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TAFT-HARTLEY REPORT

Guarding Against Fraud and Data Breaches in the Digital Age

Fraud and financial crimes are nothing new. But as technology becomes more complex and sophisticated, so do the threats we face. The ubiquity of connected devices, from computers to tablets to smartphones, only increases the possibility that sensitive personal and professional information can be exposed to those with unauthorized access. Unions and benefit funds can minimize both of these threats by utilizing best practices and implementing appropriate internal safeguards.

Fraud is most likely to occur when the opportunity presents itself to an individual who is incentivized to commit the fraud. Internal controls, such as multi-layered oversight and segregation of duties, can significantly reduce the opportunity for fraud. While necessary and important, an annual audit may not always detect instances of fraud early enough. Adopting antifraud policies and procedures for how to report and investigate potential instances of fraud can help raise awareness within an organization. These policies and procedures should allow for confidential reporting of suspected fraudulent conduct, as well as the preservation of potential evidence, pending review of the matter with legal counsel. In addition to fraud prevention strategies, organizations should also utilize other appropriate detection methods and make them visible to employees.

Protecting against the potential loss of sensitive financial or personal information is another costly and time consuming risk that must be addressed by unions and benefit funds. Information can be compromised in a variety of ways, from an employee losing a cell phone or laptop, to phishing emails that can give unauthorized access to entire computer systems. Even simply accessing the internet from an unsecured Wi-Fi connection can compromise sensitive information. Educating employees in identifying these risks can help reduce the likelihood of potential breaches.

Organizations should also consider adopting a comprehensive information technology policy. For example, prohibiting access to sensitive information from unauthorized devices is an easily implemented first step. Encrypting all data and establishing two-factor password protection can further reduce exposure to breaches. Finally, a cyber insurance policy is designed to help an organization mitigate risk exposure by offsetting costs associated with recovery after a cyber-related security breach or similar event. However, cyber insurance coverage varies by insurer and policy, so it is important to compare policies and inquire about any special circumstances and limits that may apply.

Accordingly, it is a good idea to consult with your organization and plan professionals about additional steps you can take to safeguard against threats of fraud and data breaches.

The Genesis of the Critical and Declining Pension Plan, the Looming Multiemployer Pension Plan Insolvencies, and Possible Solutions

The Employee Benefits Security Administration posted a funded research paper prepared by IMPAQ International entitled "Multiemployer Plans: Their Current Circumstances in Historical Context" on September 29, 2017. The 88 page report is a scholarly and data-driven report looking specifically at multiemployer pension plans, the scope of the problems they face, the root causes of those problems, and the expected costs and/or benefits of the available and potential solutions to those problems. The full report can be found at: https://www.dol.gov/sites/default/files/ebsa/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf

The purpose of this article is to provide a summary of the report's findings.

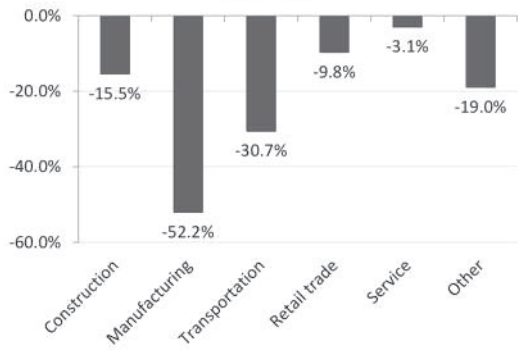
The Genesis of the Critical and Declining Pension Plan

A critical finding in the report is that large negative cash flows and large retiree/active ratios are the most significant contributors to poor financial health. Conversely, the report concludes that a pension plan's funding percentage pursuant to the Pension Protection Plan ("PPA") is a poor indicator of a pension plan's financial health.

We pulled what we think are some key metrics/charts from the report that demonstrate their conclusion.

