Pension Rights Center
Pension Counseling Center
Dealing with Recoupment

October 22, 2025

David R. Godofsky, FSA
Alston & Bird LLP

1

1

Secure 2.0 Limitations on Recoupment § 301

- Generally, no obligation to recoup.
  - Defined contribution plan – other participants must be made whole, if applicable.
  - Defined benefit plan – recoupment may be required if, otherwise, plan's ability to pay benefits to other participants would be materially affected.
- If overpaid participant is a key employee or highly compensated employee, there could be discrimination issues under IRC § 401(a)(4).

2

2

Secure 2.0 Limitations on Recoupment § 301

- No limitation on reduction of future payments to "correct" amount.
- Plan may seek recovery from the person responsible (ie: the recordkeeper).
- No "recoupment" of interest, costs or fees.
- If recoupment is annuitized, no recoupment of amount in excess of overpayment (ie: cannot annuitize and collect "actuarially").
- Recoupment is limited to one-tenth per year of overpaid amount.
- Future benefits cannot be reduced by more than 10%.

3

3

Secure 2.0 Limitations on Recoupment § 301

10% - 10% Rule

- Participant is owed $10,000 per year but paid $25,000 in year one.
- Overpayment is $15,000.
- Annual recovery cannot exceed $1,500 (10% of $15,000)
- Annual recovery cannot exceed $1,000 (10% of $10,000)
- Participant is reduced to $9,000 per year.
  - $10,000 – lesser of $1,500 or $1,000
- After 15 years, participant must be restored to $10,000 per year.
- From Participant's perspective, reduction is $16,000 per year.

4

4

Secure 2.0 Limitations on Recoupment § 301

- No threat of litigation unless amount to be recovered exceeds cost.
- Limits on collection agencies.
- If plan overpays participant, plan cannot recover from spouse or beneficiary.
- If first overpayment occurred more than 3 years before participant is first notified, no recoupment. (But, plan can reduce future benefits to “correct” amount.)
- Participant can contest recoupment through claims procedure.

5

5

Secure 2.0 Limitations on Recoupment § 301

- Employer may consider hardship on participant.
- Plan may be amended to increase benefit to overpaid participant.
- Limitations do not apply if participant is culpable.

6

6

Logic Behind Limitations on Recoupment

- Interest is inappropriate
  - No wrongful act by participant
  - No agreement to pay interest
  - Usually no evidence of profit by participant (no unjust enrichment)
- Actuaries assume “time value of money” and therefore consider interest to be inherent in a transaction in which one party holds another party’s money for a period of time. However, there is no such presumption in law.
- Annuitization of a debt includes charging interest if the annuity factor is developed using an interest assumption.
- Therefore, annuitization of recoupment must use a Zero percent interest rate.

7

7

Logic Behind Limitations on Recoupment

- Plan funding is already corrected (DB Plan).
  - Participant is given annuity of $25,000 per year instead of $10,000 per year.
  - That amount goes into funding calculations as data.
  - Present value is amortized over 15 years or less.
  - Life expectancy is more than 15 years, in nearly all cases.
  - Employer’s minimum contribution goes up by more than the annual annuity.
  - Plan has lost no money. In fact, plan may have a gain.

8

8

Logic Behind Limitations on Recoupment

- Detrimental reliance is almost a given.
  - In very rare cases, participant is so well off that increased income has no effect on spending decisions.
  - For "normal" people, spending decisions are affected by income – especially lifetime income.
  - The extra spending may be difficult to pinpoint or prove, but common sense says it is real.

9

9

Game Theory of Recoupment

Reasons for employer to let employee keep overpaid annuities

- Basic fairness / decency.
- Employee trust is important. Benefits are useless to employer if the employees do not believe they will get the benefits promised to them.
- Workforce management falls apart if employees cannot trust employer.
- Employer may be able to push cost onto recordkeeper.
- Bad publicity.
- ERISA litigation is asymmetric warfare; possible class action.

10

10

Game Theory of Recoupment

Reasons for employer to let employee keep overpaid annuities

- Note that all of the reasons enumerated for allowing an employee to keep the overpayment ***also apply to future annuity payments***.

Game Theory of Recoupment

Reasons for employer **NOT** to let employee keep overpaid annuities

- Cost.
- Perceived fiduciary responsibility.
- Perceived position of IRS.
- Stubbornness.
- Lack of authority.
- Not wanting to appear an easy target.
- Error may affect many employees. Giving in to one might force employer to give in to all.
- Public plans – perception of wasting taxpayer dollars.
- Payment exceeds a regulatory limit.

Game Theory of Recoupment

Winning Strategies for Employers

- Invite the claim.
  - Employee’s claim will waive or concede important points.
    - Most employee claims begin with “I know I’m not entitled to the benefit under the plan, but…” Then will enumerate unhelpful reasons such as “I was a loyal employee…”
    - Employee typically fails to establish detrimental reliance or worse, denies reliance.
  - If the subsequent litigation focuses on whether the claim was properly denied, employer is better positioned to win.

13

13

Game Theory of Recoupment

Ways for the employer to give the participant the extra benefit

- Take no action.
- Amend the plan.
- Grant the claim.
- **Settle the claim**.

14

14

Game Theory of Recoupment

Winning Strategies for Employees

- Check the new calculation. Possibly, it is also wrong.

15

15

Game Theory of Recoupment

Winning Strategies for Employees

- Have a lawyer file the claim.
- Emphasize facts of reliance, but emphasize list is not exhaustive.
- Do not concede any theory of recovery.
- List all possible theories of recovery.
- Ask for all documents the participant may be eligible to obtain.
  - Ask for all prior plan documents and SPDs. Note that prior documents could be relevant because they may reveal protected benefits or accrued rights.

16

16

Game Theory of Recoupment

Winning Strategies for Employees

- Asking for prior documents:
  - Employer may not be able to produce prior documents / SPDs.
  - Prior documents / SPDs could reveal *other* claims the participant may have.
  - Demonstrates participant / attorney is serious.
  - Request should be clear it is not only documents relevant to claim, but also documents participant is entitled to under ERISA section 105.

17

17

Theories Favoring Employee

- Breach of Fiduciary Duty
- Estoppel
- Reformation
- Section 105 Claim

18

18

Theories Favoring Employee
Estoppel

- Examples: *Kanefsky v. Ford* (ED Mich 2023); *Pearce v Chrysler* (6th Cir. 2018)
- Elements of estoppel:
  - Representation of a material fact
  - Awareness of the true fact by party making the representation (ie – a lie)
  - Intent by defendant for plaintiff to rely on the statement or conduct indicating that intent
  - Plaintiff unaware of true fact
  - Detrimental and justified reliance
  - Written representation
  - Plan provision too complicated for plaintiff to calculate
  - Extraordinary circumstances

19

19

Theories Favoring Employee
ERISA Section 105

- *Bafford v. Northrop Grumman Pension Plan* (9th Cir. 2024)
- Does a "grossly inaccurate" pension benefit statement satisfy ERISA's requirement that the Plan Administrator furnish pension benefit statements? No.
  - The "core purpose… would be entirely frustrated if plan administrators could satisfy their disclosure duties by providing grossly inaccurate pension benefit statements."
  - Bafford's statement: $2,114 / month. Actual is $807 / month.
  - Wilson's statement: $1,630 / month. Actual is $768 / month.
- Do plaintiffs have an addressable injury?
  - Participant "may be affirmatively misled into believing their pension will be greater than it is and make inadvisable decisions as a result." Plaintiffs alleged that they chose to retire when they did because they believed they were financially secure enough to do so.

20

20