Growing Number of Lawsuits Claim "Old" Mortality Tables Deprive Participants of Benefits – An Update

PUBLISHED: June 28, 2019
AUTHORS: Katie Kohn, Joshua Shapiro

Two plaintiffs' law firms are pressing forward with more major employers now facing challenges to the calculation of optional forms of benefits under defined benefit pension plans. The firms have now filed eight lawsuits in federal courts under the Employee Retirement Income Security Act of 1974 ("ERISA") against the pension plan sponsors—MetLife, American Airlines, PepsiCo, U.S. Bancorp, Rockwell Automation, Anheuser-Busch, Huntington Ingalls and, the latest, Raytheon—as well as against the plans' fiduciaries. The lawsuits typically allege that the plans calculate the amounts of non-single life annuity forms of benefits (such as a joint-and-survivor, preretirement survivor or certain-and-life annuities) using mortality table assumptions that are not reasonable, resulting in lower benefits that what the plaintiffs are entitled to under ERISA. Plaintiffs in these lawsuits seek the difference between their plan benefits and their benefits calculated using the assumptions set by the Secretary of the Treasury pursuant to Internal Revenue Code ("Code") sections 417(e)(3) and 430(h)(3) ("Treasury Assumptions"). The aggregate amount of this difference is alleged to be in the tens of millions of dollars.

We briefly review the legal background, summarize the key arguments on both sides, offer some observations on the future of the litigation and suggest next steps for plan sponsors.

Background

Under ERISA and the Code, benefits payable to a married participant under a defined benefit pension plan generally must be paid in the form of a "joint-and-survivor annuity," which means that the participant is paid a benefit until the participant dies, and the participant's surviving spouse receives at least 50% of the participant's benefit for the remainder of the spouse's life. But pension plans typically offer optional forms of benefits such as "certain-and-life" annuities (*i.e.*, a benefit paid to a participant or beneficiary for a minimum number of years regardless of whether that person dies) or lump sums.

ERISA generally requires that all forms of benefits be no less than the amount that is "actuarially equivalent" to a single life annuity. To meet this actuarial equivalence requirement, plans use both interest rate and mortality assumptions to convert the baseline single life annuity benefit to another form of benefit. The mortality assumption at issue in these lawsuits measures the anticipated life expectancy of a participant population at a given age.

When calculating lump sum benefits, ERISA requires that pension plans use the Treasury Assumptions. The Treasury mortality tables are prescribed by regulation by the Treasury Secretary and are required to be revised at least every 10 years to reflect "the actual experience of pension plans and projected trends in such experience."

With respect to calculation of other optional forms of benefits, however, ERISA does not prescribe particular actuarial assumptions. Instead, the plan document typically provides the interest and mortality assumptions and/or a "conversion factor"— the factor resulting from the combination of the interest and mortality assumptions— to be used to convert benefits from a single life annuity to the elected optional form. These plan-governed assumptions, which were typically developed in consultation with the plan's actuary, are used to calculate benefits such as joint-and-survivor and preretirement annuity benefits.

Plaintiffs' Claims

These plan-governed actuarial assumptions are the focus of the plaintiffs' challenges in the lawsuits. Specifically, the plaintiffs challenge the use of mortality tables that are older than the mortality tables currently prescribed by the Treasury Secretary for lump sum, etc. payouts. For example, some plans employ 1971 and 1984 mortality tables used by the insurance industry. Plaintiffs allege that these tables are "outdated" and do not reflect significant mortality improvements since the tables were developed. The result, plaintiffs argue, is that plaintiffs receive lower benefits than those to which they would be entitled if the plans used "reasonable" actuarial assumptions, *i.e*., the Treasury Assumptions. Plaintiffs maintain that this result violates ERISA's requirements that normal retirement benefits be nonforfeitable and that optional forms of benefits be at least actuarially equivalent to a participant's single life annuity benefit. The plaintiffs seek payment of the difference between their benefits calculated using the assumptions provided under the plan versus using the assumptions prescribed under the Treasury regulations for lump sums.

Defendants' Positions

Defendants have filed motions to dismiss in five of the eight cases, and additional motions are expected in the remaining three cases, one of which was just recently denied in the case involving the U.S. Bancorp plan. While the defendants advance many arguments, common themes, and the crux of many of the defendants' positions are that ERISA does not require any specific actuarial assumptions for the optional forms of benefits at issue in these cases, and that the Treasury regulations' "reasonableness" requirement that the plaintiffs rely on is satisfied and/or is not applicable here.

Groom's Perspective

So far, only one court has ruled on the defendants' motions to dismiss. The two firms (Izard, Kindall & Raabe, LLP and Bailey & Glasser, LLP) have now filed cases in the First, Second, Fourth, Fifth, Seventh and Eighth Circuits, so any eventual circuit split would set the stage for a writ of certiorari to the United States Supreme Court. If the cases are not dismissed, expert actuarial testimony and discovery would likely be required, and likely would test the concept of "reasonableness" of actuarial assumptions.

Possible Next Steps for Plan Sponsors

Because the plaintiffs' claims generally relate to benefits already accrued, plan sponsors are somewhat limited in actions they can take to avoid being the target of lawsuits like these. However, some sponsors have decided to analyze their risk of suit, identify possible options, and consider protective steps going forward. Sponsors should be aware that, unless structured properly, these types of reviews (and specifically the resulting findings/analyses) could later find their way into litigation. Groom's litigation and plan compliance teams are well positioned to assist plan sponsors with this analysis.