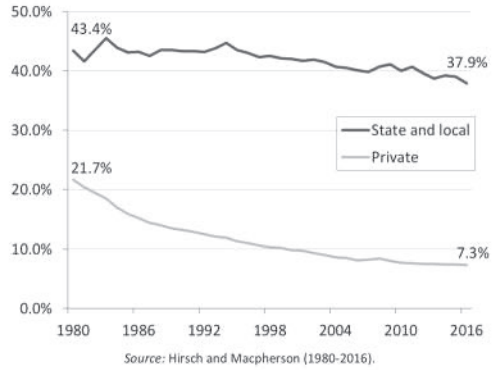
In their Exhibit 3 Chart, IMPAQ International gathered information from various Form 5500s to calculate the significant declines of active members that multiemployer plans have experienced by industry, over the last 15 years.

Exhibit 3. Percentage Change in Active Members in Multiemployer Plans by Industry 2001–2015



They also present data showing the decline in union concentration since 1980.

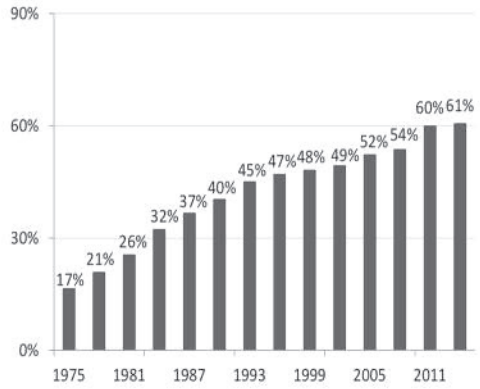
Exhibit 8. Percentage of Wage and Salary Workers in Unions, 1980–2016



Source: Hirsch and Macpherson (1980-2016).

The authors of the report also used U.S. Department of Labor data to show the large increase in the percentage of inactive participants in multiemployer plans.

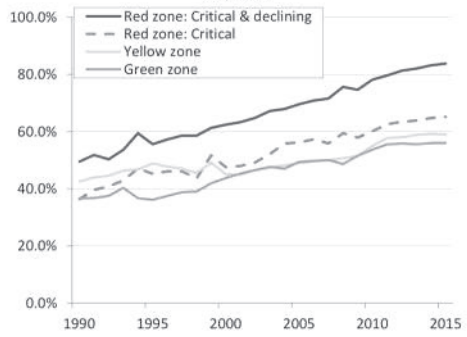
Exhibit 9. Inactive Members as a Percentage of Total Members in Multiemployer Plans, 1975–2014



Source: Authors' calculations based on U.S. Department of Labor (2016b).

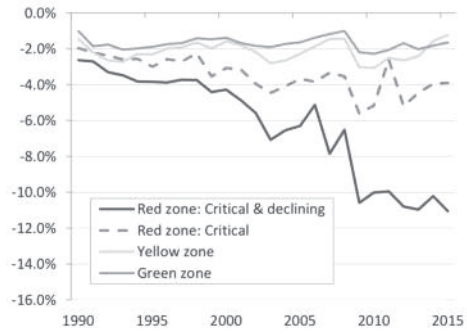
The authors of the report conclude that high inactive to active ratios and large negative net cash flows are the primary cause for failing multiemployer pension plans. The report reviews the data and findings in detail, but the following three charts tell the tale. Exhibit 34 demonstrates the strong positive correlation between critical zone status and inactive members. Exhibit 35 demonstrates the strong negative correlation between negative cash flows and critical pension health. Exhibit 33 demonstrates the weak correlation between funding percentage and pension health.

Exhibit 34. Inactive Members as a Percentage of Total Members by 2016 Risk Status, 1990–2015



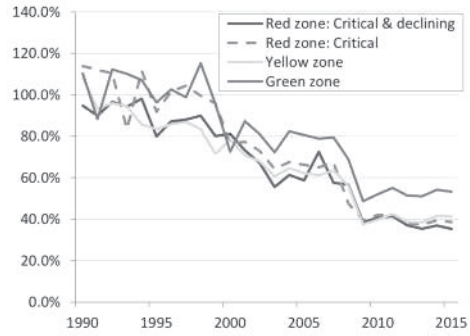
Note: "Red zone: critical" does not include the critical and declining plans.
Sources: Authors' calculations from U.S. Department of Labor, *Form 5500* (1990-2015); and U.S. Department of Labor (2017).

