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Fiduciary Responsibility

As Pension Recoupment Grows, Advocates For Pensioners Offer Advice to Agencies

Pension plans have been ratcheting up demands that retirees reimburse them for benefit overpayments, and a lack of government guidance has pushed those efforts even further, advocates for pensioners told Bloomberg BNA.

A recoupment happens when a defined benefit pension plan administrator discovers that participants or beneficiaries have received benefit payments greater than they should have according to the plan's formula.

Until recent guidance from the Department of Treasury, some plan fiduciaries interpreted the Employee Retirement Income Security Act as requiring them to pursue pensioners first, and then to replenish the plan for the lost assets by other means.

One legislator with his eye on the issue of recoupment is Rep. Joe Courtney (D-Conn.), who has been working with some of his constituents in Connecticut facing severe cuts to their benefits.

''It's really the Wild West in terms of recoupment processes, because the trustee pretty much has unfettered discretion in the name of being a fiduciary'' to the pension plan to recover overpaid funds, Courtney told Bloomberg BNA. The trustee can use ''really almost any strategy to get money recovered,'' he said.

A fiduciary also can pursue recoupment regardless of whether a retiree has a hardship condition, or whether there is joint responsibility or liability on the part of the employer, he said.

For Courtney, the issue came ''organically'' as a result of his work to help retirees from the defunct Triangle Wire & Cable Co., in Griswold, Conn. Triangle Wire retirees were informed that future pension payments were being reduced based on a recalculation of the correct benefit, but then also were told that they had to reimburse the plan, with interest, for the overpayments.

Courtney said that he has had conversations with U.S. Labor Secretary Thomas E. Perez about the recoupment issue. The DOL has a larger pension initiative it's working on, and Perez conveyed that ''he's very open to having the department look at this as part of that process they're going through,'' Courtney said.

A ''crackdown'' isn't necessary, but there does need to be a better sense of balance, Courtney said.

Karen Ferguson, director of the Pension Rights Center, said mistakes in calculating benefits can happen for a number of different reasons, such as corporate mergers, a change in audit firms or failure to factor in workers' compensation, and are typically found after a plan audit.

Ferguson said that often, pensioners weren't aware they were overpaid—and had no way of knowing—until recoupment procedures began years later. She said that in extreme cases, retirees have been faced with repaying hundreds of thousands of dollars at a point in their lives when they can least afford to do so.

''So going after them after all this time and in this manner is really cruelly unfair,'' Ferguson said.

While there isn't hard evidence about how many plans are going after retirees for recoupment, there is anecdotal evidence, according to Ellen A. Bruce, senior fellow at the Pension Action Center and the Gerontology Institute, both at the University of Massachusetts Boston.

Recoupments grew as more plans became less well funded, Bruce said. And after the Pension Protection Act of 2006, plans began to feel more funding pressure, and consequently more pressure was added on recoupments, she said.

''What we've heard informally is that plans used to informally forget'' about overpayments when plans were in good shape, but now they aren't, she said. ''So we continue to think it's a very serious issue.''

Treasury Guidance. The Treasury Department and the Internal Revenue Service issued recoupment guidance in March to help sponsors that are using the Employee Plans Compliance Resolution System to make plan corrections.

In Revenue Procedure 2015-27, the IRS said that plans discovering overpayments don't need to ask for the money back from retirees before taking other avenues to make the plan whole (42 BPR 610, 3/31/15).

The guidance was coordinated with the DOL as part of the normal regulatory review process between the sister ERISA agencies, Treasury and DOL officials said (42 BPR 841, 5/12/15).

But plan sponsors and fiduciaries still need more guidance, Bruce said.

The Treasury guidance applies only where there is a large breach and the plan is asking for a correction, but doesn't provide help when dealing with individuals, Bruce said.

''How they go about helping Mrs. Jones is what we want,'' she said.

An IRS official discussed the guidance May 14 during a District of Columbia Bar program (see related article in this issue).

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Paper Trail. Another way overpayments can happen is when factors such as overtime, bonus pay, holiday pay or payments based on shift differentials apply, said Scott J. Macey, past president and chief executive officer of the ERISA Industry Committee, which represents large employer plan sponsors.

With one large employer Macey worked with in the mid-1990s, in order to prevent miscalculations, the company assembled a task force to review automated and paper records going back as much as 30 or 40 years, and once the amount had been determined, gave participants a deadline to correct the company's result. The task force involved hundreds of people, and dealt with as many as hundreds of thousands of participants. The number of overpayments ''was pretty small,'' he said.

The company also asked the participants to provide proof that the benefit was less than what it should have been. In some cases, participants couldn't provide the documentation, such as tax filings for two years of differential pay, he said.

''But, in the end, unless somebody was outrageous, we generally took people at their word if they couldn't'' provide documentation, Macey said.

If, later, the company realized it made a mistake, it wouldn't ask for a recoupment, Macey said. The company also wouldn't go after recoupment when only de minimis amounts were involved, he said.

OPM Example. The Office of Personnel Management also has guidelines in place that deal with how quickly and aggressively the Federal Employees Retirement System and the Social Security Administration can reduce benefits or recoup overpayments when equitable remedies and hardships come into play.

Under 5 U.S.C. § 8470, recovery of overpayments may not be made when in the judgment of the OPM, ''the individual is without fault and recovery would be against equity and good conscience.''

