statement that said the unanimous 7-0 ruling was "a

landmark win for every teacher, police officer, firefighter, social worker, EMS and all our hardworking public servants."

"It fully and finally voids the illegal cuts to their retirement, and clearly states that the governor and General Assembly violated the Constitution. The decision is also an important win for good government and transparency. It sends a message that the Constitution does not allow lawmakers to hide their actions. Because of today's ruling, an 11-page sewer bill can never again be turned into a 291-page pension bill and passed in just six hours," Mr. Beshear added.

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States Boost Access to Retirement Plans, Seeking to Close Savings Gap

California and Illinois launch government programs to shore up households financially under-prepared for retirement

Two of the nation's most populous states have introduced programs designed to bring retirement-savings plans to residents who don't have access to one at work. The move escalates government efforts to reduce the retirement-savings shortfall in the U.S.

Last month, Illinois and California began requiring employers that don't offer retirement plans to give employees access to state-sponsored savings vehicles, by automatically enrolling them in individual retirement accounts invested in mutual funds. Employees are free to opt out.

The goal of the programs is to help shore up the roughly half of American households whose standard of living is at risk of declining after retirement, up from 45% in 2004, according to Boston College's Center for Retirement Research. The shortfall is due to factors including insufficient savings rates, low interest rates, rising debt levels and the gradual increase in the age at which people can claim full Social Security benefits.

The state initiatives have "the potential to create a culture of saving among workers who haven't had a lot of experience with the standard retirement-savings system," said John Scott, director of the Pew Charitable Trusts's retirement-savings project. Many are younger and lower income than the typical 401(k) participant, he said.

Oregon launched a similar program in 2017, and six other states—including New York, Connecticut and Maryland—and the city of Seattle are working on their own. Some states,

including Vermont and Washington, have enacted programs using other models that avoid coverage mandates, and several others are exploring legislation to authorize retirement-savings programs.

Proponents say they are concerned about the estimated 42% of private-sector workers who either don't have access to or don't participate in a workplace retirement-savings plan, many of whom don't save at all. State legislators say they are trying to save taxpayers' money by reducing retirees' reliance on public programs such as Medicaid.

Critics point out that if the programs don't gather enough assets to reimburse the states for startup costs, they'll leave taxpayers on the hook. The programs could also be hobbled by a lawsuit seeking to invalidate California's initiative on the basis that it violates federal pension laws. The suit was filed by the Howard Jarvis Taxpayers Association, a nonprofit advocating limited taxation.

"It's an unsettled area of law," said Michael Kreps, a principal at Groom Law Group. "We are watching the case closely."

In Illinois, companies with 25 or more workers that lack a retirement-savings plan must make Illinois Secure Choice available to their employees by November 2019. Keely Selko, office manager at Chicago restaurant The Dearborn, said she would have been happy to see 10% of the roughly 125-person workforce enroll in the Illinois program during its pilot period this summer.

"If, while people work for us, we can do something to help them think about retirement, that's a win," said Ms. Selko, who says 30% of her employees are saving.

Clara Lee, a 33-year-old sous chef, said she started contributing 5% of her pay to the Illinois program in July and has accumulated $700 so far. The Chicago resident said the experience has inspired her to refinance her debt at a lower interest rate and eat more meals at the restaurant to save more. Recently, she increased her contribution rate to 7%.

California's program, called CalSavers, launched in late November. Now in a pilot phase, that program will be required of employers with five or more workers that don't already offer a plan by 2022. Under OregonSaves, employers with 50 or more workers are already required to enroll employees, with smaller companies slated to join by 2020.

All three programs deduct 5% from workers' paychecks, and employees can opt out or change their savings rate. Employers are barred from making contributions to the IRAs.

About 10.4 million residents of the three states lack access to retirement-savings plans at work, according to AARP, the advocacy group for older Americans and a supporter of state-run retirement-savings programs.

Kevin Cox, head of government savings at Ascensus LLC, administrator of the three states' programs, predicts state-backed retirement plans will be as successful as 529 college-savings plans, which started in the late 1990s and now have about $329 billion in 13.6 million accounts.

