

Recoupment – A Primer

What is Recoupment?

In a retirement plan context, recoupment is an action taken by a pension plan to recover an overpayment made to a participant or beneficiary. Recoupment occurs when, as the result of an administrative or other error or incorrect information provided by a participant, a retirement plan has paid an individual a larger benefit than he or she is actually entitled to under the terms of the plan.

Ordinarily, the plan seeks to reclaim the overpaid amount from the recipient by demanding that the overpayment amount plus interest be repaid to the plan. In the case of a defined benefit plan that makes periodic payments, the plan reduces future pension payments if that is sufficient to recover the overpayments.¹ If the overpayment is a lump sum, the plan will typically threaten a lawsuit if the retiree or beneficiary fails to pay promptly.²

Recoupment actions often impact only a single individual, but they can also affect hundreds of thousands of retirees as the result of plan-wide audits that uncover systemic plan errors.

Agency Guidance

Both the statute and regulations³ are silent on recovery of overpayments. However, both the Internal Revenue Service and the Labor Department have issued relevant guidance.

The IRS recently updated its guidance on how plans can correct overpayment errors under its Employee Plan Compliance Resolution System (EPCRS) in Revenue Procedure 2016-51.⁴

EPCRS is a voluntary correction procedure that retirement and other employee benefit plans may use to self-correct errors that would otherwise adversely affect their tax-qualified status.

Rev. Proc 2016-51 incorporates recoupment provisions included in IRS Rev. Proc. 2015-27 that revised and clarified earlier guidance. The prior EPCRS statement, Rev. Proc. 2013-12, contained

¹ This is the technical and dictionary definition of “recoupment” (See dictionary.com: “withholding (a portion of something due) having some rightful claim to do so.”) However, the term is generally used to apply to the recovery of all overpayments, including lump sums. If a retiree is not expected to live long enough for the plan to be fully repaid through a reduction in future monthly payments, some plans have demanded additional cash payments.

² This threat is made even where the costs of litigation would far exceed the overpayments and the plans are not planning to go to court. Recently, a few plans have substituted a threat to send claims to collection agencies rather than a threat of litigation. This could impact a retiree’s credit rating.

³ An exception is a PBGC regulation addressing recoupment when the PBGC itself has made an overpayment. 29 CFR Sections 4022.81 and 4022.82.

⁴ <https://www.irs.gov/pub/irs-drop/rp-16-51.pdf>

language that had been interpreted to say that when plans discovered an overpayment to a participant they were required to either obtain a repayment of that amount with interest from the participant or recoup the overpaid amount with interest by reducing the participant's future benefit.

Under Rev. Proc. 2016-51, EPCRS does not limit plans to these two methods, and plans may use alternative methods of correcting an overpayment. Alternatives are for the plan to be amended to increase benefits to reflect the overpayment or for the plan sponsor to contribute the amount of the overpayment with interest.⁵

EPCRS places no limitation on the "look back period" for discovering overpayments and also permits the assessment of interest equal to a plan's interest rate. As a result, there are instances in which elderly retirees have been asked to repay hundreds of thousands of dollars.⁶

Since recoupment also implicates ERISA's fiduciary standards,⁷ the Department of Labor has published Advisory Opinions discussing recovery of overpayments.

DOL Advisory Opinion 77-08 says that plans may waive a recovery action where it imposes a financial hardship on a retiree. Advisory Opinion 77-07 suggests that other reasonable attempts should be made to recover overpayments before reducing participants' pensions.⁸

Case Law

There is limited case law expressly addressing recoupment. Until last year, most litigation has occurred at the district court level with mixed results. In 2016, the Supreme Court ruled in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*⁹ that ERISA limits plan actions against plan participants to remedies traditionally available at equity, and that, therefore, a plan may only recover assets from retirees that are clearly traceable. Stated differently, if a participant has spent the money, he or she cannot be sued by the plan.

