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EMPLOYEE BENEFIT REPORTING AFTER ERISA

Wesley W. Steen*

On September 2, 1974, President Ford signed the Employee Retirement Income Security Act of 1974 (ERISA).\(^1\) The Act has four parts: Title I, dealing with Labor Department matters; Title II, dealing with amendments to the Internal Revenue Code; Title III, dealing with various jurisdictional and administrative matters; and Title IV, dealing with government plan termination insurance and the Pension Benefit Guarantee Corporation. All four titles impose some reporting or disclosure requirements.

Prior to the effective date of the Act, welfare and pension plans were subject to two primary reporting requirements. First, the Welfare and Pension Plans Disclosure Act\(^2\) required the filing of various reports with the Labor Department. However, plans with fewer than 26 participants were exempt,\(^3\) while plans with fewer than 100 participants generally were required to furnish documents and information when specifically requested by the Secretary of Labor, but were not required to report.\(^4\) The second mandate for reporting was a requirement of the Internal Revenue Service that "qualified" employee benefit plans be "communicated" to the participants.\(^5\)

The 1974 Act introduces major innovations in employee benefit law. For the first time, reporting and disclosure of plan provisions are regulated, in minute detail, by federal statute and by Department of Labor regulations. In addition, some pension benefits now are guaranteed by a new federal corporation. The tax provisions for qualified plans retain basically the prior structure, but with several refinements. Of all the innovations in ERISA, the most striking are the new

\(^*\) Member, Baton Rouge Bar. This article generally does not include regulations or forms published after March 10, 1976.


reporting requirements, enactment of federal standards of fiduciary conduct with respect to employee benefit plans, federal guarantee of some employee benefits, and preemption of state law with respect to employee benefit plans.

This article deals with the statutory reporting requirements of ERISA and some of the regulations recently promulgated. But the article is not limited to pension plans and retirement plans, because the Act is not so limited. While the title of the statute is "Employee Retirement Income Security Act of 1974," and its more popular name is "Pension Reform Act," the Act really covers not only pension plans, but all types of employee benefit plans. An employer who pays part of the costs of a medical insurance plan for his employees may be surprised to find that he must make detailed disclosure to his employees; he may be even more surprised to learn that these requirements are contained in the "Pension" Reform law, but such is the case. The same applies to an employer who allows his employees to accumulate vacation time over several years and then pays them in lieu of time off. Even broader coverage is possible because, except for definitions provided by Labor Department regulations, the statute appears to cover such common employer practices as paid vacations and sick leave. Thus, but for Department of Labor exemption, such ubiquitous employer practices might be subjected to the same detailed reporting requirements as apply to pension plans.

ERISA REPORTING REQUIREMENTS

Title I Reporting

The labor section of the statute, Title I,\(^6\) defines terms generally, including "employee welfare benefit plans," "employee pension benefit plans," and "employee benefit plans."\(^7\) It then recites the employer and employee organizations covered by the Act and exempts certain plans from coverage.\(^8\) Finally, Labor Department regulations exempt certain other plans from the operation of the Act.

After defining the Act's coverage, ERISA turns to actual

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6. ERISA §§ 2-14.
7. Id. § 3(3).
8. Id. § 4.
reporting requirements. The plan administrator must furnish both a plan description and a summary plan description, as well as reporting any amendments or material modifications to either. He must also supply annual and terminal reports, along with any additional information that the Secretary of Labor might request. Finally, Title I provides for disclosure of information about the plan to plan participants.

**Coverage of Title I**

Title I contains by far the most extensive reporting requirements in the Act. The title is difficult to apply because it states a general rule, then chips away at the rule with numerous exceptions. The Labor Department subsequently has made wholesale deletions through regulations.

ERISA defines the broad term “employee benefit plan” or “plan” to include the two types of “plans” it covers:9 “employee welfare benefit plans” and “employee pension benefit plans.” An “employee welfare benefit plan” or “welfare plan” is

any plan, fund, or program . . . maintained by an employer or an employee organization . . . for the purpose of providing . . . through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, of 1974 (other than pensions or retirement or death, and insurance to provide such pensions).10

An “employee pension benefit plan” or “pension plan” is

[a]ny plan, fund, or program . . . established or maintained by an employer or an employee organization . . . to the extent . . . such plan, fund, or program—(A) provides retirement income to employees or (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the

9. *Id.* § 3(3).

10. *Id.* § 3(1).
plan, the method of calculating the benefits under the plan or the method of distributing benefits under the plan.\textsuperscript{11}

Title I reporting requirements cover all employee benefit plans maintained by an employer engaged in interstate or foreign commerce.\textsuperscript{12} In addition, any plan maintained by an employee organization representing employers engaged in interstate commerce is subject to the reporting requirements. The statute therefore is sufficiently broad to require reporting for almost every type of employee benefit that an employer or employee organization may provide. Indeed, there was some concern soon after passage of the statute that this was the case. But exceptions and exemptions appear in the statute itself as well as in regulations. The Act itself excludes governmental plans,\textsuperscript{13} church plans,\textsuperscript{14} statutory

\textsuperscript{11} Id. § 3(2). Thus “pension plan” is considerably broader than the former common definition of that term. Before ERISA, the terminology distinguished between “pension plans” and “profit-sharing plans.” The new ERISA definition of “pension plans” will thus include profit-sharing plans as well as stock bonus plans and any other type of employee benefit plan which defers income “to the termination of covered employment or beyond.” The statute creates the new term “defined benefit pension plan” to mean a plan which calculates its benefits in terms of the retirement income which the employee can expect to receive. ERISA § 3(35). The statute uses the term “defined contribution plan” to include profit-sharing plans and stock ownership plans. ERISA § 3(34).

\textsuperscript{12} More precisely, “by any employer engaged in commerce or in any industry or activity affecting commerce.” ERISA § 4(a)(1). “Commerce” is defined as “trade, traffic, commerce, transportation, or communication between any state and any place outside thereof.” ERISA § 3(11). “Industry or activity affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry affecting commerce within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.” ERISA § 3(12).

\textsuperscript{13} ERISA § 4(b)(1). “The term ‘governmental plan’ means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term ‘governmental plan’ also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669).” ERISA § 3(32).

