



NRLN Legislative Agenda – 2011

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PROTECTION AND ENHANCEMENT OF RETIREE INCOME:

Pension Asset Protection (PAP) Proposal*:

We urge creation, sponsorship and passage of a bill that limits the ability of a company to tap pension assets to pay for what properly should be considered restructuring expense. Such new legislation, likely an amendment to ERISA, would stop company use of pension assets to pay lump-sum severance or layoff payments and/or other enhancements to selected defined pension plan participants.

Plans bargained by unions and subject to terms of a collective agreement would be exempt from this legislation.

Such lump sum severance or layoff payments are typically granted to 10% or fewer of the total plan participants and dilute defined benefit pension plan assets. These often take the form of incentives designed to get workers to retire early, are usually offered in exchange for a waiver of rights by older workers which limits the company's age discrimination liability. Use of pension plan assets in this fashion benefits shareholders, not plans participants, and should not be paid from pension trusts.

Examination of the underlying nature of the these costs reveal they are corporate restructuring costs to be borne by shareholders not by defined benefit pension plans at the expense of plan participants. Accrued vested assets of plan participants should not be raided. Non-union plan participants have no bargaining power to limit corporate actions and should be entitled to this proposed ERISA protection. This practice has led to under-funding of defined benefit pension plans and thus directly increases the risk of under-funding and triggering PBGC takeover where plan liabilities have outgrown assets and/or where decline in equity markets have caused a loss in value of plan assets.

The IRS and Federal courts have allowed companies to hide behind current pension law to use defined benefit pension plan assets to pay such lump sum bonuses and, to date, Congress has allowed this practice to continue. The NRLN believes that such lump sum severance or layoff payments should properly be treated as a corporate expense, payable out of the corporation's own assets, not as a pension benefit paid out of defined benefit plan assets. Long-time ERISA and tax lawyers and Congressional staff have resisted legal changes in this area, arguing that plan sponsors have always been allowed to treat such expenses as pension benefit payments. This sacred-cow type thinking is not in keeping with the intent of ERISA, the 2006 Pension Protection Act or the vested rights of defined benefit pension plan participants.

**The NRLN has published a whitepaper on this initiative, see at www.nrln.org*

Included Asset Protection Issues Proposed by the NRLN:

Management of Defined Pension Plans By High Risk Third Parties:

Additional amendments to the Pension Reform Act of 2006 must (a) Protect defined pension fund assets from being bought out by management firms, hedge funds, or other high risk third parties; (b) Must protect the integrity of Defined Pension funds against schemes designed to enhance corporate profits.

Misuse of Defined Pension Plans to Enhance Executive Deferred Compensation:

The Pension Reform Act of 2006 must reaffirm IRS rules that state that Defined Pension Plans “Must not discriminate in favor of highly compensated employees”. If a company desires to provide enhanced supplemental deferred compensation (Qserp), it must do so without any tax advantages gained through Defined Pension Plans.

The use of plan assets as indicated above effectively constitutes reversions that place pension security at risk and deny participants the opportunity to benefit from IRS Sec 420 transfers to pay for health care and preclude COLA consideration.

Pension Benefit Guarantee Corporation (PBGC) Reform*

The PBGC currently treats changes in the annual earnings limits, mandated by Congress, as modifications to the pension plans themselves, and has applied the lowest annual earnings limit during the five –year look-back period when calculating retiree benefits. These changes result from applying IRS code changes under sections 401 (a) and 415 (b).

Current PBGC rules permit the disqualification of certain retiree vested pension benefits if granted within a five-year window prior to pension plan termination. The result has been loss of retiree vested benefits that should be protected by ERISA.

Proposed PBGC Rules and Regulations Changes:

- The PBGC shall use the Defined Benefit Plan income and pension benefit limitations defined in IRS codes 401 (a) and 415 (b) in effect on the date of the plan termination when calculating the pension benefits payable under Priority Category Three (PC3).
- PBGC rules be modified to require the PBGC to use the retiree’s age and length of service used to determine his/her benefit at retirement or termination whichever is higher when calculating and determining the PBGC pension benefit.

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- PBGC rules used to calculate or otherwise determine PBGC pension benefits (4010 filings) including those used to determine the termination values of plans and those accounting assumptions between ERISA fund reporting and the PBGC plan-termination-funding calculations as well as full disclosure of 4010 filings and calculations. Calculation of termination value by the PBGC should use the same discount rate called for under ERISA and used by the company to calculate the pension obligation of the terminated plan.
- Amend the PBGC reporting structure so it is accountable to one Federal Department.
- Raise to 'Administrative Status' retiree claims to assets in Bankruptcy filings.

