ERISA at 40:
A Time for Employees and Employers to Assess the Value and Benefits of Multiemployer Defined Benefit Pension Plans and an Occasion to Examine the Linkage Between Fiduciary Responsibilities and Independence[1]

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As the 40th anniversary of the landmark Employee Retirement Income Security Act (ERISA) is noted, participating employees and contributing employers, the primary stakeholders in the fortunes of multiemployer defined benefit pension plans, may not be among the celebrants. Employees who should benefit from retirement contributions and the employers who fund the payments are encountering a world different from that anticipated when ERISA was enacted. Whatever the travails of its day, in certain respects 1974 was a better, more promising and optimistic time for comparatively robust multiemployer defined benefit pension plans.

A SHIFT IN FUNDAMENTALS FOR DEFINED BENEFIT PENSION PLANS

Multiemployer defined benefit pension plans are a product of collective bargaining between unions and employers. The plans are designed to provide a defined monthly benefit at retirement based on a formula taking account of the years of employer contributions and employee service.[2] Optimally for the health of defined benefit pension plans, there would be a broad base of active participants for whom regular employer contributions fund their own retirement over a working life of plan participation. Atop the broad-based pyramid would be a much smaller number of retirees and beneficiaries receiving pension benefits. Stability would come from nourishment supplied by a base of new entrants into the plan, as next generations of employees begin participation through contributions from current and newly contributing employers. But such a theoretic formula for sustainability of defined benefit pension plans has been undermined by numerous realities.

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Iconic companies that once were bedrock industry participants have, in some instances, collapsed and disappeared as their fortunes reversed, or they have either relocated or outsourced previously unionized operations or lost market share (and opportunities to maintain and create jobs) to nonunion domestic and offshore competitors. In growth industries that are not historically unionized, employers have designed benefits packages that are more appealing to employee interests, with features allowing individual elections to reflect preferences, expectations of geographic and upward mobility, and portability. For many multiemployer plans, the result has been inversion of the pyramid: fewer dollars flowing in from fewer employers and for fewer active employees, while the number of individuals having vested benefits for themselves and their spouses swells.[3] A problem of increasingly acute concern is "orphan participants" who no longer participate actively in a plan because their employers or former employers no longer contribute, potentially leaving remaining contributing employers responsible for the benefits of participants who were never their employees.[4]

Accompanied by severe declines in many industries and geographic areas, the potential size of the unionized workforce making up the universe of participants in multiemployer defined benefit pension plans has contracted since massive pension reform was enacted in 1974. In 1974, 23.4 percent of the private sector workforce belonged to unions,[5] compared to about 6.6 percent nationally in 2014.[6]

Of course, investment portfolio experience also is a factor in the soundness of pension funds. With a statutory mandate to diversify investment portfolios,[7] coupled with skittishness from severe declines in 2008, many pension funds did not ride the wave of a buoyant stock market in 2013 (and other years of recovery), so they showed more conservative returns that did not materially diminish a funding gap or recoup prior losses.

The Pension Benefit Guaranty Corporation (PBGC) was created by ERISA to protect pension benefits in private-sector defined benefit pension plans and guarantee certain nonforfeitable pension plan benefits to participants and beneficiaries.[8] For multiemployer plans, the PBGC's maximum annual guarantee is $12,870 for a participant with 30 years of service; the amount has not changed since 2001.[9] The limitation for multiemployer funds compares with the maximum yearly guarantee for single employer plans, which is adjusted annually and set for 2015 at $60,136 for a 65-year-old retiree;[10] however, once the benefit level is set for a terminated single employer plan, there is no further increase or cost-of living adjustment.[11]

From time to time, Congress has stepped up with other legislation like the Pension Protection Act of 2006 (PPA) to establish new funding requirements for defined benefit pensions and introduce certain reforms.[12] More legislative reform for plans on a trajectory toward critical status or insolvency came with enactment of the Multiemployer Pension Reform Act of 2014 (MPRA),[13] introduced in the House on December 9, 2014 as part of much larger legislation funding the federal government for its 2015 fiscal year, and passed by the House two days later and by the Senate two days after that.[14]

Some other legislative "reform" has been floated periodically, with some proposals enabling actuarial assumptions that smooth adverse experience. But if the legislative accomplishment is more cosmetic and palliative than substantive—or, worse, only masks structural problems needing thoughtful attention—there may be a serious disservice to all stakeholders. At bottom, the economic and demographic fundamentals of multiemployer defined benefit pension plans dictate their real value to participating employees, as well as employer exposure to liability attributable to a gap between plan assets and unfunded vested benefits.

