INHERITED RETIRMENT FUNDS ARE NOT CREDITOR EXEMPT

Chapter 815 of the Wisconsin Statutes provides that certain personal assets are exempt from judgment creditors, and these exemptions can be claimed by individuals when they file federal bankruptcy. Likewise, the federal Bankruptcy Code [11 U.S.C. Section 522(d)] also provides an alternative set of exemptions that the individual can claim instead of using the Wisconsin set. Both sets generally provide for the right of individuals to retain their retirement funds (subject to some limitations) exempt from their creditors in bankruptcy. Section 815.18(3)(j), Stat.; 11 U.S.C. Section 522(d)(12).

There has been a recent local decision, however, denying such exempt status to an inherited IRA (whether originally-formed as an IRA, or a Rollover IRA set up when the decedent withdrew from a company-sponsored retirement plan) under the Wisconsin exemptions. In re Kirchen, Bankr. E.D. Wis. Case No. 04-29434. The bankruptcy trustee in that case successfully established that inherited retirement funds did not meet the requirement under Chapter 815 that the account be a fund for the retirement of the owning debtor, and therefore was not exempt. He directed the IRA issuer to pay out the funds to him to distribute to Kirchen's creditors.

Common definitive language under the Wisconsin law ("on account of … age") is a similar element needed for qualifying such account under the federal exemption set, so undoubtedly a similar ruling will occur if the claim of exemption of an inherited account is presented to local bankruptcy courts under that set. By extension, inherited pension funds (including 401k's) are also at risk.

While under our Wisconsin marital property law, an inherited IRA or retirement fund would not be eligible to collection efforts of many creditors of the other spouse, it is still liable for debts incurred in support of the marriage (if all other assets have been exhausted) and for the liabilities of the recipient spouse. These positions may be overruled by higher courts, but for now, they pose a problem that might be avoided by planning steps that a prudent recipient of an inherited retirement funds can take. For more information and to discuss such planning steps, contact Russell C. Brannen, Jr.

MICROSOFT SETTLEMENT BENEFITS AVAILABLE

UNTIL JUNE 30, 2007

Wisconsin businesses, governments, and individuals who bought Microsoft software between December 7, 1993, and April 30, 2003, are entitled to receive benefits from a class action settlement with Microsoft, but they must act by June 30, 2007.

Several Wisconsin plaintiffs brought lawsuits in Wisconsin courts claiming that Microsoft's marketing practices violated Wisconsin antitrust and unfair trade laws. Microsoft denied the allegations, but did agree to a settlement which could provide as much as $224,000,000 in benefits to Wisconsin consumers, businesses, and local governments.

To qualify for benefits, the individual, business, or governmental unit must have purchased for use in Wisconsin one or more of certain Microsoft programs either as a standalone purchase or already installed in a computer between December 7, 1993, and April 30, 2003. The software programs at issue are: Microsoft Office, Microsoft Excel, Windows, MS-DOS and Microsoft "Word". In addition to the initial program, each upgrade purchased is eligible as well as each license that was multiply purchased.

To get the benefits, eligible Wisconsin individuals, businesses, and governments should go to the following web site and obtain a claim form: www.microsoftwisuit.com. The form must be completed and mailed by June 30, 2007, to "Microsoft-Wisconsin Settlement, P.O. Box 1626, Minneapolis, MN 55440-1626."

For each Windows or MS-DOS program purchased during the applicable period, the purchaser is entitled to a $15 voucher. Each Office and Excel purchase yields a $23 voucher and each Word purchase yields a $10 voucher. Claims under $100 may be filed online and supporting documentation is not required. For larger claims including claims by volume license purchasers, the claim form includes a box which requires the claims administrator to search Microsoft's records for eligible purchases.

It is expected that vouchers will begin issuing to the eligible purchasers by late 2007. Voucher owners may submit their vouchers for cash upon proof of purchase of any desktop, laptop or tablet computers, or for printers, scanners, monitors, and keyboards. The new purchases do not have to be for a Microsoft product but must be made in the three years after receipt of the voucher.

O'Neil Cannon, Attorney Carl K. Buesing recently attended a seminar sponsored by the Wisconsin Counties Association which outlined the Microsoft litigation. "The benefits of this settlement are potentially enormous, particularly for businesses that made significant software investments during the 1990s," observed Buesing who also serves as Sheboygan County's Corporation Counsel. Buesing noted that the Wisconsin Counties Association was a

participant in the litigation that resulted in the settlement.

