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READING THE READABILITY RULES: ERISA AND THE SPDs

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EDITOR'S NOTE—While we are unable because of space limitations to print Dr. Thompson's study in its entirety, we know our readers will be interested in this excerpt regarding readability levels and the rules. Its irony may not be delightfully humorous, but it will elicit a wry smile, even from taxpayers.

"Ignorance of the Law is no excuse." Not exactly true! This common law legal maxim may be honored in the breach as much as it is taken to be literally true. Ignorance is often a very good excuse. If a person can show that the law has not been adequately communicated to him, ignorance may be bliss.

From the earliest days of recorded history, governments have recognized the importance of communicating laws to the people. In past generations this meant reading proclamations of law in city squares and nailing rules to church-house doors. Now state legislatures are required to have laws printed and distributed in advance of their enforcement. Federal agencies give the public notice of pending rules in the Federal Register. Likewise courts issue advance sheets as cases are decided. These efforts are all designed to put the public on notice. Public knowledge of the law is considered an essential element in the implementation of the law.

In the past few years, the problem of public notice has been viewed from another angle. The large volume of public rules and their complexity has been seen as a deterrent to effective communication. A Federal Paperwork Commission has been started. It attempts to eliminate unnecessary agency regulations. President Carter has aided the cause by requiring department secretaries to personally read all regulations their departments issue. The idea of readability has also been discovered. A rule may be long. It may be complex. Now the question is being asked of its authors, "Can the rule be understood?"

The ideas of disclosure, notice, and understanding have been a special concern in the pension field.

In the past, private pensions became "broken promises," as benefits were denied workers who could not meet obscure qualification rules. Management adopted a philosophy of "The big print giveth, the small print taketh away." Moreover, ineffective management often led to the

insolvency of pension funds and the consequent denial of expected benefits to workers. Ignorance was not bliss; it was tragic.

Public rules were necessary to correct abuses. The first rules involved disclosure. The Welfare and Pension Plan Disclosure Act of 1958 required that private pension plans report information to the United States Department of Labor. The Act was not effective. Penalties for non-reporting were minor. The accuracy of reports could not be ascertained. Reports were not given to workers. However, pension administrators soon realized they had to be careful with their promises. In 1962, the U.S. Court of Appeals ruled that explanations given a worker by the corporation's pension consultant were incomplete and misleading. Judging Henry J. Friendly declared "failure to communicate with clarity may give rise to liability," and awarded the plaintiff's beneficiary \$78,356.

The closing of Studebaker Corporation in 1964 sent shock waves through our Nation's Capitol. Because Studebaker had not set aside enough money for pensions, many workers received as little as 15% of the pension benefits they had expected to receive. In 1965 a presidential commission called for new federal legislation. Bills were prepared and put before Congress. After a long struggle, the Employee Retirement Income Security Act (ERISA) was passed, and signed into law by President Ford in September, 1974. This very comprehensive law regulated all aspects of private pensions. Pension promises could no longer be retracted. Benefits had to be funded as they accrued. Rules for the management of funds were established. But if the funds were mismanaged, pension promises could still be kept. A new federal agency, the Pension Benefit Guaranty Corporation, was created to insure certain pension benefits.

Unreasonable qualification rules were abolished And disclosure was required—disclosure both to the government and to the worker. The summary plan description (SPD) was the basic document that had to be prepared and given to the worker. It informed him of the pension plan contents, and his rights under the plan. SPDs have to be written in "a manner calculated to be understood by the average" worker. If management fails to write readable summary plan descriptions, and willful neglect can be proven, such failure may mean a fine or imprisonment.

However, specific requirements for SPD and ERISA are hidden in bureaucratic verbiage.

Now, the plans have been written and submitted. It is likely that the Department of Labor will utilize one of the several readability scales to assess the level of difficulty of the written passages. Thus, pension managers are well advised to apply such systems or scales to reports they give to workers. If their writings score too high, they should rewrite.

Pension managers do not only have to interpret their own writings for the workers—they must also interpret ERISA and the Labor Department's rules. How much of a chance does the government give the pen-

sion managers? Just how readable are the rules which call for Summary Plan Description readability?

To answer this question, the Gunning Fog Index was applied to the ERISA provision on SPDs (Section 102), and pertinent sections of the Department of Labor rules on summary plan descriptions which appeared in the Federal Register on July 19, 1977. The section contains 332 words, 86 of which are hard words (three or more syllables). There are six sentences. An average sentence length of 55.3 and frequency of hard words of 25.9% yield a Fog Index of 32.5.

Gunning has written: "If your copy tests 13 or more . . . you are writing on the college level of complexity . . ."

After almost two years of trials and delays, the Department of Labor has issued a "final" set of regulations on SPDs. The Labor Department had received many comments regarding interim regulations, and made adjustments in them. Labor explicitly recognized that some of the regulations had been hard to comprehend. Clarifications were made in some places and not in others. Regarding rules on dates of submission, the Department indicated those sections had been revised to make them clearer and more easily understood.

The Fog index was again applied, this time to indicate the readability of the three most pertinent parts of the regulations. The section on the content of the SPDs (formerly 32.5) now scored 18.4. The section dealing with the style and format of the SPDs scored 21.9. A third section, which provided for certain options produces a Fog Index of 19.4. Indications are that regulations on SPD readability are also beyond the reading abilities of the average college graduate.

Within the regulations whose scores are reported above, are three passages written directly for plan participants.

If a large portion of plan participants are literate only in a foreign language, the SPD must contain a prescribed statement for these participants in their language. In English, the statement contains 63 words, eight of which are hard, and 4 sentences. A Fog score of 11.4 is calculated for the passage. This means the passage is readable at a level slightly above the average high school junior's reading comprehension. It is almost certain that foreign language workers that have not become literate in the English language do not, on the average, have this level of education.

ERISA created the Pension Benefit Guaranty Corporation. The PBGC insures benefits in defined benefit plans. The SPD for a defined benefit plan must carry a prescribed statement indicating this fact. The statement prescribed was in the interim regulations. It drew comments indicating that it was "too complicated." However, "after consultation with the PBGC, it was decided (by the Department of Labor) that the standard statement should not be changed." This was not a good decision. The statement contains 162 words, 34 (20%) of which are hard-words. The nine sentences in the statement have an average of 18 words

each. The Fog Index for the passage is 15.6. It is readable for average college seniors.

A lengthy statement regarding participants' rights under ERISA must be included in each summary plan description. The statement contains 551 words, 76 (13.8%) of which are hardwords. The statement has 22 sentences, each averaging 25 words in length. A Fog Index of 15.5 demonstrates that this passage also is readable only at the college senior level. The fact is that the American work force has an educational attainment averaging somewhat less than completion of high school. These passages are simply not written in "a manner calculated to be understood by the average" worker.

The reading difficulty of the ERISA provisions and regulations suggests that our congressmen and bureaucrats are not able to achieve what they demand of others. If pension managers would write SPDs like the federal government writes the rules, or even like the federal government writes SPD passages, they could be fined or imprisoned. This is certainly an untenable position for our government to be in.