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Obstacle Course

Retiree Runaround: Trying to Challenge A Benefits Decision

For Fred Loewy, Years of Calls
And Letters to Motorola
Brought Scant Response

The Plan-Document Catch-22

By ELLEN E. SCHULTZ
 Staff Reporter of THE WALL STREET JOURNAL
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Fred Loewy wanted to leave his wife financially secure when he died, so he delayed his retirement at **Motorola Inc.** till he was almost 73. Not only would the delay mean bigger Social Security checks someday, he figured, but he'd earn a bigger pension from his employer too.

But when his company pension didn't turn out to be as large as he expected, Mr. Loewy learned a fact of retiree life he hadn't reckoned on: the complexity, sometimes exasperating, of trying to appeal a benefits calculation.



Fred Loewy

Mr. Loewy, now 80, embarked on an epic quest through the deep thickets of pension law and administration. Starting in 1998, he spent years sending letters and making phone calls that Motorola generally didn't respond to. Motorola says it cooperated exhaustively with Mr. Loewy but it didn't dispute most details of his account in an eventual court case.

Mr. Loewy ran into a giant Catch-22: Federal law says any retiree who disagrees with a company's benefits decision has a right both to appeal it and to see the benefit-plan documents it is based on. But not knowing what provisions lie behind a decision, retirees don't know what documents to ask for. Essentially, they're at the mercy of former employers to tell them which relevant materials exist and to provide access to those materials.

Then there is the federally prescribed series of steps in any appeal, each of which allows months for the parties to act and thus extends the process. Litigation is a rare and distant option. Few retirees can afford it, few lawyers are interested in taking such cases, and no suit can be filed until all interim appeal steps have passed. All this while, a statute of limitations is ticking, and the aging retiree often is running out of time and energy.

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Retirees are increasingly being thwarted by this Kafkaesque process, advocates for seniors say. Employers "are not giving people the information or documents they need to check their benefits calculations," says John Hotz, deputy director of the Pension Rights Center. His group, along with others such as AARP, are urging the federal government to fix the problem, by enforcing the current disclosure rules and adding new ones.

Mr. Loewy worked for 35 years at a Motorola lab in Scottsdale, Ariz., testing the reliability of computer chips used in Minuteman guided missiles and aircraft radios. He started drawing his company pension at 71, as the law then required, even as he remained employed. The day after he finally retired in January 1998, he checked the math that his pension was based on and concluded Motorola had made a mistake.

It had to do with Social Security. Motorola subtracts from a monthly pension payment half the amount of a retiree's monthly Social Security check. This is legal, and about half of companies that pay pensions do it. But Mr. Loewy figured Motorola was subtracting too much.

His Social Security, which he also delayed taking until the latest possible age of 70, was larger than it would have been if he'd started it at 65. A "delayed retirement credit" had increased the checks, as it does for all who postpone benefits. Mr. Loewy's issue: Motorola was subtracting from his pension not merely half of the Social Security benefit he was eligible for at 65 -- as the plan allowed -- but also half the delayed-retirement credit.

For this to be legal, the pension plan must specifically provide for it. Motorola's didn't, as far as he could tell from the summary of plan rules he was given when he retired. He figured his \$1,100 monthly pension ought to be slightly higher as a result, and wrote to the administrator saying why he thought so.

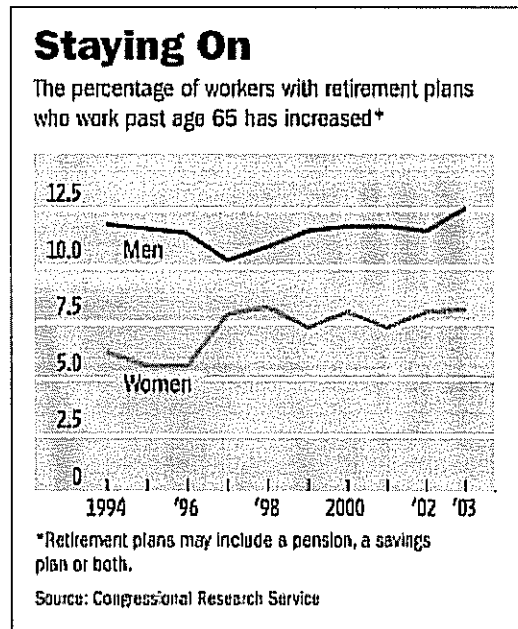
If a retiree challenges a benefits ruling and makes a written request for documents, the plan administrator must respond with an explanation of its position within 30 days, under the federal benefits law known as Erisa.

