RULES GOVERNING WORK AFTER RETIREMENT Multiemployer Defined Benefit Plans

- Joyce A. Mader
- O'Donoghue & O'Donoghue LLP

- November, 2023

1

Overview of Issues

- Has the participant retired? Is suspension the issue?
- Suspension of benefits rules—
  - Return to work before-NRA
  - Return to work after NRA
- Continued work past NRA without benefit commencement.
- Recalculating benefits after a return to work.
- Limitations on changing suspension of benefits rules.

2

Applicable Rules

- Suspension of Benefit Rules are found in two federal statutes: §401(a) and §411(a) of the Internal Revenue Code ("Code") and §203(a) of the Employee Retirement Income Security Act ("ERISA").
- Two sets of federal regulations supplement the rules found in the Code and ERISA: Treasury (IRS) Regulations §1.411(a) and Department of Labor Regulations §2530.203-3.
- Court decisions, agency guidance and other statutes also affect related issues.

3

Has the Participant Retired?

- IRS prohibition on "In-service Distributions" - No benefit distributions (payments) until after a Participant separates from service, becomes disabled, retires or dies. Violation of this rule jeopardizes tax-qualified status of the Plan.
- IRS considers a Participant "retired" if –
  - The Participant has a "Bona fide quit" and
  - The Participant has stopped working as a common law employee for an employer maintaining the Plan.

4

Has the Participant Retired?

- Retirement/Bona Fide Quit
  - Terms are not defined in the Code.
  - IRS looks for evidence of Participant's intent to retire and remain retired.
  - See PLR 201147038 (April 20, 2010).
- Employer maintaining the Plan
  - All employers contributing to multiemployer plan treated as a single employer; to be considered retired Participant must stop working for any contributing employer in any job classification.

5

Suspension of Benefits Rules

ERISA/Code provide that the right to the **employer-derived** portion of accrued pension benefit shall not be treated as forfeitable solely because an employee **pension benefit plan provides** that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits. *DOL Reg.* Code §*2530.203-3(a).*

Two sets of rules govern the suspension of a Participant's benefits –

- Rules permitting suspension of benefits for reemployment after a Participant attains Normal Retirement Age (NRA).
  - Only 203(a)(3)(B) service.
- Rules permitting suspension of benefits for reemployment prior to Normal Retirement Age or benefits which exceed normal retirement benefit.
  - ANY reemployment. Subject to recalculation to preserve participant's benefit at NRA.

6

Suspension of Benefits Post-NRA

The employment of employee subsequent to time payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment results in section 203(a)(3)(B) service during a calendar month, if the employee, in such month completes 40 or more hours of service in–

- An **industry** in which employees covered by plan were employed and accrued benefits under plan as a result of such employment **at the time that payment of benefits commenced or would have commenced if employee had not remained in or returned to employment**, and
- A **trade or craft** in which the employee was employed **at any time under the plan**, and
- The **geographic area** covered by the plan at the time that **the payment of benefits commenced or would have commenced** if the employee had not remained in or returned to employment.

DOL Reg. §2530.203-3(c)

7

Definitions *DOL Reg. §2530.203-3(c)*

"Industry" means the business activities of the types engaged in by **any employers** maintaining the Plan). At the time payment of benefits commenced.

"Trade or Craft" means a skill(s) learned during a significant period of training or practice, which is applicable in occupations in some industry in which the employee was employed at **any time under the Plan** or, supervisory activities related to such skills.

8

Definitions *DOL Reg. §2530.203-3(c)*

"Geographic area" consists of any state or province of Canada in which contributions were made or were required to be made by or on behalf of an employer and the remainder of any part of any Standard Metropolitan Statistical Area (SMSA) which falls in part within such state, **determined as of the time that the payment of benefits commenced or would have commenced if the employee had not returned to employment**.

9

Suspension During Periods of Pre-NRA Reemployment

"A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and without regard to the provisions of §203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." ***DOL Reg. §2530.203-3(a)***

Recalculation required to protect normal retirement benefits to the extent pre-NRA suspension is for other than 203(a)(3)(B) service or does not follow the requirements of the regulations.

10

Resumption of Suspended Payments Offset

Resumption: If benefit payments have been suspended, payments must resume no later than the first day of the third calendar month after the calendar month in which the employee ceases to be employed in section 203(a)(3)(B) service: **Provided, that the employee has complied with any reasonable procedure adopted by the plan for notifying the plan that he has ceased such employment. The initial payment upon resumption shall include the payment scheduled to occur in the calendar month when payments resume and any amounts withheld during the period between the cessation of employment and the resumption of payments, less any amounts which are subject to offset.** *DOL Reg. §2530.203-3(b)(2)*

Offset rules. A plan which provides for the permanent withholding of benefits may deduct from benefit payments to be made by the plan payments previously made by the plan during those calendar months in which the employee was employed in section 203(a)(3)(B) service, **Provided, That such deduction or offset does not exceed in any one month 25 percent of that month's total benefit payment which would have been due but for the offset (excluding the initial payment, which may be subject to offset without limitation).** *DOL Reg. §2530.203-3(b)(3)*

11

Notification by Plan DOL Reg. §2530.203-3(b)(4)

No payment shall be withheld by a plan pursuant to this section unless the plan notifies employee **by personal delivery or first class mail during the first calendar month in which plan withholds payments that benefits are suspended.**

Such notification shall contain a **description of the specific reasons why benefit payments are being suspended, a general description of the plan provisions relating to the suspension of payments, a copy of such provisions, and a statement to the effect that applicable Department of Labor regulations may be found in § 2530.203-3** of the Code of Federal Regulations.

In addition, the suspension notification must **inform employee of the plan's procedure for affording a review of the suspension of benefits**. Requests for such reviews may be considered in accordance with the claims procedure adopted by the plan pursuant to section 503 of the Act and applicable regulations.

12

Notification by Plan DOL Reg. §2530.203-3(b)(4)

In the case of a plan which requires the filing of a benefit resumption notice for the resumption of benefits, the suspension notification shall also describe the procedure for filing such notice and include the forms (if any) which must be filed.

If plan intends to offset any suspendible amounts actually paid during the periods of employment in section 203(a)(3)(B) service, the notification must identify specifically the periods of employment, the suspendible amounts which are subject to offset, and the manner in which the plan intends to offset such suspendible amounts.

Where the plan's summary plan description (SPD) contains information which is substantially the same as information required, the suspension notification may refer the employee to relevant pages of the SPD for information as to a particular item, provided the employee is informed how to obtain a copy of the SPD, or relevant pages thereof, and provided requests for referenced information are honored within a reasonable period of time, not to exceed 30 days.

13

Verification of Work by Employee DOL Reg. §2530.203-3(b)(5)

A plan may provide that an employee must notify the plan of any employment. A plan may request from an employee access to reasonable information for the purpose of verifying such employment. Furthermore, a plan may provide that an employee must, at such time and with such frequency as may be reasonable, as a condition to receiving future benefit payments, either certify that he is unemployed or provide factual information sufficient to establish that any employment does not constitute section 203(a)(3)(B) service if specifically requested by the plan administrator. Once an employee has furnished the required certification or information, the plan must forward, at the next regularly scheduled time for payment of benefits, all payments which had been withheld pursuant to this paragraph (b)(5) except to the extent that payments may be withheld and offset pursuant to other provisions of this regulation.

14

Status Determinations DOL Reg. §2530.203-3(b)(6)

If a plan provides for benefits suspension, the plan must adopt a procedure, and inform employees, how an employee may request, and the plan administrator in a reasonable amount of time will render, a determination whether specific contemplated employment will be section 203(a)(3)(B) service for purposes of plan provisions concerning suspension of benefits. Requests for status determinations may be considered in accordance with the claims procedure adopted by the plan pursuant to section 503 of the Act and applicable regulations.

