
The Welfare and Pension Plans Disclosure Act

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CONCLUSION

The issue of tort liability for interference with the right to employment has not been fully litigated. Despite the fact that jobs have been easier to obtain during most of the last two decades than in any earlier period, holding a job has become more important to the employee because of the seniority, pension and insurance rights that now accompany employment with many companies. State and federal labor legislation and anti-discrimination legislation as well as collective bargaining agreements place limitations on the right of the employer to terminate the employment relationship at will. The same forces that have led to these limitations have served to make individual employees more cognizant of their rights.²⁴

Future litigation will have to clarify further the relationship between *federal* administrative law which affords rights and remedies to the employee and the tort right of action in state courts. The courts will also have to determine the relationship between the tort right of action and *state* labor and anti-discrimination legislation, much of which is enforced by administrative agencies empowered to give remedies.

²⁴ The National Labor Relations Board in its Annual Report for 1957 reports that 947 cases (51% of the cases filed against labor unions) were filed by individuals charging discrimination or coercion. In 1956, Professor Milton R. Konvitz of the New York State School of Industrial and Labor Relations, Cornell University, made a study of damage actions brought against unions. He found that the largest number—119—were brought in the area of “interference with employment rights.” *Business Week*, p. 72 (Jan. 19, 1957).

THE WELFARE AND PENSION PLANS DISCLOSURE ACT

INTRODUCTION

Though private employee welfare and retirement plans have been on the American industrial scene for many years, it was not until the middle 1940's that they began a tremendous mushroom-like growth. Today, they affect over 84 million persons.¹

While it is estimated that employers pay approximately 47 percent of the cost of financing welfare plans and 87 percent of the cost of retirement plans,² millions of dollars are contributed directly by employees

¹ At the end of 1954, the number of persons and their dependents covered under these plans, for the various types of benefits, were as follows:

<i>Type of Benefit</i>	<i>Employees Covered as Percentage of Labor Force</i>
Welfare plans:	
Death	55.0
Temporary disability	43.6
Hospitalization	59.0
Surgical	53.0
Medical	32.0
Pension plans: Retirement	23.0

S.Rep. No. 1734, 84th Cong., 2d Sess. 11 (1956).

² S.Rep.No.1440, 85th Cong., 2d Sess. 7 (1958).

each year.³ Three methods of administering welfare and pension plans have evolved; employer-administered plans, trade union plans, and joint employer-union-administered plans. Employer-administered plans predominate, accounting for approximately 92 percent of all employees covered by welfare plans and 86 percent of all those covered by pension plans.⁴ Congressional investigation⁵ has revealed that the various administrators have failed, except in rare instances, to account to the employee-beneficiaries as to the financial management of these plans, be it by way of insurance or trust fund.⁶ Abuse and mismanagement have resulted, much to the detriment of the employee-beneficiary.⁷

The federal courts have warned that abuses in the administration of health and welfare funds will not be tolerated. For instance, in *Upholsters International Union v. Leathercraft Furniture Company* the court said:

The burdening of the [employee benefit] fund with undue administrative expenses or lush salaries for union officials will not be tolerated; excessive restrictions, either in the insurance policies or in the bylaws and regulations, or the providing of small benefits to the employee members in proportion to the amount contributed by the employee parties or the premiums paid, taking into consideration the risk involved, will cause more than a lifting of the eyebrows.⁸

Then, as to the liability of the trustees of such a benefit fund, the court said the following in *United Garment Workers v. Jacob Reed's Sons*:

The court considers such funds as rather sacred, and it is the purpose of the law that they be available under the contract.⁹

Yet, despite this avowal by the federal courts to deal severely with such offenders, abuse and mismanagement of employee benefit funds, especially in jointly administered plans, remained commonplace.

³ In 1954, total contributions to pension plans alone were \$3,293,000,000, of which \$2,866,000,000 was contributed by employers and \$427,000,000 by employees. S.Rep.No. 1734, 84th Cong., 2d Sess. 49,84 (1956).

⁴ S.Rep.No.1440,85th Cong., 2d Sess. 7 (1958).

