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Fate of Hospital Pensions Rests With Supreme Court

A coordinated litigation push by hospital workers who claim their pension plans are severely underfunded is headed for the U.S. Supreme Court, and no one knows exactly what will happen if the workers win.

The cases have roots in a three-year-long litigation flurry involving more than two dozen religiously affiliated hospitals throughout the country. In all, the lawsuits claim that more than 300,000 hospital workers face a pension shortfall of about $4 billion because hospitals have wrongly designated their pension plans as ''church plans'' exempt from the Employee Retirement Income Security Act.

If the Supreme Court agrees with the hospital workers—as three appellate courts did—and finds that an ERISA-exempt church plan must be established by a church, then what?

That's where things get tricky. In many cases, the workers have sought court orders requiring the hospitals to make up pension funding shortfalls that average about $325 million. They've also sought statutory penalties for decades worth of alleged ERISA violations.

Possible Blueprints? Some of the hospitals targeted in this litigation have agreed to large settlements that could provide a blueprint for what could happen if the Supreme Court's decision favors the workers.

Washington-based Providence Health & Services settled a lawsuit in October 2016 by agreeing to contribute $350 million to its pension plan over a seven-year period. It also pledged to pay $500 to each of 3,802 former employees who would have received benefits if the plan had complied with ERISA's pension vesting rules. The deal requires Providence to continue making minimum plan contributions that aim to fully fund the plan by 2029.

Trinity Health Corp. resolved two pension lawsuits in August 2016 by agreeing to contribute $75 million among nine different plans. Trinity also agreed to make individual payments to employees who lost out on certain benefits by taking lump-sum distributions and employees who would have received higher benefits under an ERISA-compliant vesting schedule.

Mary K. Samsa, a partner with McDermott Will & Emery LLP in Chicago who advises retirement plans on their legal obligations, told Bloomberg BNA it was likely that any funding shortfalls could be made up over a period of years.

''Generally, pension plans are not legally required to be fully funded at all times,'' Samsa said. ''In fact, it is anticipated by the Pension Protection Act rules that some plans won't be and if that occurs, certain restrictions on the plan come into play.''

In addition to hefty penalties and pension contributions, the hospitals say they foresee other consequences of an adverse ruling from the Supreme Court. They anticipate that they may be forced to renegotiate union contracts, alter the structure of plan trusts, create new written plan documents and revamp investment strategies to ''eliminate any religious or socially responsible investment criteria'' that might conflict with ERISA.

Penalties? Maybe Not. The cases also raise the possibility of enormous statutory penalties under ERISA. In many cases, the workers are seeking penalties of up to $110 per day for each affected participant. Defendant hospital Dignity Health estimates that the fines could be ''literally billions upon billions of dollars.''

But would those penalties actually be assessed? Some think not.

In filings with the Supreme Court, hospital workers emphasize that ERISA penalties are subject to a court's discretion. They also point out that the hospitals offered no examples of such a ''massive penalty award'' being issued in an ERISA case.

McDermott's Samsa also expressed some doubts that the hospitals would be hit with significant statutory penalties. She said it would inequitable for governmental agencies to impose penalties on employers that relied in good faith on private letter rulings in which those same agencies authorized them to run ERISA-exempt church plans.

''It would be comparable to punishing a taxpayer because the IRS provided that taxpayer with an incorrect conclusion earlier,'' Samsa said.

Government Regulators. The Supreme Court's ultimate ruling could bring these pension plans and the government regulators that oversee them into uncharted waters.

Court filings indicate that federal agencies have issued more than 550 letter rulings and opinion letters allowing pension plans established by hospitals, nursing homes and schools to be run as ERISA-exempt church plans. A Supreme Court ruling against the hospitals could wipe out all of these letters, leaving employers scrambling to figure out how to manage their plans going forward.

What's more, the Pension Benefit Guaranty Corporation—the federal agency that insures many ERISA-governed pension plans against insolvency—could find itself in a tough position if plans previously

treated as ERISA-exempt suddenly become subject to the law.

Many ERISA-governed plans are required to submit premium payments to the PBGC, which guarantees that plan participants will receive some level of benefits if the plan becomes insolvent.

However, PBGC insurance isn't conditioned on the payment of premiums—meaning that the agency would be covering plans that have not been funded in accordance with ERISA and have paid no premiums for decades.

''It's not like you're dealing with a private insurance company, where if you don't pay your premiums, they drop your coverage,'' said Harold Ashner, a partner with Keightley & Ashner LLP in Washington and former assistant general counsel for legislation and regulations at the PBGC.

However, the PBGC might phase in coverage over a period of years, Ashner told Bloomberg BNA. For example, the agency's policies allow for a five-year phase-in of PBGC's guarantee for pre-existing plans that subsequently become subject to ERISA. If such a phase-in applied, the PBGC may insure only a portion of the plan's liabilities if the plan terminates with insufficient assets within five years.

The ability to adopt a phased-in approach may depend on whether the Supreme Court's ruling applies retroactively or prospectively, Ashner said. In the case of a retroactive ruling—in which the plans are deemed to have been ERISA-covered for many years or even decades—the PBGC's existing policies don't provide clear support for such a phase-in. A prospective ruling could give the agency more flexibility.

Another wrinkle? The potential for massive penalties separate and apart from the $110-per-day penalties assessed under other parts of ERISA. The agency has discretion to impose significant penalties for missed premium payments and reporting failures. Penalties for reporting failures alone can be as high as $2,063 per day, although the agency can reduce or eliminate these amounts in its discretion.

Doomsday Scenario. Samsa pointed out that many of the pension plans involved in this litigation push likely have sufficient funding to pay out promised benefits. But what happens if an adverse Supreme Court ruling forces a financially distressed employer into bankruptcy?

If the PBGC assumes responsibility for paying that plan's benefits, it has no premium payments from prior years—and no corresponding investment returns—associated with that plan, Samsa said. Conversely, if the PBGC doesn't assume responsibility for such a plan, the participants arguably are in the same position they were in before their plan was deemed ERISA-governed—or worse, if the ruling hastens the employer's bankruptcy, Samsa said.

''If the end result is that we eventually need to be able to have the PBGC take over these plans if ever necessary, then some logical compromise will need to be arrived at to determine the best way to accomplish that without full force punishment being placed on the plan sponsors,'' Samsa said.

The Supreme Court hasn't announced when it will hear arguments in these cases.

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