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## When Equivalence Is Not Equivalent: Increase in Actuarial Equivalence Lawsuits

Defined benefit plans typically offer participants several ways to receive their benefits, including single life annuities, joint and survivor annuities, and certain life annuities (guaranteed payments for a certain number of years). ERISA requires that any retirement benefit that is not a single life annuity must be the actuarial equivalent of a single life annuity. These rules can be complex. For example, beneficiary benefits under a joint and survivor annuity must be between 50% and 100% of the amount paid during the participant's life, and benefits cannot be less than the amount that would be payable as a survivor annuity under a Qualified Joint and Survivor Annuity ("QJSA").

Over the last few years, several large pension plans have been sued, with participants alleging improper calculation of an actuarially equivalent benefit. These lawsuits focus primarily on the use of outdated mortality tables. We expect litigation in this area to increase in the next few years.

### Previous Actuarial Equivalence Litigation

Prior to 2023, mortality table arguments in actuarial equivalence lawsuits received mixed results. The U.S. District Court for the District of Massachusetts dismissed a class action in March 2022 (*Belknap v. Partners HealthCare System, Inc.*), holding that nothing in ERISA requires the use of "reasonable" or "current" actuarial assumptions when calculating optional forms of benefits. Specifically, the court noted that ERISA facially "does not specify what inputs to use, nor does it explicitly require them to be 'reasonable' – either individually or in the aggregate." However, in similar cases like *Cruz v. Raytheon Co.* (also in the District of Massachusetts) and *Berube v. Rockwell Automation, Inc.* (Eastern District of Wisconsin), the cases lasted several years before concluding with significant settlements.

### Current Actuarial Equivalence Litigation

Five notable (and largely identical) lawsuits brought over the past few months have focused on the argument that ERISA requires the assumptions used in actuarial equivalence calculations be reasonable. Defendants in these cases include the plan sponsors and fiduciaries related to the pension plans of FedEx, Kohler, Kellogg, Howard University, and Duke University. All of the defined benefit plans used mortality tables published between 1963 and 1984 when calculating optional benefit forms. Plaintiffs argue that using *current* assumptions is an *implicit* requirement of ERISA.

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Plaintiffs also cite to publications by the Society of Actuaries (“SOA”). Each defendant plan used a mortality table published by the SOA in calculating optional forms of benefits, but in 2014 the SOA issued updated actuarial tables with a statement that the prior mortality table issued in 2000 “no longer reflect[ed] the actual mortality experience of pension plan participants and projected trends in that experience.” Plaintiffs argue that if the 2000 mortality table was already inaccurate 14 years after publication, the use of mortality tables published between 1963 and 1984 cannot be reasonable.

Plaintiffs also cite to a 2021 case, *Masten v. Metropolitan Life Ins. Co.* (S.D.N.Y.), where the court concluded that “benefit plans must use actuarial assumptions that are reasonable in order to qualify as actuarially equivalent within the meaning of the Act [ERISA].” The court found plaintiffs’ argument plausible that use of decades-old tables was not reasonable in light of updated alternatives, rejecting defendant’s argument that the Treasury Department implicitly endorsed the use of 1971 and 1983 mortality tables for actuarial equivalence when it required their use for ERISA nondiscrimination rule purposes.

Pension plan fiduciaries and sponsors should review their plan documents and consider whether the actuarial assumptions used by their plans are reasonable. Kutak Rock’s [Employee Benefits and Executive Compensation Group](#) is available to assist with a review of the actuarial assumptions in your defined benefit retirement plan.

