EAR

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ERISA Plans Can't Shorten Deadlines for Benefit Denials, Federal Appeals Court Says

A FEDERAL APPEALS COURT RULED in August that an ERISA plan can't shorten the deadline for filing a legal action challenging a denial of benefits unless the participant receives written communication of the plan's altered deadline, according to an attorney who wrote an analysis of the case.

The Philadelphia-based 3rd Circuit Court of Appeals reversed a lower court's decision that had dismissed the lawsuit because it said the plaintiff had notice of the plan's one-year deadline prior to its expiration, wrote David Treibman, a Murray Hill, N.J.-based attorney with the law firm Fisher & Phillips.

The court's Aug. 26 ruling in *Mirza v. Insurance Administrator of America Inc.* puts the 3rd Circuit in line with the Boston-based 1st Circuit Court of Appeals, but breaks from the Atlanta-based 11th Circuit, which had come to the opposite conclusion, Treibman noted.

Cases in conflict among regional federal appellate courts "could go to the Supreme Court when there's a conflict over a significant issue that's unresolved," Treibman said in an interview with *EAR*. "On the other hand, this doesn't seem to me to be a pressing issue," he added.

The ruling hinged on a U.S. Department of Labor regulation that requires written notification of an adverse benefit determination contain a "description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of [ERISA] following an adverse benefit determination."

The court construed this regulation to require "that adverse benefit determinations set forth any plan-imposed time limit for seeking judicial review," Treibman wrote, and if a plan administrator fails to include this information, the plan's deadline is inapplicable and courts must instead apply the relevant state statute of limitations.

"The lesson here for plan administrators is simple, but vital: to ensure enforcement of a plan's shortened statute of limitations, the administrator must include in any adverse benefit determination a statement of the plan's deadline for initiating litigation," he wrote.

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Academy Testifies at IRS Hearing

ELI GREENBLUM, the Academy's vice president for pension issues, represented the Pension Practice Council (PPC) at a Sept. 10 Internal Revenue Service hearing in Washington regarding suspension of benefits under the Multiemployer Pension Reform Act of 2014 (MPRA).

Greenblum presented the council's position on this issue, laid out previously in an Aug. 18 comment letter sent by the PPC and the Multiemployer Plans Subcommittee to the IRS and U.S. Treasury Department on proposed regulations on suspensions of benefits under the MPRA. The letter was co-signed by Steven Rabinowitz, chairperson of the subcommittee.

Greenblum asked the IRS to consider whether some items required in the proposed regulations might not be necessary for determining whether an application should be approved or denied, and offered suggestions

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Greenblum

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Academy Releases Issue Brief on Social Security's Financial Condition

AMERICAN ACADEMY *of* ACTUARIES
ISSUE BRIEF
JULY 2015

New Report Shows Modest Improvement
Social Security's Financial Soundness Should Be Addressed Now
Disability Fund Still Projected to Be Depleted Next Year

The 2015 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds highlights that:

- The combined Social Security trust funds are projected to deplete during 2034, one year later than projected in last year's report. If changes are not implemented by that date, only about 79 percent of scheduled benefits would be payable, declining to 73 percent in 2089.
- The Disability Insurance (DI) Trust Fund alone is projected to deplete its reserves in the fourth quarter of 2016. At reserve depletion, the trustees project 81 percent of scheduled benefits would be payable, unchanged from last year.
- The present value of the shortfall between assets, which include income and reserves, and obligations, which include scheduled benefit payments, estimated over the 75-year valuation period of the projection increased slightly from $10.6 trillion in 2014 to $10.7 trillion in 2015. The unfunded obligation over the valuation period is 0.9 percent of gross domestic product (GDP) compared to 1.0 percent of GDP in the prior year. The unfunded obligation decreased from 2.73 percent to 2.53 percent of taxable payroll over the same period.
- To bring Social Security into actuarial balance for the next 75 years (using best-estimate assumptions), changes equivalent to either an immediate increase of 2.62 percentage points in the payroll tax rate, or an immediate decrease of 16.4 percent of benefits for all current and future beneficiaries, or some combination thereof, is required. The analogous numbers from last year's report were a 2.83-percentage-point increase in the payroll tax rate and a 17.4 percent decrease in all benefits.

