**MEMORANDUM**

**To:** Pension Counseling Projects

**From:** Pension Rights Center

**Re:** Suspension of early retirement benefits

**Date:** December 4, 2012

**Question Presented**

Can a pension plan suspend early retirement benefits if the participant is engaged in service that falls outside of the definition of ERISA §203(a)(3)(B) service?

**Short Answer**

Yes, a pension plan can suspend early retirement benefits if the participant is engaged in service that falls outside the definition of ERISA §203(a)(3)(B) service. The suspension must not interfere, however, with the participant’s ability to receive the retirement benefits to which s/he is entitled after attaining normal retirement age. Furthermore, the plan must properly notify participants of the suspension, and the suspension must comply with the terms of the plan.

**Discussion**

The Department of Labor expressly interprets ERISA to allow a suspension of early retirement benefits when the participant engages in reemployment outside the scope of ERISA §203(a)(3)(B).

ERISA §203(a) provides that a participant’s right to normal retirement benefits cannot be forfeited once the participant reaches normal retirement age.[[1]](#footnote-2) ERISA §203(a)(3)(B)(i) states, however, that a suspension of benefits derived from employer contributions “shall not be treated as forfeitable” if the participant returns to work for the plan sponsor after beginning to receive benefits.[[2]](#footnote-3) In the case of a multi-employer pension plan, §203(a)(3)(B)(ii) states that a suspension of benefits is not a forfeiture if the participant returns to work in the same industry and the same trade or craft within the plan’s geographic area.[[3]](#footnote-4) ERISA §203(a)(3)(B) is thus an exception to the non-forfeiture rule that applies to both reemployment during early retirement and reemployment after a participant reaches normal retirement age (NRA).

The Department of Labor (DOL) has promulgated a regulation that expressly permits the suspension of early retirement benefits when a participant returns to work, regardless of whether that work falls within the scope of §203(a)(3)(B).[[4]](#footnote-5) DOL distinguishes §203(a)(3)(B) service from non-§203(a)(3)(B) service, in the case of early retirement, by finding that service outside the scope of §203(a)(3)(B) may result in a suspension but that it must not interfere with the participant’s entitlement to a normal retirement benefit payable at normal retirement age (or its actuarial equivalent) so as not to constitute a forfeiture.[[5]](#footnote-6) By contrast, §203(a)(3)(B) service during early retirement can result in a permanent withholding of benefits.[[6]](#footnote-7) The IRS has also determined that a plan is not required to make an actuarial adjustment on account of a §203(a)(3)(B) benefit suspension.[[7]](#footnote-8)

There is no explicit textual justification in the statute for DOL’s conclusion that plans can suspend early retirement benefits for service outside the scope of §203(a)(3)(B). DOL substantiates its interpretation on the basis of ERISA §206(a),[[8]](#footnote-9) which states that a plan must pay the actuarial equivalent of the normal retirement benefit to an early retiree.[[9]](#footnote-10) DOL has inferred that “a plan would not be prohibited from ceasing payment of benefits to an early retiree for any reemployment, so long as such benefits were actuarially recalculated in order to compensate for the temporary withholding, and if payment of benefits under the recalculation began no later than normal retirement age.”[[10]](#footnote-11) Further, DOL determined that a plan may permanently withhold early retirement benefits only for reemployment that meets the statutory exception for §203(a)(3)(B) service.[[11]](#footnote-12) Presumably DOL has interpreted §203(a)(3)(B) to allow a permanent withholding of early retirement benefits because §203(a)(3)(B) service performed after NRA could also result in a lawful permanent suspension of benefits.

The Sixth Circuit has found that, pursuant to the DOL regulation, a plan may suspend early retirement benefits for any reason.[[12]](#footnote-13) Further, it has stated that where a plan’s terms place limitations on the type of reemployment that can trigger a suspension of early retirement benefits the plan is more generous than required by law.[[13]](#footnote-14) The Sixth Circuit also interprets the DOL regulation to permit the suspension of benefits derived from employee contributions, but the suspension must not interfere with the retiree’s entitlement to NRA benefits because employee contributions do not fall within the scope of §203(a)(3)(B).[[14]](#footnote-15)

The Seventh Circuit has ruled similarly.[[15]](#footnote-16) In *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, the court relies heavily on the regulation’s language that benefits attained prior to normal retirement age may be suspended without regard to §203(a)(3)(B), stating “Militello retired at age fifty-three; now sixty-one years old, he has still not attained the normal retirement age, which is defined as sixty-five in the plan. Therefore, [§203(a)(3)(B)] does not pertain to Militello, and we easily dispose of his claim.”[[16]](#footnote-17)

Potential restrictions on a plan’s ability to suspend early retirement benefits

There are some arguments against benefit suspensions that can potentially defeat the suspension and should be raised in the administrative claims and appeals process.