"There is a lot of long-term potential," said Mr. Cox, who oversees Ascensus's 529 business, which has more than $100 billion in assets under administration.

Feasibility studies for the programs project CalSavers could amass $28.4 billion in assets within six years and Oregon and Illinois could reach $5 billion and $10 billion, respectively, within a decade.

Ascensus—which charges up to a 0.75% annual fee—has a 10-year contract in Oregon, and seven- and nine-year agreements, respectively, in California and Illinois. It has agreed to cut its fee in California and Oregon when assets reach specific thresholds.

Ascensus operates websites in the three states to enroll participants and track their savings, and expects to hire a couple hundred call-center workers in the next few years, Mr. Cox said. "We launched OregonSaves last year and did not expect to make money in the first couple of years. We are pretty much on schedule," said Mr. Cox, who cites a 67% participation rate for the Oregon employees and a 5.17% average savings rate, both of which are close to expectations.

Still, enrollment in OregonSaves is off to a slow start. Oregonians have amassed $10 million, versus the at least $100 million projected by the feasibility study by the end of the first year. Of the 30,000 companies without a retirement savings plan, about 650 are currently making payroll contributions.

Geoffrey Sanzenbacher, an economist at Boston College and author of Oregon's feasibility study, says he overestimated the number of large companies that would sign up in the first year. Mr. Sanzenbacher also said it is taking longer than expected for employers that register for the program to start funneling employees' savings into investment accounts.

Enrollment should surge by 2020 as the state requires smaller companies that employ a majority of Oregon's uncovered labor force to join the program, he said.

“The idea that the program will pay for itself within a decade still holds true,” he said.

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Chicago mayor proposes $10 billion in bonds to improve pension funding

Chicago Mayor Rahm Emanuel on Wednesday proposed issuing $10 billion in bonds to improve funding in the city's pension funds and endorsed amending the state constitution to allow for reform struck down by the Illinois Supreme Court in 2015.

Mr. Emanuel, who will leave office in May, said in a speech to the Chicago City Council that he is proposing the issuance of "fund stabilization bonds," which would "immediately increase the health of our pension funds to levels we have not seen in at least a decade." Noting the bond issuance would improve the average funding ratio of the city's four pension funds to 50% from 26%, he said while the plan contains some risk, the ability to issue the debt at current low interest rates would be possible due to projected investment returns by the city's pension funds, which he said have never seen an annualized return of lower than 8% for any 30-year period.

He cited additional required contributions totaling $276 million to the $2.5 billion Chicago Policemen's Annuity & Benefit Fund and $895 million Chicago Firemen's Annuity & Benefit Fund in 2020, and an additional required $310 million total for the $4.2 billion Chicago Municipal Employees' Annuity & Benefit Fund and $1.2 billion Chicago Laborers' Annuity & Benefit Fund in 2022. With the bonds, Mr. Emanuel said, citing the police and fire contributions, "new revenue required in 2020 would drop from $276 million to $76 million."

Mr. Emanuel's press office posted details on the ordinance he has introduced, which creates the Dedicated Tax Securitization Corp. and established the framework to issue up to $7.7 billion in bonds issued by the DTSC to securitize the city' income tax, personal property replacement tax and residual sales tax revenues, and up to $2.3 billion in bonds issued by the city of Chicago, secured by its water and sewer tax, leveraging "revenues already pledged" to the municipal employees' pension fund.

The proposal further says the cost of the city's pension debt is 7% to 7.5% and the current cost of the city's bonded debt is 2.5% to 6.25% and thus "through the fund stabilization bonds, the city can refinance a portion of its existing high cost pension debt with lower cost bonded debt."

Noting how interest rates have been rising, Mr. Emanuel urged the City Council to act quickly on the bonds. "There is a window in the market today for this to work. At some point, that window of opportunity will close," he said.

Mr. Emanuel also endorsed a state constitutional amendment allowing for a state progressive income tax, promoted by Gov.-elect J.B. Pritzker, along with an amendment allowing for a change in cost-of-living adjustments for the city's pension funds.

