

Pension Rights Center
National Training Conference

Multiemployer Plans in Real Life

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Multiemployer Plans Rules

- Generally, rules that govern multiemployer plans (MEPs) are the same as single employer plans--but the differences can affect a claimant's entitlement to benefits.
- Often more significant to a claimant than legal characteristics of MEPs are features that arise by industry practice.
- These vary by industry and plan but general themes may help you recognize plan rules that will assist a claimant.
- Presentation will focus on rules and operational issues that may affect a claimant's entitlement.

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Plan Operations

- Generally larger plans and plans in cities are well run.
- Wide range of quality in professional advice.
 - Like SEPs, smaller MEPs may have limited options for administration.
 - May use union's attorney and/or accountant with little benefits experience.
- Similar to small SEPs.

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Types of Multiemployer Retirement Plans

- Generally, a bargaining unit (BU) participates in at least one defined benefit (DB) plan.
 - Occasionally there is more than one DB plan—a local union plan and a national or regional plan.
 - Union employees may also participate in a DB plan for union employees maintained by the national union that may also be a MEP.
- Often the BU also participates in a defined contribution (DC) plan of some type (more about this later).
- Occasionally, there is only a DC plan.

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Contributions

- Typically made on units of time not compensation.
 - Generally specified in collective bargaining agreement (CBA)
- Contributions and hours of service are typically linked.
 - Hour of service is hour for which contribution is required.
- DB and money purchase plan (MPP) must credit whether or not collected.
- Therefore, determining written basis for contribution is important to determine credit—CBA, participation agreement.
 - Plan records of written agreements may leave something to be desired.

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Reciprocity

- Common among MEPs in industries in which employees move among employers, e.g., construction, trucking.
- Two common types are pro rata (PR) and money-follows-the-man (MFTM).
- Reciprocity systems may be national/international (managed by national union), regional, bi-lateral.
 - Reciprocity systems may operate cross-border with Canada.

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Reciprocity

- May enable claimant to vest or to increase benefit service.
- Important to determine if Reciprocity may apply and if so, terms of applicable Agreement/Arrangement.
- Reciprocity is almost completely unregulated per MPPAA Legislative History.
 - Courts have found plans are not required to enter into reciprocal agreement.
- Claimant rights are determined by plan document and Reciprocal Agreement.

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Pro Rata Reciprocity

- Typically used by DB plans.
- Each plan agrees to recognize service under other plans for vesting & eligibility for benefit forms but typically not benefit accrual.
- May require that claimant earned at least minimal credited service in each plan from which benefit will be calculated to limit recordkeeping and very small checks.
- May reach back to count service otherwise lost due to break in service years ago including for periods prior to the signing of the pro rata agreement or may apply only to service from a specific date forward.

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Money Follows the Man Reciprocity

- Used by DB and DC Plans.
- Designates a traveler's "home fund". The "away fund" or "visited fund" is the fund in the jurisdiction in which traveler is working.
- Visited fund collects contributions due on behalf of traveler and transmits them to traveler's home fund. Away fund acts only as a conduit.
- Traveler's home fund credits the contributions received and the hours in accordance with the home fund rules.

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Other Reciprocity Issues

- PR and MFTM may be combined.
- There may be a Reciprocity Coordinator to whom questions may be directed.
- Another form of reciprocity is when Plan A Credits service in Plan B for specified purposes.

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Multiemployer Defined Contribution Plans

- Plans are typically profit-sharing (with or without 401(k) feature) (PSP) or money purchase (MPP).
- Type of plan may affect claimant's benefit rights
 - But plans are typically known as “annuities” or “supplemental” plans and claimant may not know actual type.
 - Plan may have converted from MPP to PSP retaining prior structure.
 - Plan may not have converted properly.
 - Plan may not be operating properly for type—e.g., crediting service.

