# ERISA'S ROLE IN THE DEMISE OF DEFINED BENEFIT PENSION PLANS IN THE UNITED STATES

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*In the decade or so following World War II, employer-provided pension plans became common in private-sector employment in the United States. The prevalent type was the defined benefit (DB) plan, which typically provides the employee and his or her spouse with a lifetime retirement income, paid monthly, based upon a formula that commonly takes account of the employee's compensation and length of service with the employer. Another type, the defined contribution (DC) plan, was also in use, mostly as a second and supplementary plan for highly compensated employees. A DC plan is a savings program, often tax-favored, which provides an account for each participating employee, funded mainly by salary reduction contributions that the employee authorizes together with contributions from the employer and the investment experience on the account. Subject to age and other criteria required under the Internal Revenue Code and the plan's terms, the employee and spouse decide when and in what amounts to draw down on the account in retirement. If at the death of the survivor of them the DC account contains undistributed funds, that balance will pass to heirs or other beneficiaries.*

*Into the early 1980s, DB plans covered about 85 percent of private-sector employees who had any pension coverage. In the years since, employers have retreated from offering DB plans, by terminating existing plans or closing ("freezing") them to new participants, while also ceasing to establish new DB plans. By 2003, only 33*

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*percent of large employers provided DB plans. By 2015, only 3 percent of Fortune 500 employers offered traditional DB plans to newly hired employees. The "de-risking" wave, discussed below in Part III, is further diminishing the extent of the DB system.*

*This article explores the question of what has caused this spectacular abandonment. The conventional understanding, summarized in Part II, attributes the demise of the DB system to large changes in economic conditions and employment patterns, together with the emergence of a viable DC alternative, the 401(k) plan. This article contends that the conventional account is incomplete, because it neglects the role of ERISA, the 1974 federal pension regulatory statute, in making DB plans too burdensome for employers to sustain. Part III discusses features of ERISA that have deterred employers from establishing or maintaining DB plans. Together with the changes reviewed in Part II, ERISA—although meant to promote DB plans—has had the effect of destroying the DB system in the United States.*

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On Labor Day 1974, after more than a decade of investigation, policy studies, interest-group contest, and congressional proceedings, newly-inaugurated President Gerald Ford signed into law the Employee Retirement Income Security Act (ERISA).[1] The statute imposed a "comprehensive and reticulated"[2] federal regulatory regime governing private-sector[3] employer-sponsored pension and benefit plans.

ERISA's main objective was to strengthen and promote a particular type of private-sector pension provision, the employer-provided defined benefit (DB) plan.[4] At the time of ERISA's enactment, DB plans were the prevailing type of private-sector retirement plan.[5] In the years

1. 29 U.S.C. § 1001. What became ERISA traces to the report of a commission established during the Kennedy Administration: President's Committee on Corporate Pension Funds and other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans (1965).

For a succinct account of the enactment process, *see* Michael S. Gordon, *Overview: Why Was ERISA Enacted?* in The Employee Retirement Income Security Act of 1974: The First Decade, S Rep No 98–221, 98th Cong, 2d Sess 1, 10–11 (1984). For detail on the role of organized labor, *see* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (1st ed. 2004) [hereinafter Wooten, *History*]. The Congressional sources are collected in Subcomm. on Labor, Comm. on Labor and Public Welfare, U.S. Senate, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. no. 93-406 (3 vols., 1976).

2. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).

3. ERISA excludes from coverage plans sponsored by federal, state, and local governments, and plans maintained by churches. *See* 29 U.S.C. §§ 1003(b)(1)–(2); *see also* 29 U.S.C. §§ 1002(32)–(33) (noting ERISA excludes from coverage plans sponsored by federal, state, and local governments, and plans maintained by churches); *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 483–84, 1656 (2017) (discussing the meaning of "church plan"). The trend away from defined benefit plans in the private sector, discussed *infra* text at notes 94–96, has been better resisted in plans sponsored by state and local governments for several reasons, including the exemption from ERISA regulation, which "lower[s] administrative costs." ALICIA H. MUNNELL, KELLY HAVERSTICK, & MAURICIO SOTO, WHY HAVE DEFINED BENEFIT PLANS SURVIVED IN THE PUBLIC SECTOR 5 (BOSTON COL. CTR. RET. RSCH., 2007). In 2018, some 83 percent of state and local government employees were still participating in DB plans. *See State and Local Pensions*, URB. INST, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-government-pensions (last visited Feb. 28, 2022). Unconstrained by ERISA's funding requirements, many of these plans are seriously underfunded. The Urban Institute estimates the collective underfunding at a minimum of $1 trillion. *Id.*

4. ERISA's funding standards, ERISA §§ 301–05, 29 U.S.C. §§ 1081–84, and the system of plan termination insurance that the statute established, ERISA §§ 4001–69, 29 U.S.C. §§ 1301–69, pertain only to DB plans. As amended in 1984, ERISA emphasizes its "policy . . . to encourage the maintenance and growth of single-employer defined benefit pension plans . . . ." ERISA § 2b(c)(2), 29 U.S.C. § 1001b(c)(2).

5. *See* Wooten, *Studebaker*, *infra* note 26, at 686–702 (providing an overview of the development).

since ERISA, DB plans have fallen into disfavor. New DB plans are now seldom created, and most of those established earlier have been terminated or "frozen," that is, amended to cease new benefit accruals and to exclude new employees from participating. "Approximately three-quarters of DB plans are closed to new hires and a significant portion of them have stopped accruals for participants."[6] Private-sector employer-sponsored programs to provide retirement income now mostly take the form of defined contribution (DC) plans, also known as individual account plans.[7] Today's DC plan is a tax-deferred savings program[8] "largely self-funded by the participant's salary reduction contributions to his or her own account,"[9] and commonly bolstered by matching contributions from the employer.

This Article contends that ERISA's regulatory regime bears heavy responsibility for the demise of the DB plan. ERISA undermined the institution that it was meant to promote and protect. Part I identifies the main characteristics of DB plans, the risks that a DB plan imposes on the sponsoring employer, and the factors that induced employers to assume those risks in the formative age of the DB system. Part II recounts the trend away from DB plans since the 1980s, with particular attention to changes in the economy and in employment patterns that have been thought responsible, and to the emergence of a viable DC alternative, the 401(k) plan. Part III discusses features of ERISA's regulatory regime that have become so burdensome that ERISA has become a powerful deterrent to establishing or maintaining DB plans, largely dooming the DB system that the legislation was meant to strengthen and encourage.

## I. The Defined Benefit Paradigm[10]

6. SEI, EVOLVING FORCES: CONVERGENCE IN THE U.S. RETIREMENT MARKET, 2 (2021), https://www.seic.com/sites/default/files/2022-04/SEI-IMS-Evolving-Forces-Retirement-2021-Whitepaper-US.pdf. Regarding "de-risking" transactions, *see infra*, text at notes 214–24.

7. *See* 29 U.S.C. § 1002(34) (defining the two terms synonymously).

8. Taxpayer Relief Act of 1997, Pub. L. 105–34, 111 Stat. 788, introduced a different type of tax-favored retirement savings plan, the Roth IRA, IRC § 408A(a) *et seq.*, in which there is no tax deduction for contributions, but investment experience and qualified withdrawals are untaxed.

9. Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 454 (2004).

10. This caption echoes Zelinsky, *supra* note 9.

### A. Fundamental Features

A DB plan promises to pay the participant and his or her spouse[11] a specific annual benefit upon the participant's retirement, based upon a formula that commonly takes account of the participant's compensation and length of service with the sponsor. A typical plan expresses the retirement benefit as a percentage of the participant's compensation in his or her final year(s) of employment with the sponsor. For example, a simple plan might accrue benefit credits at the rate of 2 percent for each year of covered service, subject to a cap of 30 years. Under that formula, upon retirement an employee with 30 or more years of service would be entitled to a retirement benefit of 60 percent (2 x 30) of the compensation he or she was receiving in the final year(s) of employment, typically paid monthly as a joint and survivor annuity for the lives of the retiree and his or her spouse.[12]

In 1875, the American Express Company, then closely connected to the railroad industry, created what is thought to have been the first private-sector DB plan in the United States[13] By the end of the nineteenth century large employers in some industries, notably railroads,[14] were beginning to offer DB pension plans. The Pennsylvania Railroad, then the world's largest enterprise, established a plan in 1900, which became a widely imitated model.[15]

"Businesses created the earliest pension arrangements to address personnel problems that arose in the operation of large, complex business organizations."[16] Providing a pension plan furthered employers' interests by helping attract and retain employees.[17] Reducing employee turnover allows the employer to economize on the costs of recruiting

11. Retirement Equity Act of 1984, Pub. L. No. 98–397, 98 Stat. 1426 (1984) (codified in scattered sections at 26 U.S.C. and 29 U.S.C.) (expanding ERISA's regulation of spousal interests in pension assets).

12. For detail regarding the design of DB plans, *see* DAN M. MCGILL, KYLE N. BROWN, JOHN J. HALEY, & SYLVESTER J. SCHIEBER, FUNDAMENTALS OF PRIVATE PENSIONS 315–47 (9th ed. 2010).

13. *See* STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS 23 (1997) [hereinafter Sass, *Promise].*

14. *Id.* at 18.

15. *Id.* at 28, 39; *see generally* ALBERT J. CHURELLA, THE PENNSYLVANIA RAILROAD: BUILDING AN EMPIRE 1846–1917 (Richard2012). R. John et al. eds., 2013) (explaining the organization and finance of the firm in its formative years).

16. James A. Wooten, *The "Original Intent" of the Federal Tax Treatment of Private Pension Plans*, 85 TAX NOTES 1305, 1307 (1999) (citing Sass, *Promise supra* note 13, at 29).

17. Sass, *Promise*, *supra* note 13, at 45.

and training replacements. In a DB plan that bases the pension benefit on the employee's compensation in the final year(s) of his or her service, much of the benefit accrues in the last year(s) of employment.[18] "Consequently workers who leave jobs in the early and even middle stages of their careers earn few benefits, while those who leave before vesting—[now] generally at 5 years—receive nothing. As a result, a job change poses a significant risk to the retirement savings of workers covered by DB plans."[19]

Pension plans also serve a superannuation function, by encouraging elderly employees to leave employment as their productivity declines. In the railroad industry, many jobs were dangerous, and workers were at risk both of causing and of suffering age-related physical injuries. Pension historian Steven Sass observes that "[m]assive train wrecks periodically illustrated the implications of [a locomotive] engineer's failing eyesight or a brakeman's weakened arms."[20] Inducing elderly workers to retire was a main objective of the early railroad pension plans.[21]

Before ERISA, an employer whose DB plan promised particular retirement benefits did not need to set aside adequate funds to pay for them. Rather, the firm could treat its pension promises simply as future liabilities to be paid from the firm's assets when the liabilities came due, sometimes decades after the employees began accruing benefit credits. As the understanding developed that pension benefits were a form of deferred compensation,[22]earned in one period but paid later, accounting and actuarial concepts[23] encouraged plan sponsors to attempt to anticipate the amounts needed to pay the promised benefits and to set

18. In pension parlance, this attribute of DB plans is known as backloading. For discussion, *see* JOHN H. LANGBEIN, DAVID A. PRATT, SUSAN J. STABILE, ANDREW W. STUMPFF, PENSION AND EMPLOYEE BENEFIT LAW 133 (6th ed. 2015) [hereinafter LANGBEIN ET AL., TEXT].

19. Stephanie Aaronson & Julia Coronado, *Are Firms or Workers Behind the Shift Away from DB Pension Plans?* 1 (Fed. Reserve Bd., Working Paper No. 2005-17, 2005), https://www.federalreserve.gov/Pubs/feds/2005/200517/200517pap.pdf.

20. Sass, *Promise*, *supra* note 13, at 29. Regarding the extent, causes, and severity of railroad accidents, *see* MARK ALDRICH, DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY 1828–1965 (2006).

21. Sass, *Promise*, *supra* note 13, at 29 (explaining how the Pennsylvania Railroad plan aimed "to remove older workers unable to perform their duties").

22. *See* MCGILL ET AL., *supra* note 12, at 660; WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 15 (1976).

23. *See* Wooten, *supra* note 16, at 1309 (citing Bryce M. Steward, FINANCIAL ASPECT OF INDUSTRIAL PENSIONS 16 (1976)).

aside and invest those funds across the period that the employee was earning the benefit. Actuarial firms emerged to help sponsors calculate[24] the amounts needed to fund their plans.[25] Failure adequately to fund a DB plan's liabilities raises the risk of a partial or total default on the plan's benefit promises. The celebrated default by the severely underfunded plan of the Studebaker automobile company, which closed its South Bend, Indiana, factory in 1963 and terminated its DB plan the next year,[26] discussed below,[27] was a precipitating event in the subsequent enactment of ERISA's plan termination insurance program.[28]

The practice of regular advance funding of pension liabilities raised a difficult question of tax policy. The sponsor saw its funding measures as a component of its payroll costs, which in principle should be deductible (like cash wages) as a cost of doing business in the year in which the sponsor contributed those funds to the plan. But the danger arose that such a deduction might not be allowed because the employees for whose benefit the contribution was being made received no taxable income from the plan in that year. Moreover, simply showing the funds on the sponsor's accounts as a reserve for the pension plan, so-called book reserving, would have left those assets under the employer's control and subject to the claims of the employer's other creditors in the event of insolvency. The ultimate resolution, guided by the Internal Revenue Code[29] and later echoed in ERISA,[30] was to require the

24. For an overview of the factors consulted in projecting the funding needs of a plan, *see* INT'L ACTUARIAL ASS'N, DEFINED BENEFIT PENSION PLAN FUNDING AND THE ROLE OF ACTUARIES 38 (2018).

25. *See* Sass, *Promise*, *supra* note 13, at 62–64 (regarding the emergence of the pension actuarial industry). As defined benefit plans have declined in recent years, so has the demand for pension actuarial services, resulting in some consolidation among the firms. *See, e.g.*, Elizabeth Bauer, *Aon Buys Willis Towers Watson: Another Waypoint in the Demise of Employer Pensions*, FORBES (Mar. 9, 2020), https://www.forbes.com/sites/ebauer/2020/03/09/aon-buys-willis-towers-watson-another-waypoint-in-the-demise-of-employer-pensions/#231ecbdc335b; *see but* Ephrat Livni, *Two Insurance Giants Call Off Their Planned Merger After a Justice Dept. Lawsuit*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/business/aon-willis-towers-watson-merger.html (explaining that the Aon/Willis merger was not completed on account of regulatory resistance).

26. *See* James A. Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 684–85 (2001) [hereinafter Wooten, *Studebaker*].

27. *Infra*, text at notes 194–210.

