

The Pension Protection Act of 2006: Is It Too Late to Save Traditional Pension Plans?

*“Nothing could be more clear than the message this bill sends Americans, and that is to save, save, save for your own retirement because hefty Social Security benefits and fat defined-benefit pensions are definitely yesteryear”*¹

I. INTRODUCTION

In 2006, Larry Millette believed that if he continued to work at International Business Machine’s (IBM) factory for another fifteen years, in addition to the sixteen years he worked at Digital Equipment Corporation, he would retire comfortably on the combined pension plans.² After working twelve-hour shifts at the IBM factory for eleven years, Larry Millette only has \$30,000 in his pension account.³ Instead of fulfilling his dream of retiring to spend time with his family and travel, Larry Millette is now planning to work until he is physically unable.⁴

Most Americans believe that if they work for forty to forty-five years they are entitled to a luxurious retirement.⁵ The common belief in “the Great American Retirement Dream” is problematic because comfortable retirements are perceived as guaranteed, as opposed to earned through a lifetime of active saving and planning.⁶ Currently, most Americans are unprepared for retirement because of their failures to contribute to, and properly manage, their retirement

1. Karin Price Mueller, *5 Ways the New Pension Law Could Help Your Finances*, STAR-LEDGER, Sept. 7, 2006, at 45 (internal quotation marks omitted) (quoting Debra Morrison, certified financial planner with Capital Financial Advisors in Roseland, New Jersey).

2. Robert Gavin, *Visions of the Golden Years Dim as Pension Promises Fade*, BOSTON GLOBE, Sept. 17, 2006, at A1.

3. *See id.* (discussing Millette’s disappointment discovering low pension value after years of service). Millions of disappointed Americans share Larry Millette’s experience when they discover that they will not be receiving their expected pensions. *See* RALPH NADER & KATE BLACKWELL, *WHY YOU MAY NEVER GET A PENNY—YOU AND YOUR PENSION—WHAT SHOULD BE DONE ABOUT IT* 1-3 (1973) (reviewing discrepancies between expected and realized pensions). *But see* Gavin, *supra* note 2 (comparing Larry Millette’s pension with Samuel J. Palmisano’s). Samuel J. Palmisano, the Chief Executive Officer at IBM, has a pension expected to amount to \$4 million per year at the time of his retirement. *Id.*

4. *See* Gavin, *supra* note 2 (detailing lifestyle changes due to pension disappointment).

5. JAMES GOLLIN, *THE STAR-SPANGLED RETIREMENT DREAM* 2 (1981) (quoting A. HAEWORTH ROBERTSON, *SOCIAL SECURITY: PROSPECT FOR CHANGE* 23-24 (1978)). A. Haeworth Robertson, chief actuary of the Social Security Administration until 1978, referred to this set of beliefs as “the Great American Retirement Dream.” *Id.* (internal quotation marks omitted).

6. *See id.* at 2-3, 27 (describing relative ignorance of retirement’s social significance among population and corporate pension planners). Due to inflation, increased cost of living, and health care costs, allocating sufficient funds to retirement is of escalating significance. Vada Waters Lindsey, *Tax Planning for Retirement*, 8 MARQ. ELDER’S ADVISOR 31, 31 (2006) (elucidating modern significance of retirement preparation).

accounts.⁷

One-third of private sector employees in America partake in private defined-benefit pension plans.⁸ Nevertheless, Americans are unprepared for retirement.⁹ Older employees approaching retirement age often expect nonexistent pensions to support their anticipated luxurious retirements.¹⁰ Conversely, younger employees, though not promised traditional defined-benefit pension plans, commonly fail to sufficiently contribute to their defined-contribution accounts such as 401(k) plans.¹¹ In February 2007, for the first time after the Great Depression, aggregate savings in the United States reached negative levels.¹²

In response to this pension crisis, President George W. Bush signed H.R. 4, the Pension Protection Act of 2006 (Pension Act),¹³ on August 17, 2006, referring to it as the first comprehensive transformation of retirement

7. See David R. Francis, *It's a Slow Road to Pension Reform*, CHRISTIAN SCI. MONITOR, Nov. 7, 2005, at 16 (noting most 401(k)s will not generate comfortable retirements because of low contributions); Jennifer Levitz, *Pitching 401(k)s to Generation Y Is a Tough Sell*, WALL ST. J., Sept. 27, 2006, at B1 (detailing research demonstrating Generation Y's lack of contributions to 401(k) plans); Jonathan Peterson, *U.S. Plans Stronger Oversight of 401(k)s*, L.A. TIMES, Jan. 30, 2007 (highlighting lack of attention to and concern with retirement security among Americans); see also NADER & BLACKWELL, *supra* note 3, at 2 (describing general disappointment with pensions attributed to lack of understanding of plans). But see Jeff D. Opdyke, *Rise in 401(k) Saving is Linked to Employer Enrollment Plans*, WALL ST. J., May 16, 2006, at D2 (indicating increased participation of new-hires in 401(k) plans).

8. See STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 2-3 (1997) (providing statistics regarding pension plan participation levels). "The [pension] institution is perhaps the largest beneficiary of federal tax incentives and absorbs more corporate revenue than any other employee "fringe" benefit, with the possible exception of health insurance. Private pension funds, as a result, in 1993 held about \$1.5 trillion in assets." *Id.* at 2.

9. See *infra* notes 10-11 and accompanying text (detailing retirement insecurity and preparation).

10. See NADER & BLACKWELL, *supra* note 3, at 2-9 (demonstrating employees' ignorance of lack of pension guarantees).

11. See generally NADER & BLACKWELL, *supra* note 3, at 2-5 (illustrating lack of pension distribution certainty); Francis, *supra* note 7 (describing inability of adequate retirement based on 401(k) contributions); Levitz, *supra* note 7 (reviewing insufficient contributions to 401(k) plans); *supra* note 7 and accompanying text (describing unfilled gap between diminished pensions and unfunded 401(k)s). A twenty-five-year-old earning \$100,000 needs to save \$1,600 per month to ensure preservation of eighty-five percent of pre-retirement income through retirement based on average market performance and retirement at age sixty-five. Fidelity Investments, My Plan Retirement Calculator (2007), <http://personal.fidelity.com> (log-in required). Alternatively, a twenty-five-year-old man with a \$50,000 salary must save \$700 per month to attain eighty-five percent of his pre-retirement income by retirement. *Id.* A sixty-year-old woman earning \$100,000, with no retirement savings will be unable to sufficiently save to reach eighty-five percent of her pre-retirement income within five years. *Id.* A sixty-year-old with a \$50,000 salary must save \$7,600 per month, which is impossible if savings are only derived from earned salary. *Id.* This Note predominantly addresses retirement issues in private employment, therefore, the central focus will be on defined-benefit, single-employer pension, and 401(k) plans. See *infra* Parts II-IV.

12. See Chris Silva & Kelley Butler, *Advisers Survey Foundations for Building Their 401(k) Business*, EMP. BENEFIT ADVISOR, Feb. 1, 2007, at D2 (quantifying decline in savings to negative rates). But see Jilian Mincer, *Retirement Savings Found Adequate*, WALL ST. J., Feb. 20, 2007, at D2 (contending older individuals sufficiently saving).

13. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified in scattered sections of 26 & 29 U.S.C.) (2006).

legislation since the Employment Retirement Security Act of 1974 (ERISA).¹⁴ The Pension Act mandates employer discipline in fulfilling promises made to employees by adequately funding their defined-benefit pension plans.¹⁵ The Pension Act, unfortunately, also recognizes the demise of employer-sponsored pension plans.¹⁶ By offering employers more latitude in administering their defined-contribution plans (e.g., 401(k)s), the Pension Act acknowledges that private employer defined-benefit pensions are vestiges of the past as they are being rapidly replaced by defined-contribution retirement accounts.¹⁷

This Note analyzes the demise of pension plans and the corresponding rise of defined-contribution savings plans in light of the Pension Act's recent enactment.¹⁸ Part II reviews general retirement plan concepts and includes a

14. 29 U.S.C. §§ 1001-02 (2006); George W. Bush, President of the U.S., Public Address at the Dwight D. Eisenhower Executive Office Building Before Signing Pension Protection Act of 2006 (Aug. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/08/20060817-1.html> [hereinafter Bush's Public Address] (discussing and praising Congress's drafting of Pension Act). More than one year before signing the Pension Act, the President proposed that Congress reform the pension system. The White House, *Fact Sheet: The Pension Protection Act of 2006: Ensuring Greater Retirement Security for American Workers*, available at <http://www.whitehouse.gov/news/releases/2006/08/20060817.html> (outlining background facts of Pension Act). But see Kerry Pechter, *More Predictions for the New Year: An Addendum to January's Outlook for 2007*, ANNUITY MARKET NEWS, Feb. 1, 2007 (predicting lack of commitment to retirement reform following Pension Act). In comparison to American employers, European employers are increasingly concerned about their pension obligations.

15. See Mark Trumbull, *Pension Reform Aims to Boost Saving*, CHRISTIAN SCI. MONITOR, Aug. 9, 2006, at 1 (stating Pension Act provides "a much-needed dose of retirement-saving discipline"). The Pension Act imposes obligations on employers to fund all plans by closing loopholes of underfunded plans. See *infra* Part II.D.

16. See Alvin Lurie, *The Value of a Golden Egg*, BARRON'S, Aug. 28, 2006, at 37 (predicting Pension Act will trigger reduction of defined-benefit plans); *infra* Part II.D, III (discussing key features and implications of Pension Act). The Pension Act provides few incentives for employers to maintain pension plans by requiring adequate funding according to a schedule and permitting employers holding underfunded plans to terminate them. See Bill Knight, *Are Guaranteed Pensions a Thing of the Past?*, PEOPLE'S WKLY. WORLD, Sept. 6, 2006 (arguing Pension Act does not prevent plan cancellation or employers' failure to fulfill obligations to employees); see also Pension Protection Act §§ 101-102 (detailing statutory funding requirements); Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons From Private Pensions*, 92 CORNELL L. REV. 297, 299-300 (2007) (articulating progressive decline in defined-benefit pension plans).

17. See Jonathan Peterson, *Law May Hasten Decline of Pensions*, L.A. TIMES, Sept. 4, 2006, at 1 (noting Pension Act "accelerate[s] the demise of old-style pensions"); see also Shefali Anand & Diya Gullapalli, *Pension Bill Promises Windfall for Fund Firms*, WALL ST. J., Aug. 7, 2006, at C1 (predicting benefits for mutual-fund firms associated with Pension Act); Ross Kerber, *After New Law, Fidelity Unveils 401(k) Features*, BOSTON GLOBE, Aug. 30, 2006, at F1 (describing Pension Act's effect on self-directed retirement accounts); Knight, *supra* note 16 (characterizing anticipated impact of Pension Act on pensions and 401(k)s); Lurie, *supra* note 16 (recognizing Pension Act as incentives for plan termination by employers).