\textsuperscript{14} ERISA § 4(b)(2). A “church plan” is one maintained by a church exempt from tax under INT. REV. CODE OF 1954, § 501, but does not extend to
workmen’s compensation, disability insurance or unemployment compensation plans,\textsuperscript{15} plans maintained outside the United States for nonresident aliens,\textsuperscript{16} and unfunded plans to provide benefits in excess of Internal Revenue Code limitations on contributions to qualified plans.\textsuperscript{17}

Furthermore, the Department of Labor has issued regulations that create important exemptions.\textsuperscript{18} For example, the Secretary has determined that bonuses, unless systematically deferred to the termination of employment or beyond, and severance pay plans were not “employee pension benefit plans”;\textsuperscript{19} thus, if an employer makes severance payments to his employees, he need not follow the pension plan reporting requirements even though the plan defers payment of compensation to the termination of employment or beyond.

An unusual exemption deals with “gratuitous payments to pre-Act retirees.”\textsuperscript{20} Many employers have employees who retired when the company had no, or inadequate, pension benefits; often, these employees have served long and faithfully, earning the gratitude of the employer to the extent that the employer wishes to provide some retirement assistance. The payments contemplated might be very small, and usually are meant merely to supplement social security benefits. The cost of ERISA requirements, however, would exceed the cost of the employee benefits in many cases. Labor Regulation § 2510.3-2(e) exempts a few of these situations. Payments must be essentially voluntary and gratuitous and must be made out of the general assets of the employer; the payments must have begun before the effective date of ERISA (September 2, 1974) and the employee must have retired before that date. The employee must be notified annually that the payment is gratuitous and that it does not constitute a pension plan.

One problem with the exemption is that identical pay-
ments that began after the ERISA enactment date are not included. There is no reason in the statute for such a requirement, and the results can be absurd. In a typical fact situation, a company adopts a pension plan in the 1970's, but excludes older employees for cost reasons. The company then voluntarily and gratuitously decides to supplement retirement benefits of the excluded employees by paying them, for example, $100.00 per month. If the decision to do so was made, and payments begun, in August, 1974, ERISA does not apply. But if the decision was made later, or if the employee retired later, then the ERISA costs could easily exceed the benefit costs. Employers are more likely to deny benefits to the employee than to double or to triple their cost with no added benefit to the employee. It is submitted that the exemption need not contain the requirement that payments precede ERISA.

With respect to welfare plans, the Secretary has determined that some arrangements are not within the purview of the statutory definition. For example, the regulations exclude certain “employee payroll practices,” including those that involve premium pay rates for certain periods of work (such as overtime, and holiday or shift premiums), normal compensation paid while an employee is absent for medical reasons (generally thought of as “sick leave,” although not so limited), and compensation for other excused absences. Other types of benefits are excluded, such as strike funds, industry advancement programs, discount or full-price sales to employees, remembrance funds, holiday gifts (the Christmas hams), unfunded scholarship programs, hiring halls, and on-premises service facilities (such as first-aid stations or infirmaries, dining halls, and recreation halls). The Secretary has exempted day care centers from all reporting and disclosure, but the center must supply the Secretary with plan documents on request.

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21. If a defined benefit plan is adopted, older employees may be excluded because the cost of funding benefits for them over a few years may be prohibitive. If a defined contribution plan is used, the result is the same because the period for accumulation of funds is so short.
22. Regs. § 2510.3-1(b).
23. The “other” absences would be such things as jury duty, military leave, vacation leave, holidays, and sabbatical leave. Regs. § 2510.3-1(b)(3).
24. Regs. § 2510.3-1(c)-(k).
25. Id. § 2520.104-25.
Certain group insurance programs are wholly exempted by the proposed regulations. There must be no employer contributions, and employee participation must be completely voluntary. The employer must merely allow publicity of the plan, without his endorsement, and he may collect and remit payments through payroll deductions. The employer may receive no consideration with respect to the program except for reimbursement for his costs.26 The plans described are exempted; less burdensome reporting requirements are applicable to some group insurance plans described below.27

Perhaps the most important exemption is the "plan without employees."28 This regulation exempts plans that cover only the sole proprietor of a business, the partners of a partnership, or the owner of 100% of corporate stock from all of Title I. Thus, for example, a Keogh Plan covering only partners or only a proprietor, and an insurance plan that covers only partners and no partnership employees are not subject to Title I. The exemption is not defeated if, in addition to the listed persons, the plan also covers their spouses. The exemption for plans covering the owner of corporations applies only if the sole plan participant is the 100% stockholder (or stockholder and spouse). If there is more than one stockholder, other than spouses, the exemption does not apply.29

Besides the complete exemptions from coverage, the Secretary has granted certain partial exemptions for small welfare plans. A plan that qualifies must file some but not all reports.30 The plan must have fewer than 100 participants at all times during a plan year. Also, it must pay benefits from the general assets of the employer or employee organization maintaining the plan, or through insurance; the insurance company must be licensed to do business in a state. If the employees pay part of the insurance premium, the employer must forward the premiums it collects within 3 months of collection. Rebates on premiums must be returned within 3 months under a predisclosed plan. If the exemption applies, the plan administrator's only real burden is to supply the

26. Id. § 2510.3-1(j).
27. See text at note 32, infra.
28. Regs. § 2510.3-3(b).
participants or beneficiaries with a summary plan description; he must also furnish the Labor Department with information it may request. Copies of plan documents must be available to participants. The plan is exempt from other reporting requirements.  

Certain multiple employer group insurance arrangements, apart from those that are wholly exempt, are subject to only partial reporting. Each plan must have fewer than 100 participants and must provide benefits to employees of two or more unaffiliated employers, without being a multi-employer plan. It must be fully insured through insurance contracts purchased solely by the employers (or partly by employees if collection and rebate requirements are met), with all benefits payable by the insurance company. A trust must be the legal owner of the insurance contracts, acting as a conduit for the payment of premiums to the insurance company. The administrator of such a plan is exempt from filing the plan description, the description of a material modification in the term of a plan or change in the information required to be included in the plan description, and the terminal report. He is not required to furnish to participants the plan description or terminal report. This exemption is practically identical with the “small plan” exemption with two exceptions. First, it only applies to multi-employer, group arrangements. In the “small plan” exemption the employer has a direct relationship with the insurer whereas in the multiple-employer group exemption a trust which owns the policies and acts as payment conduit is interposed. Second, this exemption does not relieve the plan administrator from the annual report requirements whereas the “small plan” exemption does.

Aside from the major exceptions, certain plans of lesser general applicability benefit from reporting and disclosure

31. Id.
32. See text at note 22, supra.
34. A multi-employer plan is a union plan covering several employers. ERISA § 3(37).
35. The collection and rebate requirements are the same as those for the “small welfare plan” exemption in the preceding paragraph. Premiums collected and rebates received must be forwarded by the employer within three months of receipt. Rebate provisions must be disclosed in advance.
relief. For instance, apprenticeship plans receive a limited exemption. Also, pension and welfare plans that cover only a select group of management or highly compensated employees are allowed alternative methods of reporting compliance.