28. ERISA's Title IV, § 4001 et seq., 29 U.S.C. § 1301 et seq., discussed *infra*, text at notes 182–224.

29. I.R.C. §§ 401(a)(1), (3), (5).

30. ERISA § 403(a), (b), 29 U.S.C. § 1103(a)–(b).

sponsor to make periodic funding payments to a trust[31] established for the exclusive benefit of the plan participants[32]

A DB plan's promise to pay specified sums for the lives of a retiree and his or her spouse is a type of financial instrument known as a joint and survivor annuity. Insurance companies offered comparable products to individual purchasers long before the emergence of occupational pension plans.[33] Some early pension plans took the simple form of buying individual annuity contracts for each retiree from an insurer, commonly the Metropolitan Life Insurance Company.[34] When employers began operating their own DB plans, they were effectively developing a new line of business, as annuity providers. The question of why this pattern of internally operated pension plans, bypassing the insurance industry, came to prevail has not been carefully studied. One factor of likely importance is that in the 1940s and 1950s when the private pension system took shape, state insurance regulation[35] restricted the investment alternatives, especially equities, permitted to insurers.[36] Another factor is that prior to the enactment of ERISA in 1974, unless constrained by a collective bargaining term to the contrary, the employer that operated its own plan could impose plan terms limiting its responsibility in the event that the plan became too underfunded to pay all its promised benefits.[37] State insurance regulators would not have permitted such a term in an annuity contract.[38] (Insurance companies continue

31. UNIF. TR. CODE [UTC] § 810(b)–(c) (UNIF. L. COMM'N 2000) (explaining that a fundamental attribute of trust law is the duty of the trustee to "keep trust property separate from the trustee's own property). AUSTIN WAKEMAN SCOTT & MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS § 17.11 at 1227 (6th ed. 2020). These requirements are now codified as U.T.C § 810(b)–(c).

32. IRC § 401(a)(2) requires the trust instrument to make it "impossible" for the trust's assets to be "used for . . . purposes other than for the exclusive benefit of [the] employees or their beneficiaries . . . ." ERISA replicates this standard in the non-inurement rule of IRC § 403(c), 29 U.S.C. 1103(c), and in the exclusive purpose rule of IRC § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

33. *See generally* James M. Poterba, *The History of Annuities in the United States*, 7–8 (NBER, Working Paper No. 6001, 1997), https://www.nber.org/papers/w6001).

34. *See* Sass, *Promise*, *supra* note 13, at 74–76 (regarding Met Life's role as "the leading pension insurer throughout the interwar period").

35. Regarding the overlap of state and federal regulatory authority over the industry, *see* BAIRD WEBEL & CAROLYN COBB, CONG. RSCH. SERV., *Insurance Regulation: History, Background, and Recent Congressional Oversight* (2005), https://www.everycrsreport.com/reports/RL31982.html.

36. *See* Sass, *Promise*, *supra* note 13, at 154; Wooten, *History*, *supra* note 1, at 44.

37. *See infra*, text at notes 227–32.

38. Regarding the rigor of state insurance regulation of annuity products, *see* Sass, *Promise*, *supra* note 13, at 69–70.

to be pension plan providers,[39] mostly for smaller employers, and more recently, as annuity providers in pension plan termination transactions.[40])

### B. Multiemployer Plans

This article deals with the prevalent type of DB plan, the so-called single-employer plan, which is operated by one firm for some or all its employees. There is another type, the collectively bargained multiemployer plan.[41] Such a plan is established by a labor union for the benefit of its members, typically in industries in which employment is too episodic and employers are too small and fragile to offer single-employer plans. Multiemployer plans are common in the craft trades, especially in building construction, and in the retailing, trucking, and entertainment industries.[42] ERISA defines a multiemployer plan as one "maintained pursuant to one or more collective bargaining agreements" between a union and the employers who agree to contribute to the plan.[43] Participating employers contribute at a rate specified in the collective bargaining agreement, for example, 50 cents per hour worked per covered employee. Under the Taft-Hartley Act of 1947,[44] a multiemployer plan must be organized as a trust having equal numbers of union- and employer-designated trustees. These trustees then set the retirement benefit levels promised to the participants. This structure causes the multiemployer plan to straddle the line between DC and DB. To the employer, the plan resembles a DC plan, because the employer's only responsibility has been[45] to contribute to the plan at the contractually

39. I.R.C. §§ 412(2)–(3).
40. *See infra*, text at notes 212–24.
41. For an overview, *see* STAFF OF JOINT COMM. on TAX'N, 115TH CONG., Present Law Relating to Multiemployer Defined Benefit Plans (Comm. Print 2018).
42. For data on industry types, *see* ALICIA H. MUNNELL, JEAN-PIERRE AUBRY & CAROLINE V. CRAWFORD, MULTIEMPLOYER PENSION PLANS: CURRENT STATUS AND FUTURE TRENDS 2–6 (BOSTON COL. CTR. RET. RSCH., Dec. 2007), https://crr.bc.edu/special-projects/special-reports/multiemployer-pension-plans-current-status-and-future-trends/.
43. ERISA §3(37), 29 U.S.C. § 1002(37).
44. Taft–Hartley Act § 302(c)(5), 29 U.S.C. § 186(c)(5).
45. Until legislation enacted in 1980, the Multiemployer Pension Plan Amendments Act, Pub. L. No. 96-364, 94 Stat. 1208 (1980) (current version at 29 U.S.C. §§ 1381-1461), which amended ERISA to impose retroactive withdrawal liability on an employer that decided to cease participating in a multiemployer plan that was underfunded. *See also* 29 U.S.C. § 1391.

specified rate. To the participating employees, the plan's promised benefit, set by the plan trustees, is an annuity expressed like that of a single-employer DB plan. In many multiemployer plans, past benefit levels have been overgenerous, leaving the plans seriously underfunded.[46]

## C. Risks to the DB Plan Sponsor

An employer that offers a DB pension plan undertakes obligations that contemplate decades to complete. A long-service employee who is a participant in the plan may begin accumulating retirement benefit credits in his or her 20s. When that participant retires, prototypically in his or her 60s,[47] the pension credits that the participant has accumulated result in a benefit that commonly takes the form of an annuity paid across the joint lives of the participant and his or her spouse. When, as is increasingly common, the survivor of the two spouses lives into his or her 80s or 90s, the sponsor's obligation for that long-service worker will have entailed a six- or seven-decades-long program of benefit accrual, funding, investment, and distribution.

A lot can go wrong in a contractual and fiduciary relationship that takes six or seven decades to discharge. The long duration of the relationship imposes upon the employer that sponsors a DB plan three onerous risks that inhere in a DB plan.

1. *Inflation risk.* Because the benefit formula under most DB plans is expressed as a fraction of the participant's final average salary,[48] the sponsor who promises that benefit bears the risk that inflation will magnify the liability. Employee compensation tends to keep pace with inflation, hence function as a proxy for inflation across the decades that

46. The most severely underfunded multiemployer plans received federal bailouts under the so-called "COVID-19 Stimulus Package," titled the American Rescue Plan Act of 2021, Pub L. No. 117-2, 135 Stat. 4 (2021). "The PBGC estimates that about $94 billion in assistance will be paid through 2027 to over 200 plans covering more than 3 million participants." Rob Kozlowski, *Milliman: Multiemployer Pension Funding Rises to 92%*, PENSIONS & INVESTMENTS (Aug. 18, 2021, 11:46 AM), https://www.pionline.com/pension-funds/milliman-multiemployer-pension-funding-rises-92.

47. ERISA's default rule treats age 65 as the normal retirement age for benefit calculation. ERISA § 3(24)(B)(i), 29 U.S.C. § 1002(24)(B)(i) (2019).

48. For an example of a benefit formula, *see* MCGILL ET AL., *supra* note 12, at 202-11.

the employee is accruing the plan's pension benefit.[49] Thus, the sponsor effectively assumes pre-retirement inflation risk (although not the risk of inflation that occurs after the benefit level becomes fixed on the participant's retirement ).[50]

2. *Investment risk*. Using the funds that the sponsor contributes, the plan conducts an investment program for the purpose of accumulating the assets that will be needed to pay the promised benefits. The sponsor bears investment risk across the life of the plan, because if the plan experiences disappointing investment results (or becomes underfunded for any other reason) the sponsor who has promised the benefit has to make up the shortfall.[51]

3. *Longevity risk.* Because a DB plan promises benefits for the life of the participant and his or her spouse, the sponsor necessarily assumes the risk that the life expectancies of one or both spouses will lengthen beyond the ages presently foreseen, thereby increasing the sponsor's aggregate liability by lengthening the duration of the required benefit payments. "Between 1940 and 2000, life expectancy for males at birth increased by 10.5 years," and "the growth in life expectancy since 1980 has increased the nominal cost of providing a DB plan per male participant by roughly 30 percent."[52] During the interval "from 1968 to 2010, life expectancy went up by an average of about two years a decade."[53] Between the 1970s and 2015, life expectancy at age 65 has increased by nearly four years.[54] Moreover, "mortality rates have

49. For a time in the automobile industry, union contracts provided for automatic inflation-offsetting cost-of-living adjustments (COLAs) in base compensation. *See* John B. Schnapp, *Auto Workers of the World Unite . . .*, WALL ST. J., Jan. 23, 2006, at A-12.

50. Regarding the effect of inflation in diminishing the real value of DB plan benefits, *see* LANGBEIN ET AL., TEXT, *supra* note 18, at 132–33.

51. ERISA now forces this outcome even if the plan has been drafted to escape it. *See* sources cited *infra* notes 225–32.

52. Dana Muir & John Turner, *Longevity and Retirement Age in Defined Benefit Pension Plans*, *in* WORK OPTIONS FOR OLDER AMERICANS 212, 214 (T. Ghilarducci & J. Turner, eds. 2007).

53. Sabrina Tavernise & Abby Goodnough, *American Life Expectancy Rises for First Time in Four Years*, N.Y. TIMES (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/us/us-life-expectancy.html (data attributed to demographer Samuel Preston, Univ. Pa.).

54. For men, from 14.2 to 18 years, for women from 16.8 to 20.5 years. STATISTICAL ABSTRACT OF THE UNITED STATES., tbl. 112 (2020). These figures reflect improvements in health, diet, and living conditions, and a precipitous decline in workplace injury. "[B]etween 1933 and 1997, deaths from unintentional work-related injuries declined by 90 percent." Lisa F. Berkman & M. Maria Glymou, *How Society Shapes Aging: the centrality of variability*, 135: 1 DÆDALUS 105, 109 (2006).

been improving much more quickly for U.S. pension plan participants than for other Americans (around 0.8 percent per year higher among over 65-year-olds.)"[55] Although interrupted recently by the opioid crisis[56] and the coronavirus pandemic,[57] the trend to enhanced life expectancy is likely to resume, inevitably at the expense of DB plan sponsors. One prominent observer has predicted that half of the cohort that was born in the 1980s will live to age 100 or beyond.[58]

Contemplate the gravity of these three risks and the question at once arises, why would any sane employer be willing to sponsor a DB plan? What firm wants to make a bet about the prospects of the firm or about the performance of the investment markets over the next fifty or sixty years? Or about the future of interest rates and employee compensation levels across those decades? And who wants to place a bet on the future of mortality experience? These are high-magnitude risks, impossible to predict accurately, and hence very hard to lay off or to hedge in the financial markets.

No firm would want to assume these risks, and that is why DB plans are in disfavor today. But since it must have been equally uncomfortable to assume these risks in the 1940s and 1950s when so many

55. Metropolitan Life Insurance Co., 2021 Pension Risk Transfer Poll [hereinafter, 2021 Met Life Poll], at 1 (citing data from Club Vita Research Note No. 21-08).

56. See the notable account by ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM (2020).

57. In consequence of the pandemic,

> deaths in the United States have increased for every age cohort over twenty-five, resulting in a fifteen-per-cent increase in total deaths from 2019; daily deaths for the coronavirus now exceed heart-disease and cancer deaths, making it our No. 1 killer; and American life expectancy for 2020 appears to have dropped as much as three full years, which is the worst setback since 1918.

Atul Gawande, *Don't Tell Me What to Do*, THE NEW YORKER, Feb. 8, 2021, at 45. Because, however, the coronavirus deaths have been concentrated among very elderly or otherwise vulnerable persons, it is thought that the pandemic will not materially affect future longevity rates for the broader population. *See* GAL WETTSTEIN, NILUFER GOK, ANQI CHEN, & ALICIA H. MUNNELL, WILL SURVIVORS OF THE FIRST YEAR OF THE PANDEMIC HAVE LOWER MORTALITY? (BOSTON COL. CTR. RET. RSCH., 2022).

58. ROBERT W. FOGEL, NAT'L BUREAU OF ECON. RSCH., CHANGES IN THE PHYSIOLOGY OF AGING DURING THE TWENTIETH CENTURY 4 (2005) (Fogel was Nobel laureate in economics); *but see* LAURENCE J. KOTLIKOFF & SCOTT BURNS, THE COMING GENERATIONAL STORM 8–9 (2005) (projecting a life expectancy range of age 92 to 101 by 2070). Regarding the complexities of estimating life expectancy, *see* Mercedes Ayuso, Jorge M. Bravo, & Robert Holzmann, *Getting Life Expectancy Estimates Right for Pension Policy: Period Versus Cohort Approach*, 20 J. PENSION ECON. & FIN. 212 (2021).

large- and medium-sized firms decided to sponsor DB plans, the obvious questions arise, what was different then, and what has changed since?

### D. The Golden Age of the DB Plan

1. *Roots*. The decade or so from the mid-1940s into the mid-1950s was the period in which DB plans became pervasive among large American firms,[59] but there was a substantial pre-history. Employer-provided retirement annuities had been in use in the United States from the latter decades of the nineteenth century, not initially within a program of orderly accumulation of benefit credits across the employee's working career, but rather, like the proverbial gold watch, awarded *ad hoc* to some retiring employees in the discretion of the firm's management and expensed to the year in which paid.[60] By the later 1920s, the Metropolitan Life Insurance Company was selling group annuity contracts to employers.[61]

"By 1920, most of the major railroads, utility companies, banks, mining companies, and petroleum companies had set up formal pension plans," as had some manufacturers, but the eligibility rules of these early plans were so restrictive that "perhaps less than 10 percent of plan members would ever qualify for benefits."[62] The railroad plans were badly underfunded, and many failed in the Depression. The federal government effectively took them over in the series of Railroad Retirement Acts of the 1930s and later.[63] These pre-World War II developments made the concept of employer-provided DB pensions familiar, but such plans were still exceptional across the broad economy.

2. *Labor unions*. The DB plan became the prevalent mode of employer-sponsored pension plan during the decade or so from the mid-1940s into the mid-1950s. The driving force was the labor movement,

59. *See* Wooten, *Studebaker*, *supra* note 26, at 686–702.