*Notice*

First, a participant can argue that the suspension did not meet the necessary notification requirements. The DOL regulation requires that a plan notify a participant in writing within the first calendar month or payroll period in which the plan withholds benefits.[[17]](#footnote-18) The notification must contain the specific reason for the suspension, a description and copy of the relevant plan provisions, a reference to the DOL regulation and a description of the plan’s procedure for reviewing the suspension.[[18]](#footnote-19) ERISA does not provide a specific remedy addressing a plan’s failure to provide a notice of benefit suspension. A participant would therefore need to bring suit under ERISA § 502(a).

In *Downie v. Independent Drivers Ass’n Pension Plan*, a participant who had taken early retirement returned to full time work in disqualifying employment.[[19]](#footnote-20) The plan permanently discontinued his benefits and terminated all the service credits he had earned prior to his retirement. [[20]](#footnote-21) It classified the participant as a new employee beginning on the date at which he returned to work and the participant began accruing new benefits as of the new start date.[[21]](#footnote-22) The district court found that the Summary Plan Description did not sufficiently notify the participant of the consequences of returning to full time employment and required the plan to restore all the service credit the participant had earned both prior to early retirement and after reemployment. [[22]](#footnote-23) It also required the participant to return to the plan the benefits that it had paid to him since he entered early retirement.[[23]](#footnote-24) The Tenth Circuit found that the lower court had been correct to award equitable relief to the participant.[[24]](#footnote-25) The circuit court nevertheless remanded the case because it found the district court’s order was unclear as written and also instructed the district court to consider the issue of attorney fees.[[25]](#footnote-26)

*Incorrect Plan Interpretation: Abuse of discretion*

A participant can also sue the plan alleging that the suspension of benefits is based on an incorrect interpretation of the plan document. This may be an effective strategy when an argument can be made that the plan provisions are more generous than the law requires. Where a plan has granted discretion to its fiduciaries courts must apply an arbitrary and capricious standard of review to determine whether the fiduciary’s plan interpretation constitutes an abuse of discretion.[[26]](#footnote-27) Where a plan interpretation is found to be an abuse of discretion, the plan administrator is not automatically stripped of discretion if the mistaken interpretation was made in good faith.[[27]](#footnote-28)

In *Brown v. Southern California IBEW-NECA Trust Funds*, the Ninth Circuit held that the plan’s fiduciaries abused their discretion when they suspended the early retirement benefits of a participant who had become reemployed performing electrical construction work.[[28]](#footnote-29) The court found that the plan document called for an early retirement benefit suspension if the participant engaged in work as an electrical contractor, but that the plan fiduciaries abused their discretion by interpreting the provision to apply to the participant’s work in electrical construction as the direct employee of a contractor.[[29]](#footnote-30) The Ninth Circuit affirmed the district court’s remedy, which required the plan to reinstate the participant’s early retirement benefits, pay the early retirement benefits that had been withheld during the erroneous suspension, and pay for attorney’s fees, expenses and costs.[[30]](#footnote-31)

In *Fralick v. Plumbers and Pipefitters Nat. Pension Fund*, a Texas district court found it was an abuse of discretion when a multiemployer plan suspended a participant’s early retirement benefits on the grounds that he was working for a contributing employer.[[31]](#footnote-32) In reality the participant was engaged in work for a contributing employer’s legally distinct sister company that engaged in work outside the plan’s definition of disqualifying employment.[[32]](#footnote-33) The court held that the plan’s interpretation was an abuse of discretion[[33]](#footnote-34) and required the plan to pay the participant the early retirement benefits it had withheld as a lump sum with interest.[[34]](#footnote-35) It also ordered the plan to cease its efforts to collect money it had already paid the participant and noted that the participant had a right to apply for an award of attorney’s fees.[[35]](#footnote-36)

*Anti-cutback rule* ERISA’s anti-cutback rule[[36]](#footnote-37) prevents plans from creating amendments that would apply new reemployment restrictions to participants who have already accrued an early retirement benefit. In *Central Laborers’ Pension Fund v. Heinz*, the Supreme Court held that the Central Laborers Pension Fund violated the anti-cutback rule when it adopted a plan amendment broadening the plan’s definition of “disqualifying work,” thereby resulting in a suspension of a retired participant’s early retirement benefits. At the time Mr. Heinz retired, the plan prohibited him from working as a construction worker, but the plan amendment in question allowed for the suspension of benefits if a retiree were also employed as a supervisor.[[37]](#footnote-38) The Supreme Court explains that a central goal of ERISA is to protect “employees' justified expectations of receiving the benefits their employers promise them” and that the anti-cutback rule is a crucial means of carrying out that objective.[[38]](#footnote-39) It states that allowing the plan to retroactively apply its amendment would undercut the participant’s reliance.[[39]](#footnote-40) The Court also clarifies that plan conditions resulting in a suspension of benefits are acceptable so long as they are set prior to the accrual of the benefit.[[40]](#footnote-41)