Reports to File With The Labor Department

The plan description is the basic report that the plan administrator must furnish to the Labor Department. It is designed to provide the federal government with information concerning the kinds of plans employers maintain. The most important information that must be disclosed includes the name and type of administration of the plan, the names and addresses of the administrator, trustees and agent for service of legal process, a description of the relevant provision of any applicable collective bargaining agreements, participation requirements, vesting provisions, circumstances that may result in denial or loss of benefits, the source of financing of the plans, procedures for claims, and remedies for review of denied claims.

The plan description is to be filed on form EBS-1. The original form designed by the Secretary was complex and difficult to complete, but the Labor Department has indicated that it will revise the form so that it will be a multiple choice questionnaire that should require less preparation time. The revised proposed form was issued in February, 1976; changes in the proposed form are likely before it becomes final. The Act requires that updated plan descriptions be filed "not more frequently than once every 5 years as the Secretary may require."

37. Id. § 2520.104-22.
38. Id. § 2520.104-23.
39. Id. § 2520.104-24.
40. The responsibility for filing plan reports is generally imposed on the "administrator" defined in id. § 3(16)(A) generally as the person so designated in the plan instrument or the plan sponsor. A very similar, though not identical, definition is contained in INT. REV. CODE OF 1954, § 414(g) for "plan administrator."
41. ERISA § 102(2)(a).
42. Id. § 102(b). In addition, the report must, by statute, include the identity of the organization through which benefits are provided and plan year and accounting data.
44. ERISA § 104(a)(1)(B).
The original due date for most reports was April 30, 1975. There have been two postponements of initial reporting deadlines. The Secretary of Labor first delayed reporting until August 31, 1975, then to May 30, 1976. If the plan was subject to ERISA before January 31, 1976, then the plan administrator must meet the following requirements: first, he must have filed the first two pages and the last page of the 1975 version of the EBS-1 by August 31, 1975, or within 120 days after coverage under the statute; he must then file the new version of the EBS-1 by May 30, 1976. If the plan was covered after January 31, 1976, it must meet the statutory criteria of filing initial reports within 120 days of coverage.

Title I also requires the plan administrator to file a summary plan description with the Secretary of Labor. The more important feature of the summary description, however, is its use to inform participants and beneficiaries of their rights and obligations under the plan. The statutory requirements for the summary are essentially the same as those of the plan description required to be filed on form EBS-1 with the Secretary of Labor. The summary plan description must be updated every fifth year if there are any amendments; if not, the update must occur every 10 years.

The deadlines for providing the summary plan description to plan participants are complex because new participants are constantly being added to the plan. For plans subject to ERISA on January 31, 1976, the deadlines are basically the same as those for the EBS-1, but if an employee becomes a participant after March 2, 1976, he must receive the summary plan description within 90 days after he becomes a partici-

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45. Id.
47. Regs. § 2520.104-3.
48. Id.
49. ERISA § 102(a)(1).
50. Id. § 102(b).
51. Id. § 104(b)(1)(B). Proposed Regs. § 2520.104b-2(c) makes it clear that the 5 and 10 year periods begin anew each time a summary plan description is published. Thus if a plan publishes a description on May 30, 1976, it may publish another on May 30, 1979; it would then not be required to publish again until May 30, 1984, or May 30, 1989.
52. Proposed Regs. 2520.104b-2(a)(1).
If the plan becomes subject to ERISA after January 31, 1976, the administrator must furnish summary plan descriptions to the initial participants within 120 days after the plan becomes subject to ERISA. Persons who become participants more than 30 days after the initial coverage of the plan by ERISA must receive their summary plan descriptions within 90 days after they become participants. Proposed regulations provided a special rule for plans which complied with earlier permission to use the EBS-1 form as a summary plan description.

On March 18, 1976, the Department of Labor announced an alternative method for distribution of summary plan descriptions. The announcement was in the nature of a press release indicating the general content of regulations which will be issued soon. The new alternative procedure affects only the summary plan description; form EBS-1 will still have to be filed with the Department of Labor within the deadlines discussed above.

Under the new procedure, an employer will distribute a “short notice” about ERISA; the notice informs employees of the existence and purpose of the statute, identifies the plan and plan administrator, describes plan documents, and explains the amendment process necessary to comply with ERISA. For pension plans, the notice must indicate that there are minimum participation, vesting, and accrual standards. Two sample notices, which can be utilized by filling in the blanks, were provided with the press release by the Department of Labor.

If a plan utilizes the alternative procedure, distribution of complete summary plan descriptions will be delayed at least until March 31, 1977. The delay might be longer, especially for pension plans complying with Department of the Treasury advance determination letter procedures. In the same press release, the Department of Labor indicated that final regulations concerning summary plans descriptions would be forthcoming soon.

Proposed regulations issued by the Secretary of Labor

53. ERISA § 104(b)(1); Proposed Regs. 2520.104b-2(a)(1)(ii).
55. Id. § 2520.104a-3(d).
are quite detailed in governing the manner of distribution, form, style, and content of the summary plan description. First, it "shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan."\textsuperscript{57} The regulations indicate that the Secretary of Labor expects "limitation or elimination of technical jargon and long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references, and a table of contents."\textsuperscript{58} The format and physical reproduction of the summary plan description must be done in a manner that will facilitate the objectives as stated, that is, to make the summary plan description understandable by the employees who are covered by it.\textsuperscript{59} If the plan is a defined benefit pension plan, then the plan description must contain a reference on the first page of the text that indicates that benefits are guaranteed.\textsuperscript{60} There does not appear to be an absolute requirement that the summary plan description be written in a language that can be understood by all participants, but if the plan covers five hundred or more participants who are literate only in a language other than English or if 50% or more of the participants of any employer establishment are literate only in a language other than English, there must be a notice in the language that participants understand to the effect that assistance will be given them in understanding the contents of the plan.\textsuperscript{61}

The plan administrator must furnish a copy of the summary plan description without charge upon request to any beneficiary receiving benefits under a welfare plan to whom a summary plan description has not already been furnished.\textsuperscript{62} There is a special rule for multi-employer plans that do not keep current lists of participants.\textsuperscript{63}