60. Into the early twentieth century, such plans were seldom funded, but were financed "pay-go," that is, charged against the sponsor's current income in the years in which benefits were paid. Wooten, *History*, *supra* note 1, at 21.

61. Sass, *Promise*, *supra* note 13, at 75.

62. GREENOUGH & KING, *supra* note 22, at 30–31.

63. *See generally Development of the Railroad Retirement System*, U.S. RAILROAD RETIREMENT BOARD, https://rrb.gov/The_Railroad_Retirement_Act_of_1937_and_Later_Amendments (last visited Feb. 28, 2023).

then at the acme of its influence, with union membership exceeding a third of the workforce.[64]

DB pension plans were and remain strongly associated with labor union power. DB plans tend to be adopted by unionized firms in the course of collective bargaining, and by non-union firms that want to forestall unionization. Labor union power forced American industry to create the defined benefit system and to bear its associated risks. The most prominent defined benefit plans were those instituted at the insistence of the major industrial unions (the old CIO unions[65]), especially the steel and auto workers, beginning in the mid-late 1940s.[66] It was collective-bargaining pressure that entrenched the defined benefit system.

3. *Abating competitive disadvantage.* In the formative era of the DB system, from the 1940s into the 1960s, the industrial unions were able to overcome employer aversion to the risks of DB plans by signaling to employers that adopting a DB plan would not cause competitive disadvantage, because the union would extract similar plans from the firm's competitors. "Industry-wide bargaining meant that competitors were seldom differently disadvantaged by increases in wages"[67] or benefit costs. That pattern was particularly evident in the steel and auto industries. "GM, Ford, and Chrysler routinely carved up 90 percent of the [auto] market . . . . As oligopolists, they could build benefit costs into the price of cars and not suffer competitive loss."[68] In later years, however, as unionization declined and foreign competition burgeoned, the power of American unions to cartelize domestic labor markets ceased to protect employers from competitive harm.

4. *Timing*. There are many reasons why the union-led demand for pension plans became acute when it did. Pension benefits, being deferred compensation, escaped the controls limiting cash compensation

64. Steven Greenhouse, *Sharp Decline in Union Members in '06*, N.Y. TIMES (Jan. 26, 2007), https://www.nytimes.com/2007/01/26/us/26labor.html (reporting union membership at 35 percent in the 1950s).

65. *See generally* ROBERT H. ZIEGER, THE CIO 35–55 (1995). CIO is an acronym for Congress of Industrial Organizations.

66. *See* GREENOUGH & KING, *supra* note 22, at 45–46; ROGER LOWENSTEIN, WHILE AMERICA AGED 17–33 (2008).

67. John H. Schlegel, *Law and Economic Change in the in the Short Twentieth Century*, CAMBRIDGE HISTORY OF LAW IN AMERICA 574 (2008).

68. LOWENSTEIN, *supra* note 66, at 28. Regarding the UAW's technique of playing the auto manufactures against each other in pension negotiations, *see* NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 282–83 (1995).

during World War II and the Korean War.[69] Into the 1940s, unions were still consolidating the power that they had acquired under the New Deal, notably under the Wagner Act in 1935.[70] In 1948-49, the federal courts sustained an order of the National Labor Relations Board interpreting the employer's statutory duty to bargain about "rates of pay, wages, hours of employment, or other conditions of employment"[71] to require bargaining regarding pensions.[72] Organized labor was long familiar with DB plans, because some of the craft and construction unions had been operating multiemployer plans,[73] in which the benefit formulas were expressed as annuities.

5. *Tax shelter.* The tax deferral allowed for contributions to qualified pension plans and for their investment earnings[74] became another factor encouraging the spread of DB plans in unionized industries in the 1940s and thereafter. As late as 1935, the federal income tax touched only four percent of the workforce; by 1945, however, more than 65 percent of earners paid the tax.[75] The revenue demands of World War II and the enlarged federal government of the Cold War years brought the federal income tax to bear on union workers, making them tax-sensitive.

6. *Integration with Social Security*. The launching of the Social Security system in the mid-1930s also played a role in encouraging the private pension system to take the DB form. Social Security is a publicly operated, mandatory DB plan, paying a lifetime retirement benefit that functions as an annuity. The benefit formula of an employer-provided DB plan is commonly "integrated" with Social Security, a technical term in pension parlance meaning that, subject to some limits, the private plan offsets or deducts Social Security benefits from what the private plan promises to pay.[76] In a sense, Social Security lowered the cost

69. LOWENSTEIN, *supra* note 66, at 64.

70. The Wagner Act, Pub. L. 74-198, 49 Stat. 449 (1935) (codified as 29 U.S.C. §§ 151–169).

71. 29 U.S.C. §§ 158(a)(5), 159.

72. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (*aff'g* Inland Steel Co. v. United Steelworkers of America, 77 NLRB 4 (1948)).

73. *See supra* notes 41–46 and accompanying text.

74. Regarding the economics of pension tax deferral, *see* LANGBEIN ET AL., TEXT, *supra* note 18, at 295–303.

75. For data on marginal federal tax rates from 1920 to 1980, *see* RICHARD A. IPPOLITO, PENSIONS, ECONOMICS AND PUBLIC POLICY 25 tbl. 2-4 (1986).

76. *See* MCGILL ET AL., *supra* note 12, at 483–88.

to an employer of providing a private DB pension plan by having the public plan provide the first tier of retirement income.[77]

7. *Limiting participant autonomy*. DB plan structure fits comfortably within the collectivist ethos of the union movement, evidenced in the emphasis on seniority common in collective bargaining[78] and in the corresponding hostility to merit-based or production-based compensation practices (piece work). That ethos is in tension with the individuation of the typical DC plan, in which the employee must decide, first, whether to participate; second, in what amounts; third, how to invest among the permitted plan options; and fourth, how and when to draw down on the account.

8. *Enabling prior and past service credits.* When a DB plan is first established for an employer's existing workforce, many of the covered workers are well into their careers with the employer, hence closer to retirement than personnel hired more recently. For these more senior participants, funds adequate to pay for their retirement benefits have not had time to accumulate in the plan. ERISA as enacted allowed a start-up DB plan to award so-called prior-service credits to such participants, that is, benefit credits for their service in the years before the plan commenced. The plan sponsor then had a period, calculated by a pension actuary, commonly decades long, to amortize the resulting funding deficit.[79] In consequence, "[v]irtually all defined-benefit pension plans came into being with benefit obligations that far outstripped the assets set aside to pay those obligations."[80]

This feature of DB-plan design, benefiting senior workers, was attractive to unions that negotiated collectively bargained plans. A similar practice, known as awarding past-service credits, arises in circumstances in which the sponsor of an existing DB plan agrees to increase the plan's benefit schedule retroactively, commonly as a result of col-

77. A point developed in JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 85-86 (2002); SILVESTER J. SCHIEBER, THE PREDICTABLE SURPRISE: THE UNRAVELING OF THE U.S. RETIREMENT SYSTEM 132–33 (2012). The connection between Social Security and the employer-provided pension system is further discussed, *see discussion infra* notes 167–69.

78. *See* Roger I. Abrams, & Dennis R. Nolan, *Seniority Rights Under the Collective Agreement*, 2–1 LABOR LAWYER 99, 100 (1986) (reviewing seniority issues arising in labor arbitration decisions).

79. *See* MCGILL ET AL., *supra* note 12, at 666.

80. Wooten, *Studebaker*, *supra* note 26, at 698.

lective bargaining negotiations. The enriched benefit schedule takes effect immediately, even though the plan has not been funded for that level of benefit.[81]

## E. Advantages of DB Plans

There is much to be said for the DB plan, from the standpoint of plan participants, and those strengths were evident to the union leaders who sought DB-type plans in collective bargaining.

1. *Noncontributory*. DB plans are commonly designed to be "noncontributory," meaning that the cost of providing coverage is not shown as a deduction from the participant's paycheck, which can cause resentment. As a matter of economic theory, DB plan benefits are now understood to constitute deferred compensation,[82] part of the sponsor's labor expense. But unlike a DC plan, in which the employee elects a reduction in cash wages to fund all or part of the amount being credited to his or her retirement account, DB benefits are expressed as an enhancement, in addition to cash wages.

2. *Annuitization*. The typical DB plan mandates annuitization as the mode of distribution, guaranteeing lifetime incomes for the participant and spouse. Such mandatory annuitization serves a protective policy, preventing the participant and spouse from spending pension wealth too aggressively, with the consequence that they or the survivor of them falls short of funds in extreme old age. The downside is that annuitization leaves no remainder for descendants, charities, or friends. In a retirement annuity pool, short-lived participants effectively subsidize retirement income for the longer lived.

3. *Investment*. The DB plan spares the participant all responsibility for investing in plan assets. The sponsor, which bears the investment risk, routinely engages skilled finance and investment professionals, either in-house personnel or external managers[83] or both, to conduct the investment function. By contrast, in a DC plan, it is the plan participant who selects among the investment alternatives that the plan authorizes.[84] Thus, each worker becomes his or her own portfolio manager. Nothing has prepared ordinary people for that task, and the evidence

81. *See* Sass, *Promise*, *supra* note 13, at 185–86.
82. *See supra* text at note 22.
83. ERISA codifies the authority to delegate investment functions to external managers. ERISA § 402(c)(3), 29 U.S.C. § 1102(c)(3).
84. ERISA § 404(c), 29 U.S.C. § 1104(c).

to date confirms that they do not, in fact, invest well.[85] The studies show that many participants tend to be excessively risk-averse and under-diversified in their investment choices, with the consequence that they underperform the professionally managed portfolios of DB plans and impair the resulting retirement savings.[86]

4. *Mandatory participation*. The DB plan imposes participation on covered workers; they cannot opt out. In a collectively bargained DB plan, the contract between union and employer sets the plan's coverage and benefit standards. Mandating participation in this way serves a protective function for employees who might otherwise be too myopic or undisciplined to save for retirement on their own. DC plans, by contrast, are mostly opt-in plans, "largely self-funded by the participant's salary reduction contributions to his or her own account,"[87] commonly increased by a matching contribution from the employer. Eligible workers decide whether to participate and in what amounts. Some decline to participate at all,[88] and many decline to participate as fully as the law allows.

### F. Coverage

Although DB plans have great advantages in delivering retirement income security to their participants and beneficiaries, the DB-centered pension system that took hold in the United States after World War II was from the outset a failure in one glaring respect: The coverage

85. *See* Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 757–71 (2020).

86. "[A] majority of . . . plan participants hold either no stock or almost all stock." ALICIA H. MUNNELL & ANNIKA SUNDÉN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 80 (Brookings, 2004); 27.8 percent of participants held no equity; *id.* at 81, tbl. 4-7. The "central problem with participant decision making . . . is that most participants are financially illiterate and tend to make investment choices that over the long run produce lower retirement income." Kathleen P. Utgoff & Theodore R Groom, *The Regulation of Pensions: Twenty Questions after Twenty Years*, 21 J. PENSION PLAN. & COMPLIANCE 1, 11 (1995).

87. Zelinsky, *supra* note 9, at 454.

88. About 15 percent of eligible workers fail to participate. Margarida Correia, *401(k) Participation Up, as Well as Contributions*, PENSIONS & INVS. (Dec. 11, 2018), https://www.pionline.com/article/20181211/ONLINE/181219870/psca-401-k-participation-up-as-well-as-contributions (reporting data from the Plan Sponsor Council of America).

levels have been consistently miserable, despite legislative efforts to increase coverage.[89] Only about half the workforce has any significant private pension coverage, and that half is the upper half by compensation. Our DB-centered pension system worked well for most of its participants, but they have been concentrated among larger employers, in better paying jobs, and disproportionately in unionized workforces. Despite a tax subsidy presently amounting to about two hundred billion dollars annually for all types of employer-sponsored retirement plans,[90] workers "in the lowest quintile of the income distribution receive almost no pension benefits."[91] "An inescapable feature of [pension tax] deferral is that it provides greater benefits to taxpayers with high marginal rates."[92]

## II. The Unraveling[93]

"In the early 1980s, defined benefit plans covered about 85 percent of [workers who had pension coverage] in the private sector . . . ."[94] "By 2003, only 33 percent of large employers provided such plans . . . ."[95] "Between 1998 and 2019, the percentage of [Fortune 500] employers offering traditional DB plans to newly hired workers fell from roughly half (49 percent . . .) to 3 percent."[96]

What explains the astonishing collapse of the DB system? There is a broadly shared account[97] about the causes, which emphasizes the

89. Regarding the inherent limits on the ability of the so-called discrimination rules to encourage deeper coverage, *see* Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419 (1984).

90. For 2018, the annual tax subsidy in foregone revenue from retirement-plan tax deferral exceeded $191 billion. U.S. Dep't Treasury, Office of Tax Analysis, Tax Expenditures, Oct. 19, 2018, at 25 (all plan types including IRAs).

91. Alicia H. Munnell, *Employer Sponsored Plans: The Shift from Defined Benefit to Defined Contribution*, *in* OXFORD HANDBOOK OF PENSIONS AND RET. INCOME 359, 363 (Gordon L. Clark et al., eds. 2006) [volume hereinafter cited as OXFORD HANDBOOK].

92. Wolk, *supra* note 89, at 429.

93. Ippolito's term, *see* Richard A. Ippolito, *Tenuous Property Rights: The Unraveling of Defined Benefit Contracts in the US*, PENSION POLICY IN AN INTEGRATING EUROPE 175 (2003). The term is also found in CHARLES R. MORRIS, APART AT THE SEAMS: THE COLLAPSE OF PRIVATE PENSIONS AND HEALTH CARE 11 (Century Fdn. 2006) discussing "the great unraveling"; and in SCHIEBER, *supra* note 77.

94. Ippolito, *supra* note 93, at 175.

95. MORRIS, *supra* note 93, at vi.

96. Brendan McFarland, *Retirement Offerings in the Fortune 500: 1998-2019*, WTW (June 25, 2020), https://www.wtwco.com/en-US/insights/2020/06/retirement-offerings-in-the-fortune-500-1998-2019.

97. *E.g.*, Munnell, *supra* note 91; MORRIS, *supra* note 93.

emergence of a new form of DC plan, the 401(k), together with changes in employment patterns and the associated decline of labor unions. In the account that follows, I summarize those and related developments, and then (in Part III) point to the many ways in which ERISA, enacted in 1974, further undermined DB plans.

### A. Substituting DC Plans

"You can't beat something with nothing," runs a familiar maxim.[98] Because terminating an existing DB plan without providing an alternative retirement-savings device would have provoked resistance from employees (and from unions where present), the availability of a plan type that was less costly and less risky to employers was as a practical matter a precondition for employers to abandon their DB plans.

