



Understanding Pension Rights

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National Elder Rights Training Project for the National Legal Resource Center.
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- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
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Moderator - Justin Freeborn

- A staff attorney and the project coordinator for the Western States Pension Assistance Project (WSPAP).
<http://www.seniorlegalhotline.org/pension.html>
- WSPAP seeks to protect and promote the retirement security of workers, retirees and their families, and has helped many people obtain the retirement benefits they earned. Since 2008, Justin and other WSPAP advocates have recovered over \$8.5 million in retirement funds owed to retirees.
- Justin has been a guest on Capitol Public Radio's Insight Program and Michael Finney's Consumer Talk Radio Program.
- He has made several pension presentations, most recently presenting at the National Aging and the Law Conference.
- His work and clients have been featured in The Wall Street Journal, The Orange County Register, and The Sacramento Bee.



Presenter – John Hotz

- Deputy Director of the Pension Rights Center (www.pensionrights.org).
- As manager of the **National Pension Assistance Resource Center**, John provides legal training and back-up services to a network of pension counseling projects around the country.
- He also designed and manages the **PensionHelp America** web site initiative (www.pensionhelp.org).
- John has also contributed to numerous amicus briefs in support of pension plan participants' cases in our nation's courts, including the recent Supreme Court, *Cigna v. Amara* case.
- Before coming to the PRC thirteen years ago, John directed the California Pension Rights Project. He has also served as an advocate for individuals with disabilities, and a human resources manager in private industry.



Understanding Pension Rights

John Hotz – Deputy Director

Pension Rights Center

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Justin Freeborn – Project Director

Western States Pension Assistance Project

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June 22, 2011

What we'll cover today...



- Fixing the easy problems
 - Finding the plan
 - Phoning the plan
- Threshold matters
 - Governing laws
 - Plan types, sponsor types and their key differences
- Spotting common issues
 - Vesting and accrual of benefits; service breaks
 - Suspensions of and limitations on benefits (post PPA)
 - Spousal rights and protections
 - Getting plan information
 - Claims and appeals procedures

Fixing the easy problems



- Finding lost plans
 - Understanding the problem
 - Statement of potential private pension benefit
 - Common searches
 - Google.com
 - PBGC.gov
 - FreeERISA.com
 - Call Kyle at the Pension Rights Center – (202) 296-3776
- Phone fixes
 - Obvious errors
 - Confused, nervous or shy participants
 - Delayed EE or ER contributions
 - Call DOL / EBSA (866) 444-3272)

What law governs?



- Employer type:
 - Private: When were you LAST employed?
 - before or after January 1, 1976
 - Government: When were you FIRST employed?
 - Federal Civil Service - CSRS or FERS?
 - CSRS; Before 1984; 5 USC § 8301 et. seq.
 - FERS; After 1983; 5 USC § 8401 et. seq.
 - Military service; 10 USC § 1204 et. seq.
 - Railroad service after 1934; 45 USC § 231 et. seq.; 42 USC § 402 et. seq.
 - State, county or municipal government plans
 - Church Plans:
 - Think: hospitals, schools, and religious conferences
 - ERISA coverage requires an *irrevocable* IRC § 410(d) election

ERISA's Titles



- Title I – Protection of Employee Benefit Rights
 - ERISA amends U.S. Labor Code
 - ERISA § 2 et. seq.; 29 USC 1001, et. seq.
- Title II – Plan Types and Qualification Rules
 - ERISA amends Internal Revenue Code
 - 26 USC (various)
- Title III - Jurisdiction, Admin., Enforcement
 - ERISA § 3001 et. seq.; 29 USC 1201 et. seq.
- Title IV – Plan Termination Insurance
 - ERISA § 4001 et. seq.; 29 USC 1301 et. seq.

Title I Characteristics



- Disclosure & Reporting
- Participation, vesting, accrual & spousal protections
- Plan funding; benefit and contribution limits
- Protection from interference
- Fiduciary duties, prohibited transactions, penalties
- Claims procedures, causes of action, remedies

Title IV Characteristics



- Preemption
- Group health plan coverage (COBRA) and portability (HIPAA)
- Plan Terminations
 - Creates the PBGC
 - Plan Terminations
 - DB Plan Sponsors Pay a Mandatory Premiums
 - PBGC Supervises Terminations of Defined Benefit Plans
 - PBGC Guarantees Benefits in Event of Plan Failure