Individuals, governments, and businesses who have questions about their eligibility for settlement benefits are encouraged to access the website at www.microsoftwisuit.com, or are welcome to call Attorney Buesing at O'Neil, Cannon, Hollman, DeJong's Sheboygan office at (920) 457-8400.

REAL PROPERTY TAX ASSESSMENT REVERSED BY COURT OF APPEALS

OCHD's Real Estate and Construction Practice Group found recent success in obtaining a reversal from the Court of Appeals relative to a real property tax assessed by the Village of Menomonee Falls against an 80-plus unit apartment complex owned by a client.

In an opinion released on May 2, 2007, the Court of Appeals District II reversed the decision of the Circuit Court for Waukesha County holding, among other things, that the Board of Review for the Village of Menomonee Falls failed to exercise proper judgment and failed to accept evidence of valuation submitted by the property owner as the "best information" available. See Opinion of Court of Appeals.

For further information or a consultation regarding your legal rights to object to and/or appeal a real property assessment on your residential or commercial property, please contact either Claude J. Krawczyk or John R. Schreiber of OCHD's Real Estate and Construction Practice Group.

PROTECTING THE ENFORCEABILITY OF YOUR MARITAL PROPERTY AGREEMENT IN THE EVENT OF A DIVORCE

In Wisconsin, people who are contemplating marriage or who are already married are permitted to enter into contracts with each other regarding their financial affairs to suit their needs and values and to achieve certainty, both during the marriage and in the event of a divorce. These contracts or marital property agreements are commonly known as pre- or post-nuptial agreements.

Wisconsin divorce law is clear that, as it relates to the division of property, any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution shall be binding upon the divorce court, unless the terms of the agreement are inequitable to either party. Because the divorce court is required to presume any such agreement to be equitable as to both parties, the party challenging the agreement has the burden of producing evidence and persuading the divorce court that the agreement is unfair and unenforceable.

For an agreement to be unenforceable, it must fail to meet the requirements of procedural fairness or substantive fairness. To assess procedural fairness, the court assesses whether each party makes fair and reasonable disclosures regarding his or her financial status by disclosing assets, liabilities, and debts; and whether each party entered into the agreement voluntarily and freely. When assessing whether a party voluntarily and freely entered into the agreement, a divorce court examines whether a party had a meaningful choice. Divorce courts are instructed to consider whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effects, and whether the parties understood their financial rights in the absence of an agreement. To assess substantive fairness, the court assesses whether the agreement was fair at the time of execution. If circumstances significantly change since execution, then substantive fairness is also assessed at the time of the divorce.

A marital property agreement that is fair at its execution is not unfair at divorce just because the application of the agreement at divorce results in a property division which is not equal between the parties or which a court might not currently order under the property division statute. If, however, there are significantly changed circumstances after the execution of an agreement, a divorce court must evaluate those circumstances and expectations from the perspectives of the parties at the time they entered into their agreement, not at the time of the divorce. Marital property agreements can (and should) be drafted in such a way as to address some of these contingencies.

While it is true that marital property agreements are binding contracts regarded with favor in Wisconsin, it is clear that, the parties to the agreement must keep in mind and adhere to the standards used to determine the enforceability of these agreements upon divorce, both when negotiating and drafting an agreement and during the marriage. To do otherwise is to risk an unpleasant surprise when a divorce court determines that the agreement is inequitable and, therefore, unenforceable at the time of divorce.

THE SPIRIT OF MARCH MADNESS TOUCHES ALL …

Nothing beats the camaraderie and emotion that accompanies an NCAA basketball tournament barn-burner, except, perhaps, the spoils and bragging rights that go along with picking an unforeseen upset of a top seed or, even better, winning your office pool. March Madness office pools are so much fun they should be illegal … well, actually, they currently are, at least in Wisconsin.

Presently, the Wisconsin statutes make it illegal to bet on sports events, and that includes an office pool. The Wisconsin statutes define a bet as "a bargain in which the parties agree that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." Wis. Stat. § 945.01(1).