Putting aside polarizing philosophy and partisan differences of left and right, liberal and conservative, the multiemployer pensions, for which unions negotiate, merit serious attention for their value, cost, and risk—irrespective of whether the conversation begins with employees, unions, or employers.

THE VALUE OF MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS RELATIVE TO DOLLARS CONTRIBUTED

Defined benefit pension plan contributions typically are based on units or periods of work. But the very nature of the structure and funding of defined benefit pension plans precludes earmarking and precise linkage of contributions to individual benefits. Some plans require a contribution formula based on all hours worked (including overtime hours) or hours paid (including vacations, sick and personal time, holidays, and other paid time off), even though there is no additional value once a threshold is satisfied, sometimes as low as 1,000 hours per year and not uncommonly 1,600 hours or less. Employer contributions for hours beyond the threshold do not fund additional benefits, so employers with a workforce whose average annual hours exceed the threshold are aiding reduction of underfunding and shortfalls from other employers, but those payments may not yield value to benefit their own bargaining unit employees.

For legal and practical reasons, many plans suffering underfunding have reduced their future benefit accrual formulas, so dollars contributed buy less credit for employee participants in the plans' current distressed times than in prior more robust or optimistic times. Rates of future benefit accrual may have been reduced so current contributions can fund vested benefits. By way of example, if the amount of a defined benefit is a function of (1) contributions, (2) years of credited service, and (3) a benefit multiplier, then reduction of the benefit multiplier will aid in reducing unfunded vested benefits, but only by redirecting current contributions that otherwise would support a larger benefit multiplier for active employees.

With societal changes in family structure, another factor of increasing concern is the benefits payable if a participating employee dies prior to the commencement of benefits or without a "surviving spouse." Many plans provide for no payment if the participating employee dies before retirement or without a beneficiary who qualifies as a surviving spouse. The effective consequence could be forfeiture of the value of anticipated benefits that were funded by long-term contributions. While extinguishing the value of a deceased participant's accrued benefits is actuarially sound, it could be disappointing to non-spouse family members or partners who survive the participant but receive none of that value.

ACTUARIAL ASSUMPTIONS DRIVE SUBSTANCE AND APPEARANCE

The financial return/report that multiemployer plans are required to file annually requires an accompanying statement by the actuary disclosing "any event which the actuary has not taken into account," and "any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future, but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates."[15] The actuary is charged to "utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported … (i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and (ii) represent his best estimate of anticipated experience under the plan."[16]

Sometimes a plan's change in the appointment of an actuary will occasion adoption of assumptions that had remained unchanged for several years. The outcome of different actuarial assumptions may be a significant alteration of the appearance or reality of financial soundness that significantly impacts participants, beneficiaries, and contributing employers:

- A decades-old assumption for mortality and the life expectancy of vested plan participants and spouses having present or future rights may be changed and updated;
- Assumptions concerning the stability of inflows from employer contributions may be recalibrated based on such factors as: (1) participant growth or decline, (2) rates and hours for which contributions are made, or (3) industry, market, or union organizing experience and trends; or
- Assumptions of interest rates or investment returns may be considered unrealistic based on prudent assessment of current and foreseeable circumstances.

