ERISA's *50th anniversary:* From pensions to the 401(k)

By Lisa Germano, CPA, JD

Part I of this trilogy on ERISA's 50th milestone **(read the article in the summer Disclosures issue)** discussed the Virginia solution for workers not covered by any retirement plan — RetirePath VA. If ERISA had fully succeeded in its goal to provide greater retirement income to workers, programs like RetirePath VA would not have gained traction. Clearly, a perfect solution remains elusive.

Part II of this trilogy offers the author's observations from an almost 40-year career specializing in ERISA from a tax and fiduciary governance perspective, as a CPA and attorney. It reflects on the evolution of the CPA and legal professions within this specialized field and the experience of sponsoring and advising employee retirement plans. The intent is to give historical reference to today's landscape.

The Employee Retirement Income Security Act of 1974 (ERISA) has left its legacy in unexpected places. Various commentators in this 50th year reflect on ERISA's impact on American workers, with both positive and negative viewpoints.

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Proposed by Sen. Jacob K. Javits in 1967 and enacted on Sept. 2, 1974, ERISA gained national attention with NBC's Peabody award-winning documentary, **"Pensions: The Broken Promise,"** by Edwin Newman. The closure of the Studebaker plant in South Bend, Indiana, leaving 3,000 workers without pensions, highlighted the need for pension security, propelling ERISA into the spotlight.

THE EMPLOYER PERSPECTIVE

As an employer, navigating regulations to maintain a relevant workplace and offer staff benefits is challenging. As a CPA and attorney, I see the necessity of these regulations. Understanding ERISA's history underscores the need for equitable government enforcement to ensure tax code compliance and protect this growing source of private-sector retirement income.

The Department of Labor's regulations help protect participants, as not all fiduciaries recognize or understand their roles. Prudence in governance, driven by actions and facts, cannot be strictly regulated, making guidelines essential. Employers often seek the least expensive compliance route, unaware of Internal Revenue Service and Department of Labor rules and regulations, which must be adhered to.

IN THE BEGINNING

When ERISA was enacted, employer plans were mainly invested in insurance products. Those that were not relied on a range of investments selected by the plan's trustees, a method now known as "trustee directed."

The oldest retirement plan I worked with began in 1957, evolving through numerous statutory and regulatory changes, particularly after the Tax Equity and Fiscal Responsibility Act of 1982. Through this, I maintained the law firm's Pattern Plan which evolved into today's prototype retirement plan.

In the 1980s, legislative changes significantly impacted plan mandates and options. As a new attorney, I learned from experienced mentors who not only served as trustees but compiled attorney, I learned from experienced mentors who not only served as trustees but compiled accounting and government information returns for 125 retirement plans and created statements of account for plan participants. Collaboration among professionals during annual meetings with investment advisors and plan sponsors benefited both sponsors and participants.

THE RISE OF THE 401(K)

By the late 1980s and into the 1990s, new investment products created an industry within the retirement arena. The influence of insurance and mutual fund companies introducing the 401(k) plan revolutionized the retirement plan offering. The 401(k) salary deferral feature, initially an addition to employer pension and profit-sharing plans, became a plan of its own: the main focus. Prototype plan documents replaced custom-designed plans, reducing the role of attorneys and CPAs who often recommended retirement plans and guided plan sponsors through the due diligence process for adopting a plan.

Lawyers who were key advisors in the development of plan design found their services replaced by prototype plan documents. These documents, indeed, a contract from the employer to its employes, became a form to sign, not a contract to be scrutinized by experience. Although most prototypes contain a caveat to review the plan with an attorney, very few employers do that.

Similarly, CPAs who recommend adopting retirement plans as part of tax or personal financial planning now refer out this work due to its increased complexity and specialization. Top CPA firms have explored various strategies to establish their role in the retirement plan space, while smaller firms rely on external resources.

A profession was dismantled, and an industry blossomed. In the early 1990s, TPA (Third-Party Administrator) firms were primarily known in the insurance industry and are state-licensed entities. Pension actuaries and consulting firms began rebranding themselves as TPA firms, often as spin-offs from insurance companies or within their agencies, creating confusion. Even today, a single plan may have two TPA service providers. Recordkeepers and independent consulting firms are both often referred to as TPAs.

What exactly is a pension TPA? Consulting firms for retirement plans grew from 1,400 in 1985 to nearly 9,000 in 2023. Today's AI-driven recordkeepers, including mutual fund private equity and insurance companies, have taken over many tasks previously handled by TPA firms. Rebranding has been happening as a solution to remain relevant.

CURRENT CHALLENGES

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The plethora of retirement plan options, from IRA, SEP, SIMPLE IRA, SIMPLE 401(k), Start-Up 401(k), Profit Sharing, Pension, Cash Balance Pension, 403(b), ERISA/Non-ERISA Defined Benefit plans, overwhelms employers, CPAs, and government agencies enforcing compliance. This confusion is compounded by state-mandated plans for those who choose none. It begs the question whether ERISA found its hoped-for success.

Human nature favors easy, inexpensive solutions, much like water that flows. Our ERISA practice has evolved into fixing issues rather than preventing them, though prevention is more beneficial. Lessons learned should shape the future, guided by national leadership resisting financial gain in favor of a national policy in the theme that ERISA began: protection of plan participants in all its forms.

LOOKING AHEAD

In the final part of this trilogy, we'll explore the future of ERISA at 50, balancing wishful thinking with statistical trends, and addressing ERISA's shortcomings. With $40 trillion in pension assets at stake, Wall Street and future retirees have much to lose.

Consumer trends show rising debt levels and increased consumption, contrasting with older generations' frugality. While life in many ways was simpler and less expensive in the 1980s, we must use the past to create a desirable future. Part III of this trilogy will offer a plan for those who are excited at the opportunity to shape it.

Lisa Germano, CPA, JD, is president and general counsel at Actuarial Benefits & Design Company in Richmond. Lisa's professional career is everything ERISA: tax code compliance and fiduciary governance to help employers find the right retirement plan solution for their workers. She incorporates the rich history of ERISA and its aftermath to help workers plan and achieve their personal goals for the lifetime chapter that starts when full-time work ends.

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Check out these resources for more info:

- **Watch the Documentary**
- **U.S. Retirement Assets:** Data in Brief

- Experian **Consumer Debt Study**