⁵ Rev. Proc. 2016-51, Section 6.06(3). In the case of a single employer defined benefit plan, the employer could amortize these payments over a 7-year period. 26 USC Section 430(c)(2)(A), 29 USC Section 1083(c)(2)(A)

⁶The relevant guidelines in EPCRS are contained in a section describing "principles" for correction. Rev. Proc. 2016-51, Section 6. Subsection 6.06(3) says that the principles applicable to overpayments by defined benefit plans are the same as those for payments in excess of the IRC Section 415 limits (currently \$215,000 a year) detailed in Appendix B, Section 2.04(1). Subsection 2.04(1)(a)(i) requires plan sponsors to take "reasonable steps to have the Overpayment (with appropriate interest) returned by the recipient to the plan and (to reduce) future payments (if any) due to the employee to reflect (the 415 limit). To the extent that the amount returned by the recipient is less than the Overpayment adjusted for earnings at the plan's earnings rate, then the Plan Sponsor or another person contributes to the plan." Subsection 2.04(1)(a)(ii)(B) says that overpayments to a retiree cannot be collected from a surviving spouse.

⁷ ERISA Section 404(a)(1)(d), 29 USC Section 1104(a)(1)(d).

⁸ Other Advisory Opinions include 77-32A, 77-33, 77-34.

⁹ 577 U.S. ___ (January 20, 2016).

Recoupment Collections Data

Name	Age	State	Press	Employer	From	Until	Retirement Date	Overpayment Amount	Annuity or Lump
Mid America Retiree 1	75	PA		ATT, Verizon	1966	2007	2001	\$ 93,223.44	Annuity
PR Retiree 1	65	PR		ATT	10/15/1979	1/20/2017		\$ 3,643.92	Lump
South Central Retiree 1	42	MO	Y	SBC	6/16/2002	7/20/2012	Jul-12	\$ 19,306.95	Lump
South Central Retiree 2	67	AL	Y	ATT				\$ 21,981.22	Lump
South Central Retiree 3	74	FL	Y	ATT				\$ 58,500.00	Annuity
South Central Retiree 4	69	CO	Y	SW Bell				\$ 59,851.16	Annuity
South Central Retiree 5	78	GA	Y	ATT				\$ 62,589.68	Annuity
South Central Retiree 6	81	FL	Y	ATT				\$ 157,843.09	Annuity
South Central Retiree 7	63	TX	N	ATT		May-03		\$ 24,000.00	Annuity
South Central Retiree 8		NC		Gannett		1999		\$ 69,998.00	Annuity
South Central Retiree 9	77	FL		ATT	1968	2004	2004	\$ 42,845.20	Annuity
Western Retiree 1	69	VA	Y	Pacific Bell	1973	2001		\$ 32,116.05	Annuity
Western Retiree 2	64		N	ATT				\$ 38,130.25	Annuity
Western Retiree 3	67		N	ATT				\$ 26,257.25	Annuity
Western Retiree 4	71		N	Pacific Bell	Aug-69	Oct-90		\$ 38,204.95	Annuity
Western Retiree 5		CA		ATT				\$ 122,722.38	Annuity

Recoupment Collections Data

Date of Erroneous Distribution	Notice of Overpayment	2nd Notice	Date of Claim	Claim Denial	Appeal	Appeal Denial	1st Notice from Lyon	2nd Notice from Lyon	"Final" Lyon Notice
Jan 2008 - Dec 2016	12/7/2016		na						
Jan-17	7/17/2017		11/16/2017				9/25/2017		
5/19/2014	7/15/2016	8/11/2016	10/6/2016	2/14/2017	4/17/2017	7/10/2017	7/18/2017		
2015	Dec-16	Oct-17	na						
2008	Sep-17	Nov-17	na						
Sep-13	Letter dated March 2017, rec'd July 2017		Oct-17	not yet					
Jul-04	Dec-16		Jun-17	Sep-17	Nov-17				
1990	Sep-17								
May 2006, May 2011, Nov 2009	May 2009, Nov 2016		Nov-16	Feb-17	May-17	Sep-17			
2009		1/30/2018	na						
2003	Sep-17		11/19/2017			2/20/2018			
2013	12/8/2016		3/17/2017	Sep-17	Oct-17		2/20/2017		
bw 2009-2016	12/8/2016		na	Sep-17	Oct-17		2/17/2017		
2015	12/9/2016		6/1/2017	Sep-17	Oct-17		Feb-17	3/23/2017	4/12/2017
2011	12/1/2016		2/1/2017	Sep-17	Oct-17				
	10/30/2017		na						

Recoupment Issues Discussed at 1-16-2018 Meeting with Treasury/IRS

- I. Scope of issues discussed. Recommendations were limited to:
 - A. Modifications of EPCRS and related guidance;
 - B. Situations where the plan made the mistake and the participant is not at fault¹;
 - C. Defined benefit pension plans; and
 - D. Overpayments to all participants other than those in excess of IRC 415 limits.
 - E. There was no discussion of issues within the jurisdiction of DOL.².