Congress should act soon to improve the long-term financial outlook of Social Security. Congress should act immediately to address the Disability Insurance Trust Fund.

An Actuarial Perspective on the 2015 Social Security Trustees Report

The Social Security Trustees Report is a detailed annual assessment that serves as a basis for discussions of Social Security's financial problems and their solutions. Social Security's chief actuary prepares and certifies the financial projections for the Old-Age, Survivors, and Disability Insurance program, under the direction of the Social Security Board of Trustees.

Because future events are inherently uncertain, the report contains three 75-year financial projections to illustrate a broad range of possible outcomes based on three separate sets of assumptions. These projections are called intermediate, low-cost, and high-cost. The report also provides a sensitivity analysis for key assumptions. The trustees consider the intermediate projection to be their best estimate. **All information in this issue brief is based on the intermediate projection, unless otherwise noted.**

OVERVIEW OF FINANCIAL STATUS

Short-Range Estimates, 2015–2024

Short-range solvency and financial adequacy are measured separately for Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) programs, as well as for the combined (OASDI) trust funds. These measures are based on the funds' projected trust fund ratios. A trust fund ratio is the

The American Academy of Actuaries is an 18,500+ member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

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THE SOCIAL SECURITY COMMITTEE published an issue brief following the release of the annual Social Security Trustees' Report in late July. The issue brief, *An Actuarial Perspective on the 2015 Social Security Trustees Report*, notes that the program's combined Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) trust funds are projected to be depleted in 2034—a year later than last year's report—and that only about 79 percent of scheduled benefits would be payable following that year, declining to 73 percent in 2089.

Social Security's fiscal health improved somewhat from last year's report, but in order to bring the program into actuarial balance for the next 75 years under best-estimate assumptions, changes equivalent to either an immediate increase of 2.62 percentage points in the payroll tax rate, or an immediate decrease of 16.4 percent of benefits for all current and future beneficiaries, or some combination thereof, is required. Analogous figures from the 2014 report were a 2.83-percentage-point increase in the payroll tax rate and a 17.4 percent decrease in all benefits.

The committee believes that any modifications to the Social Security system should include "sustainable solvency" as a primary goal, which means that not only will the program be solvent for the next 75 years under the reform methods adopted, but also that the trust fund reserves at the end of the 75-year period will be stable or increasing as a percentage of annual program cost.

Social Security's DI Trust Fund is projected to deplete its reserves by the fourth quarter of 2016—the same as last year's projection—at which time the trustees project that 81 percent of scheduled benefits would be payable. The DI's depletion must be addressed immediately to continue to pay scheduled benefits in 2016 and beyond, the issue brief said.

The program's OASI finances, excluding disability, are in "somewhat better shape" than the projection made a year ago, with a total change in the projected 10th-year trust fund ratio a decline of 16 percentage points.

Longer-range estimates for Social Security are based on a 75-year projection covering the lifetimes of nearly all current participants—both those still paying payroll taxes and those already retired, leading to the 2034 expected reversion to a pay-as-you-go system.

The aging of the U.S. population has two trend components. One is macro-aging, which at the population level refers to a shift in the average age of the population caused by the large one-time decrease in birth rates beginning in the mid-1960s following the baby boom. The second is micro-aging, which at the individual level refers to the continuous long-term increase in life expectancies caused by longer lifespans in succeeding generations. A third demographic component, immigration, acts to offset macro-aging, because immigrants tend to skew younger, the issue brief says.