PBGC and Pension Plan Asset Protection During Plan Terminations :

The NRLN advocates legislation that clarifies what a parent foreign owner's pension plan obligations are and advocates that the foreign owner must abide by ERISA rules, should a U.S. subsidiary be spun off or dissolved. All U.S. based assets under control of a foreign owner must be able to be seized by the PBGC in order to satisfy ERISA funding obligations. Pension plan fiduciaries would be required to be American citizens. Clarifications must include situations where foreign corporations that own U.S. subsidiaries are also acquired by a third party, foreign-owned corporation.

Bankruptcy Reform*:

Current bankruptcy laws do not offer clear rules that assure equal treatment to retirees that lose their pension and health care benefits as provided to "Secured Creditors." Bankruptcy courts have stymied retirees from making claims under Section 1114 rules by ruling for companies because they can establish the existence of a Reservation of Rights (ROR) clause.

- **Bankruptcy Law Proposed Changes:** Require that companies provide retirees with an updated list of all retirees and that such a list must be updated in a timely way throughout Bankruptcy proceedings.
- Disallow company Reservation of Rights (ROR) clauses as reason for denying retiree's rights to a Section 1114 Committee.
- Mandate Section 1114 Committee within 60 days of Chapter 11 filing date.
- Permanently increase the Health Coverage Tax Credit (HCTC) payment from 65% to 80% (post stimulus).
- Raise to "Administrative Status" retiree claims to assets in bankruptcy filings.

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- The NRLN supports legislation that would prohibit unions from negotiating or approving the reduction or termination of collectively bargained benefits of retirees including the plans that govern those benefits in bankruptcy proceedings.
- Require pension plan sponsors to fund underfunded plans after passage of 386 days from date of filing for Bankruptcy.
- A retiree who has suffered the loss of non-taxable health care benefits should not be subjected to taxation (as well as Social Security and Medicare taxation) on the settlement received in corporate bankruptcy court for the loss of health care benefits. The NRLN supports legislation that would designate as non-taxable income any bankruptcy claims and settlement for reduced or eliminated retiree-earned health care or other welfare benefits.

Pension Plan Asset Protection During a Bankruptcy Court Plan Termination:

The NRLN advocates legislation that clarifies what a parent foreign owner's pension plan obligations are and advocates that the foreign owner must abide by ERISA rules, should a U.S. subsidiary be spun off or dissolved. All U.S. based assets under control of a foreign owner must be able to be seized by Bankruptcy Courts and / or the PBGC in order to satisfy ERISA funding obligations. Pension plan fiduciaries would be required to be American citizens. Clarifications must include situations where foreign corporations that own U.S. subsidiaries are also acquired by a third party, foreign-owned corporation.

Protection of Retirees in Mergers and Acquisitions:

The advent of Globalization and attendant behavior of U.S. firms in forming joint ventures and in creating mergers and acquisitions with foreign based and owned corporations has added complexity to the determination of how U.S. retirees pension and welfare benefits are protected from being reduced or eliminated as a result of global change in ownership.

Mergers and Acquisitions activity can ultimately result in dissolution of a corporation, loss of jobs and loss of retiree pension and welfare benefits. Consequently, the involvement of Bankruptcy Courts and the PBGC are always possible outcomes of M&A effort gone badly. Thus, pension plan asset protection issues mentioned in the NRLN's PBGC and Bankruptcy Reform in other sections of this agenda may be the direct result of M&A activity.

In some cases it is clear that the ERISA provisions apply but not in all cases. It is also unclear what the rights of retirees, the PBGC and bankruptcy courts are in some situations. The NRLN is in the process of preparing a whitepaper that will form the foundation for determining which if any U.S. statutes must be modified or created to better assure retirees, the PBGC and the courts cases. When completed, the paper will

include proposed legislative solutions and or regulatory rule changes where appropriate.

The follow is a preliminary list of various areas that are understudy:

Restructuring Activities

Spin-off of under-performing subsidiaries:

What safeguards? Is PBGC Early Warning Program using adequate screens and interventions? Can Sec. 4062(a) be used (or extended) to trigger a PBGC lien if spun-off plan not 100% funded? Is it feasible for the parent to retain joint liability for some period?

Leveraged Buy Outs:

Role of PBGC Early Warning Program (EWP)? What protection from stripping assets and leaving the core company unable to maintain under-funded plan?

Downsizing

Is this a 'reportable event' and scrutinized adequately under EWP? What safeguards? Pension Asset Protection as one remedy.

Foreign Ownership and Assets

Expanding Early Warning Program scrutiny – 1) Are changes in foreign ownership a “reportable event”?; 2) should there be a heightened scrutiny for material transactions involving transfer of pension assets to foreign-controlled group (e.g., spin off/acquisition of U.S. pension liabilities)?