The Illinois Supreme Court had ruled in March 2016 that an earlier pension reform law, signed by then-Gov. Pat Quinn on June 9, 2014, and which took effect Jan. 1, 2015, for the municipal employees and laborers' pension funds, was unconstitutional. The court cited the state's constitutional clause that pension benefits "shall not be diminished or impaired." The law raised employee and employer contributions and reduced retiree cost-of-living adjustments for participants in the two plans.

Mr. Emanuel also said he endorses efforts by some state legislators to legalize recreational marijuana and bring a casino to Chicago to create new revenue that would be dedicated to funding the pension plans.

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Private Sector

Making Sure Your Plan Language Matches What You Are Doing – New Class Action Lawsuit Examines How a Common Definition of "Compensation" Was Applied

A recent class action lawsuit emphasizes the importance of clarity in plan language, particularly the definition of compensation – a frequent source of errors. As most plan administrators are aware, what elements of pay are counted as compensation for various purposes of the plan can vary and change from time to time, particularly when payroll systems or vendors change or employers adopt different compensation designs. In Karlson v. ConAgra Brands Inc., Case No. 1:18-cv-8328 (N.D.Ill., Dec. 19, 2018), the plaintiff has asserted that the plan sponsor should have treated certain post-termination bonuses as benefitable compensation under the terms of the plan.

According to the complaint, the plan provided that participants could elect to make pre-tax and after-tax elective contributions, while the employer was required to make matching contributions (and, in limited circumstances, nonelective contributions) equal to a percentage of a participant's compensation. Also according to the complaint, the plan defined "compensation" to include certain post-termination payments in a manner that generally appears to follow the 415 regulations on post-termination compensation.

Specifically, according to the plaintiff, compensation was defined under the plan to include payments made by the later of (i) 2.5 months after severance from employment, or (ii) the end of the calendar year that includes the date of severance, if the payments are payments that, absent a severance from employment, would have been paid to the participant while the participant continued in employment with ConAgra and are bonuses. The plaintiff then alleges that the plan fiduciaries re-interpreted the plan to exclude such bonuses in 2016, thus failing to take elective deferrals from such payments and not matching such deferrals. This, the plaintiff argues, was a failure to follow the terms of the plan in not permitting contributions on the former participants' bonuses, and thereby a breach of their fiduciary duties potentially affecting several thousand participants.

Interestingly, the named plaintiff was, prior to his own termination of employment in 2016, Senior Director of Global Benefits, and a member of the Administrative Committee that is now

a defendant, while the defendants include that committee and the Vice President of Human Resources.

Plan sponsors should take notice of this case and take the opportunity to review their plan language, particularly the definition of compensation, for its "fit" for what the payroll system is doing in practice. It is not uncommon for plans to have complicated definitions of compensation for benefit purposes that are different from the definitions used for the 415 limits or nondiscrimination testing. The various definitions may include or exclude certain types of compensation other than base salary for different purposes, and a company's compensation or payroll practices and vendors may change from time to time in ways that impact the definitions. This suit is an important reminder to make sure that the plan language is clear, up to date with current payroll practices, and consistent with what is actually applied.
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New ERISA Class Actions Claim Underpayment of Pensions Due to Unreasonable Actuarial Factors

Three recent lawsuits, filed within 15 days of each other, have targeted large corporate pension plans for using what the plaintiffs claim are unreasonable actuarial equivalent factors, including "outdated" mortality tables, when calculating plan benefits payable in various annuity forms of distribution. Plaintiffs allege that this practice has caused participants and survivor annuitants to receive lower payments than required under ERISA. The similarities in the complaints, and the fact that the same two law firms filed the complaints, suggest that additional lawsuits against other large pension plan sponsors may soon follow.