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Multiemployer Defined Contribution Plans

Feature	Money Purchase Plan Code 401(a)	Profit Sharing Plan Code 401(a)
Tax Status		
Participant Directed Investments	Permitted	Permitted
Plan Loans	Permitted	Permitted
Hardship Distributions	No	Yes
In service Distributions	No	Permitted w limits
Elective Deferrals (i.e., 401(k) feature)	No	Permitted
Annuity	Required	Permitted
Employer Contributions	Typical	Typical unless 401k with only elective deferrals
After tax employee contributions (uniform amount—no election)	Permitted	Permitted
Accounts Credited for Contributions not received	Required	Not required

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Multiemployer Defined Contribution Plans Characteristics

- A substantial portion of DC Plans are still MPPs. Possibly as high as 25%.
- Many PSPs do not have 401(k) feature.
 - A few 401(k)s have automatic enrollment.
- For the PSPs, hardship distributions are more common than loans.
- More plans than not are participant directed but a substantial portion are still trustee directed.

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Multiemployer Defined Contribution Plans Characteristics

- Participation and/or vesting may be immediate or after short period.
- Plans pay benefits upon severance which may be defined as short as 3 months or as long as 12+ months.
- Many PSPs created special fixed period distribution following 2008 recession.
- DC plans are often not viewed as “retirement” plans and fiduciaries are more willing to amend plan to permit distribution.
- Accounts in some of these plans are very large.

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Multiemployer Defined Benefit Plans

- Variable and hybrid plans are starting to appear--mostly adopted by troubled plans--but are not common.
- Typical formulas—
 - % of contributions
 - \$ x period of service
 - Some staff MEPs are % of compensation

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Multiemployer Defined Benefit Plans Common Characteristics

- Plan rules may be more liberal than IRS minimums, e.g., hours required for a year of service may be quite low.
- Benefits may be subsidized, e.g., early retirement, survivor benefits, disability.
 - Subsidized benefits may require extra years of credit to qualify.
 - Rules may be pre-ERISA holdovers.
- Plan may include rules to “cure” a break in service or work that does not count toward break in service.
 - Plans in industries with frequent unemployment may have break rules designed to protect unemployed/injured participants.

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Multiemployer Defined Benefit Plans Common Characteristics

- Plans in industries in which injuries are frequent may have definition of disability tied to inability to do BU work.
 - May have multiple tests for disability pension eligibility.
- Disability benefit is typically a pension and not ancillary.
- Plans may have provision to permit early retirement then conversion to disability upon receipt of disability award. Be aware of deadlines.

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Common Operational Problems

- Most MEPs are well run--but plans are complex operations and mistakes happen. As with SEPs, chances of error are greater in small plans with inexperienced advisers.
- MEP fiduciaries rely on advisers for expertise. If advisers are not competent, plan administration will suffer.
- IRS list of Top Ten compliance issues identified in examinations of MEPs is useful starting point as these issues affect benefit entitlement.
- My experience—errors are from lack of knowledge and experience and not intent. Other factors such as poor records from a merged plan or prior service provider may affect administration.

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**Common Operational Problems
IRS Top Ten & Beyond**

- Errors in benefit calculations, crediting service, general administration.
 - Plan documents may be misunderstood or misapplied. Various plan documents may be inconsistent.
 - Vesting and break in service rules may be misapplied.
 - Applicable law may be misunderstood.
 - Data may be bad—higher risk with data from prior service provider, merger. Error may not become apparent for years.

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**Common Operational Problems
IRS Top Ten & Beyond**

- Accruals/service credit is dependent on employer contributions being made; Code 412 funding violation for MPP.
 - Most DB plans apply this correctly but MPPs still violate.
 - DB violation may occur if DB plan terminates delinquent employer but employer still “maintains the plan”. See circumstances in IRS GCM 39048.

