National Coordinating Committee for Multiemployer Plans
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April 17, 2001

By E-Mail

CC: M&SP: RU(REG 109481-99)
Couriers Desk
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

http://www.irs.gov/tax__regs/regslist.html

Dear Sir or Madam:

These comments are filed by the National Coordinating Committee for Multiemployer plans (NCCMP) in response to the request for public comments on the Special Rules Under Section 417(a)(7) for Written Explanations Provided by Qualified Retirement Plans After Annuity Starting Dates in the Federal Register of January 17, 2001 (66 Fed. Reg. 3916). These rules were issued to implement one of the special rules added by the Small Business Job Protection Act of 1996 that permit the required written explanations of certain annuity benefits to be provided by qualified retirement plans to plan participants after the annuity starting date.

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 members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

In general the NCCMP supports the proposed regulation, as they will help plans understand when and how they can pay retiring participants retroactively. Following are some technical points identifying areas of concern for multiemployer plans. To put our comments in context we have provided an initial discussion of the situations in which retroactive annuity starting dates occur for multiemployer plans.

Background: Retroactive Annuity Starting Dates:

The "annuity starting date" is defined in IRC 401(a)(11) as the "first day of the first period for which an amount is received as an annuity." Retroactive annuity starting dates arise in several situations. In some of these situations, the period of retroactivity is relatively short, for example, in cases of administrative delay or because of application timing issues. In some of these situations, the period of retroactivity may be much longer, such as in the case of a terminated vested employee who retires after Normal Retirement Age, a participant whose Required Beginning Date under §401(a)(9) has been missed and for whom a corrective distribution is made, or a participant who retires on a disability pension effective retroactively following a Social Security Administration decision of Disability but as of the earlier date of disability. In some of these situations, the retroactive annuity starting date is required. Because of the very different situations in which retroactive annuity starting dates may occur, as discussed later, we do not believe that the same requirements should apply in every case, and, we submit, the law and existing regulations support that conclusion To provide some context, we have provided a more detailed discussion of the situations in which retroactive annuity starting date arise for multiemployer plans.

First, it is very common, in the case of multiemployer plans, for retroactive annuity starting dates to arise in connection with a disability pension. Many multiemployer plans provide that entitlement to a disability pension requires a determination of entitlement to Social Security disability benefits. However, that determination is, of necessity, made after the date of disability. Therefore, many plans provide for payment of disability pension benefits retroactive to either the "date of disability" determined by the Social Security Administration or the "date of entitlement" to Social Security disability benefits which is five months after the date of disability. The actual determination by the Social Security Administration and the plan's subsequent receipt of that determination in connection with an application for a disability pension may be anywhere from a few months to several years after the "date of disability" and/or the "date of entitlement." While retroactive payment is not required by law because the nonforfeitability requirements of ERISA and the Internal Revenue Code do not apply to these disability benefits, retroactivity as a matter of plan design is very common in multiemployer plans.

Second, where a terminated vested participant retires after normal retirement age, plans must either actuarially increase the benefit for late retirement or make a retroactive payment. Because of the significant actuarial increases for delayed retirement and the administrative issues involved in making the calculation, many multiemployer plans provide for a retroactive payment in such situations. The time period between normal retirement age may be relatively long, particularly where the plan's normal retirement age is younger than age 65.

Third, there is a required retroactive annuity starting date in the event a required distribution under § 401(a)(9) is not made timely. Since an employee's required beginning date is his or her annuity starting date, if the distribution is not made on time it will be retroactive when the plan makes the corrective distribution. Although this does not occur with great frequency for multiemployer plans, perfect compliance with the mandatory distribution requirements cannot be guaranteed, even with careful plan procedures. Multiemployer plans are separate from the employer and must rely on outside information sources for addresses and birth dates of employees. Therefore, a multiemployer plan may not be able to contact the employee to verify a

birth date because the address is not correct. Moreover, multiemployer plans typically do not automatically cash out participants with small benefits when they leave covered service, because there is

always the chance that the individual will return at a later point or will continue to earn service credit as a result of service another multiemployer plan, pursuant to a reciprocity agreement. The missed payment at the Required Beginning Date may be either the result of incorrect information or because the participant cannot be located at the time the required distribution must be made. The time period between the required beginning date and the corrective distribution may be relatively long.