Exhibit 35. Cash Flow by 2016 Risk Status, 1990–2015



Note: "Red zone: critical" does not include the "critical-and-declining" plans.
Sources: Authors' calculations from U.S. Department of Labor, *Form 5500* (1990–2015); and U.S. Department of Labor (2017).

Exhibit 33. Funded Ratio by 2016 Risk Status, 1990–2015



Note: "Red zone: critical" does not include the "critical-and-declining" plans.
Sources: Authors' calculations from U.S. Department of Labor, *Form 5500* (1990-2015); and U.S. Department of Labor (2017).

The Looming Multiemployer Pension Insolvencies and Possible Solutions

We are all familiar with the looming problems facing the PBGC's multiemployer program. The report details and quantifies the problem. The 2017 PBGC multiemployer premium was $28.00 per participant. According to the report, those premiums would need to increase to $156.00 per participant in order to give the multiemployer program a zero percent (0%) probability of insolvency by 2024. This projection takes into account plans that have or will likely make Multiemployer Pension Reform Act benefit reductions. The authors of the report point out that at that level of contribution, more employers may withdraw from plans and the underlying underfunding problem could be exacerbated.

The report then analyses two proposed solutions. One solution involves moving orphaned participants from the troubled plans and dealing with them separately so that the rest of the plan can return to health. The other solution involves low interest government loan guarantees. The analysis demonstrates that both ideas have potential, but they are both expensive.

Most of our clients have put together effective recovery plans and are either on the path to recovery or have recovered. With that said, the analysis in the report is very telling and informative. The root cause of pension failures in our industry is not poor management or bad decision making; rather, the root cause is shrinking work forces. The article continues to the authors position that plan trustees should consider a paradigm shift going forward. Trustees of healthy pension plans should consider converting their traditional pension plan to a variable annuity plan. While in a traditional sense, variable annuity plans are not as protective of a participant's benefits, recent history shows that ERISA's guarantee of benefits is largely illusory. The variable annuity plan may be a better guarantee of your participant's retirement than a traditional plan. Since it is very difficult to predict and/or prevent shrinking employment markets before they occur, the primary cause of pension failures is largely out of a trustee's control. Thus, the best course of action for plan trustees to protect the long-term retirement security of their participants may be to design a pension program that matches benefit levels to plan assets by its design.

Collective Bargaining Agreements – The Importance of Clear and Concise Language

In *Watkins v. Honeywell Int'l, Inc.*, the Sixth Circuit Court of Appeals recently held that an employer's promise for lifetime retiree health care benefits ended with the expiration of the collective bargaining agreement.[1]

For almost 40 years, Honeywell operated a manufacturing plant in Fostoria, Ohio, and staffed it with employees represented by the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW").[2] Honeywell and the UAW engaged in collective bargaining for decades, and they memorialized the outcome of those negotiations in successive collective bargaining agreements. Honeywell agreed to pay for health care benefits for employees and retirees, and even wrote to them that their healthcare "will continue during your retirement" and is "for your lifetime."[3] However, the promise made in the collective bargaining agreements was less generous.

The last collective bargaining agreement negotiated between the parties provided: "for the duration of this Agreement, the Insurance Program shall be that which is attached hereto, hereinafter referred to as the Program."[4] The collective bargaining agreement also contained a durational clause that stated "this Agreement shall continue in full force and effect until 11:59 PM, October 31, 2011."[5]

After the collective bargaining agreement expired in 2011, Honeywell sold the Fostoria plant; however, Honeywell continued to provide health care benefits until 2015. In late 2015, Honeywell informed its retirees that it would stop providing health care benefits in 2017.[6] Subsequently, two retirees filed suit on behalf of a proposed class of nearly 1,000 retirees and their spouses and dependents, alleging that Honeywell violated the collective bargaining agreement by not providing lifetime benefits.