The putative class actions were filed by current or retired employees of American Airlines, Inc. on December 3, Metropolitan Life Insurance Company on December 11, and PepsiCo, Inc. on December 12 (the companies' benefits committees were also named as defendants). The suits focus on the joint and survivor annuities that are available in the three corporations' defined benefit plans. These annuities provide reduced benefits to retired participants while they are alive, in exchange for the continuation of pension payments to the participants' spouses following the deaths of the participants. The plaintiffs allege that the pension plans used actuarial equivalence factors that were decades old to calculate the payment amounts under the various alternative joint and survivor annuities. Two of the cases zero-in on the specific mortality table designated in the plan document for this purpose (in one case, the table was from 1971, and in another, the table was from 1984). "Older mortality tables predict that people will die at a faster rate than current mortality tables," the plaintiffs allege,

thus causing the reductions applied to participant benefits to be overstated.

The complaints acknowledge that the plans' stated mortality and interest assumptions "must be viewed together to determine if they produce a reasonable, and equivalent, benefit." In the cases where the targeted plans had a fixed interest rate (e.g., 5%), the complaints indicate that the stated rate, by itself, was reasonable, but, taken together, the mortality and interest rates are unreasonable. The complaints do not indicate at what point the combined factors first became unreasonable. While mortality tables and interest rates have been updated under federal pension law over the years for various pension plan purposes, such as funding and lump sum payment calculations, there have been no required updates in the context of these joint and survivor annuity calculations.

The complaints include claims that the plan fiduciaries breached their ERISA fiduciary duties by relying on those allegedly outdated mortality tables, because they have "unreasonable conversion factors that do not provide for actuarially equivalent options," resulting "in participants and beneficiaries illegally forfeiting and losing vested benefits." The lawsuits also include two additional counts for declaratory and equitable relief, and for reformation of the plans and recovery of benefits pursuant to ERISA § 502(a).

The lawsuits address a relatively unexplored area concerning ERISA's standards for the proper method of calculating joint and survivor annuities offered in defined benefit plans. ERISA requires that such annuities must be "the actuarial equivalent of a single annuity for the life of the participant."[1] U.S. Treasury Department regulations provide that actuarial equivalence must be based on "consistently applied reasonable actuarial factors."[2] Many older pension plans still utilize factors that were adopted decades ago. This practice maintains the original design of the plan and may be consistent with a general desire not to make changes, especially for pension plans with traditional benefit formulas that have been frozen or phased out in favor of a different retirement program for the current workforce.

Given the lack of guidance in this area, the unsettled nature of the "reasonableness" standard, and the interplay of fluctuating interest rates with gradual changes in mortality rates, it is difficult to predict how the courts will view these issues. For the many remaining corporate sponsors of older pension plans, these cases may present a new area of potential legal exposure.

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Help people work longer by phasing retirement

Most people hope their retirement will be like a warm bath: You work your way in slowly and gradually phase down your workload. For many, however, retirement from a job is more like a cold shower—it happens all at once and not exactly as planned.

There's lots of talk that longer, healthier lives should mean longer working lives, that "60 is the new 50." And there are plenty of reasons to think that's true. Beyond the financial necessity of working and saving more in order to support a longer (and, with health-care costs, more expensive) retirement, extending work also provides mental, physical, and social benefits that themselves lead to longer and more fulfilling lives.

What's missing, however, is the legal right to transition into retirement gradually over several years. If we're serious about a transition to working longer, there ought to be a legal framework for doing so.

Many individuals recognize the need to extend their working lives, and they're doing it—or at least trying. In 2016, 19 percent of Americans 65 or older were working full- or part-time. Most Americans expect to join them. A recent Transamerica survey found that 53 percent of respondents plan to work past 65; thirteen percent say they'll keep working until they die. Furthermore, for many people working longer is a more effective way to increase retirement income than increasing their savings rate. Of course, health issues, caregiving requirements, and the vicissitudes of life mean that many of these plans don't work out.

Many who do keep working find that it's in a different job with a different employer, often with part-time hours that they don't control—and at lower wages. We've all heard stories about older workers who start driving for Uber or greeting shoppers at Walmart.

If we're serious about a transition to working longer, there ought to be a legal framework for doing so.

Employers say they are on the "work longer" bandwagon, but too often that's only rhetoric.

A companion survey by Transamerica found that 74 percent of employers expect their employees to work in retirement, and 82 percent support the re-definition of "retirement." Employers also report positive perceptions of older workers. They say older workers are "wiser, more reliable and responsible," and "more effective at mentoring and training."

