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CURRENT LEGISLATION

LABOR LEGISLATION

Since 1954, Congress has become increasingly concerned with the problems raised by the rapid and unregulated development of the size, scope and power of employee welfare and pension plans, and, after hearings in 1954, 1956 and 1957, Congress finally adopted the Welfare and Pension Plan Disclosure Act.[1] The special Senate committee reporting the bill in 1958 stated that there was a three-fold problem. First, insurance abuses had to be curbed;[2] second, administration abuses and mismanagement had to be ended; and third, a general disclosure of plan financial activity had to be made in order to protect the rights of the beneficiaries of the plans.[3] The 1958 Senate version of the bill, supported by President Eisenhower,[4] attempted to solve this problem by requiring disclosure of the financial activity of such plans, coupling this with criminal sanctions for failure to comply with the provisions of the bill. Preferring to rely on legal action taken by individual employees, and feeling that mere disclosure would end dishonest plan administration, the House of Representatives was less willing than the Senate to impose criminal liability for welfare and pension plan abuse.[5] The House version of the bill, containing no criminal sanctions,[6] was passed by both houses and signed by the President, who admitted approving the bill with reservations, anticipating that later amendments would considerably strengthen the new law.[7]

This expectation was realized on March 12, 1962, when Congress passed amendments to the Welfare and Pension Plan Disclosure Act.[8] Two years of experience with the 1958 law indicated that the Department of Labor, where reports of welfare and pension plan activity were made, had become "a mere repository" of documents,[9] and furthermore, as the then Secretary of Labor Arthur J. Goldberg stated, these were only summary reports.[10] Moreover, 25,000 of these were delinquent. Goldberg complained that binding, uniform interpretation of technical wording was needed but unauthorized by the existing laws;[11] that the reliance of the bill on individual employee and bene-

[1] 72 Stat. 997, 29 U.S.C. §§ 301-09 (1958).

[2] 3 U.S. Code Cong. & Ad. News 4146 (1958). The Senate committee cited such undesirable practices as payment of exorbitant commissions, charging of fictitious and excessive administrative fees and switching of carriers to obtain high first year premiums.

[3] Id. at 4139-40.

[4] Id. at 5408.

[5] Id. at 4190.

[6] The House report is not explicit as to the reasons for omitting criminal penalties. Perhaps it is, as one commentator suggests, that the House of Representatives wanted time to study the incoming reports before deciding on specific positive action. See 42 L.R.R.M. 86-87 (1958).

[7] U.S. Code Cong. & Ad. News 505 (1962).

[8] 76 Stat. 35 (1962), 29 U.S.C.A. §§ 301-09 (Supp. 1962), amending 72 Stat. 997, 29 U.S.C. §§ 301-09 (1958) (hereinafter referred to by section).

[9] U.S. Code Cong. & Ad. News 509 (1962).

[10] Id. at 506.

[11] Prior to passage of the amendments the Secretary of Labor issued "interim memoranda" on such items as exemption from filing, L.R.X. 8604 (1959); Whether a

ficiary complaint and court action was unrealistic;[12] that the Secretary sorely needed investigatory and enforcement powers to effectively administer the act; and finally, that flagrant abuses such as conflicts of interest, kickbacks and embezzlements were still not punishable under the act.[13]

The amendments are a multi-pronged weapon attempting to employ administrative, criminal and financial sanctions to wrongdoing, and seeking to alleviate some of the confusion with regard to such matters as what information must be filed and who must file. Such confusion arose during the first two years of the act, leaving plan administrators in the dark as to what their responsibility was under the new law. The fog-clearing process has been facilitated, first of all, by the inclusion in the amendments of a definitional section[14] which clearly applies the act to the District of Columbia and possessions of the United States generally, spells out the scope of the act as being concurrent with that of the Taft-Hartley Act and the Railway Labor Act, and explicitly states who is to be considered a "party in interest" under section 13 of the act which, under the amendments, requires disclosure of such a person's interest in a plan.