The eventual solution to the shortcomings of the DB plan was for employers to substitute DC (individual account) plans.[99] Such plans had been long familiar. In the university and research sector, in which the mobility of employment patterns made the DB plan less attractive on account of its intrinsic backloading of benefits, pension provision had taken the individual account format, funded by employee contributions, often with an employer match.[100] These plans were authorized under what is now section 403(b) of the Internal Revenue Code, and facilitated by the Carnegie Foundation, which in 1918 founded the Teachers Insurance and Annuity Association (TIAA) to provide a program of annuitized and portable DC accounts for college and university professors.[101] During the epoch of DB ascendancy, DC plans were also

98. Judicially invoked in Cripe v. Henkel Corp., 858 F.3d 1110, 1113 (7th Cir. 2017) (Easterbrook, J.).

99. Another response was to convert a DB plan into a so-called cash-balance plan, in which the benefit formula of a DB plan mimics the account balance of a DC plan. *See* Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683 (2000).

100. Tax-exempt organizations are also allowed to sponsor individual account plans under I.R.C. § 457, a measure enacted in 1976 to enable state and local governments to sponsor tax-sheltered DC plans.

101. *See* GREENOUGH & KING, *supra* note 22, at 56; for detail see *Teachers Insurance and Annuity Association-College Retirement Equities Fund History*, http://www.fundinguniverse.com/company-histories/teachers-insurance-and-annuity-association-college-retirement-equities-fund-history/ (last visited Feb. 28, 2023).

widely used as supplementary plans for owners and managers,[102] often in the form of profit-sharing plans.

### B. Individual Retirement Accounts

An important impulse toward the later spread of DC plans was the authorization of individual retirement accounts (IRAs), enacted as part of ERISA in 1974.[103] The design was to enable a worker not covered by an employer-provided pension plan to make tax deferred contributions from current earnings to a retirement savings account, and also to defer taxation on the account's investment gains until the worker retired. "[C]ontributions were initially limited to $1,500 per year and were permitted only if the taxpayer was not an 'active participant' in an employer-based qualified plan."[104] A variant, the "rollover" IRA, functions as a portability device for employees who have accumulated pension credits in an employer-provided plan, and whose employment with that plan's sponsor terminates before retirement. The rollover provisions allow such persons to direct that these accumulations be transferred to an IRA, preserving the tax-sheltered status of the transferred funds.[105]

For a five-year interval between 1981 and 1986,[106] the Reagan administration supported legislation that increased the permitted maximum contribution to an IRA to $2,000 per year and allowed persons who were already participating in an employer-provided pension plan to establish an IRA and to make tax-deductible contributions to the IRA up to that amount. This experiment "caused a quantum growth in the number of persons with IRAs and in the amounts held in those accounts. . . . In 1982, the first year [that the expansion] was in force, the number of taxpayers with IRAs almost quadrupled, to 12 million."[107] Total IRA assets leaped "from slightly less than $5 billion in 1981 to

102. *See* MUNNELL & SUNDÉN, *supra* note 86, at 9, n. 12.
103. Codified as I.R.C, § 408. Although the IRA was created by ERISA, most IRAs are established and maintained by individuals, not by employers, hence not covered within the regulatory regime of ERISA. *See* ERISA § 3(2)(A), 29 U.S.C. 1002(2)(A).
104. Zelinsky, *supra* note 9, at 474 (citing IRC § 219(b)(2)).
105. I.R.C. § 402(c); I.R.C. § 408 (d)(1), (e)(1).
106. Economic Recovery Tax Act (ERTA) of 1981, Pub. L. No. 97-34, 95 Stat. 172; Tax Reform Act of 1986, Pub. L. No. 99-514, § 1101, 100 Stat. 2085 (codified as amended at I.R.C. § 219(e), (g)).
107. Zelinsky, *supra* note 9, at 487.

more than $28 billion in 1982."[108] (As of year-end 2020, the figure was $12.2 *trillion*,[109] mostly from rollovers.[110]) Meanwhile, the percentage of private-sector workers whose only pension coverage was a DB plan decreased from 28 percent in 1979 to 2 percent in 2017.[111]

Pension-law scholar Edward Zelinsky has advanced the important insight that the widespread experience with IRAs during the Reagan years "acclimated employees to individual accounts so that the [subsequent] switch from employer-sponsored defined benefit pensions to employer-sponsored individual account plans (a switch that employees might otherwise have resisted) seemed normal . . . ."[112] The IRA put the US "on the path toward the defined contribution paradigm by acclimating Americans to the individual account format."[113]

### C. The 401(k) Plan

Congress authorized what became the 401(k) plan as part of an omnibus tax revision measure enacted in 1978,[114] which provided for a new section 401(k) of the Internal Revenue Code effective in 1980. The Internal Revenue Service drafted implementing regulations effective in

108. *Id.*

109. *Retirement Assets Total $34.9 Trillion in Fourth Quarter* 2020, INV. CO. INST. (Mar. 18, 2021), https://perma.cc/U63P-RX6S.

110. ANQI CHEN & ALICIA H. MUNNELL, WHO CONTRIBUTES TO INDIVIDUAL RETIREMENT ACCOUNTS?, Issue Brief No. 17-8, at 1, 3 (fig. 2) (BOSTON COL. CTR. RET. RSCH., Apr. 2017).

111. EMP. BENEFITS RSCH. INST. [EBRI], *Tracking the Shift in Private-Sector, Employment-Based Retirement Plan Participation from Defined Benefit to Defined Contribution Plans, 1979–2017*, EBRI FAST FACTS No. 329 (June 6, 2019).

112. Zelinsky, *supra* note 9, at 475.

113. *Id.*

114. Revenue Act of 1978, Pub. L. No. 95-600, § 135, codified at I.R.C. § 401(k) (2000). Regarding the concerns that had caused resistance to 401(k)-type plans in tax policy circles, see Norman P. Stein, *An Alphabet Soup Agenda for Reform of the Internal Revenue Code and ERISA Provisions Applicable to Qualified Deferred Compensation Plans*, 56 SMU L. REV. 627, 659 (2003); Zelinsky, *supra* note 9, at 482–84.

One version of the still poorly understood history of the enactment is that pressure from Eastman Kodak Corp. induced Rep. Barber Conable, the Congressman from Rochester, N.Y., Kodak's home, to use his influence on the House Ways and Means Committee to promote the measure. RICK WARTZMAN, THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA 276 (2017).

1981,[115] after consultation with potential plan sponsors.[116] The employer commonly makes matching contributions, also tax-deferred,[117] to the participant's account. Investment returns earned on the account are also tax-deferred. The plan typically designates investment alternatives, usually mutual funds, from which the participant chooses to invest the account assets.

Within two years of the 1981 IRS regulations, "nearly half of all large firms were either already offering a 401(k) plan or considering one."[118] The early 401(k) plans were mostly supplementary plans, replacing preexisting secondary plans that lacked tax deferral; these were plans offered by employers that were also providing DB plans.[119] Only later, as DB plans lost their allure (for reasons about to be discussed) did 401(k) plans begin to displace DB plans. The pattern of offering a 401(k) plan in connection with freezing or terminating the sponsor's DB plan[120] became widespread.[121] Whereas in 1981 roughly 60 percent of

115. Treas. Reg. § 1.401(k) (as amended in 1981).

116. For discussion of the activity of benefits staff from a major pharmaceutical firm in these consultations, see Herbert A. Whitehouse, *Toward a More Complete History: Johnson & Johnson's 401(k) Nursery*, EBRI NOTES 1, at 2–4 (EBRI Dec. 2003). Whitehouse corrects the claims of a benefits consultant, Ted Benna, to have been "the father of the 401(k)." For Benna's version, *see, e.g.*, TED BENNA, 401K–FORTY YEARS LATER (2018).

117. Unless the employee elects to establish the account as a "Roth 401(k)," in which contributions are made with taxed dollars but investment gains and distributions are untaxed. *See* I.R.C. § 402A.

118. EBRI, *History of 401(k) Plans: An Update*, EBRI FAST FACTS 2 (Nov. 5, 2018).

119. MUNNELL & SUNDÉN, *supra* note 86, at 2 ("When 401(k) plans began to spread rapidly in the early 1980s, they were viewed mainly as supplements to employer-funded pension and profit-sharing plans.").

120. A prominent example widely noticed in the contemporary press was IBM's decision in 2006 to freeze its DB plan, that is, to amend the plan to allow no further accruals of benefit credits, while launching a 401(k) plan featuring an employer contribution of up to four percent of annual compensation in addition to the employee's salary reduction contribution. *See* Albert B. Crenshaw & Amy Joyce, *IBM Adds Its Name to List of Firms Freezing Pensions*, WASH. POST, Jan. 6, 2006, at A1; Ellen E. Schultz, Charles Forelle, & Theo Francis, *IBM to Freeze Pension Program in '08*, WALL ST. J., Jan 6, 2006, at A3; Mary Williams Walsh, *I.B.M. to Freeze Pension Plans to Trim Costs*, N.Y. TIMES, Jan. 6, 2006, at A1. In 2022 IBM engaged in "de-risking" transactions to transfer $16 billion in pension assets and liabilities to group annuity contracts from Metropolitan Life and Prudential Insurance. *See* Rob Kozlowski, *IBM Offloads $16 Billion in Pension Liabilities*, PENSIONS & INV. (Sept. 13, 2022, 4:37 PM), https://www.pionline.com/pension-risk-transfer/ibm-offloads-16-billion-pension-liabilities-annuity-purchases. Regarding "de-risking," see *infra* text at notes 214–24.

121. Already by 2004, Munnell and co-authors were observing that "[i]n most cases, companies that have frozen their defined benefit pensions have introduced a

employees with pension coverage had only a DB plan, by 2001 nearly 60 percent had only a DC plan,[122] prevailingly a 401(k) plan. By 2016 there were 560,000 401(k) plans, having 67.1 million active participants.[123] As of 2019, 401(k) plans held $6.2 trillion in assets.[124]

From the standpoint of employers, 401(k) and other DC plans have many advantages. DC plans spare the employer the intrinsic risks of DB plan sponsorship, previously discussed,[125] inflation risk, investment risk, and longevity risk. DC plans are more flexible, because the employer does not have to commit to the long-term program of actuarially guided funding that a DB plan requires. An employer whose 401(k) plan offers matching contributions can unilaterally alter or eliminate them, as happened with many plans during the pandemic-induced economic turmoil of 2020.[126] During the 2008–09 financial crisis, 20 percent of companies suspended or reduced matching contributions.[127]

Fortuitously, and fortunately for participants, the introduction of 401(k) plans coincided with the great runup in asset values during the

401(k) plan as a replacement." ALICIA H. MUNNELL, FRANCESCO GOLUB-SASS, MAURICIO SOTO & FRANCIS VITAGLIANO, WHY ARE HEALTHY EMPLOYERS FREEZING THEIR PENSIONS?, Issue Brief No. 44, at 1, 3 (BOSTON COL. CTR. RET. RSCH., Mar. 2004).

122. Munnell, *supra* note 91, at 359, 365–66.

123. EMPLOYEE BENEFITS SECURITY ADMINISTRATION U.S. DEPT. OF LAB., PRIVATE PENSION PLAN BULLETIN, ABSTRACT OF 2016 FORM 5500 ANNUAL REPORTS 1 (2018), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2016.pdf.

124. INVESTMENT COMPANY INSTITUTE, FACT BOOK 169 (60th ed. 2020).

125. *See supra* text at notes 48–58.

126. *See, e.g.*, Erwin Seba, *Exxon Halts Contributions to Employee Retirement Plan*, REUTERS (Aug. 5, 2020), https://www.reuters.com/article/us-exxon-mobil-retirement/exxon-halts-contributions-to-employee-retirement-plan-idUSKCN2510IG; Anne Tergersen & Dieter Holger, *Companies Hit Hard by Coronavirus Look to Cut 401(k) Contributions,* WALL ST. J. (Apr. 1, 2020), https://www.wsj.com/articles/companies-hit-hard-by-coronavirus-look-to-cut-401-k-contributions-11585746000. The shift to DC plans may have enabled employers to lower their aggregate pension expense. JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM 109 n. 25 (2d ed. 2019).

127. Tracey Longo, *Employers are Cutting Matching Contributions to Employee Retirement Plans*, FIN. ADVISOR, (Apr. 14, 2020), http://www.fa-mag.com/news/employers-are-cutting-matching-contributions-to-employee-retirement-plans-55176.html.

bull market years of 1982–2000, during which, for example, the Dow Jones industrial average increased 1,018 percent.[128]

### D. Economic Dislocation and Changed Patterns of Employment

Across the decades from the 1970s onward, the American economy underwent profound structural changes, which undermined the stability of the post-World War II economic order that had given rise to the DB pension system. "[T]he American system of [employee] benefit provision took shape within an institutional landscape dominated by a remarkably stable and long-lived cadre of big companies," which had formed "before World War I [and] mostly held their positions into the 1980s."[129] In the 1950s, "[f]ewer than 500 companies employed more than a fifth of all nonfarm workers," and produced about half of American industrial output.[130] World War II devastated European and Asian economies, leaving the United States "[a]s the only truly functioning major economy north of the equator . . . ."[131]

1. *Decline of manufacturing*. Across the postwar generation, the economies of competing nations were rebuilt. "[T]he onslaught of Japanese and European companies on global manufacturing and technology markets" led to the "collapse of America's industrial preeminence in the 1970s and 1980s."[132] The American manufacturing heartland—the arc of states from Pennsylvania and Ohio across Michigan and northern Indiana to Illinois and Wisconsin—came to be called the Rust Belt, on account of its accumulation of closed factories.[133] Transnational supply chains outsourced components of formerly domestic production. Companies had to "take advantage of the best producers at the lowest prices anywhere they [could] be found [for fear that] [i]f you

128. From 776.92 to 8,688.89. *See* Tom Petruno, *A Look Back at a Great Bull Market*, L.A. TIMES, (Aug. 13, 2002), https://www.latimes.com/archives/la-xpm-2002-aug-13-fi-bull13-story.html.