Following *Heinz*, the IRS issued regulations clarifying that, in the event of a plan amendment imposing new restrictions on post-retirement employment, a participant is entitled to a prorated share of the early retirement benefit that accounts for the participant’s accrual up to the date of the plan amendment[[41]](#footnote-42) (for instance, if a participant works for twenty-eight years prior to the plan amendment and then retires after thirty years of service, the participant is entitled to twenty-eight thirtieths of the benefit s/he would have received under the pre-amendment plan). Furthermore, following *Heinz* the Second Circuit ruled that a plan had to retroactively pay a participant benefits that had been wrongfully suspended even though the suspension had taken place prior to the *Heinz* decision.[[42]](#footnote-43)

**Conclusion**

Though not immediately apparent from the language of ERISA §203, a plan may lawfully suspend early retirement benefits for any reason so long as the suspension does not interfere with the participant’s receipt of the benefits to which s/he would have become entitled at normal retirement age. The Department of Labor, the Internal Revenue Service and federal courts have confirmed this understanding. Plans must properly notify the participant of the suspension and the plan document must contain the relevant reemployment restrictions prior to the participant’s accrual of the early retirement benefit.

1. 29 U.S.C. §1053(a). [↑](#footnote-ref-2)
2. *Id.* at §1053(a)(3)(B)(i). [↑](#footnote-ref-3)
3. *Id.* at §1053(a)(3)(B)(ii). [↑](#footnote-ref-4)
4. 29 C.F.R. §2530.203-3(a). [↑](#footnote-ref-5)
5. *Id.* [↑](#footnote-ref-6)
6. *Id.* at §2530.203-3(b). [↑](#footnote-ref-7)
7. Rev. Rul. 81-140, 1981-1 C.B. 180. [↑](#footnote-ref-8)
8. 46 Fed.Reg. 8894 (Jan. 27, 1981). [↑](#footnote-ref-9)
9. 29 U.S.C. §1056(a). [↑](#footnote-ref-10)
10. 46 Fed Reg. 8894. [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *Whisman v. Robbins*, 55 F.3d 1140 at 1147 (6th Cir. 1995), citing *Gardner v. Central States, Southeast & Southwest Areas Pension Fund,* No. 93-3070, 1993 WL 533540 (6th Cir. 1993). [↑](#footnote-ref-13)
13. *Id.* [↑](#footnote-ref-14)
14. *Whisman* at 1149. [↑](#footnote-ref-15)
15. *Militello v. Central States, Southeast and Southwest Areas Pension Fund,* 360 F.3d 681 (7th Cir. 2004). [↑](#footnote-ref-16)
16. *Id.* at 691. [↑](#footnote-ref-17)
17. 29 C.F.R. §2530.203-3(b)(4). [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. 934 F.2d 1168, 1169 (10th Cir. 1991). [↑](#footnote-ref-20)
20. *Id.* at 1169-1170. [↑](#footnote-ref-21)
21. *Id.* [↑](#footnote-ref-22)
22. *Id.* at 1170. [↑](#footnote-ref-23)
23. *Id.* [↑](#footnote-ref-24)
24. *Id.* at 1171. [↑](#footnote-ref-25)
25. *Id.* [↑](#footnote-ref-26)
26. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). [↑](#footnote-ref-27)
27. *Conkright v. Frommert*, 130 S.Ct. 1630 (2010). [↑](#footnote-ref-28)
28. 588 F.3d 1000 at 1003-1004 (9th Cir. 2009). [↑](#footnote-ref-29)
29. *Id.* [↑](#footnote-ref-30)
30. *Id.* at 1002. [↑](#footnote-ref-31)
31. 2010 WL 2563429, N.D. Tex. (2010). [↑](#footnote-ref-32)
32. *Id.* at 11. [↑](#footnote-ref-33)
33. *Id.* at 13. [↑](#footnote-ref-34)
34. *Id.* at 22. [↑](#footnote-ref-35)
35. *Id.* [↑](#footnote-ref-36)
36. [29 U.S.C. § 1054(g)](http://web2.westlaw.com/find/default.wl?mt=WestlawGC&db=1000546&stid=%7bad18e439-34ab-4547-8180-694f6afdabbd%7d&docname=29USCAS1054&rp=%2ffind%2fdefault.wl&findtype=L&ordoc=2004549964&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=T&pbc=40D8B384&referenceposition=SP%3b16f4000091d86&rs=WLW12.07). [↑](#footnote-ref-37)
37. 541 U.S. 739 (2004). [↑](#footnote-ref-38)
38. *Id.* at 743-744. [↑](#footnote-ref-39)
39. *Id.* at 745. [↑](#footnote-ref-40)
40. *Id.* at 745-746. [↑](#footnote-ref-41)
41. 26 C.F.R. § 1.411(d)-3. [↑](#footnote-ref-42)
42. *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, (2nd Cir. 2006). [↑](#footnote-ref-43)