In addition to definitions, however, Congress has attempted to make compliance with the law easier by allowing the Secretary of Labor to issue binding administrative rulings in advance of action contemplated by plan administrators subject to the act in much the same fashion as followed by the Internal Revenue Service.[15] These rulings should have the effect of eliminating needless litigation and of providing plan administrators with a measure of certainty that they are complying with the law. Moreover, the Secretary of Labor has been empowered by the amendments to issue regulations regarding the form of the welfare and pension plan reports, and, in his discretion, to relieve plan administrators of their duty to supply certain information which he finds to be repetitive, uninformative or not readily ascertainable.[16] This, too, should be a welcome improvement. The committee reporting the bill for these amendments expressed the legislative intent that this leeway granted the Secretary would be used to simplify reports,[17] and to this end section 9 of the amendments specifically allows a waiver of the full annual report of financial activities though not of the description of the plan required by section 16.[18]

Plan Has Been Established by an Employer, or by an Employee or by Both, L.R.X. 8605 (1959). Despite these high level rulings, no person could rely on them with certainty for each carried with it the ominous caveat that "This memorandum is . . . not an official ruling . . . authoritative interpretation . . . being left to the courts."

[12] U.S. Code Cong. & Ad. News 508 (1962). On this point the House Committee regards the record as clear "that 'self-policing' and the institution of suits by participants and beneficiaries will not result in compliance with even the provisions of the present law."

[13] Id. at 509.

[14] Section 4.

[15] Section 16(a) (setting forth new section 12 of the act).

[16] Section 7.

[17] U.S. Code Cong. & Ad. News 510 (1962).

[18] Prior to the amendments all plan administrators falling under the act had to file a thorough and exhaustive financial report. The relief granted to administrators of small funds, the assets of which are often handled by outside banks and insurance companies, should be great because it frees them from the duty to supply certain remotely obtainable information.

The importance of the amendments extends well beyond mere clarification of the original act. As has been pointed out, the most serious weakness of that act was its lack of force. The reliance which the act placed upon action by private individuals to enforce their rights based upon information made available by the required disclosure of information, previously held secret, had proved to be unrealistic.[19] The amendments recognized the fact that if protection of the rights of individual employees and beneficiaries was the major reason for the law, then further governmental action was necessary.

The first new sanction to consider is administrative. Whereas the Secretary of Labor was previously quite powerless to enforce the act, the amendments grant him administrative subpoena powers and investigative authority when compliance with the law is questioned.[20] Furthermore, the Secretary can now require an independent auditor's certification of the report[21] which should turn out to be an excellent low cost method of avoiding plan abuse. Because of the highly ethical nature of the accounting profession, it is reasonable to expect that no independent auditor would certify as a "true statement of the financial records" of a plan if there were material misstatements or omissions in those records. The possibility of an outside audit should be a real deterrent to an unscrupulous administrator who depends on secrecy and a "friendly audit" for protection. Lastly, the Secretary is now authorized to bring a civil action in a federal court to enjoin violation of the act,[22] greatly strengthening the Government's former authority to go to court only in the event of "deliberate defiance, or persistent refusal in bad faith to comply . . ."[23] with the act.

The second new sanction is criminal penalty. The amendments add to Title 18 of the United States Code three new felonies: theft or embezzlement from welfare or pension plans covered by the act;[24] concealment of facts which are required to be disclosed under the act,[25] and kickbacks by or to officials of plans covered by the act.[26] Inasmuch as federal crimes must be statutory, the federal government was powerless to act against baldfaced thievery such as had been occurring.[27] While state prosecution was, and still is, a possibility, local prosecution is extremely difficult where interstate plans are involved.

Third, Congress has added financial sanctions to the act in the form of bonding requirements, and has delegated authority to the Secretary of Labor to make appropriate regulations therefor.[28] Essentially the new law

[19] 3 U.S. Code Cong. & Ad. News 4140 (1958). The congressional hearings brought out the fact that there were plan abuses and that information regarding plan management was scarce. The logical step was, as the Senate committee reporting the bill in 1958 said, "to bring the facts with respect to their financing and reserves out into the open and . . . permit self-policing and self-appraisal of these plans by the participants. . . ."

[20] Section 15(b) (setting forth new sections 9(d) and (e) of the act).

[21] Section 9(c).

[22] Section 15(b) (setting forth new section 9(f) of the act).

[23] 3 U.S. Code Cong. & Ad. News 4190 (1958).

[24] Section 17(a).

[25] Section 17(c).

[26] Section 17(e).

[27] U.S. Code Cong. & Ad. News 510 (1962).