The plaintiffs argued that some of Honeywell's actions indicated that they actually intended the health care benefits to last a lifetime. More specifically, the plaintiffs pointed out that Honeywell rescinded a statement to its retirees that it "reserves the right" to "terminate" health care benefits, explaining that the termination right "does not pertain to retiree medical benefits negotiated by a collective bargaining unit."[7] The plaintiffs also argued that Honeywell provided health care benefits to its retirees for five years after the collective bargaining agreement expired.

Honeywell moved to dismiss the plaintiffs' complaint for failure to state a claim under Rule 12(b)(6), and the district court granted Honeywell's motion to dismiss. The plaintiffs subsequently appealed to the Sixth Circuit.

The Sixth Circuit noted that collective bargaining agreements are "first and foremost a contract, which should be interpreted according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy."[8] Based on this premise, the Sixth Circuit determined that the language contained in the collective bargaining agreement was unambiguous and did not require further interpretation. The Sixth Circuit determined that the phrase "for the duration of this Agreement" limits Honeywell's promise to provide health care benefits for as long as the collective bargaining agreement lasts.[9] The Court reasoned that the "duration" is set by the collective bargaining agreement's general-durational clause, which in turn provided that the collective bargaining agreement "shall continue in full force and effect until 11:59 PM, October 31, 2011."[10] The Court held that when "read in tandem, these two clauses unambiguously promise healthcare benefits until October 31, 2011 – the 'duration' of the agreement."[11] Accordingly, the Sixth Circuit affirmed the judgment of the district court.

This case highlights the importance of drafting collective bargaining agreements that contain clear and concise language. The negotiating parties should be cognizant to avoid vesting benefits that are not intended to vest.

If Your Spouse Kills You, Does She Still Get Your Pension?

The Employee Retirement Income Security Act of 1974 ("ERISA") generally requires that pension plans pay survivor benefits to a surviving spouse unless the benefit is affirmatively waived by both

[1] *Watkins v. Honeywell Int'l, Inc.,* 875 F. 3d 321 (6th Cir. 2017).

[2] *Id.* at 322.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 323.

[8] *Id.* at 324 (citing *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015)).

[9] *Id.* at 325.

[10] *Id.* at 326.

[11] *Id.*

spouses. However, what happens when the surviving spouse is the cause of their spouse's death and has not affirmatively waived the survivor's benefit? In other words, if your spouse kills you, does she still get your pension?

That was the question that was recently posed to the Seventh Circuit in *Laborers' Pension Fund v. Miscevic.*[12] The facts in Miscevic were relatively straightforward. The husband, Zeljko Miscevic ("Zeljko"), worked as a union laborer. As a union laborer, Zeljko earned a pension from the Laborers' Pension Fund which was to be paid as a monthly annuity upon his retirement. The pension plan contained a survivor's benefit to be paid to the spouse of a participant if the participant was married and died before commencing his pension.

In January 2014, Zeljko's wife, Anka Miscevic ("Anka"), intentionally killed him while he slept. Anka was charged with first degree murder, but was later found not guilty by reason of insanity. Anka later sought to recover Zeljko's survivor benefits from the Laborers' Pension Fund. However, Illinois, like many states, has a "slayer statute" which prohibits a person from financially benefiting from the intentional killing of another.[13] Anka's attorneys argued that the "slayer statute" was preempted by ERISA. The question before the Seventh Circuit was whether the State's slayer statute was preempted by ERISA. If it was preempted, then Anka was entitled to her former spouse's pension, even though she had intentionally killed him.