129. MORRIS, *supra* note 93, at 7.

130. WARTZMAN, *supra* note 114, at 110.

131. Schlegel, *supra* note 67, at 573.

132. MORRIS, *supra* note 93, at 11–12.

133. The view has been advanced that "the Rust Belt's decline started in the 1950s when the region's dominant industries faced virtually no product or labor competition and therefore had little incentive to innovate or become more productive." Lee Ohanian, *Competition and the Decline of the Rust Belt*, FED. RESRV. BANK OF MINNEAPOLIS (Dec. 20, 2014), https://www.minneapolisfed.org/article/2014/competition-and-the-decline-of-the-rust-belt.

don't, your competitors will."[134] By 2016 American manufacturing employment had declined 28 percent from the level achieved at the end of World War II.[135] From June 1979 to December 2009, "the United States lost 41 percent of its manufacturing jobs."[136] "In 1960 almost 40 percent of nonagricultural employment [in the United States] was in manufacturing. By 2015 only 9 percent was, and more than 80 percent of nonfarm work was in services."[137]

2. *Technology*. Technological developments contributed importantly to the decline of American industries, making older productive processes obsolete. Containerization and intermodal transport reduced transportation costs drastically, facilitating the import of foreign-made goods and wiping out much domestic freight-handling employment.[138] From 1976, the US has run an annual trade deficit, and in every year since 1999 the deficit has exceeded 2.7 percent of GDP.[139] Information technology, notably computerization and the internet, disrupted older patterns of data collection and analysis, decimating workforces in clerical, retail, and inventory-control functions. Enterprises as disparate as travel agencies, bookstores, and newspapers found themselves imperiled. Automation and artificial intelligence displaced wide swaths of prior employment.[140]

134. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 153 (3rd ed. 2007).

135. Anek Belbase & Alice Zulkarnain, *Is This time Different? What History Says about Machines' Impact on Jobs*, Issue Brief No. 19-12 CTR. FOR RETIREMENT RSCH. AT BOS. COLL. 1, 3 (FIG.4) (2019) (citing to U.S. Bureau of Labor Statistics data).

136. Eric Tawney, *Manufacturing Matters*, CHI. POL'Y REV. (May 29, 2013), https://chicagopolicyreview.org/2013/05/29/manufacturing-matters. The level of manufacturing employment recovered 2.6 percent from December 2009 to September 2011. *Id.*

137. HACKER, *supra* note 126, at 71.

138. *See* MARC LENINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER (2d ed. 2016).

139. Tawney, *supra* note 136.

140. *See, e.g.*, MARTIN FORD, RISE OF THE ROBOTS: TECHNOLOGY AND THE THREAT OF A JOBLESS FUTURE ix (2015). One study finds that "a 1-standard increase in industrial robot usage is associated with an 11 percent increase in nontraditional work status." Matthew S. Rutledge, Gal Wettstein & Sara Ellen King, *Will More Workers Have Nontraditional Jobs As Globalization and Automation Spread?*, 12 (BOSTON COL. CTR. RET. RSCH., Working Paper No. 2019-10, 2019). "Nontraditional jobs" are those lacking employer-provided retirement and health benefits, and which exhibit "volatility in employment status, earnings, or work hours." *Id.* at 4.

3. *Unions*. Organized labor, it will be recalled, had been the incubator of the DB pension system.[141] The decline of American manufacturing struck at the levels of union membership, which fell from a third of the workforce in the 1950s[142] to a quarter in 1974[143] to 6.4 percent of the private sector workforce in 2017.[144] The combination of increased foreign competition and lowered unionization was particularly unfavorable for DB plans, and thus the view that "the decline in unions has produced a decline in pension coverage."[145] It became much harder for unions to induce employers to sponsor DB plans because, no longer controlling the labor costs of the relevant industries, unions were no longer able to protect a plan sponsor from competitive disadvantage[146] by forcing the sponsor's competitors to offer comparable plans.

4. *Deregulation*. The deregulation movement that commenced in the 1970s and 1980s disrupted the previously stable patterns of operation in many industries, including banking and financial services,[147] electric utilities,[148] airlines,[149] trucking,[150] and telecommunications.[151]

5. *Corporate reorganization*. The economic chaos of the 1970s and 1980s led to traumatic adjustments in enterprise organization. "[N]early half of all major U.S. corporations received a takeover offer in the 1980s," and "many firms that were not taken over restructured

141. *See supra* text at notes 64–75, 78–81.

142. *See* Greenhouse, *supra* note 64.

143. Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment Regimes*, *in* RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 9, 64 (tbl. 4.1) (Katherine V.W. Stone & Harry Arthurs, eds. 2013) (reporting 24.8 percent unionization in 1974).

144. Aparna Mathur & Mark J. Perry, *Counterpoint: Unions Are Irrelevant*, AM. ENTER. INST. (Sept. 1, 2017), https://www.aei.org/articles/counterpoint-unions-are-irrelevant/.

145. Teresa Ghilarducci, *Organized Labor and Pensions*, *in* OXFORD HANDBOOK, *supra* note 91, at 384.

146. *See supra* text at notes 67–68.

147. *See, e.g.*, CHARLES W. CALOMIRIS, U.S. BANK DEREGULATION IN HISTORICAL PERSPECTIVE (2000); ALAN GART, REGULATION, DEREGULATION, REREGULATION: THE FUTURE OF THE BANKING, INSURANCE, AND SECURITIES INDUSTRIES 81 (1993).

148. *See, e.g.*, RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM (1999).

149. *See, e.g.*, GEORGE WILLIAMS, THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION (2nd ed. 1994); BARBARA STURKEN PETERSON & JAMES GLAB, RAPID DESCENT: DEREGULATION AND THE SHAKEOUT IN THE AIRLINES (1994).

150. *See, e.g.*, MICHAEL H. BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION (2000).

151. *See, e.g.*, ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS (1989); ALAN STONE, WRONG NUMBER: THE BREAKUP OF AT&T (1989).

in response to hostile pressure to make themselves less attractive targets."[152] Researchers have found that "the takeover and restructuring activity in the 1980s cluster[ed] in the industries that experience[d] shocks of the greatest magnitude."[153]

6. *Employment instability*. The dislocations in American industry were associated with major changes in the patterns of employment, notably the decline of the "stable one-firm career path" characteristic of the 1950s and 1960s.[154] "The median number of years [that] wage and salaried employees stayed with their current employer in 2018 was 4.2 years."[155] Tenures this brief do not fit well with the backloaded nature of benefit accrual in a DB pension plan, in which most of the benefit accrues in the final years of a long-service relationship.[156]

By 2010, contingent workers and independent contractors comprised 20 percent of the American workforce.[157] Labor-law scholar Katherine Stone points to "a fundamental change in the nature of work"[158] beginning in the late 1970s.[159] Employment became increasingly "intermittent, episodic, and precarious."[160] She describes "a world in which knowledge workers, entrepreneurs, free agents, and laboring

152. Bengt Holmstrom & Steven N. Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and 1990s*, 15 J. ECON. PERSPECTIVES 121, 121 (2001), citing research by Mark L. Mitchell & J. Harold Mulherin, *The Impact of Industry Shocks on Takeover and Restructuring Activity*, 41 J. FIN. ECON. 193 (1996); *see also* GLENN YAGO, JUNK BONDS: HOW HIGH YIELD SECURITIES RESTRUCTURED CORPORATE AMERICA (1991) (regarding the role of high yield bonds in facilitating the restructuring wave of the 1980s).

153. Mitchell & Mulherin, *supra* note 152, at 194, 196. The authors define "shocks" to "include deregulation, changes in input costs, and innovations in financing or technology that induce or enable alterations in industry structure," and see the takeovers as "often merely messengers of the underlying economic changes taking place in the industry." *Id.* at 196.

154. Ewald Engelen, *Changing Work Patterns and the Reorganization of Occupational Pensions*, *in* OXFORD HANDBOOK, *supra* note 91, at 108.

155. David Weedmark, *Job Tenure and the Myth of Job Hopping*, (Jan. 28, 2020), https://www.thebalancecareers.com/job-tenure-and-the-myth-of-job-hopping-2071302.

156. *See supra* text at note 18. Regarding the correlation between declining job tenures and declining rates of DB pension coverage, *see* Leora Friedberg & Michael Owyang, *Explaining the Evolution of Pension Structure and Job Tenure* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10714, 2004), https://www.nber.org/system/files/working_papers/w10714/w10714.pdf.

157. HACKER, *supra* note 137, at 74.

158. Katherine V.W. Stone, *Rupture and Invention: The Changing Nature of Work and the Implications for Social Policy*, in CAMBRIDGE HANDBOOK OF U.S. LABOR LAWS FOR THE TWENTY-FIRST CENTURY 154 (Richard Bales & Charlotte Garden eds. 2020).

159. *Id.* at 158.

160. *Id.* at 159.

drifters move about in diffuse networks, working on projects, delinked from stable employing institutions."[161] This is not the world of the DB pension plan, with its "expectation of lifelong loyalty between employer and employee."[162] "[T]he changing nature of the workforce made traditional defined benefit arrangements less relevant as a means of employee retention."[163] "The ebb of large enterprise and career employment has undermined management's interest in pensioning off its workforce."[164]

7. *Interest rates.* The long-term decline in interest rates that occurred over the last few decades is a factor widely thought to have discouraged plan sponsors from continuing with DB plans. Among other effects, lower interest rates reduce the yield from bonds and other fixed-income investments, increasing the sponsor's cost of servicing its DB liabilities.[165]

8. *Displacement?* The abandonment of employer-provided DB plans may come to be seen as a subtopic in a larger saga, which is the growing displacement of private-sector retirement plans by public provision through Social Security. Already by 1988, the income of persons 65 and older consisted 37.6 percent of Social Security payments, 20.7 percent of earnings from employment, and 19.9 percent from private savings; only 18.7 percent derived from employee benefit plans.[166] Thereafter, "[f]rom 1996 to 2019, the value of Social Security benefits that participants had earned but [had] not yet [been] paid out nearly tripled in real dollar terms, from $13.1 trillion to $37.9 trillion in 2019 dollars."[167] The greater generosity of Social Security benefits, which to

161. *Id.* at 155.

162. WARTZMAN, *supra* note 114, at 277.

163. Daniel Halperin, *Fifty Years of Pension Law*, 6 DREXEL L. REV. 503, 507 (2014).

164. Steven Sass, *Crisis in Pensions*, FED. RSRV. BANK OF BOS. REG'L REV. (1993), at 15.

165. *See* YIMENG YIN, DAN BOYD & HAO SUN, UNDERSTANDING THE IMPACT OF THE LOW INTEREST RATE ENVIRONMENT ON RETIREMENT SECURITY IN THE UNITED STATES: A REVIEW OF ACADEMIC AND PRACTITIONER RESEARCH 7 (Society of Actuaries eds., 2021), ("Low returns will cause challenges in meeting existing pension obligations," and "may accelerate the transition from DB to DC.").

166. *Sources of Retirement Income*, U.S. BUREAU LAB. STAT. (May 23, 2001), https://www.bls.gov/opub/ted/2001/may/wk3/art03.htm#.

167. Andrew G. Biggs, *Changes to Household Retirement Savings Since 1989*, AM. ENT. INST. 5 (May 8, 2020), https://ssrn.com/abstract=3683899. Comparable figures are reported in Sylvain Catherine, Max Miller, & Natasha Sarin, *Social Security and Trends in Wealth Inequality* (2020), https://ssrn.com/abstract=3546668 ("Social Security wealth increased substantially from $3.4 trillion in 1989 to $37.2 trillion in 2019").

some extent offset declines in pension income, may have weakened workers' resistance to the demise of DB pension plans.

To the extent that Social Security's publicly provided DB system is displacing the private pension system, the question arises of what role the private system will continue to serve. One answer is to see the private system, and especially its transition in recent decades from DB to DC,[168] as only incidentally serving the purpose of promoting retirement income policy.

Functionally, the entire private pension system can be understood simply as part of a set of tax shelters,[169] the cumulative effect of which is materially to diminish the progressivity of the income tax for the affluent.

## III. ERISA

The profound changes in the American economy and workforce just described explain much of the decline of the DB pension system in

168. A study of recent participation data concludes that the "401(k) system provides meaningful benefits only for the top two quintiles of the income distribution . . . ." ALICIA H. MUNNELL & ANQI CHEN, 401(K)/IRA HOLDINGS IN 2019: AN UPDATE FROM THE [SURVEY OF CONSUMER FINANCE] at 1 (BOSTON COL. CTR. RET. RSCH., Oct. 2020).

169. I have elsewhere observed that

> [t]hese shelters include the home mortgage deduction, the exclusion of capital gains on residential housing, the exclusion of employer-paid health insurance, and the favorable treatment of many forms of investment income, including the capital gains rate, forgiveness of capital gains taxation on assets held until death (the so-called stepped-up basis), the exclusion of interest on state and local bonds, and now the lower rate on dividend income.

John H. Langbein, *Social Security and the Private Pension System*, *in* IN SEARCH OF RETIREMENT SECURITY: THE CHANGING MIX OF SOCIAL INSURANCE, EMPLOYEE BENEFITS, AND INDIVIDUAL RESPONSIBILITY 109, 112 (T. Ghilarducci et al. eds. 2005).

An important article by Michael Doran shows how across recent decades "Congress has steadily increased the amounts that higher-income earners may contribute to tax-exempt retirement plans and IRAs, and [Congress] has steadily delayed the time when higher-income earners must remove their savings from those tax-exempt accounts—all at great cost to the federal treasury." Michael Doran, *The Great American Retirement Fraud*, 30 ELDER L.J. 265 (Apr. 19, 2023). Tracing the enactments that skewed retirement-income policy to benefit the financial services industry and wealthier employees, Doran attributes this trend to "[c]lever lobbyists and pliable lawmakers [who] sell the legislative packages as promoting general retirement security, but only the affluent are in a position to make use of the new rules." *Id.* Zelinsky has described the financial services industry as the "sales force" of the defined contribution movement. Edward A. Zelinsky, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 96–97 (2007).

the US. However, these changes were accompanied by another set of developments, the regulatory interventions of ERISA, which became ever more onerous for DB plan sponsors. In this Part of this article, I examine structural dimensions of ERISA that have become deterrents to creating or maintaining DB plans, and I direct attention to features of ERISA that have embroiled plan sponsors in litigation and compliance costs.

### A. Basics

Enacted in 1974 and effective in 1976, ERISA federalized the law of employee benefit plans, providing for federal jurisdiction,[170] and for enforcement both by aggrieved private parties[171] and by the three government agencies to which ERISA gave oversight powers.[172] Although titled as an act dealing with "retirement income," ERISA also governs some aspects of so-called "welfare benefit plans," which are employment-based programs that provide a range of non-retirement benefits, including health, life, accident, and disability insurance.[173]

The main substantive features of ERISA that bear on pension plans include (1) reporting and disclosure rules requiring plans to generate professionally prepared accounting and actuarial reports for dissemination to participants and to the Department of Labor;[174] (2) vesting rules that prevent plan terms from causing forfeiture of accrued pension benefits beyond statutorily permitted periods of service;[175] (3) funding standards aspiring to require plan sponsors to pre-fund promised benefits on an actuarially sound basis;[176] (4) fiduciary standards to protect plan assets from misuse or mismanagement;[177] and (5) a program of plan termination insurance[178] to protect the interests of DB plan participants and beneficiaries in the event that the plan defaults on promised vested pension benefits.