⁵ The Welfare and Pension Plans Disclosure Act is the culmination of Congressional investigation which was begun by Senate subcommittee in May of 1954.

⁶ S.Rep.No.1440, 85th Cong., 2d Sess. 4 (1958).

⁷ Senate subcommittee hearings of the 84th Congress on the welfare funds of two unions, the Laundry Workers' International Union and the Painters, Cleaners and Caulkers Union, Local No. 52, Chicago, uncovered gross abuses and mismanagement. The LWIU welfare fund case was characterized by embezzlement, exorbitant commissions, improper service fees and other irregular insurance practices, and complicity among insurance, union and employer representatives. The painters, cleaners and caulkers case was characterized by large diversion of funds and almost complete absence of financial accounting. Welfare and Pension Plans Investigation, Second Interim Report, July 20, 1955.

⁸ 82 F. Supp. 570, 575 (E.D. Pa., 1949).

⁹ 83 F. Supp. 49, 52 (E.D. Pa., 1949).

Prior to the passage of the Welfare and Pension Plans Disclosure Act, federal legislation with specific regard to welfare and pension plans was limited to certain provisions in the Internal Revenue Code of 1954 relative to tax privilege qualifications,¹⁰ and the Taft-Hartley Act with respect to employer payments to employee representatives.¹¹ As will be demonstrated below, both the internal Revenue Code and the Taft-Hartley Act are deficient in certain respects and cannot afford the employee-beneficiary full protection. To fill this gap Congress saw fit to pass the Welfare and Pension Plans Disclosure Act, the main provisions of which require the administrators to publish elaborate accounts of their financial activities, under penalty of law.

NATURE OF THE PLANS AND RIGHTS OF EMPLOYEES

Before discussing the provisions of the Act itself, it appears proper to review, at least in summary fashion, the nature of pension and welfare funds generally and the relative rights and obligations of employer, union and employee.

Pension plans.—Today, largely due to the holding in *Inland Steel Co. v. NLRB*,¹² which required an employer to bargain collectively under section 9(a) of the NLRA¹³ upon the ground that pensions are “wages” in the form of deferred compensation,¹⁴ most pension plans are collectively bargained and financed solely by employer contributions.¹⁵ In establishing a plan, the employer has three alternatives. He may leave the plan unfunded and pay the claims as they come due, treating them as current expenses, or he may fund the plan in advance by purchasing annuities, or he may fund the plan by way of a trust fund.¹⁶

Depending upon the employer's choice of financing the plan, the employee under a pension plan may have a beneficial interest in trust, or he may have a contract right. When a plan is funded by a trust, his rights are

¹⁰ 26 U.S.C.A. § 401 (1956) sets forth the tax privilege qualifications and requirements of a plan; § 402 deals with the taxability of beneficiaries of an employees' trust; § 403, taxation of employee annuity; § 404, deduction for contribution of an employer to an employee's trust or annuity plan and compensation under a deferred plan; § 501 (c) (9), voluntary employees' beneficiary associations as exempt from taxation.

¹¹ National Labor Management Relations Act (1947) at § 302, 29 U.S.C.A. § 186 (1952).

¹² 170 F.2d 247 (C.A. 7th, 1948).

¹³ 29 U.S.C. 159 (1952).

¹⁴ In the recent case of *Matter of Embassy Restaurant, Inc. Bankrupt*, 254 F.2d 475 (C.A. 3rd, 1958), it was held that money paid into a union welfare fund by an employer was “wages” under the Bankruptcy Act, 11 U.S.C.A. § 104, giving wages to workmen priority over taxes due the United States.

¹⁵ S.Rep.No.1734, 84th Cong., 2d Sess. 14 (1956).

