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Court Extends Anticutback Protection to Post-Normal Retirement Age Pension Distributions

PUBLISHED: April 5, 2022

A recent district court decision improperly (in our view) restricts the ability of plan sponsors to modify participant distribution elections after normal retirement age. We describe the decision, and offer some observations, below.

The Decision

In *Cooper v. Willis Towers Watson Pension Plan for U.S. Emps*, 2022 WL 807418 (C.D. Cal. Mar. 3, 2022), a defined benefit pension plan ("Plan") was amended to require that terminated vested participants commence benefits at age 62. Previously, the Plan allowed these benefits to be deferred until age 70. A participant filed suit against the Plan, claiming that the plan amendment eliminated a protected optional form of benefit under Code section 411(d)(6) (and its ERISA counterpart).

The court ruled on summary judgment that the right to defer receipt of the pension benefit after age 62 was a protected benefit under Code section 411(d)(6) and was not subject to any exception. It reasoned that the regulations under Code section 411(d)(6) plainly state that the timing and commencement of a benefit are protected. Treas. Reg. § 1.411(d)-4, Q&A-1(b).

The Plan explained that an exception to the anticutback rule allows a plan to be amended to provide for the "involuntary distribution of an employee's benefit to the extent such involuntary distribution is permitted under sections 411(a)(11) and 417(e)." Treas. Reg. § 1.411(d)-4, Q&A-2(b)(2)(v). The Treasury Regulations under Code sections 411(a)(11) and 417(e) provide that a plan can distribute a benefit without the consent of the participant at age 62 (or normal retirement age, if later). Treas. Reg. §§ 1.411(a)-11(c)(4); 1.417(e)-1(b)(1). The Plan properly argued that because these regulations allowed for the

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distribution to occur without consent, the amendment was not taking away a protected benefit in violation of Code section 411(d)(6).

The court disagreed. The court found the anticutback exception expressly referenced Code sections 411(a)(11) and 417(e). Further, under those statutory provisions, it was clear the involuntary cashout provision only applied to benefits up to $5,000 in value. The court asserted that the statutes clearly define the scope of the Code section 411(d)(6) exception – therefore, there is no need to look to the 411(a)(11) or 417(e) regulations. On that basis, the court found that the amendment providing for involuntary distributions at age 62 was not covered by the anticutback exception, and therefore violated Code section 411(d)(6).

Observations

It is puzzling why the court's analysis did not include the Treasury Regulations regarding the "involuntary distributions" that were the subject of the anticutback rule exception. Treasury Regulations have provided for decades that, under both sections 411(a)(11) and 417(e), involuntary distributions *are allowed* if the benefit is immediately distributable (*i.e.*, for age 62 or normal retirement age, if later). Despite the regulatory authorization, the court found it sufficient to review only the statutory text to determine that an "involuntary distribution" only applies to benefits with a value of up to $5,000. It is unclear why the court would not consider the Treasury Regulations – which directly state when an "involuntary distribution" may be made under 411(a)(11) and 417(e) – when the sole issue in this case is whether the involuntary distribution was permissible.

The Plan has not yet appealed to the Ninth Circuit. Until then, plan sponsors in California at least should be wary of making plan amendments to eliminate or modify post-normal retirement age deferral rights. Notably, however, the SECURE Act includes anti-cutback relief that may be helpful at least for changes related to plan's "required beginning date."