

National Coordinating Committee for Multiemployer Plans

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VIA COURIER AND U.S. MAIL

CC:IT&A:RU (REG-142499-01)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C.

Re: Proposed Regulation under IRC section 414(v)

Dear Friends,

The National Coordinating Committee for Multiemployer Plans (the NCCMP) respectfully requests that the proposed regulation's treatment of the "universal-availability rule" for catch-up contributions be revised to accommodate the unique position of multiemployer plans.¹ Specifically, multiemployer 401(k) plans and their contributing employers should each be allowed to offer a catch-up contribution option without regard to what the other is doing. Otherwise, the catch-up contribution opportunity could be denied to the participants in multiemployer 401(k) plans and, in many cases, to all of the other people working for an employer that contributes to a multiemployer 401(k) plan.

In addition to this written comment, we respectfully request the opportunity to testify on this issue at the hearing that you will be holding on the proposed regulation.

1. The Problem

Multiemployer plans, as you know, cover people working under collective bargaining agreements for any number of employers. A multiemployer plan can have as few as two and as many as several thousand different contributing employers. Typically the number of contributors ranges from, say, 30 to several hundred. Because unions often represent discrete crafts or people working at specific locations, the multiemployer plans that they sponsor may also only cover a sliver of an employer's workforce. For example, a

¹ 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. Our 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 organization, with member plans and plan sponsors in every major segment of the multiemployer plan universe.

supermarket may contribute to a Teamsters multiemployer plan for its truckdrivers and warehousemen and to a United Food & Commercial Workers multiemployer plan for the people working in the stores. And within a given supermarket chain, stores in Washington, DC may contribute to different multiemployer plans than the stores in Baltimore, and the Richmond stores may not contribute to any multiemployer plan.

Multiemployer plans are administered by independent boards of trustees, wholly separate from any of the contributing employers. In the great majority of cases plan benefits are also designed independently by the trustees, based on the levels of contributions to which the employers have agreed through collective bargaining. If employer cooperation is needed for the introduction or operation of a particular plan feature, as is the case when the parties want to introduce a salary-reduction option, that is addressed in the bargaining process. There is a small but growing number of multiemployer 401(k) plans, which are almost invariably supplements to broad-based defined benefit plans.²

In sum, individual employers do not control the benefits and other features of multiemployer plans, which are designed and delivered without regard to the benefits that contributing employers may be providing for their other employees. An employer that wants to provide a catch-up opportunity to the employees covered by that employer's single employer plans should be allowed to do so regardless of the plan design decisions being made independently by the trustees of a multiemployer 401(k) plan that covers some of that employer's workers. Conversely, the trustees of a multiemployer 401(k) plan should be allowed to offer the catch-up savings opportunity to the plan's participants regardless of the independent plan design decisions being made by the various contributing employers – sometimes in consultation with various unions – with respect to their other employees.

Applied blindly to multiemployer plans and their contributing employers, the universal-availability rule could spawn daisy chains linking business after unrelated business, all of whose over-50 employees would be blocked from making catch-up contributions. Consider, for instance, this scenario:

A large multi-line manufacturer and financial services company employs a small group of union-represented construction workers on a public works project in a northeastern state. They are covered by a county-wide multiemployer plan that includes a 401(k) feature. Also contributing to that multiemployer plan is a small local contractor that has signed up for a standardized 401(k) plan through the owner's insurance broker. That plan has not been updated to include catch-up contributions.

Unless the universal-eligibility rule is moderated, the following are barred from making catch-up contributions:

- all of the participants in the local county-wide multiemployer 401(k) plan,
- everyone who works for any of the businesses owned by the conglomerate,

² Although there is no theoretical barrier, we are not aware of any multiemployer 403(b) programs.

- everyone covered by any of the other multiemployer 401(k) plans elsewhere in the country to which the conglomerate contributes from time to time,
- all of the people working for any other company that contributes to any of those plans,
- and so on and so on.