¹⁶ In 1954, 1,000,000 employees were covered by unfunded plans, 3,915,000 by funded insurance plans, and 7,585,000 by funded trust plans. *Ibid.*, at 48.

those of an ordinary beneficiary of a trust. However, where the plan is not in the character of a trust the courts have expressed different views as to whether or not the employee has an enforceable contract right. Under one line of cases, the employee is held to have no enforceable rights under a plan financed entirely by the employer, despite fulfillment of the conditions of the plan, on the theory that the pension is a mere gratuity offered by the employer.¹⁷ Where the employee has contributed financially to the plan, the courts have generally held that he has a contractual right according to the terms of the plan once he has qualified thereunder, e.g. becomes 65 years of age.¹⁸ The courts have similarly held where the plan is included in a collective bargaining agreement.¹⁹ Even where the employee has paid nothing into the plan, some courts have held the employer's obligation contractual on the theory of unilateral contract²⁰ or promissory estoppel.²¹

Welfare plans.—Welfare plans typically include hospitalization, medical, disability and death benefits. Nearly all welfare plans are financed through the purchase of insurance.²² Under collectively bargained welfare plans, at least one-half of the cost is commonly covered by employer contributions.²³ In voluntary plans outside of collective bargaining, the employer contributions are generally much less.²⁴ Clearly, when the employee contributes, through union dues or pay deductions, he has rights resting in contract where the protection is purchased through insurance, and in trust where the plan is so financed.²⁵ Even where the employee has contributed nothing and the plan is offered and financed solely by the employer, some courts have held that the employer has a contractual obligation to render the benefits promised, the long-continued service of the employee in reliance thereon being sufficient consideration.²⁶

¹⁷ *Hughes v. Encyclopedia Britannica, Inc.*, 1 Ill. App. 2d 514, 117 N.E. 2d 880 (1954); *Umshler v. Umshler*, 332 Ill. App. 494, 76 N.E. 2d 231 (1947).

¹⁸ *Cowles v. Morris*, 330 Ill. 11, 161 N.E. 150 (1928).

¹⁹ *Nallejo v. American R. Co.*, 188 F. 2d 513 (C.A. 1st, 1951); *A. F. of L. v. Western Union Tel. Co.*, 179 F. 2d 535 (C.A. 6th, 1950).

²⁰ *Bos v. United States*, 100 Cal. App. 2d 565, 224 P.2d 386 (1950); *Wallace v. Northern Ohio Traction & Light Co.*, 57 Ohio App. 203, 13 N.E.2d 139 (1937); *Schofield v. Zion's Co-operative*, 85 Utah 281, 39 P.2d 342 (1934). See: *Gilbert v. Norfolk W.R. Co.*, 114 W.Va. 344, 171 S.E. 814 (1933).

²¹ *Sessions v. Southern Calif. Edison Co.*, 47 Cal. App. 2d 611, 118 P.2d 935 (1941). See: *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P.2d 807 (1948).

²² N.Y. Ins. Rep. 83. ²³ S.Rep.No.1734, 84th Cong., 2d Sess. 18 (1956). ²⁴ *Ibid.*

²⁵ For a more complete discussion of this subject, especially with regard to pension plans, see 58 Colum. L. Rev. 78 (1958); 70 Harv. L. Rev. 490 (1957); 4 Labor L. J. 541 (1953); 29 St. John's L. Rev. 106 (1954).

²⁶ *Moore v. Postal Tel. Cable*, 202 S.C. 225, 24 S.E.2d 361 (1943); *Robinson v. Standard Oil Co. of La.*, 180 S. 237 (La., 1938); *Perkins v. Eagle Lock Co.*, 118 Conn. 658, 174 Atl. 77 (1934); *Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 Atl. 205 (1933).

INADEQUACY OF FEDERAL LEGISLATION PRIOR TO ACT

As mentioned above, Federal legislation dealing with pension and welfare funds was limited primarily to the Internal Revenue Code of 1954²⁷ and the Taft-Hartley Act,²⁸ prior to the passage of the Welfare and Pension Plans Disclosure Act.

