

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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January 19, 2016

Submitted electronically to: e-ORI@dol.gov

RIN 1210-AB39
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Department of Labor, RIN 1210-AB39: Claims Procedure for Plans Providing Disability Benefits Proposed Rule

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments on the above-referenced proposed rule (the “Proposed Rule”) issued by the Department of Labor (the “Department”). The Proposed Rule contains proposed amendments to claims procedure regulations for plans providing disability benefits under ERISA. The NCCMP appreciates the opportunity to provide comments on the Proposed Rule. Among other comments, the NCCMP has particular concerns regarding the impact of the Proposed Rule in the case of multiemployer pension plans that provide disability benefits, particularly in the case of pension plans in financial distress and operating under rules provided in the Pension Protection Act (PPA) and the Multiemployer Pension Reform Act (MPRA).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 20 million active and retired American workers 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 contributing employers in every major segment of the multiemployer plan universe, including in the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, retail food, service, steel and trucking industries.

Summary of Comments

Application of disability claims rules: The Proposed Rule should incorporate the provisions of FAQ A-9 from the previously-issued FAQs About The Benefit Claims Procedure Regulation. This FAQ clarifies that the special disability claims rules do not apply to a benefit payable upon

disability where the determination of disability is made by a party other than the plan for purposes other than making a benefit determination under the plan. The preamble to the Proposed Rule references this FAQ; it would be helpful to include in the final regulations.

Issues specific to pension plans: Many multiemployer pension plans provide subsidized early retirement benefits that are paid based on a definition of disability as provided in the plan. The Proposed Rule raises a number of issues for this type of benefit. The ERISA rules relating to accrued benefits already address many of these issues and, thus, it may be appropriate to exclude disability retirement benefits from the Proposed Rule. If the final rule does apply to disability pension benefits, then the NCCMP requests the following changes: (a) the final rule should specifically include the language of FAQ A-9, from the FAQs About The Benefit Claims Procedure Regulation, including the example with respect to pension plans that rely on a third party determination of disability; (b) the final rule should specifically state that the rescission rule does not apply to disability pension benefits that are reduced or eliminated in accordance with the PPA (provisions relating to adjustable benefits), MPRA (suspension of benefits) or any similar law; and (c) at a minimum, the final rule should adopt a “good faith” standard for compliance with the new language requirements to enable plans to locate appropriate translation services.

Detailed Comments

A. Definition of Disability Claim; Exception for Third-Party Determinations

Footnote 4 of the preamble to the Proposed Rule states that a benefit is a disability benefit subject to the disability claim rules if the plan conditions its availability to the claimant on a showing of disability and that it does not matter whether the plan as a whole is a pension plan or a welfare plan. If the claims adjudicator must make a determination of disability in order to decide a claim, the preamble states that the claims must be treated as a disability claim. In discussing this issue, the preamble references the prior FAQs About The Benefit Claims Procedure Regulation, A-9 (http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html).

The FAQ goes on to say that the rules for disability claims do not apply in the case of a benefit that is conditioned upon the finding of disability by a third party. In particular, the FAQ states:

However, if a plan provides a benefit the availability of which is conditioned on a finding of disability, and that finding is made by a party other than the plan for purposes other than making a benefit determination under the plan, then the special rules for disability claims need not be applied to a claim for such benefits. For example, if a pension plan provides that pension benefits shall be paid to a person who has been determined to be disabled by the Social Security Administration or under the employer’s long-term disability plan, a claim for pension benefits based on the prior determination that the claimant is disabled would be subject to the regulation’s procedural rules for pension claims, not disability claims.

The reason for the position in the FAQ seems fairly clear -- in these circumstances, the claims adjudicator under the plan is not making a determination of disability and, thus, the claim is not a disability claim. The reference to the FAQ in the preamble to the Proposed Rule indicates that

the FAQ is consistent with the Proposed Rule and that the Department intends this position to continue. It would provide clarity to plans to include the position in the FAQ in the final disability claims regulations.

B. Issues Relating to Multiemployer Pension Plans that Provide Retirement Benefits Triggered By Disability

Many multiemployer pension plans provide subsidized early retirement benefits that are paid based on a definition of disability as provided in the plan. These benefits are reflective of the industries served by multiemployer plans, and workday realities of employees in those industries.

1. The NCCMP believes that it is appropriate to exclude pension plans from the Proposed Rule.

A number of the provisions in the Proposed Rule create significant issues for such multiemployer pension plans, particularly for pension plans that are in a Pension Protection Act (PPA) rehabilitation plan or that have submitted an application for a suspension of benefits under the Multiemployer Pension Reform Act (MPRA). The NCCMP believes it is appropriate to exclude pension plans from the Proposed Rule where the benefit in question is a pension benefit payable upon disability. The existing pension plan rules, including those relating to when benefits can be reduced or eliminated address issues included in the Proposed Rule. If the Department disagrees, then the following changes and clarifications should be reflected in the final rule with respect to pension plans.

2. If the final rule applies to pension plans, the following changes should be made to the rule.

- a. The final rule should clarify that the disability claims procedures do not apply to pension benefits (or in other situations) based on third party determinations of disability.***

As discussed above, the NCCMP recommends that the final regulations should incorporate the provisions of the prior FAQs About The Benefit Claims Procedure Regulation, A-9. Further, NCCMP recommends that, if the final rules apply to disability pension benefits, the specific example regarding pension benefits that base disability benefits upon a finding by a third party be included, as follows:

For example, if a pension plan provides that pension benefits shall be paid to a person who has been determined to be disabled by the Social Security Administration or under the employer's long-term disability plan, a claim for pension benefits based on the prior determination that the claimant is disabled would be subject to the regulation's procedural rules for pension claims, not disability claims.