15

Presumptions DOL Reg. §2530.203-3(b)(7)

A plan which has adopted verification requirements and which complies with the notice requirements may provide that whenever the plan fiduciaries become aware that a retiree is employed in section 203(a)(3)(B) service and the retiree has not complied with the plan's reporting requirements with regard to that employment, the plan fiduciaries may, unless it is unreasonable under the circumstances to do so, act on the basis of a rebuttable presumption that the retiree had worked a period exceeding the plan's minimum number of hours for that month. In addition, a plan covering persons employed in the building trades which has adopted verification requirements and which complies with the notice requirements may provide that whenever the plan fiduciaries become aware that a retiree is employed in section 203(a)(3)(B) service at a construction site and the retiree has not complied with the plan's reporting requirements with regard to that employment, then the plan fiduciaries may, unless it is unreasonable under the circumstances to do so, act on the basis of a rebuttable presumption that the retiree engaged in such employment for the same employer in work at that site for so long as that same employer performed that work at that construction site.

16

Presumptions DOL Reg. §2530.203-3(b)(7)

A plan which provides for a presumption described in this section may employ such presumption only if the following requirements are met. The plan must describe its employment verification requirements and the nature and effect of such presumption in the plan's summary plan description and in any communication to plan participants which relates to such verification requirements (such as employment reporting reminders or forms), and retirees must be furnished such disclosure, whether through receipt of the above communications or by special distribution, at least once every 12 months.

17

Suspension for Continued Work after NRA

Required by regulations but often missed.

Unless suspension notice is provided when employee attains NRA while still working, benefit must be actuarially adjusted for delayed retirement.

18

Recalculating Benefits after a Return to Work

A benefit recalculation following a return to work involves several factors--

- Whether the participant has earned additional accruals under the plan
- Whether the age of the participant upon resumption of retirement requires an adjustment
- Whether an actuarial adjustment for delayed retirement is required.
- Whether a new application and benefit form election is required. See IRS Reg 1.401(a)-20, Q&A 10(d).

19

Recalculation of Pension Benefits after Post Retirement Return to Work

Factors	Additional Accruals	Benefit Election	Age Adjustment	411(b)(1)(H) offset	Actuarial Adjustment
BENEFIT NOT SUSPENDED					
Retirement and return to CE before NRA	Yes	New benefit election	No	No	No
Retirement; return to CE after NRA	Yes	New benefit election if initial retirement was pre-NRA	No	Yes	No
Retirement; return to non-CE before or after NRA	No	NA- no accruals	No	NA	No
Participant continues in CE after NRA	Yes	Upon benefit commencement	NA	Yes	Yes, if benefit delayed past NRA
Participant in non-CE after NRA	No	NA-no accruals	No	NA	No
No retirement but no employment after NRA	No	Upon benefit commencement	NA	No	Yes, if benefit delayed past NRA
BENEFIT SUSPENDED					
Retirement; return to CE; benefits resume before NRA	Yes	New benefit election	Yes	No	No
Retirement; return to CE; benefits resume after NRA	Yes	New benefit election if initial retirement was pre-NRA	Yes, if benefits were reduced based on age at initial retirement	Yes	No, suspension notice given
Retirement; return to non-CE; benefits resume before NRA	No	NA-no accruals	Yes, if benefits were reduced based on age at initial retirement	NA	No, suspension notice given
Retirement; return to non-CE; benefits resume after NRA	No	NA-no accruals	Yes, if benefits were reduced based on age at initial retirement	NA	No, suspension notice given
Participant continues in CE after NRA	Yes	Upon benefit commencement	NA	Yes	No, deemed suspension notice given
No retirement; Participant in non-CE after NRA	No	NA-No accruals	No	NA	No, deemed suspension notice given

20

Limitations on Changing Suspension of Benefit Rules

Supreme Court Decision in *Central Laborers' Pension Fund v Heinz*. The U.S. Supreme Court held that a plan amendment expanding the types of post-retirement employment for which benefits would be suspended could not apply to the portion of a Participant's benefit earned prior to the effective date of the amendment without violating the anti-cutback rule.

Review subsequent IRS guidance and regulations.

21

Limitations on Changing Suspension of Benefit Rules

(Unintentionally) Establishing an Accrued Benefit.

The IRS has taken the position that repeated renewal of certain "temporary" benefits, such as a COLA, thirteenth check or **the repeated waiver of a Plan's suspension of benefits**, even without a plan amendment, may lead to the benefit becoming an "accrued benefit" subject to the anti-cutback provisions of the Code and ERISA.

Authority goes both ways.

22

Limitations on Changing Suspension of Benefit Rules

Modification of Suspension Rules in a PPA Rehabilitation Plan: The trustees of a Critical Status Plan may reduce "adjustable benefits" subject to collective bargaining. "Adjustable benefits" are

- Benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits,
- Any early retirement benefit or retirement-type subsidy (within the meaning of § 411(d)(6) and any benefit payment option (other than the qualified joint-and survivor annuity), and
- Benefit increases that would not be eligible for a guarantee under section 4022A of the Employee Retirement Income Security Act of 1974 on the first day of the initial critical year.

Code § 432(e)(8)(A)(iv).

23

Assessing a Possible Suspension Claim

- Get all of the facts and documents.
- Has the participant retired? Is this a suspension issue?
- Does the matter involve pre-NRA employment? If so, suspension rules apply only to the extent provided in the plan.
- Does the matter involve a participant who continued in employment past NRA without commencing benefits?
- Has the plan provided the required notices?
- Has the participant verified employment as required by the plan and provided requested information?
- If applicable, have benefits been recalculated properly?

24

Rules Governing Work after Retirement: Multiemployer Defined Benefit Plans

By Joyce A. Mader
O'Donoghue & O'Donoghue, LLP

November, 2023

Work After Retirement: Issues

A pension plan's rules on working after retirement are affected by ERISA and DOL regulations as well as the Internal Revenue Code, IRS Regulations and other guidance and Court decisions. This memo will review the rules that limit the choices plan trustees may make in structuring their suspension of benefit rules and will explain the consequences to the plan and participants of these legal requirements.

There are also related issues that arise in connection with working after retirement as follows:

- Has the participant retired? Is suspension of benefits even the issue?
- Suspension of benefits for return to work
    - Suspension of benefits after Normal Retirement Age (NRA)
    - Suspension of benefits before NRA
    - Notices and presumptions
    - Definitions
- Deemed suspension for continued work after NRA
    - Notices
    - Adjustment for delayed retirement
- Recalculating benefits after a return to work
    - Additional credited service
    - Age
    - Actuarial adjustment
- Limitations on changing suspension of benefits rules
    - The Heinz decision and accrued benefit rules
    - Modification in a PPA Rehabilitation Plan

I will touch on all of these is this presentation. I emphasize that the facts of each case, including the plan documents, the regulations and the timeline are critical to determining if the plan or the participant or both have complied with the rules. **There are no short cuts.**

In my experience, participants typically fail to comply in a basic suspension case. That is, the participant retired, returned to work, failed to notify the plan, the employment was discovered and his/her benefits were suspended. Some plans regularly require tax returns or certifications from participants to monitor for undisclosed work. Plans typically do this correctly.