While multiemployer defined benefit pension plans may weather downward spirals of portfolio performance and interest rates, some structural fundamentals of demographics are rigid and not subject to fluctuation or upward movement. Perhaps a case could be made for holding interest rate assumptions constant. After all, even with aberrant periods of high inflation (as experienced in the period from the mid-1970s through the early 1980s) and low inflation (encountered since 2008), or boom and bust equity market swings, interest rates are cyclical and may rebound, correct, or warrant actuarial smoothing. In contrast, mortality assumptions do not swing or fluctuate; pension plan participants and their spouses are living longer, and pension plans must fund payment of benefits for the duration of their longer lives. Similarly, declines of industries and unionization rates may warrant structurally different assumptions concerning participation levels and associated contributions.

When actuaries change core assumptions, the impact on a fund and its participants and beneficiaries, as well as on contributing employers, may not be incremental annual variations moving along a trend line or transitioning predictably into another cycle. Rather, certain disruptive, and sometimes abrupt, quantum changes are exponential and incapable of offset by such factors as historically customary adjustments occasioned by improved investment performance, rising employment, or increased contribution rates.

PLANS IN CRITICAL OR ENDANGERED STATUS

By statute, actuarial certifications are required annually, based on standardized funding and liquidity measures for determining the financial health of multiemployer plans.[17] With passage of the PPA, plans that do not meet certain funding thresholds are classified as either "endangered" or "critical," and they must adopt a funding improvement plan or a rehabilitation plan, depending upon their funding status.[18] The amounts necessary for funding improvement or rehabilitation to amortize the funding shortfall are added to the employer contributions for employee benefits that have been negotiated in collective bargaining.

Plans considered in "critical" status because of funding and/or liquidity problems that hit certain statutory thresholds (generally, a projected funding deficiency, with consideration of whether the funding is less than 65 percent) are required to adopt a rehabilitation plan.[19] For participants and beneficiaries having a benefit commencement date after the plan is in critical status, the rehabilitation plan may reduce or eliminate adjustable benefits, including post-retirement death benefits, 60-month payment guarantees, disability benefits (if not yet in pay status), early retirement benefits or retirement-type subsidies, benefit payment options other than a qualified joint and survivor annuity, and benefit increases occurring in the past five years.[20] Less severely distressed plans that are considered "endangered" (generally, assets less than 80 percent of liabilities or a projected funding deficiency within seven years) are required to adopt a funding improvement plan that may include reductions of benefits earned in future years.[21] The MPRA permits plans projecting they will be in critical status within five years to elect critical status.[22] For severely distressed plans projecting insolvency, labeled in the MPRA as "critical and declining," there is a rigorous adoption and review procedure for suspending or reducing certain benefits.[23]

Although fulfilling a statutory obligation to move a plan towards financial stability, rehabilitation plan contributions that amortize the underfunding of plans in critical status do not produce a tangible benefit enhancement for current employees participating in a defined benefit pension plan. Currently contributing employers and their bargaining unit employees participating in a plan requiring rehabilitation plan contributions may deplore the portion of employer contributions they perceive as amortizing underfunding that they attribute to hobbled or extinct employers that have exited the plan—a situation in which the dilution in value may be analogized to paying off the neighbors' mortgages with each payment of one's own.

CURRENT CIRCUMSTANCES AND FIDUCIARY RESPONSIBILITIES

Living in the changed world of the fortunes and prospects of multiemployer defined benefit pension plans and the realistic expectations of employees, employers, and other plan stakeholders occasions a review of the fundamentals of fiduciary responsibilities. Within each multiemployer plan, fiduciary responsibility to address current circumstances and future needs rests with plan trustees, appointed equally by contributing employers and the unions with which they negotiate.[24]

Essentially, anyone who exercises discretionary authority or discretionary control with respect to management of the plan or the disposition of its assets or has any discretionary authority or discretionary responsibility in the administration of the plan is an ERISA fiduciary.[25] Plan fiduciaries are charged to perform their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan with care, skill, prudence, and diligence in accordance with governing plan documents.[26]

The assumptions made by a plan's actuary on such economically consequential items as funding, investment return, mortality tables, and interest rates may impact the appearance and substance of funding and plan soundness dramatically. However, like attorneys and accountants engaged by plan trustees, actuaries performing essential functions and exercising discretion generally are not fiduciaries when acting solely in their professional capacities[27]—because the key to determining whether an individual or an entity is a fiduciary is whether the person is exercising discretion or control over the plan.[28] Nevertheless, the plan trustees interviewing, selecting, and retaining such advisers are fiduciaries, responsible for the prudence of their actions and inactions.

