



**PENSION RIGHTS
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Retirement Plan Basics
Governing law, plan types and sponsor types

March 5, 2013
Rebecca Davis, Legal Director
Pension Rights Center

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What law governs?

To determine governing law, ask:

- What type of employer did the client work for?
- When did the client work?

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Type of employer

- Private company or companies (union)
- Government
 - Federal
 - State, county or municipality
 - Military
- Religious affiliated employer
- Railroad

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Private plans

- Ask: when was the worker last employed?
- If the worker was last employed on or after January 1, 1976 then ERISA (Employee Retirement Income Security Act of 1974) applies.
 - 29 USC §1001 et. seq; 26 USC §410 et. seq
- If the worker was last employed before ERISA's effective date, look to the rules of the plan.
 - Some protections existed in the Internal Revenue Code at the time

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Federal government plans

- Ask: When was the worker hired?
- Civil Service Retirement System (CSRS) if hired before January 1, 1984.
 - 5 USC §8301 et. seq.
- Federal Employee Retirement System (FERS) if hired on or after January 1, 1984.
 - 5 USC §8401 et. seq.
- Military Retirement System
 - 10 USC §1204 et. seq. (benefit formula different depending on hire date)
 - Final Pay (Before September 8, 1980); High 3 (September 8, 1980- July 31, 1986); Career Service Bonus/ REDUX (After July 1, 1986)

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Other non-ERISA plans

- Railroad Retirement (45 USC §231 et. seq.; 42 USC §402 et. seq.)
 - For service after 1934
- State, County, Municipal and other local plans
 - Governed by the laws of the jurisdiction
 - Portions of the Internal Revenue Code apply
- Religious institution claiming the “church plan” exemption from ERISA

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What type of retirement plan?

Defined benefit pension plans (DB)

- Traditional
- Hybrid

Defined contribution plans (DC)

- Profit sharing, 401(k), 403(b), 457
- Money purchase, Target benefit- IRC §415(c)

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Differences: DB v. DC plans

1. Payout
2. Funding
3. Investment risk
4. Insurance
5. Spousal protections

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Defined benefit plans

- Pay a specific monthly benefit for life
- Pooled assets held in trust
 - No investment risk to workers and workers don't have to make investment decisions
- Benefit based on a formula
 - Examples of formulas
 - Compensation based (final pay, career average)
 - non-compensation based (flat benefit multiplied by number of years of service)
 - Cash balance

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DB plans: Traditional

- Designed to reward long-term employees
 - Accrual rules limit back loading
 - Accruals and accrued benefit cannot decline because of the attainment of any age. IRC §411(b)(1)(G); §411(b)(1)(H)
- Forms of benefit
 - Single life annuity; joint and survivor if married
 - Early retirement
 - Actuarial reduction of the normal retirement age annuity
 - Subsidized- unreduced early payout
 - Reemployment and plan funding restrictions

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DB plans: Cash Balance

- Looks like a DC plan but is technically a DB plan
- Each employee has a “hypothetical” account
- Account is credited with an amount representing a percentage of pay plus interest earnings.
- Plans offer lump sums but annuities are available.
- Majority of cash balance plans were converted from traditional DB plans

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Defined Contribution Plan

- Depending on the plan’s design, employees, employers or both contribute to the plan
- Benefits are the accumulation of employee and employer contributions plus or minus:
 - Gains, losses, earnings and expenses

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Defined Contribution Plan

- Other features
 - Employee contributions are pre-tax
 - Employer contributions often match employee contributions
 - Many allow workers to select their own investments
 - Pre-retirement distributions- loans, hardship distributions
 - Automatic Enrollment
 - Employees are notified that they may opt out
 - Contributions invested in a default investment option

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Saver's Tax Credit

- Tax credit up to \$1,000 for making contributions to 401(k)s, IRAs, or other retirement savings accounts.
- Rewards low- and moderate-income workers who save for retirement.
- Depending on how much you make, the credit is 10 to 50 percent of each \$1 contributed.

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Plan Sponsors

Single employer

- One employer, one plan. Can be negotiated.

Multiemployer

- Multiple employers generally in the same industry
- Negotiated plan
- Jointly administered by a board comprised of employer and union representatives
- Portable benefit. Participant can work for several employers and remain covered by the plan.

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Common problems

DB plans generally

- Establishing work history to prove participation, vesting and accrual
- Overpayment and recoupment
- Divorce and survivor rights
- Lost plans

Multiemployer plans

- Suspension of benefits due to re-employment

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Common problems

Defined Contribution plans

- Plan is failing to timely transfer contributions to the individual account
- Difficulty getting plan to pay out benefits
- Divorce and survivor rights

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Common problems

Defined Contribution plans

- Plan is failing to timely transfer contributions to the individual account
- Difficulty getting plan to pay out benefits
- Divorce and survivor rights

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Retirement Plan Basics
Coverage, participation, and vesting

March 5, 2012
Rebecca Davis, Legal Director
Pension Rights Center

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Coverage, Participation and Vesting

- Did the client work in covered employment?
 - Covered job?
 - Covered employer?
- Is the client a participant in the plan?
 - If so, when did he become a participant?
- Did the client work long enough to vest?
 - Counting service
 - Breaks in service

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Coverage IRC §410(b)

- Coverage rules are designed to prevent plans that cover mostly highly compensated workers.
- Nevertheless exclusions are permitted so that many plans do not cover an entire workforce.
- Examples of exclusions
 - Union workers who collectively bargain pensions
 - Separate line of business
 - Up to 30% on non-highly compensated employees

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Coverage

- Is the employer covered by the plan?
 - In a single employer plan, the sponsoring employer is covered by the plan.
 - In a multiemployer plan, covered employers have signed on to the collective bargaining agreement.
- Is the job covered by the plan?
 - Plans may exclude large portions of workers from coverage.
 - Division, job class, department, etc.

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Coverage

What if the plan says the client is not covered?

- Check the plan rules.
 - Is the plan following its own rules?
 - Is the plan following the law?
 - The plan's coverage rules must meet the Minimum Coverage Rules in IRC §410(b)
 - See also IRC §401(a)(26)

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Participation ERISA §202, IRC §410(a)

- Participation date is crucial because workers don't start accruing benefits until becoming a participant
- Current (1989- present) participation rule:
 - In a tax qualified plan a worker must become a participant after the later of-
 - Completing one year of service, or
 - The attainment of age 21
 - If plan has 100% vesting upon participation, then it may require two years of service for participation.