The U.S. has undergone a major shift in recent years from defined benefit pension plans to defined contribution plans. The shift has important consequences for most Americans because defined-contribution plans, in granting decision-making authority to participants, will often fail to provide adequate retirement income to individuals with median earning capacity.

Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 331 (2007).

18. See *infra* Part II-IV.

discussion of the economic and sociological importance of saving for retirement.¹⁹ This Part also surveys the historical and statutory development of ERISA and the Pension Act.²⁰ Part III then summarizes the immediate economic effects of the Pension Act, analyzes the recurring problems that the Pension Act attempts to resolve, and considers whether the social issues surrounding retirement education undermine the Pension Act's solutions.²¹ Lastly, Part IV concludes that America's social and economic culture must stress saving for retirement in order for the benefits of the Pension Act to be fully realized.²²

II. HISTORY

A. *Why Do We Retire?*

Pensions have existed in various forms for thousands of years.²³ Traditional pensions emerged in response to occupational hazards associated with industrialization in the United States.²⁴ The Grand Trunk Railway of Canada established the first formal pension plan in America on October 1, 1874, thereby starting a trend for other similar companies to slowly follow.²⁵

19. See *infra* Part II.A-B.

20. See *infra* Part II.C-D.

21. See *infra* Part III.

22. See *infra* Part IV.

23. See GOLLIN, *supra* note 5, at 27-28 (describing history of pension plans). Initially, pensions were granted in the form of property. *Id.* As a reward for victories, Athenian generals were given farmland. *Id.* at 28. In China and India, "high civil functionaries" were given pensions from royal treasuries, and in England, King Charles II gave his friends and mistresses pensions. *Id.* at 28-30. In 1889, Germany's Otto von Bismarck established retirement plans triggered at age seventy. See JOEL S. SAVISHINSKY, BREAKING THE WATCH: THE MEANINGS OF RETIREMENT IN AMERICA 11 (2000) (summarizing early established retirement ages). The plan proved clever as it reduced aging employees from the workforce but was never triggered because most employees never lived to the retirement age of seventy. *Id.*

24. See GOLLIN, *supra* note 5, at 36-38 (reviewing impact of industrialization and Civil War on formal pension development in United States). See generally FELIX POMERANZ ET AL., PENSIONS: AN ACCOUNTING AND MANAGEMENT GUIDE 4 (1976) (noting payments to retirees likely existed since "commerce and industry began"). In recognizing the paramount safety hazards of railway work, railroad employers began offering pensions. GOLLIN, *supra* note 5, 36-38. Around the same time, soldiers wounded in the Civil War also began to receive pensions. *Id.*

25. See GOLLIN, *supra* note 5, at 38-39 (detailing emergence of first pension plans in America). Though the Grand Trunk pension plan only covered five percent of the organization's employees, within a year, the American Express Company established a pension "plan now generally accepted as the forerunner of today's pension programs." *Id.* The plan covered all employees with twenty years of continuous service that had "become worn-out or disabled while in its employ" and provided up to fifty percent of the average salary received within the past ten years. *Id.* The plan, however, provided limited protection and security for employees because the employer retained the sole discretion to cancel or grant the pension benefits. *Id.* Shortly thereafter, leading universities began offering academic pensions, beginning with Columbia University in 1892 and Yale University in 1897. *Id.* at 40. Andrew Carnegie, in 1918, foresaw the need for pensions to attract faculty at academic institutions, thereby establishing the Teachers Insurance and Annuity Association of America, currently known as TIAA-CREF. TIAA-CREF, Company History.

Beginning in the early twentieth century, major industrial companies established pension plans.²⁶ Even at the outset, employers faced significant funding hurdles that still exist today.²⁷

Defined-contribution plans, conversely, only recently emerged to complement traditional pension plans and encourage individual retirement savings.²⁸ For example, Congress added 401(k)s, a popular form of defined-contribution plans, to the Internal Revenue Code (IRC) in 1978.²⁹ Congress intended for 401(k)s to respond to the growing mobility of the modern workforce by offering alternative, and more portable, retirement plans.³⁰ Though originally designed to augment traditional pension plans and ease portability concerns, defined-contribution plans are now the norm because employers prefer for their employees to assume liability for their own retirement security.³¹

The concept of retirement is equivocal.³² Traditionally, retirement is considered a “[v]oluntary termination of one’s own employment or career,”³³

http://www.tiaa-cref.org/about/press/about_us/history.html.

26. See GOLLIN, *supra* note 5, at 40 (listing major employers first establishing pension plans). The earliest companies to offer pensions attained a level of “prestige” within their respective industries. *Id.* By the late 1920s, “the pension concept had begun to be respectable.” *Id.* Notably, General Motors, Ford Motor, and IBM did not establish pension plans before 1928. *Id.*

27. See generally GOLLIN, *supra* note 5, at 43 (explaining early employer inexperience and apathy towards funding pensions); NADER & BLACKWELL, *supra* note 3, at 4-11 (delineating employers’ lack of legal obligations before ERISA); SASS, *supra* note 8 (evaluating history, development, and downfall of private employer pension plans).

28. See Sharon Reece, *Enron: The Final Straw & How to Build Pensions of Brick*, 41 DUQ. L. REV. 69, 80 (2002) (discussing history of defined-contribution plans).

29. Revenue Act of 1978, Pub. L. No. 95-600, § 132, 92 Stat. 2763-86, § 135 (1978).

30. See *Pension Portability—Visions*, HR MAGAZINE, Feb. 1992 (highlighting high turnover rate in modern workforce and explaining 401(k) adopted as partial resolution). Traditional pensions generally benefit employees with longstanding service with one employer, whereas defined-contribution plans permit employees retain their retirement account when they change jobs by either rolling them into their new employer’s plan or into an Individual Retirement Account (IRA). *Id.*

31. See Burk & McCouch, *supra* note 16, at 303 (explaining “comparative disadvantage of defined-benefit plans because of stricter ERISA regulations); Reece, *supra* note 28, at 79 (explaining features of defined contribution plans and trend away from traditional pension plans); *Pension Portability—Visions*, *supra* note 30 (reviewing portability benefits of defined-contribution plans). Cash balance plans, which are hybrids of defined-benefit and defined-contribution plans without a clear statutory definition, gained popularity in the mid-1990s because “they offer a variety of benefit promises and single pool of assets found in a defined benefit plan, but also [offer] the perceived portability and understanding of an individual account rather than a retirement annuity.” Barry Kozak, *The Cash Balance Plan: An Integral Component of Defined Benefit Renaissance*, 37 J. MARSHALL L. REV. 753, 760 (2004) (describing features of cash balance plans); Kenneth R. Elliot & James H. Moore, Jr., OFFICE OF COMPENSATION AND WORKING CONDITIONS, DIVISION OF COMPENSATION DATA ANALYSIS AND PLANNING, BUREAU OF LABOR STATISTICS, *Cash Balance Plans: The New Wave*, 5 (2000), available at <http://www.bls.gov/opub/cwc/archive/summer2000art1.pdf> (quantifying growth of cash balance plans through 1990s).

32. See Robert L. Clark, *Impending Age Structure Changes, in RETIREMENT POLICY IN AN AGING SOCIETY* 9, 9 (Robert L. Clark ed., 1980) (listing common understandings of the term “retirement”). “Many people consider retirement to be the termination of a long career, but it can also be viewed as a significant reduction in hours of work below some minimum.” *Id.*

33. BLACK’S LACK DICTIONARY 1342 (8th ed. 2004) (defining “retirement”).

although the term commonly refers to the age at which an individual is eligible to accept pension benefits.³⁴ Given the varying interpretations of the term, the meaning, implications, and motivations for retiring and receiving pension benefits differ.³⁵

Due to the decline of personal savings, Americans rely on various forms of pension plans to provide economic stability during retirement.³⁶ In theory, a capitalist economy depends on citizens assuming personal responsibility for their individual retirement security.³⁷

Americans tend to believe that somewhere in their early to mid-sixties they will retire. Retiring before age fifty-five . . . would be seen by most as retiring early, and working much past sixty-five would be seen as a stubborn and somewhat odd clinging to work (Supreme Court justices excepted).

The idea that retirement can be expected as a stage in one's life is relatively new.³⁸

Since their origin, pensions have served dual roles by recognizing service and loyalty of employees while operating as inducements for older employees to stop working.³⁹ The concepts of retirement and pensions have differing meaning and significance to employers and employees.⁴⁰ From the employer's

34. See Clark, *supra* note 32, at 9 (considering varying interpretations of "retirement").

35. See *infra* notes 38–46 and accompanying text (observing different rationales for retirement and pensions).

36. T. Leigh Anenson & Karen Eilers Lahey, *The Crisis in Corporate American: Private Pension Liability and Proposals for Reform*, 9 U. PA. J. LAB. & EMP. L. 495, 499 (2007) (stressing pensions provide secure retirements and allow employers to eliminate inefficient and aging employees).

37. See SASS, *supra* note 8, at 8 (describing optimal economic and market circumstances permitting opportunities for retirement planning). Sass postulates that "from a purely theoretical perspective, wage and salary workers were quite capable of preparing for their own old age." *Id.* By saving a portion of wages and investing appropriately, employees may reap the benefits of the capital markets while maintaining adequate levels of risk protection from market fluctuations. *Id.*

38. ROBERT S. WEISS, *THE EXPERIENCE OF RETIREMENT* 16 (2005) (footnote omitted) (citing DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880-1990* (1998)).

39. See *id.* at 16 (reviewing various employer incentives for establishing pension plans); Anenson & Lahey, *supra* note 36, at 498 ("[p]rivate pensions mutually benefit both employers and employees."). Both business leaders wanting to improve productivity and union leaders seeking to improve job availability supported "[t]he institutionalization of retirement as a life stage." WEISS, *supra* note 38, at 16. Earlier pensions, however, focused more on giving disability assistance, rather than retirement benefits. See GOLLIN, *supra* note 5, at 41.

40. See GOLLIN, *supra* note 5, at 14 (describing employer's rationale for offering employee retirement plans); WEISS, *supra* note 37, at 14 (noting convenience of turning over aging employees with retirement plans); Eric D. Chason, *Outlawing Pension-Funding Shortfalls*, 26 VA. TAX REV. 519, 521 (2007) (comparing employer's rationale for offering retirement plans and employee's considerations in retirement decision). The contrasting impetus for desiring deferred compensation plans results in dissonant economic goals. Chason, *supra* at 521.