170. ERISA § 502(e)–(f), 29 U.S.C. § 1132(e)–(f). Legislative history is cited *supra* note 1.

171. ERISA § 502(a), 29 U.S.C. § 1132(a).

172. The Department of Labor, the Internal Revenue Service, and the newly-established Pension Benefit Guaranty Corporation, *see* ERISA §§ 3(2)(B), 3(13), 3(14)(I), 101(c), 103, 29 U.S.C. §§ 1002(2)(B), 1002(13), 1002(14)(I), 1021(c), 1023.

173. ERISA § 3(1), 29 U.S.C. 1002(1), discussed *infra* note 265.

174. ERISA §§ 101–105, 29 U.S.C. §§ 1021–25.

175. ERISA § 203, 29 U.S.C. § 1053, discussed *infra*, text at notes 233–41.

176. ERISA §§ 301–306, 29 U.S.C. §§ 1081–86. The funding rules were significantly revised in the Pension Protection Act of 2006, Pub. L. No. 109–280, § 101(a), 120 Stat. 780. For discussion of the requirements before and after the 2006 Act, see MCGILL ET AL., *supra* note 12, at 616–36.

177. ERISA §§ 401–413, 29 U.S.C. §§ 1101–13, discussed *infra*, text at notes 270–75.

178. ERISA §§ 4001–69, 29 U.S.C. §§ 1301–69, discussed *infra*, text at notes 194–211.

### B. Unexamined Premises

The drafters of ERISA attempted to fix what they understood to be major shortcomings in an inherited system. ERISA did not disturb the three core premises[179] of American private-sector pension provision as the system stood in 1974 and remains today: (1) pension plans are employer-provided; (2) they are tax-subsidized; and (3) they are voluntary (in the sense that an employer is free not to offer a pension plan). All these features are deeply questionable as matters of policy: Why should an employer have such influence over whether and how the firm's employees can engage in tax-favored saving for retirement? Since the bottom half of the workforce (in terms of compensation) pays little or no income tax, why provide a subsidy that takes the form of income tax deferral, and which therefore provides scant benefit to those who most need subvention?[180] And why in an employment-focused pension regulatory system should employers not be required to provide pension plans (as happens in the Social Security system), in order to extend retirement savings opportunities to all workers? [181] ERISA did not confront these systemic issues.

179. Identified in LANGBEIN ET AL., TEXT, *supra* note 18, at 3–4.

180. "In 2018, the top 50 percent of all taxpayers paid 97.1 percent of all individual income taxes, while the bottom 50 percent paid the remaining 2.9 percent." Erica York, *Summary of the Latest Federal Income Tax Data, 2021 Update*, TAX FOUND. (Feb. 3, 2021), https://taxfoundation.org/federal-income-tax-data-2021/.

181. A commission appointed by the Carter Administration recommended requiring a Mandatory Universal Pension System (MUPS) as a funded supplement to Social Security. *See* PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 42–43 (1981). By the time the commission reported, Carter had been voted out of office, and subsequent administrations ignored the recommendation. Reviewing the MUPS proposal, Bruce Wolk has observed that "[o]nce retirement savings are made mandatory, little reason remains to allow the present favorable tax treatment of retirement plans." Wolk, *supra* note 89, at 467. Regarding the complexities of distribution policy in a system of funded Social Security accounts of the sort later proposed by the administration of President George W. Bush, *see* NATIONAL ACADEMY OF SOCIAL INSURANCE, UNCHARTED WATERS: PAYING BENEFITS FROM INDIVIDUAL ACCOUNTS IN FEDERAL RETIREMENT POLICY: STUDY PANEL FINAL REPORT (Kenneth S. Apfel, Michael J. Graetz, Catherine Hill, Joni Lavery, Virginia P. Reno eds., 2005).

### C. Plan Termination Insurance

Several features of ERISA's design have proved to be particularly problematic, incentivizing the flight from DB to DC plans. ERISA's Title IV,[182] the program of termination insurance meant to protect participants and beneficiaries in the event that their DB plan defaults on paying its promised benefits, has been the most consequential.

1. *The Studebaker default*. The triggering event that led to the enactment of Title IV was the decision in 1963 of the Studebaker Company, a long-troubled automobile manufacturer, to close its factory in Indiana, dismiss its 5,000-person automotive workforce, and terminate its DB pension plan, which covered thousands of present employees and retirees.[183] The affected participants were members of the United Automobile Workers (UAW). The terminated plan was a single-employer pension plan negotiated between the UAW and Studebaker. The plan was severely underfunded, in part because of successive retrospective benefit enhancements negotiated with the union.[184]

Following termination, the plan's assets were distributed[185] in a fashion that provided full promised benefits (in the form of annuities purchased from an insurance company) to participants already retired and to active workers who had already reached the plan's permitted retirement age of 60. Paying for these annuities largely exhausted the plan's assets. In consequence, the bulk of the covered workforce, some 4,000 participants younger than 60 who had at least ten years of service with the company and whose promised benefits under the plan had vested, received lump-sum payments equal to about 15 percent of the actuarial value of their accrued benefits. These participants had an average age of 52 and an average period of service with the company of

182. ERISA §§ 4001–69, 29 U.S.C. §§ 1301–69.

183. *See* Wooten, *Studebaker*, *supra* note 26, substantially republished in Wooten, *History*, *supra* note 1, at 51–79; Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, *in* LANGBEIN ET AL., TEXT, *supra* note 18, at 67–70 [hereinafter Allen, *Studebaker*].

184. The plan commenced in 1950 with an unfunded liability of $18 million for prior service credits, that is, for service before the plan came into effect. Benefits were increased in 1953, 1955, 1959, and 1961, creating additional unfunded liabilities for past service credits. Each increase was to be amortized over a new thirty-year period. *See* Allen, *Studebaker*, *supra* note 183, at 68 (citing *Private Pension Plans: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 89th Cong., 2nd Sess. 104 (1966) (statement of Clifford M. MacMillan, Studebaker Vice President)).

185. The material summarized in this paragraph derives from Allen, *Studebaker*, *supra* note 183, at 67–69.

nearly 23 years. Thus, workers who thought that they had secured their pension benefits discovered late in their work lives that they would receive only a fraction of what they had been promised. The youngest participants, several thousand workers whose accrued benefit credits had not yet vested under the plan's vesting schedule, received nothing.

The hardship borne by the participants who received little or none of their promised benefits[186] resonated with UAW President Walter Reuther and his colleagues in the union's leadership.[187] They had been worried about potential default risk in DB plans in the years preceding the Studebaker default and had been sketching out a potential federal program of plan termination insurance to remedy the problem.[188] Reuther took from the Studebaker incident the lesson that default risk in DB plans "is beyond the economic capability of finding a rational answer at the bargaining [table],"[189] and accordingly, that government intervention was needed to protect plan participants. "Working with Indiana Senator Vance Hartke and his staff, [UAW] officials prepared legislation to create [a plan termination insurance] program,"[190] which Hartke introduced as a Senate bill[191] in 1964, just as the Studebaker plan was being wound up. In this way, the Studebaker default became "an ideal vehicle for injecting termination insurance into"[192] the larger deliberations about pension matters then underway[193] that would result in ERISA.

186. The participants' reliance has been questioned. "Studebaker was not particularly creditworthy. It was in no position to offer a 'defined benefit' plan, and it would be hard, in my judgment, to argue that the employees did not sense this." DENNIS LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS 21 n.12 (Am. Ent. Inst., 1979).

187. In congressional testimony in 1966, Reuther lamented the predicament of DB plan participants suddenly confronted with default on promised benefits upon which they had relied. "How many hundreds of Studebakers do we have . . .?" he asked rhetorically. *Federal Reinsurance of Private Pension Plans: Hearings on S. 1575 Before the Comm. on Finance*, 89th Cong., 2nd Sess. 51 (1966).

188. *See* Wooten, *History*, *supra* note 1, at 67–73.

189. *Federal Reinsurance of Private Pension Plans: Hearings on S. 1575 Before the Comm. on Finance*, *supra* note 187, at 50.

190. Wooten, *Studebaker*, *supra* note 26, at 726.

191. *The Federal Reinsurance of Private Pensions Act, S. 3071*, 88th Cong. (1964); 110 Cong. Rec. 17725 (1964).

192. Wooten, *Studebaker*, *supra* note 26, at 726.

193. *See generally* Gordon, *supra* note 1; Wooten, *History*, *supra* note 1.

2. *The insurance program*.[194] ERISA's Title IV created a new federal agency, the Pension Benefit Guaranty Corporation (PBGC),[195] inspired to some extent by federal deposit insurance of bank accounts, to administer the termination insurance program. Title IV provides that the PBGC "shall guarantee [the] payment of all nonforfeitable [that is, vested] benefits"[196] arising from ERISA-covered[197] single employer DB plans. Benefits accrued but not yet vested are not covered. Because DC plans do not promise a particular benefit, they do not present the default risk to which the PBGC guarantee is directed and are excluded from coverage.[198] As amended in 1986,[199] the guarantee becomes operative in circumstances in which (1) the sponsor terminates a plan that has assets insufficient to pay its promised benefits,[200] and (2) the sponsor is bankrupt or nearing bankruptcy.[201] PBGC takes over the plan and its assets and pays the plan's promised benefits up to a ceiling, currently $5,607.95 per month ($67,295.40 per year).[202] PBGC automatically acquires a lien against the assets of the defaulting sponsor in the amount of PBGC's outlay.[203]

3. *Premiums*. To pay the costs of assuming these benefit obligations to the participants of terminated plans, PBGC charges a so-called insurance premium on all covered single-employer DB plans, initially set in 1974 at the "wildly optimistic"[204] rate of $1.00 per participant per year.[205]

194. The account in text summarizes the current law, some details of which have been modified since ERISA's enactment in 1974.
195. ERISA §§ 4002–06, 29 U.S.C. §§ 1302–06.
196. ERISA § 4022(a), 29 U.S.C. § 1322(a).
197. ERISA excludes from its coverage plans sponsored by federal, state, and local governments, and plans maintained by churches, *see supra* note 3.
198. ERISA § 4021(b)(1), 29 U.S.C. § 1321(b)(1).
199. Single–Employer Pension Plan Amendments Act of 1986 (SEPPA), Pub. L. No. 99-272, Title XI, 100 Stat. 237–82 (1986).
200. ERISA § 4041(c), 29 U.S.C. § 1341(c).
201. *Id.*
202. PENSION BENEFIT GUAR. CORP., *Your Guaranteed Pension: Single-Employer Plans*, https://www.pbgc.gov/wr/benefits/guaranteed-benefits/your-guaranteed-pension (last modified Dec. 13, 2022).
203. ERISA § 4068, 29 U.S.C. § 1368. As originally enacted, PBGC's recourse was limited to 30 percent of the sponsor's net worth, which "created an incentive for a plan sponsor to terminate the plan if the unfunded insured liability ever exceed[ed] 30 percent of its net worth." MCGILL ET AL., *supra* note 12, at 572.
204. Wooten, *History*, *supra* note 1, at 274.
205. PBGC, 2004 Data Book, at 62 & tbl. S-37, https://www.pbgc.gov/Documents/2004databook.pdf (2004) [hereinafter PGBC, 2004 Data Book].

As the costs[206] mounted, Congress increased the rate to $2.60 in 1977, $8.50 in 1985, $16 in 1987, $19 in 1991, $31 in 2007, $57 in 2015, $74 in 2018, and $96 in 2023.[207] In addition, legislation effective in 1997[208] imposed a second layer of premium charges, called the variable-rate premium (VRP), which is based on the extent of the plan's unfunded vested benefits.[209] For 2023, the VRP is currently $9 per $1,000 of unfunded vested benefits per covered participant per year, up to a cap of $652.[210]

4. *Winners and losers*. If one multiplies today's base rate of $96 times the number of participants (retirees and active workers) in a large employer's DB plan, the result can be an annual PBGC bill for that plan in the hundreds of thousands or even millions of dollars. That bill falls due even for a plan that is fully funded or indeed overfunded, a striking contrast with private-sector insurance markets, in which coverage tends to be priced according to the insurer's estimate of the degree of risk that the particular insured event presents.

Although labeled insurance, the PBGC system is best understood as a tax borne mostly by healthy plans that present little or no risk of default, for the purpose of subsidizing sick plans that have promised more benefits than their sponsors could afford to pay. Moreover, because the sick plans have been prevailingly those of unionized firms in an economy in which such a small portion of the private-sector workforce is unionized,[211] the union-designed PBGC system functions disproportionately to tax nonunion firms for the benefit of union workers.

206. PBGC's costs consist of administrative costs; pension disbursements to retirees in plans that terminated with insufficient assets; and the cost of building actuarially sound reserves to pay the vested pension benefits of future retirees in the terminated plans. *See id.* at 83 tbl. M-2.

207. *See id.* at 62 tbl. S-37.

208. Pension Protection Act of 1996, H.R. 3688, 104th Cong. (1996).

209. ERISA § 4006(a)(3)(E), 29 U.S.C. § 1306(a)(3)(E).

210. *Premium Rates*, PENSION BENEFIT GUAR. CORP., https://www.pbgc.gov/prac/prem/premium-rates (last updated Jan. 23, 2023).

211. According to a study of the claims experience in PBGC's first decade, 63 percent of all claims paid through 1986 came from steel and auto industry plans. Another 31.6 percent came from other collectively bargained plans. Only 5.4 cents on the PBGC claims dollar went to nonunion workers. RICHARD A. IPPOLITO, THE ECONOMICS OF PENSION INSURANCE 43, 45 tbl. 3–5 (1989). More recent evidence suggests that the skew to unionized industries continues, but with changes in the mix of unions, especially as a result of airline-industry plan terminations. As of 2019, four of the ten largest claims against PBGC came from airline bankruptcies. PENSION BENEFIT GUAR. CORP., PBGC 2019 DATA TABLES tbl. S-5 (2019). Regarding the extent of unionization of the current workforce, *see supra* text at note 144.

5. *Exit.* The soaring cost of PBGC insurance has been a major factor in encouraging plan sponsors to terminate DB plans. ERISA allows a plan sponsor to terminate a plan on condition that the plan "purchase irrevocable commitments from an insurer to provide all liabilities under the [plan]."[212] The insurer in such a case issues annuity contracts for the plan's participants, which replace the plan as the obligor responsible for paying the retirement benefits accrued under the plan. The sponsor who terminates a DB plan in this way commonly offers a 401(k) plan for future retirement saving by active workers. [213]

6. *De-risking*. Plan termination transactions of this sort[214] are among moves that have come to be known in pension-industry parlance as "de-risking."[215] De-risking has burgeoned. Scholars writing in 2016 observed that "[i]n the last few years, for example, Verizon, General Motors, Ford, Motorola, and Bristol Myers Squibb have all undertaken pension de-risking transactions worth together over $100 billion dollars and affecting hundreds of thousands of workers, retirees, and their beneficiaries."[216] In one such transaction completed in 2020, a General Electric plan transferred $1.7 billion in assets to an annuity provider, which assumed responsibility for payments to about 70,000 participants.[217] At the base-level premium rate of $96 per capita, this transaction saves GE well over $6 million per annum in PBGC premiums.