- b. The rescission rules should not apply to pension benefits based on disability; ERISA separately addresses when pension benefits may be modified or reduced retroactively.***

c. In particular, the rescission rule should not apply to benefits that are reduced or eliminated in accordance with the PPA and/or MPRA.

The Proposed Rule provides that a rescission of disability coverage is an adverse benefit determination subject to the disability claims rules, whether or not, in connection with the rescission, there is an adverse effect on any particular benefit at that time. A “rescission” is defined as the cancellation or discontinuance of coverage that has retroactive effect, except to the extent it is attributable to a failure to timely pay required premiums or contributions toward the cost of coverage. The preamble further provides that a rescission of disability coverage¹ would be an adverse benefit determination even if the affected participant or beneficiary was not receiving disability benefits at the time of the rescission.

As noted above, many multiemployer plans provide subsidized early retirement benefits that are triggered by a definition of disability as provided in the plan. While plans have different eligibility requirements for such benefits, they are typically based on the completion of a stated number of years of services and age requirements (in addition to a disability trigger).

Under ERISA and the Internal Revenue Code (the “Code”) as amended by the PPA, multiemployer pension plans that are in Critical Status (also referred to as being in the “red zone”) are subject to special rules in order to help repair the funded status of the plan. While there are a number of factors that determine whether a plan is in Critical Status, in general, a multiemployer pension plan is in Critical Status if it has a funded ratio of less than 65 percent. Plans in Critical Status are required to develop a Rehabilitation Plan. As part of a Rehabilitation Plan, certain benefits (called “adjustable benefits”) may be reduced, including subsidized early retirement benefits triggered by disability. The plan sponsor is required to provide notice that the plan is in Critical Status to participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor. The notice is required to include a statement that any benefit reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date the notice is provided for the first plan year in which the plan is in Critical Status. ERISA § 305(b)(3)(D)(ii)(II); Code § 432(b)(3)(D)(ii)(II).

The Rehabilitation Plan does not have to be adopted for many months after the notice of Critical Status is adopted and does not apply to active employees until bargained. But once bargained, the benefit reductions may apply (as described above) to anyone whose annuity starting date is on or after the date of the original critical status notice.

While not entirely clear from the Proposed Rule, the definition of a “rescission” could be read to apply in such circumstances because the reduction or elimination of a disability benefit as part of a Rehabilitation Plan could be retroactive to the date of the Critical Status notice. Further, any “rescission” could be considered to occur with respect to *all* participants and beneficiaries, regardless of whether they are receiving a subsidized early retirement benefit based on disability

¹ The meaning of disability “coverage” is not clear in the pension context. The pension accrued benefit rules would protect the right to such disability benefits accrued with any year of service earned even if the age and service rules had not yet been satisfied. However, the same pension accrued benefit rules would allow those accrued benefits, called “adjustable” benefits, to be eliminated in accordance with PPA and MPRA. Since “coverage” is not defined for pension benefits, it is not clear what rights are intended to be protected by the Proposed Rule.

or have even met the plan's eligibility requirements (e.g., age and service requirements) to receive such a benefit in the event they became disabled.

A similar issue can arise under MPRA, which allows suspension (i.e., reduction) of benefits in certain circumstances based on the funded status of the plan if certain requirements are satisfied. Approval for a benefit suspension may occur after the proposed effective date of the suspension, which could result in a retroactive reduction in benefits. This could be considered a "rescission" of disability benefits under the Proposed Rule.

PPA and MPRA have detailed, complex rules that are designed to assist multiemployer pension plans that are in financial distress so that the financial health of the plans may be improved (or at least not made worse) and any adverse impact on participants and beneficiaries may be limited to the extent possible. These rules include a variety of requirements, including notice requirements and approvals by regulators; further, reductions in benefits are subject to bargaining. Plans in the circumstances of financial distress that trigger the PPA and MPRA requirements are focused on difficult decisions and implementing complex rules that are specifically designed to address the situation. The Proposed Rule should not interfere with the provisions of the PPA and MPRA. The NCCMP recommends that the final rule clarify that a "rescission" does not occur with respect to disability pension benefits that are reduced or eliminated in accordance with the provisions of the PPA and/or MPRA.

d. *The Department should consider a "good faith" compliance period for the new language requirements.*

The Proposed Rule would require plans providing disability benefits to provide notices of adverse benefit determinations in a culturally and linguistically appropriate manner. This requirement includes both oral and written language services. As described in the preamble:

This requirement is satisfied if plans provide oral language services including answering questions and providing assistance with filing claims and appeals in any applicable non-English language. These proposed regulations also require each notice sent by a plan to which the requirement applies to include a one-sentence statement in the relevant non-English language that translation services are available. Plans also must provide, upon request, a notice in any applicable non-English language.

These language requirements are similar to those that apply under the Affordable Care Act's (ACA) claims and appeals requirements. Translation needs may be different for pension benefits triggered by disability than they are with respect to medical or other disability benefits. For example, pension plan disability rules may involve factors such as attachment to the industry and required service. It may take plans some time to locate appropriate and accurate translation services for all the required non-English languages. NCCMP requests that the Department at least incorporate a "good faith" compliance standard as plans attempt to comply with any final rules and locate translation services.

Conclusion

NCCMP greatly appreciates the opportunity to comment on the Proposed Rules. We are more than happy to discuss any questions you may have regarding these comments and related issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randy G. DeFrehn". The signature is written in a cursive style with a large initial "R" and "D".

Randy G. DeFrehn
Executive Director