Treatment of pension assets and funding requirements vis-à-vis consolidation of subsidiaries by foreign-owned companies (e.g., require funding at the highest level among merged plans).

Clarify authority to impose liens on the unrelated subsidiaries or other US-based assets of foreign-based plan sponsor.

Clarify PBGC authority to treat foreign controlled group members as jointly and severally liable.

Foreign Ownership and M&A Impact on Health Care and other Welfare Benefits:

1) Clarify Impact of M&A activity as it may affect participants receiving benefits from VEBA trusts; 2) Clarify Authority to switch into new health care plan benefits in-year at the time of a Merger or Acquisition; 3) Clarify whether or not welfare benefits paid from Life Insurance or other Welfare Trusts must be maintained; 4) Clarify whether or not such Trusts are protected; 5) Examine and

clarify when Regulatory Requirements that may protect or could be changed to protect benefits during an M&A are under review; 6) Examine the impact of M&A activity on the precipitation of insolvency and potential for retiree losses in bankruptcy resulting from breakups at the time of M&A activity.

Mergers and Acquisitions activity can ultimately result in dissolution of a corporation, loss of jobs and loss of retiree pension and welfare benefits. Consequently, the involvement of Bankruptcy Courts and the PBGC are always possible outcomes of M&A effort gone badly. Thus, pension plan asset protection issues mentioned in the NRLN's PBGC and Bankruptcy Reform in other sections of this agenda may be the direct result of M&A activity.

Cash Balance Plans:

Revenue Ruling 2008-7: The NRLN supports members of Congress, AARP and the Pension Rights Center in the reversal of this ruling's endorsement of the use of "wear-away" which was rejected by Senate resolution in 2000 and prevented by the Pension Protection Act of 2006. NRLN involvement is support of other organizations and members of Congress who share our views.

Social Security Reform:

The NRLN advocates legislation that will make Social Security financially sound without reducing current and future retiree benefits. The view of the NRLN is that the Social Security system is not broken. Congress must keep its promises and honor the terms of the present system.

Current and future retirees have paid taxes to fund this benefit and the annual inflation adjustment. Congress must deal with this as a short-term problem through the period during which baby boomers enter and exit the liability pool.

PROTECTION AND ENHANCEMENT OF RETIREE HEALTH CARE:

Maintenance of Cost Protections (MCP)*:

In the event that a corporation cancels or reduces all or part of a retiree's health care benefits, including those that are ancillary such as life insurance, prescription drugs, long term care and other benefits, the employer would be required to pay to the retiree the amount the corporation had been paying on behalf of the retiree and eligible dependents, adjusted for retiree participation in Medicare, at the time of a partial or full cancellation. Companies would be entitled to tax credits as an offset against dollars paid. Retirees could use such funds to purchase supplemental insurance from

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employers or third party providers but employers would be required to continue to make available and pay administrative costs for self-insured or contracted group plans.

Eliminate Health Care Statute Inequities:

The NRLN advocates that provisions in statutes such as in Sec 720 of ERISA which allow denial of protections otherwise enacted by Congress must be stricken from such statutes. Denying enacted benefit coverage to retirees, simply because retirees are members of retiree-only plans, where such protections are otherwise afforded to younger active employees or retirees is discriminatory, is unjust and is bad policy.

The NRLN advocates that Congress enact legislation to change ERISA and H.R. 3590 so as to remove all 'carve-outs' of benefits excluded from retiree-only group plans as prescribed by the Patient Protection and Affordable Care Act of 2010 but not limited to: 1) Prohibition of Pre-existing conditions exclusion or other discrimination based on health status; 2) Prohibition on excessive waiting periods; 3) No lifetime or annual limits; 4) Prohibition on recessions (can't drop coverage for high claims or health conditions); 5) Extension of dependent coverage until age 26; 6) Development and utilization of uniform explanation of coverage documents and standardized definitions; 7) Bringing down cost of health care coverage (for insured coverage).

Protection of Medicare Benefits:

The NRLN advocates that Congress must guard against reductions in Medicare expenditures that negatively impact the care that retirees receive from doctors, hospitals and other health care services.

Medicare Buy-In For Retirees Ages 55 – 65*:

Permit Medicare buy-in for retirees between ages 55 and 64 at an age-adjusted premium. The NRLN advocates that adults age 55 to 64 be allowed to buy Medicare coverage at a cost that does not burden the Medicare system. Access would be limited to individuals without access to an employer-sponsored or other group health plan actuarially equivalent or superior to Medicare.

Modification of the Medicare Sustainable Growth Rate Formula:

The NRLN advocates that adequate compensation be provided to medical providers to assure availability of Medicare accepting physicians. Any revised formula should assure that physicians are obligated to reduce the cost of health care.

