

Seventh Circuit's Contilli Decision Clarifies Requirements for Post-Retirement Actuarial Adjustments

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What is the "benefit" that becomes nonforfeitable once the plan's vesting standards have been satisfied? *Contilli v. Local 705, Int'l Bhd. of Teamsters Pension Fund*, 559 F.3d 720 (7th Cir. 2009), adds to the unbroken line of recent Federal Circuit Court cases which have concluded - as many would contend the statute and regulations have long made clear - that the "benefit" to which Code § 411 and its ERISA counterpart refer is the lifetime stream of annuity benefits commencing at a participant's normal retirement age; and that what ERISA's nonforfeiture provisions protect is the **value** of that benefit stream. What this means in plain English is that, absent an explicit statutory or regulatory exception, the *value* of the benefit a participant actually receives can never be less than the *value* of the participant's vested accrued-to-date benefit payable under the terms of the plan at normal retirement age.

Thus, for example, a participant who requests a cash-out of her accrued benefit at normal retirement age is entitled to a lump sum amount equal to the value of the life annuity she would have received commencing at that age had she elected that form of payment. A participant who asks to start her benefit *before* normal retirement age is entitled to a lump sum or stream of payments with a value at least equal to the value of the life annuity that would have commenced at normal retirement age, had she waited to commence benefits

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until that age. Finally - and this was the fact pattern specifically addressed by *Contilli* - a participant whose benefit payments commence *after* normal retirement age is entitled to a lump sum amount or stream of payments with a value at least equal to the value of the life annuity she could have received had she retired and commenced benefit distributions at normal retirement age. Again, there are limited exceptions - for example, in the case of a participant who continues to work past normal retirement age and receives a timely suspension of benefits notice. But absent an explicit statutory or regulatory provision, the value of the normal retirement annuity must be preserved.

For benefits that commence after a participant's normal retirement age, there generally are three fact patterns. First, in the case of a participant who has terminated employment, any late commencement of benefits must be accompanied by interest or an actuarial adjustment, as dictated by the circumstances. (Contrary to common belief, whether to pay interest or make an actuarial adjustment is not left to the discretion of the plan or the employer - the facts generally dictate one or the other as appropriate). Second, in the case of a participant who continues to work a sufficient number of hours and receives a timely suspension of benefits notice, an adjustment generally is not required (unless upon termination of employment, payments do not begin promptly, *i.e.*, the first fact pattern). Third, in the case of a participant who continues to work but does *not* receive a timely suspension of benefits notice, a complicated adjustment process is mandated. According to the IRS, a participant in this situation is entitled to a benefit calculated *as of the end of each year* that is the greater of (i) the benefit calculated under the plan's benefit formula taking all years or service into account, or (ii) the benefit payable as of the close of the preceding year, actuarially adjusted through the end of the current year. This greater-of rule is applied iteratively to determine the benefit payable as of the end of each succeeding year until the benefit commencement date. Prop. Treas. Reg. § 1.411(b)-2(b).