Why do plans care? **Cost**—In many industries, early retirement benefits are heavily subsidized. If participants retire on heavily subsidized benefits and then return to work, typically in employment without contributions to the plan to avoid detection, it encourages more costly early retirements. This

is a substantial drain on the plan. **In-service distributions**—often such "retirees" miss little to no work and had no intention of ceasing work. This is not a *bona fide* retirement under IRS rules and, if the employer is a contributing employer, the pension is an "in-service distribution" in violation of IRS rules that could put the plan's qualified status at risk.

Plans tend to violate the rules, either intentionally or unintentionally, in other ways.

- In-service distributions—plans may permit individuals to "retire" when it is clear they intend to return to work.
- Incorrect application of "industry" and "trade or craft" rules to suspensions.
- Deemed suspension—incorrect notices, application of rules and adjustments for delayed retirements.
- Recalculating benefits—incorrect application of recalculation rules.
- Heinz/accrued benefits issues—improper changes to suspension of benefits rules.

A. Suspension of Benefits for Return to Work after Retirement

1. Has the participant "retired"? Is suspension of benefits the issue?

Before a participant can receive a pension, the participant must "retire". It is important to look at the plan definition of "retirement" and be familiar with the limited guidance on the subject. This is a first step because unless the participant has "retired", he/she is not entitled to a pension benefit. What might appear to be a benefit suspension might instead be a determination that the participant did not retire.

Defined benefit pension plans and certain types of defined contribution plans are generally prohibited from distributing benefits until after participants separate from service, become disabled, retire or die.[1] Benefits paid before a participant has one of these "distribution events" is an "in-service" distribution' and is prohibited for these plans. An exception to this rule does permit in-service distributions to participants of these plans who attain *normal retirement age* if the plan documents so provide. In-service distributions to participants in these types of plans before reaching the plan's normal retirement age is never permissible.[2]

The IRS does not define the terms "retirement" or "termination" with any precision. The agency determines retirement status according to the following guidelines:

> "Once the status of the worker changes from common law employee of the employer sponsoring the plan, the employee has retired. Other situations will be addressed on a case by case basis. Not having enough hours of service to trigger the suspension of benefits rules [i.e. less than 40 hours per month] is not sufficient to be considered retired. If the employee has had a bona fide quit, then the subsequent re-employment with the same employer does not require that benefits be suspended to the individual." [3]

---

[1] Treas. Reg. section 1.401-1(b)(1)(i); Rev Rul. 56-213, modified by Rev. Rul 74-254.

[2] Rev. Rul. 56-693, 1956-2 C.B. 282, as modified by Rev. Rul. 60-323, 1960-2 C.B. 148; Rev. Rul. 73-533, 1973-2 C.B. 129; Technical Information Release 1403, question M-15; Private Letter Ruling 8137048; ABA Joint Committee on Employee Benefits, 1998 Questions and Answers with the Agencies, IRS, Question 7, pp.27-8.

[3] ABA Joint Committee on Employee Benefits, 1998 Questions and Answers with the Agencies, IRS Question 9, p.28.

While failing to provide a precise definition of "retirement," the IRS statement indicates that, at minimum, retirement requires termination of common law employee status.[4] Thus, if a participant were to take a vacation and return to work without any interruption in the employment relationship that participant has not retired. A participant who moves from covered employment (typically bargaining unit employment) to non-covered employment but with an employer that contributes to the pension plan for other employees, has also not retired. That individual would still be a common law employee of an employer sponsoring the multiemployer plan. Benefit payments to these participants before normal retirement age (as defined in the plan) would likely constitute an impermissible in-service distribution and jeopardize the qualified status of the plan.

The following are two pieces of guidance from IRS that I find helpful in relation this IRS Rule.

Ruling request by plan to permit employees to retire early and return to work with suspended benefits to avoid losing early retirement subsidies under critical status rehabilitation plan: In PLR 201147038[5], IRS explicitly states that a pension plan will be disqualified if the plan makes distributions to employees who "retire" with an understanding that they will continue working or promptly return to work with an employer maintaining the Plan.

The PLR involved a collectively bargained plan in critical status under the Pension Protection Act (PPA) and had adopted a Rehabilitation Plan that eliminated all subsidized early retirement pensions including service pensions. There were several hundred participants who were eligible for these pensions who would be unable to retire after the Rehabilitation Plan went into effect. The Pension Plan asked the IRS for a ruling whether the Pension Plan would be disqualified if it adopted a rule to permit participants to retire on an early retirement pension to qualify for the subsidy and then quickly return to work with their pension benefits suspended.

IRS ruled that such "retirements" were not bona fide retirements and if a pension was paid to participants based on such retirements the Pension Plan would be disqualified.

IRS stated that "whether a termination of employment has occurred is based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date". IRS stated that there are possible facts and circumstances that would indicate that a reemployed employee had, in fact, legitimately retired. The example provided involved an employee who was rehired by his former employer after the employee's replacement suddenly quit. The employee and employer had intended the retirement to be a complete severance but changed circumstances caused the rehiring.

IRS concluded that "an employee legitimately retires when he stops performing service for the employer and there is not the explicit understanding between the employer and the employee that upon retirement the employee will immediately return to service with the employer." Therefore, an

[4] There is also IRS guidance finding that an employee who leaves employment and becomes a consultant with the same employer has separated from employment. See PLR8124130 (March 23, 1981), PLR 8715061 (Jan. 16, 1987), PLR8931054 (May 10, 1989). Such rulings are very fact specific. Also such consulting arrangements are less common in the case of multiemployer plans.

[5] PLR 201147038 (April 20, 2010).

employee who "retires" with such an understanding has not legitimately retired and may not qualify for benefits under the plan.

IRS further concluded that employees who "retire" with the explicit understanding with an employer that they are not separating from service with the employer, are not legitimately retired. "Accordingly, because these employees would not actually separate from service and cease performing services for the employer when they "retire" these "retirements" would not constitute a legitimate basis to allow participants to qualify for early retirement benefits (which are then immediately suspended). Such "retirements" will violate section 401(a) of the Code and result in disqualification of the plan under section 401(a) of the Code."

You will note that this opinion involved whether or not the employee had legitimately retired. It does not address suspension of benefits. **For benefits to be suspended, there must first be a *bona fide* retirement. The proposal submitted by the plan to the IRS called for the benefits of the re-employed employees to be suspended. If benefits are not suspended, there would also be an unlawful in-service distribution.**

Letter from IRS Chief Counsel to Senator Sarbanes in response to a letter from Sarbanes on behalf of a constituent whose employer advised that the employee could not be rehired after her retirement: In a September, 2000 letter[6] from the IRS Chief Counsel to Senator Sarbanes in response to a letter from Sarbanes on behalf of a constituent, IRS took positions consistent with those in the PLR above. The constituent's employer had advised the constituent that the employer could not rehire her after her retirement if she retires and takes a distribution from her 401(k) plan. Senator Sarbanes, writing on behalf of the constituent, asked what law prohibited the rehiring.

The IRS Chief Counsel stated that there was no definitive ruling of the IRS that prohibits rehiring an employee who has received a distribution from a 401(k) or other retirement plan.

