LEGISLATION AFFECTING EMPLOYEE BENEFITS:
Where things stand now

By

Phyllis C. Borzi
O’Donoghue & O’Donoghue
Washington, D.C.

I. Legislation passed by the 106th Congress with provisions related to employee benefits

A. **Y2K Act (H.R. 775)** - Became P.L. 106-37 on July 20, 1999 – This legislation established certain procedures relating to civil actions brought for damages in connection with the failure of any device or system to deal with the transition from the year 1999 to the year 2000 (see separate outline on this topic)

B. **Taxpayer Refund and Relief Act of 1999 (H.R. 2488)** – Vetoed by the President on August 5, 1999, this bill contained a number of pension provisions that have now been added to various other pieces of legislation described below in pending legislation section.

C. **Consolidated Appropriations Act of 1999 (H.R. 3194)** - Became P.L. 106-113 on November 29, 1999 – This legislation included a provision authorizing an emergency transfer of interest earned by the Abandoned Mine Reclamation Fund to the United Mine Workers of America Combined Benefit Fund to cover collection shortfalls. The fund was established through the 1992 Coal Industry Retiree Health Benefit Act and is financed through a tax paid by current and former mining employers and related parties.

D. **Ticket to Work and Work Incentives Improvement Act of 1999 (H.R. 1180)** – Became P.L. 106-170 on December 17, 1999 - The new law contains provisions that would extend several expired or expiring tax provisions were added to H.R. 1180, legislation designed to ensure that the disabled can enter the workforce without losing their government health benefits. These provisions were adopted as revenue offsets and include:

- Extending the exclusion under IRC §127 for employer-provided undergraduate-level educational assistance until December 31, 2001, and
• Extending the life of provisions under IRC §420 that permit employers to transfer excess defined benefit plans assets to fund retiree health benefits through a 401(h) account to cover transfers made before October 1, 2006. In addition, employers would be able to use “cost” rather than “benefits” to satisfy the 5-year maintenance of effort requirement.

E. **Senior Citizens’ Freedom to Work Act of 2000 (H.R. 5)** – Became P.L. 106-182 on April 7, 2000 – The new law repeals the Social Security retirement earnings test for people who have reached the age at which they qualify for unreduced retirement benefits (age 65 in 2000). Individuals who attain age 65 in 2000 are allowed to earn up to $17,000 in the months before age 65 without a reduction in benefits. Excess earnings result in withholding $1 in benefits for each $3 earned. However, benefits are payable for each month after attainment of age 65, regardless of how much the person earned. A special prorated rule applies to self-employed individuals who are age 65 or older in 2000.

The law is retroactive to January 1, 2000, so those individuals whose benefits were adjusted or suspended because of the earnings test will automatically receive refunds from SSA. However, individuals who are 65 or older in 2000 and who did not apply for benefits because they knew that their earnings were too high under previous law must file an application with the SSA to establish their right to benefits. There is a six-month limit on retroactive applications for benefits, and, of course, applications cannot be retroactive to months preceding the month in which the individual became 65.

Note that there is no change for Social Security beneficiaries who are under age 65 during the entire year 2000.

F. **Worker Economic Opportunity Act (S. 2323)** – Became P.L. 106-202 on May 18, 2000 – This law amends the Fair Labor Standards Act to permit employers to exclude stock option profits in overtime pay for hourly workers. The law was passed in response to a Department of Labor advisory opinion issued last year which appeared to require employers to base overtime pay not only on their hourly employees’ regular wages but also on any profits that employees made from exercising stock options. This caused great consternation, particularly in the high tech industry, because it would have increased the overtime costs for employers who offer stock options to their non-management employees.

II. **Pending Legislation**

A. **Minimum wage** (Wage and Employment Growth Act of 1999, H.R. 3081) – On March 9, 2000, the House passed this bill increasing the minimum wage by $1 per hour over 3 years and cut taxes by $30 billion over 5 years. The pension provisions in the vetoed tax bill (except for the IRA expansions) were included
in the Ways and Means Committee package adopted by the House on March 9, 2000. On November 9, 1999, the same day the Ways and Means Committee reported H.R. 3081, the Senate passed a similar set of minimum wage and tax provisions, but as an amendment to the bankruptcy reform bill (S. 625). The Senate tax provisions were about half the size of the House bill, costing $18.4 billion over 5 years and $75 billion over 10 years. Many of the pension provisions in the vetoed tax package were also included in the Senate amendment.

B. Cash balance plans – A number of bills have been introduced, primarily focusing on increased disclosure for conversions, although some would preclude common features of conversions, such as “wear away” (a period of time in which an employee earns no additional accrual for service because his or her benefit under the old benefit formula is greater than under the cash balance plan; accruals will resume when the benefit under the cash balance “catches up” to the frozen benefit under the old plan). Other proposals would require employers to give certain groups of employees a choice between staying under the old benefit formula for future years or having their benefit calculated under the new cash balance formula. These bills include S. 659/H.R. 1176 (Moynihan/Weller – increased disclosure), S. 1708/H.R. 3047 (Moynihan/Matsui/Weller and supported by the Administration – increased disclosure), S.1640/H.R. 2902 (Wellstone/Sanders – precludes “wear away” and requires employee choice), S. 1300 (Harkin – also precludes “wear away”) and H.R. 2759 (Hinchley/Sanders) also precludes “wear away” and requires employee choice. The debate continues to rage over whether conversions to cash balance plans violate the Code, ERISA, and/or the Age Discrimination in Employment Act (ADEA) and whether the basic structure of cash balance plans are legal.