The ratio of workers to Social Security beneficiaries is expected to fall rapidly, from 2.8 in 2014 to 2.1 in 2035, primarily due to macro-aging, and then decrease more slowly to 2.0 by the end of the 75-year projection period, primarily due to micro-aging. Providing for solvency beyond the next 75 years will require changes to address micro-aging, as beneficiaries will likely be receiving benefits for long periods of retirement, the issue brief notes.

IRS Releases Mortality Tables

THE PENSION COMMITTEE sent comments to the IRS and the Department of the Treasury regarding the timing of 2016 applicable mortality tables, stressing the urgency for those tables to be released in a timely manner. The IRS issued the updated mortality tables in mid-August, several weeks following the letter.

Many plan sponsors and administrators had expressed concerns to the Pension Committee regarding their ability to plan for and administratively implement 2016 plan year mortality tables given their uncertain release date and the potential for substantial changes from 2015 tables, according to the letter.

Plan administrative procedures often require that the applicable interest and mortality rates be known several months in advance of the plan year—for example, to facilitate timely provision of benefit election information to participants electing to commence their benefit effective Jan. 1.

Under the current Treasury procedures, plan sponsors and administrators of calendar-year plans will know the applicable interest rates and applicable mortality table in effect for the next calendar plan year as early as mid-September, if they elect to use the maximum permissible lookback period for interest rates.

That knowledge allows plan administrators to begin providing retirement packages to eligible participants three to four months in advance of their annuity starting date, to allow for thoughtful consideration of the available options.

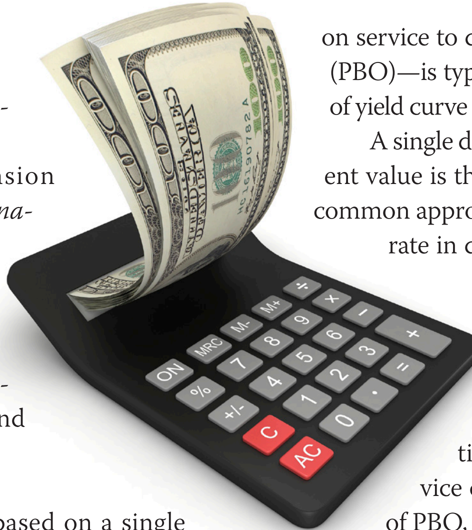
Plan administrative procedures often require that the applicable interest and mortality rates be known several months in advance of the plan year.

"It is critically important that the mortality tables for 2016 be available and incorporated into plan administration systems and valuation software by the time the August 2015 segment rate notice is published," the committee wrote.

Committees Release Issue Brief on Alternatives for Pension Cost Recognition

TWO ACADEMY COMMITTEES released an issue brief on alternative expense methodologies and their theoretical rationales and implications.

The Pension Committee and Pension Accounting Committee's issue brief, *Alternatives for Pension Cost Recognition—Issues and Implications*, provides a discussion of an area of emerging practice. Its objective is to inform actuaries and other interested parties about alternative expense methodologies, and their theoretical rationales and implications.



The issue brief states that:

- It is common to develop pension cost based on a single aggregated discount rate; i.e., that is used to develop projected benefit obligation.
- Alternative approaches have been identified that represent more "granular" applications of yield curve rates.
- Use of such alternatives may reduce the amount of recognized pension cost, but also have implications for expected gains/losses to be recognized at year-end.
- There are varying views about what yield curves represent that impact expectations for year-end gains/losses and thus may act to justify different levels of cost recognition.

For U.S. pension accounting, the present value of benefits based on service to date—i.e., the projected benefit obligation (PBO)—is typically calculated based on the application of yield curve spot rates to projected benefit cash flows.

A single discount rate that produces that same present value is then determined and disclosed. The most common approach has been to also use that same single rate in determining other cost components such as service cost and interest cost.

Alternative approaches have been proposed for the recognition of various components of pension cost. These involve more granular applications of interest rates for developing service cost and interest cost. The measurement of PBO, as described above, does not change.