Fourth, retroactive annuity starting dates often occur as a result of an unplanned retirement or a retirement decision made close to the actual retirement date. For example, an employee may be laid off near the end of a month and decide to retire instead of returning to work. Many plans provide that a non-disability pension begins the first of the month following the receipt of an application. Therefore, an employee may quickly submit an application at the end of a month without receiving the written explanation with the expectation that benefits will eventually be paid as of the beginning of the next following month. The retroactive payment involved in such timing mishaps will be relatively short. Although retroactive payment is not required by law, multiemployer plans want to make the retroactive payment and participants expect it.

Finally, as the regulations recognize, there are often relatively short delays for administrative processing of applications. This occurs due to the need to send documents back and forth in the mail and to gather and verify pertinent information. In this situation, as discussed above, retroactive payment is not required by law. However, many multiemployer plans want to make the retroactive payment and, where it is common practice, their participants expect it.

Prior Regulations

Until the issuance of regulations in 1988, multiemployer plans routinely provided written explanations after the annuity starting date and paid retroactive benefits. The Final and Temporary Regulations issued in 1977 provided for a ninety (90) day election period after the written explanation was provided. However, the Final Regulations issued in August 1988 implemented the requirement for written explanations before the annuity starting date effective for plan years beginning on or after January 1, 1989.

Section 417(a)(7) of the Internal Revenue Code (Code) which was added by the Small Business Job Protection Act, creates an exception to the Qualified Joint and Survivor Annuity (QJSA) notice rules of Code §417(a)(3)(A) (requiring a written explanation before the annuity starting date), effective for plan years beginning after December 31, 1996.

Code §417(a)(7)(A)(i) provides that, notwithstanding any other provision of Code §417(a), a plan may provide the QJSA explanation after the annuity starting date, as long as the applicable election period is extended for at least thirty (30) days after the date on which the QJSA notice is provided.

Code §417(a)(7)(A)(ii) provides that the Secretary may limit the application of this provision but may not limit the period of time by which the annuity starting date precedes the furnishing of the written QJSA explanation other than by providing that the retroactive annuity starting date may not be earlier than the termination of employment.

Code §417(a)(7)(B) provides that a plan may permit a participant to waive any requirement that the written explanation be provided at least thirty (30) days before the annuity starting date or to waive

the thirty (30) day requirement of Code §417(a)(7)(A)(i) (in either case with spousal consent, if required) if the distribution commences at least seven (7) days after the explanation is required.

Final Regulations were issued under this section on December 18, 1998. These regulations provided for the written explanation after the annuity starting date but included no other requirements or limitations.

Comments on Proposed Regulations:

The law and regulations recognize three different situations in which the annuity starting date may be less than thirty (30) days after the date on which the individual is given the detailed information on benefit options:

- Code §417(c)(7)(B), which essentially codifies the 1998 Treasury regulations authorizes plans to allow a participant (and spouse) to waive the advance notice and receive distribution as early as seven (7) days after the date the information is given.

- Treas. Reg. §1.401(a)-20(b)(3) which provides that benefit payments can commence after the annuity starting date, without changing the annuity starting date, if the delay is for administrative processing. These include the situations described above in which the retroactive payments are the result of timing and administrative processing.

- Code §417(c)(7)(A), which applies retroactive payments required by law or plan design decisions made by plan sponsors. Corrective required distributions after the Required Beginning Date are required by law. Multiemployer plan trustees frequently adopt retroactive payments when a terminated vested participant retires after normal retirement and retroactive payments in the case of disability pensions as a matter of plan design.

It appears that this proposed regulation applies *only* to the third situation, and that it does not override or displace the retroactivity opportunities presented under the first two legal and regulatory provisions.