\textsuperscript{57} ProposedRegs. § 2520.102-2. The requirement that it be in plain language and understandable by the plan participants is contained in the statute, ERISA § 102(a)(1).
\textsuperscript{58} ProposedRegs. § 2520.102-2(a).
\textsuperscript{59} Id. § 2520.102-2(b).
\textsuperscript{60} Id. § 2520.102-2(c).
\textsuperscript{61} Id. § 2520.102-2(d).
\textsuperscript{62} Id. § 2520.104b-2(a)(3).
\textsuperscript{63} Id. § 2520.104b-2(b).
In addition to the plan description and summary plan description, the plan administrator must file an annual report with the Secretary of Labor and the Secretary of the Treasury.64 On September 30, 1975, the Treasury and Labor Departments jointly announced forms 5500 and 5500-K to be used for the annual report.65 On November 19, 1975, the Labor Department published proposed regulations for the annual report.66 On December 24, 1975, the Labor Department announced the joint development of a first change; corporate plans with fewer than 100 participants will report on form 5500-C.67 Forms 5500, 5500-C and 5500-K, with respect to the Labor Department, must be filed for all plan years beginning on or after January 1, 1975.68 For the Treasury Department, the forms must be filed for years ending on or after December 31, 1975; these new forms replace the old IRS forms 4848, 4848-A, and 990-P. They also replace the Labor form D-2. The deadlines have been extended several times; the most recent requirement is that the form be filed nine and one-half months after the end of the plan year; in the same announcement, Labor and Treasury indicated that the forms could be expected in early April and that they would be different from the initial proposals.69

The instructions to the initial version of the forms indicated that they should be filed for both pension plans and welfare benefit plans, including plans to which contributions have been discontinued.70 The original proposals for the forms are deceptively simple. For example, one question to be answered “yes” or “no,” asks, “Did the plan hold any investments (general or party-in-interest) at the end of the year?” If answered “yes,” however, the instructions indicate that extensive information is required, including the identity of the

64. ERISA §§ 103-04; INT. REV. CODE OF 1954, § 6058(a).
66. 29 C.F.R. §§ 2520.103-0 through 2520.103-7; 2520.104-40 through 2520.104-45; 2520.104a-0; 2520.104a-5; 2520.104a-6; 2520.104b-0; 2520.104b-10; 2520.104b-11 (1975).
68. ERISA § 111(b), Department of Labor News Release 76-149 (March 2, 1976); also released as Department of the Treasury IR-1566.
69. Id.
70. This and subsequent information concerning the form are found in the instructions to the form issued at the same time as the form.
issuer, description of investment, cost, and current value of each investment.\textsuperscript{71} The result of this and similar questions is that the form appears short only because separate schedules must be attached, and proposed regulations demonstrate that these reporting rules are very complex indeed.\textsuperscript{72}

But not all plans need to file the annual report. Certain welfare benefit plans with fewer than 100 participants are exempt.\textsuperscript{73} Also, no plans generally excluded from Title I need file with the Labor Department.\textsuperscript{74} All qualified pension plans and governmental and church plans, however, must at least file with the Internal Revenue Service.\textsuperscript{75}

With the exception of plans with fewer than 100 participants,\textsuperscript{76} the annual report of a plan must include an opinion of a qualified public accountant concerning financial data of the plan.\textsuperscript{77} However, if fund assets are held in a common trust fund by a bank, as is commonly the case, then the bank must submit a statement of the assets and liabilities of the common trust; the same applies to assets held by an insurance carrier in a separate pooled account.\textsuperscript{78} Then the accountant need not express an opinion as to these statements if the bank or insurance carrier is supervised and subject to periodic examinations by a state or federal agency and if the statements are certified by the bank or insurance carrier;\textsuperscript{79} the annual report must contain a copy of the common trust (or pooled account) annual statement, but otherwise need only report the purchase and sales of units in the pooled account or common trust.\textsuperscript{80}

Two other exemptions are provided by proposed regulations. First, an employer that participates in a group insur-
ance arrangement may shift the annual report burden to the trust or trade association which acts as intermediary.\textsuperscript{81} Second, unfunded plans and fully insured plans must file annual reports, but need not complete the financial schedules.\textsuperscript{82}

ERISA § 101(c)(1) requires a terminal report to be filed with the Secretary of Labor and with the Pension Benefit Guarantee Corporation for every pension benefit plan which is winding up its affairs. A welfare plan need only file the terminal report if the Secretary of Labor publishes regulations requiring the report.\textsuperscript{83} Regulations for these reports have not yet been promulgated.

The Secretary of Labor may reject any filing if he determines that it is incomplete or if there is a material qualification by an accountant or an actuary.\textsuperscript{84} If the filing is rejected, the plan has 45 days to submit a new corrected report; if it fails to do so, the Secretary of Labor may initiate an investigation by an independent accountant and an enrolled actuary to prepare the reports at the cost of the plan; he may also bring civil suit to enforce compliance.\textsuperscript{85}

\textit{Disclosure to Plan Participants}

One of the primary purposes of ERISA is disclosure to participants,\textsuperscript{86} which was originally set for April 30, 1975.\textsuperscript{87} However, the Secretary of Labor has deferred deadlines for both initial reports and annual reports with respect to disclosure to participants as well as to the Labor Department;\textsuperscript{88} in most cases the new date is May 30, 1976. There are three principal kinds of disclosure to participants and beneficiaries. First, disclosure must be made at specified times or intervals, regardless of whether there have been any changes or significant events. Second, some disclosure is required upon the occurrence of certain events or upon written request. Finally, certain material must be available for inspection at reasona-

\begin{itemize}
\item \textsuperscript{81} 29 C.F.R. § 2520.104-43 (1975).
\item \textsuperscript{82} Proposed Regs. §§ 2520.104-44 and 2520.104-45.
\item \textsuperscript{83} ERISA § 101(c)(2).
\item \textsuperscript{84} Id. § 104(a)(4).
\item \textsuperscript{85} Id. § 104(a)(5).
\item \textsuperscript{86} A "participant" is an employee who is entitled to benefits, who may become so entitled, or who may designate a beneficiary. ERISA § 3(7).
\item \textsuperscript{87} Id. § 111(b).
\item \textsuperscript{88} Regs. §§ 2520.104-2, 2520.104-3.
\end{itemize}
ble times and places, although it need not be provided without request. 89

Sections 101(a) and 104(b) require the plan administrator to supply a summary plan description, 90 a summary of any change in the plan description or material modification in terms of the plan, 91 an updated summary plan description, 92 and a summary of the annual report to participants without any request. 93 Other disclosure is required upon the occurrence of certain events. When an individual terminates employment and has benefits coming to him, the administrator must give him a statement of vested benefits. 94 Prior to the beginning of an annuity, the administrator must furnish a written explanation of the joint and survivor annuity alternative. 95 If any employee's claim for benefits is denied, he must be notified in writing of the reasons for the denial. 96

Upon written request, the administrator must furnish a participant or beneficiary with a statement of his total accrued and nonforfeitable pension benefits, if any, or the earliest date on which benefits will become nonforfeitable; 97 this requires an independent calculation for each request in order to obtain the information. Less burdensome is the requirement that, upon written request, the plan administrator fur-

89. Proposed Regs. § 2520.104b-1(a).

90. Within 90 days after a person becomes a participant or beneficiary or within 120 days after the plan becomes subject to the reporting and disclosure provisions of the Act. ERISA § 104(b). The summary plan description is discussed in the text, supra, at note 49.