> However, certain sections of the Internal Revenue Code (the "Code"), as well as case law and revenue rulings, impose restrictions on distributions from 401(k) plans that would explain the reluctance [of the employee's] former employer to rehire her if she takes such distribution. The underlying issue in her inquiry is whether she will have experienced a bona fide "separation from service" if she retires from full time employment but returns to work, as was intended before she retired, as a part-time employee...
>
> Based on the information [the employee] has provided, the plan administrator is apparently treating her request for a distribution as due to her separation from service. The plan administrator or the employer has also apparently concluded that she will not have experienced a qualifying separation from service if the employer rehires her as a part-time employee after she retires.
>
> The term "separation from service"[7] is not defined by either the Code or regulations. However, its meaning has been explained in revenue rulings and case law. The basic rule is that, to receive a distribution from a 401(k) plan on account of a separation from service, the

[6] IRS Information Letter 2000-0245 (Sept. 30, 2000)

[7] The term has since been changed to "severance from employment". Therefore, rulings on the meaning of "separation from service" may be relevant to the meaning of the current requirement of "severance from employment."

participant must have experienced a *bona fide* termination of employment in which the employer/employee relationship is completely severed. *See e.g.,* Rev. Rul. 56-214, 1956-1 C.B. 196; S*ee also Barrus v. United States,* 23 AFTR 2d 990 (DC NC 1969) (finding the participant had a true separation from service, even though he returned to employment with his former employer five months after he retired, because at the time of his retirement he had no intention of returning and was only able to return to employment following an unforeseen change in circumstances.)

In *Meakin v California Field Ironworkers Pension Trust*, (9th Cir., June 5 2019), the Court ruled in favor of the Trustees' reinterpretation of the Plan to prohibit receipt of a pension unless and until an employee had retired after the trustees became aware that their prior practice permitting receipt of a pension without retirement violated the qualification requirements of the Internal Revenue Code.

2. Suspension of Benefits Rules:

See ERISA § 203(a)(3)(B); DOL Regulations 29 CFR § 2530.203-3.

The DOL regulations include important information that I have highlighted. I have also provided comments.

> ***(a) General.*** *Section 203(a)(3)(B) of the Act provides that the right to the* ***employer-derived*** *portion of an accrued pension benefit shall not be treated as forfeitable solely because an employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits. This section sets forth the circumstances and conditions under which such benefit payments may be suspended.* ***A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.***

COMMENTS: The suspension rules apply ONLY to the employer funded benefit. Some plans (very few anymore) include employee contributions. Any portion of the defined benefit based on employee contributions may not be suspended.

The last sentence is the most important because this practice is very common. Plans are permitted to suspend (I will use the term "withhold" in this paper) benefits prior to NRA or subsidized benefits based on any reemployment as stated in the plan. A single hour of employment could be the basis for such a withholding. But the withholding cannot affect the employee's right to his accrued benefit after NRA. This means the benefit must be adjusted to take into account the withholding of benefits based on employment that would not support a suspension after NRA. Often employees move in and out of 203(a)(3)(B) service so calculating the actual suspension for which no adjustment is required and the non-203(a)(3)(B) service for which adjustment is required can be challenging particularly if the participant failed to give the required notices.

***(b) Suspension rules**—(1) General rule. A plan may provide for the permanent withholding of an amount which does not exceed the suspendible amount of an employee's accrued benefit for each calendar month, or for each four or five week payroll period ending in a calendar month, during which an employee is employed in "section 203(a)(3)(B) service" as described in § 2530.203–3(c).*

(2) Resumption of payments.** If benefit payments have been suspended pursuant to paragraph (b)(1) of this section, payments shall resume no later than the first day of the third calendar month after the calendar month in which the employee ceases to be employed in section 203(a)(3)(B) service: **Provided, That the employee has complied with any reasonable procedure adopted by the plan for notifying the plan that he has ceased such employment. The initial payment upon resumption shall include the payment scheduled to occur in the calendar month when payments resume and any amounts withheld during the period between the cessation of employment and the resumption of payments, less any amounts which are subject to offset.

COMMENTS: Benefits resume when the employee gives notice that employment has ceased in accordance with plan notice rules. Employees routinely ignore plan notice rules and they are also typically advised of these rules on a regular basis. But counsel for either the plan or the employee must review the plan rules and notices in case the rules or notices are deficient.

(3) Offset rules.** A plan which provides for the permanent withholding of benefits may deduct from benefit payments to be made by the plan payments previously made by the plan during those calendar months or pay periods in which the employee was employed in section 203(a)(3)(B) service, **Provided, That such deduction or offset does not exceed in any one month 25 percent of that month's total benefit payment which would have been due but for the offset (excluding the initial payment described in paragraph (b)(2) of this section, which may be subject to offset without limitation).

COMMENTS: The offset of future benefit payments is 25% EXCEPT for the initial payment upon resumption which might be several months of benefits if the employee has failed to give notice. This entire amount may be offset against benefits improperly paid.

(4) Notification.** No payment shall be withheld by a plan pursuant to this section unless the plan notifies the employee **by personal delivery or first class mail during the first calendar month or payroll period in which the plan withholds payments that his benefits are suspended.** Such notification shall contain a **description of the specific reasons why benefit payments are being suspended, a general description of the plan provisions relating to the suspension of payments, a copy of such provisions, and a statement to the effect that applicable Department of Labor regulations may be found in § 2530.203–3** of the Code of Federal Regulations. In addition, the suspension notification shall **inform the employee of the plan's procedure for affording a review of the suspension of benefits**. Requests for such reviews may be considered in accordance with the claims procedure adopted by the plan pursuant to section 503 of the Act and applicable regulations. **In the case of a plan which requires the filing of a benefit resumption notice as a condition precedent to the resumption of benefits, the suspension notification shall also describe the procedure for filing such notice and include the forms (if any) which must be filed. Furthermore, if a plan intends to offset any suspendible amounts actually paid during the periods of employment in section 203(a)(3)(B) service, the notification shall identify specifically the periods of employment, the suspendible amounts which are subject to offset, and the manner in

which the plan intends to offset such suspendible amounts. Where the plan's summary plan description (SPD) contains information which is substantially the same as information required by this paragraph (b)(4), the suspension notification may refer the employee to relevant pages of the SPD for information as to a particular item, provided the employee is informed how to obtain a copy of the SPD, or relevant pages thereof, and provided requests for referenced information are honored within a reasonable period of time, not to exceed 30 days.

COMMENTS: The timing of notice and requirements for the content of the notice are specific including the notice of the right to appeal the suspension. If the plan intends to offset suspendible amounts previously paid against future benefits, the notice is required to identify specifically the periods of employment, the suspendible amounts which are subject to offset, and the manner in which the plan intends to offset such suspendible amounts. In situations in which the participant has failed to give required notices of reemployment or concealed information, the plan may be unable to give precise information in the first notice when the 203(a)(3)(B) service is discovered. The employee might still be working. Therefore, the notice may be amended after more precise information is determined.

(5) Verification. A plan may provide that an employee must notify the plan of any employment. A plan may request from an employee access to reasonable information for the purpose of verifying such employment. Furthermore, a plan may provide that an employee must, at such time and with such frequency as may be reasonable, as a condition to receiving future benefit payments, either certify that he is unemployed or provide factual information sufficient to establish that any employment does not constitute section 203(a)(3)(B) service if specifically requested by the plan administrator. *Once an employee has furnished the required certification or information, the plan must forward, at the next regularly scheduled time for payment of benefits, all payments which had been withheld pursuant to this paragraph (b)(5) except to the extent that payments may be withheld and offset pursuant to other provisions of this regulation.*

COMMENTS: Plan provisions typically require that retired employees notify the plan of any employment. Employees often violate this requirement. Plans also request periodic certifications and documentation. Some plans require copies of tax returns on a periodic basis from all retirees because of the prevalence of notice failures.

(6) Status determination. If a plan provides for benefits suspension, the plan shall adopt a procedure, and so inform employees, whereunder an employee may request, and the plan administrator in a reasonable amount of time will render, a determination of whether specific contemplated employment will be section 203(a)(3)(B) service for purposes of plan provisions concerning suspension of benefits. Requests for status determinations may be considered in accordance with the claims procedure adopted by the plan pursuant to section 503 of the Act and applicable regulations.