A fiduciary who breaches any of his or her ERISA responsibilities, obligations, or duties is subject to personal liability to the plan, as well as equitable or remedial relief; this includes liability "to make good to such plan any losses to the plan resulting from each such breach."[29] Separate from direct liability for breaches, co-fiduciaries may be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan for knowingly participating in or concealing an act or omission of another fiduciary, enabling another fiduciary to commit a breach, or failing to make reasonable efforts to remedy a known breach.[30]

A plan beneficiary, participant, or fiduciary may bring a civil action for fiduciary breaches, as may the Secretary of Labor,[31] but contributing employers are not among those statutorily listed as having standing to bring an action for fiduciary breaches.[32] The relief available for fiduciary breach claims "inures to the benefit of the plan as a whole,"[33] not to the plaintiff.

EMPLOYER OPTIONS TO STAY IN THE GAME OR WITHDRAW

A contributing employer's estimated withdrawal liability may serve as a realistic indicator of the value and benefit of employer contributions to a multiemployer defined benefit pension plan. Although a technical calculation subject to actuarial determination, very generally, withdrawal liability is a contributing employer's proportionate share of the plan's unfunded vested benefits.[34]

For a “complete withdrawal,” the trigger for assessment of a withdrawal liability is the permanent cessation of an employer’s obligation to contribute to a multiemployer plan, possibly because the obligation to bargain collectively with a sponsoring union has ended or because of a permanent cessation of covered operations, as by a sale or closing of the business unit or facility that was subject to collective bargaining.[35] Withdrawal liability is not triggered by a merger or consolidation[36] or a change in business form.[37] However, an asset sale will trigger withdrawal liability unless a bona fide sale of assets at arm’s length to an unrelated party is structured to satisfy three statutory criteria, the most notable of which is an obligation by the purchaser to contribute to the same multiemployer plan as the seller and for substantially the same number of “contribution base units.”[38]

An otherwise healthy employer that contributed to a plan may have a withdrawal liability for a significant multiple of its annual contributions, or even the aggregate of its cumulative contributions, and a surprising portion of its net worth, or its value in an economic or strategic merger or acquisition; in extreme, but not unprecedented, situations, withdrawal liability may approach or exceed the value of a business.[39] Sometimes that is unforeseen, perhaps because the employer never inquired about its estimated withdrawal liability, but other times because experience or assumptions underlying estimates were changed abruptly.

In the context of a merger or acquisition, withdrawal liability presents a potential impairment to the net worth or value of a business, whether or not the transaction actually triggers withdrawal liability payment obligations. A purchaser of assets willing to step into a seller’s shoes and make the commitments enabling a seller to avoid withdrawal liability may price its contribution commitment or a future withdrawal into the transaction cost by reducing its offer, depending upon its experience, expectations, and objectives.

Plan trustees are subject to a statutory charge to determine withdrawal liability based on “actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary’s best estimate of anticipated experience under the plan.”[40] However, seemingly routine assumptions by plan actuaries concerning funding, investment return, or mortality tables can materially alter the substance and appearance of fund soundness and spike withdrawal liability exposure, frequently without advance notice to affected employers or any advance opportunity to protest. Whether initiated by a plan’s actuary or its trustees, changed actuarial assumptions can significantly increase withdrawal liability, operating as a poison pill to deter employer exits from an underfunded plan.

Notwithstanding sound and documented funding of any particular plan, there is the additional peril of taking on an unanticipated withdrawal liability when a relatively healthy plan is merged with one that is not as well funded. The merger of a healthy plan with a currently or prospectively weaker plan, or a plan having less favorable demographics or characteristics, can severely alter financial soundness. The impact of individual or cumulative mergers affecting the soundness of the plan to which an employer contributes can upset predicate expectations and projections underlying its initial willingness to commence participation as a contributing employer or its analysis justifying ongoing and escalating contributions. Although PBGC authority to regulate plan mergers has been expanded by the MPRA and now includes "facilitation,"[41] a merger of plans may occur without meaningful prior notice and entirely beyond the control of a contributing employer, which may learn about it outside of customary union relations or collective bargaining only after the fact, perhaps by a ministerial notice that may not attract much attention.