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**Common Operational Problems
IRS Top Ten & Beyond**

- Suspension of benefits (including deemed suspension) not administered properly; benefit recalculation upon re-retirement not done at all or not done properly.
 - Timing/content may be wrong; “industry” may not be properly identified.
 - Deemed suspension notice often not given at all; requirements, timing, to whom given, actuarial adjustment still misunderstood.
 - Broad pre-NRA suspension requires restoration of benefits.
 - Additional benefits earned requires separate benefit election if initial retirement was pre-NRA. May not be done.

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Common Operational Problems IRS Top Ten & Beyond

- To comply with *Heinz* ruling, MEP may have multiple suspension rules that apply to benefits earned during different time periods.
 - Some plans change suspension rules for prior service in Rehabilitation Plan.
 - Court case now challenging.

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Common Operational Problems IRS Top Ten & Beyond

- No written agreement; failure to comply with written agreement.
- Taft-Hartley Act requires contributions made pursuant to written agreement.
 - CBA for BU.
 - Participation Agreement (PA) for non-bargaining unit (NBU) employees.
- Plans typically establish rules for participation of NBUs including signed (PA).
 - Plan may not have signed PA.

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Interacting with Multiemployer Plans

- Plan staff tend to try to help participants.
 - Conversation with plan staff re issues with your claimant's situation will likely provide useful information.
- Larger plans post much information on open access website—plan documents, policies, forms, etc.
- Some MEPs have a liberal approach to appeals—permitting repeated appeals if new information is presented.
 - May be confusion over various aspects of claims rules, e.g., timing, levels of appeal, what is a claim.

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Interacting with Multiemployer Plans

- Ask your claimant if Union or employer will provide support.
- Trustees will sometimes advocate on behalf of a participant when appeal is heard.
- If claimant is not entitled under plan terms, advocating an exception or broad amendment not helpful for most plans still recovering from 2008.
 - Suggest narrow factual interpretation or exception
 - Plans still in endangered or critical status generally cannot improve benefits.

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Interacting with Multiemployer Plans

- If claimant's problem is based on errors in plan administration including legal errors, a conversation with plan counsel may be more productive than a confrontational letter or discussion.
- MEPs typically adopt rules to assist participants in the industry earn & retain pension. Understanding the "culture" of industry and plan may help your advocacy on behalf of a claimant.

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EP Examination Process Guide - Section 2 - Compliance Monitoring Procedures - Top Ten Issues - Multiemployer Plans

Top ten issues identified during audits.

1. Errors made in benefit calculations, crediting service, reduction factors, general administration

Errors are made when participant benefits are calculated. The following reasons for these mistakes have been identified:

- benefit provisions in the plan are misapplied
- applicable law is not understood
- faulty participant data is used and/or provided (by employer and/or union)
- combinations of above

Administrators should take greater care when considering the applicable plan provisions, law changes, and the accuracy of participant data when determining benefits.

2. Internal Revenue Code Section 412 violation - funding deficiency

Plans subject to Internal Revenue Code Section 412 minimum funding requirements are failing to receive contributions necessary to satisfy this code section. In addition, participating employers responsible for the excise taxes that result are not filing the appropriate excise tax return (Forms 5330) and/or paying the tax.

Administrators should actively pursue the collection of delinquent employer contributions and inform any employer who has failed to satisfy its section 412 obligation of the requirement to file Form 5330 with the Service and pay the appropriate excise tax.

3. Plan did not make required actuarial adjustments for benefit payments beginning after Normal Retirement Date

The required actuarial adjustments or interest adjusted back payments are not being paid to participants whose retirement benefits first commence after the Normal Retirement Date as stipulated in the plan. This issue tends to be more prevalent when plans have normal retirement ages that are less than 65 because many participants are unaware of their eligibility to receive these benefits at this earlier age and thus fail to apply for their benefits.

Administrators should ensure that all missed payments due to the delayed commencement of benefits are restored and that these payments are increased by the appropriate interest factor.