COMMENT: Review plan provision to confirm that the plan has adopted this required review procedure and has informed employees of it. Such provisions might be in the SPD.

(7) Presumptions.

(i) A plan which has adopted verification requirements *described in paragraph (b)(5) of this section,* ***and which complies with the notice requirements*** *set forth in paragraph (b)(7)(ii) of this*

section ***may provide that whenever the plan fiduciaries become aware that a retiree is employed in section 203(a)(3)(B) service and the retiree has not complied with the plan's reporting requirements with regard to that employment, the plan fiduciaries may, unless it is unreasonable under the circumstances to do so, act on the basis of a rebuttable presumption that the retiree had worked a period exceeding the plan's minimum number of hours for that month.*** *In addition,* ***a plan covering persons employed in the building trades*** *which has adopted verification requirements described in paragraph (b)(5) of this section and which complies with the notice requirements set forth in paragraph (b)(7)(ii) of this section* ***may provide that whenever the plan fiduciaries become aware that a retiree is employed in section 203(a)(3)(B) service at a construction site and the retiree has not complied with the plan's reporting requirements with regard to that employment, then the plan fiduciaries may, unless it is unreasonable under the circumstances to do so, act on the basis of a rebuttable presumption that the retiree engaged in such employment for the same employer in work at that site for so long before the work in question as that same employer performed that work at that construction site.***

(ii) A plan which provides for a presumption described in paragraph (b)(7)(i) of this section may employ such presumption only if the following requirements are met. The plan must describe its employment verification requirements and the nature and effect of such presumption in the plan's summary plan description and in any communication to plan participants which relates to such verification requirements (for example, employment reporting reminders or forms), and retirees must be furnished such disclosure, whether through receipt of the above communications or by special distribution, at least once every 12 months.

COMMENTS: Presumptions can be burdensome which is why many plans adopt them. They also benefit the plan when the employee fails to give notice of employment which is common. Presumptions permit the plan to assume that work is 203(a)(3)(B) service and suspend based on the presumption. But the presumptions and employment verification procedures must be described in communications to employees at least once every 12 months.

(c) Section 202(a)(3)(B) service-- (2) Multiemployer plans. *In the case of a multiemployer plan, as defined in section 3(37) of the Act, the* ***employment*** *of an employee subsequent to the time the payment of benefits commenced* ***or would have commenced if the employee had not remained in or returned to employment*** *results in section 203(a)(3)(B) service during a calendar month, or during a four or five week payroll period ending in a calendar month, if the employee, in such month or payroll period:*

—Completes 40 or more hours of service (as defined in § 2530.200b–2(a)(1) and (2)) or
—Receives payment for any such hours of service performed on each of 8 or more days (or separate work shifts) in such month or payroll period, Provided, That the plan has not for any purpose determined or used the actual number of hours of service which would be required to be credited to the employee under § 2530.200(b)–(2)(a); in
—An industry in which employees covered by the plan were employed and accrued benefits under the plan as a result of such employment at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment*, and*
—A trade or craft in which the employee was employed at any time under the plan*, and*

—The geographic area covered by the plan at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment.

COMMENTS: Pay attention to timing of the elements of suspension as well as the definitions. The "industry" is any industry in which employees covered by the plan were engaged at the time the employee's benefits commenced (or would have commenced in the case of a deemed suspension for continued employment) whether or not the specific employee was employed in that industry. Plans may not adequately identify all industries covered by the plan. The "geographic area" covered by the plan is also determined at the time payment of benefits to the employee commenced or would have commenced. However, the "trade or craft" element is specific to the employee at issue and must be one in which the employee engaged at any time under the plan.

There have also been several cases interpreting when a retiree is "employed". *See Cirincione v Plumbers Local Union No. 200 Pension Fund* 07-CV-2207 (EDNY Sept. 24, 2009); *Stout v Lundak*, 3:94-CV-361 (EDTenn., July 5, 1995).

(i) Industry. *The term "industry" means the business activities of the types engaged in by any* ***employers maintaining the plan.***

EXAMPLE.
One of the employers contributing to a multiemployer plan engages in heavy construction, another in textile manufacturing, and another in communications. Employee E began his career as an employee of an employer engaged in heavy construction. Later E was employed by an employer in communications. With both employers, E accrued benefits under the plan. If E retires and then becomes reemployed in the same trade or craft and in the same geographic area, employment by E in either heavy construction, communications or textile manufacturing, whether or not with an employer who contributes to the plan or in a self-employed capacity, may be considered by the plan to be employment in the same industry, assuming that employees covered by the plan were accruing benefits as a result of employment in these industries at the time E commenced receiving benefits. This is true even though E did not previously accrue benefits as a result of employment with an employer engaged in textile manufacturing because other employees covered by the plan were employed in that industry and were accruing benefits under the plan as a result of such employment at the time when benefit payments to E commenced or would have commenced if E had not returned to employment.

COMMENTS: There is some guidance on the definition "industry" that clearly states it is different from "trade or craft". But plans may confuse these elements. In Adv. Op. 84-21A,[8] DOL stated:

> In this regard, you suggest in your letter that it is not the identity of the employer which determines in which industry an employee works, but rather it is the kind of work performed by the employee. We do not agree. Under section 203(a)(3)(B)(ii) and §2530.203-3(c)(2) the "industry" test is in addition to, and separate from, the "trade or craft" test and, therefore, the "industry" test cannot be applied solely on the basis of the trades or crafts performed by individual employees without being duplicative of the "trade or craft" test. Accordingly, while the trades or crafts performed by employees of an employer may, in some instances, be indicative of the industry or industries of which the employer is a part, an independent determination must be made, for purposes of section 203(a)(3) (B)(ii) and §2530.203-3(c)(2), as to the business activities of the employer, taking into consideration the products and/or

[8] Adv. Op. 84-21A (May 1, 1984)

services offered by the employer in the course of its business activities and such other facts and circumstances as may be relevant to such a determination.

(ii) Trade or craft. *A trade or craft is* ***(A) a skill or skills, learned during a significant period of training or practice, which is applicable in occupations in some industry, (B) a skill or skills relating to selling, retailing, managerial, clerical or professional occupations, or (C) supervisory activities relating to a skill or skills described in (A) or (B) of this paragraph (c)(2)(ii).*** *For purposes of this paragraph (c)(2)(ii), the determination whether a particular job classification, job description or industrial occupation constitutes or is included in a trade or craft shall be based upon the facts and circumstances of each case. Factors which may be examined include whether there is a customary and substantial period of practical, on-the-job training or a period of related supplementary instruction. Notwithstanding any other factor, the registration of an apprenticeship program with the Bureau of Apprenticeship and Training of the Employment Training Administration of the U.S. Department of Labor is sufficient for the conclusion that a skill or skills which is the subject of the apprenticeship program constitutes a trade or craft.*

EXAMPLE.

Participation in a multiemployer plan is limited solely to electricians. Electrician E retired and then became reemployed as a foreman of electricians. Because a "trade or craft" includes related supervisory activities, E remains within his trade or craft for purposes of this section.

