

**2023 Advisory Council on
Employee Welfare and Pension Benefit Plans
Meeting on
Recordkeeping in the Electronic Age**

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Overview

- 1975 DOL guidance has led some courts to conclude that calculating DB pensions is a non-fiduciary, “purely ministerial” function
- Benefit calculations for large DB plans have become increasingly complex through benefit formula changes and corporate acquisitions
- Electronic recordkeeping in DB plans makes pension benefit information more accessible to participants
- But automation can perpetuate calculation errors over time and across participants
- Participants who rely on erroneous pension figures may have no recourse under ERISA’s fiduciary duty provisions
- DOL should clarify that communicating pension benefit information to participants is a fiduciary function

1975 DOL Guidance

The following “purely ministerial functions” are non-fiduciary when performed “within a framework of policies, interpretations, rules, practices and procedures made by other persons”:

- Calculation of services and compensation credits for benefits
- Preparation of employee communications material
- Maintenance of participants’ service and employment records
- Calculation of benefits
- Preparation of reports concerning participants’ benefits

29 C.F.R. § 2509.75-8, Q&A D-2



Electronic Recordkeeping in DB Plans

- Recordkeeper's proprietary system houses data necessary to calculate benefits
- Recordkeeper's proprietary system provides automated benefit calculations for many participants
- Participants can obtain new calculations online, on demand
- Participants can compare calculations based on various annuity start dates
- Participants can store prior calculations online
- Errors can replicate themselves over long periods and across multiple participants

DB Plan Benefit Calculations Have Become Increasingly Complex

- Multiple layers of protected benefits as new benefit formulas reduce benefits
- Multiple layers of protected benefits as plans are acquired
- Participants with multiple periods of employment
- Benefits must be calculated under multiple complex formulas
- Participants have no ability to independently verify calculations

DB Plan Benefit Calculations Have Become Increasingly Complex

- Examples:
 - A large bank's cash balance plan document has **74 appendices**, each governing benefits earned under a different acquired plan
 - A large employer maintains more than **20 “legacy plans”**; thousands of employees have benefits under multiple DB plans
- Pension benefit calculations delivered to participants may be labeled “estimates” or state that plan reserves right to correct errors
- Participants have no way to independently confirm calculations
- Prevalence of electronic financial statements supports belief in reliability

Examples From Litigated Cases

- Missing or incomplete records
- Misapplication of plan benefit formulas
- Failure to segregate alternate payee benefit

Pension Calculation Errors Can Be Life-Changing

- 12 statements over 6 years showed benefit of \$2,000/mo.; 3 months after retirement, benefit corrected to \$800/mo.¹
- Statements over 3 years showed benefit of \$1,600/mo.; 3 years after retirement, benefit corrected to \$768/mo.²
- Statements over 10 years showed benefit of \$1,000/mo.; pension was distributed as a lump sum of less than \$5,000³
- Statements showed benefit of \$7,000/mo.; 2 months after retirement, benefit corrected to \$2,800⁴
- 11 statements over 7 years showed NRB of \$3,900/mo.; upon retirement, corrected to \$1,700/mo.⁵
- For over 3 years, statements showed lump sum benefit of \$800,000 to \$1,000,000; actual lump sum was \$500,000⁶

Recent Applications of the 1975 Guidance in the Context of Electronic Recordkeeping

- *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020 (9th Cir. 2021)
- Online pension calculator overstated participants' pensions
- Recordkeeper's "calculation of participants' future pension benefit estimates was itself not the type of communication with beneficiaries that is fiduciary in nature"
- Dismissal of breach of fiduciary duty claims against Plan Administrator and recordkeeper affirmed
- DOL brief in support of rehearing argues that court has misconstrued the 1975 Interpretive Bulletin as to the Plan Administrator

Recent Applications of the 1975 Guidance in the Context of Electronic Recordkeeping