There are three possible outcomes. One: many, many people are kept from making catch-up contributions because of the shortcomings in the benefits advice provided to one small business. Two: many multiemployer 401(k) plans and their contributing employers violate the universal-availability rule. Three: the section 414(v) regulation carves multiemployer plans out of the universal-availability rule. We recommend solution number three.

2. The Universal-Availability Rule in the Multiemployer Context

Under IRC section 414(v)(4)(A), it appears that a plan that allows catch-up contributions will be treated as providing discriminatory benefits, rights and features under IRC section 401(a)(4) unless a similar opportunity is offered to all age-50+ employees of the sponsoring employer who are covered by 401(k) or similar plans “maintained by” that employer. Read literally, this provision could require that, where the catch-up opportunity is limited, a plan would be condemned as discriminatory even if the catch-up opportunity is in fact clearly **not** discriminatory, for example, if it is offered only to non-highly compensated employees or, in the case of a multiemployer plan, to employees who are treated as covered by collective bargaining agreements for nondiscrimination purposes.³

Suggestion 1: Analogize to Nondiscrimination Treatment. Given the administrative and structural problems that the literal application of the universal-applicability rule poses for multiemployer plans and the employers that contribute to them, perhaps section 414(v)(4)(A) should be read a little differently in the multiemployer context. At its core the universal-applicability rule is a substitute for, and arguably the functional equivalent of, the nondiscriminatory coverage requirements of IRC section 410(b).

In light of IRC section 413(b)(2), coverage of bargaining-unit participants in multiemployer plans is deemed to pass section 410(b) without further inquiry, Treas. Reg. section 1.410(b)-2(b)(7). Accordingly, one way of resolving the dilemma for multiemployer plans would be to treat them as automatically meeting the universal-availability rule to the same extent that they are deemed to meet section 410(b). Thus a multiemployer 401(k) plan could offer the catch-up contribution opportunity to participants who are considered covered by collective bargaining agreements, regardless of what those participants’ employers are doing with their other plans. However, the catch-up option could only be offered to a multiemployer plan’s non-bargained participants if their employers meet the universal-availability rule with respect to their other employees and tax-sheltered savings plans.

³ This category is defined in Treas. Reg. section 1.410(b)-6(d).

Suggestion 2: Definition of “Maintained By” an Employer. Policy-makers have wrestled with the question of what it means for an employer to “maintain” a plan in various contexts. In this particular instance, the problem exists precisely because individual employers have no affirmative role in designing or administering the multiemployer plans to which they contribute. We suggest that the most straightforward way to free contributing employers to offer catch-up contributions to their salaried employees and others who do not participate in multiemployer plans would be to state, in the final regulation, that for this purpose employers are not considered to be “maintaining” multiemployer 401(k) plans to which they contribute.

3. A Tradition of Pragmatism

We are encouraged that the Treasury and IRS have already taken a pragmatic approach to resolving the administrative difficulties that could be posed by a literalistic interpretation of IRC section 414(v), for instance by including a transition rule for collectively bargained plans in the proposed regulation.

Indeed, in Notice 97-57 the agencies have already recognized and dealt with a similar problem. That involved rules calling for employers to use the same definition of Highly Compensated Employee in all of their qualified plans. Recognizing the problems that a rigid insistence on uniformity could cause when multiemployer plans are part of the mix, Section VI (3) of that Notice provides that multiemployer plans are disregarded in applying the consistency requirement. For the same reasons, that is the right answer here as well.

We will be happy to provide any additional information that might be of assistance to your resolution of these issues. If you would like anything further from us, please be in touch with me at (202) 756-4644, rdefrehn@nccmp.org.

Thank you for your consideration.

Sincerely,

Randy G. DeFrehn
Executive Director

cc: William Sweetnam, Esq.
Carol Gold, Esq.
Nancy Marks, Esq.