COMMENT: See *Eisenrich v Minneapolis Retail Meat Cutters and Food Handlers Pension Plan*, (8th Cir, 2009)[9]:

ERISA does not define "trade" or "craft," or elaborate on what it means for a job to be "in the same trade or craft" as another. Its language does not resolve whether an employee's "trade or craft" is defined by what the employee actually did in his former job, or what employees with the same job title typically do. Nor does the statute's history or purpose shed much light on the issue. In allowing plans to suspend the benefits of retirees who accept certain kinds of postretirement employment, "Congress seems to have been motivated at least in part by a desire 'to protect participants against their pension plan being used, in effect, to subsidize low- wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan.'" *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 742 n.1 (2004) (quoting 120 Cong. Rec. 29,930 (1974) (statement of Sen. Williams regarding section 203(a)(3)(B))). But assuming that Congress sought to prevent the "evil of 'doubledipping,' i.e., a pensioner's taking a job that would otherwise have been available to a member of the union who had not retired," *Riley*, 570 F.2d at 410, the statute does not speak to the precise question at issue. The meaning of "trade or craft" in ERISA is ambiguous.

Where Congress has delegated authority to an agency to implement an ambiguous statute, we are required to accept the agency's statutory interpretation, so long as it is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Here, Congress has authorized the Department of Labor to "prescribe such regulations as may be necessary to carry out the

[9] 574 F.3d 644, 651-653.

purposes" of section 203(a)(3)(B). 29 U.S.C. § 1053(a)(3)(B). Pursuant to this authority, the Department issued a regulation defining "trade or craft" as:

> (A) a skill or skills, learned during a significant period of training or practice, which is applicable in occupations in some industry, (B) a skill or skills relating to selling, retailing, managerial, clerical or professional occupations, or (C) supervisory activities relating to a skill or skills described in (A) or (B).

29 C.F.R. § 2530.203-3(c)(2)(ii). This regulation further states that "the determination whether a particular job classification, job description or industrial occupation constitutes or is included in a trade or craft shall be based on the *facts and circumstances of each case*." *Id.* (emphasis added). We understand this language to prohibit a plan from deciding whether a retiree worked in a "trade or craft" based solely on the retiree's "job classification, job description or industrial occupation." Because a plan must rely on the "facts and circumstances of each case," it must consider the "skill or skills" actually used by the retiree in his job.

This reading of the regulation accords with the Department's own understanding, which itself is entitled to substantial deference. *See Gonzales v. Oregon*, 546 U.S. 243, 255 (2006); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In commentary published with the regulation at the time of its promulgation, the Department explained that "it is the use by the retiree of [particular] skills . . . , rather than performance of duties under any specified job description or classification, which is important for determining whether there is employment in the same trade or craft under section 203(a)(3)(B)." 46 Fed. Reg. 8894, 8900 (Jan. 27, 1981). According to the Department, the analysis should be "functional": "a retiree would be employed in the same trade or craft if post-retirement employment required the use of the same skills as preretirement employment, regardless of whether, for example, the preretirement employment was as a 'bricklayer' and the post-retirement employment was as a 'mason.'" *Id.* The Department's commentary confirms that examining the "facts and circumstances of each case" means looking beyond the skills typically associated with a particular job. Under the "functional" approach embraced by the regulation, a plan must look to the skills put to "use by the *retiree*," not by other employees in his occupation.

(iii) Geographic area covered by the plan.

(A) *With the exception of a plan covering employees in a maritime industry, the "geographic area covered by the plan" consists of any state or any province of Canada in which contributions were made or were required to be made by or on behalf of an employer and the remainder of any Standard Metropolitan Statistical Area (SMSA) which falls in part within such state, determined as of the time that the payment of benefits commenced or would have commenced if the employee had not returned to employment.*

EXAMPLE.
A multiemployer plan covers plumbers in Pennsylvania. All contributing employers have always been located within Pennsylvania. Accordingly, the "geographic area covered by the plan" consists of Pennsylvania and any SMSAs which fall in part within Pennsylvania. Thus, for example, in the case of the Philadelphia SMSA, Burlington, Camden and Gloucester Counties in New Jersey are within the "geographic area covered by the plan".

(B) *[Reserved—for definition of the geographic area covered by a plan that covers employees in a maritime industry.]*

For purposes of this paragraph (c)(2)(iii), contributions shall not include amounts contributed: After December 31, 1978 by or on behalf of an employer where no contributions were made by or on behalf of that employer before that date, if the primary purpose of such contribution is to allow for the suspension of plan benefits in a geographic area not otherwise covered by the plan; or with respect to isolated projects performed in states where plan participants were not otherwise employed.

(3) ***Employment in a maritime industry.*** For plans covering employees employed in a maritime industry, as defined in § 2530.200b–6, the standard of "five or more days of service, as defined in § 2530.200b–7(a)(1)" shall be used in lieu of the standard "40 or more hours of service", for purposes of determining whether an employee is employed in section 203(a)(3)(B) service.

COMMENTS: "Industry" and "Geographic area" do NOT include areas/plans covered by reciprocal agreements. See Preamble to Final Suspension of Benefit Rules, 46 Fed. Reg. 8894 (January 27, 1981), P 8899, 3rd column

"Reciprocity" and similar arrangements. Many commentators urged the Department to clarify the applicability of provisions of the proposed regulation in the situation where a plan is a party to a reciprocal or similar type of arrangement, under which service by a plan participant for an employer which maintains a separate plan, may, for example, be treated as service under the participant's plan for various purposes, or may be combined with service under the participant's in order to calculate the participant's entitlement to benefits. In the context of multiemployer plans, commentators suggested that the term "industry" and "geographic area covered by the plan" should be defined to include the industries and geographic area covered by plans with which the participant's plan has entered into a reciprocal agreement. With respect to plans other than multiemployer plans, it was suggested that the definition of the term "an employer which maintains the plan" should be defined to include an employer with which the participant's plan has an agreement for crediting service. Commentators argued that these changes should be adopted because under these types of arrangements, plan participants are afforded opportunities for benefit accrual, vesting and portability beyond those required by the Act. While the Department generally supports the goals which reciprocal and similar arrangements seek to achieve, the Department is concerned that adoption of the suggestions described above might broaden the authority of plans to impose suspension beyond that contemplated by Congress. Accordingly, pending further study of the general nature, extent and effect of reciprocal and similar arrangements, the Department has decided not to adopt, at this time, the changes suggested in this regard. The Department wishes to note, however, that where an individual is receiving benefits under more than one pension plan (whether or not as a result of a reciprocal arrangement), each plan is permitted to apply its suspension provisions to that individual independently of any other plan.

B. Suspension for continued work after Normal Retirement Age

These requirements have been the subject of significant guidance for some time yet still cause confusion and errors. Since the enactment of ERISA the law required that an employee who retired

after normal retirement age receive the actuarial equivalent of the benefit at normal retirement age calculated at the rate in effect at normal retirement age. This meant that an employee who retired late would receive an increase for late retirement in the same fashion as the early retiree receives a reduction for early retirement. Initially, the law did not require plans to provide for benefit accruals if an employee worked past normal retirement age. If a plan did provide for such accruals they were taken into account to determine if an employee who retired late was receiving at least the actuarial equivalent of his benefit at normal retirement age based on the rates in effect at normal retirement age. In other words, the additional benefit an employee earned after normal retirement age was offset against the actuarial increase for late retirement.

Suspension of benefits regulations were effective in 1982. Under these regulations and DOL and IRS guidance, an employee who continued to work past normal retirement age would not have to receive an actuarial increase for the delayed commencement of his benefit if he received a suspension of benefits notice. In addition, the opinion letters confirmed that additional accruals after normal retirement age were offset against, the actuarial increase. See IRS General Information Letter on the Forfeiture of Benefits issued in 1983[10]; Revised Labor Department Letter on Notice of Suspension of Benefits, July 12, 1982[11]; and IRS Rev. Rul. 81-140[12].