Plan trustees have some discretion to adopt methods for calculating withdrawal liability, generally by adoption of either of two types of allocation methods: (1) direct attribution that traces the unfunded vested benefits attributable to the employer's employees, or (2) pro rata that allocates liability in proportion to the employer's share of the fund's total contributions over a specified period.[42] Also, as an inducement to newly contributing employers, a "free look" may be adopted by plan trustees to allow a period of contributions (generally not more than five years) during which there is no exposure to withdrawal liability.[43]

Employer challenges to the assessment of withdrawal liability *after* withdrawal occurs are subject to arbitration[44] and then reviewable in a United States District Court.[45] An arbitrator's findings of fact are subject to presumption of correctness, rebuttable only by a clear preponderance of the evidence.[46] On the other hand, an arbitrator's legal conclusions are reviewed *de novo*.[47]

PLAN SELF-HELP AND OTHER INTERVENTION TO SEPARATE HISTORIC PARTICIPANTS, EMPLOYERS, AND EXPERIENCE FROM THE FUTURE

As an inducement to potential new contributing employers concerned about taking on withdrawal liability obligations not related to contributions for their own employees, and as an enticement to employees who may be targeted for organizing and new collective bargaining agreements, some plans with funding shortfalls have endeavored to isolate legacy underfunded portions of a plan by creating separately designated "pools" of experience, or entirely separate plans operating under a single trust. The initiative started with certain Teamsters plans in about 2010, and it has gained traction with others since then. Essentially, the objective is to segregate historically underfunded experience from more positive current and future activity. As stated in a 2010 publication of the New England Teamsters & Trucking Industry Pension Fund, an alternative schedule of benefits was created with a second withdrawal liability pool that is monitored with the express goal of "zero withdrawal liability in the second withdrawal liability pool."[48]

Also, on a very limited basis, expanded somewhat by the MPRA, a multiemployer plan may be partitioned to separate and transfer liabilities to a successor plan.[49] But partition remains technically rigorous and available only in extreme situations.[50]

FOR ACUTE PROBLEMS, IS AN INDEPENDENT PRESENCE NECESSARY?

From time to time, financial or governance problems invite introduction of independent controls. After the notorious Enron and WorldCom collapses and fallout, Congress enacted the Sarbanes-Oxley Act of 2002[51] and codified the independent audit committee whose members may not accept any consulting, advisory, or other compensatory fee from the issuer and may not be an “affiliated person” of either the issuer or any of its subsidiaries.[52] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 added independence of compensation committee members.[53] Famously, independent monitors have been mandated to address and reform municipal fiscal practices, wayward police practices, and charges of corporate wrongdoing, while private sector compliance officers independently initiate inquiries or investigate matters of concern that are brought to their attention. Other models for independent positions with varying authority and enforcement capabilities exist in governmental comptroller offices and with inspectors general having a mission to detect and deter waste, fraud, abuse, and misconduct. While an ombudsman may introduce an independent conscience, the role customarily is limited to pronouncements and advice, lacking power to implement.

Acting in a monitoring, moderating, executive, administrative, advisory, or oversight role to initiate action beneficial to participants and beneficiaries or to prevent detrimental action, an independent authority could function with detachment and objectivity that may be necessary in some multiemployer defined benefit pension plan situations. Such an independent presence might have yielded a different outcome for some currently distressed plans. It may have provided a different scrutiny of assumptions concerning mortality, investment returns, and levels of active participation and accompanying contributions that were allowed to continue beyond periods of validity. Also, there may have been a different assessment of some lawful and authorized trustee decisions that enabled plan mergers or other actions that were cast as convenient or expedient but proved detrimental to long-term interests of active participants encountering reduced future accruals and benefit insecurity, or that crippled contributing employers with additional costs and risk for unfunded liabilities having no rational relationship to their own workforces and the amount of their contributions.