1. Administrative delays.

Because of the very different situations in which retroactive annuity starting dates may occur, we do not believe that the same requirements should apply in every case. As our previous examples show, the delays due to timing and administrative processing tend to be relatively short. Not only is the retroactive payment expected by the participant but the additional requirements in

the proposed regulations would make further administrative delay likely. We believe that the provisions of the proposed regulations which add requirements for additional consents, interest calculations, and the double §415 calculations are not necessary, particularly for these relatively short delays, and will only serve to further delay the processing and payment of the benefit. Therefore, sections 1.417(e)-1(b)(3)(iv)(B), 1.417(e)(b)(3)(v)(B) of the proposed regulations should not apply in the case of timing and administrative delays. This is addressed by a provision of the current regulations §1.401(a)-20(b)(3) (issued prior to the statutory change to permit retroactive annuity starting dates) which provides that a payment after the annuity starting date is not considered retroactive "merely because actual payment is reasonably delayed for calculation of the benefit amount if all payments are actually made." The current regulations do not require special consents, interest or double §415 calculations. We believe that the provisions of the current regulations make sense in these situations and that no change should be made.

2. Retroactive payments required by law or plan design; trustee control of plan design.

In the case of retroactive annuity starting dates for corrective required beginning date payments, the payments must be made retroactively. The participant cannot choose a different annuity starting date. Therefore, the requirements of §1.417(e)-1(b)(3)(v)(A) of the proposed regulations with respect to the special spousal consent and the requirements of §1.417(e)(b)(3)(v)(B) with respect to the application of Code §§415 and 417(e)(3) as of both the date of distribution and the retroactive annuity starting date should not apply.

In the case of retroactive annuity starting dates for terminated vested participants who retire after normal retirement age, the plan is required either to make a retroactive payment or must provide for an actuarially increased benefit adjusted for the late retirement. Because of the significant actuarial increases for delayed retirement and the administrative issues involved in making the calculation, multiemployer plans typically provide only for a retroactive payment in such situations. Multiemployer plans typically do not provide for alternative ways to satisfy this qualification requirement. Similarly, multiemployer plans typically provide that the commencement of a disability pension is keyed to the date of disability as determined by the Social Security Administration. This is a design determination that makes sense to participants. The effect of the proposed regulation is to take such plan design decisions away from the trustees since it requires the plan to offer the employee the choice between retroactive payments subject to the regulations and prospective-only payments. We believe that the statutory language does not support this requirement.

The law apparently intends to authorize plan sponsors to make retroactive annuity starting date's an automatic plan design feature, rather than an optional privilege for retiring participants (unless the plan sponsor chooses to make it a participant option). This is supported by the structure of §417(c)(7), which includes one provision – subparagraph (B) – that expressly includes an employee choice regarding retroactivity and one – subparagraph (A) – that does not. It appears that subparagraph (B) is in the law to cover the case where the *employee* does not want to wait the full 30 days after receipt of the written explanation for his or her benefits to commence; subparagraph (A) is in there to cover the case where the *plan sponsor* decides how to treat late retirees. Therefore, we believe that § 1.417(e)-1(b)(3)(iv)(B) of the proposed regulation should be modified to eliminate the requirement for affirmative election of the retroactive annuity

starting date by the participant where the trustees of the plan have made a design decision to provide for automatic retroactive dates.

3. Consent by spouse as of date of distribution.

We agree with the approach in the proposed regulations, which provides that the spouse as of the date of distribution, and not the spouse as of the retroactive annuity starting date, must consent to the waiver of the QJSA. This will make it much easier to administer the spousal consent rules since plans will not have to search for a former spouse who was married to the participant on a date some months or even years earlier. However, to make this workable, conforming changes may need to be made in other regulations, which seem to provide that the spouse as of a date other than the date of distribution receives the survivor portion of the QJSA. Thus while the spouse as of the date of distribution may consent to the waiver of the QJSA under the proposed regulations, it would be helpful to provide that, where the benefit is paid in QJSA form on the basis of a retroactive annuity starting date, it is the spouse

as of the date of distribution who is entitled to the QJSA at the retiree's death after retirement (subject, of course, to a superseding QDRO).