The response to Mr. Loewy: A month after writing his letter, he got a check for \$222, without explanation.

In April 1998, he wrote again, asking the plan to recalculate his pension and explain what it was doing. Soon after, he received another check, this one for \$111, again without explanation.

At that point his wife, Marilyn, who was 10 years his junior, died suddenly from a bad reaction to medication. Mr. Loewy stopped pursuing his pension issue for a long time as he dealt with family matters and medical claims. In late 2001 he resumed his pursuit of the matter. He mailed a certified letter to the pension administrator in December 2001 asking the company to recalculate his pension, send him copies of the pension formulas that had been used, and explain what was going on.

Frequently Asked Questions



Receiving no answer, he phoned the administrative offices in January 2002, and was told his letter hadn't been received. Then -- in an account he later filed in court and that Motorola didn't dispute -- he sent the letter again, once again certified, and again got no answer.

In February 2002, he called again, and was again told that his letter hadn't been received. He sent it a third time.

In March, not having heard back, Mr. Loewy again sent a certified letter asking administrators to refigure his pension.

In April, he phoned and was told yet again that his letter hadn't been received. Mr. Loewy sent the letter again. This time, an administrator wrote back saying it had been received and asking Mr. Loewy to resend his December letter. He did so.

In May, the administrator sent him a pension-plan rules summary dated 1996 and one dated 1997. Known as a "summary plan description," this is a booklet companies commonly give workers and retirees, and indeed Mr. Loewy already had one dated 1998, the year he retired. But the administrator didn't discuss how his pension had been calculated, as he was requesting. So on June 3, 2002, Mr. Loewy wrote to Motorola's Appeals Center, complaining that his requests for a review of his pension calculation had been "consistently ignored."

Five months later, after more letters and calls, he received in the mail two booklets summarizing the plan's rules -- the 1997 and 1998 editions, which he already had.

Under federal pension law, employers are supposed to provide beneficiaries with an explanation of how their benefits were calculated and make available the plan documents they need to understand the rules. Unless they're given documents with the needed information, beneficiaries can't know what the formulas or rules are, so they can't check a calculation or adequately challenge a benefits decision.

A federal appeals court addressed this problem in 1998, after a disabled employee of Kmart Corp. appealed its decision to stop buying life insurance for him. Being disabled gave him a right to insurance, and he got a doctor's letter attesting to his disability.

But the letter didn't call him "totally and permanently disabled," as the plan, unknown to the worker, required. Kmart denied his claim. A federal appeals court eventually ruled the firm should have given him fuller information, saying: "The Erisa claims process is not designed to be an endurance contest where an employee must continue to appeal, without knowing what information an employer requires...."

Brothers in Arms

Many retirees might have given up at this point, but Mr. Loewy comes from tenacious stock. His father, Elias, ran a radio shop in Alsace, France, until 1940, when the Loewys, who were Jewish, were interned. They escaped and fled south to the mountains near Montpellier, where a teacher taught them how to pass as Catholics.

Fred, a teenager, used his chemistry skills to make shoe polish and soap, which he traded for tobacco that he then swapped for food. He and his brother, Max, joined a unit of the French underground called St. Germain de Calberte. Fred fixed the group's makeshift weapons and the

brothers fought the Germans, though Max was killed. After the war, Fred, his parents and his sister came to the U.S. and settled in Phoenix.

Mr. Loewy began 2003 with a fresh effort to get the documents. He wrote to a plan administrator in Scottsdale, Noemi Lopez. The letter came back, marked undeliverable after three attempts. In her affidavit, Ms. Lopez said she had "no knowledge of anyone attempting and failing to deliver a letter to me on three occasions."

In March, after more unanswered letters, he reached Ms. Lopez on the phone. She said she hadn't received his letter, Mr. Loewy later told a court, in an account that Ms. Lopez didn't address in her own court affidavit. He re-sent it.

In late April, after Mr. Loewy left messages twice, Ms. Lopez called him back. According to her affidavit, she said she would ask an actuarial specialist to review his calculation, and that when she had an answer she would advise him.

In early May, Mr. Loewy received a letter from Ms. Lopez telling him that "our legal counsel" would address his request that his pension be recalculated.

He decided a personal visit was in order. He had already asked Ms. Lopez by phone if he could visit to review pension-plan documents, a right beneficiaries have by law. In her later court affidavit, Ms. Lopez said she told him she "didn't work in an office that serves such a purpose and would not necessarily have the documents he wanted to review since he did not know what he wanted to review." Ms. Lopez declined to comment for this article.