In practice, however, studies routinely find bias against aging workers. Some argue that this is justified and point to higher employee-benefit costs. For example, under most health insurance programs, older workers cost more and have more health-related absences. Others point to a concern that, without a fixed retirement age, it's hard to remove substandard employees. (Interestingly, one study of the University of North Carolina found that both faculty members and the university were better off, because low-performing faculty started the phase-down more quickly.)

But it's easier to measure the costs of older workers than the benefits of having them. Those benefits are significant. They range from reduced turnover and onboarding costs to quicker productivity gains for younger workers through formal mentoring programs.

The most important question, however, is especially hard to measure: Are older workers less or more productive than younger ones? There are some intriguing studies suggesting that, at least in some circumstances, older workers may be more productive. One carefully researched study involving physical laborers at a European truck manufacturing plant found no loss of productivity among older workers; in fact, productivity increased until age 65. It turned out that, although older workers were slower, they made fewer serious mistakes. It's also worth noting that hourly wages, a basic measure of productivity, are not only higher for older workers than younger, but the pay premium is increasing.

Employers may think they value experienced workers, but most don't act like it. Only 20 percent offer any type of formal phased retirement program, and the majority have no plans to consider one in the future. Instead, most companies offer only one choice — continued full-time work or full retirement with no work at all. Clearly, if people are going to work longer, they'll need other options.

Governments in some other countries have already acted. Japan and Singapore, where aging populations are already putting more pressure on economic growth, have enacted their own phased retirement programs. In Japan, where the mandatory retirement age, once 55, is now 60 and possibly moving to 65, the Continuous Employment Policy launched in 2013 provides workers guaranteed employment with their existing employer until age 65. Employees officially "retire" from the company at age 60 and then negotiate a new employment contract. Employees incur a 27 percent pay and benefits cut on average in exchange for 5 more years of guaranteed employment.

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End of Year IRS Checklist for Plan Providers

Most retirement plans provided by employers have a tax-favored status to provide tax savings to both employers and beneficiaries. However, when a retirement plan does not continue to meet the necessary requirements, the plan can lose tax-favored status and end up costing plan providers.

Employers can use the IRS Voluntary Correction Program (VCP) to correct mistakes involving retirement plan benefits, in order to reduce assessed penalties and maintain tax-favored status. The IRS provides a list of the “Top Ten Failures Found in Voluntary Correction Program” to alert businesses to common benefit plan tax problems, including the following:

- Review benefits plan for tax law changes.

Tax and benefit laws change every year. Setting up a benefits plan is not really a one-time event. Benefit plans need to be reviewed annually to ensure tax and benefit law changes do not require changes to the plan. In addition to implementing changes, benefit plan laws generally require notifying plan participants of any changes or updates to benefit plans or plan documents.

- Review plan definition of compensation for determining contributions.

Compensation can have different definitions for individuals, employers, and the IRS. In determining benefit contributions, errors can be made that wrongly exclude certain types of compensation, or include compensation that is supposed to be excluded. This can include bonuses, overtime, or commissions. When changes are made to employee pay structure or if the employer changes payroll companies or software, compensation calculations should be reviewed to ensure contributions are properly determined.

- After a merger, define eligible and ineligible employees.

In mergers, acquisitions, or changes in ownership, there is often a change in benefits plans as a group of employees come aboard. This may result in a number of formerly benefit plan included employees who should be excluded or vice versa. Making unintended contributions can cost employers a significant amount of money, especially when large numbers of employees are involved.

- Collecting loan repayments under IRC 72(p).

Loans from benefit plans are another common source of correction issues with the IRS. The IRC 72(p) has specific requirements for how employers withhold loan payments. If the plan does not properly or timely collect loan repayments, the loan is in default and the participant is to be taxed on the loan in the year of the default.

- Review in-service withdrawals and distributions.

Certain distributions can be made from benefit plans for hardships. However, these distributions or withdrawals need to meet certain requirements. If an improper hardship distribution was made, the plan participant should return the hardship distribution amount plus earnings. In the future, plans may be amended to provide for such hardship distributions.