Retirees want their pension benefits to be secure. Current employees want security as well, but also

perspective, retirement plans serve wholly economic objectives.⁴¹ Pensions offer employers the opportunity to maintain optimal employee productivity without restraining their ability to replace aging employees.⁴² Although pension plans may be costly burdens for employers, they are less expensive than retaining older, and presumably more inefficient, employees.⁴³

Conversely, employees view pension plans as providing post-retirement economic security.⁴⁴ The employee's decision to retire, however, entails more than just financial considerations, like escaping work-related conflicts and spending more time with family.⁴⁵ A life beyond a working career appears more "attractive" to employees.⁴⁶

the opportunity to earn more benefits in the future. Employers want flexibility over plan contributions and low PBGC premiums. Taxpayers, if they pay attention at all, want to avoid, or at least mitigate, any bailout of the PBGC. Because these interests are irreconcilable, Congress has been responding to cacophony. The result is a broken system of pension funding and insurance.

Id.

41. See GOLLIN, *supra* note 5, at 14 (describing reasons employers offer retirement plans); see also WEISS, *supra* note 38, at 16 (noting pensions as effective mechanisms for removing older employees). *But see* SASS, *supra* note 37, at 12 (contending pensions originally offered in recognition of loyal military service). Upon reviewing the motivating factors surrounding the inception of retirement plans, however, the primary reason was "money." GOLLIN, *supra* note 5, at 14. In addition to serving the employer's interests in generating an effective workforce, substantial tax benefits entice employers to offer pension plans. See JAY CONISON, *EMPLOYEE BENEFIT PLANS IN A NUT SHELL* 30-32 (3d ed. 1998) (listing mutual tax benefits among employers and employees).

42. See GOLLIN, *supra* note 5, at 14-15 (highlighting benefits of employer-sponsored retirement plans). Employee productivity increases with time and experience. *Id.* at 14. After a certain point, however, an aging employee becomes less efficient and productive due to "loss of physical strength and stamina and the decline in alertness and the ability to concentrate," thus necessitating a mechanism for terminating the employee. *Id.* By establishing a precedent that all employees stop working at a certain age (e.g., sixty-five), employer and employee expectations are properly aligned. *Id.* at 15. An established retirement age and a promised retirement benefit "gives the employer a velvet glove to slip over the iron hand of enforced termination. It offers a way to reward loyalty and to encourage productivity right up to the last hour on the job." *Id.* As opposed to discriminately terminating employees as their productive value declines, enforced retirement ages produce equitable remedies and additional benefits by encouraging more employees to cease working earlier than the prescribed age. *Id.* Furthermore, predictable and regularly enforced retirement policies shield employers from claims by terminated employees. *Id.*; WEISS, *supra* note 38, at 16 (reviewing effectiveness of pensions in inducing retirement). Theoretically, "the economy ought to generate enough jobs for all persons, young and old, so it will not be necessary to force the older to retire to make a place for the younger." Juanita M. Kreps, *Developing a National Retirement Policy*, in *RETIREMENT POLICY IN AN AGING SOCIETY* 2, 3 (Robert L. Clark ed., 1980).

43. See GOLLIN, *supra* note 5, at 15 (describing retirement plans as inexpensive solution to ensuring employee termination at retirement age).

44. Richard V. Burkhauser & John A. Turner, *The Effects of Pension Policy Through Life*, in *RETIREMENT POLICY IN AN AGING SOCIETY* 128, 128-29 (Robert L. Clark ed., Press 1980) (reviewing varying economic factors affecting employee retirement decisions). Retirement plans are not designed to directly benefit either the employee or the retiree, but only to serve the company's best economic interests and enhance labor relations. GOLLIN, *supra* note 5, at 15.

45. See WEISS, *supra* note 38, at 16-39 (providing additional rationalizing factors employees consider when retiring).

46. See SAVISHINSKY, *supra* note 23, at 12 (elucidating modern perspectives on retirement).

B. Basic Definitions and Concepts

Depending on the employer and the objectives sought, employee welfare benefit plans assume a variety of models.⁴⁷ An employee welfare benefit plan, as originally defined by ERISA, is “any plan, fund, or program . . . [offered] by an employer or by an employee organization . . . [with] the purpose of providing [economic security] for its participants or their beneficiaries.”⁴⁸ Specifically, all employee welfare benefit plans are conceptualized as “pensions,” but are distinguished into two distinct categories—a defined-benefit or a defined-contribution plan.⁴⁹

A defined-benefit pension plan is an account into which employers directly deposit funds to provide employees with remuneration upon death, retirement, or early separation from employment due to disability.⁵⁰ Typically, a defined-benefit pension is distributed in the form of an annuity, namely, regular payments over a period of time from the point of retirement, or early employment termination, until death.⁵¹ The pension’s value is generally, but with substantial variation, calculated by considering factors including an employee’s salary and his years of employment with the company.⁵²

Conversely, defined-contribution plans, like 401(k)s, “provide for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses,

47. See *infra* Part II.B and accompanying text (defining basic retirement plan concepts).

48. 29 U.S.C. § 1002(1) (2006) (defining employee welfare benefit plan).

49. See CONISON, *supra* note 41, at 3-21 (simplifying distinctions among employer sponsored retirement plans).

50. See CONISON, *supra* note 41, at 4 (citing 29 U.S.C. § 1002 (35) (2000) (defining defined-benefit plans)) (reviewing pension plans as promulgated by ERISA). ERISA regulates all employee welfare benefit plans, and categorizes both defined-contribution and defined-benefit plans as “pensions.” 29 U.S.C. § 1002 (34)-(35). Title II of ERISA, as codified in the IRC, however, “use[s] slightly different terminology to describe plans. . . . [A] pension plan is defined as a retirement plan in which benefits are ‘definitely determinable.’ . . . Hence, this definition of pension plan includes defined benefit and money purchase plans, but excludes profit sharing and stock bonus plans.” CONISON, *supra* note 41, at 6 (citation omitted) (citing Treas. Reg. § 1.401-1(b)(1)(i)-(iii) (1976)). Common colloquial usage of the terms, however, refer to defined-benefit plans as “pensions” and defined-contribution plans as “401(k)s,” or other individualized retirement plans offered through an employer. “As a practical matter, however, the term ‘defined[-]benefit plan’ is more commonly understood to mean a plan in which the benefit at retirement is determined by a formula in the plan.” Alden J. Bianchi, *Chapter One*, in MASSACHUSETTS BAR ASSOCIATION: NUTS AND BOLTS OF RETIREMENT BENEFITS 1, 2 (1996).

51. See GOLLIN, *supra* note 5, at 23-24 (explaining typical defined-benefit distributions). Depending on the plan model, an employer may offer alternatives to annuities. *Id.* at 24. The alternatives include guaranteed benefits to an employee’s beneficiaries or spouse, in the event that the employee predeceases them, in exchange for the employee electing reduced benefits during his lifetime. *Id.* An employee may also elect to receive larger benefits at retirement in exchange for lower payments after Social Security benefit disbursements. *Id.*

52. See Evelyn A. Haralampu, *ERISA Liability*, in 2 MASSACHUSETTS EMPLOYMENT LAW § 19.2.2(b) (John F. Adkins & Nancy S. Shilepsky, eds. 2006) (explaining basic defined-benefit plan features). “For example, a defined[-]benefit plan might provide an employee an annual benefit when he or she retires at age sixty-five that is equal to 2 percent of the employee’s average compensation multiplied by the number of years that the employee completes, up to a maximum of thirty years.” *Id.*

gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."⁵³ An employee, and possibly her employer, allocates contributions to a trust account and the benefit is valued as the aggregate of contributions and investment performance.⁵⁴ As opposed to a defined-benefit plan where the employer's responsibility is to duly contribute to, and manage, the fund, the employer sponsoring a defined-contribution plan is only obligated to make any promised contributions.⁵⁵ Accordingly, employees personally assume the hazards of investment volatility in defined-contribution plans while employers, due to ERISA requirements, assume the investment management and contribution risks in defined-benefit plans.⁵⁶

A defined-contribution plan is considered a transferable benefit.⁵⁷ Upon early termination of employment, an employee may, depending on plan rules, exercise one of the following four options: transfer the assets from the plan to a new employer's plan and maintain the tax-qualified status of the contributions; roll over the assets into an IRA; make a withdrawal by paying taxes on the pre-tax contributions and, depending on the circumstances

53. 29 U.S.C. § 1002(34) (defining general provisions of ERISA). By assessing the Pension Act in light of its key features and influence on private employers, the defined-contribution analysis of this Note is restricted to that of 401(k) plans.

54. See CONISON, *supra* note 41, at 4 (distinguishing defined-contribution from defined-benefit pension plans). A substantial benefit derived from contributing to a traditional 401(k) plan is that the employee potentially lowers his taxable income by making pre-tax contributions to the plan. See *Top Things to Know*, CNNMONEY.COM, <http://money.cnn.com/pf/101/lessons/23/index.html> (explaining beneficial aspects of participating in employer's 401(k)). By making pre-tax contributions, the employee defers paying taxes on the contribution until withdrawal, which occurs during retirement, when the employee is in a lower tax bracket. *Id.* Consequently, "the money [employees] save benefits from tax-deferred growth, which lets [the] money compound more quickly than it would if it were taxed yearly." *Id.*

55. See CONISON, *supra* note 41, at 4 (comparing investment risk assumption among plans); Haralampu, *supra* note 52, at § 19.2.2(a)-(b) (delineating distinctions of liability between defined-benefit and contribution plans). Under a defined-contribution plan, the employee traditionally retains the responsibility of delegating investments and overseeing their performance. Haralampu, *supra* note 52, at § 19.2.2(a)-(b). The traditional 401(k), as promulgated by the IRC, will serve as the prototypical example of a defined-contribution plan for the purposes of this discussion. See 26 U.S.C. § 401(k) (2006). Other popular examples exist, including "profit sharing, . . . money purchase pension, and employee stock ownership plans." Haralampu, *supra* note 52, at § 19.2.2(a).

56. See Haralampu, *supra* note 52, at § 19.2.2(b) (explaining defined-benefit plan's risk assumption). But see Lydell C. Bridgeford, *On the Bandwagon: Auto-Enrollment, Roth 401(k)s Gain Momentum with Employers*, EMP. BENEFIT NEWS, Sept. 1, 2007, at 2, available at 2007 WLNR 17239321 (describing "paternalistic mindset" of employers transitioning from defined-benefit to defined-contribution plans). Defined-contribution plans are easier to terminate, especially in bankruptcy, than defined-benefit pension plans because of the discrepancies in risk allocation. See Carol Connor Flowe, *But There's No Money: A Tale of Management and Pensions*, 16-DEC BUS. L. TODAY 23, 29-30 (Nov./Dec. 2006) (comparing terminations of plans in employer bankruptcy).

