

July 20, 2015

Submitted electronically to
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Internal Revenue Service
Room 5203
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Ben Franklin Station
Washington, D.C. 20044

Re: CC:PA:LPD:PR (Rev. Proc. 2015-27)
Recoupment of Overpayments

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. The Center applauds the IRS for the clarifications to the correction rules on overpayment failures contained in Revenue Procedure 2015-27 and welcomes the opportunity to comment on further revisions to Revenue Procedure 2013-12.

Over the years, one of the most difficult challenges confronted by the Center and the regional pension counseling projects we advise has been trying to protect elderly clients from efforts by pension plans to recover overpayments caused by plan errors. These have all been situations where the retirees had no way of knowing that mistakes were made. The amounts are often very large, and the retirees do not have the funds to repay the amounts demanded by the plans.¹ Our clients are participants in both private and public retirement plans. Our comments will be limited to suggestions related to defined benefit pension plans.

Background

Prior to the issuance of IRS Revenue Procedure 2015-27, paying participants benefit amounts greater than the amounts they are entitled to was a plan failure that could only be corrected by recovering (recouping) the overpayments with interest from plan participants.² Repayments

¹ See [Can They Grab Your Pension?](#), Carole Fleck, *AARP Bulletin*, March 2015; [Pensions ask retirees to pay back tens of thousands](#), Melanie Hicken, *CNN Money*, October 24, 2013; [Shot and stabbed subway worker left with \\$5-a-month pension after crackdown by NYCERS](#), Susan Edelman, *New York Post*, June 17, 2012; [2 Investigators: Pension Fund Demands Overpayments Back, With Interest](#), Pam Zeckman, *CBS2 Chicago*, September 27, 2013; [Former Triangle Wire workers fight to retain pensions](#), Adam Benson, *Norwich Bulletin*, December 23, 2014; [Pension rights group: Overpayments to Pontiac retirees should be forgiven](#), Dustin Blichok, *Oakland Press*, April 6, 2015

² IRS Revenue Procedure 2013-12.

were required for all tax years that the mistakes had been made. Only if the amounts repaid were insufficient were plans permitted to proceed against employers or others. The goal was to make the plan whole so that plan assets would benefit all participants. Department of Labor Advisory Opinions take the position that recoupment of overpayments is a fiduciary duty and allow, but do not require, plans to make exceptions for hardship and situations where the costs of recovery exceed the benefits of recovery.³

Revenue Procedure 2013-12 did not contain a special method to correct overpayments to participants and beneficiaries of defined benefit pension plans resulting from plan miscalculations of their monthly benefits. Instead, it merely stated that recoupment actions by these plans should follow rules similar to those for correcting overpayments from plans that paid benefits in excess of Section 415 limits.⁴ These payments are typically made to company owners, officers, and other highly-paid employees who would have reason to know that they were being overpaid and who could afford to repay. Our understanding is that the question of the appropriateness of applying the Section 415 recoupment rules to rank-and-file retirees was not considered at the time Rev. Proc. 2013-12 and earlier overpayment revenue procedures were issued.

Under Rev. Proc. 2013-12, plan sponsors were required to take reasonable steps to have overpayments, with interest at the rate used by the plan, returned by the participant. Future benefit payments were reduced to the correct amounts, and additional reductions were made to recover the overpayment amounts. In some cases, the participants' future payments were reduced to zero. In others, additional lump sums were demanded if it was projected that the retirees would not live long enough to recover all of the overpayments.

IRS Revenue Procedure 2015-27 recognizes that recovery of overpayments, especially with substantial accumulated interest, from retired participants who have received incorrect payments over lengthy periods of time can impose severe financial hardships on retirees and their families. Revenue Procedure 2015-27 states that recoupment from participants is not the only way to correct overpayments. Other methods of correction, such as payments by employers or other persons and/or retroactive plan amendments, may be reasonable. The Revenue Procedure also invites comments on further revisions to Rev. Proc. 2013-12.

