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BENEFITS REPORT

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With more than 25 attorneys practicing solely in employee benefits law, Trucker Huss is one of the largest employee benefits specialty law firms in the country. Our in-depth knowledge and breadth of experience on all issues confronting employee benefit plans, and their sponsors, fiduciaries and service providers, translate into real-world, practical solutions for our clients.

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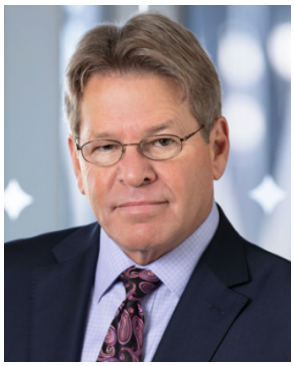
SECURE Retirement Legislation on Hold in the Senate



CRAIG P. HOFFMAN

AUGUST, 2019

Congress will soon be returning to Washington from its summer recess. The question for those interested in retirement policy is whether pension reform will finally move forward this year. The answer will depend on whether several key senators agree to lift the "holds" they have placed on the legislation.

Background

Over the last 10 years, various retirement reform proposals have been introduced in Congress. In 2016, Orrin Hatch (R-UT) and Ron Wyden (D-OR) jointly introduced the Retirement Enhancement and Savings Act of 2016 (RESA). This bill pulled together a number of ideas for retirement reform that had been under consideration. Noteworthy was the fact that the co-sponsors of the bill were the two highest ranking members of the Senate Finance Committee, the Republican Chairman and the Democratic Ranking Member.

Before it was introduced, the bill's provisions were carefully negotiated so as to be acceptable to both parties. Anything controversial was omitted to ensure bi-partisan support. As a result, the bill passed out of the Senate Finance Committee by a unanimous vote.

INDIVIDUAL ARTICLES WILL BE AVAILABLE AT TRUCKERHUSS.COM/PUBLICATIONS

IN THIS ISSUE...

Trucker ✦ Huss is pleased to announce...

Tiffany N. Santos has been elected Incoming Chair of the ABA's Joint Committee on Employee Benefits, and Vice-Chairperson of the Board of Directors of Advancing Justice — Asian Law Caucus effective July 2019.

Tiffany was also appointed Vice-Chair of both the EMI Planning Committee and the Health and Wellness Committee of the ABA Health Law Section.

The belief at the time was that RESA would be ripe for passage during the lame duck session of Congress after the 2016 elections. Unfortunately, Congress adjourned without taking up the measure. As a result, the bill "died" when the 114th Congress ended.

RESA was reintroduced during the next session of Congress, which began in 2017. The bill stalled as Congress focused on the top Republican priority, passage of the Tax Cuts and Jobs Act. Supporters once again hoped that RESA would be considered during the lame duck session following the 2018 mid-term elections. Many thought Congress would pass RESA to honor its then co-sponsor, Orrin Hatch, who was retiring at the end of that term. Other political matters intervened and once again, Congress adjourned without considering the legislation.

The SECURE Act of 2019

In 2019, the 116th session of Congress began and pension reform is again front and center. RESA was reintroduced in both the House and the Senate earlier this year. Then, in late March, Richie Neal (D-MA), Chairman of the House Ways and Means Committee, introduced the Setting Every Community Up for Retirement Act of 2019 (SECURE). SECURE is very similar to RESA. Some of the highlights include:

- Pooled Employer Plans (open MEPs) would be permitted;
- Plan fiduciaries would be given a new safe harbor standard to assist in prudently selecting an annuity provider for the plan;
- The "stretch" IRA would be eliminated;
- A new disclosure would be required on defined contribution plan benefit statements which would provide an estimate of the lifetime income stream that a participant could expect at retirement based on his or her current account balance;
- An employer sponsoring a 401(k) plan would have to offer long-term, part-time workers the opportunity to make elective deferral contributions;
- The deadline to formally adopt a new plan would be extended to the due date of the employer's tax return;
- The required beginning date for minimum distributions would be moved back to age 72 (from 70½);
- A single, aggregated Form 5500 would be permitted for groups of plans that share common trustees, fiduciaries, and investments;
- The annual safe harbor notice for plans using the non-elective safe harbor contribution design would be eliminated; and
- Plan loans made though credit cards would be prohibited.

Best Lawyers® 2020 Recognizes Trucker ✦ Huss Attorneys

We are pleased to announce that three of the firm's attorneys were recently selected by their peers for inclusion in *The Best Lawyers in America*® 2020 in the areas of Employee Benefits (ERISA) Law and ERISA Litigation.

