

The Benefit of Home: LMRA § 302(c)(7) and the Challenge of Providing Housing Assistance through ERISA Funds
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The ability of working Americans to keep a roof over their heads presents a major challenge to workers, employers, and communities nationwide. Housing costs are a problem for most working Americans ages 25-40, which, when coupled with childcare demands, put a sizable dent in working family budgets. Working Americans are often priced out of the real estate market.

In June, 2023, the National Association of Realtors issued a study showing that, nationwide, middle and low income buyers with annual incomes below \$75,000, the median household income in the United States, are effectively priced out of the housing market as only 23 percent of real estate listings were affordable for those households.² Their research showed that, for the 100 largest metro areas in the country, 96 percent had supply shortages of homes that families earning under \$75,000 a year could afford to buy. However, the problem of affordable housing is not limited to large cities. In Boise, Idaho, for instance, a city with fewer than 236,000 people, just 2 percent of the homes were affordable for households earning \$75,000.³ The shortage of available affordable housing stock in both major cities and places like Spokane, Washington, El Paso and McAllen, Texas, Fresno and Riverside, California effectively keeps low- and middle-income families from obtaining adequate housing.

Research⁴ shows that increasing access to affordable housing is the most cost-effective strategy for reducing childhood poverty and increasing economic mobility in the United States. Stanford economist Raj Chetty found that children who moved from high poverty to lower poverty neighborhoods saw their earnings as adults increase by approximately 31%, an increased likelihood of living in better neighborhoods as adults, and a lowered likelihood of becoming a single parent. Moreover, children living in stable, affordable homes are more likely to thrive in school and have greater opportunities to learn inside and outside the classroom.

Recently, the popular press has reported on a survey indicating that the time and costs of commuting and childcare concerns are the most important factors for those who want to work remotely.⁵ While some employers in the tech industry may consider a return to the company town with the creation of employer-designed communities,⁶ the creation of a housing assistance program that can help low- and moderate-income workers and their families achieve housing security

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² https://cdn.nar.realtor/sites/default/files/documents/2023-housing-affordability-and-supply-report-06-08-2023.pdf?_gl=1*1y6re46*_gcl_au*MTg0NDU3NjQzMj4xNzEzNDYyOTY2

³ <https://data.census.gov/profile?q=Boise%20City,%20Idaho>

⁴ Chetty, Herdren and Katz, "The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project," 106 American Economic Review 4 (2016).

⁵ S. Mitra Kalita, "The Latest Employee Perk? An Affordable Home," Time (May 16, 2023).

⁶ Glaeser and Tarki, "What Employers Can Do to Address High Housing Costs," Harvard Business Review (March 14, 2023).

through an ERISA welfare plan can be the start of addressing the housing needs of workers and their communities to create housing that is affordable, climate resilient, and energy efficient.

In 1990, Congress amended section 302 of the Labor Management Relations Act of 1947 by adding section (c)(7) to include “financial assistance for employee housing.” 29 U.S.C. 186(c)(7)(C). In doing so, Congress added housing assistance to the types of benefits that could be included in an employee welfare benefit plan. See 29 CFR 2510.3-1(a)(2)(ii). However, very few welfare plans have taken advantage of this legislation to provide this form of benefit. This paper will explore how ERISA welfare funds can help their participants through the provision of an employee housing assistance benefit. Starting with the early efforts asking how pension plans might help create housing assistance in the form of direct mortgage loans, the paper will then discuss the 1990 amendment to Taft-Hartley and the structural challenges ERISA plans have in providing housing assistance and how, with legislative and/or agency assistance, ERISA benefit plans might work in conjunction with federal, state and local government initiatives to create housing that is affordable, climate resilient, and energy efficient for low- and moderate-income workers.

With the passage of ERISA in 1974, plan loans to participants are considered prohibited transactions where the recipient is a party-in-interest or disqualified person. In DOL Opinion Letter 81-21A,⁷ the Department of Labor weighed how ERISA applied to investment programs under which “multiemployer plans may offer mortgage loans to plan participants and beneficiaries.” Framed as an investment program for a pension fund rather than a plan benefit, the Department noted that the plan fiduciaries would need to give consideration to the factors provided in the regulations under ERISA 404(a)(1)(B) such as portfolio diversification, the liquidity needs of the plan, the projected return of the portfolio relative to the funding objectives of the plan and the opportunity for gain and risk of loss association with the investment.⁸