The issue brief also looks at some of the strengths and weaknesses of an aggregated approach. In comparison to the current "aggregated" (single rate) approach, alternative approaches might result in a lower cost amount being recognized during the measurement period.

But because every dollar of service cost and interest cost recognized is, by definition, reflected in the expected year-end value of obligations, a change in recognized cost also changes the expectation for the year-end obligation and thus affects the gain or loss that results when obligations are re-measured at year-end.

Task Force Submits Comments on Proposed Labor Fiduciary Rule

THE LIFETIME INCOME RISK JOINT TASK FORCE submitted comments to the Department of Labor (DOL) on proposed regulations defining fiduciaries and conflict of interest.

"Financial preparation for retirement has two phases—accumulation and decumulation," the letter says. While the financial press has focused on accumulation for retirement preparedness, "decumulation is equally important for retirement security and merits greater attention, particularly as larger numbers of Americans in the baby boomer generation move into retirement," it says.

"An adviser should be required to advise on a broad range of decumulation strategies and products when providing advice to individuals … relevant to the individual's goals, requirements, and current circumstances," the letter says.

A "requirement to discuss a broad range of options should exist regardless of the adviser's ability or inability … to provide any specific strategy or sell any specific product, and is necessary in light of the intertwining of the accumulation and decumulation phases needed to secure lifetime income," it adds.

The proposed rule is heavily focused on when advice creates a fiduciary responsibility and on the appropriateness of compensation. The stated intent of the guidance is to protect consumers and help them to better manage retirement savings, and while that guidance is not specified as to applying to accumulation or decumulation, it provides an opportunity to give prominent recognition to the need to advise on lifetime income needs during the decumulation phase after the individual has retired and in the transition from accumulation to decumulation.

The Proposed Best Interest Contract Exemption would create a requirement that the totality of retirement investing be considered when particular investment advice is provided. Investment advice must be provided not just in relation to a single investment but rather within the context of the entire investment portfolio and the totality of retirement income needs. This requires recognition of appropriate vehicles to create lifetime income when providing investment advice. This recognition of lifetime income needs should apply at all times, particularly when the individual is approaching or in retirement, the letter states.

Investment advice must be provided not just in relation to a single investment but rather within the context of the entire investment portfolio and the totality of retirement income needs.

The task force also recommends the DOL have educational material—and perhaps an interactive tool on its website—to reinforce whatever information an adviser provides on managing lifetime income.

Such material "should include information on lifetime income risks, which is essential for individuals to gain a better appreciation of their retirement income planning and management needs," the letter states, adding that "advisers should be required to direct their clients to such a site as part of the investment advisory process."

The DOL held four days of public hearings on the rule, and the comment period ends Sept. 24. Public hearing transcripts and video are available for viewing on the department's website.

Register Now for the Academy's 50th Anniversary Celebration

Make plans now to attend the Academy's **golden anniversary Annual Meeting and Public Policy Forum**, Nov. 12-13 in Washington. Pension-specific sessions will cover public-plan funding and risk disclosures, implications of the Multiemployer Pension Reform Act of 2014, and lifetime income. And don't miss the gala dinner the night of the 12th. Please mark your calendars and **plan on attending**.

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on annual plan sponsor determinations, suspension not materially in excess of the level necessary to avoid insolvency, reasonable actuarial assumptions, and on initial value of plan assets.

For example, while the PPC and the subcommittee understand why a reviewer would be interested in the sensitivity of the projections to various adverse investment returns and employment levels, it is not clear how this information would contribute to an approval decision, Greenblum said.

"Such sensitivities will likely show projected insolvency, given the limitation that suspensions must not materially exceed the level necessary to avoid insolvency," Greenblum said, while "the same concern applies to the projection of funded percentage, except in cases where this projection is necessary to demonstrate compliance with … the proposed regulations."