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Participation (old rules)

- 1976- 1984
 - The later of
 - Completing one year of service, or
 - The attainment of age 25
 - Or three years of service if the plan has 100% vesting upon participation
- 1985-1988
 - The later of
 - Completing one years of service, or
 - The attainment of age 21
 - Or three years of service if the plan has 100% vesting upon participation

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Participating in 401(k) plans

- Opting in
 - Once eligible most 401(k) plans require workers to elect to participate.
 - Participants must decide
 - how much to contribute and,
 - How to allocate investments across the options available in the plan.

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Participating in 401(k) plans

- Automatic enrollment
 - Eligible employees are automatically enrolled with a set percentage of pay contributed to the account.
 - Money is invested in a default investment option.
 - Enrolled employees are notified that they may opt out within 90 days of enrollment without paying a tax penalty.

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Default investment

- Participants contributing to a 401(k) account who have not selected investment options will be automatically invested in a Qualified Default Investment Alternative
 - Summary of regulation on QDIAs: <http://www.pensionrights.org/issues/regulations/default-investments>

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A reminder about multiemployer plans

- Many of the rules in ERISA have exceptions for multiemployer plans providing later effective dates for the rules as applied to those plans.
- Congress wanted to respect benefits that had been collectively bargained and the later effective dates account for the expiration date of collective bargaining agreements.

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Vesting

- Vesting means ownership
- A vested participant has a claim to payment on either an immediate or deferred basis of at least a percentage of his or her accrued benefits, which is unconditional and legally enforceable against the plan.
- Described by a vesting schedule contained in the plan rules.
 - Plan vesting schedule must meet ERISA and IRC minimum standards.

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Vesting

- Minimum vesting standards
 - IRC §411, ERISA §203
 - Vesting schedules have changed over the years.
 - Look at the rules in effect on your client's last hour of service.
- If your plan is pre-ERISA, then look to the plan rules.

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Vesting

- Participants always 100% vested in own contributions
 - Rare to see contributory DB plans but they do exist
- 100% vesting in accrued benefits upon plan termination
- normal retirement age.
- Plans can exclude service before age 18

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Current vesting rules

- Cash balance and other hybrid DB plans
 - 3 year cliff
- Traditional DB plans
 - 5 year cliff
 - 3-7 year graded (20% per year after 3 years)
- Individual account plans
 - 3 year cliff
 - 2-6 year graded (20% per year after 3 years)

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Vesting schedules

- January 1, 1976- December 31, 1988
 - 10-year cliff
 - 5-15 year graded
 - Rule of 45
- January 1, 1989- December 31, 1998
 - 5-year cliff for single employer plans
 - 10 year cliff for multiemployer plans
 - 3-7 year graded

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Vesting schedules

- January 1, 1999- December 31, 2001
 - 5 year cliff
 - Note this is still the prevailing rule for traditional DB plans
 - 3-7 year graded
- January 1, 2002- for 401(k) plan matches
 - 3 year cliff
 - 2-6 year graded
- January 1, 2007- for hybrid DB plans
 - 3 year cliff

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Counting years of service

- In general a year of service is a plan year (or 12-month period) in which an employee is credited with at least 1,000 hours of service.
 - Vesting- IRC §411(a)(5)
 - Participation-IRC §410(a)(3)(A)
- Hour of service defined as hours that an employee was entitled to be paid, was paid, or actually worked.
 - IRC §410(a)(3)(C), 29 CFR §2530.200b-2

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Breaks in service

- Leaving a job before vesting can result in forfeiting the vesting time already earned even if the worker returned to covered employment.
- Pre-ERISA
 - Extremely harsh break in service rules. Often required worker to work continuously up to normal retirement age and any premature departure caused total forfeiture of benefits.

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Breaks in service

- 500 hour rule: A one-year-break in service occurs when participant works less than 500 hours in a year
- 500-1000 hour rule: no break incurred and no vesting credit earned
- Time not counted toward breaks
 - Military service, maternity or newborn care
 - Credits with 501 hours

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Breaks in service

- How many breaks does it take to cause a forfeiture? (permanent forfeiture)
- January 1, 1976- December 31, 1983:
 - The greater of 1 year or the rule of parity
- January 1, 1984- present:
 - The greater of 5 years or the rule of parity

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Curing breaks in service

- Return to covered employment before incurring too many breaks and vesting.
- What if the vesting schedule changed while the worker was on a break?
 - Ex) The plan had 10 year vesting and the worker left after 7 years. Two years later, the worker returns to covered employment and the plan now has 5 year vesting. If he works for one year (1,000 hours) under new rule, he vests.

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Case example

- Plan had 10 year vesting on client's last hour of service.
- Plan claims client only worked 9.5 years.
- He's 200 hours short of vesting.
- What do we do?

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Case example continued

- How does the plan count hours?
 - Very important regulation: DOL reg §2530.200b-3
 - Several methods plans may use to streamline how plans count hours.
 - Check the plan document. What method does it use to count hours?
 - Ex) the earnings equivalency method gives workers credit for 1,000 hours of service if employee's gross pay divided by hourly wage is 870 hours or more.

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Case example continued

- Check the employee handbook. What types of earned, paid leave does the plan sponsor provide?
- Did the employee work overtime? That could have altered the equivalency calculation.
- Check the Social Security earnings report. Does it match with the employer's records?
- Old tax returns, W-2s, collective bargaining agreement

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Case example: The Baker Man

- Pre-ERISA plan with lengthy vesting and harsh break in service rules
- Denied benefit. Plan said he never vested due to breaks in service
- Client was fully employed- never out of work. No apparent explanation for the breaks.
- Several employers were not signatories to the collective bargaining agreement
- Result: client was not vested.

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What is the benefit?

- DC plans
 - Benefit determined by the contributions and investment performance
 - $(EE \text{ contributions} + ER \text{ contributions}) \pm \text{investment return} = \text{account balance}$
- DB plans
 - Benefit is calculated based on a formula
 - Compensation based
 - Non-compensation based
 - Cash Balance

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How is the benefit paid?

- DC plans- benefit is the account balance
 - Few have annuity options within the plan
 - Participant can rollover account balance or take withdrawals (minimum distribution rules)
- DB plans- benefit is a monthly life annuity
 - For married participants a 50% joint and survivor annuity
 - Many plans have other options (lump sum, level income option, term certain)

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When is the benefit paid?