91. Within 210 days after the plan year in which the changes are adopted. ERISA § 104(b)(1).

92. Every 5 years if there are changes and every 10 years if not. Id. § 104(b)(1)(B).

93. Id. § 104(b)(3). Proposed Regs., 29 C.F.R. § 2520.104b-10 (1975), deal with the content, style, and format of the report. In addition to the statutory requirement that the report include assets, liabilities, receipts, and disbursements of the plan, the regulations require an accountant's statement. Financial information is not required for wholly insured and for unfunded plans.

94. ERISA § 105(c). See also id. § 209(a), which requires a similar statement upon request and upon the occurrence of a 1-year break in service.

95. Id. § 205(e).

96. Id. § 503(1).

97. Id. § 105(a). A similar requirement is contained at § 209(a). The latter requires the report on the termination of employment and upon a 1-year break in service as well.
nish a participant or beneficiary with a copy of the updated summary plan description, plan description, latest annual report, any terminal report, bargaining agreement, and any contract or other instruments under which the plan is established or operated.98

Finally, although they need not be furnished directly to participants at designated times or on request, some documents must be made available for examination by any participant or beneficiary in the principal office of the plan administrator “and in such other places as may be necessary to make available all pertinent information to all participants.”99 Documents in this category include a copy of the plan description and the latest annual report, any bargaining agreement relating to the plan, the trust agreement, and the contract or other instruments under which the plan was established or is operated.

The mechanical procedure for disclosing the required information differs according to the manner in which the statute requires its availability. With respect to information that must be made available by operation of law or upon individual request, the administrator must “use measures reasonably calculated to insure actual receipt . . . of the material.”100 Material that must be sent to participants without request must be sent by first class mail “unless another method . . . is likely to result in full distribution,”101 e.g., personal delivery. In some circumstances the material may be inserted as a special insert in a periodical if a prominent notice on the first page of the periodical advises readers that the issue contains an insert with important pension or wel-

98. Id. § 104(b)(4). The plan administrator may impose a reasonable charge to furnish these documents. The Secretary of Labor has written a regulation: “The charge assessed by the plan administrator to cover the cost of furnishing documents is reasonable if it is equal to the actual cost per page to the plan for the least expensive means of acceptable reproduction, but in no event may such charge exceed 10 cents per page.” Proposed Regs. § 2520.104b-30. The proposed regulations are quite detailed and indicate that the plan administrator must use some effort to see to it that the beneficiary or participant is actually receiving the least expensive method of reproduction.

99. ERISA § 104(b)(2). See text at note 104, infra, concerning proposed regulations on maintenance of the documents.

100. Proposed Regs. § 2520.104b-1(b)(1).

101. Id.
fare benefit plan rights. This method of disclosure contemplates a union newsletter or some similar publication. Simply posting the material will never be acceptable.\textsuperscript{102}

Material that must be furnished upon written request must be mailed to the stated address or personally delivered; the administrator need not use first class mail if another method is "reasonably calculated to insure actual receipt."\textsuperscript{103} If the material need only be available for inspection, the documents must be current, readily accessible, and clearly identified.\textsuperscript{104} Also, sufficient copies must be available in anticipation of the expected volume of inquiries. The documents must be maintained at each establishment\textsuperscript{105} in which at least 50 participants customarily work, unless they may be made available at these locations within three working days.

\textit{Title II Reporting}

Title II of ERISA amends parts of the Internal Revenue Code, and its reporting requirements are generally only applicable to plans that receive special tax benefits,\textsuperscript{106} but there are exceptions. Annual registration with the IRS is required for those plans subject to the vesting requirements of ERISA.\textsuperscript{107} The primary purpose of this registration is to inform the Secretary of the Treasury of accrued vested benefits of employees who terminate their employment during the year. The Secretary then notifies the Secretary of Health, Education and Welfare who is to compile this information and notify the employee of the additional benefits when the employee applies for Social Security retirement benefits.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id. § 2520.104(b)-1(b)(2).
\item \textsuperscript{105} Id. An "establishment" is the place to which employees report each day. There is a provision in this regulation covering the situation in which the employees do not report to the same place each day.
\item \textsuperscript{106} Basically these are plans "qualified" under INT. REV. CODE OF 1954, § 401 for which contributions are deductible under § 404.
\item \textsuperscript{107} INT. REV. CODE OF 1954, § 6057. If a participant terminates his employment (other than because of death or disability) before retirement, he may forfeit part of his accrued benefit. The extent to which the benefits are nonforfeitable are the "vesting" provisions of the plan. ERISA contains minimum standards in § 201 et seq.
\item \textsuperscript{108} See the Joint Explanatory statement of the Committee of Conference XIV, "registration with Social Security." ERISA § 1032.
\end{itemize}
The employee who terminates will also receive personal notice of his benefits.\(^{109}\) The Code allows plans that are not required to register to do so voluntarily, presumably so that the employees will be reminded by the Secretary of Health, Education and Welfare of their benefits.\(^{110}\) An annual return is also required,\(^{111}\) informing the Treasury of plan status, including financial status. Forms 5500, 5500-C, and 5500-K fulfill these requirements as well as those of the Labor Department.

An actuarial statement of valuation is required if a defined benefit plan is to merge, consolidate, or transfer assets or liabilities.\(^{112}\) The administrator must also file these actuarial reports for defined benefit pension plans subject to the Code's minimum vesting standards.\(^{113}\) The first report is due for the first plan year in which the vesting requirements apply. A new report is due every third year thereafter or more frequently if the Secretary of Treasury determines that it is necessary.\(^{114}\) The report must be prepared by an "enrolled actuary."\(^{115}\)

**Title III Reporting**

Title III deals with allocation of jurisdiction and responsibility between the Labor and Treasury Departments, administration, enforcement, and the establishment of the Joint Pension Task Force. However, it also has disclosure provi-