In May 2003, Mr. Loewy drove the 20 miles from his Glendale, Ariz., home to the benefits administrator's Scottsdale offices and asked to see documents and speak to Ms. Lopez. According to his sworn affidavit, a receptionist told him that Ms. Lopez was leaving for a meeting and that he couldn't see any documents.

Then, for the first time since his initial request for a benefits explanation in January 1998, Mr. Loewy got a written response. It came from Fredric Singerman, an outside lawyer for the pension plan, from the Washington law firm of Seyfarth Shaw. The letter said the plan's rules did, in fact, let Motorola subtract from the pension half the Social Security delayed-retirement credit. What's more, said the letter, it was too late to appeal. The reason: Mr. Loewy had been receiving his pension for more than five years.

Mr. Loewy had never seen a reference to a statute of limitations. So he wrote back, asking the lawyer for details of it.

A second letter from Mr. Singerman came two weeks later. It said Mr. Loewy had exhausted his right to appeal and it was also too late to go to court.

This letter said Mr. Loewy's appeal window had closed as soon as he first inquired about his pension calculation, in 1998. It said Ms. Lopez "has been very cooperative and patient in explaining how your benefits were calculated and why the calculation amount was correct."

Mr. Singerman wrote that Ms. Lopez would send Mr. Loewy plan documents for 1995 to 1998. "If you are aware of other documents relevant to your claim, you will need to specify them," the lawyer wrote. "However, we cannot permit you to use the Plan's offices to browse Plan records

without limit in hopes of finding something 'useful,' and we are not aware of additional documentation that would serve to perfect your claim."

Legal Aid

In November 2003, Mr. Loewy sued the Motorola pension plan and its administrator over how his pension was calculated. By this time, Motorola had outsourced administration of the plan to **Hewitt Associates Inc.** of Lincolnshire, Ill. Ms. Lopez joined Hewitt as a project manager in June 2003 and continued handling Motorola's plan. Hewitt, which wasn't named a defendant, says it doesn't comment on specific clients but "we place the highest importance on customer service."

Mr. Loewy's suit, filed in federal court in Phoenix, said Motorola could subtract from his pension half of the Social Security he was entitled to at 65, but not half of the delayed-retirement credit that enhanced his ultimate Social Security benefit. The suit also asserted that Motorola had made another mistake calculating Mr. Loewy's pension for the years he worked past age 65, with the result that it owed him more than \$100,000.

It contended, as well, that the plan had denied his claims without adequate explanation and wrongly told him the statute of limitations had expired. The complaint, filed by the Phoenix law firm of Martin & Bonnett, was a class action, whose result would apply to at least 500 Motorola retirees who worked past 65.

Motorola's pension plan replied in court that it had calculated Mr. Loewy's pension correctly. It also said it had cooperated exhaustively with Mr. Loewy and Hewitt had spent 196 hours responding to Mr. Loewy's lawyer's document requests. An affidavit from Ms. Lopez said that she "repeatedly explained the benefits calculation and gave him plan documents."

This March, Judge Frederick Martone ruled that Motorola's plan didn't permit it to offset half of Mr. Loewy's Social Security delayed-retirement credit. This was what Mr. Loewy contended in his very first letter in January 1998, but couldn't prove for lack of plan documents.

The judge also said Motorola's response to Mr. Loewy's inquiries hadn't complied with federal law. "Defendants admit that the May 6, 2003, letter was the first written response to plaintiff's claim that his Social Security offset was miscalculated," he wrote. If a plan administrator denies a claim, it must say so in writing within 90 days, the judge said, adding that the check Mr. Loewy received, without explanation, in March 1998 didn't meet this test, nor did the outside lawyer's letter in May 2003.

Judge Martone also rejected a contention by the Motorola plan that the labor statute, Erisa, required it to provide only the latest plan documents. Erisa says an administrator "shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, and terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The judge wrote that under this language, Mr. Loewy "is entitled to see all the Plan documents under which the Plan actually operates."

The judge also rejected the idea that the statute of limitations had expired.

In May, the Motorola plan agreed to settle, and the preliminary agreement, which is currently confidential, was filed earlier this month. Once the judge rules on the terms of the agreement,

sometime this summer, notifications will be sent to the class members for approval.

Mr. Loewy retains a sense of perspective about the fight. He spends time translating his records from World War II, including a eulogy that a French Protestant minister gave at his brother's 1944 funeral: Max fell in "an uneven battle," said the cleric, against an adversary that had him "outclassed...in number of and strength of weapons."

Compared with those times, Mr. Loewy muses, "This pension matter is nothing." Still, he won't let it go. "I'm 80. My days are numbered. I only hope to live long enough to see this suit completed."

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