The consequences of violating the current Wisconsin statute forbidding betting on sports events may be a fine of up to $1,000, imprisonment for not more than 90 days, or both. Even more alarming, the fine for running an illegal commercial gambling operation is a fine of up to $10,000, imprisonment of up to 3½ years, or both.

A recent bill of the Wisconsin Legislature, however, proposes to decriminalize managing and participating in office sports pools by excepting sports office pools from the definition of a "bet" under Chapter 945. If the proposed bill is enacted, people may legally participate in office sports pools under the following circumstances:

- All participants in the pool are employed by the same employer
- The entry fee does not exceed $50
- A prize is awarded based on the results of a sporting event or a series of related sporting events
- The prize is all or any portion of the money provided by the participants
- The person managing the pool is a participant and does not manage the pool for gain

This proposed amendment to Chapter 945 seems a good start toward decriminalizing an enjoyable and morale-boosting event in which a substantial number of American workers participate. Any bets on whether this proposal becomes a law?

WISCONSIN'S NEW "RIGHT TO REPAIR" LAW

Wisconsin's new "Right to Repair" law was enacted on March 27, 2006, and became effective

on October 1, 2006. The new law affects the relationship between owners and builders or remodeling contractors, and between such contractors and the suppliers of windows and doors.

The “Right to Repair” law is a misnomer. The new law does not give the contractor an absolute right to repair a claimed defect. Instead, the new law is lmerely an ADR (Alternative Dispute Resolution) law that applies to construction defect claims on residential construction and remodeling projects. It is intended to reduce owner lawsuits by fostering settlement through mandatory pre-suit procedures aimed at opening a dialogue for a negotiated resolution of such claims.

At the time that the contract is made, the contractor is required to provide the owner with a specific statutory notice and a brochure prepared by the Department of Commerce advising the owner about the new law. Before an owner may commence a lawsuit or an arbitration against the contractor for breach of warranty or for construction defects, the owner must first give the contractor a written notice of the nature and description of the alleged defects, and the owner must also provide the contractor with an opportunity to offer to repair the defect or to make a monetary settlement offer. An action or arbitration filed by the owner without first giving the contractor such notice would be subject to dismissal without prejudice or to stay by the court or arbitrator pending the owner’s compliance with the statutory requirements.

In response to the owner’s notice of claim, the contractor has five options:

- Make a written offer to repair the defect at no cost to the owner
- Make a written monetary settlement offer
- Make a written offer including a combination of repairs and monetary payment
- Make a written statement rejecting the claim
- Make a proposal for inspection of the dwelling

Under the option to make a proposal for inspection of the dwelling, the contractor has the right to inspect the dwelling and to conduct destructive testing before responding to the claim on the merits. Contractors also have a right to seek contribution from suppliers of windows and doors, and may require their participation in this process. In cases where the contractor does not flatly reject the owner’s claim, the “Right to Repair” law includes specific procedures and deadlines requiring the parties to make a series of offers and counteroffers until the parties either reach an agreement or reach an impasse. The obvious intent is to cause the parties to engage in active negotiation. However, the law does not require the parties to reach an agreement.

The law will not apply to all owner-contractor disputes. For example, it may not apply to claims involving purely design defects, as opposed to construction defects. Nor would it apply to accounting or delay claims, or to claims arising under Wisconsin’s Home Improvement

Practices regulations. Furthermore, it allows owners to make immediate repairs “to protect the health and safety of its occupants” without first giving notice to the contractor. It is the author’s opinion that owners would also be permitted to make emergency repairs where a failure to take immediate action could result in serious additional damage to the home, such as the emergency repair of a plumbing leak.

The “Right to Repair” law leaves many questions unanswered. For example, it does not specifically state what happens if the owner first repairs the alleged defect before giving notice to the contractor of a claim where the repair was not an emergency. Under such circumstances, the contractor’s right to inspect the defect and to offer to repair has been compromised, but not necessarily its right to make a monetary offer of settlement. Such questions are left to the Courts to decide.

Without question, there will be a learning curve both for contractors and for attorneys and judges in dealing with the new “Right to Repair” law.

For more information, please contact Steven J. Slawinski.

A PRE-CLOSING PROFESSIONAL INSPECTION IS ESSENTIAL TO PRESERVE REMEDIES FOR HOME DEFECTS

A recent Wisconsin Court of Appeals decision, *Malzewski v. Rapkin*, 2006 WI App 183, demonstrates the importance of obtaining a professional inspection prior to closing on a residential home transaction. Failure to do so may, under certain circumstances, prohibit a buyer from asserting otherwise available remedies against a home seller if a defect is discovered after the sale.