- ERISA plans must allow access to the benefits no later than 60 days after the plan year in which the **latest** of the following events occur:
 - The earlier of age 65 or the plan's normal retirement age
 - 10th anniversary of participation
 - Termination of service with covered employer

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When is the benefit paid?

- ERISA plans may allow benefit distributions before the *later* of the plan's Normal Retirement Age (NRA) or age 62.
 - Forced lump sum for amounts less than \$5,000
 - Early retirement options
 - DC plans: death, disability, age 59 ½, and termination of employment
 - In-service distributions for loans and hardship withdrawals.

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When is the benefit paid?

- Participants must begin to receive benefits from a plan at the *later* of:
 - April 1 of the year following the year in which they reach age 70 ½, OR
 - Separation from covered employment
- For DB plans- delayed retirement may trigger an upward actuarial adjustment to the benefit amount.
- For DC plans, the required distribution amount is calculated. (See IRS Publication 590)

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Distribution problems in DC plans

- Client is mid-career, leaves job and wants 401(k) funds to pay for a financial emergency.
 - Plan is not required to allow pre-NRA distributions, but many permit
 - No law governing the timing of the distribution
 - Check the plan to see if it has a self-imposed time frame
 - Make payment demand in writing, via certified mail, return receipt requested and CC the U.S. Department of Labor.

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Common problems revisited

- Communications and disclosure
- Recoupment of overpayment
- Offsets
 - Social Security Integration/ Permitted Disparity
 - Disability/ Workers' Compensation
 - WEP/GPO

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Communications and Disclosures

- Often a client comes to you with a confusing or misleading communication from the plan.
 - See handout on types of plan disclosures
- Your analysis never stops with the rules of law.
 - Always look to the rules of the plan.

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Documents to request

- Summary Plan Description (SPD)
 - Booklet providing a clear explanation of the rules of the plan.
 - Provided to employees when they enroll in the plan, or within 30 days of a written request.
 - The SPD explains eligibility requirements, how the benefit is earned and paid, and how to file a claim for benefits.
 - Not the governing plan document, so ask for a plan document as well.

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Documents to request

- Ask for your client's entire pension file
 - Make your request in writing to named plan administrator found on most recent form 5500 or SPD if you have one
 - In addition to governing plan documents, seek all information used to arrive at client's benefit calculation.
 - Work history, logs, worksheets
 - Plans may charge a "reasonable" copying charge not to exceed \$0.25 per page.
 - If plan tries to charge ask for electronic copies when available.
 - Expect a response within 30 days of request.
 - ERISA §502(c)(1) and corresponding regulation permit a court to impose a fine up to \$110 per day after 30 days.

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Individual Benefit Statement

- Total benefits earned
- Vested accrued benefit, or the earliest date the benefit will be non-forfeitable
- An explanation if Social Security or other payments will be subtracted when the benefits are calculated.
- Remember, this is only an estimate.

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Individual Benefit Statement

- Must be provided upon written request
 - Can request annually
- 401(k) plans must provide benefit statements quarterly
- Defined benefit plans must provide benefit statement either,
 - Every three years, or
 - Notify all participants annually that a statement will be provided upon request.

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Recoupment of overpayment

- Problem occurs when a participant retires and at a future date the plan discovers that it paid too much. The plan reduces the payments to the correct amount and then further reduces to recoup the overpayment.
 - Some plans attempt to charge interest
 - Some demand full lump sum repayment and terminate benefits until overpayment is fully recouped.

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Recoupment of overpayment

- Participant is already retired and receiving benefits
- Plan sends a notice that benefit was miscalculated.
- Monthly benefit is lowered to the correct amount.
- Plan attempts to recover the overpayment.
 - See working paper on Unfair Pension Take-backs

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Offsets

- Social Security Integration/ Permitted Disparity
 - Social Security benefits may be factored into benefit calculation.
 - Two primary methods
 - Must be disclosed in the Individual Benefit Statement
- Worker's compensation and/ or disability benefits may also reduce pension benefit

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Offsets

- Windfall Elimination Program (WEP)
 - Social Security benefit can be reduced if individual is receiving a pension benefit from a Social Security exempt employer.
- Government Pension Offset (GPO)
 - Social Security spouse's benefit is reduced by two-thirds of any government pension.

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Questions?

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BENEFICIARY DESIGNATIONS AND SPOUSAL RIGHTS

Denise M. Clark, Esq.
CLARK LAW GROUP, PLLC
March 5, 2013

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BENEFICIARY DESIGNATIONS

- Plan Enrollment is the most critical stage for individuals to establish and confirm their plan rights because that is the time to elect the type of benefits you wish to have, the amount of money you expect to set aside for retirement planning, and to determine who will be beneficiaries to the newly elected benefits.

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BENEFICIARY DESIGNATIONS

- Most plans do not condition beneficiary designations for enrollment or receipt of benefits, and typically a beneficiary designation for one plan will not be used as a designation for all plans.

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BENEFICIARY DESIGNATIONS

- No beneficiary designation—then the default at the time of distribution will follow the plan language, so long as it complies with both ERISA and the Internal Revenue Code.
- Existing beneficiary designation—the plan will always follow those selections, even over a will or a divorce decree.

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TYPES OF PLANS USING BENEFICIARY DESIGNATIONS

- DB Pension Plan – only provided in connection with period-certain options at retirement. Typically, benefits paid pursuant to beneficiary designation are Lumps Sum Death Benefit; remaining benefits under 5 and 10-year certain options.
- Health Plan – Life Insurance and Accidental Death and Dismemberment (AD&D)
- Related DB, DC & Health Plans – Account balance (DC), retiree death benefit (DB), life insurance (Health).
- Any plan with a death benefit, including DB and DC pensions, H&W Funds with life insurance, and SUB and Vacation Funds with a death benefit.

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Beneficiary Designation Issues

- Failure to update designations to include new spouse, and remove former spouse;
- File beneficiary designations naming two spouses without removing one;
- Slayer Statutes
- Same-Sex Marriage/Domestic Partners

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J&S Rules

- IRC § 401(a)(11)
 - Qualified pre-retirement survivor annuity
 - (QPSA).
 - Qualified joint and survivor annuity (QJSA).
- IRC § 417.
 - Minimum survivor annuity requirements.