For example, for purposes of determining the spouse who may receive the QPSA/QJSA, the one-year married rule in Code §§401(a)(11)(D) and 417(d); Treas. Reg. §§1.401(a)-20, Q&A 25(b)(2) and 1.401(a)-11(d)(3) refers to the annuity starting date. Treas. Reg. §1.401(a)(9)-1 H3A provides that for purposes of required distributions, the participant's spouse is the spouse as of the required beginning date. We urge the Service to clarify the interplay of these provisions. If the spouse as of the date of distribution is to be the spouse only for the purpose of consenting to the waiver of the QJSA, this should be clarified in the preamble to the regulations to avoid confusion by plan administrators. If, however, the purpose is provide that the spouse as of the date of distribution is the spouse for all purposes of the QPSA/QJSA, which we encourage, then other provisions in the Code and regulations must be modified.

4. <u>Double testing under §415 and other limits.</u>

The proposed regulations require that the retroactive amounts paid to a late retiree meet the limits that would have applied under §§401(a)(17) and 415, year by year, if the payments had started on the retroactive ASD.[1] That is appropriate. However, it also appears to require that §415 again be applied to the total amount payable when benefits commence. That is inappropriate and unwarranted. It would force plans to deprive some participants of earned benefits, just because they retired late.

Depending on the amounts involved, the length of the retroactivity and the application of the interest adjustment, this would create a §415 problem for people who otherwise would not be affected by it. In particular, this would exacerbate the widely recognized unfairness of the 100%-of-pay limit and make it applicable to substantially more people. For someone who left covered service at, say, age 60 and then retires at age 68 under a plan with an age-62 normal retirement age, the total amount payable in the year of benefit commencement as calculated for §415 testing

could well be higher than the person's high-3 years' pay, even after inflation indexing. While multiemployer plans are hoping for relief from the 100%-pay limit, it is not clear when or whether that will pass Congress. Moreover, the requirement for double-testing under §415 could make the 100%-of-pay limit a problem even for people in single-employer plans whose pay-based formulas ordinarily would prevent the accrual of benefits that are higher than pay.

In these cases, a prospective, actuarially adjusted benefit would not be a useful alternative. That is because the 100%-of-pay limit is not actuarially adjusted for late retirement, although it can be indexed in line with the CPI. By contrast, the actuarial increase in benefits to compensate for late retirement is very powerful: typically, in the area of 1% a month for periods between ages 65 – 70, and 1.5% a month for ages 70 – 75. Whenever inflation is less than 12 – 18% a year, the annual benefit amount will go up faster than the individual's indexed final pay.

Moreover, double-testing is inconsistent with the corrections prescribed by IRS under its voluntary compliance programs.

5. <u>Application to defined contribution plans</u>.

[1] We assume the reference to §401(a)(17) is for people who continue or resume working and accruing new benefits after normal retirement age, without having their already-accrued benefits formally suspended. The treatment of §415 is the only one that gives multiemployer plans trouble.

We assume that the reason the proposed regulations limit the opportunity to provide for a retroactive annuity starting date to defined benefit plans was that the concept of a "retroactive" lump sum, the typical payment form provided by a defined contribution plan seemed inappropriate. However, there is a different issue for defined contribution plans that are, or at one time were, money purchase plans. For them, the law requires that annuities be the presumptive payment form.

If a defined contribution plan is required to pay an annuity as of a retroactive date, either because of a timing issue or because of a missed required beginning date, the participant could be forced to receive benefits as an annuity when he/she would prefer a lump sum.. We acknowledge that there is a potential problem calculating the interest from the retroactive annuity starting date. For example, the account balance as of the retroactive annuity starting date plus interest may be more than the current account balance if the investments in the account have declined. The regulations could provide that, in the case of a defined contribution plan, the amount to be distributed is the account balance as of the date of distribution provided that the requirements of Code §401(a)(9) are satisfied.

Many multiemployer defined contribution plans have already adopted retroactive annuity starting dates under the provision of the Small Business Job Protection Act and the 1998 Final Regulations, neither of which prohibited defined contribution plans from adopting retroactive annuity starting dates.

If you have any questions, please feel free to contact me at 202-756-4644 or by e-mail at rdefrehn@nccmp.org. Thank you for your consideration.

Sincerely,

Randy DeFrehn
Executive Director