4. Deficient Plan Language and/or Conflict between Plan Document and Other Agreements (Collectively Bargained, Joinder, Participation)

This involves situations where the language in the plan document is not specific as to its terms, or the language does not meet Internal Revenue Code Section 401(a). It also includes situations where the Plan Document does not agree with the language in Other Written Agreements. For example, the benefit formula in the plan is not the same as the one in the Collectively Bargained Agreement, or the eligibility provisions in the plan do not agree with those in a participation agreement.

Administrators should first ensure the plan document meets the requirements of Internal Revenue Code Section 401(a) and that the document is specific as to its terms. Administrators should also make sure that the terms in the plan document agree with all Other Written Agreements, especially when changes are made to these Other Agreements.

5. Internal Revenue Code Section 401(a)(9) violation (required minimum distributions)

Because administrators typically rely on participants to apply for benefits before addressing such issues, the required minimum distribution requirements of Internal Revenue Code 401(a)(9) are not being met. Specifically many plans have failed to make required distributions to participants by the first of April following the later of the year he/she turns 70 ½ or the calendar year in which they retire. In addition when participants die the rules governing the timing of such distributions to their beneficiaries are not being followed.

Plan administrators should be more proactive with respect to monitoring the section 401(a)(9) requirements.

6. Plan fails to follow or does not have a participation agreement for each participating employers

This normally involves non-collectively bargained employees working for union and/or trust fund who are participating in the plan yet did not have an agreement signed or the agreement in place is not followed. These agreements can be in the form of a side agreement, contained within the CBA or provided for within the plan itself. The failure to properly define the plan's eligibility and participation requirements may result in its failing to constitute a definite written program under the law.

Administrators should ensure that prior to admitting a non-collectively bargained employee to the plan, adequate language addressing the eligibility requirements and benefit structure pertaining to such employee is formally adopted.

7. Accruals/service credit is dependent on employer contributions being made

Plans are failing to meet the definitely determinable benefit rules of I.T. Reg. 1.401-1(b)(1)(i). Plans are failing this requirement in form and in operation. The situation that usually results in such a violation is when the plan requires payment from the participating employer prior to crediting a participant for covered service associated with that employer contribution.

Administrators should ensure that the crediting of participant accruals and service is not dependent on the receipt of related employer contributions.

8. Internal Revenue Code Section 411 violations including cash out/forfeitures from lost participants,

wrong vesting schedule used, and error in vesting percentages

Every plan is required to have provisions regarding how participants are vested in their benefits. Normally, the percentage a participant is vested is dependent on their credited service. If employers and/or union do not track a participant's service correctly, the vesting percentage could be incorrect.

Errors that have been cited include the following:

- erroneous cash outs and forfeitures
- wrong vesting schedules being used
- errors when calculating a participant's vesting percentage
- suspension of benefit issues including Heinz type violations

Greater care should be applied to the vesting provisions contained in the plan document and legal changes to Internal Revenue Code section 411.

9. Delinquent/late contributions

Plans subject to Internal Revenue Code Section 412 minimum funding requirements are failing to receive contributions by certain dates necessary to satisfy this code section. When the plan receives these contributions late, there are consequences which can include excise taxes being assessed, and/or deductions being disallowed on the employer's tax return.

Administrators should advise all employers making contributions to the plan to make them timely per section 412. This may be difficult as not all the employers involved in a plan may have the same tax year nor the same method of accounting. If contributions are not timely per section 412, employers should be advised to file Form 5330 with the Service, and pay the appropriate excise tax due.

10. Misuse/Diversion of Pension Funds

This involves situations where the plan's assets are used for purposes other than the benefit of plan participants or the trust. Errors that have been noted include the following:

- plan trustee is using trust assets for personal use
- plan loans money to a trustee using an interest rate that is less than the Fair Market rate
- trust sells an asset to a "disqualified person" for less than Fair Market Value
- failure to properly allocate expenses between different trusts
- improper transfer of assets between related trusts
- embezzlement of trust assets

Administrators should make sure that the trust assets are used for the exclusive benefit of plan participants.

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