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BofA plan assailed in lawsuit

Bank denies claim that pension policy inflates profits at employees' expense

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Bank of America Corp.'s pension plan uses an unusual retirement age to calculate pension benefits that could be costing employees tens of millions of dollars, according to a recent motion in a lawsuit against the company.

In the suit, current and former employees allege the Charlotte bank violated federal pension rules in an effort to make profits at the expense of its workers.

The bank says the plan is designed to give employees more diversified investment options and meets applicable law. The bank plans to defend itself "vigorously," spokesman Terry Francisco said.

The motion filed this month targets the retirement age used by the "cash-balance" plan the bank launched in 1998, shortly after NationsBank Corp. merged with BankAmerica Corp.

The plan uses a retirement date of five years of work at the bank, instead of what the motion calls a "normal" retirement date of age 65. Plaintiffs argue the date violates federal law and allows Bank of America to boost profits by paying workers less than they would receive with a later retirement date.

The case, originally filed last year in federal court in Illinois, moved in May to the U.S. District Court for the Western District of North Carolina in Charlotte. The motion asks U.S. District Judge Bob Conrad to rule on the legality of the retirement age, calling it the "single-most important question" in the case.

The motion says the nation's No. 2 bank by assets could owe tens of millions of dollars now and in the future to tens of thousands of current and former employees. Bank of America employs about 178,000, including 13,000 in the Charlotte area.

In a filing last week, the bank asked the court to stay the plaintiffs' motion until decisions on class-action certification and other matters. The bank argues plaintiffs are trying to "pluck one issue out of sequence ... and test the waters before moving forward with their other claims."

Details of complaint

Cash-balance plans are defined-benefit pension plans, offering a monthly payment to retirees or a lump-sum payout. But they are similar to a 401(k) plan in that employees have a "virtual" account showing the value of benefits. They are pitched as more

favorable to younger, mobile workers because they can easily see their account balances and roll them into Individual Retirement Accounts when they leave for another job. Since the 1990s, an estimated 1,200 employers with 7 million employees have switched to cash-balance plans.

Plaintiffs call Bank of America's pension plan "unusual and aggressive" because it awards workers hypothetical investment credits in their pension. Those credits rise and fall with the market instead of increasing at a fixed rate over the years.

This feature, according to the suit, allows the company to make extra money because Bank of America is better at investing than a typical employee, and can pocket the difference.

Plaintiffs say the other unusual feature is the five-year retirement age. The only other company with a five year-age, the motion contends, is PricewaterhouseCoopers, the accounting firm that helped design the bank's plan. The early date affects employees who leave the company before age 65 and choose to receive their pension in a lump sum, instead of a monthly annuity.

Take the example of a 55-year-old employee with a \$10,000 account balance who leaves a company and asks for a lump-sum payment. In a plan using a retirement age of 65 and an expected pension plan return of 8.5 percent, the employee would actually receive \$14,000 -- an extra \$4,000 -- because of future interest.

In Bank of America's plan, however, the employee wouldn't receive the extra money, just \$10,000. That's because the early retirement date eliminates any future gains.

Bank of America believes its five-year retirement age is permissible under pension law, Francisco, the bank spokesman, said. The retirement age "is part of the plan's design that allows the bank to allow a range of investment options," he said.

Plan isn't prevalent

The normal retirement age for a pension plan is usually age 65, said Gordon Young, retirement practice leader in the Charlotte office of Mercer Human Resource Consulting.

He said Bank of America's retirement date gained attention in human resources circles when the plan was created. He hasn't encountered other plans with a similar age.

While it's not prevalent, Janice Gregory, who lobbies on pension issues for major corporations, said there are other companies that use a five-year retirement age. She could not provide any examples.

She acknowledged the five-year date would let Bank of America avoid paying projected account balances on lump sums. The five-year date is lawful, said Gregory, a vice president with the Washington-based ERISA Industry Committee.

In the motion, plaintiffs acknowledge that pension rules allow flexibility on a retirement age to accommodate different types of workers such as airline pilots. But the motion contends this flexibility cannot be used to bypass key regulations.

Five years "is not the age at which Bank employees normally retire," the motion states. "The bank employs tellers and office workers -- not NFL running backs."

IRS Audit Ongoing

The retirement age isn't the only unusual aspect of Bank of America's pension plan at issue in the suit.

The lawsuit also challenges the voluntary transfer of millions of dollars of employee assets from Bank of America's 401(k) plan to the pension plan in 1998 and 2000.

The IRS is auditing tax returns of the bank's pension and 401(k) plans and has "tentatively concluded" the bank violated tax rules with the transfer, according to a March securities filing.

The audits could take one to two years to be resolved, according to the company filing.