- II. Proposed modifications to ECPRS guidance:
 - A. Plans should not be permitted to charge interest on overpayments;
 - B. Plans should be permitted to reduce annuity payments to the correct amount prospectively and then further reduce monthly payments by no more than 10% to offset past overpayments;
 - C. Plans should not be permitted to demand lump sum payments from participants whose annuities are being reduced to collect overpayments;
 - D. Plans should not be permitted to continue to recoup after the plan has recovered the full amount of the overpayment (regardless of actuarial calculations at the outset);
 - E. Plans should not be permitted to recover overpayments resulting from errors that occurred before some set time limit.
 - i. Possible time limits include:
 1. 3 years, the period that taxpayers have to amend their tax returns and also the ERISA statute of limitations for fiduciary actions when the plaintiff has knowledge of a fiduciary breach; and
 2. 6 years, the median of all applicable state law limitations periods and close to the average of applicable state limitations periods.
 - ii. If the plan document includes a limitations period for benefit claims, the plan should not be able to recover overpayments made for a period greater than the plan's limitations period.

- III. Situations where fiduciaries should have discretion not to recoup:
 - A. Participant is at fault but is sympathetic (e.g. a grieving widow, an unsophisticated individual, person with dementia, hospitalized or otherwise incapacitated, etc.)
 - B. Where the plan is unlikely to prevail in court, including situations in which:
 - i. The participant is unlikely to be able to satisfy a judgment; or
 - ii. The costs of litigation are likely to exceed the amounts recoverable from the participant;

¹ Fault by a participant can be defined as fraud, intentional misrepresentation, or deliberate concealment of critical information, or situations where the participant clearly knew that the overpaid amount was incorrect.

² Such as hardship waivers or suspension of benefits.

- iii. The plan sponsor determines that it is against the sponsor's interest for the plan to seek recovery (for example, because of possible cost to employee morale or damage to the plan sponsor's reputation).
- C. These principles should apply to pension overpayments in the form of both lump sums and annuities.

IV. Additional suggestions

- A. Guidance should highlight the existing prohibition on recoupment against surviving spouses.
- B. Guidance should provide that Self-Correction by amendment is available in all recoupment situations.
- C. Treasury/IRS should consider guidance or correction program regarding tax consequences to participants required to repay benefits.

Robin Price – Overpayment Case Summary

For the St. Louis office of the South Central Pension Rights Project, there have been a couple of new developments in the overpayment/recoupment situation since we last met.

First, for one client, half of the overpayment was waived. This was due in large part I believe because since the client retired in 2006 her benefit was erroneously calculated three separate times. We went through the claims and appeals procedure with this client, and in denying our appeal, AT&T noted, "But due to the facts and circumstances of her appeal, the Committee approved to reduce the amount of the overpayment in half to \$12,996.10."

In a second case, we went through the claims and appeals procedure and in the appeal denial, Fidelity noted, "The Committee determined that under the provisions of the Plan, the facts and circumstances of this appeal, and in the exercise of its fiduciary authority, he is not eligible to have the overpayment, in the amount of \$62,589.68, that occurred on his account waived. However, the Committee decided not to pursue further collection attempts of the overpayment amount at this time, without waiving any rights to resume the collection process in the future."

In another interesting situation, I have two clients that received their notices of overpayment around the same time in Fall 2017. In February before I had a chance to even start on the cases, one client received a letter saying, "Previously, the option to further reduce your ongoing annuity, in an effort to recover your overpayment over the course of your lifetime stream of payments, was made available to you. That option is no longer available. Please disregard all communications in relation to the lifetime offset repayment option."

And both clients' letters said,

"After review with AT&T, the overpayment, in the amount of \$58,500.11 , remains as a balance that is owed back to the pension Trust; however, your overpayment information will not be sent to an outside collections agency at this time."

At this point I was erroneously optimistic that AT&T might be reconsidering its position on recoupment in general, but since that time we have been contacted by four new clients that received notices of overpayment and “requests” for repayment who have not received the follow up backpedaling letters from Fidelity.

Throughout last year I opened nine AT&T overpayment cases and have closed four of them, including the two that received letters stating that their information would not be sent to collections before we ever even started investigating. I feel very strongly that these could be temporary case closures and that we may hear more from Fidelity on these cases.

I have three cases that I am waiting for a decision on my appeals and two cases that I have not even looked at yet.