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J&S Rules: QJSA Defined

- IRC § 417(b)
- QJSA
 - For the life of participant
 - Survivor annuity for the life of the spouse
 - not less than 50% joint life annuity
 - not greater than 100% joint life annuity
 - actuarial equivalent of a single life annuity for the life of the participant.

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J&S Rules: QPSA Defined

- IRC § 417(c)
- QPSA
 - Generally 50% annuity for life of surviving spouse

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J&S Rules: Plans Covered

- IRC § 401(a)(11)(B)
- QJSA and QPSA requirements apply to:
 - All DB plans;
 - DC plans subject to the funding standards of IRC §412 relating to minimum funding (e.g., money purchase plans); and
 - Other DC plans (e.g., profit sharing plans, unless certain requirements are met).

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J&S Rules: Plans Covered

- QJSA/QPSA rules not apply to DC plans (other than money purchase and target benefit plans) if DC plan states:
 - Participant's spouse is entitled to full vested account balance upon participant's death (or spousal waiver); and
 - Plan does not offer a life annuity or the participant does not elect to receive benefits in the form of a life annuity.

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J&S Rules: Spousal Consent

- Participant may waive QJSA or QPSA spousal benefit
 - if spouse properly consents to the waiver
 - Other benefit form
 - Other beneficiary
- Spouse's consent must
 - Acknowledge effects of the election
 - Be witnessed by a plan representative or a notary public.

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J&S Rules: Exceptions

- IRC § 417(d)(1) and (e)
 - Survivor annuities need not be provided if the participant and spouse are married less than one year.
 - Present value of benefit is \$5,000 or less

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QDROs: ERISA §206(d) & Code §414(p)

- QDRO is a Domestic Relations Order (DRO)
- which is:
 - Judgment, decree or Order (including approval of property settlement agreement)
 - Made pursuant to domestic relations law
 - Relates to child support, alimony, marital property rights
 - To a spouse, former spouse, child or other dependent of plan Participant

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QDROs: ERISA §206(d) & Code §414(p)

- Creates or assigns to AP right to receive all or
- portion of P's benefit
- Clearly specifies the following:
 - Name and address of P and each AP
 - Amount or % to be paid to each AP or determination method
 - Number of payments or period to which the order applies
 - Each plan to which order applies

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QDROs: ERISA §206(d) & Code §414(p)

- Order may NOT:
 - Require plan to provide type or form of benefit or option not otherwise provided in plan
 - Require plan to provide actuarially increased benefits
 - Require payment of benefits to AP already awarded to another AP under prior QDRO
 - Require plan to pay QJSA with AP and subsequent spouse

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QDROs: ERISA §206(d) & Code §414(p)

- Order will not fail--
 - Because order requires payment to AP before P has separated from service but after P's "earliest retirement age",
 - As if P had retired above but not including any early retirement subsidy,
 - In any form of payment available to P under plan except QJSA with AP and subsequent spouse.

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QDROs: Regulations

- Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders, 75 Fed. Reg. 32846
- (June 10, 2010), 29 CFR §2530.206
- Subsequent order between same parties that decreases amount to AP does not fail for that reason.
- Order issued after P's death or after annuity starting date (ASD) does not fail for that reason.
- But orders may fail for other reasons, for example, order after ASD requiring benefit form inconsistent with plan rules would fail.

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QDROs: Other DOL Guidance

- See DOL Advisory Opinions and Field Assistance Bulletins.
 - Sham divorce; interpretation of state law
 - Charge for reviewing DRO
 - Benefits that may be assigned
 - Effect of subsequent order between same parties
 - What orders may be DRO
 - May state agency be AP?

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QDROs: IRS Regulations

- The following provisions in IRS regulations are applicable to APs.
- §1.401(a)-13 Assignment or alienation of benefits.
- Which spouse's consent is required – Former spouse treated as current spouse under QDRO or actual current spouse?
- Calculation of QJSA/QPSA when more than one person treated as spouse QDRO cannot provide AP with greater right to designate beneficiary than P has.

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QDROs: IRS Regulations

- §1.401(a)-20 Requirements of qualified joint and survivor annuity and qualified preretirement survivor annuity.
 - Definition of “annuity starting date” for surviving spouses, beneficiaries and APs is the same as it is for participants.
- §1.411(a)-11 Restriction and valuation of distributions.
 - Consent requirements of §411(a)(11) do not apply to payments to AP, defined in §414(p)(8), except as provided in a QDRO.
- §1.401(a)(9)-8 Special rules
 - Treatment of APs benefits for purposes of 401(a)(9)

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QDROs: Procedures & Administration

- Plan notices/communication
 - Plan administrator must promptly notify P and each AP of receipt of DRO and plan's procedures for determining qualified status.
 - Within reasonable period after receipt of DRO plan administrator shall determine whether DRO is a QDRO and notify P and each AP of determination
- AP must be permitted to designate representative for receipt of notices.

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QDROs: Procedures & Administration

- ERISA 206(d)(3)(G)(ii) requires plan to establish reasonable written procedures
 - to determine qualified status of DRO and administer distributions under QDROs.
 - that provide for prompt notice upon receipt of DRO to each person specified as entitled to payment under DRO.
 - that permit AP to designate representative

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QDROs: Procedures & Administration

- Other provisions that may be included in Procedures:
 - Description of plan—especially if DB
 - Description of “shared payment” and “separate interest” methods of allocating benefits in DRO.
 - Description of review
 - Description of escrow during determination period including definition of “Final Determination” for purposes of escrow.

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QDROs: Procedures & Administration

- Other provisions that may be included in Procedures:
 - Plan provisions re when AP benefits may commence
 - Review and effect of Proposed DROs.
 - Provisions to hold application upon receipt of DRO or Proposed DRO
 - Presumptions plan will use unless order states otherwise, e.g., that AP may direct her DC plan account.
 - Any fees for review by DC plan.

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QDROs: Procedures & Administration

- Other provisions that may be included in Procedures:
 - Treatment of subsequent order modifying first order after qualification.
 - Actions plan will or will not take, e.g., plan will apply administrative expenses to APs DC plan account in same fashion as to any other account.
 - Forms/information required from AP for benefit commencement

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QDROs: Model Orders

- Model orders are not required but are a good idea.
- May not require use of model.
- Even with model, it will be modified incorrectly so review is important.
- Depending on plan, i.e., national, regional, single state, model may include full provisions under state law or only “core” benefit provisions.
- Model more important for DB plans and plans with uncommon provisions.