In Malzewski, prospective buyers of a home received a Real Estate Condition Report from sellers disclosing a defect in the basement/foundation. Sellers explained that “[d]uring heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened.”

Buyers’ Offer to Purchase incorporated the language from the Real Estate Condition Report listed above, contained a home inspection contingency and further conditioned their purchase of the home upon the right to do a walk-through within three working days of acceptance. Sellers accepted Buyers’ Offer to Purchase. Immediately prior to the closing, Buyers exercised their right to do a walk-through of the home. Upon noticing no visible

defects, Buyers waived their right to conduct a home inspection despite having knowledge of foundation seepage and closed on the sale.

The following summer, Buyers noticed that paint had begun to peel on the basement walls and pre-existing cracks on the basement walls opened. An engineer was hired to investigate the foundation and concluded that the cracks had been present for many years, were failing and needed to be fixed. The cost to repair the foundation walls was estimated to be $25,600.

Buyers sued Sellers under contract, tort and statutory theories, seeking money damages or, alternatively, rescission of the sale and restitution. During the discovery process, Sellers admitted to their awareness of multiple 12-foot long, three-eighths inch wide cracks that they had filled with masonry caulk 10 to 20 times during their ownership of the home. Sellers also admitted to painting the walls 5 times and touching them up after they had filled-in the cracks with caulk from time-to-time. Sellers never, however, had a professional inspect the home's basement to provide an opinion or to get a repair estimate.

Buyers' claims were dismissed on summary judgment by the trial court. The trial court decided as a matter of law that it would not allow Buyers' claims to continue where there was no showing that Sellers had any subjective knowledge as to the significance of the basement cracks and where Buyers waived their right of inspection despite being informed of foundation seepage merely to save a few hundred dollars on a home inspection.

The Court of Appeals held that the trial court was correct in dismissing most of Buyers' claims since, in order to recover damages under breach of contract, breach of warranty, misrepresentation or theft-by-fraud theories, Buyers were required to show that they reasonably relied to their detriment upon an affirmation of fact from the Sellers.

The court added that Buyers acted unreasonably as a matter of law when they waived their right to have the home inspected prior to closing on the property. The Court of Appeals deemed that the language in Sellers' Real Estate Condition Report concerning seepage in the walls and floors of the basement was enough to put Buyers on notice, at least to the extent that they should have conducted further investigation by hiring a registered home inspector.

The court did, however, think one of Buyers' claims raised a factual issue that should have been reserved for determination by a jury. Specifically, Buyers' deceptive advertising claim under section 100.18, Wis. Stats., was returned to the trial court for a trial on the issue of whether Sellers' representation that the only problem with the basement was slight seepage was a violation of Wisconsin's deceptive advertising statute where Buyers waived their right to have the property inspected.

Despite the survival of Buyers' deceptive advertising claim, Malzewski stresses the importance, both in the eyes of a court and potentially a jury, of conducting a professional

home inspection prior to purchasing a home. To ignore one's right to conduct such an inspection may be deemed unreasonable in the eyes of a court or jury and may foreclose remedies that would otherwise be available to buyers with claims relating to unknown home defects.
For further information on Malzewski and other cases and issues relating to home defect claims and defenses, contact John R. Schreiber of O'Neil Cannon

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BENEFITS UNDER SEVERANCE PLAN DETERMINED ON DATE EMPLOYEE STOPPED WORKING

Fifth Circuit Court of Appeals denies former Sabre, Inc. employee's claim that he was entitled to severance benefits determined on the date he was informed that he was to be terminated and not severance benefits determined on the date he actually stopped working.

Although the severance plan did not define the term "termination of employment" or explain when a termination of employment occurs, the Court found that the plan administrator was proper in its interpretation of the plan when it determined that Chacko's termination occurred when he officially separated from Sabre. Because of this, the severance plan that applied to Chacko was the one in effect on the date he officially separated from Sabre.

