By Stephen J. Silverberg, CELA, CAP

The Day an Elder Law Attorney Walked Into a Room of Retirement Experts

Stephen J. Silverberg, CELA, CAP, testified at a recent DOL ERISA Advisory Council hearing on "de-risking" transactions of employer-sponsored defined benefit plans.

Encouraging savings and engineering lifetime income has recently dominated the thinking of retirement experts. Running out of savings in old age is an issue for many. Unfortunately, these discussions often lack the analysis of what happens to your hard-earned money when a catastrophic illness strikes you or a loved one.

Congress designed the Employee Retirement Income Security Act of 1974 (ERISA) and portions of the Internal Revenue Code to protect (the former) and increase (the latter) savings for retirement. However, Congress took the opposite approach with the Social Security Act; should you require long-term services and supports, you must become impoverished to enjoy the protections afforded by Medicaid.

This issue came up recently when I testified at a Department of Labor (DOL) ERISA Advisory Council hearing on "de-risking" transactions of employer-sponsored defined benefit (DB) plans. Many companies no longer wish to have the liabilities or risks associated with a DB plan. In a DB plan, the company holds the risk, such as investment and longevity risk; in a defined contribution (DC) plan, the employee holds that risk. These "de-risking" transactions seek to offer employees the option of taking the present value of their vested defined benefits as a "lump-sum" distribution or transferring the benefit payments to an annuity underwritten by an insurance company.

The ERISA Advisory Council contacted NAELA because the DOL had tasked the Council with creating a standard form for beneficiaries who've been given the option to take a lump-sum or an insurance annuity. They wanted to speak with someone who had experience dealing with persons with diminished capacity to understand what issues arise during these transactions.

The framing of these inquiries came largely from behavioral economics: how to ensure someone understands the trade-offs between a DB plan and managing their money. It is an important question, but it is the wrong one for this population.

Catastrophic illnesses such as Alzheimer's disease can require substantial long-term services and supports often for many years. That risk does not fit the standard risk/return trade-off model, which factors in quantifiable metrics like investment return, inflation, and longevity. These models leave out the reality of living with these diseases, the costs associated with caring for it, and the complex, contradictory legal structures in place for protecting retirement assets and covering long-term care costs.

Asset Treatment by Medicaid

At the most basic, Medicaid treats assets differently for qualifying purposes. Own a $500,000 home? You can keep it, and Medicaid will cover you. Own a $300,000 condo and have $200,000 in cash? Then you must spend down the cash if you want any government assistance.

For retirement plans, the rules get even more complex. Every state has their rules often in contradiction with federal law and regulation. At the federal level, ERISA contains "anti-alienation" protections against creditors. This means that someone with a DB plan, for instance, can't be forced to liquidate the present value of their current benefits and turn it over to their nursing home or state Medicaid agency.

However, IRAs are not ERISA plans, so they are not subject to these protections. In the majority of states, those suffering from a catastrophic illness must spend their entire IRA before receiving Medicaid benefits. In

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