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Multiemployer Plans

Features and special issues of multiemployer plans

March 5, 2013
 Rebecca Davis, Legal Director
 Pension Rights Center

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Multiemployer Plans: A brief history

- Labor Management Relations Act of 1947 (AKA Taft-Hartley Act) 29 USC §186
- In general under the LMRA, it is illegal for an employer to make a payment to a union or union official. §302 LMRA
- §302(c)(5) exception allows employers to make payments to employee benefit plans provided a proper structure is established.

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§302(c)(5) LMRA

- Payments made to a separate trust established for providing retirement benefits
- Assets must be held in trust for sole and exclusive benefit of workers and families
- Terms must be included in a written agreement.
- Trust must be jointly administered with equal representation from labor and management.
- Annual audit by independent accountant

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ERISA and the Code

- IRC §414(f) A multiemployer plan is a plan,
 - to which more than one employer is required to contribute and,
 - is maintained pursuant to one or more collective bargaining agreements.
- A multiemployer plan is NOT
 - A plan maintained and administered exclusively by an employer (even if it is collectively bargained) or,
 - A plan maintained and administered exclusively by a union, or
 - A plan maintained jointly by several employers. (AKA Multiple employer plan)

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Characteristics of multiemployer plans

- Funding
 - Longer amortization, less volatile for employers
- Portability
 - Workers earn benefits under one plan while moving among several employers
- Reduced risk of failure (termination, insolvency, sponsor bankruptcy)
- Lower PBGC premium/ less insurance protection

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Characteristics of multiemployer plans

- Jointly administered
- More than 1,500 multiemployer plans
- More than 10 million participants
- Can be a defined benefit or defined contribution plan
- Generally affiliated around a certain industry
 - Plumbers, carpenters, truck drivers, painters, etc.

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Multiemployer cases

- Common situations with Multiemployer plans
 - “I paid union dues for 20 years...”
 - Crediting all service
 - Reciprocity agreements
 - Suspension of benefits
 - Underfunding/ benefit reductions
- Less common situations
 - Lost Plans/ mergers
 - Terminations/ insolvency

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Effective dates

- Recall that effective dates of ERISA/IRC amendments are often delayed for multiemployer plans
- But don't take the plan's word for it.
 - Check the code, the CBA, and the plan amendments
 - Verify the amendment was timely adopted.
 - Sometimes the deadline is the termination of a CBA and sometimes it is a stated date.

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Payment of union dues ≠ pension benefit

- The client calls and tells you that he worked for 20 years and paid union dues that entire time but now the plan is saying he only has 13 years of service.
 - This is a basic misunderstanding about the separation between the funding of the pension plan, and the purpose of union dues.
- Could this be a dues only plan?
 - If so, then it is not a multiemployer plan
 - Probably not- very rare

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Plan document requests

- Multiemployer plans use several documents in calculating a benefit;
 - See handout- model document request
 - Request the usual documents (Plan document, SPD, SMM)
 - Plus other plan documents unique to multiemployer plans (collective bargaining agreement, trust agreement, board meeting minutes)
 - And documents specific to the client Social Security detailed earnings report, logs, worksheets
 - If you are working on an appeal of a benefit denial, then ask for everything used to make the adverse benefit determination.

98

Crediting ALL service

- The recordkeeping challenge.
 - The plan relies on records from contributing employers to determine service. An error on the part of the employer will cause an error in the plan's calculations
 - Social Security Earnings report can often help establish the service
 - Many plans obtain the earnings report to verify its internal records

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Contiguous non-covered service

- Client's husband worked for a signatory employer. The plan denied benefits on the basis that part of the work was done in non-covered assignments-out of the plan's geographic area. (See appeal from NEPAP)
- Rule: Non-covered service counts toward participation and vesting if it is "contiguous" to covered service under the plan. DOL reg. §2530.210(c)(1)

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Contiguous non-covered service continued

- Thus all years of service must be counted for participation and vesting where the participant moves from covered to non-covered service for the same contributing employer.
- For accruals however only covered service counts.
- By contrast "non-contiguous non-covered service can be disregarded which occurs when changing from covered to non-covered service AND changing employers.

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Delinquent employer contributions

- Worker is told his employer didn't pay into the pension fund, and so the plan is refusing to give credit.
- Rule: If a signatory employer fails to remit contributions to the plan on behalf of a participant, the plan still owes the benefit to the participant.

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Delinquent employer contributions

- Definitely determinable benefit rule – Treas. Reg. 1.401-1(b)(1)(i) Service credit cannot hinge on an employer making the required contributions because the benefit must be “definitely determinable” from the rules of the plan.
- Allowing an outside actor (employer) to effectively determine a benefit violates the code.

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Delinquent employer contributions

- Forfeiture of past service credit
 - IRC §411(a)(3)(E) says the plan can provide a benefit forfeiture of past service credit if the employer withdraws from the plan.
- The plan’s remedy when it has not been properly funded is under ERISA §502(g)
 - a cause of action under ERISA permitting multiemployer plans to sue employers for missed contributions

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Reciprocity

- The plan may cover employees who are not subject to the collective bargaining agreement.
 - Employees of the union
 - Employees of benefit funds
 - Affiliated pension funds
 - Affiliates of signatory employers

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Reciprocity

- Parties to a reciprocity agreement recognize service earned under other plans.
- **WARNING:** These are difficult cases to win and plans don't make them easy.
 - Giving reciprocity for work done for a non-contributing employer is expensive.
 - A plan claims it has reciprocity with other plans, but there are many moving parts.
 - Ask for a copy of the "side agreement"

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Smith v. Contini 205 F.3d 597 (3d Cir. 2000)

- Example of the difficulties in reciprocity cases
 - Teamsters Multiemployer plan had reciprocal agreements with several other local Teamsters' plans
 - Plan provided "deferred pension" to participants with 10 years of service, or "pro rata pension" to participants with a combined 15 years of service between contributing employers and reciprocal employers.

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Smith v. Contini 205 F.3d 597 (3d Cir. 2000)

- Worker had 11 years total but not 10 under the plan. The Plan denied benefits.
- Worker sued arguing that plan violated ERISA by effectively imposing a 15 year cliff vesting schedule.
- Lower court Holding: Worker loses. ERISA does not require reciprocity agreements therefore minimum vesting standards do not apply to such benefits.
- 3rd Circuit Holding: Worker wins! ERISA §203(a) applies to both pension benefits offered by the plan.