ERISA's preemption clause states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" described by ERISA.[14] A law "relates to" an employee benefit plan if it has a connection with or reference to such a plan. Therefore, courts have held that ERISA "preempts a state law claim if the claim requires the court to interpret or apply the terms of an employee benefit plan." [15]

This was a matter of first impression for the Seventh Circuit. In fact, no federal court of appeals had faced the question of whether ERISA preempts a state slayer statute. However, several lower courts had faced such a question, with the majority of the lower courts holding that ERISA does not preempt a state's slayer statute.[16]

On January 29, 2017, the Seventh Circuit ruled that the Illinois slayer statute was not preempted by ERISA. In its ruling, the Court stated that "Congress could not have intended ERISA to allow one spouse to recover benefits after intentionally killing the other spouse."[17] The Court noted that slayer laws are an aspect of family law, which has been a traditional area of state regulation. The Court further stated that the axiom that an individual who kills a plan participant is not able to recover plan benefits is a well-established legal principal which predates even ERISA.

The Court rejected Anka's argument that the Illinois slayer statute did not apply to her because she was found not-guilty by reason of insanity, citing an opinion of the Illinois Appellate Court which applied the slayer statute to an individual who was found not-guilty by reason of insanity.

Judge Joel M. Flaum issued the opinion of the Court, which was joined by Judges Michael S. Kanne and Ilana Diamond Rovner.

King v. Blue Cross Blue Shield of Illinois

On September 8, 2017, the United States Court of Appeals for the Ninth Circuit confirmed that the Patient Protection and Affordable Care Act's ("ACA") prohibition on lifetime benefit maximums does not apply to certain retiree-only plans in *King v. Blue Cross Blue Shield of Illinois*.[18] However, the Court of Appeals also held that the plan failed to disclose this adequately to its plan participants as required under the Employee Retirement Income Security Act of 1974 ("ERISA").

By way of background, Linda King participated in a welfare benefit plan sponsored by the United Parcel Services of America ("UPS"). UPS provided and administered two self-funded welfare benefit plans governed by ERISA: (1) the Active Employee Plan; and (2) the Retiree Plan. UPS was the Plan Administrator and Plan Sponsor, and Blue Cross Blue Shield of Illinois ("BCBS") was the

[12] *Laborers' Pension Fund v. Miscevic*, No. 17-2022, 2018 U.S. App. LEXIS 2178 at *12 (7th Cir. Jan. 29, 2018). Order affirming district court decision.

[13] The Illinois Probate Act of 1975, known as the "slayer statute" provides that "[a] person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death." 755 Ill. Comp. Stat. 5/2-6.

[14] 29 U.S.C. § 1144(a)

[15] *Collins v. Ralston Purina Co.,* 147 F.3d 592, 595 (7th Cir. 1998)).

[16] *Hartford Life & Accident Ins. Co. v. Rogers,* No. 3:13-cv.101, 2014 WL 5847548, at *2-3 (D.N.D. Nov. 12, 2014) (ERISA does not preempt North Dakota's slayer statute); *Union Sec. Life Ins. Co. of N.Y. v. JJG-1994*, No. 1:10-cv-00369, 2011 WL 3737277, at *2 (N.D.N.Y. Aug. 24, 2011) (New York's slayer rule is not preempted by ERISA); *Mack v. Estate of Mack*, 206 P.3d 98, 110 (Nev. 2009) (Nevada's slayer statute is not preempted by ERISA).

[17] *Laborers' Pension Fund v. Miscevic*, No. 17-2022, 2018 U.S. App. LEXIS 2178 at *19.

[18] *King v. Blue Cross Blue Shield of Illinois*, 871 F. 3d 730 (9th Cir. 2017).

claims administrator for medical coverage under both plans. Ms. King participated in the Retiree Plan as a covered dependent when her husband retired from UPS.

UPS issued a Summary Plan Description ("SPD") in 2006, which governs both the Active Employee Plan and the Retiree Plan. UPS subsequently issued twelve summaries of material modifications ("SMMs") between May 2006 and December 2012. The SMMs were not cumulative and each SMM described only newly announced amendments. This meant that plan participants would have to read the relevant section from the SPD and then read all twelve SMMs to determine the current language for a specific benefit provision. Following the enactment of the ACA, UPS issued an SMM that eliminated the lifetime benefit maximum in the Active Employee Plan. Because the SMM included amendments to both the Active Employee Plan and the Retiree Plan, the parties dispute whether the lifetime benefit maximum applies to the Retiree Plan.