Where the proposed mortgage loans would charge a lower interest rate to plan participants, the Department found that such an investment would not be prudent within the meaning of ERISA’s fiduciary duty when compared to other comparable investments. Noting that the statutory class exemption found at ERISA § 408(b)(1) for loans to parties in interest requires a “reasonable rate of interest, the Department opined that the “reasonable” rate of interest would be the rate established under a similar “arm’s length” loan. As ERISA fiduciaries could not consider the “incidental advantages” that a lower-than-market interest rate for plan participants would provide in evaluating an investment strategy, the Department held that a mortgage loan program adopted to provide mortgage financing for plan participants would be unlawful if it did not meet the requirements of the Department’s regulations on the investment duties of plan fiduciaries.

Given this position, ERISA pension plans are effectively prohibited from providing below-market rate mortgages to their participants. Consequently, hardship withdrawals from 401(k) plans may be the only means whereby an individual plan participant may use the assets of a qualified retirement plan to help finance the purchase of a primary residence. 26 Treas. Reg. § 1.401(k)-

⁷ DOL Op. Ltr 81-12A (January 15, 1981). <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1981-12a.pdf>

⁸ 29 C.F.R. § 2550.404a-1.

1(d)(3)(ii)(B)(2). Participants may take a distribution from a retirement plan for immediate and heavy financial need for, among other reasons, “[c]osts directly related to the purchase of a principal residence for the employee (excluding mortgage payments).” *Id.* However, those distributions come with costs in the form of automatic 20% withholding and a 10% penalty for early withdrawal along with the inclusion of the hardship withdrawal in the participant’s gross income for that tax year. While 401(k) plan participants may take a hardship distribution to finance the purchase of a principal residence, Treas. Reg. 1.401(k)-1(d)(3)(ii)(B)(2), they do so at the risk of undermining their retirement security.

While the use of ERISA pension plan assets for housing purposes became problematic, there remained another alternative. In Boston in the 1980s, while a majority of unionized hotel workers held down more than one job, 78 percent could not afford to buy an apartment in metropolitan Boston and 98 percent could not afford to buy a house.⁹ In 1988, Boston hotel workers and their employers negotiated a housing assistance benefit but, to permit the benefit to meet the requirements of federal law, the Union conducted a 18-month campaign to amend Section 302(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c) (“Taft-Hartley Act” or “the LMRA”) to permit the bargaining parties to create a housing fund.¹⁰ Prior to the 1990 amendment, welfare plans were limited to the benefits enumerated in Section 302(c) of the LMRA that addressed health, retirement, apprenticeship and training. With the amendment, ERISA welfare funds were able to include housing assistance to the benefits that could be provided by an ERISA welfare plan.

As explained by the principal sponsor in the House, Representative Bill Clay of Missouri, the amendment made the creation of a housing trust a permissive subject of bargaining under the framework established for benefit funds under the Taft-Hartley Act. Allowable assistance by a housing assistance plan would include “payments to employees for down payments, closing costs, bank fees, mortgage interest buydowns, and initial rental costs such as security deposits and first month’s rent.”¹¹ Congressman Clay also indicated that the housing assistance trusts contemplated by the amendment would be employee welfare benefit plans subject to ERISA and its general fiduciary and prohibited transaction provisions. Passed with bipartisan support, the amendment was signed by President Bush on April 18, 1990.¹²

With the passage of the amendment, ERISA welfare plans were able to offer housing assistance benefits in conformance with the provisions of the new section 302(c)(7). Since many ERISA welfare plans are exempt from income taxation under Code section 501(c)(9) as voluntary employees’ beneficiary associations (“VEBAs”), VEBAs can provide life benefits, sick and accident benefits and other benefits intended to safeguard or improve the health of a member and their dependent or protect against a contingency that interrupts or impairs a member’s earning power, including any benefit provided in a manner permitted by paragraphs 5 *et seq.* of section 302(c) of

⁹ 136 Cong. Rec. 6327 (1990) (Statement of Cong. Markey).

¹⁰ Diesenhouse, Susan, “Focus: Boston; A Union-Employer Housing Fund,” New York Times (June 24, 1990).

¹¹ 136 Cong. Rec. 6323 (1990) (Statement of Cong. Clay).