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Smith v. Contini 205 F.3d 597 (3d Cir. 2000)

- The establishment of reciprocal pension agreements promotes transfers of employees between employers within funds that are parties to reciprocity agreements and provides the employees with the apparent security that they will receive a pension based upon their combined years of service. *See Helms, 1999 WL 965230, at *12. It would be inconsistent with the purpose of ERISA to allow funds to promote movement by employees in these circumstances while at the same time subjecting such employees to "penalties" for having so moved.*
- Further, by opting to provide pension benefits based upon years or service earned under other funds, the Local 641 Fund chose not to avail itself of the provisions of ERISA section 203(b) for the purposes of the Pro-rata Pension. Section 203(b) is permissive in that it states that a plan *may* disregard service with an employer during any period in which the employer did not maintain the plan. *See 29 U.S.C. § 1053(b)(1)(C).* Thus, ERISA does not require a plan to disregard such service. Having chosen to provide a pension plan expressly based upon years of service earned with certain employers not within the Local 641 Fund jurisdiction, the Local 641 Fund is barred from disregarding those years of service for the purposes of vesting under ERISA Section 203(a).

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Suspension of benefits

- ERISA §203(a)(3)(B) A plan may provide that a retiree's benefits may be suspended if he is reemployed:
 - For at least 40 hours per month
 - In the same industry,
 - In the same trade or craft,
 - In the same geographical region
 - And such suspension was covered by the plan at the time payment commenced

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Suspension of benefits

- DOL Reg. 2530.203-3, (See also Rev. Rul. 81-140)
- Benefits withheld under §203(a)(3)(B) service are forfeited permanently. Other suspensions are permitted but the plan must make that up with actuarial adjustments.

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Case example

- The trick with these cases is that the plans often try to impose what the law allows on the retiree, rather than what the plan requires.
 - Plans tend to be more restrictive on their ability to suspend benefits than the law allows. Probably because the union negotiated the terms.
 - Courts give plan administrators great deference in interpreting their plans, so when your client's facts don't squarely fit into the plan's rules, it can be a difficult road.

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Notice of suspension

- Suspension cannot begin until plan notifies retiree.
 - DOL Reg. §2530.203-3(b)(4)
- If the plan failed to properly notify participants, then the plan must restore the portion of the benefits suspended prior to notice, but once a plan gives notice, future payments can still be suspended.

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Recoupment

- If the plan discovers that the retiree is engaged in prohibited employment, it may suspend the benefits and also recover the overpayment. Treas. Reg. §1.401(a)-13(c)(2)(iii)
- Ask the plan for a waiver of overpayment. Recycle the arguments you used when arguing that the retiree wasn't engaged in prohibited employment

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Restoration of benefits

- If you succeed on behalf of your client and the benefits are restored, don't forget the plan owes the client for the missed payments.
 - Actuarial adjustment to the normal retirement benefit including interest.
 - See outline on actuarial adjustments for delayed and missed benefit payments.

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Benefit restrictions for underfunded plans

- ERISA §305 as amended by the Pension Protection Act of 2006 imposes benefit restrictions on certain underfunded multiemployer plans.
- Establishes three zones or statuses to measure a plan's funding
 - Red zone- critical status
 - Yellow zone- endangered status
 - Green zone
- The plan actuary must annually certify the plan's funded status, and if it falls into the red zone, then the plan may cut benefits that would be otherwise protected.

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Benefit restrictions: timeline

1. No later than the 90th day of the plan year, the plan actuary must certify whether or not the plan is in endangered or critical status. Certification is given to the Treasury Department and plan sponsor only. §305(b)(3)(A)
2. No later than 30 days after the date of certification, plan must provide notice of the underfunded status and its ramifications including the possibility of benefit reductions. The notice must be given to participants, beneficiaries, bargaining parties, the PBGC and the Secretary of Labor. §305(b)(3)(D)
3. If the plan is certified in critical status, the plan sponsor (trustees) must adopt a rehabilitation plan no later than 240 days after the date of certification. §305(e)(1)(A)

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Benefit restrictions: timeline

- Within 30 days of the date the plan sponsor adopts the rehabilitation plan, the sponsor must present the plan to the bargaining parties. The plan must include any reductions in future benefits or adjustable benefits. §305(e)(1)(B)
- If the bargaining parties fail to adopt the rehabilitation plan, a default schedule will be implemented at the earlier of the date the Secretary certifies that the parties are at an impasse, or 180 days after the expiration of the collective bargaining agreement. §305(e)(3)(C)
- If the adopted rehabilitation plan reduces adjustable benefits, the plan must give notice to participants, beneficiaries and bargaining parties at least 30 days before the general effective date of the reduction. §305(e)(8)(C)
 - This notice is essentially meaningless because the benefit cutbacks can apply to ANYONE who retired with an adjustable benefit after the original notice.

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Benefit restrictions: adjustable benefits

- The statute defines adjustable benefits to include subsidized benefits such as unreduced early retirement benefits.
- Every year this provision becomes more and more oppressive because benefit cutbacks can potentially apply to anyone who retired after the original notice went out which for some was in 2007!

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Red Zone cutback examples

- Mr. K was a truck driver for 34 years. Plan notified participants that it was in critical status on April 28, 2008. Mr. K was allowed to retire with a subsidized early retirement benefit on November 1, 2009. In October 2010 he was notified that the plan was cutting back his benefit as a result of the rehabilitation plan. He is getting half of his original benefit.

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Red Zone cutback examples

- Plan mailed notice to participants that it was in the red zone on April 20, 2010. Mr. A submitted retirement application the next day on May 1, 2010.
- On November 1, 2010 benefit was reduced according to the rehabilitation plan from \$3,110.35 to \$1,633.
- The plan also tried to recoup the alleged overpayment for the higher benefits paid from May to October.
 - project argued no overpayment because when benefit was paid, the participant was entitled to it.
 - Small victory.