Defined Benefit Plans



- Benefits are determined by the benefit formula:
 - $\text{Contribution Rate} \times \text{Final Average Compensation} \times \text{Years of Service} = \text{Annual Benefit}$
- Traditional compensation-based formulas:
 - $1\% \times \text{Final Average Compensation} \times \text{Years of Service}$
 - $1\% \times \$50,000 \times 25 \text{ years} = \$12,500$ (\$1,042.66)
 - Career average formulas
 - Non-compensation formulas:
 - $\$100/\text{year} \times \text{Years of Service}$
 - $\$30 \times \text{Years of Service}$ to a max of \$1000
- Cash Balance Plans
 - Career average formula in a “hypothetical” account
 - $3\% \text{ of annual compensation} + 3\% \text{ interest}$
 - Designed to sound like a defined contribution plan

Defined Contribution Plans



- Benefits are determined by the contributions and investment performance
 - ER contributions + (EE contributions) +/- Interest-to-date = Account Balance
- Profit-Sharing Plan
 - 3% of annual compensation - discretionary
- Money-Purchase Pension Plan
 - 5% of annual compensation
- Target Benefit Plan
 - Money purchase plan; funded like a defined benefit plan
- 401(k) Plan
 - Employee contributes to the profit sharing plan
- Stock bonus plans and ESOPs
 - Built to hold employer securities exclusively

What difference does it make?

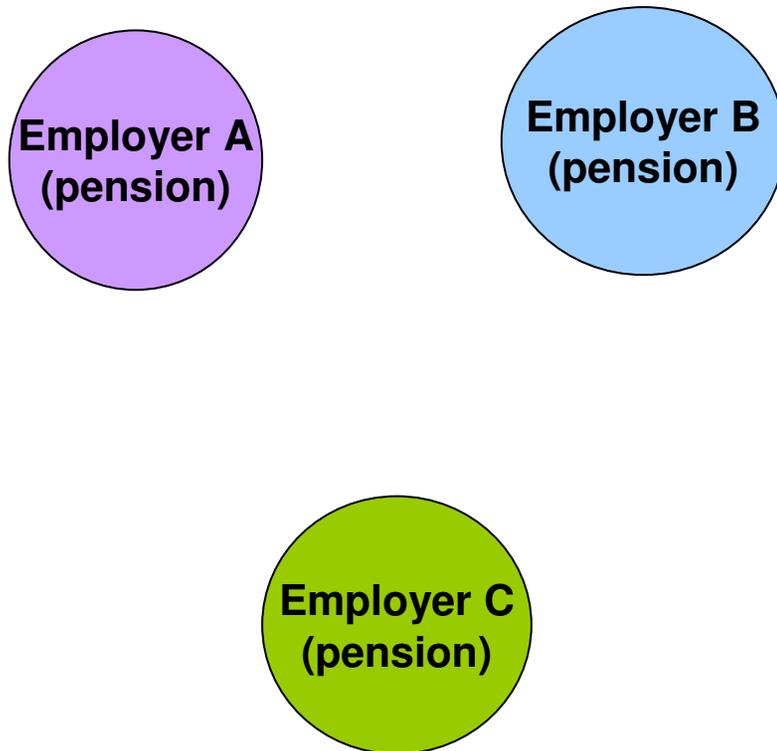


- Funding
 - DB: primarily ER; DC: primarily EE (possible match)
- Investment obligation and risk
 - DB: ER bears the risk; DC EE bears the risk
- Default form of distributions
 - DB: Life Annuity; DC Lump Sum
 - Mortality / longevity risk
 - ERISA protections
- Spousal Protections
 - DB: Joint & Survivor Annuity / Pre-retirement survivor annuity; Waiver & Consent requirements
 - DC: Consent to distributions; Balance to spouse on death