Ninan Chacko worked for Sabre, Inc. since 1990. In September 2003, he learned that the company intended to implement a company-wide layoff and on September 29, 2003 Chacko was informed that he would be offered a severance package. Chacko and his superior planned for Chacko's last day to be October 13, 2003. Soon after September 29, 2003, Chacko accepted an offer of employment by one of Sabre's competitors.

On September 29, 2003 Sabre maintained the Sabre, Inc. Severance Plan (the "General Severance Plan" or GSP) which provided for up to twenty-six weeks of salary benefits payable in a lump sum conditioned upon the execution by the terminated employee of an agreement and general release ("Agreement and General Release" or AGR) that released all causes of action and claims against Sabre and related parties. The GSP gave Sabre the right to terminate or amend the GSP at any time and further provided that participants had no vested right to benefits under the severance plan.

On September 30, 2003, Chacko received a separation summary outlining the terms of his severance package which stated that he would be offered thirty-two weeks of salary benefits payable over an eight-month period conditioned upon his signing a general release

containing non-compete and non-solicitation provisions (the “Expanded AGR”.) Chacko refused to sign the Expanded AGR believing that the non-compete and periodic payment provisions to be contrary to the terms of the GSP, On October 7, 2003, Sabre’s Benefits Committee adopted a resolution amending the GSP to grant Sabre the discretion 1) to include non-compete and non-solicitation provisions in the terminated employee’s AGR; and 2) to pay severance benefits in periodic installments (the “Amendment”.) The resolution provided that the Amendment was effective immediately.

On October 17, 2003, Chacko officially separated from Sabre. On November 3, 2003 he filed a claim for severance benefits in which he indicated he was willing to sign an AGR that was consistent with the pre-amendment GSP (without the non-compete and non-solicitation provisions) and that he demanded payment of his benefits in a lump sum as opposed to periodic payments allowed by the Amendment.

On November 6, 2003, Sabre informed Chacko that the Plan Administrator had denied his claim for benefits based on the fact that on his termination date, the plan as in effect allowed for both the non-compete and non-solicitation provisions as well as payment of benefits in periodic installments. Chacko appealed to an independent appeals committee which denied his appeal on the grounds that 1) he had no vested rights under the plan in effect on September 29, 2003; 2) that the GSP granted Sabre the right to amend or terminate the GSP at any time; 3) that the October 7, 2003 amendment was validly executed; 4) Sabre had complied with ERISA’s notice requirements regarding the amendment; and 5) Chacko was not eligible for the GSP in effect on October 17, 2003 because he refused to sign the Expanded AGR.

Chacko sued Sabre, the GSP, the Benefits Committee, the Plan Administrator and others claiming that he was wrongfully denied benefits under the GSP in violation of ERISA Section 502(a)(1)(B) which provides an ERISA plan participant or beneficiary a cause of action to recover benefits due him under the terms of the plan, enforce his rights under the plan or clarify his right to future benefits under the plan.

The district court granted Sabre’s motion for summary judgment finding that the Plan Administrator’s denial of benefits was not an abuse of discretion. Chacko appealed to the Fifth Circuit court claiming that Sabre et.al. engaged in “inequitable conduct” by offering him a severance package one day before the change adding the non-compete and non-solicitation provisions and changing the benefit payout option to installments. He also alleged that Sabre et al. breached their fiduciary duty of loyalty and engaged in self-dealing by conditioning his receipt of severance benefits upon his execution of a non-compete agreement. Chacko also challenged the Administrator’s denial of benefits under the terms of the GSP, claiming that he should receive the benefits in effect as of the date he was told he would be offered a severance package (September 29, 2003) instead of the amended GSP in effect on the date he stopped working for Sabre (October 17, 2003.)

The Fifth Circuit Court affirmed the lower court's decision that the Plan Administrator did not abuse its discretion in amending the plan or in denying benefits to Chacko. The Court explained that in reviewing a plan administrator's plan interpretation for abuse of discretion, the Court must initially determine whether the administrator's interpretation is legally correct. If the interpretation is legally correct then no abuse of discretion could have occurred. Here, the Court found that the Administrator's interpretation of the term "termination" was consistent with the fair reading of the severance plan. Further, the Court indicated that the interpretation of the term "termination" proposed by Chacko would lead to the unintended result that employees could demand severance plan benefits while they were still receiving regular pay.