57. See Peterson, *supra* note 17 (describing Pension Act's impact on various forms of retirement plans). "A lot of people aren't sure they're going to spend their whole careers with one company, and they like the idea of a benefit that they can transport to another company . . ." *Id.* (internal quotations omitted) (quoting Lori Captain, spokeswoman for DuPont). 401(k) plans tend to attract management-level employees intending to regularly change jobs, as opposed to other workers who intend to maintain one career employer and derive an expectation interest from an employer's retirement plan. *Id.*

surrounding the withdrawal and the age of the participant, possibly an early withdrawal fee; or leave the money with the employer's plan until retirement.⁵⁸ On the contrary, defined-benefit plans are less portable and tend to induce employees to remain with a single employer throughout their career.⁵⁹

C. Recent Pension Legislation and Regulation

Until 1974, when Congress passed ERISA, pensions remained largely unregulated aside from tax benefits offered as incentives for employers to offer pension plans.⁶⁰ No standards regulating pensions existed because state courts treated pension benefits as revocable gifts by employers to their employees.⁶¹ Individual employees retained minimal remedies against an employer's denial of retirement benefits.⁶² Consequently, Congress enacted federal pension laws to protect employees' retirement benefit expectations.⁶³

Congress enacted ERISA in 1974, thereby repealing the Welfare and Pension Plans Disclosure Act of 1958 and amending sections of the IRC.⁶⁴ By "protect[ing] interstate commerce and the interests of participants in employee

58. See 33A AM. JUR. 2D *Federal Taxation: Retirement Plans* § 8984 (2006) (reviewing IRA rollover options); *Pension Portability—Visions*, *supra* note 30 (describing portability options but noting employees commonly fail to utilize these options); *Top Things to Know*, *supra* note 54 (listing four account options upon employment termination).

59. See NADER & BLACKWELL, *supra* note 3, at 3 (describing pension crisis and negative defined-benefit features); see Peterson, *supra* note 17 (comparing portability of plans). Lump sum distributions, rollovers to IRAs, and transfers to new employer plans are permissible but more limited than with 401(k)s. CONISON, *supra* note 41, 141-54 (describing defined-benefit options and tax implications).

60. See Jill L. Uylaki, Note, *Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Corporation?*, 6 ELDER L.J. 77, 81-82 (1998) (citing Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 121-22 (1996)) (summarizing pre-ERISA pension regulation). Promises by employers of retirement benefits to employees "were matters for private agreement" before ERISA. Ulen, *supra*, at 120.

61. See Haralampu, *supra* note 52, at § 19.1.1 (articulating state courts' noninvolvement with pensions pre-ERISA).

62. See Haralampu, *supra* note 52, at § 19.1.1 (reviewing employees' potential causes of action against employers). Causes of action arose under contract and labor law, but these claims tended to be unsuccessful due to problems of demonstrating the existence of a viable contract. See Haralampu, *supra* note 52, at § 19.1.1; Ulen, *supra* note 60, at 121. Before ERISA, employers frequently terminated employees prematurely to avoid paying retirement benefits. See Haralampu, *supra* note 52, at § 19.1.1. Additionally, because regulations did not mandate funding, employers commonly denied retirement age employees promised benefits due to inadequate funding. *Id.* The Studebaker plant, for example, closed in 1963 due to bankruptcy, and thousands of employees with many years of service did not receive promised pensions because of vast underfunding. *Id.* The Studebaker example served as one trigger for ERISA. *Id.*

63. See Haralampu, *supra* note 52, at § 19.1.1 (describing catalytic events preceding ERISA).

64. See 29 U.S.C. § 1001 (2006) (summarizing projected benefits of ERISA); see Pomeranz, *supra* note 24, at 39 (detailing ERISA's primary legislative effects). 401(k) plans did not exist at the time of ERISA's enactment. Revenue Act of 1978, Pub. L. No. 95-600, § 132, 92 Stat. 2763-86, § 135 (1978); see also Colleen Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 7 (2000) (observing 401(k)s created through IRC amendments in 1978).

benefit plans and their beneficiaries,”⁶⁵ Congress legislated in accordance with its constitutional power “to regulate commerce . . . among the several states.”⁶⁶ The primary purposes of ERISA were to enforce employers’ promises of retirement benefits and minimize potential for mismanagement and misuse.⁶⁷ Until recently amended by the Pension Act, ERISA governed employer retirement plans and failed to comprehensively regulate remunerations received by employees.⁶⁸ ERISA established specific plan participation eligibility requirements, extended coverage to non-collectively bargained union employees (including all employees of corporations), fixed standard vesting schedules, mandated minimum funding requirements, and detailed deductible contribution limits.⁶⁹ In response to infamous instances of massive underfunding and disappointment with anticipated pension benefits, ERISA demanded detailed accounting and auditing procedures and set forth civil and criminal penalties for noncompliance.⁷⁰

In addition to regulating pension plan management and funding, ERISA established the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor to insure pension benefits.⁷¹ The three-part role of the PBGC is:

- (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
- (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
- (3) to maintain premiums established by the corporation . . . at the lowest level consistent with carrying out its obligations under this subchapter.⁷²

65. 29 U.S.C. § 1001(b).

66. U.S. CONST. art. I, § 8, cl. 3.

67. See *Retirement Insecurity: 401(k) Crisis at Enron: Hearing Before the Comm. on Governmental Affairs*, 107th Cong. 1-2 (2002) (statement of Sen. Joseph Lieberman, Chairman, S. Comm. on Governmental Affairs) [hereinafter *Lieberman Statement*] (reviewing ERISA’s historical context preceding Enron 401(k) crisis); Haralampu, *supra* note 52, at § 19.1.1 (distinguishing transformation of employee’s rights). “ERISA has expanded the rights of employees to retirement benefits. Instead of a nonenforceable gratuity, pension rights have evolved into a federally enforceable contract right.” Haralampu, *supra* note 52, at § 19.1.2.

68. See CONISON, *supra* note 41, at 1 (describing ERISA). See generally POMERANZ ET AL., *supra* note 24 (reviewing pension history).

69. See CONISON, *supra* note 41, at 1-2 (explaining ERISA); POMERANZ ET AL., *supra* note 24, at 48-65 (articulating key ERISA features).

70. See 29 U.S.C. § 1001 (2006); Haralampu, *supra* note 52, § 19.1.1 (highlighting substantially stricter reporting requirements under ERISA); POMERANZ ET AL., *supra* note 24, at 66-80. Furthermore, ERISA defined the specific duties imposed on the fiduciaries of defined-benefit funds. See 29 U.S.C. § 1001; POMERANZ ET AL., *supra* note 24, at 60-63.

71. See 29 U.S.C. § 1302(a); SASS, *supra* note 8, at 220 (acknowledging major initiatives ERISA established).

72. 29 U.S.C. § 1302(a)(1)–(3).

ERISA requires employers to pay premiums to the PBGC, thereby establishing insurance on employee's promised pension benefits in the event of inadequate funding or plan termination.⁷³

Following ERISA, defined-benefit pension plans slowly declined and defined-contribution plans proliferated.⁷⁴ From 1980 until 1998, the percentage

73. 29 U.S.C. § 1305; see POMERANZ ET AL., *supra* note 24, at 3, 69-70 (discussing established role of PBGC); Uylaki, *supra* note 60, at 83 (summarizing PBGC's role as governmental insurance for failed pension plans). Plan sponsors or administrators must make annual contributions to the PBGC towards the insurance premium. See CONISON, *supra* note 41, at 426-29 (characterizing plan administrator obligations under ERISA). The PBGC realizes the risk of pension plans by absorbing employer's pension risks. See Margaret M. Blair, *The Great Pension Grab: Comments on Richard Ippolito, Bankruptcy and Workers: Risks, Compensation and Pension Contracts*, 82 WASH. U. L.Q. 1305, 1306-07 (2004) (addressing employer's manipulative risk-shifting ability under ERISA through PBGC).

[T]he corporation can "put" the pension assets to the . . . [PBGC], forcing it, rather than the employer, to satisfy the employer's promised pension obligations. But if the return on a pension portfolio is unusually high, the corporation can terminate the plan and call back the surplus value in that plan. Thus the employer gets the benefit of the upside potential of what they invest in the pension portfolio. But they have offloaded the downside risk onto the PBGC and to the employees.

Id. Normally, the PBGC only absorbs the risk of an employer's pension plan when such plans are inadequately funded. See generally *Who Will Rescue the Pension Benefit Guaranty Corp.?*, 43 BCD NEWS & COMMENT 16 (2004) (describing basic function of PBGC when plans are trustee). "When a pension plan is trustee to the PBGC, the agency assumes both the assets and liabilities of the plan." *Id.* Namely, the PBGC continues to pay promised pension benefits to the employees for a certain period of time. See *id.* Accordingly, the PBGC undertakes more liabilities than it can support and is currently significantly underfunded. *Id.*

74. See *infra* Part II.C (detailing trend of retirement plans after ERISA); see also Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 327-29 (2007) (highlighting post-ERISA trends); *Private Pension Plans, Participation, and Assets: Update*, [hereinafter FACTS FROM EBRI] (Empl. Benefit Research Inst., Washington, D.C.), Jan. 2003 (quantifying declining participation in defined-benefit plans since 1975), <http://www.ebri.org/publications/facts/index.cfm?fa=0103fact>.

of Americans participating in some form of a defined-benefit pension plan decreased from thirty-eight percent to sixteen percent, whereas the number of defined-contribution plans more than tripled.⁷⁵ Various social and economic factors contributed to this decline, including changes in American demographics, employee fears of participating in pension plans, and employers' inability to fulfill funding obligations.⁷⁶

Despite the advantageous funding rules under ERISA, major employers terminated underfunded pension plans, thereby reducing the number of plans subject to the statute.⁷⁷ Employer bankruptcy primarily accounted for plan

PBGC Terminations (1975–2004):
Single-Employer Program

Fiscal Year	Adequately Funded Plan Terminations	Underfunded Plan Terminations
1975–1979	28,572	586
1980–1984	29,236	621
1985–1989	48,519	537
1990–1994	36,340	692
1995–1999	15,620	438
2000-2004	6,969	595
TOTAL	165,256	3,469

Table recreated from Jack VanDerhei, *Defined Benefit Plan Freezes: Who's Affected, How Much, and Replacing Lost Accruals* ISSUE BRIEF (Empl. Benefit Research Inst., Washington, D.C.), March, 2006, at 4 fig.1, available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-20063.pdf (citing PENSION BENEFIT GUARANTY CORP., PENSION DATA BOOK (2004)).

