FOCUS: LAW

New laws increase responsibilities for pension plan trustees

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SPECIAL TO CRAIN'S DETROIT BUSINESS

Labor lawyers and other experts are increasingly being tapped to serve as professional trustees for pension funds.

Increased legal compliance and oversight from agencies such as the **Internal Revenue Service** and **U.S. Department of Labor** require defined benefit plan trustees to be more informed about their duties.

This is especially true for union pension plans designed to pay monthly funds to union members upon retirement.

The Pension Protection Act of 2006 was passed to strengthen funding rules for defined benefit plans while increasing the ability of participants and beneficiaries to receive plan actuarial and financial information. Many of the PPA's requirements became effective this year — the exact month depending on whether a plan is set up on a fiscal or calendar year.

Some of the changes associated with the PPA require a more stringent adherence to funding targets. This has led to a trend of more funds hiring professional trustees who are often labor lawyers, CPAs or other financial professionals, rather than relying on labor leaders or high-level employees to manage them, said Michael Asher, partner and business attorney with **Sullivan, Ward, Asher & Patton, P.C.** in Southfield.

Asher

"Let's not forget that you are talking about significant money here, often $100 million to over $2 billion," Asher said. "You need to think of your trustee as more of a CEO because he or she needs to be an expert in policing the experts that help manage the fund."

Those experts may include individuals who are experienced in investment planning, accounting and auditing, Asher said. The pension act and other laws have given the IRS and other agencies more leeway to audit plans to ensure fiduciary obligations are being met.

Fund rankings

The funding provisions provided by the pension act for multiemployer plans are given green, yellow or red status. As of this summer, an estimated 65 percent to 70 percent of plans were green because they appeared to be properly funded, said Randy DeFrehn, executive director of the **National Coordinating Committee for Multiemployer Plans**, an advocacy group representing multiemployer plans.

Second-tier or yellow plans indicated those in an endangered state while red plans are considered critical. Yellow plans are required to meet funding targets over a specific period, often 10 years, DeFrehn said. Red plans must adopt more serious changes and trustees must complete a rehabilitation plan.

The types of benefit changes that often should be made if a plan is considered underfunded include: reductions in subsidized early retirement money, the elimination of subsidized joint and survivor benefits and the elimination of lump sum payments, DeFrehn said.

"A last resort is that contribution increases may be imposed on employers," he said.

The Employment Retirement Income Security Act, in place since 1974, imposes personal liability for trustees under federal law. Increased standards also have been imposed on trustees that require them to incorporate accurate future projections of needed funding.

Said Asher: "There is no rubber stamping allowed and trustees need to keep their actuaries accountable."

Employers also need to ensure that money going into the pension plan is sufficient both now and in the foreseeable future. And, they should know about the withdrawal liability.

"Unlike health care, there is an anti-cutback law in place for defined benefit plans so once a benefit is given, you can't go back and take it away," Asher said. "That is why it is difficult for pension plans to declare insolvency."

Reaching benchmarks

Before the 2006 act, plans were highly dependent on investment income rather than from contribution income. This was a viable strategy during decades when the stock market consistently rose. But during the bear market of 2000-01, many plans lost 20 percent to 30 percent or more of net holdings, dropping below minimum requirements.

When that happens, fees and requirements could increase employer costs by four to five times per employee, DeFrehn said. "Unions were looking at this as Armageddon. They were losing contributing employers and their (membership) was losing jobs."

Under the PPA, single employer plans must now meet a funding target of 100 percent of the present value of all accrued benefit liabilities. If not met, the funding shortfall must now be amortized over seven years, rather than 30 years.

Employers need to be aware of their plan's funding status, DeFrehn said.

"There could be serious implications for some of these plans if (market) volatility continues," DeFrehn said. "Employers need to be aware of whether their plan is on track to remain properly funded."