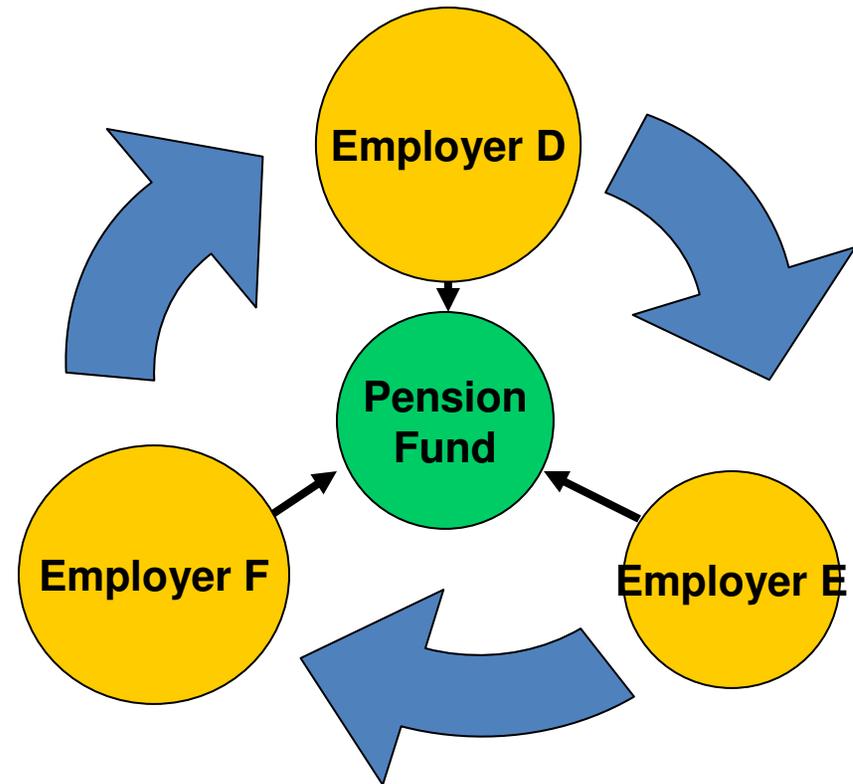
Employer-Employee Relationship



Single-Employer Arrangement



Multi-Employer Arrangement



Coverage and participation?



- Eligibility for participation
 - *After the later of 1 year of service*
 - 1000 hours within 1 year (from the 1st hr of service)
 - *Or the attainment of 21 years of age*
 - *Then a participant on the earlier of 6 months or next plan year*
- Automatic enrollment
 - Immediate participation with a notice to opt out (90 days)

Vesting in plan benefits



- Vesting = a right to a benefit, possibly deferred
- Year of Service
 - 1000 hrs in any 12-month period designated by the plan
 - Hours paid or entitled to payment for performance of duty
 - Hours when no duties were performed (vacation, holiday, illness, leave of absence, etc.) earn up to 501 hours toward vesting.
- Schedules
 - Cliff: 0% vested until the end of the period; then 100%
 - Graded: Incremental vesting (20%/year); then 100%
- Current vesting requirements
 - 5 year cliff / 7-year graded for traditional DB plans
 - 3 year cliff; 6 year graded for all others
 - Must work under the new schedule to benefit from it
- Always 100% vested in EE's own contributions

Breaks in Service



- Pre-vesting breaks allow the plan to disregard pre-break service in calculating post-break benefits
 - January 1, 1976 to December 31, 1983:
 - the greater of 1 year or the *rule of parity*
 - After January 1, 1984:
 - the greater of 5 years or the *rule of parity*
 - Time not counted as a break in service:
 - Post-1985 newborn care, military, other language
- Post-vesting breaks affect the LEVEL of benefits
 - Termination or transfer / any departure from coverage
 - 1.5% X Comp X Years of Service for years 1 – 10
 - 1% X Comp X Years of Service for years 16 - 20

How you can help...



- Verify service and rebuild the work history
 - Request for Earnings - SSA 7050 f4
 - Collect W-2s and tax returns
 - Request service records from the employers or unions

Distributions & Spousal Protection



- Qualified Joint and Survivor Annuity (QJSA)
 - 50% QJSA pays an annuity for the joint lives of the participant and spouse; then, on participant's death, a 50% annuity to surviving spouse.
 - Current law also requires a second QJSA option => 75%
- Qualified Pre-Retirement Survivor Annuity
 - 50% QPSA pays a 50% annuity to the surviving spouse
- Required of all DB, MPPP, TBP (and possibly other) plans.

Distributions & Spousal Protection



- QJSA / QPSA Waiver & Consent
 - Plan provides notice of the right to waive (*and right to revoke the waiver*) within 180 days before the annuity start date
 - Terms and conditions of QJSA
 - P's right to make the election and to waive it
 - S's right to consent, or not consent, to the waiver
 - A description of optional forms of benefit and their relative values
 - Plan must allow at least 30 days to elect from date of notice

Distributions & Spousal Protection



- QJSA / QPSA Waiver & Consent
 - Waiver must be notarized or witnessed by plan representative
 - Electronic notarization is allowed, per latest Reg.s
 - Possible 1-year eligibility requirement
- Fiduciary issues
 - If F acts reasonably in obtaining waiver, consent, or P's representations that consent cannot be obtained, waiver is considered valid – ERISA 205(c)(6)
 - If F acts reasonably in relying on P's revocation of election to waive, F is not liable.