Problem

Plan administrators and their representatives make mistakes in calculating benefits, both for individual participants and for groups of participants. In addition to mathematical errors, plan administrators may fail to adjust for benefit offsets or correct an early benefit amount when the participant reaches normal retirement age. These errors may go undetected for years. Increasingly, when companies are bought, sold, or merged, plan calculations are reviewed and errors discovered. Participants receiving benefits had no way of knowing that they are receiving incorrect benefit amounts.⁵

³ Department of Labor Advisory Opinion 77-08 and Adv. Opinions 77-07, 77-33 and 77-34

⁴ Section 415 of the Internal Revenue Code limits the amounts of benefits and contributions that are exempted from income tax in a specific year.

⁵ Pension Rights Center, "What is Recoupment?" <http://www.pensionrights.org/publications/fact-sheet/what-recoupment>.

The recoupment of overpayments from participants can cause great hardship for retiree families, in some instances requiring them to sell their homes, or even file for bankruptcy. This is because Rev. Proc. 2013-12 required plan administrators to identify errors in benefit calculations made decades ago and recover overpayments for all of those years, with interest based on the plan's investment returns (typically 7.25 percent).

Typically, with no warning, retirees facing recoupment actions receive a letter advising that their future monthly benefit amounts will be reduced due to a benefit recalculation and overpayment deduction. In addition, they may receive a demand for a lump sum payment. They are usually told that the recoupment action is required by the Internal Revenue Service and that legal action will be instituted if they do not make timely payments. In many instances, retirees are not given the right to challenge the recoupment action in a claims and appeal process or the opportunity to request a hardship waiver. They may not be given information on how the new benefit amount was calculated or receive copies of the plan documents that justify the reduction of benefits. Retirees receiving recoupment letters are typically bewildered and do not know what recourse they may have. In most cases they have been receiving the same pension amount for years and rely on that monthly benefit for daily living expenses.

Discussion

While we recognize that, as a general rule, it is in the interests of all of a plan's participants and beneficiaries to make a pension plan whole by restoring assets to the plan that were incorrectly paid out, as a practical matter, mistakes made in the past have typically already been absorbed in the plan's financial calculations. Even when this is not the case, it is critical that the plan's interests in protecting participants and beneficiaries in the aggregate be weighed against the interests of individual retirees whose financial security can be devastated by recoupment actions. Our recommendations seek to balance the interests of all plan participants in restoring assets to the plan versus the high costs to those retirees facing recoupment actions.

Recommendations for the Treasury Department and Internal Revenue Service

The Pension Rights Center recommends the following revisions to IRS Revenue Procedure 2013-12 for situations where the plan made the error and participants were not at fault. In addition to mathematical errors or improper crediting of service, these should include situations where the plan administrator failed to apply a benefit offset or failed to reduce or adjust a special benefit amount at retirement age. Our recommendations do not apply to situations involving fraud, deliberate misrepresentation, or overpayments due to exceeding the IRC Section 415 limits on benefit amounts.⁶

Look-back period

We recommend that the Treasury Department and the IRS establish a look-back period of three years or the plan's statute of limitations, whichever is less. Three years should be sufficient time for plan administrators to catch significant errors and make corrections. A three-year time limit would encourage plan administrators to employ quality control checks on benefit calculations.

⁶ IRC Section 415, 26 U.S.C. Section 415

Interest

No interest should be charged on overpayments when participants are not at fault.⁷ Typically a retiree receiving monthly pension payments uses all of the income for current living expenses, and does not invest the money. Charging interest is an extra and unjustified burden for retirees whose monthly benefits have just been reduced. In some instances the amount of interest charged is as much or more than the overpayment.

Cap benefit reduction amount

Limit the amount of reduction for the overpayment to 10 percent of the new and reduced benefit amount.⁸ This limit will lessen the burden of the overpayment reduction so that retirees may be able to adjust their living standards accordingly.

End recoupment reductions when the overpayment amount is recovered

In some circumstances recoupment reductions can continue indefinitely.⁹ Once the overpayment amount has been paid, the recoupment should end.

Require plans to seek alternatives before recouping from participants and beneficiaries

Alternative sources of restitution include fiduciary insurance and contributions from employers or third parties that made the calculation errors.