Paradoxically, multiemployer plans, whose legal existence requires joint labor-management trusteeship, may depend on a nonpartisan independent presence to fulfill the trustees’ fiduciary duty to act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. Other models show that empowering an independent function is not antithetical to the predicate of joint trusteeship; it can be an effective means of advancing fiduciary objectives. Apart from the merit of its own perspective, opinion, actions and influence, an independent trustee shares with the others the same fiduciary responsibility to make “reasonable efforts under the circumstances” to remedy the actions of any co-trustee that are considered a breach of fiduciary duty.[54] Moreover, institutional convention aside, there is no statutory imperative that trustees be selected from within the ranks of union and employer camps.[55]

Tangible adverse consequences of actions initiated, delayed or deferred, that were inherited by a current generation of active participants in some underwater plans and their contributing employers, might have been avoided if considered more independently and with different diligence. Whether the impetus comes from trustees within plans who perceive a need for such independent advisers or decision-makers or from outside forces, there may come a time when independence will be valued as much in the multiemployer pension plan arena as in others where it is accepted as necessary prudence.

CONCLUSION

Employer contributions to multiemployer defined benefit pension plans have been a mainstay, legacy feature of union negotiations in many industries. But the fabric of such staples may be tearing apart as employers and employees contemplate the potential of escalating contributions to amortize unfunded liabilities that increase costs but may have imperceptible value for current participants. Increasingly, employers and their employees are questioning whether the promise of retirement security can be delivered cost effectively—or at all—by defined benefit pension plans maintained under union contracts. Some actuarial and legislative measures address appearances when there are funding deficiencies, but they are incapable of reforming fundamentals afflicting many plans and potential value for their participants.

Active participants and their employers in many industries may lack confidence that dollars contributed today present real value relative to benefit and cost. For the good of current and future plan retirees, participants, and beneficiaries, the reality of underfunding, its root causes, and responsible ways to address it, has to be seen and approached differently than the optics.

At the start of ERISA’s fifth decade, multiemployer plan trustees and actuaries, investment managers, attorneys, and the negotiators on both sides of labor-management relations face a dramatically different future to provide promised retirement security at a cost and value that makes sense for the workforce of today and tomorrow. The fundamentals of underfunded multiemployer defined benefit pension plans signal the urgency and importance of new approaches and meaningful actions for the common good of participants and beneficiaries who are owed a fiduciary duty, and for current and future generations of employees and employers—the stakeholders and enablers without whom multiemployer plans cannot survive.

NOTES

[1] This Article updates an article featured in *Benefits Law Journal* Vol. 27, No. 4, Winter 2014, which was published prior to the December 16, 2014 enactment of the Multiemployer Pension Reform Act of 2014.

[2] 29 U.S.C. § 186(c)(5); 29 U.S.C. § 1002(37)(a) (2012).

[3] In a January 22, 2013, joint report to Congress, the Secretary of Labor, the Secretary of the Treasury, and the Director of the Pension Benefit Guaranty Corporation (PBGC) related that in 2010 only 4.09 million of 10.4 million total participants in multiemployer pension plans were in active status compared to 6.33 million inactive (retired or

separated vested) participants—a significant reversal of the 3:1 ratio in 1980 (6.07 million active status and 1.93 million inactive). DEP'T OF LABOR, DEP'T OF TREASURY, and PENSION BENEFIT GUARANTY CORP., MULTIEMPLOYER PENSION PLANS, 13–14 (Jan. 22, 2013), *available at* http://www.pbgc.gov/documents/pbgc-report-multiemployer-pension-plans.pdf. (Joint Report to Congress on Multiemployer Pension Plans).

[4] Data based on 2010 Form 5500 annual return filings indicate more than 400 plans reported having over 1.3 million orphan participants out of 6.7 million total participants. *Id*. at 15–17.

[5] Barry T. Hirsch and David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among Private Sector Workers, 1973-2013*, (2014), http://www.unionstats.com/ (last visited Feb. 18, 2015).