DOL regulations define 203(a)(3)(B) service that is the basis for a suspension of benefits as "*the* ***employment*** *of an employee subsequent to the time the payment of benefits commenced* ***or would have commenced if the employee had not remained in or returned to employment*** *results in section 203(a)(3)(B) service*"[13].

The Age Discrimination in Employment Act of 1986/OBRA 86 required that plans provide for benefit accrual for employees who work past normal retirement age. Therefore, such accruals were mandatory and could not be used to offset the actuarial adjustment for delayed retirement. However, if the suspension of benefits notice was given to employees who worked past normal retirement age, the actuarial increase was not required. This change was effective for the 1988 plan year for employees who have an hour of service on or after the first day of the plan year.[14]

IRS Proposed Regulations §1.411(b)-2(b)(4)(iii) provides that if a participant delays retirement after NRA, the amount of the benefit is the greater of (1) the participant's benefit at NRA not including post-NRA accruals actuarially increased for delayed retirement, or (2) the participant's benefit determined under the plan benefit formula including post-NRA accruals. See examples in the original and subsequent versions of the proposed regulations.[15] The regulations also provide that the actuarial adjustment need not be given for periods after NRA that the benefit is properly suspended. Both Code § 411(b)(1)(H) and the regulations state that the offset may be provided

[10] Letter to Livingston, March 15, 1983, BNA Pension Reporter, Vol. 10, p. 712 (April 18, 1983).
[11] DOL Information Letter to David Livingston, July 12, 1982, BNA Pension Reporter, Vol. 9, p 1068 (July 26, 1982).
[12] May 11, 1981.
[13] 29 CFR § 2530.203-3(c)(2).
[14] See Code 411(b)(1)(H) and IRS Proposed Regulations on Continued Accruals Beyond Normal Retirement Age, 53 Fed. Reg. 11876 (April 11, 1988). Although final regulations have not been issued, IRS has provided reliance on the proposed regulations. See also IRS Notice 88-126.
[15] 53 Fed. Reg. 11876 (April 11, 1988); 67 Fed. Reg. 76123 (Dec. 11, 2002). See also IRS Employee Plans CPE Topics for 2002, "Benefit Accruals: Post-Normal Retirement Age [Code § 411(b)(1)(H)]", Training 4213-021 (Rev. April 2002).

in the plan thus indicating that it is not mandatory. The IRS confirmed this in response to a question from actuaries in the "Gray Book".[16]

1. Notices

But how does a plan "suspend" a benefit that has never commenced? According to the regulations and agency guidance, a notice is required that contains all of the elements required when a benefit in pay status is suspended. The requirement of a notice suspending a payment that is not being made confuses plans and participants alike. The "suspension" (hereafter referred to as "deemed suspension") is the fact that the participant will not receive benefits (including actuarial adjustments if they continue to work in covered employment). Such a notice is required to avoid the requirement of an actuarial adjustment that can be extremely expensive.

In a 1984 Information Letter to Louis T. Mazawey, Esq., the DOL rejected a request from multiemployer plans that deemed suspension notices could be sent in general notices or included in the Summary Plan Description instead of a specific notice as each employee reaches Normal Retirement Age.[17] At least one court has refused to award actuarially increased benefits based upon a notice failure when the relevant information was contained in the plan and summary plan description.[18] In the past, IRS has routinely resolved Voluntary Compliance applications involving notice failures by permitting application of Code § 411(b)(1)(H) greater benefit calculations whether or not the plan documents include such a provision.

2. Adjustment for Delayed Retirement

The adjustment can be very complicated particularly if an offset is involved. Some plans include the formula for the adjustment in the plan document. The adjustment is further complicated if the participant has reached his or her required beginning date. See the article by James Holland, Jr. in Plan Consultant, Fall 2012 which includes several examples.[19]

The actuarial adjustment must be made if the participant delays retirement whether or not the participant continues working in covered employment, unless a deemed suspension notice is provided. If the participant is not working at all or is not working in 203(a)(3)(B) service, a deemed suspension notice has no effect and an adjustment must be made in every case.

C. Recalculating Benefits after a Return to Work

A benefit recalculation following a return to work involves several factors--

---

[16] See Q&A 39, 2009 Gray Book: "To take advantage of the offset inherent in providing the greater of the accruals or the year-by-year actuarial increases on previously accrued benefits the plan has to specifically provide for this. Where the plan does not so provide, ERISA would require that the plan provide both the actuarial increase and the additional accruals. In light of the Supreme Court's Heinz decision, a suspension of benefits rule could be added to the plan for future accruals to avoid the need for the actuarial increases, but it would not apply to accruals earned before the adoption of the amendment.

[17] DOL Information Letter to Mazawey (May 11, 1984).

[18] Monks v. Keystone Powdered Metal Co., 78 F.Supp 2d 647 (2000).

[19] See "Distributions After Normal Retirement Age: Are You Prepared?", James E. Holland, Jr., MSPA, EA, Plan Consultant, Fall 2012, p. 18.

- Whether the participant has earned additional accruals under the plan
- Whether the age of the participant upon resumption of retirement requires an adjustment
  - An age adjustment is required if the participant initially retired on an actuarially reduced benefit due to age and returned to work before the participant had reached the age at which the benefit would no longer have been reduced due to age. Benefits reduced based on age are paid over a longer time period. But if the benefit is suspended before the participant has reached the age at which the unreduced benefit would be paid, the age must be adjusted upon resumption of benefits to ensure that the participant receives the actuarial equivalent of the normal retirement benefit. A fully subsidized early retirement benefit need not be adjusted.
- Whether an actuarial adjustment for delayed retirement is required.
  - An adjustment is required unless the participant continues in or resumes 203(a)(3)(B) service and is given a compliant suspension notice.
- Whether a new application and benefit form election is required.
  - IRS Reg 1.401(a)-20, Q&A 10(d) provides that the recommencement of benefits after a suspension of benefits is not a new annuity starting date unless the plan document provides otherwise. If benefits are suspended for an employee who continues in service without commencement of payments, the commencement of benefits after the (deemed) suspension is the annuity starting date.
  - If the annuity starting date is on or after normal retirement age, that annuity starting date and benefit elections applies to any additional accruals after normal retirement age unless the plan provides otherwise. But if the annuity starting date occurs before normal retirement age, that annuity starting date and the benefit election does not apply to any additional accruals after that annuity starting date. A new election is required for additional accruals.

See chart attached to this paper.

D. Limitations on Changing Suspension of Benefits Rules

1. The Heinz decision and accrued benefit rules

Both the IRS Code and ERISA provide that a Plan may not reduce an employee's accrued benefit. Prior to 2004, the IRS and US Courts of Appeal had taken the position that a change to a Plan's suspension of benefits rules was not a cutback of an accrued benefit.[20] Therefore, suspension rules could be made more liberal or more restrictive depending on the circumstances including the industry's need for manpower or certain skills. Many plans did this either by amending the Plan or by waiving benefit suspensions from time to time.

In *Central Laborers' Pension Fund v. Heinz*[21], the US Supreme Court determined that a plan amendment that expanded the types of post-retirement employment for which benefits would be suspended, is a

[20] *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998). In *Spacek*, the Fifth Circuit held that a plan amendment that retroactively expands disqualifying employment prior to normal retirement age is not a cutback of an accrued benefit. IRS had also stated in its Multiemployer Audit Guidelines that since ERISA and the Internal Revenue Code specifically permitted suspensions as an exception to the vesting rules, it was permissible to add or expand a benefit-suspension provision, up to the limits of the law.