C. Managed care – The Senate passed its version of the Patient Protection Act (S. 1344) on July 15, 1999. The House passed its bill (H.R. 2990) on October 6, 1999, combining in a single bill the Republican access and tax bill (H.R. 2990) with the Norwood/Dingell bill (H.R. 2723). On October 14, 1999, the Senate took up the House bill, substituted the text of its bill for the House text and demanded a conference. Senate conferees were appointed on October 14, 1999 and House conferees on November 3, 1999. When the second session of Congress began in January, the conferees began to meet. As of the date this paper is written, no agreement has yet been reached. Attached, however, is a short side-by-side analysis of the two bills published by the Kaiser Family Foundation of both the House and Senate versions of the bill.

D. Medical privacy – Although a number of bills are pending, none passed Congress prior to the August 21, 1999 deadline in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Thus the Secretary of Health and Human Services (HHS) promulgated proposed privacy regulations in accordance with her HIPAA mandate on November 1, 1999. Congressional efforts to pass a more comprehensive privacy statute continue.
E. **Electronic signatures** (Global and National Commerce Act, H.R. 1714) - On Nov. 12, 1999, the House passed legislation creating national standards for electronic signatures and records and prohibit the enactment of state laws denying the legality of agreements that are electronically signed. Although the Administration has threatened a veto arguing that the bill would undermine consumer protections, the bill passed the House by an overwhelming 356-66 vote.

F. **Prescription drug benefits for Medicare beneficiaries** – In its proposed Fiscal Year 2001 Budget, the Administration called for the creation of a Medicare prescription drug benefit available to all beneficiaries with no deductible, but with a monthly premium the first year of $26. Initially the benefit would be half of a beneficiary’s drug costs up to $2000 per year, but, in 2009, when fully phased-in, the dollar limitation on the benefit would be $5,000. The new benefit would be part of Medicare but administered by private sector pharmacy benefit managers (PBMs) or other qualified entities. The Congressional Republican leadership opposes the Administration’s proposal because it is an expansion of Medicare and supports an approach making prescription drug benefits available through the private insurance market.

G. **Bankruptcy reform bill** - The House passed H.R. 833, comprehensive bankruptcy reform legislation, on May 5, 1999. On February 2, 2000, the Senate took up the House bill, substituted the text of a similar bill it had been considering (S. 625) and demanded a conference. As previously noted, the Senate amendment to the House bill contained many of the pension reform provisions that were in the vetoed tax bill from last year. Although the conferees have been working to reach agreement, it is unclear what the ultimate likelihood of passage for this bill will be. A benefits-related controversy arose over a provision in the Senate bill championed by Senator Charles Grassley (R-IA) that would permit consumers to waive their rights to have their pension benefits protected from the reach of credit card creditors under the anti-alienation provisions of ERISA and the Code. Hearings were held focusing on this issue and the provision was opposed by the Administration and a wide range of diverse organizations, including business consumer groups.

### III. Outlook

Election politics will dominate the legislative landscape as each party positions itself for November.

It is possible that Congress and the Administration will agree on a relatively narrow set of patient protections, but so far the response of many Members of Congress and their constituency groups to the three key issues to be resolved has often been long on emotion and short on objectivity. These issues are (1) which
group of participants will be protected by the new rules (the “scope” of the bill), (2) the extent to which an external reviewer will be bound by the health plan’s definition and interpretation of key terms such as “medical necessity,” “experimental and “investigational,” and (3) whether the current judicial rights that participants have under ERISA §502 to challenge improper health care coverage decisions ought to be expanded and the remedies for successful plaintiffs broadened. On the latter issue, the options under consideration at this point seem to be: (1) make no change in ERISA §502, but add a requirement for plans to provide for independent external review of coverage decisions; (2) take the House approach and permit participants under certain circumstances to sue in tort under state law for injuries that occur because of bad coverage decisions; (3) expand participants’ rights and remedies under ERISA that participants have for substandard coverage decisions.

The future of the pension reforms that were in the tax bill President Clinton vetoed is linked to the question of whether or not a viable legislative vehicle exists to carry them to enactment. Currently they are attached to the House minimum wage bill the President opposes and the Senate version of the bankruptcy reform bill whose future is in doubt. Both parties have a keen interest in repealing the marriage penalty and that proposal could provide a vehicle for pension reforms, although there is no agreement on the size and scope of any underlying tax bill. In fact, the House and Senate Republican leadership have not themselves even reached agreement on the parameters of a tax bill. The sponsors of the leading pension reform bill, Representatives Rob Portman (R-IL) and Ben Cardin (D-MD) have said they would try to move a stand-alone bill if all else fails, but the chances of it passing are even more unlikely since some of the provisions (such as raising the contribution limits and revisions to the top-heavy rules) are quite controversial.

Cash balance plan legislation is likely, perhaps on a tax bill, although it is unclear what form it will take. Clear consensus has emerged about the need for additional disclosure for participants whose defined benefit plans are being converted to cash balance plans (or other non-traditional defined benefit plans), but important details need to be worked out. These include how detailed and personalized the disclosure would have to be, to whom the information must be given, what is the appropriate time frame for disclosure, and how the information should be communicated. In addition, there is likely to be pressure on Congress to go beyond disclosure and address other concerns, such as “wearaway,” employee choice, and related age discrimination problems. Unlike the pension reform proposals which are unlikely to pass on their own, cash balance plan legislation seems to have “legs” – and because of the tremendous play the IBM conversion has received in the popular press, this legislation could, in fact, move separately if a bipartisan proposal emerged.

Meanwhile Social Security and Medicare reform appear to be on the back burner. Although the Presidential candidates are speaking out and offering general proposals to deal with these critical issues, legislative activity is highly unlikely until after the election. The sole exception is the probability that some form of a
prescription drug benefit for the elderly will be enacted. Both parties have a keen interest in courting the senior vote and will be looking for ways to reach agreement on a modest drug benefit to present to the voters this fall.