The Trucker Huss attorneys named in The Best Lawyers in America® 2020 are:

R. Bradford Huss
Employee Benefits (ERISA) Law and ERISA Litigation
(25 Year Anniversary on the List)

Clarissa A. Kang
ERISA Litigation

Charles A. Storke
Employee Benefits (ERISA) Law
(15 Year Anniversary on the List)

Earlier this year, Trucker Huss was recognized as one of the *2019 Best Law Firms* by *U.S. News & World Report* and *Best Lawyers* in the areas of employee benefits law and ERISA litigation.

Since it was first published in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers is considered a singular honor. *Corporate Counsel* magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

The SECURE Act has strong bi-partisan support. On May 23, 2019, it passed in the House of Representatives by a vote of 417–3. The bill was immediately sent to the Senate for consideration, where it has languished. Senate Majority Leader Mitch McConnell (R-KY) has made approving federal judges a top Republican priority. Consequently, he is unwilling to spend precious floor time in the Senate considering pension reform legislation, at least for the time being.

As an alternative, supporters of SECURE sought to have the bill approved in the Senate by a unanimous consent vote, which could be done expeditiously without the need for debate or floor time. There was hope that the bill could be passed in this fashion ahead of the Memorial Day recess. However, this approach requires unanimity, which means any one senator can place a "hold" on the bill to delay the vote; and that is precisely what happened as several senators have raised concerns with SECURE.

There are several sticking points. Ted Cruz (R-TX), the most vocal objector, has taken issue with a last-minute decision to remove a provision that would have permitted home schooling and charter school expenses to be paid

from a section 529 plan. (Senator Cruz had previously sponsored standalone legislation with similar provisions.) The SECURE Act, as passed out of the House Ways and Means Committee, permitted this expanded use of section 529 funds. Democratic leadership, however, dropped the provision from the language of the bill before it came to the House floor. Apparently, some members of the Democratic caucus thought the expansion to cover charter schools and home schooling expenses would hurt the public education system and lobbied leadership to have it removed. Senator Cruz has objected to the provision being dropped, and he wants to add it back. He hopes to do so by bringing the bill to the floor of the Senate where it can be amended (which can't be done if passed by unanimous consent). He remains firm in his resolve because it is uncertain whether any other tax legislation will move through Congress before the 2020 elections, and he wants Section 529 expansion to be enacted as soon as possible.

Other Republican senators have complained about the mandate in SECURE that an employer who offers a 401(k) plan must allow long-term, part-time employees to make elective deferral contributions. This provision was not included in any previous iterations of RESA and was likely inserted into SECURE at the behest of Chairman Neal. Many believe it will cause administrative nightmares and act as a disincentive to plan formation, and therefore it needs to be more fully vetted before being considered for a vote.

What's Next?

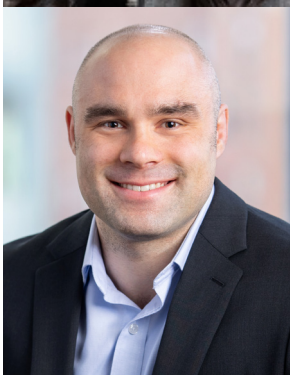
Congress is in recess and will return to Washington after the Labor Day holiday. Various trade associations, particularly those representing insurers and the financial services industry, are continuing their advocacy efforts in hopes of convincing the objecting senators to release their "holds." It is unclear whether they will be successful. It is equally unclear whether Senate Majority Leader Mitch McConnell (R-KY) will relent and allow for precious floor time in the Senate to be spent on a retirement policy bill.

Another possibility is for SECURE to be added to a "must pass" bill that will require consideration and floor time before year end, Senator McConnell's priorities notwithstanding. For example, to avoid a government shutdown, a budget bill funding the federal government's new fiscal year beginning October 1st will have to be enacted between now and then (or at least a continuing resolution to provide stopgap funding). SECURE could be made part of that bill and passed as a package. Much will depend, however, on the political landscape as we approach next year's elections.

Given the broad bi-partisan support backing SECURE, it is still more likely than not that it will get through Congress and to the President's desk by the end of the year. Then again, the same was said of RESA in 2018, and yet it never came up for a vote. The prospects for the bill's passage next year will become more challenging as the election cycle kicks into high gear. Plan sponsors and retirement plan professionals should keep a watchful eye on Washington as passage of SECURE will significantly affect retirement policy in America.

Craig P. Hoffman *is Counsel to Trucker Huss where his practice focuses on ERISA and federal tax matters. Prior to Trucker Huss, Craig was General Counsel to, and a retirement policy lobbyist with, the American Retirement Association in Washington, DC.*

Defined Benefit Plan Actuarial Equivalence Litigation — A Formidable Threat or An Unfounded Theory?