[6] Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members – 2014*, Table 3, Union affiliation of employed wage and salary workers by occupation and industry, 2013-2014 annual averages (Jan. 23, 2015) *available at* http://www.bls.gov/news.release/union2.t03.htm. The percentage of private sector employees represented by unions in 2014 is larger than the percentage having union membership and may be more indicative of bargaining unit members who could be participants in multiemployer pension plans *if* such participation was collectively bargained. In 2014, 7.4% of the private sector workforce was represented by unions (*id*.); the percentage for 1974 is not available.

[7] 29 U.S.C. § 1104(a)(1)(C) (2012).

[8] 29 U.S.C. § 1302(a) (2012).

[9] 29 U.S.C. § 1322a (2012); Press Release, Pension Benefit Guaranty Corp., PBGC Maximum Insurance Benefit Increase for 2015, Oct. 27, 2014 *available at* http://www.pbgc.gov/news/press/releases/pr14-12.html (last visited Feb. 18, 2015).

[10] 29 U.S.C. § 1322 (2012); Pension Benefit Guaranty Corp. *supra*. at note 9.

[11] *Id*.

[12] Pension Protection Act of 2006, Pub. L. No. 109–280, (120 Stat. 780–84) (codified at 29 U.S.C. § 1001 et seq.).

[13] Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, Division O, 113th Cong. (2013-2014) (as introduced to the House, Dec. 9, 2014)

[14] Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law 113-235, Division O (2013-2014) (as passed in the Senate, Dec. 13, 2014).

[15] 29 U.S.C. § 1023(d)(10) (2012).

[16] 29 U.S.C. § 1023(a)(4)(A) (2012).

[17] 26 U.S.C. § 432(b)(3) (2012).

[18] A "plan sponsor," including "the association, committee, joint board of trustees, other similar group of representatives of the parties who establish or maintain [a multiemployer] plan," that fails to adopt a rehabilitation plan as statutorily required for plans in critical status could be exposed to a substantial excise tax of at least $1,100 for each day of violation until a rehabilitation plan is adopted. 26 U.S.C. § 4971(g)(4) (2012).

[19] 26 U.S.C. § 432(a)(2), (b)(2) (2012).

[20] 26 U.S.C. § 432(e)(8) (2012).

[21] 26 U.S.C. § 432(a)(1), (b)(1) (2012).

[22] Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, Division O, 113th Cong. (2013-2014) (codified at Multiemployer Pension Reform Act § 102, 29 U.S.C. § 1085 and 26 U.S.C. § 432).

[23] *Id*. (approval of benefit suspension must clear the Secretary of the Treasury *and* a vote by plan participants and beneficiaries).

[24] 29 U.S.C. § 186(c)(5) (2012).

[25] 29 U.S.C. §1002(21)(A) (2012). Investment advisers receiving a fee or other compensation are included in the definition, as well. *Id*.

[26] 29 U.S.C. §1104(a)(1)(A) (2012).

[27] "[W]hile ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." Mertens v. Hewitt Assocs., 508 U.S. 248, 253-54 (1993).

[28] U.S. Dep't of Labor, *Meeting Your Fiduciary Responsibilities*, http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited Feb. 18, 2015).

[29] 29 U.S.C. § 1109(a) (2012).

[30] 29 U.S.C. § 1105(a) (2012).

[31] 29 U.S.C. § 1132(a)(2) (2012).

[32] *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir.1983), *cert. denied*, 464 U.S. 845 (1983) (no employer standing to sue because employers are not among persons enumerated in Section 1132(e)(1)); *but cf. Fentron Industries, Inc. v. National Shopmen Pension Fund,* 674 F.2d 1300, 1305 (9th Cir.1982) (no statutory prohibition on employer suits to enforce ERISA) .

[33] *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985).

[34] 29 U.S.C. § 1391 (2012). Withdrawal liability was not an initial feature of ERISA; it was introduced with the enactment of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified at 29 U.S.C. §1381 et seq.).