While the Code makes the submission of elaborate information, similar to that required under the new Act, a prerequisite to tax privileges,²⁹ it makes no attempt to regulate the administration of the funds. The Taft-Hartley Act permits an employer to make payments to employee representatives, provided such funds are held in trust for the benefit of the employee for pensions, medical care, unemployment and other like benefits.³⁰ However, there is no specific provision requiring efficient management of the funds, or establishing a penalty for mismanagement. The Taft-Hartley Act provides for an annual audit of the trust fund "available for inspection by interested persons at the principal office of the trust fund and at such places as may be designated in the written agreement. . . ."³¹ Notwithstanding this feature the report has not proved sufficient to protect beneficiaries for at least two reasons: (1) as a result of the (Taft-Hartley) Act's failure to specify the information to be included in the report, the usual report is not adequately detailed to disclose the nature of the fund disbursements; and, (2) the report is usually not given the wide distribution necessary for effective disclosure. Also, the Taft-Hartley Act deals only with jointly administered plans. It does not cover the

²⁷ Title 26 U.S.C.A. (1956).

²⁸ National Labor Management Relations Act (1947) at § 302, 29 U.S.C.A. § 186 (1952).

²⁹ For example, Treasury Regulation 1.404 requires the following information to be furnished by an employer in the first taxable year in order to qualify for deductions under § 404: (1) verified copies of all instruments constituting or evidencing the plan; (2) a statement describing the plan, including (a) employee eligibility requirements for participation in the plan, (b) employee contributions, (c) employer contributions, (d) the basis or formula for determining the amount of each type of benefit and the requirements for obtaining such benefits and vesting conditions, (e) the medium of funding, (f) the discontinuance or modification of the plan and the distributions of benefit payments upon liquidation or termination; (3) data on the twenty-five highest paid participants; (4) total compensation and contributions for all participants; (5) number of employees in various classifications, such as number of employees ineligible for coverage under the plan because of requirements as to employment classification, specifying the reasons applicable to the group (as, for example, temporary, part-time, hourly basis); (6) financial statements; (7) information on cost basis; (8) statement of limitations on deductions under § 404 (a) (1), (2), (3), or (7); (9) a statement of the contributions paid in the taxable year, showing the date and amount of each payment. Also, a summary of the deductions claimed.

³⁰ National Labor Management Relations Act (1947) at § 302, 29 U.S.C. § 186 (1952).

³¹ *Ibid.*

great majority of welfare plans where the employer provides benefits directly through an insurer and those plans where the employer administers the plan himself. In addition, it omits plans where the benefits are provided by a union, as long as the employer does not make a direct payment to the union.

EXISTING STATE STATUTES

The first legislation on disclosure came in 1955 when the State of Washington passed a law requiring the registration and reporting of employee welfare trust funds.³² In 1957, similar laws with respect to disclosure and regulation of employee benefit plans were enacted in California,³³ Connecticut,³⁴ Massachusetts,³⁵ Wisconsin,³⁶ and New York.³⁷ These statutes vary in detail, amount of information required, scope of coverage, and method and agency of enforcement.³⁸ Illinois has no legislation on the subject, nor is any bill pending with respect thereto.

WHAT THE ACT REQUIRES

As the title of the Act implies, it will impose substantial duties upon the administrators of employee welfare and pension plans with regard to disclosure and reporting. To this extent, the legislation is of importance to employers and union officials whose responsibility it is to manage such programs, and to the many beneficiaries whose interests are sought to be protected.

The following are the main provisions of the Act, effective January 1st, 1959.

SEC. 3. Definitions.—The term “employee welfare benefit plan” means any plan, fund or program established by employer or employee organization, or both, through the purchase of insurance or otherwise, which has as its purpose the furnishing to employees or their beneficiaries “medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment.” The term “employee pension benefit plan” means any plan, fund or program established by employer or employee organization, or both, which provides for employees or their beneficiaries, through the purchase of insurance annuity contracts or

³² Wash. L. (1955) c. 8, 1745.

³³ Calif. L. (1957) c. 2167, 3841.

³⁴ Public Acts of State of Connecticut, 1957 Session, P.A. No. 594.

³⁵ Mass. Laws Ann. (1957) c. 151 D, § 1 ff. (Supp.).

³⁶ Wis. Stat. (1957) c. 552, p. 1189.

³⁷ N.Y. Insurance Law (McKinney, Supp. 1957) Art. III-A, § 37; Art. II-A, §§ 60-75.