212. ERISA § 4041(b)(3)(A)(i), 29. U.S.C. § 1341(b)(3)(A)(i).

213. *See, e.g.*, *supra* notes 120–21.

214. Another technique for reducing a sponsor's PBGC exposure is to buy out the plan participant's entire accrued benefit. Participants who accept these so-called lump sum distributions cease to be participants and thus are not taken into account in calculating the sponsor's PBGC premium. For a recent example, *see, e.g.*, Rob Kozlowski, *General Electric Pays $2.65 Billion in Lump Sums*, PENSION & INVS. (Feb. 25, 2020), https://www.pionline.com/pension-funds/general-electric-pays-265-billion-lump-sums.

215. The topic is surveyed in Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U. L. REV. 733 (2016).

216. *Id*. at 736. For additional sources *see id.* at n.13; *see also* Sven Klinger, Suresh M. Sundaresan & Michael A. Moran, Corporate Pension Risk Transfers (2015).

217. James Comtois, *General Electric Transfers $1.7 Billion in Pension Liabilities to Athene*, PENSIONS & INVS. (Dec. 16, 2020, 2:29 PM), https://www.pionline.com/pension-risk-transfer/general-electric-transfers-17-billion-pension-liabilities-athene.

The Metropolitan Life Insurance Company, an active party in the de-risking market,[218] wrote in 2019 that it "expected that a significant portion of the over $3 trillion of DB plan liabilities that have not yet been de-risked will flow through the pension risk transfer pipeline over the next decade."[219]

Because an insurance company's annuity substitutes for the plan participants' former interest in the ERISA-covered DB plan, after such a de-risking transaction the former plan participants cease to have any claim on PBGC in the event that the annuity provider becomes insolvent.[220]

It is widely understood that escaping PBGC premiums has been a driving force behind the de-risking trend.[221] Polling data from a survey of DB plan sponsors conducted by Met Life found that PBGC premium

218. *See, e.g.*, Rob Kozlowski, *FedEx to Ship $6 Billion of Pension Obligations to Annuity with MetLife*, PENSIONS & INVS. (May 8, 2018, 1:00 AM), https://www.pionline.com/article/20180508/ONLINE/180509859/fedex-to-ship-6-billion-of-pension-obligations-to-annuity-with-metlife. Met Life reports that "there are currently nearly 20 [pension risk transfer] insurers in the U.S." 2021 Met Life Poll, *supra* note 55, at 5.

219. MET. LIFE INS. CO., 2019 PENSION RISK TRANSFER POLL 1–2 (2019) [hereinafter 2019 Met Life Poll]. A poll of large plan sponsors that Met Life conducted in 2021 found that "nine in ten [such firms] expect to completely offload their pension liabilities in the foreseeable future." 2021 Met Life Poll, *supra* note 55, at 3.

220. "Since the early 1970s, there have been about 600 insolvencies of property and casualty insurers." *Facts and Statistics*, NAT'L. CONF. INS. GUAR. FUNDS, https://www.ncigf.org/resources/media-room/facts-and-stats/ (last visited Feb. 28, 2023). Many states operate guaranty funds for the victims of insurance company default, but these programs are frail substitutes for the PBGC's extensive federal-level protection. The state funds are thinly financed, and the coverage they provide varies from state to state. Some do not cover pension annuities, and most have relatively low ceilings on the amounts covered. Some restrict coverage to that state's residents, excluding out-of-state victims of an insurer headquartered or operating within the state. For detail *see* NAT'L ORG. OF LIFE & HEALTH INS. GUAR. ASSOCS., CONSUMER PROTECTION COMPARISON: THE FEDERAL PENSION SYSTEM AND THE STATE INSURANCE SYSTEM (2016).

221. *See, e.g.*, Rob Kozlowski, *Managing Pension Risk: More Firms Make Move, But Targets Shifting*, PENSIONS & INVS. (Nov. 13, 2017), https://www.pionline.com/article/20171113/PRINT/171119966/managing-pension-risk-more-firms-make-move-but-targets-shifting. A plan advisor interviewed in the pension press described the mindset of the prototypical plan sponsor thus: "If I'm paying $100 a month to a retiree but I'm paying the PBGC $80 a year for the privilege of paying the retiree, it makes sense to offload those liabilities . . . . [R]educing PBGC costs ranges anywhere from helpful to enormously helpful." *Id.* quoting an officer of Mercer LLC.

increases "are the primary catalyst for plan sponsors to initiate a pension risk transfer to an insurance company . . . ."[222] One PBGC spokesperson has acknowledged that "the premium levels are causing de-risking . . . ."[223]

7. *Full circle*. De-risking has in a sense brought the American system of employer-provided pensions full circle. We have seen that in the early years of the Twentieth Century before the single-employer DB system took hold, employer-provided pension provision often took the form of buying annuities from Met Life and other insurers.[224] Now in the early decades of the Twenty-First Century, the de-risking movement has brought us to replicate that pattern.

### D. Reversing the Risk of Default[225]

Before the enactment of ERISA, the sponsor of a DB plan could insert in the plan a term providing that the sponsor's responsibility for paying promised benefits was limited to whatever assets were contained in the plan. If the plan's assets were insufficient, the shortfall reduced the participants' pensions, even though the promised benefits were vested. The effect was to cause the pension promise to run solely against the plan and not against the firm sponsoring the plan. The Studebaker plan[226] contained such a term.[227]

Somewhat circuitously, ERISA outlaws such terms. The vesting rules make pension promises nonforfeitable after periods of service ranging from three to ten years.[228] The termination insurance provisions

222. 2019 Met Life Poll, *supra* note 219, at 4.

223. David B. Brandolph, *Employers Cite High Premiums as Driving Pension Risk Transfers*, BLOOMBERG L. (Jan 4, 2018), https://www.bloomberglaw.com/bloomberglawnews/employee-benefits/X8DBR3ES000000 (quoting Constance A. Donovan, identified as "PBGC's participant and plan sponsor advocate").

224. *See supra* text at note 34.

225. This section derives from LANGBEIN ET AL., TEXT, *supra* note 18, at 187.

226. *See supra* text at notes 183–93.

227. The language of such a pre-ERISA provision, as found in a reported case, reads: "The Company shall have no liability in respect to payments under the Plan except to pay over to the [plan's] Trustee [all promised or contractually agreed] contributions . . . Each employee or retired employee . . . shall look solely to the Trust Fund for any payments or benefits under the Plan." *Matter of Defoe Shipbuilding Co.*, 639 F.2d 311, 312 (6th Cir. 1981).

228. See ERISA § 203(a), 29 U.S.C. § 1053(a) (nonforfeitability requirements); ERISA § 204(g), 29 U.S.C. § 1054(g) (the anti-reduction rule).

of ERISA's Title IV, just discussed, require PBGC to guarantee nonforfeitable (vested) benefits,[229] and give PBGC recourse against the sponsor to recoup any such amounts that the PBGC pays.[230] The effect of these interrelated provisions is to say to the employer: "If you promise a benefit, once it vests under the terms of your plan you must pay it. If you do not, PBGC will,[231] and PBGC will then recover those amounts from you up to your net worth."

By banning plan terms that tied the pension promise to the amounts in the fund, ERISA worked a radical change[232] in the risk calculation of the DB-plan sponsor. The sponsor ceased to be able to restrict its exposure to the otherwise intrinsic risks of such plans. This feature of ERISA constitutes a major disincentive to creating and maintaining DB plans.

## E. Vesting

A primary objective of ERISA was to limit the plan sponsor's power to impose conditions that interfere with a participant's ability to obtain and retain benefits under the plan. Vesting is "a significant factor in the cost of a pension plan. A more liberal vesting provision means that more employees will qualify for benefits."[233] Before ERISA, a plan could contain a term providing that a covered employee accrued no benefit under the plan unless the employee completed a specified period of service of whatever length the plan imposed. As enacted in 1974, ERISA limited the permitted period to ten years, and an amendment effective in 1986 shortened the period to five years in most cases.[234]

229. ERISA § 4022(a), 29 U.S.C. § 1322(a).

230. *See* ERISA §§ 4062–63, 29 U.S.C. §§ 1362–63.

231. This payment is subject to the previously discussed benefit ceiling. *See supra* text at note 202.

232. Writing in 1967, a few years before the enactment of ERISA, an officer of the Bureau of Labor Statistics observed that "[p]ension plans, with few exceptions, limit an employer's financial obligations to the amount of his contributions, i.e., any deficit in the plan's finances is not chargeable against company assets in case of default." Emerson H. Brier, *Terminations of Pension Plans: 11 Years of Experience*, 90 MONTHLY LAB. REV. 26, 29 (1967).

233. Wooten, *Studebaker*, *supra* note 26, at 695.

234. The provision now requires that "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit . . . ." ERISA § 203(a)(2)(A)(ii), 29 U.S.C § 1053 (a)(2)(A)(ii) (cliff vesting). Under an alternative permitted period, vesting occurs in percentages of the accrued benefit across a seven-year interval. ERISA § 203(a)(2)(A)(iii), 29 U.S.C § 1053

ERISA's five-year vesting requirement approximates common American employment tenure patterns. As of 2018 it was reported that "[o]ver the past 35 years, the median tenure of all wage and salary workers ages 25 or older has stayed at approximately five years."[235] Thus, ERISA's vesting regime effectively prevents employers from using the sanction of pension forfeiture to encourage longer-than-usual employee tenures.

The vesting rules are so restrictive that they prevent plan sponsors from enforcing forfeiture-for-cause provisions, such as plan terms conditioning receipt of the pension on the participant's not stealing from the company or not working for a competitor after retiring from the sponsor.[236] Moreover, having to pay "small lump-sum distributions to short-tenure workers [as ERISA vesting requires] dramatically increase[s] costs" for plan sponsors.[237]

ERISA reinforces the vesting rules with measures designed in part to prevent plan sponsors from evading or weakening the protections, including anti-backloading rules "designed to prevent the disproportionate accrual of benefits until late in the worker's employment,"[238] an anti-reduction rule to prevent plan amendments from reducing promised benefits;[239] and an anti-discrimination provision making it "unlawful . . . to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."[240]

ERISA's elaborate vesting regime strikes at one of the core reasons that employers sponsor pension plans, which is to encourage employees to align their interests with those of the employer, especially by reducing employee turnover.[241]

(a)(2)(A)(iii) (graduated vesting). ERISA and the Internal Revenue Code also provide some special-purpose vesting rules of limited extent; *see, e.g.*, LANGBEIN ET AL., TEXT, *supra* note 18, at 115.

235. Craig Copeland, *Trends in Employee Tenure, 1983-2018*, EBRI Issue Brief No. 474, (Emp. Benefits Rsch. Inst., 2019), at 1.

236. *See, e.g.*, Nedrow v. MacFarlane & Hays Co. Emps. Profit Sharing Plan & Tr., 476 F. Supp 934, 935 (E.D. Mich. 1979).

237. MUNNELL, *supra* note 3, at 6.

238. Alicia H. Munnell, *ERISA–The First Decade: Was the Legislation Consistent with Other National Goals?*, 19 U. MICH. J. L. REFORM 51, 56 (1985).

239. ERISA § 204(g), 29 U.S.C. § 1054(g).

240. ERISA § 510, 29 U.S.C. § 1140.

241. *See supra* text at notes 16–18.

## F. The Sponsor's Financials

Yet another consequence of ERISA that has soured employers on DB plans is the concern that ERISA injects the inherent volatility of the pension accounts into the financial statements of the sponsor. "[T]he finances of a defined benefit pension plan can affect an organization's corporate financial statements . . . [in three ways]: the balance sheet, where the funded position is recognized; the income statement, where the pension expense is recognized; and the corporate cash flow statement, which reflects annual contributions to fund the plan."[242] Since a DB "plan's funded position flows directly to the corporate balance sheet," plan sponsors' decisions to shift from DB to DC plans "are generally viewed as being largely driven by corporate finance considerations."[243]

Measuring and reporting pension plan assets and liabilities has long been a challenging field of financial accounting. Plan assets fluctuate in value with the markets on which they are traded. On the liability side, many components of pension cost involve projections about future factors such as interest rates, employee tenures, funding levels, and rates of benefit accrual,[244] factors that cannot be discounted to present values with precision. Remarkably, "there were no generally accepted accounting principles for pension plans"[245] until the enactment of ERISA pressured the Financial Accounting Standards Board to develop such standards, known as FASB 87, in 1985.[246] By preventing the DB-plan sponsor from distancing itself from the liabilities of the plan,[247] ERISA "alter[ed] the capital structure of every firm that has an unfunded vested pension liability."[248]

242. JIM GANNON, MANAGING AND MITIGATING A PENSION PLAN'S IMPACT ON FINANCIAL STATEMENTS 1 ( VANGUARD, 2021).

243. *Id.* at 2, 8.

244. Regarding actuarial cost factors, *see* MCGILL ET AL., *supra* note 12, at 581–97.

245. *Id.* at 715.

246. *See* FIN. ACCT. STANDARDS BD. [FASB], Statement of Fin. Acct. Standards No. 87 (1985) (citing "the enactment of ERISA" among the precipitating factors leading to the preparation of the FASB 87 standards).

247. *Supra* text at notes 225–32.

248. JACK L. TREYNOR, PATRICK J. REGAN & WILLIAM W. PRIEST, JR., THE FINANCIAL REALITY OF PENSION FUNDING UNDER ERISA (1976). Writing under a pen name during the congressional deliberations leading to ERISA, Treynor developed the insight that, from the standpoint of corporate finance, a firm that sponsors a DB plan needs to be understood as having an "augmented balance sheet" that consolidates

A key principle of FASB 87 is that plan assets must "be measured at their fair value,"[249] that is, marked to market. The consequence initially was benign for most DB plan sponsors, on account of the great runup in asset values during the bull market years of 1982–2000.[250] Thereafter, however, the market declines of the "dot.com bust" of 2000–02 and the great recession of 2007–09 caused serious discomfort to many plan sponsors, whose operating results became submerged in pension asset declines. Publicly traded companies want their financials to show orderly growth.[251] "The inherent volatility of equity investments"[252] and other assets in the pension plan portfolio interferes with that objective, discouraging companies from sponsoring DB pension plans.