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109. ERISA § 104(a)(4).
110. INT. REV. CODE OF 1954, § 6057(c).
111. Id. § 6058(a). This is to be accomplished on forms 5500, 5500-C and 5500-K. Prior to form 5500, the Internal Revenue Service had required forms 990-P, 4848, and 4849, with Schedule A, or form 4848-A. These forms will continue to be filed with the Internal Revenue Service for taxable years which end before December 31, 1975.
112. Id. § 6058(b).
113. Id. § 6059. Schedule B for the form 5500 series has been prescribed for this purpose. Id. §§ 512, 6059 appear to require this report for defined contribution pension plans as well as for defined benefit plans, but the instructions to the forms indicate that only defined benefit plans need file. There would appear to be some basis for requiring a report from a defined contribution pension plan since it is subject to minimum funding standards. Id. § 412. However, requiring an actuary's certification would be absurd since such plans do not involve actuarial principles.
114. INT. REV. CODE OF 1954, § 6059(a).
115. Id. § 6059(b). Enrolled actuary is defined in INT. REV. CODE OF 1954, § 7701(a)(35).
sions. Before the Secretary of the Treasury may issue an advance determination letter concerning a qualified pension, profit-sharing, stock bonus plan or its associated trust, or an annuity or bond purchase plan, he must require the applicant to provide whatever information the Secretary of Labor may require under Title I of the Act. In addition, the applicant must show that he has notified each employee who qualifies as “an interested party.” 116 The purpose of this disclosure provision is to allow interested parties to comment on the request for the determination letter so that the Secretary of the Treasury may take these comments into consideration in consultation with the Labor Department before issuing a determination letter. 117

The effective date of this provision depends on whether a plan was in existence on January 1, 1974, or whether the plan is a “new” plan. For the “old” plans, the provision applies to plan years beginning after December 31, 1975. For other plans, the requirement is effective as of September 2, 1974. 118

**Title IV Reporting**

Title IV, creating the Pension Benefit Guarantee Corporation (PBGC), became effective immediately upon the signature of the President, September 2, 1974. 119 It applies to all employee pension plans maintained by an employer or employee organization engaged in or affecting interstate commerce, 120 and to all employee benefit plans qualified under the Internal Revenue Code, even if they do not meet the interstate commerce test. 121 However, “individual account plans,” meaning defined contributions plans, such as profit-sharing plans, money purchase pension plans, and stock bonus plans are specifically excluded. 122 Thus, in practice, only defined benefit plans are subject to this title. Section 4021(b)(2) contains more limited exceptions. 123

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116. ERISA § 3001(a).
117. Id. § 3001(b).
118. Id. § 3001(e) indicates that the critical date depends on when the application is received by the Secretary of the Treasury. But Rev. Proc. 75-31, IRB 1975-27, also published as TIR-1385, indicates that the critical date is the beginning of the plan year involved.
119. ERISA § 4082.
120. Id. § 4021(a)(1).
121. Id. § 4021(a)(2).
122. Id. § 4021(b)(1) and ERISA § 3(34).
123. Id. § 4021(b)(2) excludes: government plans; church plans; fraternal
Pursuant to Title IV, the plan administrator must file an annual report on the form prescribed by the PBGC. In addition, certain "reportable events" trigger required reports. The principal "reportable events" are notification by Secretary of the Treasury of loss of qualified status, notification by Secretary of Labor of violation of ERISA, adoption of an amendment which could decrease a participant's benefit, substantial decrease in the number of plan participants, failure to meet minimum funding standards, inability to pay benefits when due, some distributions to substantial owners, merger or consolidation of plans or transfer of assets, and any other event which might indicate a need to terminate the plan. Thus, "reportable events" are essentially occurrences that might indicate the likelihood of plan termination.

In addition, the title requires certain other notices. Notice of intent to terminate a plan must be given the PBGC society plans; plans which have no employer contributions after the date of ERISA; unfunded plans for management and highly compensated employees; plans for nonresident aliens maintained outside the United States; excess benefit plans; plans for "substantial owners" (one who owns an entire unincorporated trade or business or, for a partnership, owns more than 10% of either capital or profits interest, or, for a corporation, owns more than 10% value of the voting stock); certain international organization plans; workmen's compensation, unemployment compensation, disability insurance plans; hybrid defined benefit/defined contribution plans; plans of professional service employers with fewer than 25 active participants at all times during the year.

124. Id. § 4065. The Pension Benefit Guarantee Corporation has provided form PBGC-1 (revised August, 1975). There is also a form PBGC-1R which is for revising premium estimates. A premium estimate is due within 30 days after the commencement of the plan year or the effective date of the plan. Premium reconciliation (that is, reconciliation of estimated premiums with actual premiums due) is due within two years and thirty days after the commencement of the plan year. The annual report is due within six months after the end of each plan year which ends on or after September 1, 1975; see the instructions to form PBGC-1. Form PBGC-1 has 3 purposes: (1) premium estimate; (2) premium reconciliation; and (3) plan annual report. See the form instructions. PBGC Regulations for the annual report can be found at 29 C.F.R. § 2606.1 et seq. (1975).

125. ERISA § 4043 requires a report within 30 days after a plan administrator knows, or has reason to know, of a reportable event.

126. Form PBGC-1 asks, in item 21, whether a reportable event occurred; in schedule B on the back of the form, there is a check list concerning whether certain events occurred. However, the instructions to the form, at page 8, indicate that completion of this check list does not suffice as notice to the PBGC. Therefore, the "reportable events" must be separately reported to the PBGC but there are as yet no forms prescribed.

127. ERISA § 4043(b).
at least 10 days before the proposed termination date.\textsuperscript{128} The plan administrator must also give notice of the closing of a substantial facility\textsuperscript{129} and of the withdrawal of a substantial employer.\textsuperscript{130} Upon termination, the corporation and plan administrator must furnish actuarial, asset, and plan liability data.\textsuperscript{131} Finally, the plan administrator must inform each "substantial employer" of his status as such if more than one employer contributes to the plan.\textsuperscript{132}

\textit{Individual Retirement Account Reporting}

The Individual Retirement Account (IRA) is a new device created by ERISA to allow individuals without employer plans to set aside funds for retirement. Internal Revenue Code § 219 allows an income tax deduction for contributions, provided that the account qualifies under § 408 of the Code. If the account is established by an individual for himself, then it is a plan without employees and consequently not subject to the Title I disclosure provisions.\textsuperscript{133} If the employer has any connection with the IRA, then he must look to Labor regulations for an exemption from Title I reporting.\textsuperscript{134} The exemption will not apply if the employer or employee association contributes to the IRA, or if participation is not completely voluntary. The extent of employer involvement is limited to allowing publicity of the plan (without endorsement) and allowing payroll deductions for contributions. If neither of these exemptions applies, the plan is subject to all of the reporting requirements of Title I as described above.