ANGEL L. GARRETT and BRYAN J. CARD

AUGUST, 2019

A new wave of putative class-action lawsuits filed under the Employee Retirement Income Security Act of 1974 (ERISA) has emerged onto the scene alleging that companies are using outdated mortality tables from the 1970s and 1980s in calculating alternative forms of benefits under defined benefit plans. Starting with four lawsuits in December of 2018, there are now nine lawsuits, all filed by the same two plaintiff-side law firms against plan sponsors Metropolitan Life Insurance Company ("MetLife"), American Airlines, PepsiCo, U.S. Bancorp, Rockwell Automation, Anheuser-Busch, Huntington Ingalls Industries, Raytheon Company, and Partners Healthcare System, and the plans' fiduciaries.

All nine lawsuits generally allege that the plans used unreasonable actuarial assumptions when converting the plans' normal forms of retirement benefit such as a single life annuity, to an alternative form of benefit, such as a joint and survivor annuity. Essentially, plaintiffs allege that the alternative forms of benefit are not actuarially equivalent to the normal form of benefit as required under ERISA and, therefore, some retirees who are participants in the companies' defined benefit pension plans have lost part of their vested retirement benefits in violation of ERISA section 203(a). The plaintiffs also claim that the plans' fiduciaries breached their duties in using these alleged outdated mortality tables. Ultimately, the lawsuits seek reformation of the plans, payment of benefits pursuant to the reformed plan's terms, and payment of improperly calculated and withheld benefits.

Defendants in seven of the cases have filed motions to dismiss, but decisions have been reached inonly two of these motions. The courts in *Smith, et al. v. U.S. Bancorp* (C.D. Minn.) and *Torres, et al. v. American Airlines* (N.D. Tex.) denied the defendants' motions to dismiss. While the plaintiffs may view these denials as victories, this does not indicate that the plaintiffs will prevail at the end of the day as litigation continues and actuarial experts are brought in. Moreover, there are still five motions to dismiss pending — which will likely increase to seven motions if the defendants in the two latest cases file such motions. Because this litigation is still in the early stages, it is unclear how significant a threat these lawsuits may prove to be, but given the increase in the number of lawsuits filed and the spread of these cases among six circuits — the First, Second, Fourth, Fifth, Seventh, and Eighth Circuit — plan sponsors should take a close look at their plan document, specifically the interest rate and mortality table specified in the plan document.

As shown in the chart on the next page, the plaintiffs in these lawsuits attack the use of various actuarial assumptions as unreasonable.

Article continues on page 7, following chart on page 6.

	Case Name	Venue	Complaint Filed	Mortality Table	Interest Rate
1	Masten, et al. v Metropolitan Life Insurance Company, et al.	S.D.N.Y.	12/03/18	1971 Group Annuity Mortality Table (GAM), set back one year for participants and set back five years for beneficiaries 1983 GAM, set back one year	6% 5%
2	Torres, et al. v. American Airlines, Inc., et al.	N.D. Tex.	12/11/18	1984 Unisex Pension Mortality Table (UP)	5%
3	DuBuske, et al. v. PepsiCo, Inc., et al.	S.D.N.Y.	12/12/18	Separate conversion factor for each category of alternative form of benefit	
4	Smith, et al. v. U.S. Bancorp, et al.	C.D. Minn.	12/14/18	Early commencement factor that varies depending on the participant's age at retirement if they retire before 65	
5	Smith v. Rockwell Automation, Inc., et al.	E.D. of Wisc.	04/08/19	1971 GAM 1984 UP	7% 6%
6	Duffy v. Anheuser-Busch Companies, LLC	E.D. Mo.	05/06/19	1984 UP	7% or 6.5% depending on the sub-part of the Plan
7	Herndon v. Huntington Ingalls Industries, Inc., et al.	E.D. Va.	05/20/19	1971 GAM	6%
8	Cruz v. Raytheon Company, et al.	D. Mass.	06/27/19	1971 GAM table 1971 Towers, Perrin, Forster & Crosby mortality table (TPF&C) 1984 UP	PBGC's interest rate for immediate annuities 7% PBGC's interest rates
9	Belknap v. Partners Healthcare System, Inc., et al.	D. Mass.	06/28/19	1951 GAM	7.5%

Actuarial Equivalence in a Defined Benefit Plan

Under the Internal Revenue Code (IRC), the plan document for a defined benefit plan must specify the plan's normal form of benefit, which must be expressed in the form of an annuity commencing at normal retirement age.[1] In most plans, the normal form of benefit is a single life annuity (SLA). In addition to the normal form of benefit, most defined benefit plans also offer a variety of alternative forms of benefit. Some of the more common alternative forms of benefit are the qualified joint and survivor annuity, certain and life annuities, and early retirement. Participants, regardless of the form of benefit they choose at retirement, accrue their benefit under the plan's normal form of benefit.[2]