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Inclusion of Catastrophic Coverage in Medicare*:

There is a rapidly increasing number of bankruptcies among retirees who have either been uninsured or underinsured against health care cost liabilities. Many suffer because catastrophic illnesses that are covered by out-of-pocket maximum limits written into employee and retiree company-sponsored plans are not covered when the retiree becomes Medicare eligible. Currently, Medicare does not provide out-of-pocket maximum coverage. The NRLN advocates that Congress should extend protection against catastrophic medical costs to the Medicare population by setting a reasonable maximum limit on out-of-pocket costs

Legislation to Reduce the Cost of Prescription Drug*:

Importation/Re-importation:

Importation involves foreign manufactured drugs imported into the U.S. Most U.S. companies manufacture offshore and are de facto importers. Re-importation involves U.S. manufactured drugs sold at discounted prices in other countries and then resold in the U.S. NRLN supports legislation to amend the Federal Food, Drug, and Cosmetic Act and Homeland Security regulations with respect to the importation of prescription drugs.

Competitive Bidding:

NRLN supports legislation to allow competitive bidding for Prescription Drugs under any federally supported health programs.

Generic Drugs:

Brand Name drug manufacturers pay user fees to the FDA that help fund adequate staffing to approve Brand name prescription drugs. Generic drug manufacturers are not offered, or required to pay the fee to expedite generic drug approval. The NRLN supports legislation to provide equal funding and staffing of the FDA to both Brand Name and Generic Drug manufacturers.

Generic Drug Restraint Of Trade:

Patent settlements between Brand Name manufacturers and Generic Drug manufacturers – called “pay-for-delay”, “reverse payments” or “exclusion payment settlements” – keep Generic drugs off of the market in violation of anti-trust laws. The NRLN supports legislation to prohibit brand name drug companies from compensating generic drug companies to delay the entry of a generic drug into the market.

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Medicare Part D “Donut Hole”:

The NRLN supports legislation to more rapidly eliminate the Medicare Part D prescription "donut hole".

Encourage Retention Of Company-Provided Health Care For Retirees:

The NRLN advocates legislation that would increase the Medicare Part D prescription plan subsidy paid to employers who offer better coverage than required for equivalent coverage in Part D, if they agree to maintain their current plans.

Company Benefits Bundling:

The NRLN urges legislation to prohibit companies from forcing retirees to choose between company pre-determined bundles of plans or none of their sponsored Health Care or Prescription Drug Plans. This bundling practice holds retirees hostage to company plans and makes it impossible for plan participants to make free choices.

Medicare Advantage Plans:

Medicare-eligible retirees on fixed incomes elected to purchase Medicare Advantage plans because of lower premium costs and / or enhanced benefits created by subsidies authorized by Congress in the 2003 Medicare Modernization Act. The Centers for Medicare and Medicaid Services rules do not protect guaranteed issue rights of those affected where they have exceeded a twelve month coverage time limitation period. As a result, Medigap insurers may not allow retirees to buy into Medigap plans due to pre-existing medical conditions, many of which may have developed while covered by a Medicare Advantage plan, nor can retirees freely switch to plans annually.

The NRLN supports legislation that will require providers to allow Medicare Advantage Plan participants to buy into Medigap coverage regardless of pre-existing conditions or lapses in time frame parameters and to also allow retirees with Medicare Advantage plans to switch plans annually without prejudice.

RETIREE INCOME and HEALTH CARE BENEFIT TAX REFORM:

Taxes Affecting Retiree Income Sources:

Alternate Minimum Tax:

Support legislation to raise the threshold level and indexing to inflation

Taxing Social Security Income:

Support legislation to amend the tax codes to eliminate federal and state taxes on all Social Security income and/or allow a tax credit for taxes withheld.

401-k / IRA Mandatory Distribution Requirement From 70 ½ to age 75:

Support legislation that will allow individual choice to defer Required Mandatory Distribution (RMD) from retirement savings accounts in years when equity markets decline.

Taxes Affecting Retiree Health Care Benefits:

Taxing Health Care Benefits:

The NRLN advocates that the portion of premiums paid by employers that is currently treated as a tax-free benefit to employees and retirees should remain tax free.

Deductibility of Health Care Costs:

Support new legislation that enables health care premiums (including Medicare premiums) to be tax deductible, similar to the way health insurance premiums for self-employed individuals are deductible. Such deductions would be exempt from the 7.5% (AGI) limitation.

Health Savings Accounts (HSA's):

Change IRS Code of 1986 to allow HSA funding directly from IRAs for all years not one year without tax penalties and limits on annual contributions.

Withdrawals To Pay Retiree Health Premiums:

Support new legislation that enables penalty- free withdrawals from 401k, IRA, SEP and other qualified accounts to pay for retiree health care premiums.

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