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Employer withdrawal/ termination

- Employers withdrawing from the plan are subject to withdrawal liability
 - An often highly disputed amount the withdrawing employer pays to the fund
- Generally this is a dispute between the fund and the withdrawing employer

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Lost plans/ mergers

- Lost multiemployer plans less common
 - Employers may go out of business, but the plan remains
- Mergers
 - As an industry contracts or plans find themselves in financial trouble, they merge
 - Often they include the old plan/ union name
 - Ex. Bakery, Confectionery, Tobacco Workers and Grain Millers' International Union

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Terminations/ insolvency

- Less PBGC coverage and involvement
 - PBGC does not trustee the plan
 - Plan is insolvent if it cannot pay guaranteed benefits when due to be paid
 - Guarantees are often much lower than accrued benefits.
 - Participant with 30 years of service can receive a maximum of \$12,870 per year.
 - Insolvent plans receive financial assistance from PBGC to pay benefits

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Questions?

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Pension Basics
Finding a Lost Plan

March 5, 2013
Emily Spreiser, Staff Attorney
Pension Rights Center

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What is a Lost Plan?

A “lost plan” scenario occurs when:

- A plan participant leaves an employer before retirement,
- Later reaches retirement age,
- Has lost contact with the plan, and
- Cannot find a way to get in touch with the plan in order to claim benefits

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Plans Don't Just Disappear

Any number of things may have happened to the plan:

- The employer has relocated
- Corporate restructuring
 - Merger or Acquisition
 - Plant or division closed
 - Company split into pieces
- Employer has shut down & plan has terminated
 - Termination requires benefit be paid

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When Will Participants Come to You?

- The participant remembers being verbally told s/he is entitled to benefits
- The participant has old documentation of benefits
- The participant isn't sure if s/he is entitled to benefits but needs additional retirement income and thinks it's worth a shot...

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When Will Participants Come to You?

- The participant has received an SSA notice of *potential* benefits
 - Sent to deferred vested participants
 - Participant is either entitled to a benefit or was paid a benefit and does not remember
 - Often results in recoveries, but make sure that participant has realistic expectations
 - Old tax records will show whether benefit has been paid

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Lost Plan Search Principles

- Put on your investigator hat
- Find leads and follow up on them
- Be creative and resourceful about new sources of information
- Compile bits of information and use them to locate even more information
- It is extremely easy to find people and information online if you know where to look

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

1. Contact the Right Company

5500

- ERISA plans MUST file a Form 5500 with the government and this must contain the name and contact information for the plan administrator
- FreeERISA.com – most recent 5500s for all plans
- DOL – back to 2009 (but if plan's last year before 2009 will not be found)

Basic online search to locate company

- Google, Manta.com, Hoovers.com, etc.
- Is the company still in business and how do you contact it?
- Any articles or evidence of corporate restructuring?

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

2. Check the PBGC

- When underfunded plans terminate PBGC may assume responsibility
- If your client mentions that the company went bankrupt this should be your first stop
- Search for unclaimed pensions by participant last name, by company or by state at:
<http://search.pbgc.gov/mp/mp.aspx>

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

3. Contact the Right People

- Try to find the Plan Administrator / Senior HR People
- Use 5500 if available.
- If it's a small company, does the participant know...
this person?
- Know anybody who knows this person?
- Know the city in which this person now lives?
- Company this person now works for?

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

3. Contact the Right People

- Try to find other people in the know
- Who was the CEO, CFO, COO, Payroll guru?
- Can you locate them?
- Do they know what happened with the plan or how to get in touch with the plan administrator?
- Was there corporate restructuring?
- Is a new company responsible for the plan?

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

3. Contact the Right People

State Corporations Database

- In most states available at the secretary of state's website
- http://www.secstates.com/MD_Maryland_Secretary_of_State_Corporation_Search/
- Will generally provide:
 - Dates of operation
 - DBA
 - Key company officials (sometimes w/ home contact info)
 - A contact person
- Can also use Westlaw Corporate Records search

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

3. Contact the Right People

- Be Creative
- <https://campaignfinancemd.us/Public/ViewReceipts>
- Online phone search tools (e.g. using someone's home address to locate their home phone number)
- Facebook, LinkedIn, etc.

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Step 1: Pension Notice - Step 2: ? - Step 3: Benefits

4. Contact EBSA

- Can FOIA any 5500
- Benefits Advisors
 - Will provide some lost plan search assistance but not full service
 - Two advantages:
 - Unlimited instant 5500 access
 - The FBI (as last resort)

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Prevent future lost plan issues by informing clients

Most important tips:

- Hold on to SPD, all correspondence, employment records, individual benefit statements
- Upon leaving get most current SPD, vesting status, and continue to keep track of former employer
- At retirement read everything carefully and check accuracy

More Info:

Pensionrights.org > Get the Facts > Fact Sheets > General Retirement Plan Information > Tips for Keeping Track of Your Pension

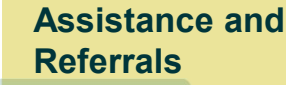
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Pension Basics
Resources, Tools and Sources of Information

March 5, 2013
Emily Spraiser, Staff Attorney
Pension Rights Center

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Assistance and Referrals

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Pension Counseling and Information Program

- Pension Rights Center
 - Pensionrights.org
 - (202) 296-3776
- Pension Counseling Projects
- Pension Help America – pensionhelp.org

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Employee Benefits Security Administration (EBSA)

- Benefits Advisors
 - 202-693-8700 (Washington District Office) or 1-866-444-EBSA (3272)
 - Refer ERISA cases in states not covered by projects
- Civil and Criminal Investigations
 - www.dol.gov/ebsa, left hand menu, “EBSA Offices”

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National Pension Lawyers Network

- No Cost Referral Service for attorneys who specialize in pensions, retirement and related issues
- Located at UMass Boston
- (617) 287-7324
- Online referral form at <http://www.umb.edu/pensionaction/npln>

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Pension Assistance List

- <http://www.actuary.org/content/pension-assistance4-list-pal>
- American Academy of Actuaries
- Pro bono service for plan participants
- Up to 4 free hours of pension work from a volunteer actuary
- Online request form

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ERISA Plan Resources

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The ERISA Big Three

- Employee Benefits Security Administration (EBSA)
 - Department of Labor
 - www.dol.gov/EBSA
 - Reporting and Disclosure
 - Fiduciary Duty
- Website Navigation Tips
 - Things written from plan sponsor perspective are often most helpful for research purposes
 - FAQ section has legal citations

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Example – Excerpt of DOL FAQ on QDROs

Frequently Asked Questions

Qualified Domestic Relations Orders

[Printer-Friendly Version](#)

What is a Qualified Domestic Relations Order?

A "qualified domestic relations order" (QDRO) is a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and that includes certain information and meets certain other requirements.

Reference: ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)

What is a "domestic relations order"?

