

Oral Remarks of Anna-Marie Tabor
To the ERISA Advisory Council
On the Subject of
Recordkeeping in the Electronic Age
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My name is Anna-Marie Tabor, and I am a Visiting Professor of Law at the University of Massachusetts School of Law. For five years, I provided free legal assistance to plan participants as the Director of the Pension Action Center (PAC), a regional pension counseling and information center that is located at the University of Massachusetts Boston, and where I continue to serve as an adviser. The Pension Action Center was founded in 1994 to provide free legal help to workers, participants, and their families about problems with their retirement benefits. Today I am testifying on behalf of the Pension Rights Center with Norman Stein.

Thank you for the opportunity to speak with you today. I previously submitted written comments about the implications of the shift to electronic and digital recordkeeping. In my oral remarks today, I will share examples of the challenges that participants face when electronic recordkeeping goes wrong.

The quality of a retirement plan's recordkeeping can make or break participant access to benefits. During my time as PAC Director, I either worked on or supervised cases involving hundreds of participants who could not access their pension or 401(k) benefits at retirement. Lost benefits were the most frequent problem I encountered, and almost every lost benefit involved missing or inaccurate records.

I would like to share the story of a client whom I will call Ron, and his wife Lisa, although those are not their real names. Ron worked for a local New England bank in the 1970s and 1980s before moving on to other opportunities. He was at the bank long enough to vest in his defined benefit pension.

The banking industry went through significant consolidation in the 1980s and 1990s. The bank where Ron worked first merged with another local bank, and subsequently merged with a larger bank that has branches nationwide.

When Ron reached retirement age, he contacted the successor bank to start his pension. He had several old pension statements that clearly indicated that he was vested, and that even mentioned the amount of the monthly benefit due to him. However, the successor plan told him that they had no records of his pension. They told him that he probably received a distribution at some point over the previous decades, which, they said, would account for his pension not being included in their electronic records. Notably, the plan did not have any records of a distribution previously paid to Ron.

Ron and Lisa refused to take no for an answer, and they asked the Pension Action Center for help. When we contacted the plan on Ron's behalf, the plan told us a different story. They denied that they had acquired liability for any of benefits owed to any of the participants in Ron's plan. We knew that this was wrong, because we had already confirmed with the Pension Benefit Guaranty Corporation that the bank was paying premiums for Ron's original plan.

There was another reason we knew that the plan was wrong. It turned out we had helped one of Ron's colleagues with a similar issue several years earlier.

In the prior case, as in Ron's case, the successor plan had denied liability for the client's pension. We had contacted a former recordkeeper for the plan and identified an employee who I am happy to say went above and beyond to help locate the lost pension.

It turned out that electronic recordkeeping was at the root of the problem. Our contact found data from an old system that was no longer in use. The records for employees of the original bank were included in this older data, but the older data had not been integrated into the plan's newer systems. As a result, when participants in the legacy plan tried to claim their pensions, they were told – incorrectly – that they did not have a benefit.

Over my five years at the Pension Action Center, countless participants sought out the Center's help after their pension plan told them that they were not listed in their computer systems. When we then pursued these matters, many times the plan would agree to conduct further research, which sometimes led to the benefit. While my colleagues and I were always happy to help, we also were deeply troubled that most participants do not have access to legal resources to help them claim their benefits. We worry that they will take that initial "no" from the plan as a final response.

Ron's story has a bittersweet ending. He started his pension last February, which was a year and a half after we started working with him. During that time, Ron developed cognitive and physical impairments that would have made it impossible for him to pursue the matter alone. And while Ron has a spouse who is caring for him and helping with his affairs, many

other Americans in Ron's position struggle on their own. What will they do when their pension plan tells them – as Ron's told him – that they "must have received a distribution" because the plan cannot find them in their electronic records? I expect that many of them will simply give up, and never recover the money they earned.

Next, I would like to share the story of another client, whom I will call Susan, although again this is not her real name. Susan's husband died in the 1980s, leaving her with a small survivor benefit. For over 30 years, she held onto paperwork from his plan stating that she would be able to collect his benefit when she turned 65.

When Susan finally reached retirement age, she tried to start her pension by contacting the company that had acquired her husband's former employer. While the successor company acknowledged that her husband's pension plan had merged with their own, they also indicated that they had no record of Susan. I filed a claim on her behalf, which was denied. I also filed an appeal, which the plan denied as well. The plan asserted that Susan must have received a distribution of her benefit, even though the plan's records had no information about any such distribution. The plan explicitly treated the lack of information in its own database as evidence supporting the denial—despite the extensive documentation that Susan had retained in her own files.

Susan is one of many of my clients whose benefits were denied based on the plan's lack of data in its own systems. These denials leave participants feeling accused of dishonesty, forgetfulness, and bad faith. The reality is that retirement plans have been operating for

decades in an environment with insufficient guidance related to recordkeeping, and without consequences for errors that ultimately result in participants losing their benefits.

I would like to note how these stories illustrate several themes raised by prior witnesses on this topic.

First, company mergers are a stress point for electronic data, which may be corrupted or lost during the transition. In the two client cases I described, and many, many others, plan sponsors and plans were merged. Ron and Susan had defined benefit pensions, but this is also a significant issue for defined contribution plans. It is imperative that plans of all sizes and their recordkeepers collaborate to ensure that no participant data is lost at these transition points.

Second, systems upgrades and transitions are also a stress point. Ron's case was unusual because we were able to pinpoint a change in the data system as the moment when participant information was lost. I suspect that many more lost pension cases also involve data that slipped through the cracks when systems were transitioned or upgraded.

Third, plans and recordkeepers would benefit from additional guidance from the Department regarding data practices, including practices when data is known to contain errors and omissions. Plans and participants would benefit from an honest and open discussion about how plans should respond when a *bone fide* participant is missing from the plan's records. This is a common and costly problem. Currently these costs are borne by the individual participants who are denied the benefits they earned.

Thank you again, and I look forward to answering your questions. I now will turn over the microphone to Norman Stein to continue the testimony.