- *Hawkes v. Wells Fargo & Co.*, 2018 WL 11182068 (N.D. Cal. 2018)
 - Online calculator stated that participant's pension was double the correct amount
 - “That Defendants made an unfortunate, and major, error in applying [the plan formula] does not, without more, transform the pension projection into a fiduciary act.”
 - Breach of fiduciary duty claims dismissed against Plan Administrator and recordkeeper
- *Dutra v. Recology, Inc.*, 2021 WL 4722959 (N.D. Cal. 2021)
 - Participant retired based on recordkeeper's representations that his pension was vested, but it was not
 - Breach of fiduciary duty claims dismissed against Plan Administrator and recordkeeper

Recent Applications of the 1975 Guidance in the Context of Electronic Recordkeeping

- *Miller v. Campbell Soup Co.*, 2022 WL 1093652 (D.N.J.)
- Online calculator provided by recordkeeper overstated participant's pension
- Participant stated claim for breach of fiduciary duty against Plan Administrator
- “Defendant’s argument is that because the calculation of benefits is ministerial, it is not possible to bring a claim relating to an incorrect or misleading calculation of benefits. But this lawsuit is not against a ‘person who performs purely ministerial functions.’ It is against the administrative committee of the Plan.”

9th Cir. Distinguishes *Bafford*

- *Morris v. Aetna Life Ins. Co.*, 2023 WL 3773656 (9th Cir. 2023)
- LTD insurer overstated and overpaid benefit
- District court dismissed breach of fiduciary duty claim based on *Bafford*
- Dismissal reversed because even if initial benefit calculation was not discretionary, subsequent actions were:
 - Consulted with participant by phone about her benefit amount
 - Confirmed benefit amount in letters it knew participant would share with lenders
 - Communicated with financial institutions to verify participant's benefit amount
 - Gathered participant's earnings information and interpreted the Plan's terms to determine which benefits and deductions applied
 - Collected overpayment
- “The extent of Aetna’s involvement in Morris’s financial life distinguishes her case from the ministerial calculation error addressed in *Bafford*.”

If Pension Calculations Are Non-Fiduciary, Are They Inherently Unreliable?

Affirmative defenses asserted by recordkeepers:

- Contributory negligence: Participant acted negligently in relying on pension calculations provided by recordkeeper¹
- Assumption of risk: Relying on recordkeeper's pension calculations was inherently risky and participant knowingly and voluntarily assumed risk²
- Reliance on recordkeeper's pension calculations was "unreasonable as a matter of law"³

Conclusion

- DOL should clarify that its 1975 guidance on ministerial functions does not apply to named plan fiduciaries
- DOL should clarify that the communication of plan benefit amounts to participants is a fiduciary function when the communication is made by an entity that establishes calculation systems or methods

Notes

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¹ *Bafford, et al. v. Northrop Grumman Corp., et al.*, No. 2:18-cv-10219 (C.D. Cal.)

² *Id.*

³ *Wilson v. Bank of America Corp.*, No. 3:18-cv-07755-TSH (N.D. Cal.)

⁴ *Wallace v. Int'l Paper Co.*, No. 2:20-cv-02478-SHL (W.D. Tenn.)

⁵ *Mabry v. ConocoPhillips Co.*, No. 3:20-cv-00039-SLG (D. Alaska)

⁶ *White v. Aetna Inc.*, No. 2:17-cv-513 (C.D. Cal.)

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¹ *White v. Aetna Inc.*, No. 2:17-cv-513 (C.D. Cal.); *Wilson v. Bank of America Corp.*, No. 3:18-cv-07755-TSH (N.D. Cal.)

² *White v. Aetna Inc.*, No. 2:17-cv-513 (C.D. Cal.); *Dutra v. Recology, Inc.*, No. 4:20-cv-08716-JST (N.D. Cal.)

³ *Wallace v. Int'l Paper Co.*, No. 2:20-cv-02478-SHL (W.D. Tenn.)