- Are the minimum age-based distributions being made?

Once participants reach a certain age, distributions are required. If distributions are not timely made, participants must pay an excise tax. However, in some cases, the IRS may waive the excise tax based on plan sponsor waiver requests.

- Employer eligibility failure.

When adopting a benefits plan, some employers may be ineligible for the type of plan they end up choosing. Certain types of plans (like 401(k) or 403(b) plans) may not be available for certain businesses. This includes government plans or tax-exempt plans. Adopting an ineligible benefits plan can lead to significant tax liability.

- Failure to pass the ADP/ACP nondiscrimination tests under IRC 401(k) and 401(m).

This common error involves classification of highly compensated and non-highly compensated employees. Using a safe harbor plan or automatic enrollment can help businesses avoid this mistake. As above, plan administrators should review employee classification to ensure classification is in line with plan documents and IRC requirements.

- Failure to properly provide the minimum top-heavy benefit or contribution under IRC 416 to non-key employees.

Another area affected by employee classification involves non-key employees. When key employees' (often owners) benefits or balances constitute a substantial percentage of plan

assets (generally 60%), non-key employees may require a minimum benefit or contribution.

Certain top-heavy plans may require minimum contributions made to the benefit plan. Lower paid employees are generally required to receive a minimum benefit if the plan is top-heavy. Plan providers should perform a top-heavy test to ensure contributions are properly allocated for all employees.

- Failure to satisfy the limits of IRC 415.

In defined contribution plans, like 401(k)s or profit-sharing plans, participants are limited in the amount of contributions they can receive. Similarly, the IRC limits the amount of benefits a participant can accrue in a defined benefit plan. When a plan provider does not properly monitor contributions or benefits, these amounts can exceed the limits.

Plan administrators should prepare allocation schedules with reference to amounts contributed and amounts allocated to plan participants. These amounts should be monitored and compared with the IRC 415(c) limits.

Changes to the VCP Program in 2018 and 2019

In light of the changing benefits laws, it is important to keep up to date on changes to the VCP itself. Changes to the IRS Voluntary Correction Program that went into effect on January 2, 2018, resulted in changes to the user fees, intended to simplify the fee schedule based on the total amount of net plan assets. Beginning in April 2019, all VCP applications must be submitted electronically.

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View From Groom: Top Five Post-Election Retirement Policy Observations

The historic 2018 mid-term elections are in the rearview mirror, and Democrats are poised to take control of the House in January while Republicans will expand their majority in the Senate. The new political landscape fundamentally changes the retirement policy dynamic in Washington and there is a very real possibility of significant reforms over the next two years. As stakeholders consider their policy priorities heading into the new Congress, there are five key issues to keep in mind.

1. Retirement policy may take center stage in the House Ways and Means Committee in 2019.

It is very likely that Rep. Richard Neal (D-Mass.) will be the Chairman of the House Ways and Means Committee in the next Congress. Mr. Neal is one of a handful of lawmakers who can be considered a true retirement policy wonk. His interest in the issue dates back to the beginning of his career, and all signs indicate that Mr. Neal will use his chairmanship to focus on retirement legislation. Mr. Neal is a longtime supporter of automatic IRA proposals and has sponsored similar legislation to ensure that every employee has access to an employer-provided retirement plan. He also has shown a willingness to work on bipartisan proposals, including supporting the Retirement Enhancement and Savings Act ("RESA," discussed below) and has been opposed to attempts to reduce the tax incentive for retirement savings, including through "Rothification" (i.e., requiring employee plan contributions to be made on a post-tax "Roth" basis).

2. The prospects for bipartisan retirement legislation are good.

There is a broad, bipartisan support in Congress for the RESA, which would, among other things, expand the availability of multiple employer plans, facilitate in-plan lifetime income options and disclosures, and simplify plan administration. The bill was unanimously approved by the Senate Finance Committee in 2016, and the House companion bill sponsored by Reps. Mike Kelly (R-Pa.) and Ron Kind (D-Wis.) has 85 cosponsors. Unfortunately, RESA has been bogged down by procedural and policy disagreements this year, though the House did recently pass the Family Savings Act ("FSA").

