

By Electronic Mail

July 28, 2003

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5569
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
Attn: COBRA Notice Regulations

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 Proposed Regulations for Health Care Continuation Coverage issued by the Employee Benefits Security Administration, 29 CFR Part 2590 and published in the Federal Register on May 28, 2003. The Proposed Regulations specify the notice requirements that must be satisfied under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”).

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. Given this purpose, the NCCMP wishes to bring to your attention a comment in the preamble to the Proposed Regulations which adversely impacts participants in multiemployer health plans by requiring confusing disclosure concerning a matter that does not apply to multiemployer plans.

1. Multiemployer-Plan Issue. In the preamble of the Proposed Regulations, there is an extended description of the COBRA notice requirements which each covered group health plan must satisfy in its communications with covered employees and their spouses. Among these requirements is the plan’s obligation to include in its summary plan description (“SPD”) certain rights which a covered employee and spouse may have under the Trade Act of 2002. Based on the NCCMP’s review of the Proposed Regulations and the Trade Act of 2002, it appears that employees participating in multiemployer plans would not be eligible for one of the entitlements provided by the Trade Act. Given that this outcome would limit the COBRA rights of an otherwise eligible covered employee and his family, the NCCMP requests that the Proposed Regulations make clear that multiemployer plans are not required to include

in Summary Plan Descriptions a description of Trade Act COBRA rights that do not apply to participants in multiemployer plans.

The Trade Act of 2002 amends ERISA § 605 to add a new subsection (b). It provides a second 60-day election period for COBRA coverage for individuals who become eligible for trade adjustment assistance. Further, by enacting new I.R.C. § 35, the Trade Act of 2002 allows such individuals to take a tax credit of up to 65% of the amount paid in premiums for qualified health insurance. Such an individual will have the right to elect COBRA coverage for both himself and his family, with the additional election period starting on the first day of the month in which he was determined to be eligible for trade adjustment assistance. The preamble to the Proposed Regulations requires plans to provide notice of these new rights by including information about them in the SPD.

The problem arises in the definition of who is eligible for trade adjustment assistance for purposes of these COBRA rights. As set out in I.R.C. § 35, an individual will be deemed eligible either if he is in fact receiving trade adjustment assistance, which requires government certification under the Trade Act of 1974, or if the individual is an “eligible PBGC pension participant.” The latter is defined in I.R.C. § 35(c)(4) as an individual who has attained age 55 “and is receiving a benefit for such month any portion of which is paid by the PBGC under Title IV of ERISA.” Thus, unless an individual has obtained the requisite government certification and is receiving trade adjustment assistance, he will have the above-described entitlement under the Proposed Regulations only if he is receiving pension benefits directly from the PBGC.

The problem results because treatment of multiemployer pension plans by the Pension Benefit Guaranty Corporation (“PBGC”) under Title IV of ERISA differs from that afforded single employer plans. With the latter, the PBGC will pay pension benefits directly to eligible participants and beneficiaries. However, for multiemployer plans receiving PBGC assistance, benefits continue to be paid by the plan, albeit at a reduced level. Rather than pay benefits to participants, the PBGC provides financial assistance to the plan pursuant to § 4261 of ERISA. Thus, it appears that multiemployer plan participants would never satisfy the definition of an individual eligible for trade adjustment assistance based on the individual's receipt of pension benefits from the PBGC. Consequently, they would not be entitled to the second COBRA election period or the tax credit as set out in the Proposed Regulations.

The Preamble to the Proposed Regulations should be clarified that multiemployer plans are not required to include in Summary Plan Descriptions a description of Trade Act COBRA rights that do not apply to participants in multiemployer plans.

2. General Issues. This TAA issue is the only concern with the proposal that we have identified that is unique to multiemployer plans. We understand that other groups will be commenting on certain administrative concerns that affect plan sponsors of all types, aimed at avoiding adding complexity to an already administratively challenging area. Without repeating the analysis you will be hearing from other quarters, we do want to point out here that we share many of those concerns, in particular:

- The proposed regulation's creating additional formal plan notice requirements beyond those imposed by the statute (i.e., when an individual who is losing coverage is not entitled to COBRA, or when COBRA coverage terminates) and

- The requirement that a plan accept informal notification of a qualifying event that does not comply with the plan's reasonable notice procedures, once the affected qualified beneficiaries are informed of the plan's procedures.

We also urge the Department to give plans a substantial opportunity to institute any changes needed in their COBRA notice procedures, in light of the regulations, as long as the plans' practices reflect a reasonable, good faith interpretation of the law and relevant court decisions in this area. At this point a 2004 compliance date would not give plans adequate time.

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

Sincerely,

Randy DeFrehn
Executive Director
National Coordinating Committee for
Multiemployer Plans