Prohibit demands for lump-sum repayments

Plans sometimes demand lump-sum payments when a retiree is not expected to live long enough to make a full repayment. This practice should not be permitted.

No recoupment from beneficiaries

Although IRS Revenue Procedure 2013-12 prohibits collecting overpayments from surviving spouses, we recommend that this prohibition be expanded to cover alternate payees and all other beneficiaries.

Recommendations for the Department of Labor

The Center recommends that the Labor Department modify previous opinions concerning fiduciary obligations to collect overpayments to conform to any corrections made by the IRS to Revenue Procedure 2013-12. This will prevent conflicts in guidance from the agencies.

In addition, we urge the Department to require that all fiduciaries purchase fiduciary insurance policies that cover calculation and other mistakes by plan officials, employees, consultants, and third party administrators.

The Department of Labor has jurisdiction over two other areas related to recoupment of overpayments, hardship waivers and claims and appeals procedures.

⁷ The Pension Benefit Guaranty Corporation (PBGC) does not charge interest on overpayments. (See 29 C.F.R. Section 4022.81)

⁸ The PBGC limits monthly recoupment amounts to 10 percent of the new benefit amount. (29 CFR Section 4022.82).

⁹ See Accounting mistakes can squeeze pension benefits, Len Boselovic, *Pittsburgh Post-Gazette*, July 6, 2014

Hardship Waivers

We recommend that the Department of Labor require that all plans offer hardship waivers and provide specific guidance concerning the standards applicable to hardship waivers. This is because recovery of overpayments for three-year periods can amount to very substantial amounts for retirees living on fixed incomes.

Advisory Opinion 77-08 recognizes that financial hardship is an exception to the fiduciary duty to collect overpayments and hardship waivers are permissible. However, the Advisory Opinion does not require that plans offer hardship waivers or give guidance on the factors to be considered in determining hardship. In new guidance, DOL could require hardship waivers and specify that granting waivers does not constitute a breach of fiduciary duty. New guidance could provide details of the types and levels of hardship that justify a waiver.

For example, the Office of Personnel Management (OPM) limits recoveries when a recovery would be against “equity and good conscience.”¹⁰ “Equity and good conscience” includes financial hardship. A recovery of an overpayment could cause financial hardship for a participant if the participant “needs substantially all of his or her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities.” The Department should require that all recoupment actions include a notice describing the right to a hardship waiver and the standards that will be applied.

Claims and appeals procedures

The Labor Department should clarify that a recoupment action is a benefit denial under the Department’s claims and appeals rules.¹¹ Retirees facing a recoupment action should be accorded the full rights associated with benefits appeals. That includes a complete explanation of the benefit recalculation and plan documents supporting the recalculation, 60 days to make an appeal, notice of the right to request, free of charge, copies of all documents and records relating to the recoupment, notice of a right to request a hardship waiver, and notice of the right to judicial review of a final denial.

Additionally, we request that the Department consider tolling the appeal period when plan documentation is not provided with the recoupment letter sent by the plan. Retirees often have been receiving the same benefits for years and no longer have their retirement documents. They may have thrown out statements, letters, and booklets they no longer considered necessary. A tolling provision will encourage plan administrators to provide all necessary documentation with the recoupment letter.

We further recommend that the Department require a delay in applying the new and reduced benefit amount during the 60-day appeal period. Instead of an immediate reduction in benefit amounts, retirees will have some time to adjust to their reduced monthly income.

¹⁰ See 5 U.S.C. Section 8470 and 5 CFR Sections 845.303 and 845.304.

¹¹ See Labor Department claims and appeals rules 29 CFR Section 2560.503-1.

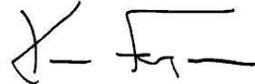
Conclusion

We urge the Treasury Department, Internal Revenue Service, and Department of Labor to rewrite current procedures and guidance on recovery of overpayments from participants and beneficiaries who face recoupment actions due to plan miscalculations and omissions. These recoupment actions can cause irreparable harm to retirees and their families. New guidance will be invaluable in protecting the retirement security of vulnerable older Americans.

Sincerely,



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