The FSA shares some common components with RESA (e.g., multiple employer plan expansion, in-plan lifetime income fiduciary safe harbor) but also has major differences. For example, the FSA included potentially controversial proposals like the creation of "universal savings accounts" (i.e., tax-favored savings accounts with no withdrawal restrictions) and the expansion of 529 accounts to cover home schooling and other expenses, while omitting key provisions from RESA, such as new tax credits for small business plans, lifting the cap on auto-enrollment plans, and requiring lifetime income disclosure.

It is likely that Congress will eventually take up RESA, either as proposed or with some modifications to reflect member priorities. There is some hope that lawmakers, less constrained by election politics, will be able to reach a compromise during the "lame duck" session after the election. However, lame duck sessions are rarely as productive as members might wish, particularly where the balance of power has shifted, so consideration of RESA could slip until the next Congress. At that point, the prospects for passage of bipartisan retirement legislation like RESA are good, considering that there is continuing support in the Finance Committee and from the likely incoming Ways and Means Committee Chairman.

3. Congress will continue to grapple with the crisis facing the multiemployer pension system.

There is bipartisan recognition that there is a very real crisis facing some multiemployer pensions plans and the Pension Benet Guaranty Corporation ("PBGC") multiemployer program. The Joint Select Committee on Multiemployer Plans—created by the Bipartisan Budget Act of 2018—was established to facilitate bipartisan consensus on potential solutions, and the Committee is facing a Nov. 30, 2018, deadline to produce legislative recommendations, if possible. There are, however, still significant policy disagreements between Republicans and Democrats, and it is unclear whether the Joint Select Committee will be able to produce bipartisan legislation. If lawmakers are unable to reach consensus in the lame duck, the looming multiemployer crisis will be front and center in the next Congress.

Newly empowered House Democrats may be eager to demonstrate to constituents—particularly those in Midwestern swing states that voted to elect President Trump—that they will protect retirees facing steep benefit cuts absent Congressional action. The leading Democratic reform proposal is the Butch Lewis Act, which was sponsored by likely Ways and Means Committee Chairman Richard Neal (D-Mass.) and freshly reelected Sen. Sherrod Brown (D-Ohio). That bill would create a government-backed, low interest loan program and provide additional PBGC financial assistance to aid struggling multiemployer plans. At this point, it appears likely that House Democrats would support the bill if it were to come up for a vote. However, Senate Republicans have been less receptive to the proposal, and it is unlikely that measure could muster enough votes to overcome a filibuster without material changes.

4. There is a growing momentum in the Democratic caucus for Social Security expansion.

Social Security is one of the most popular social programs, and the Democratic caucus has largely coalesced around a policy of increasing benefits and improving the program's fiscal solvency. In 2015, 42 out of 46 Senate Democrats voted in favor of a budget amendment supporting Social Security expansion, and in September, 150 Democratic members of Congress started the Expand Social Security caucus. It seems likely that House leadership will seriously consider Social Security expansion legislation in the next Congress.

Even if the House is able to pass legislation to expand Social Security, it is unlikely to gain traction in the Republican-controlled Senate. In the run-up to the elections, Senate Majority Leader Mitch McConnell (R-Ky.) signaled an interest in addressing budget deficits by trimming entitlement programs. President Trump's chief economic advisor—Larry Kudlow, Chairman of the National Economic Council—similarly stated that the Administration would begin to consider changes to the "large entitlements" next year, though the President has at times opposed entitlement cuts.

5. The Administration is poised to move retirement policy by regulation and guidance.

To date, retirement policy has largely taken a backseat to health-care issues and tax reform implementation in the list of Administration priorities. However, President Trump recently signed an executive order prioritizing several retirement policies. In response, the Department of Labor quickly proposed regulations intended to expand the use of multiple employer plans, and the agency is considering options to streamline disclosures, including potential new rules regarding electronic delivery. The Treasury Department and Internal Revenue Service are also considering guidance related to multiple employer plans and required minimum distributions.

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