Chacko v. Sabre Inc., 5th Cir., No. 05-11445, 12/21/2006. The decision is available at http://caselaw.lp.findlaw.com/data2/circs/5th/0511445cv0p.pdf

Practice Pointer—Employers should take the time to review and understand the terms of their benefit plans, including the process and timing requirements for making plan amendments.

ERISA PREEMPTS STATE LAW CLAIM FOR BREACH OF CONTRACT OVER ESOP BENEFITS

The Six Circuit Court of Appeals rules that ERISA preempts state law claims against Fifth Third Bank.

In a complicated set of facts, Suburban Bancorp and Fifth Third Bank entered into a merger agreement that contained language covering Suburban's ESOP because the ESOP held shares of Suburban. The merger agreement provided that Suburban obtain determination from IRS that the ESOP satisfied relevant tax regulations and perform several other tasks associated with the ESOP because of a concern of the tax implication of distributing the ESOP shares prematurely. Pending the determination by the IRS, the merger agreement provided that Suburban maintain the ESOP for the benefit of individuals who were ESOP participants on or before the merger (the class members.) The merger agreement also included a contingency plan for the ESOP that provided that if the parties agreed in good faith that allocating the ESOP shares would violate IRS rules, then Suburban would apply to the IRS for approval allowing the ESOP funds to either revert to Fifth Third Bank or be transferred to one of Fifth Third's benefit plans. The merger agreement further provided that if and only if the IRS

approved the transaction allowing for the reversion or transfer of shares to Fifth Third, or if Fifth Third proceeded with the reversion or transfer without IRS approval, that Fifth Third would pay class members out of its own corporate assets the amount of money in the ESOP at the time of the merger less administrative costs.

Suburban started the process necessary to distribute ESOP funds to class members, but did not finish the process or obtain the IRS determination regarding the tax issues. After the merger, Fifth Third, which became the successor ESOP sponsor and trustee, made amendments to the ESOP which effectively ensured that class members would no longer recover benefits from the ESOP. Thereafter Fifth Third terminated the ESOP distributing the proceeds to Fifth Third employees, and not to class members.

Hutchison, on behalf of the class members brought three types of claims—two of which were state-law claims relating to Fifth Third's breach of the merger agreement, misrepresentation and negligent misrepresentation as well as conversion and unjust enrichment relating to the alleged taking by Fifth Third of the ESOP's assets. The third claim was an ERISA claim. The lower federal court held that ERISA preempted the state law claims and dismissed the ERISA claim finding that Fifth Third did not breach any fiduciary duties owed to class members.

The appeal to the Sixth Circuit Court of Appeals only concerns the lower court's decision to dismiss the state law claims not the dismissal of the ERISA claim.

The Six Circuit Court affirmed the lower court ruling finding that the state law claims relating to Fifth Third's alleged breach of the merger agreement were preempted by ERISA because the necessary elements of the state law claims (amending the plan to exclude class members) go to the heart of what Congress intended ERISA to govern. They ruled so even though some of the elements of the state law cause of action came into existence before Fifth Third was an ERISA fiduciary to the ESOP. The court concluded that because the class members sought damages for ERISA-regulated actions of an ERISA fiduciary, based on the merger agreement entered into before Fifth Third became a plan fiduciary, the state law contract claim would bind fiduciaries to particular choices, thereby functioning as a regulation of an ERISA plan.

Hutchison v. Fifth Third Bancorp, 6th Cir., No. 05-4389, 11/30/2006.
http://www.ca6.uscourts.gov/opinions.pdf/06a0448p-06.pdf

This is a reminder that as noted by the court here, ERISA is comprehensive and preempts virtually any state law claim relating to an employee benefit plan.

PAY ATTENTION TO PENSION PROTECTION

The Pension Protection Act of 2006 was signed into law on Aug. 17, 2006. At a whopping 900-plus pages, the Act makes significant changes to the Code and ERISA. Although the Act has been widely publicized in its efforts to reform pension plans, much of it impacts defined contribution plans such as 401(k)s, 403(b)s and 457 plans, as well as IRAs. Below is a summary of some of the key provisions impacting defined contribution plans and IRAs.

EGTRRA permanency. The 2006 law made permanent many of the provisions of EGTRRA 2001 which were scheduled to expire in 2010. These include increased IRA and 401(k) contribution and deduction limits, age 50 and over catch-up contributions, Roth-type contributions to 401(k)s and 403(b)s, and more favorable rollover and vesting rules.