With respect to Title II reporting, Internal Revenue Code § 408(i) requires the trustee of the IRA and the issuer of an endowment contract or an individual retirement annuity to make whatever disclosures the Secretary of the Treasury may require by regulation; the disclosure must be made to the Secretary and to the individuals for whom the account is maintained.

\textsuperscript{128} Id. § 4041(a).
\textsuperscript{129} Id. § 4062(e).
\textsuperscript{130} Id. § 4063(a).
\textsuperscript{131} Id. § 4046.
\textsuperscript{132} Id. § 4066.
\textsuperscript{133} Id. §§ 3(1), 3(2); Regs. § 2510.3-3; see text at note 23, supra.
\textsuperscript{134} Regs. § 2510.3-2(d).
The Treasury has issued Temporary Regulation § 11.408(i)-1 requiring a disclosure statement for each individual who opens an IRA. The statement must be given at least 7 days before the account is opened, but may be given at the time the account is opened if the taxpayer is given the right to close the account, without penalty, within 7 days. The information required is quite detailed, consisting of three parts: a description of the statutory requirements for the IRA, a statement of penalties for such acts as early withdrawal, prohibited transactions, excess contributions, tardy withdrawals, and the like, and a projection of growth of the fund and of charges to be levied for maintenance of the account.

In addition, each year the trustee must provide the account holder with IRS form 5498, summarizing the year's transactions in the account and providing a statement of opening and closing balances, together with contributions and income. The trustee must furnish the form to the account holder by January 31 and must send a copy to the Treasury Department by February 29.\textsuperscript{135}

The individual who takes a deduction for an Individual Retirement Account must attach a form 5329 to his individual tax return in order to compute and substantiate the deduction.\textsuperscript{136} If an employer sponsors an Individual Retirement Account, the payments are reported as income to the participant and then the participant deducts these payments from his individual return. The plan then becomes an "employer plan."\textsuperscript{137}

Even if an individual has not made any contributions to his IRA (and consequently is not entitled to a current deduction) he must still file form 5329,\textsuperscript{138} since the Internal Revenue Code requires an "annual return" for all deferred compensation plans, including Individual Retirement Accounts.\textsuperscript{139} In a

\textsuperscript{135} Form 5499 is used by the Trustee as a transmittal of all his forms 5498. No form 1099 is required if a 5498 is issued for the account. Technical Information Release No. 1425 (December 15, 1975).

\textsuperscript{136} See the instructions to IRS form 1040 at 10.

\textsuperscript{137} See text at note 134, supra.

\textsuperscript{138} See the general instructions to form 5329.

\textsuperscript{139} INT. REV. CODE OF 1954, § 6058, particularly § 6058(c). Thus, for an Individual Retirement Account, form 5329 is the substitute for form 5500 used for corporate plans.
recent interview, an IRS official indicated that about one half of the early returns for 1975 were deficient in this respect.\textsuperscript{140} Considering the penalties involved,\textsuperscript{141} the omission could be quite costly.

SANCTIONS

\textit{Title I Sanctions}

Willful violation of any Title I reporting requirement carries a penalty of a $5,000 fine or imprisonment not to exceed 1 year (or both),\textsuperscript{142} but the maximum penalty is a $100,000 fine if the violation was "by a person not an individual."\textsuperscript{143} In addition, a civil action may be brought by a participant or beneficiary against any administrator who fails or refuses to comply with a request for information. The court may award a penalty against the administrator personally, in favor of the participant or beneficiary, in the amount of $100 per day for each day of refusal, and such other relief as the court deems proper.\textsuperscript{144}

Participants, beneficiaries, or fiduciaries may bring a civil action to require compliance with the Act;\textsuperscript{145} the Secretary of Labor may also bring injunctive actions in most cases.\textsuperscript{146} However, if the plan is qualified and the violation concerns participation, vesting, or funding, the Secretary of Labor may bring the suit only if the Secretary of the Treasury requests it, or if a participant, beneficiary, or fiduciary requests it and the Secretary of Labor determines that enforcement is necessary to protect the claims of participants or beneficiaries.\textsuperscript{147} Special provision is made for an action by the Secretary of Labor, a participant, or beneficiary for a civil action in case the employer neglects to notify an individual concerning his deferred benefits on termination of employment.\textsuperscript{148} In any

\textsuperscript{140} Comments of Fred Ochs, IRS Director of Employee Plans Division, reported in \textit{P-H Pension and Profit-Sharing} \textsuperscript{\textcopyright} 14.3, March 12, 1976.
\textsuperscript{141} A fine of $10 per day up to $5,000. \textit{INT. REV. CODE OF 1954}, § 6652(f).
\textsuperscript{142} \textit{ERISA} § 501.
\textsuperscript{143} Id.
\textsuperscript{144} Id. §§ 1502(a)(1)(A) and 502(c).
\textsuperscript{145} Id. § 502(a)(3).
\textsuperscript{146} Id. § 502(a)(5).
\textsuperscript{147} Id. § 502(b).
\textsuperscript{148} Id. § 502(a)(4).
such action brought by a participant, beneficiary, or fiduciary, the injured party may recover attorney's fees and costs.\textsuperscript{149}

Employers are required to maintain records sufficient to indicate the benefits due or which may become due to employees. An employee may request a statement of his accrued benefits under the plan once per year and is entitled to such reports upon termination of service or upon a one year break in service.\textsuperscript{150} Failure to keep these records or to provide the information results in an additional penalty of $10 per employee with respect to whom the failure occurs.\textsuperscript{151}

\textit{Title II Sanctions}

Failure to file the annual registration statement required by Title II results in a payment "in the same manner as a tax" in the amount of one dollar for each participant with respect to whom there is a failure, multiplied by the number of days during which the failure continues. The fine cannot exceed $5,000.\textsuperscript{152} Furthermore, if the annual statement does not give notice of the change in status, a one dollar fine per day, not to exceed $1,000, may be assessed.\textsuperscript{153} Failure to file Form 5500, 5500-C, or 5500-K results in a fine of $10 per day, not to exceed $5,000.\textsuperscript{154}

In addition, the Internal Revenue Code provides a $50 penalty for failure to supply an employee with a statement of deferred benefits upon termination of employment as well as for fraudulent statements in the disclosure of deferred benefits upon termination.\textsuperscript{155} Finally, failure to file the actuarial report required for a defined benefit plan evokes a $1,000 penalty.\textsuperscript{156}