75. See Blair, *supra* note 73, at 1305 (citing Richard A. Ippolito, *Bankruptcy and Workers: Risks, Compensation and Pension Contracts*, 82 WASH. U. L.Q. 1251 (2004) (observing mechanisms absorbing employer retirement plan liabilities)) (quantifying recent declining defined-benefit participation trends); FACTS FROM EBRI, *supra* note 74. These figures are contrasted with the number of participants in any form of retirement plan which only declined from fifty-four percent to fifty-two percent in the same time period. FACTS FROM EBRI, *supra* note 74.

76. See Blair, *supra* note 73, at 1305-06 (describing "substantial aging of the population"); Lieberman Statement, *supra* note 67, at 2-4 (recognizing fear instilled in employees preventing participation). See generally NADER & BLACKWELL, *supra* note 3 (discussing pension funding crisis pre-ERISA).

77. See Charles J. Ford et al., *Weaknesses in Defined-benefit Pension Funding Rules: A Look at the Largest Plans 1955-2002*, 44 BRANDEIS L.J. 351, 352-58 (2006) (describing "structural weaknesses in . . . [ERISA's] funding rules"). "Despite the presence of minimum funding rules and the [additional funding charge], plan underfunding has persisted. In recent years, the level of total plan underfunding has increased rapidly, from about \$39 billion in 2000 to an amount estimated to exceed \$450 billion as of September 30,

underfunding in the wake of ERISA.⁷⁸ Contrary to congressional intent to eliminate employer malfeasance surrounding pension accounts, employers misappropriated funds allocated to employee pensions in the 1980s as the stock market improved.⁷⁹ Congress attempted to address the funding issues by enacting several pieces of legislation.⁸⁰

By 2005, many major pension plans were severely underfunded and the PBGC's liabilities vastly outweighed its assets.⁸¹ The resulting pressures from inadequate funding of pension plans burdened the PBGC and destroyed current employees' and retirees' retirement aspirations.⁸²

The Congressional Budget Office (CBO) projected that benefits paid would grow from about \$4 billion in 2005 to approximately \$10 billion in 2015. According to this projection, the PBGC would exhaust its on-budget surpluses around 2013 and would need to use a larger percentage of its trust fund to meet benefit obligations. Additionally, the Center on Federal Financial Institutions

2004." *Id.* at 3578.

78. See Uylaki, *supra* note 60, at 79-80 (enumerating employer bankruptcy as cause of pension plan underfunding).

79. Uylaki, *supra* note 60, at 82 (detailing economic trends).

80. See Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (codified at 15 U.S.C. §37b (2006)) (tackling underfunding issues in defined-benefit plans); Amy Lassiter, Note, *Mayday, Mayday!: How the Current Bankruptcy Code Fails to Protect the Pensions of Employees*, 93 KY. L.J. 939, 956 (2004) (criticizing Congress's failed legislation regarding funding crisis). In addition to attempting to revive defined-benefit pension plans, Congress offered new tax credits to individuals contributing to private savings plan. Ross Kerber, *How Democrats Plan to Beef Up 401(k)s for Millions*, BOSTON GLOBE, Nov. 19, 2006, at D1 (describing recent tax credits offered for savings). "Congress has recently proposed a lot of 'quick fixes' regarding the current pension underfunding crisis. However, the proposed solutions do nothing more than delay the inevitable." Lassiter, *supra*, at 956.

81. See *Solvency of the Pension Benefit Guaranty Corporation—Current Financial Conditions and Potential Risks: Hearing Before the S. Comm. on Budget*, 109th Cong. 91-93, 96-98 (2005) (statement of Bradley Belt, Executive Dir., PBGC) [hereinafter *Belt Statement*] (articulating PBGC and pension system's financial statuses); *The Role of Employer-Sponsored Retirement Plans in Increasing National Savings: Hearing Before the S. Spec. Comm. on Aging*, 109th Cong. 4-7 (2005) (statement of Mark J. Warshawsky, Assistant Sec'y for Economic Policy, U.S. Dept. of Treasury) [hereinafter *Warshawsky Statement*] (criticizing current problems plaguing defined-benefit pension plans and PBGC). At the time of Mr. Belt's statement on June 15, 2005, the PBGC's liabilities exceed its assets by \$20 billion. See *Belt Statement, supra*, at 91-93, 96-98 (quantifying PBGC's 2005 deficit). The PBGC, at the time of Belt's statement, managed 350 bankruptcy plans, including thirty-seven plans with over \$100 million in inadequate funding. *Id.* Though the role of the insurance system of the PBGC, as established by ERISA, is to assume plan payment responsibility upon the termination of a plan, the PBGC's financial deficit in 2005 would not allow it to satisfy long-term insurance commitments, thus threatening its long-term viability. *Id.*

82. See *The Retirement Security Crisis: The Administration's Proposal for Pension Reform and Its Implications for Workers and Taxpayers: Hearing on the President's Proposal for Single-Employer Pension Funding Reform Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 109th Cong. 1, 29-37 (2005) (statement of Ann. L. Combs, Ass. Sec'y, Empl. Benefits Security Administration, U.S. Dept. of Labor), available at <http://www.dol.gov/ebsa/newsroom/ty030805.html> [hereinafter *Combs's Statement*] (arguing employer's unfulfilled pension promises unacceptable). Prior to the Pension Act, regulations failed to assure sufficient capitalization of pension plans and the "funding rules [were] complicated and ineffective." *Id.* at 31.

(COFFIs) predicted in 2004 that overall PBGC funds would be depleted by 2021.⁸³

In response, President Bush called upon Congress to draft legislation reforming the private retirement system.⁸⁴ “The Administration . . . developed a reform package to improve pension security for workers and retirees, stabilize the defined benefit pension system, and avoid a taxpayer bailout of the PBGC.”⁸⁵ Congress subsequently enacted the Pension Act in the summer of 2006.⁸⁶

D. The Pension Protection Act of 2006

Before enacting the Pension Act in 2006, the Senate and House passed bills with similar advantageous goals of reforming the private pension system.⁸⁷ The bills required five months of joint review because they featured key differences.⁸⁸ President Bush signed the Pension Act, House Bill 4, after the House and Senate passed it.⁸⁹ When announcing the newly passed Pension Act, President Bush assured Americans that “[i]n addition to reforming the laws governing traditional private pensions, the bill . . . also contains provisions to help workers who save for retirement through defined contribution plans like IRAs and 401(k)s. These savings plans are helping Americans build a society of ownership and financial independence.”⁹⁰

83. Daniel B. Klaff, *The Pension Act of 2006: Reforming the Defined Benefit Pension System*, 44 HARV. J. ON LEGIS. 553, 556 (2007) (footnotes and internal quotation marks omitted) (foreshadowing impending defined-benefit pension plan funding crisis).

84. See *Combs's Statement*, *supra* note 82, 29-37 (explaining President Bush's pension reformation proposal).

85. *Combs's Statement*, *supra* note 82, at 31. The objectives of the Pension Act included improving the economic status of the PBGC. John H. Rains, IV, Note, *Searching for Fairness in All the Wrong Places: Valuing the Pension Benefit Guaranty Corporation's Unsecured Claim in Bankruptcy*, 58 FLA. L. REV. 1107, 1136 (2006) (evaluating Congressional Budget Office's objectives for PBGC based on Pension Act).

86. See Bush's Public Address, *supra* note 14 (announcing Pension Act's enactment).

87. See LEGISLATION 2006: PENSION PROTECTION ACT OF 2006: LAW, EXPLANATION AND ANALYSIS 3 (2006) [hereinafter PENSION ACT LAW, EXPLANATION AND ANALYSIS] (examining legislative history and primary feature of the Pension Act).

88. See *id.* at 3 (chronicling debates and negotiations following initial bills leading up to Pension Act enactment). The differences between the Senate and House bills “include[ed] the level of required plan contributions and the premiums needed to return the . . . (PBGC) to solvency.” *Id.*

89. See H.R. 4, 109th Cong. (2006) (adopting House version of Pension Act); Bush's Public Address, *supra* note 14 (announcing President's signing of Pension Act after years of preparation). The House of Representatives passed the Pension Act by a vote of 270 to 131 on July 28, 2006, and the Senate approved the same version ninety-three to five on August 3, 2006. See *President Signs Pension Reform Bill Into Law*, 5-5 MEALEY'S LITIG. REP.: ERISA (Sept. 2006) (outlining provisions of Pension Act).

90. Bush's Public Address, *supra* note 14 (highlighting crucial aspects of the Pension Act in transforming retirement and savings vehicles in America). But see Matt Ackerman, *Fidelity Sees 401(k) Growth Even Without New Law*, 171 AM. BANKER 7, 7 (2006) (illustrating mutual funds flourishing due to increased contributions); Ellen Marshall, *Private Investment Funds Aided by Pension Reform*, EMP. BENEFIT NEWS, Feb. 2, 2007 (predicting increased business for private equity funds from pension plans).

The Pension Act's new funding requirements address inadequate funding issues associated with defined-benefit pension plans.⁹¹ Under the Pension Act, most pension funds must be completely funded within seven years, and "at-risk" plans must comply at an accelerated pace.⁹² Furthermore, the Pension Act mandates underfunded plans pay higher premiums, disclose the plan's funding status to plan participants, and produce more accurate actuarial plan assessments.⁹³

Regarding 401(k) plans, the Pension Act features provisions aimed at increasing employee and employer participation and contribution.⁹⁴ By introducing automatic enrollment features, employers may now unilaterally enroll employees in 401(k) retirement plans.⁹⁵ Projections estimate that the automatic enrollment feature will increase 401(k) participation by more than twenty percent.⁹⁶ Similarly, the Pension Act establishes fixed annual

91. Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 101-04, 201-04, 120 Stat. 780 (codified in scattered sections of 26 & 29 U.S.C.) (2006); Bush's Public Address, *supra* note 14 (criticizing employers failing funding obligations). Predictions anticipated the Pension Act's amelioration of severely underfunding of defined-benefit pension plans. See Rains, *supra* note 85, at 1136-37.

