NRLN
NATIONAL RETIREE
LEGISLATIVE NETWORK

Pension Plan Risks in Mergers, Acquisitions and Spin-offs

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Talking Points

Certain corporate transactions – particularly the spin-off of under-performing subsidiaries – greatly increase the risk of a distress termination and benefit losses for retirees.

Congress needs to update a number of ERISA provisions to ensure that both pension spin-offs and the merger of plans following M&A activity do not unnecessarily increase the risk of a distress termination and permanent pension losses for plan participants.

The stakes are high for workers and retirees when an under-funded pension plan is terminated or abandoned. Although most retirees continue to receive their monthly benefit, when an under-funded pension plan terminates it imposes an ***immediate and permanent loss of income*** on beneficiaries.

As globalization and the acquisition of American companies by foreign firms and investors becomes increasingly common, there is a particular concern about the PBGC's ability to deter plan terminations by, or recover assets from, foreign-owned or foreign-based plan sponsors and named fiduciaries.

Unfortunately, the PBGC and other federal regulators lack the tools to protect retirees from unnecessary and severe terminations. ERISA's outdated and narrow protections create a number of gaps that harm retirees and worsen the PBGC's reported deficits.

These tools are neither broad enough in scope nor flexible enough to deal with an under-funded plan. There are major gaps in the law that undermine efforts to prevent a pension plan from default.

The NRLN recommends six changes for legislation, regulatory reform and stepped-up enforcement:
1. **Congress should give regulators broader and more flexible authority under Section 4042(a) to negotiate or seek court approval for a more tailored remedy, short of plan termination**, to address spin-offs or other transactions that greatly increase the risk of future loss to the PBGC and participants.
2. Congress should further amend Section 4042(a) to authorize the PBGC to initiate proceedings to terminate a plan, or seek an alternative remedy short of plan termination, if a spin-off, controlled group break-up, takeover by a foreign entity or other corporate transaction transfers 20% or more of the plan's benefit liabilities without a commensurate and sufficient transfer of assets.
3. Congress needs to clarify that the PBGC has the authority to enforce a lien against all U.S.-based assets of the parent company of a foreign-owned plan sponsor even if those other assets or subsidiaries are not considered part of the controlled group sponsoring the plan.
4. The Department of Labor should revise its regulations **clarify that fiduciaries under ERISA – especially contributing sponsors and "named fiduciaries" – must be subject to the jurisdiction of federal district courts for the enforcement of judgments for potential breaches of fiduciary duty**.
5. Congress should **add the proposed transfer or spin-off of pension assets or liabilities to a foreign controlled group or entity to the list of transactions requiring an Advance Notice of Reportable Events, triggering special scrutiny under the PBGC's Early Warning Program.**
6. Congress should require that intra-firm plan mergers are reportable events, as ERISA originally required, that require review and pre-approval of PBGC, particularly if any of the plans are in at-risk status, as NRLN proposes in a separate white paper on *Defined Benefit Pension Plan Mergers*.

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