How you can help...



- Participant spouse lies about being married or forges signature on waiver
- If witnessed by a plan representative
 - Marriage documents
 - Signature verification (contemporaneous writing)
 - Health plan participation
 - Verify receipt and timing of notices
- If notarized
 - Check the notary requirements in your state
 - Proper seal, signature, certification number
 - Verify timing of notices
- No benefits are likely, absent serious plan error, if the annuity has been paid out (but it still might be worth trying).

Distribution Restrictions



- A word about plan funding
- Limits for single employer defined benefit plans
 - Participants receive an annual funding notice
 - If 80% funded or less
 - No new or increased benefits or accrual rates
 - Lump sums restricted to 50% of accrued benefit (or PBGC Max., whichever is less)
 - No lump sums if <80% for 2 years running
 - If 60% funded or less
 - No early retirement benefits
 - No additional benefit accruals (freeze) until plan is at 60%
 - No contingent event benefits (disability pensions, plant shutdown benefits) unless the benefit is funded or plan is brought to 60%

Distribution Restrictions



- Limits for multi-employer defined benefit plans
 - If 80% funded or less
 - Funding improvement plan (increased contributions, benefit reductions, or both)
 - If 80% funded or less and expected not to meet its funding obligations or become insolvent in 3 to 6 years
 - Rehabilitation plan (10 years)
 - Reduction or elimination of already-accrued, subsidized early retirement benefits

Distribution Restrictions



- Multiemployer reduction or elimination of already-accrued, subsidized early retirement benefits
 - What's at risk with subsidized early retirement benefits
 - What Heinz protected
 - Central Laborers' Pension Fund v. Heinz; 541 U.S. 739
- Notice Requirements after the Pension Protection Act
 - 90 days: Actuary certifies plan's underfunded status
 - 30 days: notice of status and possibility of benefit reductions
 - 240 days from certification: rehabilitation plan adopted
 - 30 days: plan is presented to bargaining parties and must include any benefit reductions; Plans must also consider increases in employer contributions.
 - If plan is adopted, 30 day notice must be provided prior to benefit reduction (but retroactive to 1st notice)
 - Benefit restrictions apply back to the date of the initial notice for those retiring after the notice.

How can you help...



- It's all about the facts and the timing
 - Check the dates of plan changes and notices
 - Check the funding level (funding notice)
 - Check the specific restriction complained of
- Look for genuine Heinz issues
- Advise and counsel

Fiduciary Issues



- Is the actor a fiduciary?
 - Yes if person rendered investment advice for a fee
 - Yes if person has discretionary role in administering the plan
 - Yes if person exercises any discretionary authority over management of plan
 - Yes if exercises actual authority over management or disposition of plan assets

General Fiduciary Duties



- Fiduciary Duties: ERISA Section 404(a)
 - Plan must administered for exclusive benefit of participants and their beneficiaries
 - Plan must be administered prudently
 - Assets must be diversified, unless clearly prudent not to diversify
 - Plan must be administered in accordance with its terms, except insofar as terms are inconsistent with the statute

First example



- 502(a)(2) for relief under 409
 - Relief sought on behalf of plan under 409
 - Generally involves
 - Theft or misuse of plan assets
 - Poor investment decisions
 - » Including lack of diversification
 - Relief includes compensating plan for losses
 - Relief can also include payment of profits fiduciary earned using plan assets
 - Other equitable and remedial relief
 - LaRue v. DeWolff; 552 U.S. 248

Second example



- Section 502(a)(3)
 - Relief against non-fiduciaries who violate statute
 - Relief against fiduciaries who harm individual plan participants
 - But only equitable relief--this means traditional equitable relief
- Varsity v. Howe; 516 U.S. 489 (1996)
 - But See Farr v. US West, Inc., 58 F. 3d 1361
 - Bad tax advice; no remedy if no self dealing

Fiduciary Misrepresentations



- Varsity establishes that fiduciary has an obligation not to make deliberate misrepresentations to employees
- Issue often comes up in following context:
 - Employer is considering plan improvements
 - Employee, unknowingly retires before the change.
 - The change is announced shortly thereafter.