### G. Compliance and Litigation Costs

ERISA is a poorly drafted statute, which has had to be amended incessantly.[253] The act has been further amplified by a mass of regulations issued by the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation.[254] ERISA begat an immense interpretive case law, including as of 2020 some 68 Supreme Court decisions.[255] Many interest groups, government agencies, legisla-

pension liabilities and assets with the traditional financial statements; Walter Bagehot, *Risk and Reward in Corporate Pension Funds*, 28 FIN. ANALYSTS J. 80, 82 (Jan.–Feb. 1972). (Regarding the ascription to Treynor, *see* Fischer Black, *The Tax Consequences of Long-Run Pension Policy*, 36 FIN. ANALYSTS J. 21, 28 (July–Aug. 1980.)

249. FASB, *supra* note 246, at 18, 47.

250. *See* Petruno, *supra* text at note 128 & n. 128.

251. During the tenure of Jack Welch as CEO of General Electric, the company reported 51 consecutive quarters of earnings gains between 1981 and 1994; the market value of GE stock advanced across those years from $12 to $90 billion. *See* THOMAS F. O'BOYLE, AT ANY COST: JACK WELCH, GENERAL ELECTRIC, AND THE PURSUIT OF PROFIT 332 (1998).

252. Oxford Handbook, *supra* note 91, at 368.

253. As of 2010, there had been 43 such enactments, tracked in JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 98–104 (5th ed. 2010), and more have been enacted since.

254. "Anyone who has ever worked on ERISA legislation knows the problems caused by the fact that most [ERISA] legislation must go through at least four committees of Congress and that the regulations to implement new laws are written by three different federal agencies." Utgoff & Groom, *supra* note 86, at 5.

255. EVERSHEDS SUTHERLAND, *Step by Step: Employee Benefits in the Supreme Court: October 2020 Update*, 3 (Oct. 1, 2020), https://us.eversheds-sutherland.com/NewsCommentary/Articles/235652/White-paper-Employee-benefits-in-the-Supreme-Court-2020-update.

tors, and legislative staff members had their hands in drafting the original Act.[256] The conference committee that assembled the final draft was working under deadline pressure to clear the congressional calendar to make time for projected impeachment proceedings against President Nixon.[257]

ERISA's regulatory initiatives impose significant compliance and litigation costs on sponsors of DB plans.[258] The reporting and disclosure rules require that professional service providers (accountants, actuaries, lawyers) be engaged to facilitate compliance and prepare the associated paperwork.[259] These expenses are in addition to sponsor-level costs of plan administration.[260]

Among the most burdensome parts of the statute,[261] four stand out.

1. *Preemption*. ERISA § 514(a) "supersede[s] any and all State laws insofar as they . . . relate to any [ERISA-covered] employee benefit

256. Extensively detailed in Wooten, *History*, *supra* note 1, and summarized in Gordon, *supra* note 1.

257. *See* Wooten, *History*, *supra* note 1, at 229, 244–46, 265, 269–72.

258. *See especially* Utgoff & Groom, *supra* note 86. (Writing in 1995 to evaluate ERISA's first twenty years, Utgoff (former executive director of the Pension Benefit Guaranty Corporation) and Groom (a prominent ERISA lawyer) emphasized that the "complex and cumbersome" character of the legislation "imposed enormous compliance costs.) These costs are so high that many workers, particularly those in small firms, have been 'protected' out of a pension." *Id.* at 1. "Billions of dollars are spent on compliance every year. . . . The compliance costs are very high and the rules achieve no useful objective." *Id.* at 4.

259. Zelinsky, *supra* note 9, at 474.

260. Reliable data on administrative and compliance costs is hard to find. Writing in 1991, an informed observer estimated that "[a] large employer's plan administration expenses generally run at about 4 percent of average contributions . . . ." Kathleen P. Utgoff, *Costly, Complicated Pension Laws Not Working As Intended, Utgoff Says*, 18 BNA PENSION REP. 823, 826 (1991). Regarding Utgoff, *see* Utgoff & Groom, *supra* note 258.

261. Consistent with the scope of this article, the discussion above is limited to problematic features of ERISA's treatment of single-employer DB plans. ERISA's worst drafting blunder was its handling of multiemployer plans. The 1974 act insisted on covering these plans without working out the principles, which Congress had to supply by amendment in 1980. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, 94 Stat. 1208. The amendment imposed unexpected and dismaying retroactive liabilities on employers, thereafter increasing employer resistance to participation in multiemployer plans. ERISA's other fundamental mistake of design, in my view, was the drafters' decision to extend the statute's coverage beyond pension plans to welfare benefit plans, *see infra* note 265.

plan . . . ."[262] This provision, applicable both to DB and DC plans, "sweeps as broadly as the English language allows."[263] It displaces state laws that "relate to" employee benefit plans even in circumstances in which ERISA does not contain a conflicting federal provision. ERISA preemption has produced a vast case law.[264] The Supreme Court has recurrently addressed the subject,[265] oscillating between fidelity to the statutory text[266] and the impulse to avoid preemption when the state law in question has only a tenuous connection to the ERISA-covered plan. In 1995, the Court effectively rewrote the preemption provision to restrict its application in cases in which the questioned state law "had only an indirect economic effect"[267] on the ERISA-covered plan.

2. *Funding*. ERISA's funding rules aspire to require the DB plan sponsor to institute an orderly program of contributions that, together

262. ERISA § 514(a), 29 U.S.C. § 1144(a). Regarding the obscure legislative history of this hastily drafted "regulatory vacuum," *see* Daniel M. Fox & Daniel C. Schaffer, *Semi–Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47, 48–52 (1988).

263. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J. L. REFORM 109, 110 (1985).

264. A Westlaw search conducted in 2009 found 4,300 judicial opinions dealing with ERISA preemption. *See* LANGBEIN ET AL., *supra* note 253, at 818–19.

265. As of 2020, the Court has decided 32 ERISA preemption cases. *See* EVERSHEDS SUTHERLAND, *supra* note 255, at 5. Many of these cases involve nonpension plans, so-called welfare benefit plans, noticed *supra* text at note 173. The legislative decision to extend ERISA to such plans was in my view a major mistake. The main reason for having the statute cover welfare benefit plans was to prevent corruption and looting of union-dominated multiemployer insurance-plan assets by extending ERISA's fiduciary standards to such plans. *See* Gordon, *supra* note 1, at 10–11, discussing abuses of multiemployer welfare-benefit-plan assets discovered in the mid-1960s by a U.S. Senate committee chaired by Sen. John McClellan. There was no need for ERISA to protect single-employer welfare benefit plans, which are essentially current-expense corporate liabilities of the plan sponsor that do not entail the decades-long period of accumulation, investment, and distribution that are the defining characteristics of a DB pension plan. Multiemployer plans were already regulated under the Taft-Hartley Act, *supra* text at note 44. Taft-Hartley could have been amended to contain ERISA-comparable fiduciary and remedial measures, sparing much of the preemption mischief that resulted when ERISA was made to apply to welfare benefit plans.

266. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 (1983), (emphasizing "the plain language of § 514(a), the structure of the Act, and its legislative history . . .").

267. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 662 (1995). In a later case, Justice Scalia, despite his textualist predisposition, exulted that in "our current ERISA jurisprudence . . . 'relates to' is irrelevant." California Div. Lab. Standards Enf't et al. v. Dillingham Constr., N.A., 519 U.S. 316, 336 (1997).

with the plan's actual and projected investment experience, will be sufficient to defray the plan's benefit promises. As modified in 2006, these rules greatly restrict the sponsor's former freedom to decide when, whether, and how much to contribute to the plan.[268] Zelinsky observes that "the inflexibility, impenetrability, and administrative costs associated with ERISA's defined benefit minimum funding rules are, for many employers, a significant deterrent to establishing or continuing defined benefit plans, particularly when those rules are contrasted with the greater flexibility, transparency, and simplicity of the rules governing . . . 401(k) plans."[269]

3. *The fiduciary regime*. ERISA's fiduciary rules impose on both DB and DC plans standards of loyalty and prudence derived from trust law to protect plan assets against misuse and mismanagement,[270] but the regime is clumsily designed[271] in ways that embroil plan sponsors in

268. ERISA §§ 301–306, 29 U.S.C. §§ 1081–1086, as modified by the Pension Protection Act of 2006, Pub. L. 109–280, 120 Stat. 780. The current funding regime is summarized in MCGILL ET AL., *supra* note 12, at 616–36.

269. Zelinsky, *supra* note 9, at 476–77. For the view that changes in the minimum funding rules enacted in 1987 became a major contributor to the decline in the number of DB plans, *see* Pamela D. Perdue, *Going, Going, Gone: The Continuing Decline of the Traditional Defined Benefit Plan*, 26 J. PENSION PLAN. & COMPLIANCE 1, 1–4 (Win. 2001).

270. ERISA § 404(a)(1)(A)–(B), 29 U.S.C. §§ 1104(a)(1)(A)–(B). For an example of these standards in application, *see* Donovan v. Mazzola, 716 F.2d 1226 (9th Cir. 1983), remedying cronyism and corrupt investment practices in a pair of interlocked multiemployer plans. Contrast the machinations of James Hoffa *pere* using Teamster Union multiemployer plan assets in the immediate pre-ERISA period, noticed in RALPH C. JAMES & ESTELLE D. JAMES, HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER 213–317 (1965).

271. ERISA left unresolved the question of in what respects the plan sponsor is and is not acting in a fiduciary capacity, producing a large and complex case law, thoughtfully analyzed in Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. REV. 459 (2015); Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007 (2018).

ERISA modeled its fiduciary law on the law of personal trusts, protecting plan participants but neglecting the interests of plan sponsors and the Pension Benefit Guaranty Corporation. *See* John H. Langbein & Daniel R. Fischel, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 UNIV. CHI. L. REV. 1105 (1988). Almost half a century after the enactment of ERISA, the Department of Labor is still trying to decide how to define an ERISA fiduciary. *See* Employee Benefits Security Administration, Department of Labor, Definition of "Fiduciary," 29 C.F.R. § 2510.3-21 (2020).

compliance difficulties and litigation expense.[272] An overlapping scheme of so-called prohibited transaction rules imposes wide-ranging restrictions on many aspects of administering plans and investing plan assets.[273] These rules are largely redundant to ERISA's core fiduciary duties of loyalty and prudence,[274] but they support a lucrative Washington-based ERISA practice for lawyers who obtain prohibited-transaction exemptions from the Department of Labor.[275]

4. *Benefit denials*. ERISA regulates the procedures that a plan must follow when denying a participant's claim to a benefit under the plan, whether DB or DC. The plan must "provide adequate notice in writing to [the] participant," and disclose "the specific reasons for such denial . . . ."[276] Moreover, the plan must implement internal procedures "for a full and fair review . . . of the decision denying the claim" by a decision-maker who is a fiduciary.[277] A participant who is dissatisfied with this plan-level resolution of the claim is empowered to bring a federal civil action "to recover benefits due . . . under the terms of [the] plan . . . ."[278] Alas, having provided for federal-court review of contested benefit denials, ERISA's drafters neglected to specify the standard of review. The Supreme Court stepped into this breach in 1989 with a problematic decision[279] that imposes *de novo* review as the default standard but allows the plan drafter to substitute a contrary and self-

272. *See*, *e.g.*, Robert Steyer, *Sponsors Rocked by Fiduciary Insurance Hikes*, PENSIONS & INVESTMENTS (Sept. 20, 2021, 12:00 AM), https://www.pionline.com/defined-contribution/sponsors-rocked-fiduciary-insurance-hikes; Emile Hallez, *Fiduciary Insurance Costs Soar Amid New 401(k) Litigation*, INVESTMENTNEWS (Oct. 21, 2020), https://www.investmentnews.com/fiduciary-insurance-costs-401k-litigation-198407.

273. ERISA §§ 406–408, 29 U.S.C. §§ 1106–1108.

274. In 1995 two prominent ERISA practitioners observed that the prohibited transaction rules "prevent plans from engaging in beneficial investment transactions;" and that because of compliance costs, the prohibited transactions rules "increase the marginal cost of nearly every investment transaction that does not take place in public [markets]." Utgoff & Groom, *supra* note 86, at 13. The authors reported asking "[s]everal experienced ERISA attorneys [if] they were aware of any case in which these rules had prevented or punished some abusive act that was not also proscribed by the general fiduciary rules. None could identify a single case." *Id.*

275. The Department's authority to grant exemptions derives from ERISA § 408(a), 29 U.S.C. § 1108(a).

276. ERISA § 503(1), 29 U.S.C. § 1133(1).

277. ERISA § 503(2), 29 U.S.C. § 1133(2).

278. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

279. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 101 (1989), criticized in John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. R. 207 (1990).

serving standard requiring the reviewing court to defer to the plan's decision unless the reviewing court finds the decision to have been "arbitrary and capricious." A vast and costly case law has resulted, dealing with such issues as the interpretation of "arbitrary and capricious," the adequacy of the plan's internal review procedures, and whether the plan's language was sufficient to defeat the default standard.[280]

## IV. Conclusion

Part II of this article ("The Unraveling") has summarized the drastic changes that shook the American economy and workplace in the last quarter of the Twentieth Century. These developments were so severe that they might alone have led to the atrophy of the DB pension system and the consequent success of the emergent 401(k) plan as quasi-substitute. But these developments did not happen alone. In the United States,[281] they were accompanied by the enactment of ERISA in 1974, and it was ERISA that ultimately sealed the fate of the American DB pension system.

Before ERISA, as the Studebaker incident illustrates, employers were able to design DB plan terms that placed the risk of shortfall or default on the plan participants.[282] In addition to imposing many other costs on plan sponsors, especially the PBGC premium tax, ERISA attempted to transfer default risk to plan sponsors, most importantly, by toughening funding requirements,[283] by imposing PBGC liability, and by forbidding the sponsor from confining its DB plan liabilities to the plan's assets.[284] But ERISA's attempted liability shift has turned out to be a vast regulatory miscalculation, because in a system in which employers are not required to offer DB plans,[285] most have now responded by ceasing to do so.

280. For an overview of ERISA benefit-denial law, *see* LANGBEIN ET AL., TEXT, *supra* note 18, at 625–81.

281. DB plans have been on the decline in other countries, which did not, of course, experience ERISA. For an overview of developments elsewhere, *see* G. A. (SANDY) MACKENZIE, THE DECLINE OF THE TRADITIONAL PENSION: A COMPARATIVE STUDY OF THREATS TO RETIREMENT SECURITY (2010).

282. *See supra* text at notes 225–32.

283. *See supra* text at notes 268–69.

284. *See supra* text at notes 225–32.

285. A proposal has been under consideration in Congress that would require all but very small employers to offer a 401(k) or other individual account plan, *see* Brian Croce, *House Committee to Consider Requiring Employer-Sponsored Retirement*