[35] 29 U.S.C. §§ 1381, 1383(a) (2012). A "partial withdrawal" occurs, generally, if there is a 70 percent decline in contribution base units in a three-year testing period (consisting of the current plan year and the two preceding plan years), relative to the highest two-year average in the five-year period preceding the three-year testing period, or there is a partial cessation of the employer's contribution obligation. 29 U.S.C. § 1385(a–b) (2012).

[36] 29 U.S.C. § 1369(b) (2012).

[37] 29 U.S.C. § 1398 (2012).

[38] 29 U.S.C. § 1384(a)(1)(A) (2012) Essentially, the purchaser must become bound by a collective bargaining agreement with the same basis and amount of pension fund contributions as the seller and substantially maintain the same headcount of employees for whom pension contributions had been made by the seller. The statute additionally requires: (1) a bond or escrow amount (equal to the seller's highest annual contribution for a specified period) to be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first five plan years beginning after the sale; and (2) provision in the contract of sale that, if the purchaser withdraws in a complete or partial withdrawal during the first five plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations if the liability of the purchaser with respect to the plan is not paid. 29 U.S.C. § 1384(a)(1)(B), (C) (2012).

[39] In any given situation, the amount of withdrawal liability actually paid may total less than the full amount assessed because ERISA provides for amortization of assessed liability in "level annual payments" based on the highest average number of employees and hours worked in three consecutive plan years in the past ten consecutive years (technically, "contribution base units") and the highest rate of contribution—but with a 20-year cap on payments. 29 U.S.C. § 1399(c)(1) (2012).

[40] 29 U.S.C. § 1393(a)(1) (2012).

[41] 29 U.S.C. § 1411 (2012); 29 U.S.C. § 1411 (2012); Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, Division O, 113th Cong. (2013-2014) (codified at Multiemployer Pension Reform Act § 121, 29 U.S.C. § 1411). (Under section 121 of MPRA, the PBGC may take such actions as it deems appropriate to promote and facilitate the merger of two or more multiemployer plans if it determines that the transaction is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the overall interests of the participants and beneficiaries of any of the plans.)

[42] 29 U.S.C. § 1391(b), (c), (d) (2012).

[43] 29 U.S.C. § 1390 (2012).

[44] 29 U.S.C. § 1401(a)(1) (2012).

[45] 29 U.S.C. § 1401(b)(2) (2012).

[46] 29 U.S.C. § 1401(c) (2012).

[47] *Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund*, 982 F.2d 857, 860 (3d Cir. 1992) (affirming District Court decision vacating arbitration award and rejecting arbitrator's determination of date withdrawal occurred when normal business operations ceased, even though contributions continued for non-operational tasks incidental to a total closing).

[48] New England Teamsters & Trucking Industry Pension Fund, *Alternate Schedule of Benefits* 14 (Oct. 2010), *available at* http://www.nettipf.com/pdf_files/newplanspd.pdf.

[49] 29 U.S.C. § 1413(b)(1), (d) (2012); Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, Division O, 113th Cong. (2013-2014) (codified at Multiemployer Pension Reform Act § 122, 29 U.S.C. § 1413).

[50] 29 U.S.C. § 1413(b)(2), (3), (4) (2012); Pub. Law No. 113-235, Division O, 113th Cong. (2013-2014) (codified at Multiemployer Pension Reform Act § 122, 29 U.S.C. § 1413).

[51] Sarbanes-Oxley Act of 2002 Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 15 U.S.C. 7201 et seq.).

[52] Sarbanes-Oxley Act of 2002 Pub. L. No. 107-204, § 301, 116 Stat. 745–76 (2002) (codified at 15 U.S.C. § 7201 et seq.).

[53] White Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, §952, 116 Stat. 804–05 (2002) (codified at 18 U.S.C. § 1341).

[54] 29 U.S.C. § 1105(a)(3) (2012).

[55] 29 U.S.C. § 186(c)(5)(B) (2012). The statute requires that "employees and employers are equally represented in the administration of such fund, *together with such neutral persons* as the representatives of the employers and the representatives of employees may agree upon." *Id*. (emphasis added).