In November 2012, Mrs. King suffered a back infection that required immediate surgery and extensive post-surgery rehabilitative care.[19] After initially approving her treatment as medically necessary, the defendants denied her claim for benefits because Mrs. King exceeded the Retiree Plan's $500,000 lifetime benefit maximum. Subsequently, Mrs. King filed suit against UPS and BCBS alleging breach of contract and breach of fiduciary duties in violation of ERISA. Mrs. King passed away while her case was pending before the district court and Mr. King was substituted as the representative of her estate. Mr. King argued that the defendants failed to adequately disclose that the lifetime benefit maximum applied to the Retiree Plan. The district court granted summary judgment to the defendants holding that the defendants did not abuse their discretion or breach their fiduciary duties.[20] The district court also held that the ACA did not amend ERISA to ban lifetime benefit maximums for retiree-only plans.[21] The district court did not address Mr. King's argument that the SMM violated ERISA's disclosure requirements. Mr. King subsequently appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the defendants. The Court of Appeals first considered whether ERISA, as amended by the ACA, bans lifetime benefit maximums in retiree-only plans. The Court of Appeals ultimately concluded that it does not.[22]

The Court of Appeals next considered whether or not the SPD, as amended by the SMM, violated ERISA's statutory and regulatory disclosure requirements. The Court of Appeals held that the defendants violated ERISA's statutory and regulatory disclosure requirements by providing a faulty SMM describing changes to the lifetime benefit maximum.[23] The Court of Appeals ultimately concluded that the SMM did not reasonably apprise the average plan participant that the lifetime benefit maximum continued to apply to the Retiree Plan.

The Court of Appeals also considered whether or not the defendants breached their fiduciary duties under ERISA by failing to comply with ERISA's disclosure requirements. The Court of Appeals concluded that the SMM "failed to alert retirees and their covered dependents that, despite the defendants' announcement that the lifetime cap would no longer apply to the [Active] Employee Plan, the defendants intended that the lifetime maximum would still apply to the Retiree Plan."[24] Accordingly, the Court of Appeals reversed the district court's order granting summary judgment in favor of the defendants on the breach of fiduciary duty claims.[25] Because the district court granted summary judgment in favor of the defendants, it did not address the appropriate remedy for the violations. Therefore, the Court of Appeals remanded the case back to the district court to determine the appropriate remedies.

This case highlights the importance of drafting clear and concise summaries of material modifications and summary plan descriptions. Plan sponsors and administrators should make sure that notifications are clearly communicated to plan participants to prevent any issues.

New Rules Expanding Employer Exemptions to Contraceptive Coverage Blocked

On October 6, 2017, the Departments of Health and Human Services ("HHS"), Treasury, and Labor ("Departments") announced two companion interim final rules that expand the types of employers that may be exempt from the Patient Protection and Affordable Care Act's ("ACA") contraceptive coverage requirement.

[19] *Id.* at 736.

[20] *Id.* at 738.

[21] *Id.*

[22] *Id.* at 739.

[23] *Id.* at 744.

[24] *Id.* at 745.

[25] *Id.*

By way of background, under the ACA, non-grandfathered health plans are required to cover various preventive services delivered by in-network providers without cost-sharing. Under this rule, non-grandfathered plans must cover the full range of FDA-identified contraceptive methods. This means that coverage must be provided without cost-sharing for at least one form of contraception in eighteen identified categories, including emergency contraception (most commonly referred to as the Plan B pill).