[28] Section 16(a) (setting forth new section 13(a) of the act).

requires all administrators, officers of companies administering plans and their employees to be bonded in an amount not less than $1,000 or ten per cent of the assets of the fund, whichever is more, and not more than $500,000 or ten per cent of the fund, should the Secretary so require.[29] It is further required that the person being bonded have no interest in the insurance company issuing the bond, direct or indirect.[30] This last provision has been interpreted by the Secretary to allow the insurance company to serve a fund both as a bonding agent and as an insurer in other capacities (e.g., to underwrite liability insurance and employee life insurance). The test established is one of the bonding company's freedom to exercise an independent judgment as to the insurability of the personnel in question.[31]

The National Association of Manufacturers[32] and the United States Chamber of Commerce[33] have gone on record against the bonding provisions and the subsequently issued regulations. Their quite similar arguments are that bonding will cause an unreasonable expense and an undue burden on the beneficiaries because of the complexity of the bonding regulations and the requisite employment of expensive legal advice in interpreting them. Both organizations also raised the technical objection to there being legal duties owed to a *plan* as expressed in the regulations. As an example, the Chamber of Commerce cites the regulations whereby "certain persons" (bonding companies) are to secure any loss *to the plan*.[34] The argument runs that since many plans are not legal entities, they cannot have legal duties owed to them. It is still too early to tell whether this distinction will be drawn by the courts to anyone's disadvantage.

Another objection raised is that where several plans are jointly administered, the size of the required bond is determined not by the aggregate sum of the funds, but as if each fund were administered individually. Thus the example is given of a single fund of $50 million secured by a $500,000 bond (the usual maximum under the act) as opposed to four funds of $5 million being jointly administered, but bonded for $2 million (four multiplied by ten per cent of each fund). Hence the curious situation arises where a $50 million fund is secured by an amount equalling but one per cent of its value as opposed to a $20 million fund being secured by a bond equalling a full ten per cent of the plan's worth. This would seem, on the surface, to be a valid objection, but it should be noted that the $500,000 ceiling can be raised to ten per cent of the fund if the Secretary feels that this is necessary to safeguard these assets.[35] Again it is too early to determine whether the discretionary aspect of increasing the bond beyond $500,000 will result in an injustice.

The bonding provisions could, in addition to insuring the funds, have

[29] Ibid.

[30] Section 16(a) (setting forth new section 13(c) of the act).

[31] 51 Lab. Rel. Rep. 237 (Nov. 5, 1962). For the full text of the ruling see L.R.X. 8691 (1959). The Secretary points out that the purpose of limiting the insurer's connection with the plan was to force all plan administrators to pass under the scrutiny of a bonding company, and that this purpose would not be thwarted merely because an insurance company did more than one type of business with a plan.

[32] 51 Lab. Rel. Rep. 188 (Oct. 22, 1962).

[33] 51 id. 166 (Oct. 15, 1962).

[34] Ibid.

[35] Supra note 28.

the further benefit of eliminating criminal influences from positions of plan management, for underwriters make it a practice to investigate the background and character of those for whom they have been invited to issue a bond. They are loath to insure losses when convicted criminals are closely involved in financial activities, the honest administration of which is vital to the underwriter's profit. Already apparent are the difficulties faced by one major union in obtaining the bond coverage required by the Landrum-Griffin Act, even when allowed "blanket bonds."[36] Thus the inability of a questionable individual to obtain a bond, together with other judicial, administrative and financial sanctions, should make the Welfare and Pension Plan Disclosure Act the protector of employee benefits that it was originally intended to be.

The amendments, in addition to clarification and enforcement sections, include a provision for a council to advise the Secretary of Labor regarding enforcement and interpretation of the act.[37] Hopefully, the House committee reporting the bill was correct in its expectation that the council will render great help to the Secretary and gain the cooperation of interested groups.[38]

STEPHEN M. RICHMOND

SECURED TRANSACTIONS

New Jersey has recently amended sections 9-204 and 9-312 of its Commercial Transactions statute[1] by deleting three subsections, all relating to security interests in after-acquired property.[2]

[36] 51 Lab. Rel. Rep. 106 (Oct. 1, 1962).
[37] Section 16(a) (setting forth new section 14 of the act).
[38] U.S. Code Cong. & Ad. News 511 (1962).

[1] N.J. Stat. Ann. §§ 12A: 9-204 & 9-312 (1961).
[2] Section 9-204. When Security Interest Attaches; After-Acquired Property; Future Advances.

(1) A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights

[(a) in crops until they are planted or otherwise become growing crops, in the young of livestock until they are conceived;]

. . . .

(4) No security interest attaches under an after-acquired property clause

[(a) to crops which become such more than one year after the security agreement is executed except that a security interest in crops which is given in conjunction with a lease or a land purchase or improvement transaction evidenced by a contract, mortgage or deed of trust may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction;]

Section 9-312. Priorities Among Conflicting Security Interests in the Same Collateral.

[(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than 3 months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such