
the dana report

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ABOUT THE FIRMS

Dana Consulting Group, Ltd. and Jennings Law Firm, Ltd. were established to provide employers with a single source of comprehensive legal and consulting services relating to retirement plan and employee benefit matters.

QUOTES

"I must do something" will always solve more problems than "Something must be done."

- Anonymous

The men who try to do something and fail are infinitely better than those who try to do nothing and succeed.

- Lloyd James

You can't build a reputation on what you're going to do.

- Henry Ford

Route To:

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Defined Benefit Plans: Their Fall & Revitalization

Kenneth Porter, chief actuary and senior VP of international benefits at the American Benefits Council, a consultancy studying employee benefit programs around the world, recently gave a speech about defined benefit plans (DB plans). He made some very interesting remarks:

1. Many factors contributed to the downfall of DB plans but a "major" factor was Congress' lack of vision and their inability to develop a national retirement income policy. Many large employers tried to get Congress in 2006 to think in terms of such a national policy but were unsuccessful.
2. Globalization also played a large role by focusing employers on cost cutting. To compete globally required employer to have a cost structure that could compete globally, not just in the US. Over time this has translated into lower US wages and reduced opportunity for American workers to save.
3. Mr. Porter also cited a shift from blue-collar jobs to white-collar jobs requiring a college education. Apparently at the university level, professors who participated in the defined-contribution model TIAA-CREF program encouraged students to seek employment with companies offering similar programs. This led high tech employers to devise robust defined contribution-type plans to attract the workers they needed.
4. Finally, he cited corporate concerns over shareholder lawsuits. There was a time when there was concern that discount interest rates might increase and result in permanently built up surpluses

in DB plans that could not be reached. These lawsuits never materialized but their perception remains. DB plans also became far too complex; from the employers' perspective the unknown simply became unknowable.

Your author has been advising employers on retirement plan matters since 1981. I cannot agree more that the country needs a national policy on retirement savings. Congress is unlikely to be the right place to develop this policy since Congress does not tackle large problems well. What success has occurred in changing ERISA and the tax code over the years has occurred in baby steps and this is unlikely to change. Too few members of Congress understand how the retirement plan rules operate and are unable to think broadly about national policy. Also with attitudes expressed by senators such as Harry Reid (see next article), there seems to be little interest at the congressional level to make any hard choices.

It is unlikely large companies will establish DB plans (or their sister - the cash balance plan) in the future but small employers may. The regulatory environment must be simplified and streamlined. The actuarial rules need to be simplified. Employers need to understand what their liabilities are with these plans so they can make informed decisions. Cash balance plans can be designed to provide a guaranteed basic benefit for rank and file employees, but still give employees the opportunity to save in their 401(k) plans and participate in the long term growth of the stock market. These "combo plan" arrangements provide rank and file employees with a solid retirement program yet still give the owners the tax benefits they need to make these combo plans financially realistic. Congress seems to understand this (at times) and the rules governing cash balance plans have improved. While more changes are necessary, we don't expect those changes to occur rapidly. ■

Harry Reid Agrees to Reform SS Finances - in 20 Years!!!

Much is written all the time about the sorry state of Social Security's finances and the wrangling going on in Washington, DC on what to do about it. Senator Harry Reid (D. Nevada) was recently quoted as saying he would "consider" reforming Social Security - IN 20 YEARS. Mr. Reid is currently 70 years old and in 20 years he will either be dead or near the end of collecting all of his government pension. ■

Americans Are Less Confident About Retirement Security

Americans' confidence in having enough money to last during retirement is at an all-time low, according to a recent survey. The annual survey, *The 2011 Retirement Confidence Survey*, is conducted by the Employee Benefit Research Institute, a well known and respected consultancy.

1. Most respondents acknowledge they have not adequately saved for retirement but they have not changed their savings habits. Only 13% of respondents expressed confidence in having adequate retirement savings.
2. About 20% of respondents expect to work longer to make up the shortfall.
3. 56% of respondents indicated they have less than \$25,000 in savings and investments (excluding their homes and any defined benefit plan benefits).
4. 31% of respondents think they need less than \$250,000 to have a comfortable retirement.
5. 42% of respondents determined their retirement savings needs by guessing.
6. 16% of respondents do not expect to ever receive Social Security.

7. 45% of respondents who were already retired said they retired earlier than they would have liked due to health problems or disability. ■

Employee vs. Independent Contractor - An Update

The IRS has long been of the view that misclassification of workers is one of the areas on greatest noncompliance in the tax laws. The IRS is insistent that this classification problem is costing the Treasury Dept billions of dollars and that something "needs to be done." The legislative effort has not just focused on proper classification but on penalties. For many years Congress tried to persuade errant employers to come clean with relief from draconian penalties. For example, as far back as 1978 is what became known as Section 530, relief was provided to employers. To the IRS however this was little more than a free get out of jail card. Congress's forgiving nature may be coming to an end. President Obama has included in his 2012 budget proposal new ideas to close what is now being viewed as a loophole.

Stiff IRS penalties are not the only risks facing employers who improperly classify workers as independent contractors. If what was viewed as a watershed case, the 9th Circuit Court of Appeals permitted workers classified as independent contractors by Microsoft Corporation to sue to receive benefits restricted to employees. Those "employees" were successful in obtaining those benefits.

Employers who continue to classify workers as independent contractors should take definite steps to buttress their argument that these workers are properly classified. For example, employers should consider the following steps to defend their classification of workers as independent contractors: use written service agreements and/or require workers to be incorporated. ■

IRS EPCRS Program

Martin Pippins, newly installed at the IRS in charge of EPCRS filings, indicated recently that the Service expects to receive over 6,000 filings in 2011 to correct document and other operational failures affecting qualified retirement plans. He said there are only 50 employees at the Service available to process those submissions.

EPCRS is a program offered by the IRS to permit employers to voluntarily correct various failures occurring with their employee retirement plans. Employers often complain about the long time it takes for the Service to process these applications. We have seen several filings languish for over a year. Mr. Pippins said he is looking at ways to speed things up. ■

Who is a Fiduciary?

The Labor Dept has posted a fact sheet on its website regarding its proposal to change the definition of fiduciary under ERISA? For those advisors who service ERISA plans, this is a document you should be familiar with. The fact sheet can be found at <http://www.dol.gov/ebsa/newsroom/fsfiduciary.html>. ■

DOMA Update

In our March edition of The Dana Report, we reported that the Dept of Justice will no longer defend Section 3 of the Defense of Marriage Act that defines marriage as the exclusive union between a man and woman. Some of the effects of this position include IRA contributions for non-working same-sex spouses, and survivor benefits under qualified retirement plans and Social Security. The US district court in Massachusetts has already held Section 3 unconstitutional and, as of today, no less than 12 bills have been introduced into Congress addressing same-sex marriage. ■



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