The ACA rule also carved out an exemption for religious institutions and places of worship. These entities could choose to be exempt from the requirement to cover contraceptives if they had legitimate religious objections. However, religiously affiliated non-profits and for-profit organizations were not eligible for an exemption; instead, they could select an accommodation.[26] With an accommodation, these employers could opt out of providing the coverage in their plans by submitting a form or notice to HHS stating their objections. Once the objection was received, if any individual covered under the employer's plan requested the disputed contraception, then the insurer would be required to provide the contraceptive outside of the plan.

Despite the exemption and accommodation provisions, the rule was the subject of significant litigation from religious employers including 122 non-profit entities and 87 for-profit entities (two of which were heard by the U.S. Supreme Court) claiming that the requirement infringed upon their religious freedom.[27]

In response to the ACA rule, the Trump Administration released two interim final rules – (1) the Religious Exemptions and Accommodations for Coverage of Certain Preventive Services and (2) the Moral Exemptions and Accommodations for Coverage of Certain Preventive Services – which radically changed the position of the Obama Administration.

For entities claiming religious objections, the exemption previously limited to religious institutions and places of worship is now expanded to cover more employers, namely non-governmental employers (including for-profit corporations, regardless of their size or whether they are publicly or privately held, as well as churches, religious orders, non-profit organizations, and institutions of higher education), issuers, and individuals that have a "sincere" religious objection to the provision of all or a subset of contraceptives.[28] For entities claiming moral objections, the rule is slightly narrower. Only specific non-governmental employers (including non-profit organizations, privately held for-profit employers, insurers, and institutions of higher education) can claim a moral objection.[29] As it pertains to moral objections, the Departments requested comments as to whether the rule should also apply to all for-profit entities, regardless of whether they are closely held or publicly traded, and non-federal government employers, such as local hospitals.[30]

Both interim final rules also make the accommodation process optional and, as a result, entities are no longer required to self-certify or submit objections formally. The rules are silent as to how the religious or moral objections of employers would be evaluated for legitimacy.

According to the Departments, the expansion will reduce HHS's expenses for administering the accommodation process, as well as combat litigation costs. The interim final rules became effective October 6, 2017; however, federal judges in Pennsylvania and California granted injunctions blocking them at the end of December 2017, respectively saying they would cause "serious and irreparable harm" and that the federal government failed to follow proper procedures in their implementation. The Department of Justice is currently appealing the California judge's decision in the Ninth Circuit.

[26] Sobel, Laurie, Alina Salganicoff and Caroline Rosenzweig. *New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women*. The Henty J. Kaiser Family Foundation. October 2017.

[27] Keith, Katie and Timothy Jost. Trump Administration Regulatory Rebalancing Favors Religious and Moral Freedom Over Contraceptive Access. Health Affairs Blog. October 6, 2017.

[28] *Id.*

[29] *Id.*

[30] *Id.*

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Johnson & Krol
Welcomes Karl E. Masters
Associate Attorney

Karl joined Johnson & Krol in late 2017 as an Associate Attorney as part of both the Labor and ERISA Departments. Karl has been an advocate exclusively for labor unions and their associated ERISA trust funds his entire career. He has successfully defended and prosecuted several complex matters in Federal and State Courts, and before the National Labor Relations Board, Equal Employment Opportunity Commission, and Department of Labor.

Karl has extensive experience helping union clients navigate Department of Labor audits and investigations, both criminal and civil. In addition to his litigation background, he also advises ERISA trustees on a wide range of matters concerning the design and administration of their plans.

Karl is a seasoned yet practical attorney who works with clients to solve their most challenging problems. He brings substantial experience in both Labor and ERISA matters, and believes his interdisciplinary experience is an asset to clients in both practice areas.

Karl graduated *cum laude* from Loyola University in Chicago, and thereafter graduated with high honors from the Chicago Kent College of Law in 2002 with a certificate in Labor and Employment from the Chicago Kent Institute for Law in the Workplace. He is a licensed attorney in the United States Supreme Court, U.S. Northern District of Illinois, Central District of Illinois, U.S. Southern District of Indiana and is a member of the Order of the Coif national legal honors society.