Under FERS regulations, ''against equity and good conscience'' includes financial hardship. The FERS regulations define financial hardship as applying when the benefits recipient ''needs substantially all of his or her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.'' The rules also specify what is included as ordinary-and-necessary living expenses.

Social Security has a similar no-fault equity and good conscience requirement, under 42 U.S.C. § 404(b). That section states that the commissioner of the SSA ''shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).''

ERISA, however, doesn't have such specific guidance, leaving the door open for overpayment recovery attempts going back years or even decades.

The Sheet Metal Workers' Local No. 73 Pension Plan provides one of the most glaring cases of aggressive recoupment measures by plan trustees, according to Ferguson.

In that case, the Hillside, Ill., plan received an audit in May 2010 that found overpayments and underpayments dating back to 1974. Four years later, the plan filed a proposal with the IRS's Voluntary Correction Program to pursue recoupments, with some going back 34 years, and for amounts in the tens of thousands, or even hundreds of thousands, of dollars. The plan trustees went after nearly 600 plan participants, and informed recipients who weren't expected to live long enough to pay by installments that they would have to pay immediately in a lump sum, Ferguson said.

''This is the most spectacular case,'' Ferguson said.

Jeanne M. Medeiros, director and managing attorney of Pension Action Center, who has been working with the Triangle Wire retirees in Connecticut, said their plan was an ''ungenerous plan,'' but that after the benefit amounts were recalculated, retirees were told their benefits were being reduced to the correct amount, then reduced another 25 percent, and finally that they were being charged 7.5 percent interest. Some retirees saw their benefits reduced by as much as 80 percent, Medeiros said.

Triangle Wire is an outlier. Medeiros said the Pension Action Center has had a variety of experiences dealing with plans going after recoupments. Some have agreed to waive amounts in full, some have agreed to a significantly reduced amount and some ''have just gone away,'' she said.

''In the absence of regulation, we really have varied results based on who's on the receiving end of requests'' to address recoupments, Medeiros said.

Policy Recommendations. From a policy standpoint, the Pension Rights Center; Bruce, in a 2013 letter to the DOL; and Medeiros each offered suggestions that the DOL or Treasury can use to develop guidance:

■ *Claims and appeals process.* Either the DOL or Treasury should state that plans must follow the usual claims and appeals process.

■ *Statute of limitations.* Many plans impose a statute of limitations on participants, stating, for example, that claims must be brought within three years, or even as little as one year. But plans impose no such limitations on themselves.

■ *Limit recoupment to a percentage of monthly benefit.* As examples, the OPM has a limitation on how much can be recouped, and under 29 C.F.R. § 4022.82(a)(2), the Pension Benefit Guaranty Corporation sets a 10 percent cap of the monthly ongoing benefits. The PBGC also will notify participants or beneficiaries in writing of the net amount being sought for recoupment before beginning the benefits reduction, a requirement that doesn't apply to plan sponsors.

■ *Prohibition on interest.* Under 29 C.F.R. § 4022.81(c)(5), the PBGC also doesn't impose interest on net overpayments.

■ *Waivers guidance.* The DOL should also develop guidance as to what constitutes a hardship, such as exists with the OPM and Social Security.

The DOL does offer some guidance on when fiduciaries can waive their right to recoupment. For example, in Advisory Opinion 77-08, the agency said that fiduciaries may be limited in their duties to recoup overpayments if the ''facts and circumstances involved'' include hardship to the participant or if the costs to the plan are so high that it would be imprudent to pursue recoupment.

However, according to the Pension Rights Center, the facts-and-circumstances test is subjective, and doesn't provide specific guidance on the types or level of hard-

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ship that a participant must demonstrate before the plan decides to waive the recoupments.

And without clearer regulation, Medeiros said, ''administrators have unfettered discretion'' as to when to use the test. ''We don't have a lot of firm ground to say this is where you draw the line,'' she said.

Advisory Opinion 77-33 also applies a facts-and-circumstances test, and adds that requiring participants and beneficiaries to repay benefits exceeding the amounts owed to the plan would be inconsistent with ERISA's fiduciary standards.

The DOL provided similar guidance in Advisory opinions 77-07, 77-32 and 77-34.

Medeiros said her group has also suggested that fiduciary insurance could cover losses in cases in which it would be inequitable to require that retirees return overpayments.

It is also possible that fiduciaries could cover a separate insurance policy that insures against negligent overpayments, but Medeiros said she didn't know if that would be feasible.

Rule of Reason. Another way to tackle the recoupment issue is by applying the rule of reason, said Macey, the former president of the ERISA Industry Committee.

Under this approach, the IRS and DOL should develop guidance under which the underlying principle is that the fiduciary should consider factors such as the amount of the benefit and communications between the plan and the participant.

If, after applying those factors, the fiduciary determined that the participant should have known about the error, the fiduciary would be obligated to seek recoupment or repay the fund.

If the amount were de minimis and the plan was fully funded, the fiduciary shouldn't seek the recoupment, Macey said. If the plan weren't fully funded, the fiduciary should make a makeup contribution to the plan, he said.

''Those things, to me, are a reasonable way of dealing with it,'' Macey said.

BY SEAN FORBES

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Text of the DOL guidance is at: Advisory Opinion 77-07, Advisory Opinion 77-08, 77-32, Advisory Opinion 77-33 and 77-34.