A domestic relations order is a judgment, decree, or order (including the approval of a property settlement) that is made pursuant to state domestic relations law (including community property law) and that relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a domestic relations order under ERISA. The mere fact that a property settlement is agreed to and signed by the parties will not, in and of itself, cause the agreement to be a domestic relations order.

There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order. It is also not necessary that the retirement plan be brought into state court or made a party to a domestic relations proceeding for an order issued in that proceeding to be a domestic relations order or a qualified domestic relations order. Indeed, because state law is generally preempted to the extent that it relates to retirement plans, the Department takes the position that retirement plans cannot be joined as a party in a domestic relations proceeding pursuant to state law. Moreover, retirement plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign retirement benefits unless they are QDROs.

Reference: ERISA §§ 206(d)(3)(B)(i), 514(a), 514(b)(7); IRC § 414(p)(1)(B)

Must a domestic relations order be issued by a state court?

A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law).

Reference: ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(B); Advisory Opinion 2001-06A.

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The ERISA Big Three

- Internal Revenue Service (IRS)
 - www.irs.gov/retirement
 - Plan qualification rules and tax compliance for both plans and participants
 - Eligibility, non-forfeiture, contribution limits, distribution timing and methods
 - Website Navigation Tips
 - Compliance Information is More Helpful
 - Fastest Portal is "Types of Retirement Plans"

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The ERISA Big Three

- Pension Benefit Guarantee Corporation (PBGC)
 - www.pbgc.gov
 - Insures pension plans, deals with plan terminations and bankruptcy or insolvency
- Website Navigation Tips
 - Termination fact sheet is most helpful
 - Advisory Opinions available and searchable from landing page

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Obtaining ERISA plan documents

- Plan Document & SPD
 - Plan must provide to anyone who is a participant, beneficiary or alternate payee
 - Anyone with colorable claim for benefits
- Form 5500
 - Useful for:
 - Determining number of participants
 - Determining funding status
 - **Identifying Plan Administrator**
 - FreeERISA.com

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EBSA Public Disclosure Room

- Old 5500s within 5 days and other documents within 10 days
- Must *acknowledge* large document requests within 5 days and give estimate
- EBSA was required to retain SPDs for all plans until 1997

Send written request to:

U.S. Department of Labor
Employee Benefits Security Administration
Public Disclosure Room
200 Constitution Avenue, NW, Suite N-1513
Washington, DC 20210
Tel 202.693.8673

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Legal Research Tools

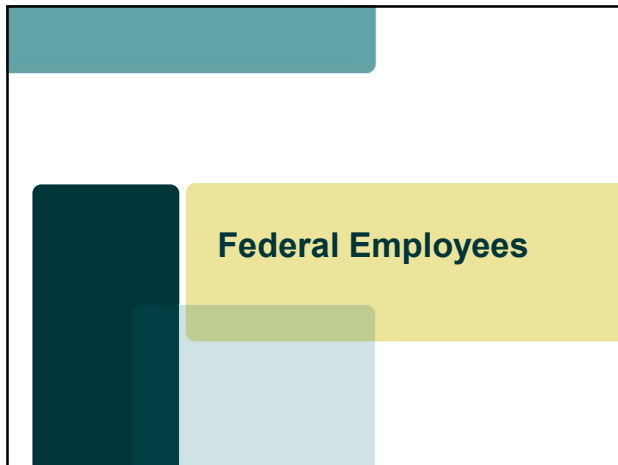
Erisaadvisoryopinions.com

- Access to EBSA advisory opinions regarding to Title I of ERISA back to 1974.
- Further back and more navigable than DOL website

<http://benefitslink.com/erisa/crossreference.html>

- Precise descriptions of every provision of ERISA
- Links to corresponding section of U.S. Code

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Federal Retirement Plans

- Civil Service Retirement System (CSRS)
 - Hired 1920-1986
- Federal Employees Retirement System (FERS)
 - Hired Jan 1, 1987 to present
- Managed by OPM
 - www.opm.gov/retire
 - CSRS Information and FERS Information tabs on left hand menu

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Send written requests for documentation, reconsideration, appeal to:

U.S. Office of Personnel Management
Retirement Operations Center
Post Office Box 45
Boyers, PA 16017

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Military Retirement

- Defense Finance and Accounting Service (DFAS)
 - <http://www.dfas.mil/>
 - DFAS pays all DoD military and civilian personnel, retirees and annuitants, as well as major DoD contractors and vendors

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Military Retirement

Ex-Partners of Servicemembers for Equality

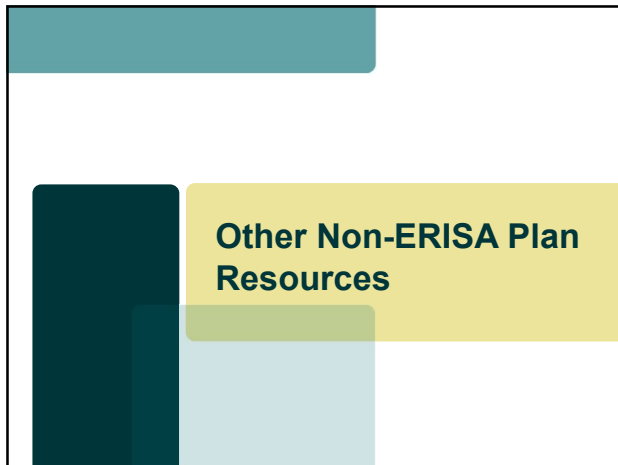
- <http://ex-pose.org/>
- Most military retirement issues we get are spousal
- Non-profit volunteer organization made up of former military spouses
- Provides information on benefit availability for former military spouses
- Offers attorney referral service

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Other Plans for Federal Employees

- CIA
- Foreign Service
- NAFI
- Etc.

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State Plans

- Maryland
 - Department of Budget and Management
 - <http://dbm.maryland.gov/benefits/Pages/Retirees.aspx>
- DC
 - Department of Human Resources
 - <http://dchr.dc.gov/page/employee-benefits>
 - Employees hired before Oct 1, 1987 = CSRS → OPM

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Church Plans

Pensionrights.org > Get the Facts > Fact Sheets > Private Pension Plans > The Facts About Church Pension Plans

Railroad Retirement Board

- www.RRB.gov
- Railroad Retirement Act
- Illinois Project

Others out there – ex, Lighthouse Widows

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