92. See Pension Protection Act of 2006 § 501; Jayna Paquin, *What Employers Need To Know About The Pension Protection Act of 2006*, MONDAQ BUS. BRIEFING, Aug. 15, 2006 (highlighting Pension Act's funding requirements for defined-benefit pensions). Inadequately funded plans, namely those at less than eighty percent funding, are subject to the accelerated schedule. *Id.*

93. See generally Pension Protection Act of 2006; Gene Meyer, *Pension Act Shakes and Shapes the Future: Changes Big and Small Await Millions of Workers Under Act to Be Signed Into Law*, KANSAS CITY STAR, Aug. 17, 2006, at C1 (surveying major features of Pension Act); Paquin, *supra* note 92 (reviewing Pension Act's implications for defined-benefit plans).

94. See generally Pension Protection Act of 2006.

95. See Pension Protection Act of 2006 § 902 (codifying automatic enrollment features); Kathy Kristof, *New 401(k) Plan Advances Along on Autopilot*, TULSA WORLD, July 29, 2007, at E3 (summarizing Pension Act's "safe harbor" features); Paquin, *supra* note 92 (summarizing major revisions to 401(k) plans); *Rules May Ease 401(k) Enrollment*, WALL ST. J., Sept. 27, 2006, at D2 (describing amendments easing employer enrollment of employees into 401(k) plans). In codifying the automatic enrollment feature, the Pension Act clarified wage garnishment issues troubling employers. See Jenna Gottlieb, *Defined-contribution: 401(k) Response to Be Automatic; Pension Protection Act to Spur Plans to Adopt Enrollment Feature*, 34 PENSIONS & INVESTMENTS 17, 2 (2006). The automatic enrollment feature and increased annual contribution limits will contribute to improved retirement savings. See Marc Hogan, *An Automatic Boost For Your Nest Egg*, BUS. WK. ONLINE, Jan. 29, 2007 (praising automatic enrollment and contribution features of Pension Act). "Autopilot 401(k)s may lack . . . appeal, but their rise might increase the odds of a secure retirement for people who lack the time or inclination to become expert investors. If your retirement can't be guaranteed, at least it could be automatic." *Id.*

96. See Gottlieb, *supra* note 95, at 2 (citing Employee Benefit Research Institute, Washington, D.C.) (quantifying projected increased participation). The EBRI estimates participation to jump from seventy percent to over ninety percent because of the Pension Act. *Id.* As a result of the new and "attractive" automatic enrollment feature, companies like Apple Computer Inc., McKesson Corp., URS Corp., and Crossmark Inc. are considering adopting the alternative for their 401(k) plans. *Id.*; Lavonne Kyukendall, *Lincoln National CEO: New Retirement Bill Hits Sweet Spot*, DOW JONES NEWS SERVICE, Aug. 9, 2006 (announcing Pension Act's impact on Lincoln National Corporation's long term business strategy); Jessica Papini, *Auto Enroll Boosting Retirees' Outlook; But Only 2% of 401(k) Participants Automatically Enrolled*, 12 MONEY MGMT. EXECUTIVE, July 30, 2007, at 1 (summarizing research arising from automatic enrollment feature). In conjunction with the automatic enrollment "safe harbor" feature, "[t]he investment default option is another positive aspect . . . , with many plans increasingly putting employees in funds targeted to their retirement date. There are a lot of

contribution limits and enables plan administrators to incrementally increase deductions, thereby increasing aggregate contributions.⁹⁷ In addition to promoting increased participation in, and contributions to, defined-contribution retirement plans, the Pension Act provides participating employees with more information and access to professional investment advice.⁹⁸

The Pension Act's coverage includes sections applying to 401(k) plans, traditional defined-benefit pensions, IRAs, donations, charitable organizations, and tuition programs.⁹⁹ Popular provisions of the Pension Act, through amendments of ERISA and the IRC, enhance 401(k) plans and attempt to reform current traditional defined-benefit pension plans.¹⁰⁰ The Pension Act,

new lifecycle funds being launched, all using good allocation techniques . . .” Papini, *supra*, at 12 (considering additional changes in retirement plan features resulting from automatic enrollment). Though automatic enrollment contributes to increased employee participation, few employers are utilizing the feature and are slow to appreciate its benefits. *See id.*

97. *See* Tom Lauricella, *The 401(k) of the Future*, WALL ST. J., Aug. 5, 2006, at B1 (summarizing enabling attributes increasing contributions and participation). In response to the Pension Act, major mutual-fund firms are offering more lifecycle funds to their customers. *See* Diya Gullapalli, *On Tap: Retirement-Oriented Offerings*, WALL ST. J., Feb. 22, 2007, at C15 (highlighting proliferation of lifecycle funds following Pension Act); *see also* *Wealth Management Media Scan: What Consumers Financial Publications Wrote About This Week*, AM. BANKER, Sept. 4, 2007, at 10 (predicting increased prevalence of “target-date funds”).

98. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 601, 120 Stat. 780 (codified in scattered sections of 26 & 29 U.S.C.) (2006); Paquin, *supra* note 92 (describing changes altering employee information and advice access). *But see* Stephen M. Saxon, *ERISA Fiduciary Developments*, 39 A.L.I.-A.B.A. 597, 600 (2006) (asserting new investment advice provisions); Lee Gomes, *H-P's Pension Switch Signals End to Era of Cozy Retirements*, WALL ST. J., Mar. 14, 2007, at B1 (noting underutilization of 401(k)s); Lauricella, *supra* note 97 (revealing criticism of Pension Act investment advice features); Jonathan Peterson, *More 401(k) Oversight Planned: Labor Department, Congress to take Action*, MONTEREY COUNTY HERALD, Jan. 31, 2007 (fearing increased fees absorbed by participants as opposed to employers); Robert Powell, *Retiring: Omissions In New Pension Law Hobble Customers*, DOW JONES NEWS SERVICE, Aug. 17, 2006 (exposing fears regarding unethical fiduciary advisement); Scott Stearns, *Bill to Aid 401(k) Investors Raises Bias Concern*, WALL ST. J., Aug. 3, 2006, at D2 (describing concerns regarding investment advice features); Howard W. Wolosky, *CPAs as Fiduciaries: Not All CPAs Fully Understand What Acting as a Fiduciary Entails*, PRAC. ACCT., Feb. 1, 2007, at 29 (reviewing lack of understanding of fiduciary obligations). Previously, the old law prohibited fiduciaries offering funds within 401(k)s from offering investment advice. Paquin, *supra* note 92. Advisors may now also offer investment advice through verified computer programs. *Id.* As long as plan participants are advised of the conflicts of interests, including fee generation, created through the offering of investment advice by fund fiduciaries, participants will become eligible for such advice in 2007. *Id.* “The law also reduces liability for plan sponsors that offer investment advice to participants.” *See* Ackerman, *supra* note 90, at 7 (declaring mutual fund companies potentially benefiting from new Pension Act). IBM was the first American company to begin offering tailored investment advice to their employees. *See* Jilian Mincer, *IBM to Provide Financial Advice for Workers*, WALL ST. J., Mar. 8, 2007, at D4 (reporting IBM's offering enhanced individual investment advice). *But see* Hannah Glover, *A Few Words on 401(k) Advice: Don't Be First*, MONEY MGMT. EXECUTIVE, Jan. 29, 2007 (cautioning fiduciary liability associated with offering direct investment advice given delayed safe harbor provisions).

99. *See generally* Pension Protection Act of 2006; PENSION ACT LAW, EXPLANATION AND ANALYSIS, *supra* note 87, at 4 (listing diverse impact of Pension Act on varying economic institutions). House Bill 4 also includes miscellaneous sections addressing non-retirement issues, including mine safety, tariffs, and transportation. H.R. 4, 109th Cong. (2006).

100. *See infra* notes 95-133 and accompanying text (describing key features of Pension Act). *Contra* Zachary Warmbrodt, *Taking New Looks at Employee Benefits*, OKLAHOMAN, Aug. 1, 2007, at 2B (noting reduction of defined-benefit and increase in defined-contribution plans); *see Economic Challenges Facing the*

however, falls short of legislative intent to revive defined-benefit plans.¹⁰¹ Accordingly, the Pension Act is considered to be the “tombstone for defined-benefit plans and resurrection of defined-contribution plans.”¹⁰²

III. ANALYSIS

A. *Disparities Between Objectives and Achievements of the Pension Act*

The Pension Act demonstrates ambitious congressional efforts to reform America’s retirement system by amending ERISA and the IRC. The Pension Act, however, fails to properly address and reform failing defined-benefit pension plans by channeling more enhancements into self-directed retirement plans.¹⁰³ “The current system [still] allows persistent plan underfunding and charges a scanty premium for PBGC insurance. . . . [Though the Pension Act is] arguably the most significant revision of pension law[,] . . . [it] will let underfunding continue.”¹⁰⁴ Though shortcomings with regard to the 401(k) aspects of the Pension Act exist, the resulting demise of defined-benefit plans is instead imminently foreseeable because “401(k) accounts . . . have become the linchpin of retirement savings for millions of Americans”¹⁰⁵

The Pension Act is “well-meaning but [a] misguided attempt[] to provide more certainty that pension promises will be fulfilled. . . . [What the Pension Act is] certain to do is drive the majority of remaining defined-benefit plans out of existence.”¹⁰⁶ Employers are given few incentives to properly fund or

Middle Class: Hearing Before the H. Comm. on Ways and Means, 110th Cong. [private] (2007), available at http://www.brookings.edu/~media/Files/rc/testimonies/2007/0131saving_furman/furman20070131H.pdf, at 2-3 (statement of Jason Furman, Senior Fellow of the Brookings Institute) [hereinafter *Furman Statement*] (observing employer reduction of defined-benefit plans); Ross Kerber, *State Street to Freeze Pension Plan, Boost 401(k)*, BOSTON GLOBE, Sept. 25, 2007, available at 2007 WLNR 18873532 (listing employers terminating defined-benefit pension plans and shifting retirement responsibility to employees).

101. See *infra* Part III. A-B (critiquing shortcomings of Pension Act).

102. Interview with Marc D. Greenbaum, Professor of Law, Suffolk Univ. Law Sch., in Boston, Mass. (Oct. 31, 2006) [hereinafter Greenbaum interview] (reviewing essential Pension Act elements and historical trends between ERISA and Pension Act); see Susan J. Stabile, *Is It Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 306 (2007) (stating “era of . . . defined benefit plan is over”); see also Scott J. Macey, *Pension Protection Act: Some Emerging Issues*, Vol. 23, No. 4 J. COMPENSATION & BENEFITS 5, at 22-26 (2007) (outlining Pension Act and foreshadowing future unanticipated effects). But see *Lautenberg Leads Bipartisan Group of Senators to Push for Restoring Airline Employee Pensions*, U.S. FED. NEWS, Jan. 30, 2007 (reporting benefits of preserving certain pension plans).