If a participant at retirement elects an alternative form of benefit, then the accrued normal form of benefit must be converted to the alternative form of benefit, which must have a present value that is actuarially equivalent to the plan's normal form of benefit.[3] This conversion is accomplished through the application of the plan's actuarial assumptions that are based on mortality tables and interest rates (or a table of adjustment factors, e.g., early retirement factors), and those must be stated in the plan document.[4] The actuarial assumptions are then used to determine a conversion factor which is applied to the normal form of benefit to calculate the value of the alternative form of benefit.

Summary of Defendants' Motions to Dismiss

While all of the defendants advanced arguments specific to the facts and circumstances of their own case, below are the defendants' general arguments.

- **The actuarial assumptions used by the plans are not unreasonable.** The mortality tables at issue (e.g., 1971 GAM) are standard mortality tables under IRC regulations for nondiscrimination testing purposes and, therefore, are reasonable. In addition, the defendants argue that the alternative form of benefit and the normal form of benefit are "approximately equal in value" as set forth under IRC regulation C.F.R. § 1.417(a)(3)-1(c)(2)(iii)(C). These regulations governing "relative value" expressly state that a difference of five percent or less in value is deemed to be "approximately equal in value." Furthermore, the interaction between the mortality table and the interest rate allows for the interest rate to offset allegedly outdated mortality assumptions.

- **ERISA does not require that actuarial assumptions be "reasonable."** ERISA sections 203 and 205, 29 U.S.C. sections 1053 and 1055, do not require that plans use "reasonable" actuarial factors for calculating joint and survivor annuities.

- **Congress could have required plans to use "reasonable" actuarial assumptions but it did not.** Congress does require the use of reasonable actuarial assumptions, but not for the purpose for which the plaintiffs allege. IRC Section 1085(a) requires that plans use reasonable actuarial assumptions for funding purposes. Also, IRC Section 1393(a)(1) specifies that, for determining withdrawal liability in the aggregate, reasonable actuarial assumptions must be used. However, no such requirement is found with respect to the calculation of alternative forms of benefit.

- **There is no independent private right of action to enforce IRC Regulations.** Plaintiffs' claim must be dismissed because there is no independent private right of action to enforce the IRC regulations on which the plaintiffs rely.

- **The claims are barred by ERISA's statute of limitations.** ERISA states that no fiduciary breach claim may be brought six years after the "the date of the last action which constituted a part of the breach or violation." The plaintiffs received information regarding the actuarial assumptions more than six years from the date of the complaint.

- **There is no viable claim for breach of fiduciary duty.** There is no breach of fiduciary duty because plan design is a settlor decision, not a fiduciary decision.

Next Steps for Plan Sponsors

While awaiting a more definitive outcome in these cases, plan sponsors should review the interest rates and mortality table specified in their defined benefit plan documents. In addition to providing updates to plan sponsors, Trucker Huss is also available to assist with this analysis.

1 IRC Section 411(a)(7)(A)(i).

2 IRC Section 411(a)(7)(A)(i).

3 ERISA Section 204(c)(3), IRC Section 411(c)(3).

4 IRC Section 401(a)(25).

FIRM NEWS

On August 27, **Marc Fosse** presented a Lorman Education Services webinar entitled, *Share-Based Compensation — Impact of Recent Events on the Use of Equity Compensation*. Marc discussed recent legislative, judicial and accounting changes that affecting the way companies grant stock compensation to their employees, officers and board of directors.

Angel L. Garrett has been appointed Co-Chair of the Queen's Bench (Bay Area Women's Bar Association) Awards Committee.

On September 12, join **Marc Fosse** for a Trucker Huss Webinar: *Anatomy of an Employment Agreement*. This presentation will break down the components of an executive employment agreement, reviewing the purpose of each component, as well as best practices and tax-traps for the unwary.

Thursday, September 12, 10–11 AM PDT
To register: https://register.gotowebinar.com/register/6699542451678039563

Clarissa A. Kang has been appointed Vice-Chair of Programming for the ABA Trial Tort and Insurance Practice Section's Employee Benefits Committee, as of 8/1/2019.

On October 29, **Marc Fosse** will co-present a Strafford Webinar entitled, *Mastering IRC 457(f): Guidance for ERISA Counsel in Structuring Deferred Compensation Plans for Nonprofit Entities.* This CLE webinar will provide employee benefits and ERISA counsel with a thorough and practical guide to deferred compensation for nonprofit and exempt organization executives and employees.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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