\textit{Other Penalties}

Violation of the disclosure requirements of Titles III and IV, as well as the IRA provisions, also results in the assessment of penalties. Failure to notify interested parties of the

\begin{footnotes}
\item[149] Id. § 502(g).
\item[150] Id. § 209(a).
\item[151] Id. § 209(b).
\item[152] INT. REV. CODE OF 1954, § 6652.
\item[153] Id. § 6652(e)(2).
\item[154] Id. § 6652(f).
\item[155] Id. § 6690.
\item[156] Id. § 6692.
\end{footnotes}
application for an advance IRS determination letter may result in a denial of the application by the Internal Revenue Service.\textsuperscript{157} Under Title IV, the PBGC may assess a late payment penalty of not more than 100\% of the premium payment.\textsuperscript{158} It may also collect interest on the late premiums,\textsuperscript{159} at the same rate as that for underpayment of taxes, currently 7\%.\textsuperscript{160} There is apparently no specific penalty in the statute for failure to file the other Title IV reports. The sanction for a trustee’s or custodian’s failing to provide reports on Individual Retirement Accounts is $10 per failure, unless the failure is due to “reasonable cause.”\textsuperscript{161} The penalty for an individual who fails to file form 5329 for his IRA is much more severe: $10 a day up to $5,000. Officials of the IRS are quite concerned because about half of the early returns for 1975 included this failure.\textsuperscript{162}

CONCLUSIONS

The detail and complexity of the reporting requirements inflicted by ERISA make it difficult to conceive that a failure to report under Title I could be willful. Perhaps due to the overwhelming complexity and broad coverage of the Act, there have been a rash of plan terminations since September 2, 1974.\textsuperscript{163} Many employers consider the lesser benefits of an IRA well justified by the decreased cost and administrative burden.

Part of the Congressional findings that led to ERISA were that “despite enormous growth in . . . plans many employees with long years of employment are losing anticipated retirement benefits owing to . . . lack of vesting provisions . . . [and] inadequacy of current minimum standards.”\textsuperscript{164}

\textsuperscript{157} ERISA § 3001.
\textsuperscript{158} Id. § 4007(b).
\textsuperscript{159} Id.
\textsuperscript{160} Advance Revenue Ruling 75-487 published as TIR-1407.
\textsuperscript{161} INT. REV. CODE OF 1954, § 6693(a).
\textsuperscript{162} Comments of Fred Ochs, IRS Director of Employee Plans Division, reported in P-H Pension and Profit-Sharing ¶ 14.3, March 12, 1976.
\textsuperscript{164} ERISA § 2(a).
It now appears that many employees will lose benefits because of complex regulatory legislation. It is respectfully submitted that this cure is at least as bad as the malady. There are several very fundamental problems with the statute.

First, it attempts to regulate dissimilar types of plans with the same statutory provisions. A medical insurance plan and a defined benefit pension plan have little in common; the dissimilarity increases when the pension plan is one over which the employer retains investment control, whereas the medical plan is insured. The employer writes the provisions of the pension plan, determining exactly how much benefit will be available and under what conditions it will be payable; these employer options extend to virtually every minute detail of the plan. With regard to the insured medical plan, in contrast, most employers select from standard plans offered by insurance companies. The employer's ability to influence plan provisions is usually limited to deciding the maximum benefits of the insurance plan. A more important distinction is the difference between the financial strength of a regulated insurance company and that of a pension trust which relies on a single company for contributions; the investments of the trust often are not professionally managed. To regulate both types of plans in a statute titled "Employee Retirement Income Security Act of 1974" (emphasis supplied) only leads to confusion. The confusion is increased by the necessity for the statute to state a general rule and then to state exceptions in order to deal with different types of plans, then exceptions to the exceptions. The result is unnecessarily complex legislation which could have been much more easily and rationally handled in separate statutes, or at least by separate treatment within a statute.

The second fundamental defect in the statute appears to be Congressional failure to focus on the full breadth of the legislation it was enacting. Section 2 of the Act sets forth the "Congressional Findings and Declaration of Policy," yet even a close reading fails to disclose that Congress had anything but pension plans in mind. A glance at the title of the statute and the Joint Conference Committee report leads to the same conclusion.

Third, the Congress failed to undertake the difficult task of making hard decisions, a task necessary if solid, worthwhile reform legislation is to be enacted. The breadth of the
statute has been adequately demonstrated; it is so broad, in fact, that drastic circumscription by Labor Department regulation was necessary to make it workable. It appears that Congress was unable to decide which employer practices to include and consequently included all practices, leaving to the discretion of the Labor Department the decision of which plans did not need regulation; this is essentially delegation of legislative authority to an executive department. The best example is the situation of day care centers; section 3(1) of the Act includes them, and prescribes extensive reporting requirements; Labor Regulations § 2520.104-25 is titled “Exemption from reporting and disclosure for day care centers.” Why should the statute totally include, and regulations virtually exclude, day care centers? The only answer that suggests itself is that the decision has been delegated to the Department of Labor.

The fourth defect in the statute is its failure to distinguish among employers. Large multi-national corporate employers have personnel departments that can afford the expertise to deal with extensive reporting requirements; a sole proprietorship with only a few employees cannot. The Labor and Treasury Departments have considerably simplified the reporting requirements for plans with fewer than 100 employees. The problem is that, for the most part, this simplification is limited to elimination of only a few reports. The preceding discussion illustrates that there is much more to the ERISA reporting requirements. The small employer cannot afford, in-house, the expertise involved. Insurance companies, banks, actuaries, and attorneys are either declining the responsibility for filing reports, or else indicating that hefty fees will be charged.

It is respectfully suggested that one does not cure insecurity of pension benefits by passing a law which results in 5500 plan terminations in 14 months affecting nearly 160,000 employees. The rate of terminations was 4 times as large as previously predicted by the government. As a minimum curative measure, Congress could enact “safe-harbor” rules for small plans. Under such a scheme, employers might have much less opportunity to tailor-make their plans: for example, investment could be limited to bank common trust funds, annuity and endowment insurance policies, mutual funds,

165. Id. § 502(a)(4).
and government bonds. Vesting might be made more rapid, maybe 100% in 5 years, with no alternatives. The rules might require coverage of all fulltime employees, except for union-negotiated exclusions. A separate account could be maintained for each employee and the complex “years-of-service” rules abolished or vastly simplified. The Labor or Treasury Department could publish a booklet for such plans, providing all the required plan description disclosure. Annual reporting might be limited to a listing of opening balance, adjustment for income (loss), addition of contributions, and a statement of ending balance. Such a “safe-harbor” provision would provide as much, or more, employee protection as ERISA’s complex regulation. Moreover, it would shift the cost burden of some of this protection to a well-staffed federal agency.

Legislation has been introduced to reduce the burden for small employers.\textsuperscript{166} Although this is a step in the right direction, more fundamental rethinking of ERISA is in order.

\textsuperscript{166} H.R. 7597, 93d Cong., 2d Sess. (1975).