103. See Lurie, *supra* note 16 (evaluating Congress’s misdirected endeavor to reform defined-benefit plans); *supra* Part II.D (explaining Pension Act); *infra* part III (surveying Pension Act’s recent criticism and suggested reform).

104. Chason, *supra* note 40, at 522 (highlighting consistent Congressional failures in improving defined-benefit pension plans).

105. See Lurie, *supra* note 16 (describing predicted downfall of defined-benefit pension plans resulting from Pension Act); Peterson, *supra* note 98 (considering increased oversight required as 401(k)s proliferate); see also Greenbaum Interview, *supra* note 102 (characterizing shortcomings of Pension Act).

106. Lurie, *supra* note 16 (criticizing Pension Act’s contribution to defined-benefit plans’ demise).

sustain currently offered defined-benefit plans, and the Pension Act fails to stop employers from terminating or failing to fulfill their promises and obligations to their employees.¹⁰⁷ Although it may take years to ascertain the Pension Act's definitive impact on defined-benefit pension plans, within one month of enactment, three major employers reduced their pension plans.¹⁰⁸ Instead of saving defined-benefit pension plans, as originally promised, the Pension Act diverts money away from defined-benefit pension plans and into defined-contribution plans.¹⁰⁹ Accordingly, the Pension Act perpetuates gaps in retirement security.¹¹⁰

Maximizing economic stability and certainty for retirees motivates legislative reform regarding retirement issues.¹¹¹ Economic factors drive employers to offer, and employees to participate in, retirement plans.¹¹² Thus, in drafting the Pension Act, President Bush's Administration sought to revitalize defined-benefit retirement plans by providing employers the opportunity to continue offering such retirement plans to their employees.¹¹³ Contrary to congressional intent to save defined-benefit pension plans in response to previous plan malfeasance, however, the Pension Act instead serves to further eliminate such plans by promoting defined-contribution plans.¹¹⁴ In 2006, after Congress enacted the Pension Act, several major employers declined to offer participation in defined-benefit pension plans to new

107. See Knight, *supra* note 16 (predicting increase in pension plan terminations). "The full impact is unclear, but certainly there will be fewer traditional pension plans, more 401(k)-type retirement accounts and a lot of betrayed workers, but companies happy to be able to more easily freeze or terminate pensions." *Id.*

108. See Peterson, *supra* note 17 (summarizing Pension Act's immediate impacts on plan reductions).

109. See Kerber, *supra* note 17 (forecasting defined-contribution plan proliferation resulting from Pension Act); see also Dawn Kopecki, *Wrestling for the 401(k) Purse*, BUS. WK., Sept. 10, 2007, at 60 (noting of \$90 million of assets under management); *supra* note 96 and accompanying text (describing anticipated proliferation of defined-contribution plans). Several billion dollars is predicted to be invested in defined-contribution plans. *Supra* note 96 and accompanying text. Mutual-fund firms stand to absorb increased assets resulting from automatic enrollment and enhanced investment features of 401(k) plans. *Id.*

110. See *supra* notes 5-12 and accompanying text (detailing lingering gaps between defined-benefit plan extinction and defined-contribution replacement).

111. See *supra* note 81 and accompanying text (considering concerns in retirement system preceding Pension Act).

112. See *supra* notes 39-46 and accompanying text (discussing primary objectives surrounding retirement plans).

113. See *Warshawsky Statement*, *supra* note 81, at 4-7 (stressing Administration's commitment to preserving defined-benefit retirement plans); see also *Combs's Statement*, *supra* note 82, 29-37 (stressing necessity for pension reform). In preparation for the Pension Act, President Bush's Administration maintained commitment to "three simple principles: [First,] funding rules should ensure pension promises are kept by improving incentives to fund plans adequately. Second, workers, investors and pension regulators should be fully aware of pension plan funding status. Third, [p]remiums should reflect a plan's risk and ensure the pension insurance system's financial solvency." *Combs's Statement*, *supra* note 82.

114. See *supra* notes 81-84 (chronicling impetus for Pension Act's enactment); see also Kerber, *supra* note 17 (stressing Pension Act's impact on 401(k) plans). Professionals agree the Pension Act primarily benefits institutions providing 401(k) services by simplifying enrollment and investment features. Kerber, *supra* note 17.

employees.¹¹⁵

B. Impact on Defined-Benefit Plans and the PBGC

Due to stringent funding requirements, investment risks, and longer life expectancies of retired employees, several employers no longer offer defined-benefit pensions to new employees.¹¹⁶ Heightened liability and increased costs outweigh tax incentives and contribute to employer's disincentives to offer defined-benefit plans.¹¹⁷ Employers prefer defined-contribution over defined-benefit plans because of the relative simplicity and transparency associated with managing defined-contribution plans.¹¹⁸

The implicit defects of the Pension Act counteract its proclaimed goals.¹¹⁹ Instead of rescuing defined-benefit pension plans, the Pension Act eradicates them.¹²⁰ Consequently, the Pension Act provides little recourse for employees near retirement age who traditionally benefit from substantial accruals in their defined-benefit pension plans in their last years of employment, but do not have enough time to reap the compounding benefits of investments in defined-contribution plans.¹²¹ Alternatively, the Pension Act assists younger

115. See *Furman Statement*, *supra* note 100, at 2-3 (describing economic shift towards individualized retirement accounts among employers). Major employers declining to offer defined-benefit pension plans to new employees include Fidelity Investments, IBM, State Street Corporation, and Verizon. *Id.*; Kerber, *supra* note 101.

116. See *Furman Statement*, *supra* note 100, at 2-3; *supra* note 115 and accompanying text (describing declining number of defined-benefit pension plans). *But see supra* notes 39-46 and accompanying text (describing primary economic incentives for employers offering employee pensions). Despite the tax and workforce advantages associated with offering defined-benefit pensions, the funding requirements and liabilities serve as disincentives for employers offering such benefits. See *supra* note 41 and accompanying text (detailing economic forces motivating employers); *supra* note 103 and accompanying text (highlighting Pension Act's negative impact).

117. See *supra* notes 64-70 (summarizing enhanced liability under ERISA); see also Flowe, *supra* note 56, at 29 (noting defined-contribution plans easier to terminate than defined-benefit plans due to ERISA requirements).

118. See *supra* notes 47-59 (highlighting primary distinctions between defined-contribution and defined-benefit plans).

119. See *supra* notes 81-98 and accompanying text (declaring aspirations of Pension Act rescuing pension plans); *supra* notes 99-100 and accompanying text (recounting immediate effects of Pension Act).

120. See Greenbaum Interview, *supra* note 102 (characterizing Pension Act as enhancing defined-contribution plans).

121. See *supra* note 7 and accompanying text (criticizing Americans' lack of retirement preparation); *supra* text accompanying note 52 (explaining defined-benefit value increases with years of service); *infra* text accompanying note 122 (highlighting benefits for defined-contribution plan participants). In the absence of adequately funded and promised defined-benefit pensions, employees hoping to retire within a few years will find themselves severely unprepared for retirement. *Supra* notes 10-11 and accompanying text (indicating predicted insufficient preparation for retirement among both younger and older employees). Conversely, younger employees that are not offered defined-benefit pension plans have sufficient time to prepare for retirement. *Id.* By making regular contributions to their 401(k) plans and maximizing the receipt of any employer matching contributions, younger employees may compensate for the extinction of pension plans. *Id.* Research suggests individuals nearing retirement age are prepared for retirement because they still retain benefits from employer health care and pension plans. See Mincer, *supra* note 12 (claiming eighty percent of

employees, who benefit from years of investment performance and contributions to their defined-contribution plans.¹²²

Despite the poor state of defined-benefit plans, the economic health of the PBGC improved within five months of the Pension Act's enactment.¹²³ The Pension Act contributed to the PBGC's reduction of over \$4 billion in liabilities in 2006.¹²⁴ This improvement to the PBGC's balance sheet reflects the diminished vitality of defined-benefit pension plans.¹²⁵

C. Impact on Defined-Contribution Plans

The Pension Act promotes defined-contribution plans.¹²⁶ While employers are consistently eliminating defined-benefit plans, other employers are taking advantage of the automatic enrollment feature of defined-contribution plans to increase employee participation.¹²⁷ Sections aimed at increasing participation in and contributions to 401(k) plans serve the ultimate goals of the Pension Act.¹²⁸ Features like automatic enrollment and lifecycle funds tend to increase actual employee participation, but also fail to address lingering issues of individuals failing to provide sufficient funding to their accounts and fail to utilize sound investing strategies.¹²⁹

individuals born between 1931 and 1941 adequately prepared for retirement). Older generations still stand to benefit from accrued pension benefits, though such benefits are generally not available to younger generations. *Id.*

122. See *supra* text accompany note 54 (noting defined-contribution benefit depends on investment performance and individual contributions).

123. See Mark Douglas, *The Year in Bankruptcy: 2006*, MONDAQ BUS. BRIEFING, Jan. 30, 2007 (analyzing PBGC's financial improvement following Pension Act's enactment).

124. See *id.* (quantifying reduction of PBGC pension liabilities in 2006). In 2006, the PBGC experienced a \$4.7 billion economic improvement due to the Pension Act. Compare *id.*, with *supra* note 81 and accompanying text (describing PBGC's economic condition in 2005).

125. See Douglas, *supra* note 123 (attributing decline in PBGC liabilities reduction of defined-benefit plans); see also *Furman Statement*, *supra* note 100, at 2-3 (detailing reduction of defined-benefit plans). Despite legislative attempts to revive defined-benefit pension plans and the PBGC, failed businesses and plan terminations continue to threaten the vitality of defined-benefit plans. See Douglas, *supra* note 123 (attributing pension underfunding to business failure).

126. See *supra* notes 94-98 and accompanying text (detailing 401(k) plan improvements because of Pension Act).

127. Warmbrodt, *supra* note 100 (comparing increased automatic enrollment utilization among employers that terminated defined-benefit plans). "Of companies that have closed defined-benefit plans, 59 percent have adopted automatic 401(k) enrollment Of companies that will stop allowing new hires to join defined-benefit plans, 61 percent have developed automatic enrollment options." *Id.*

128. See *supra* notes 94-102 and accompanying text (highlighting Pension Act's features promoting 401(k) participation and contribution); *supra* note 109 and accompanying text (predicting major shift of assets into 401(k)s); see also *supra* notes 96-98 (assessing predicted benefits for defined-contribution plans). But see *Stabile*, *supra* note 102, at 318 (contrasting benefits of Pension Act with resulting shortcomings).