³⁸ For a good summary and analysis of these state laws, see McNeill, Charles, 97 *Trusts and Estates* 196 (March, 1958).

otherwise, "retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement."

SEC. 4. Coverage.—The Act applies to any welfare or pension benefit plan established or maintained by an employer or employers engaged in an industry or activity affecting commerce, or any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or both.

However, subsection (b) of Section 4 excludes a plan if it is administered by the federal or state government, or any subdivision or instrumentality thereof; it was established and maintained solely for the purpose of complying with workmen's compensation laws or unemployment compensation disability insurance laws; such plan is exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and is administered as a corollary to membership in a fraternal benefit society described in Section 501(c) (8) of the Code or by organizations described in Section 501(c) (3) and 501(c) (4) of such Code;³⁹ any such plan does not cover more than twenty-five employees.

SEC. 5. Duty of disclosure and reporting.—This section places upon the administrator of the plan the duty of publishing two items of information to the participant or beneficiary.⁴⁰ These are: (1) a description of the plan, and (2) an annual financial report.⁴¹

Subsection (b) of Section 5 defines "administrator" as either the person or persons designated by the plan or collective bargaining agreement as the one with the responsibility for the "ultimate control, disposition or management of the money received or contributed, or, in the absence of such designation, the person actually responsible . . . , irrespective of the fact that the control, disposition or management is exercised directly through an agent or trustee designated by such person or persons."

SEC. 6. Description of the plan.—A description of the plan must be published within ninety days after the effective date of the Act⁴² or within ninety days after the establishment of the plan, whichever is later. The information required to be presented might be separated into two areas, as follows:

³⁹ 26 U.S.C.A. § 501(c) (3) (1956) exempts from taxation, with certain qualifications, corporations, community chest, fund or foundation organized and operated exclusively for religious, charitable, educational, or other like purposes. § 501(c) (4) exempts from taxation civic leagues or organizations not for profit operated exclusively for the promotion of social welfare, and local associations of employees with charitable, educational or recreational purposes solely.

⁴⁰ Section 8 of the Act sets out the procedure for publishing.

⁴¹ Sections 6 and 7 of the Act itemize the things that must be included in the description and annual report.

⁴² Since the effective date of the Act is January 1st, 1959, a description of the plan must be published by April 1st, 1959.

1. Information relative to the administrator(s) must include names and addresses; relationship, if any, to the employer or employee organization; official positions of the administrator with respect to the plan; and, any other offices, positions or employment held by the administrator or administrators.

2. Information relative to the plan itself must include the name, address and description of the plan and the type of administration; schedule of benefits under the plan; names, addresses and titles of any trustees, if different from those named as administrators; whether the plan is mentioned in a collective bargaining agreement; copies of the plan or of the collective bargaining agreement, trust agreement, contract or other instrument, if any, under which the plan was established and is operated; source of financing the plan and the identity of any organization through which benefits are provided; whether the records of the plan are kept on a calendar, policy or fiscal year basis; and, the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part.

SEC. 7. *Annual reports.*—The administrator must publish an annual report within 120 days after the end of the calendar year, or within 120 days after the end of the fiscal or policy year if the plan is not on a calendar year basis. What must be included in the annual report depends upon the nature of the plan (whether it is welfare or pension), and the method of financing the plan (by investment, trust or insurance contract). However, where the plan is funded, all annual reports must include the amounts contributed by employer and employee respectively; the amount of benefits paid or otherwise furnished; the number of employees covered; a summary statement of the assets, liabilities, receipts and disbursements of the plan; and, a detailed statement of the salaries, fees and commissions charged to the plan, to whom paid, in what amount and for what purposes. This information must be sworn to by the administrator, or certified by an independent certified or licensed public accountant, based upon a comprehensive audit.

When a plan is *unfunded*, only the following information need be submitted: the total benefits paid in the past five years; the average number of employees eligible for participation during the past five years, broken down by years; and, a statement, if applicable, that the general assets of the employer are the only ones from which claims against the fund may be paid.