Investment advice. The Act provides fiduciary relief to plan fiduciaries. A prohibited transaction exemption is included for the provision of investment advice to plan participants. The exemption applies if the advice arrangement between the plan fiduciary and the investment adviser meets numerous requirements. It applies to flat fees and to advice using a computer model. Plan fiduciaries continue to have the fiduciary duty to prudently select and monitor the investment options as well as the investment adviser. Also, the fiduciary relief available under the exemption only applies to advice provided to participants, not to plan-level investment advice provided to the fiduciary by an investment adviser or manager.

Automatic enrollment 401(k) safe harbor. Under current law, employers can design 401(k) plans to include automatic enrollment provisions (also called negative elections). These provisions enable them to withhold a certain amount from an employee's pay as a salary deferral unless the employee affirmatively elects not to contribute to the plan. The employee must be notified in advance. Plans containing automatic enrollment provisions are still subject to the ADP/ACP test and top-heavy rules. Effective for plan years beginning on or after Jan. 1, 2008, if this provision meets the new law requirements as a "qualified automatic contribution arrangement," the plan will satisfy the ADP/ACP test and the top-heavy rules. The plan must contain provisions regarding the minimum and maximum deferral amounts allowed, employee notice requirements, and mandatory employer contributions and vesting.

Default investment safe harbor. The Act requires the DOL to make a change to ERISA Section 404(c) that will provide plan fiduciaries protection for certain types of default investments. Currently, ERISA Section 404(c) provides relief to plan fiduciaries of participant-directed plans if participants direct their investments. It also provides relief if the plan satisfies certain design and disclosure requirements. However, if participants do not make investment selections, plan fiduciaries remain responsible for the investment of those

participant accounts. The procedure often used is to invest those accounts in a default investment. Usually, the default investment has the lowest volatility of investment options and is designed for principal preservation. That, however, may not be the most prudent investment choice for a participant who has decades until retirement. It is anticipated that the new Section 404(c) default investment requirements will allow for the use of asset allocation funds and models that take into account risk tolerance and estimated years to retirement.

Electronic display of Form 5500s. For plan years beginning in 2008, the Form 5500 must be provided electronically so that some information can be displayed by the Department of Labor (DOL) on the Internet. Plan sponsors who maintain intranet sites must also display the information on the sponsor's intranet site.

Benefit statement requirements. Currently, ERISA generally requires that defined benefit and defined contribution plans provide participants benefit statements upon request, but not more than once per year. In the case of participant-directed plans intending to qualify for fiduciary relief under Section 404(c) benefit statements must be provided automatically and, generally, at least quarterly. Beginning for 2007 plan years, participant-directed plans must provide participants and beneficiaries benefit statements at least quarterly. The statement must contain information regarding the importance of diversifying plan investments and a message that refers the participant to a DOL Web site with information on investing. Employer-directed defined contribution plans must provide participants and beneficiaries benefit statements annually.

Individual Retirement Accounts (IRAs). The Act makes a number of changes impacting IRAs.

- Indexing traditional and Roth IRA contribution limits. Beginning in 2007, the income limits for traditional and Roth IRA contributions will be indexed for inflation (rounded to the nearest $1,000).
- Direct deposit of tax refunds to IRAs. Beginning with the 2007 tax year, taxpayers may elect to direct deposit all or a portion of their tax refunds to an IRA of the taxpayer or spouse of the taxpayer in the case of a joint return. Previously, taxpayers only had the ability to elect direct deposit of their refunds to checking or savings accounts. This provision does not modify the rules relating to the timing and deductibility of IRA contributions or any other rules relating to IRAs.
- Direct rollover to Roth IRAs. For distributions made in plan years beginning on or after Jan. 1, 2008, participants in qualified retirement plans, 403(b) plans and governmental 457 plans will be able to roll over distributions directly from those plans into Roth IRAs, subject to current law.
- Tax-free distributions from IRAs for charitable purposes. For the 2006 and 2007 tax years only, IRA owners who are age 70½ and older can make distributions from traditional IRAs of up to $100,000 to tax-exempt charities.

Just as ERISA changed the retirement landscape for millions of workers over 30 years ago, so

too does the Pension Protection Act change the landscape of existing laws affecting the private retirement system.