129. See *Stabile*, *supra* note 102, at 318 (noting lower economic benefits of Pension Act because of other factors).

[A]utomatic enrollment is not a cure-all to nonparticipation. First, while it is true that many employees do not participate in 401(k) plans due to inertia, many do not because "they simply do not

Additionally, with the onset of the automatic enrollment features, “[t]he new rules, designed to combat . . . inertia, could bring investment managers an extra \$90 billion in retirement assets—and the annual fees generated by that business.”¹³⁰ Critics of the Pension Act worry that new access to investment advice will lead to faulty advising based on conflicts of interest and fiduciary obligations.¹³¹ Furthermore, those assuming roles as fiduciaries may not completely appreciate the extent of their responsibilities and liabilities.¹³² Given previous regulatory shortcomings of 401(k) plans and lack of participant understanding, however, the benefits associated with offering investment advice offset the corresponding risks.¹³³

D. Recurring Problems and Suggestions

Beyond promoting defined-contribution and other self-directed retirement plans, as opposed to revitalizing defined-benefit pension plans, the Pension Act fails to properly address recurring concerns predating the Pension Act and ERISA.¹³⁴ For instance, the Pension Act only partially addresses issues of inflation, lack of participant understanding, funding, annuity options, and

earn enough to pay for current needs and to save.” . . . Where nonparticipation is due to insufficient earnings, automatic enrollment is no help. Second, automatic enrollment is a two-edged sword. Evidence suggests that although participation increases, for many employees, account balances decline[], since such plans tend to have a low default contribution rate and a conservative default investment option, and employees tend to remain with the default investment selections.

Id. (footnotes and internal citations omitted) (quoting Lorraine Schmall, *Defined Contribution Plans After Enron*, 41 BRANDEIS L.J. 891, 903 (2003)).

130. Kopecki, *supra* note 109 (quantifying increased assets under management). Congress has yet to approve default investment options available through automatic enrollment features. *Id.* Economists, however, predict the increased prevalence of “target [retirement]-date funds,” or lifecycle funds, due to the Pension Act. Ackerman, *supra* note 90 (discussing increase in “target-date fund” investment).

131. See Lauricella, *supra* note 97 (revealing criticism of Pension Act investment act features); Powell, *supra* note 98 (exposing fears regarding unethical fiduciary advisement); Stearns, *supra* note 98 (describing concerns regarding investment advice features). *But see* Powell, *supra* note 98 (concluding Pension Act’s beneficial features outweigh troubling aspects). Previously, plan sponsors offered third party investment advice but did not endorse it. *Supra* note 98.

132. See Wolosky, *supra* note 98, at 29 (contrasting fiduciary responsibilities with appreciation of such responsibilities); *supra* note 98 and accompanying text (outlining concerns regarding newly defined fiduciary obligations). The Pension Act fails to address whether investment advisors may offer investment and contribution advice to participants with non-401(k) assets, such as regular brokerage accounts. See Powell, *supra* note 98 (criticizing lack of clarity in fiduciary definition in Pension Act).

133. Powell, *supra* note 98 (arguing benefits of fiduciary advisement features outweigh partiality concerns). The investment advice provision is the most contentious aspect of the Pension Act. See Saxon, *supra* note 98, at 600. Furthermore, given the risk allocation in defined-contribution plans, employers are hesitant to take advantage of this feature, fearing increased liability. *Id.* at 600 (highlighting new concerns after passage of PPA); *supra* note 56 and accompanying text (detailing traditional risk allocation between employers and employees).

134. See Lieberman Statement, *supra* note 67, at 1-5; *supra* text accompanying note 67 (characterizing chronic historical issues hindering retirement reform).

diversification.¹³⁵ In 1973, one year prior to ERISA's enactment, Ralph Nader stressed the necessity for reform of the private retirement system and beneficiary activism.¹³⁶ Despite sporadic landmark legislation, similar concerns exist thirty-four years later.¹³⁷

Furthermore, the gap created between defined-contribution and defined-benefit plans since the introduction of defined-contribution plans still remains.¹³⁸ Defined-contribution plans "were initially introduced to supplement traditional [defined-benefit] plans but have now become the principal private retirement vehicle for most workers."¹³⁹ Traditionally, employers assumed the risk of investment performance and contributions of defined-benefit plans.¹⁴⁰ Though such oversight historically led to instances of manipulation, pension plans benefited from professional management.¹⁴¹ Individuals, however, are responsible for their defined-contribution plans, thereby increasing the importance of ensuring that they make informed decisions regarding contributions and investments.¹⁴² Consequently, the Pension Act only partially addresses the risks associated with lay management and retirees outliving their defined-contribution plan's savings.¹⁴³ Additionally, given the increased mobility of the American workforce, defined-benefit plan participants are at a relative disadvantage compared to defined-

135. See *supra* Part II.C-D (summarizing effects of Pension Act).

136. See NADER & BLACKWELL, *supra* note 3, at 127 (declaring need for "improvement of the private pension system"). Nader and Blackwell urged citizens to actively partake in reformative efforts by "supporting private pension legislation at the national level and influencing employers and union officials to improve their plans." *Id.* Most legislative reform directly affects employers and their plans, rather than plan participants and their beneficiaries. *Id.* at 3, 127.

137. See Silva & Butler, *supra* note 12 (highlighting deficiencies in American retirement system and lack of understanding among plan participants). See generally NADER & BLACKWELL, *supra* note 3. "For whatever reason, retirement security is just far too tenuous for many American families." Peterson, *supra* note 7 (quoting Rep. George Miller of Cal.) (noting lack of commitment to retirement security among American families).

138. See *infra* notes 140-143 and accompanying text (surveying distinctions between defined-benefit and defined-contribution plans).

139. See Estreicher & Gold, *supra* note 17, at 334 (explaining economic disparity resulting from proliferation in defined-contribution plans).

140. See CONISON, *supra* note 41, at 4 (comparing liability and management differences between defined-contribution and defined-benefit plans); Flowe, *supra* note 56 (contrasting plan termination consequences in cases of employer bankruptcy); Haralampu, *supra* note 52, at § 19.2.2(a)-(b) and accompanying text (outlining defined benefit plan and distinguishing respective liability of defined-benefit and defined-contribution plans).

141. See *supra* notes 77, 80 (reviewing underfunding problems associated with employer pension plan management); see also 26 U.S.C. § 404 (2006) (mandating liabilities burdening employer); Haralampu, *supra* note 52, at § 19.2.2(a)-(b) (noting differing liability of employer management of pension plans).

142. See 26 U.S.C. § 404; Haralampu, *supra* note 52, at § 19.2.2(a)-(b) (stating defined-contribution plans managed and controlled by employee); Medill, *supra* note 64, at 15-19 (stressing importance of informing individuals because individuals retain responsibility for defined-contribution plans). Defined-contribution plan participants need information to make sound retirement decisions, but research demonstrates that information provided to participants is "either too basic for participants who are financially sophisticated or too sophisticated for participants who are financially illiterate." *Id.* at 4.

143. See Hogan, *supra* note 95 (reviewing defined contribution features of Pension Act).

contribution plan participants because employees participating in defined-contribution plans can easily transition among employers without losing accrued benefits.¹⁴⁴

Educating employers and employees about their respective responsibilities for funding their retirements, along with ensuring that employees are assisted with sound and unbiased investment advice, is paramount to safeguarding future retirement security.¹⁴⁵ In light of the foreseeable extinction of Social Security benefits, along with the scarcity of defined-benefit pension plans, defined-contribution plans are increasingly important to younger generations.¹⁴⁶ It is therefore paramount for younger employees, who are not offered defined-benefit plans, to begin saving for retirement by contributing to their defined-contribution plans immediately upon joining the workforce.¹⁴⁷ The Pension Act alerts Americans to the necessity of asserting control over their retirement savings, but more legislative and employer activism is required.¹⁴⁸ By encouraging individuals to assume responsibility for their retirements, the Pension Act reflects immense progress, but falls short of guaranteeing retirement security.¹⁴⁹

IV. CONCLUSION

The Pension Act of 2006 represents a neglected opportunity to revitalize defined-benefit pension plans in the United States.¹⁵⁰ The recent legislation, however, robustly enhances defined-contribution plans. Accordingly, private defined-benefit pension plans will disappear as defined-contribution plans

144. See Peterson, *supra* note 17 (highlighting portability benefits of defined-contribution plans).

145. See Francis, *supra* note 7; Levitz, *supra* note 7; Opdyke, *supra* note 7; Opdyke, *supra* note 7; Peterson, *supra* note 7 (describing recurring issues concerning retirement plans).

146. See *supra* note 1 and accompanying text (declaring impending elimination of Social Security benefits and defined-benefit plans).

147. See *supra* note 11 (quantifying necessary savings for adequate retirement). Several investment firms have responded to this adjustment through intense marketing and advertising. See Ackerman, *supra* note 90 (indicating Fidelity's anticipated benefits); Anand & Gullapalli, *supra* note 17 (predicting increased contributions benefiting multi-fund firms); Levitz, *supra* note 7 (analyzing increased marketing and advertising among financial firms). Over the past five years, financial firms have quadrupled their efforts to attract younger investors. Levitz, *supra* note 7. Financial firms' spending amounted to \$200 million in 2005. *Id.* Based on the increased contributions by participants in defined-contribution plans as a result of the Pension Act, financial firms anticipate acquiring large premiums. Anand & Gullapalli, *supra* note 17.

148. See Mueller, *supra* note 1 (characterizing Pension Act's effect of alerting Americans about retirement savings requirements). Despite differing interests associated with dispensing information, the mutual fund industry's recent marketing campaigns contribute to Americans' overall appreciation and understanding of inherent risks associated with lack of retirement savings. Kopecki, *supra* note 109, at 60 (suggesting gains anticipated by financial firms due to Pension Act).

149. See *supra* Part III (analyzing problems Pension Act tries to solve and considering possible solutions).

150. See Stabile, *supra* note 102, at 306 n.2 (critiquing vast inadequacies of Pension Act in resolving American retirement crisis). See generally Peterson, *supra* note 17 (suggesting Pension Act fails to incentivize employers to maintain defined-benefit pension plans).

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continue to proliferate.¹⁵¹ Despite the recency of 401(k) plans, the economic performance of defined-contribution and defined-benefit plans demonstrates that defined contribution models will continue to dominate retirement plans in the future.

Prospects for comfortable retirements, however, will not improve unless individuals and employers build upon the Pension Act's enabling features. The economic culture must stress saving and planning for retirement in order for the transition to defined-contribution plans to be successful. The improvements to defined-contribution plans by the Pension Act, therefore, will remain unrealized until the economic culture responds.

Emma Cecilia Eriksson

151. See generally *supra* note 102 and accompanying text (portraying Pension Act as "tombstone . . . and resurrection").