The following additional information is required if the plan is funded by *insurance*: premium rate; total premiums paid; approximate number of persons covered by each class of benefits; total amount of premiums received by carriers; total claims paid; dividends, retroactive rate adjustments, commissions and other acquisition costs paid by the carrier;

amounts held to provide benefits after retirement; remainder amount of such premiums; and, the names and addresses of brokers and agents, the amount of fees or commissions paid to them and the purpose of such payments.

The following additional information must be included in the annual report if the funds of a *welfare* fund are *invested*: a summary statement of the assets of the fund, broken down by types;⁴³ a detailed list of all investments in the securities of the employer or employee organization, including information as to cost, present value, and percentage of total fund; and, a detailed list of all loans to employer or employee organization.

Pension plans require additional information where the plan is funded through the medium of a *trust* or where it is funded by an *insurance* contract.

Where the pension plan is funded through the medium of a trust, the annual report must include the type and basis of funding; actuarial assumptions used; amount of current and past service liabilities; number of employees, both retired and non-retired, covered; a summary statement of the assets of the fund, broken down by types;⁴⁴ a detailed list of all investments in securities of employer or employee organization, but the identity of securities and details of brokerage fees need not be revealed if the securities are subject to regulation by the Security Exchange Commission or under the Investment Company Act of 1940 or the Public Utility Holding Company Act of 1935; and, a detailed list of all loans made to the employer or employee organization. If the plan is funded through a trust invested in insurance, then, as to the funds so invested, only the information required of a plan funded by insurance need be reported.

Where the pension plan is funded by insurance, the annual report must include the type and basis of funding; actuarial assumptions used in determining payments; number of employees, retired and non-retired, covered; and, reserves accumulated under the plan, and the amount of current and past service liabilities, except for benefits completely guaranteed by the carrier.

If the pension plan is *unfunded*, the report must include the total benefits paid to retired employees for the past five years, broken down by year.

SEC. 8. Publication.—The administrator must make copies of the description and latest annual report available for examination by any participant or beneficiary in the principal office of the plan. Upon written request, he must mail a copy of the description and a summary of the latest annual

⁴³ These assets are to be valued on the basis regularly used in valuing investments held in the fund and reported to the United States Treasury Department, or at their aggregate cost or present value, whichever is lower.

⁴⁴ *Ibid.*

report to any participant or beneficiary. In addition, the administrator must file with the Secretary of Labor two copies of the description and annual report.⁴⁵

SEC. 9. *Enforcement.*—This section imposes a criminal liability for any willful violation with respect to disclosure, reporting or publication. Also, a civil liability arises against the administrator and in favor of a participant or beneficiary who has been refused or has failed to receive, upon request, publication of a description or annual report within thirty days after such request. In the court's discretion, the administrator may be liable up to fifty dollars a day from the date of failure or refusal.

CONCLUSION

The Act calls for some duplication of information already required of administrators under the Internal Revenue Code and the Taft-Hartley Act. However, the Welfare and Pension Plans Disclosure Act covers a substantially wider area. In addition it places the information in the hands of a governmental agency, the Department of Labor, which can, under the Act, regulate and enforce proper administration and impose penalties where needed.

Notwithstanding its advantages, the new Act will not be a panacea for the problems which prompted it. The closer watch afforded the federal government and the employee-beneficiary will not completely discourage the unscrupulous. But the fact that man is inclined to misbehave is no valid argument against a regulatory statute or criminal law. In short, the new Act seems to be a proper step in the direction of curtailing abuse and mismanagement in the administration of employee benefit plans.

⁴⁵ Under this section, the Secretary of Labor is required to make copies of the description and annual reports available for inspection in the public document room of the Department of Labor.

THE PLEA OF NOLO CONTENDERE IN THE FEDERAL COURTS

INTRODUCTION

In the early case of *United States v. Hartwell*¹ there was an attempt made to set up a distinction between a plea of nolo contendere and a plea of guilty. The court, however, said that this suggestion should not be given any weight, as it is well settled that the legal effect of the former is that of the latter as it regards all the proceedings on the indictment.

However, though the defendant concedes his guilt by using the plea, it is still a valuable piece of procedural machinery in a criminal proceeding;

¹ Fed. Case No. 15,318 (1869).