Serious Consideration Test



- Most courts have held that an employer has a fiduciary obligation to inform employees of a possible benefit change when it is under **“serious consideration”**
- Serious consideration occurs
 - When a serious proposal
 - Is being discussed for purposes of implementation
 - By senior management with authority to implement the change
 - *See Bins v. Exxon, 189 F.3d 929 (9th Cir. 1999)*

How you can help...



- Check the facts
- Refer to a Pension Counseling Project
 - www.PensionHelp.org
 - (202) 296-3776
- Refer to the DOL / EBSA
 - (866) 444-3272
- Refer to National Pension Lawyers Network
 - (617) 287-7324

Getting Plan Information



- Summary Plan Description (and SMM)
 - 90 days after participation; 30 days after written request; 5 year reprint if amended, 10 if not. SMM – 210 days
 - Statement of ERISA rights; QDRO procedures; claims and appeals procedures; benefits, rights and obligations; named fiduciary
 - Written to be understood by the average plan participant; must reasonably apprise participants of their rights and obligations

Getting Plan Information



- Plan Document
 - Includes plan document, collective bargaining agreement, and trust agreement, as well as other governing instruments (insurance policies)
 - 30 days after written request, inspection at plan offices
- Individual Benefit Statement (Pre- and Post PPA)
- Latest Annual Report (Form 5500)
- Final Annual Financial Report
- Summary Annual Report (through 2007)
- Extensive notices related to plan funding

Getting Plan Information



- Written requests for all plan information
- Certified mail, return receipt requested
- 1st Request: 30 Calendar Days
- 2nd Request:
 - Attach copy of 1st request and return receipt
 - Request information within 10 days
 - Calculate out the penalties to date
 - Mention the harm (if any) that you client is experiencing due to the plan's delay
 - Kitchen sink: unreasonable procedures; failure to operate the plan consistent with applicable law; potential failure to provide full and fair review...
 - CC the local DOL / EBSA field office

Getting Plan Information



- Access and Costs:
 - All documents are available at no charge or for a reasonable copying charge not to exceed \$0.25 cents per page, through the Plan Administrator, 30 days after a written request, unless otherwise noted:
- 502(c)(1) penalty of “up to \$100 per day”
 - **\$110 / day** per 29 CFR 2575.502c-1 (effective after July 29, 1997)
- Need not be an attorney to assist participants
 - See DOL Opinion 79-82A

How you can help...



- Make a phone call to the plan
- Write a letter or help the client write one
- Refer to a Pension Counseling Project
 - www.PensionHelp.org
 - (202) 296-3776
- Call the DOL / EBSA
 - (866) 444-3272

Claims Procedures



- Application or claim is submitted
 - Sufficient to put the plan on notice
 - Within a time set by the plan or an otherwise reasonable time
- Application or claim is approved or denied
 - Within 90 days of receipt
 - Upon notice of “special circumstances,” plan may extend period by an additional 90 days

Claims Procedures



- Plan must notify participant of denial of claim per ERISA section 503(1)
 - Electronically, or in writing
 - Notice must set include
 - Specific reasons for denial
 - References to pertinent plan provisions
 - Description of additional material or information need to perfect claim
 - Steps to appeal denial
 - Notice of right to bring civil action on notice of adverse determination on review

Claims Procedures



- The claimant must be provided Full & Fair Review:
 - At least 60 days from receipt of denial to appeal
 - Opportunity to submit information relevant to the claim
 - Reasonable access to records and information relating to the claim

Claims Procedures



- Administrator must notify the participant of the denial within 60 days from receipt of the appeal
- Electronic or written form, in a manner calculated to be understandable by claimant. Includes:
 - Reasons for denial
 - Relevant plan provisions
 - Statement that claimant may receive free:
 - Access to and copies of relevant information
 - Description of any voluntary appeal procedures under the plan
 - Statement of right to bring civil action under ERISA 502(a)

Claims Procedures



- Note on statutes of limitation
 - For benefit claims; analogous state law statute; accrues upon final formal denial (or continuous repudiation)



PensionHelp America

www.PensionHelp.org

- Referral to:
 - The govt. agency with jurisdiction over the plan in question
 - Pension Counseling Project
 - Age- or income-based legal services
 - National Pension Lawyers Network
- Plus
 - Additional govt. resources (PBGC, IRS, as appropriate)
 - Lost Plan research tools



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