¹² Public Law No. 101-273 (April 18, 1990). <https://www.congress.gov/bill/101st-congress/senate-bill/1949/all-actions>

the Labor Management Relations Act of 1947.¹³ Housing assistance improves the health of the members and their families as homelessness affects both physical and mental health.¹⁴ In the case of Local 26, housing assistance became a benefit for members with 2 or more years of enrollment in the health benefit fund to a no-interest loan of up to \$10,000 to be used for the down payment or closing costs of a participant's primary residence located within 55 miles of the member's workplace. The interest-free loan is secured by a lien on primary residence recorded at the appropriate Registry of Deeds. The loan is repayable in full upon the earliest of the member's sale of the property at an amount equal to or greater than the original purchase price, relocation, or death.¹⁵

This type of housing assistance benefit provided through an ERISA welfare fund has the potential to give low- and moderate-income workers and their families the opportunity to purchase a primary residence that will allow them and their families to accumulate home equity and a chance to acquire wealth that can be passed on to future generations. The concept of providing participants with an interest-free loan for the purchase of a primary residence is a relatively simple concept that offers a potentially life-changing benefit for workers and their families. Moreover, the benefit places a small administrative burden on the plan, making it an attractive option for plans whose participants are struggling with housing insecurity.

While the availability of housing assistance through ERISA welfare funds has been shown to help workers achieve some measure of housing security, it is by no means a silver bullet to resolve the problem of housing for millions of Americans. There remains a shortage of housing for low- and moderate-income families. Zillow reports that the United States is 4.5 million homes short of demand.¹⁶ The National Low Income Housing Coalition study shows that there is a shortage of 7.8 million rental units for extremely low-income families.¹⁷ The manifest need for investment in housing and home construction suggests that new and creative sources of funding are needed to address this gaping need.

In 2023, the Department of Labor issued its final rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."¹⁸ The final rule retained the core duty of ERISA fiduciaries to focus investment decisions on risk-return factors and not subordinate the interests of participants and beneficiaries to objectives unrelated to the provision of benefits under the ERISA plan. The final rule clarified that the duty of fiduciary prudence may include economic effects of climate change and other ESG considerations on a particular investment or investment course of action where such factors are relevant to the risk and return analysis to be considered within the scope of a fiduciary's duty of prudence. The final rule also provided for a "tiebreaker test" whereby a fiduciary may select an investment based on collateral benefits other

¹³ Treas. Reg. 1.501(c)(9)-3.

¹⁴ Centers for Disease Control and Prevention, "Homelessness as a Public Health Law Issue: Selected Resources": https://www.cdc.gov/php/php/publications/homelessness.html?CDC_AAref_Val=https://www.cdc.gov/php/publications/topic/resources/resources-homelessness.html.

¹⁵ <https://www.local26.org/wp-content/uploads/Local-26-Housing-Application-Packet-1.pdf> (Boston Hotel Workers Local 26 program) and <https://culinaryunion226.org/affiliates/housing-fund> (Las Vegas Culinary Workers program).

¹⁶ Zillow Press Release, "The U.S. is now short 4.5 Million homes as housing deficit grows," (June 18, 2024).

¹⁷ National Low Income Housing Coalition, "GAP: a Shortage of Affordable Homes" (March 2024).

¹⁸ 29 CFR 2550.404a-1.

than investment returns where the fiduciary prudently concludes that competing investments equally serve the financial interests of the plan over the appropriate time horizon.

Given this change in policy, ERISA pension plans may consider investments in housing that meet this new standard and provide the collateral benefit of increasing access to affordable housing. The Department of Labor may consider providing additional guidance that would help ERISA plans provide much-needed capital to federal, state, and local housing initiatives that would not only provide low- and moderate-income housing but also housing that is climate resilient and energy efficient. Where such investment may raise potential prohibited transaction concerns, the Department could consider a class exemption that would permit ERISA plans serving workers in the building and construction industry to invest in state and local housing initiatives designed to provide housing to low- and moderate-income families.

The 1990 amendment to Taft-Hartley provides a means whereby ERISA welfare plans can provide housing assistance that helps participants and their families get their start toward achieving housing security and home equity. While some welfare plans currently show how their program of interest-free loans secured by a lien on the principal resident can help workers make a down payment for a home, much more is needed to help American workers and their families secure a future without homelessness. Where prudent investment options in housing are available that meet the prudence standards required of ERISA fiduciaries, pension and welfare plans should be encouraged to make those investments working in coordination with governmental and other stakeholders in the housing sector to provide housing security for all.