

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308



EDWARD C. SULLIVAN
CHAIRMAN

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

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www.regulations.gov (IRS Reg-133300-17)**

CC:PA:LPD:PR (REG-133300-07)
Couriers' Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Proposed Regulations on Automatic Contribution Arrangements

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (NCCMP) is pleased to comment on the proposed regulation under section 414(w) of the Internal Revenue Code (IRC), regarding Eligible Automatic Contribution Arrangements (EACAs).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe, including in the airline, building and construction, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service and trucking industries.

We propose that two special rules be added to the regulation to accommodate the special circumstances of multiemployer 401(k) plans, so that they can use the EACA approach to stimulate participation. Specifically, the 414(w) regulation should provide that, in the case of a multiemployer plan:

- The section 414(w) requirements are applied separately to contributions made under each separate collective bargaining agreement (CBA) and separate benefit computation formula, as if they were being made to separate plans, and
- The requirement for contributions based on a "uniform percentage of pay" is deemed met if contributions are either:
 - A uniform dollar amount or
 - A uniform percentage of the wage amount specified in the CBA for the regular-time hours (or days, or weeks, or whatever the applicable period in the industry) with respect to which the contributions are made.

The Multiemployer Plan Context

The defining characteristics of multiemployer plans are that they (1) cover people working for more than one employer and (2) are maintained pursuant to collective bargaining and typically administered by joint labor-management boards that are independent of the contributing employers. This structure assures that they are focused on providing broad-based benefits that are responsive to their participants' needs, rather than serving primarily as corporate personnel or tax planning devices. However, operating at a distance from the participants' worksites and the employers' data collection systems creates special administrative challenges, which are compounded in the case of larger statewide, regional or national funds that serve people working in very different economic and collective bargaining environments.

Most multiemployer retirement plans are funded by fixed-dollar contribution amounts payable on the basis of hours, days or weeks worked under the CBA or some other consistent measurement of participants' service. These amounts are negotiated and specified in the various CBAs governing the employment relationships. To address industry variations, different CBAs often call for different contribution amounts. Most often, these contributions are allocated to participants' accounts based on units of service as well. Individual participants' compensation rarely plays much of a role in multiemployer plan administration, and the plans therefore collect little information about it.

Moreover, a prime objective of multiemployer plan arrangements is to relieve contributing employers of as many plan-related administrative chores as possible. The goal is to channel as much of what can be negotiated from the employers into contributions to fund benefits and pay for administering the multiemployer plan. Indeed, one of the reasons multiemployer plans developed was that so many of their contributors are small, owner-operated enterprises such as local construction or trucking companies that do not have the wherewithal to maintain these plans on their own.

Automatic enrollment offers particular advantages for multiemployer plans, given their general inability to provide and explain salary-reduction options at the point a new hire goes to work for a contributing employer. Indeed, for that reason some multiemployer 401(k) plans already use the basic automatic enrollment approach endorsed in the pre-PPA regulations. The EACA approach under IRC section 414(w) would be a useful adjunct that might encourage more multiemployer plans to offer 401(k) savings opportunities, since the plan and its trustees could mute possible employee objections by making refunds to those who do not want to take part.

Recommendation: Treat Each Bargaining Agreement and Benefit Computation Formula as a Separate Plan

As noted, because multiemployer plans cover people working for numerous employers, the differences among their economic and other employment conditions may be reflected in differences in the CBA provisions related to their benefit-plan coverage. This might translate into different employer contribution levels, different bases for contributions or other differences based on what different employers can accommodate. The 401(k) regulations accommodate this reality, providing in pertinent part that, for purposes of testing coverage and nondiscrimination, in the case of a multiemployer plan

... the portion of the plan that is maintained pursuant to a collective bargaining agreement ... is treated as a single plan maintained by a single employer that employs all the employees benefiting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The rules of paragraph (b)(4)(v)(B) of this section (including the permissive aggregation of collective bargaining units) apply to the resulting deemed single plan in the same manner as they would to a single employer plan, ... The noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the noncollectively bargaining unit employees who benefit under the plan are employed by one or more employers.
[Treas. Reg. section 1.401(k)-1(b)(4)(v)(B)]

The auto-enrollment provisions of IRC section 414(w) are, at heart, special coverage rules. We recommend that they be applied to multiemployer plans on the same basis as the coverage rules under section 401(k) generally, thereby making it easier for more multiemployer groups to accommodate voluntary salary-reduction retirement savings.

Adaptation of the Concept of “Uniform Percentage of Compensation”

IRC section 414(w)(3)(B) requires that the default salary reduction amounts under an eligible automatic contribution arrangement be “a uniform contribution percentage of compensation”. Through cross-references to related rules, proposed Treas. Reg. section 414(w)-1(b)(2) authorizes certain exceptions needed to make the statutory uniformity rule work, such as a schedule of increasing percentages in connection with the new QACA safe harbor under IRC section 1.401(k)(13). We recommend that a similar, limited variance from strict uniformity be authorized for multiemployer plans, to simplify administration for both contributing employers and the plans themselves and thus make EACAs a more practical option for multiemployer groups.

The easiest for employers to implement and plans to monitor and enforce would be a fixed dollar amount per hour, day, week or whatever activity unit serves as the basis for other employer contributions to the plan, if there is one, or to a related employee plan covering the same employees.¹ Alternatively, it could be a uniform percentage of the negotiated pay rate under the current CBA for the hour, day or week for which the contribution is being made. This might be more difficult for the plan to police, but it would give the employers a relatively simple point of reference point to determine the amount to withhold from the participants’ pay and forward to the multiemployer plan and avoid confusion in cases where plan contributions are not required under the CBA with respect to special types of wages such as overtime or holiday pay.

The NCCMP believes that this same principle could and should be applied for multiemployer plans in other situations under the IRC that use the concept of a uniform percentage of compensation as a simplified way to assure fairness and nondiscrimination, such as the safe harbors under IRC subsections 401(k)(12) and (13). However, since those provisions set quantitative requirements, further adjustments would be appropriate. We expect to address this with you separately, when the occasion presents itself.

¹ Many multiemployer 401(k) arrangements are features of traditional defined contribution arrangements funded by negotiated employer contributions for all participants. Even where there is a stand-alone 401(k) plan, the participants are almost always covered by another multiemployer retirement or health and welfare fund, whose negotiated contribution schedule could act as a control against possible manipulation in the EACA situation.

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We appreciate your consideration of these comments. We welcome the opportunity to offer further commentary in the event you accept oral testimony, and will be happy to otherwise provide any further information on this subject that you believe would be helpful.

Sincerely,

Randy G. DeFrehn

Randy G. DeFrehn
Executive Director