[21] 541 U.S. 739 (2004).

violation of the anti-cutback rule of the Internal Revenue Code if the new rules are applied to service already earned. Based on prior court cases and the position of the IRS, the Central Laborers' Pension Fund had amended the plan to suspend benefits for work as a superintendent and applied the new rule to benefits previously earned. The amendment was adopted because the plan permitted participants to retire at very early ages on full, unreduced pensions and then work without suspension in certain jobs. So many people were retiring on these subsidized, costly benefits that the plan changed the suspension rules to help control increasing costs.

The IRS supported the plan's position in the case before the US Supreme Court. The Court ruled for the employees and found that amending the plan to prevent these employees from working in supervisory jobs was an impermissible cutback of accrued benefits. This kind of violation could cause a plan to lose its qualified status but the Court strongly urged the IRS to work out some means that plans, which had relied on the position of the IRS[22] and prior court decisions, could correct this violation and not lose qualified status. The IRS issued such guidance over the next few years.[23]

The IRS required "reforming" amendments by plans that had adopted an amendment before the Heinz decision that violated Code § 411(d)(6) based on the decision. See Rev. Proc. 2005-23. This guidance required retroactive payments in certain circumstances. It is useful to read both the Proposed and Final Regulations including the Preamble. These regulations do permit some reductions in accrued benefits.

2. Serial Waivers of Benefit Suspension Rules: <u>(Unintentionally) Establishing an Accrued Benefit</u>.

Instead of amending plan suspension rules, multiemployer plans commonly adopt individual or broad "suspension waivers" usually pursuant to a plan provision specifically permitting such trustee action. This approach allows the plan to adjust suspension rules to respond to manpower needs in the jurisdiction.

However, IRS may consider serial waivers to constitute an amendment. The IRS has long taken the position that repeated limited amendments or actions of a plan may constitute an amendment that creates an accrued benefit. IRS has applied this analysis to COLAs and 13th checks. The Tax Court did not agree with the IRS position on serial actions and the Fourth Circuit affirmed the Tax Court. *See Board of Trustees of the Sheet Metal Workers' National Pension Funds v Commissioner*[24]. The IRS then overruled this court decision in its 2005 Final 411(d)(6) regulations but the regulations specifically address another aspect of the case. More relevant is an earlier case involving a 13th check. *DeCarlo v.*

---

[22] "The Plan points to a provision of the Internal Revenue Manual that supports its position: "[a]n amendment that reduces IRC 411(d)(6) protected benefits on account of [a plan's dis- qualifying employment provision] does not violate IRC 411(d)(6)." Internal Revenue Manual 4.72.14.3.5.3(7) (May 4, 2001), available at http//www.irs.ustreas.gov/ irm/part4/ch49s18.html. And the United States as *amicus curiae* says that the IRS has routinely approved amendments to plan definitions of disqualifying employment, even when they apply retroactively to accrued benefits." Central Laborers' at 746.

[23] IRS Rev. Proc. 2005-23 (April 18, 2005)--The stated purpose was to limit the retroactive application of Heinz for qualified plans; Rev. Proc. 2005-76 (Dec. 12, 2005)--extending the deadline for compliance; IRS Proposed Regs on 411(d)(6) Protected Benefits, 70 Fed Reg. 47155 (Aug. 12, 2005); Final Reg. 411(d)(6) Protected Benefits, 70 Fed. Reg. 47109 (Aug. 12, 2005); Final Reg. 411(d)(6) Protected Benefits, 71 Fed. Reg. 45379 (Aug. 9, 2006).

[24] 318 F.3d 599 (4th Cir. 2003). See *Thornton v. Graphic Communications Conference of the International Brotherhood of Teamsters Supplemental Retirement and Disability Fund*, 566 F.3d 597 (6th Cir. 2009).

Rochester Carpenters Pension, Annuity, Welfare and SUB Funds[25], which found that a plan did not eliminate accrued benefits when after issuing a 13th check for 5 out of 6 consecutive years, it decided not to offer a 13th check. The court based its ruling on IRS Revenue Ruling 92-66.

Rev. Rul. 92-66 concluded that § 411(6)(6) does not require that an early retirement window benefit be provided permanently to all employees under a plan where the employer amends its plan to make the benefit available for substantially consecutive, limited periods of time. "Whether the recurrence of plan amendments constitutes a pattern of amendments within the meaning of §1.411(d)-4[26] of the regulations is determined on the basis of the facts and circumstances. Although no one particular fact is determinative, relevant factors include: (i) whether the amendments are made on account of a specific business event or condition; (ii) the degree to which the amendment relates to the event or condition; and (iii) whether the event or condition is temporary or discrete or whether it is a permanent aspect of the employer's business."

While, serial suspension waivers might raise an issue whether the waiver has become accrued, the authority is mixed and the analysis fact specific.

3. Modification of Suspension Rules in a PPA Rehabilitation Plan

A multiemployer plan in critical status under the Pension Protection Act (PPA) is required to adopt a rehabilitation plan.[27] The rehabilitation plan consists of actions, including the options or range of options that are to be proposed to the bargaining parties, formulated based on reasonably anticipated experience and reasonable actuarial assumptions which will enable the plan to emerge from critical status by the end of the rehabilitation period.[28]

The rehabilitation plan must also include the schedules to be provided to the collective bargaining parties. The schedule(s) shall reflect reductions in future benefit accruals and adjustable benefits, and increases in contributions, that the plan sponsor/trustees determine are reasonably necessary to emerge from critical status. A schedule designated the default schedule must assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits the reduction or elimination of which are not permitted under Code § 411(d)(6) have been reduced to the maximum extent permitted by law.[29]

---

[25] 823 F. Supp. 115 (WDNY 1993).

[26] Q&A-1(c)(1) of §1.411(d)-4 of the regulations provides ..." if an employer establishes a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time, such benefits will be treated as provided under the terms of the plan, without regard to the limited periods of time, to the extent necessary to carry out the purposes of §411(d)(6), and, where applicable, the definitely determinable requirement of §401(a)(25). A pattern of repeated plan amendments providing that a particular optional form of benefit is available to certain named employees for a limited period of time is within the scope of this rule and may result in such optional form of benefit being treated as provided under the terms of the plan to all employees covered under the plan without regard to the limited period of time and the limited group of named employees."

[27] Code §432(e)(1)(A).

[28] Code § 432(e)(3)(A).

[29] Code § 432(e)(1)(B)(ii).

The trustees may reduce "adjustable benefits"[30] as appropriate subject to collective bargaining. "Adjustable benefits" are

(1) Benefits, rights, and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits,
(2) Any early retirement benefit or retirement-type subsidy (within the meaning of § 411(d)(6) and any benefit payment option (other than the qualified joint-and survivor annuity), and
(3) Benefit increases that would not be eligible for a guarantee under section 4022A of the Employee Retirement Income Security Act of 1974 on the first day of the initial critical year.

The participant's amount of normal retirement benefit is protected.[31]

Suspension of benefits rules are adjustable benefits subject to change as part of a PPA rehabilitation plan.[32]

Conclusion:

As is evident from this brief review, issues involving working after retirement include several related subjects each of which could the subject of a separate presentation. In this presentation, I did not attempt to do a thorough review of the case authority.

These matters are fact specific and to begin to determine which fork in the analysis to pursue, counsel for the plan or participant will require a detailed timeline, copies of records and plan documents.

[30] Code § 432(e)(8)(A)(iv).
[31] Code § 432(e)(8)(B). "Except as provided in subparagraph (A)(iv)(III), nothing in this paragraph shall be construed to permit a plan to reduce the level of a participant's accrued benefit payable at normal retirement age."
[32] PPA was not enacted at the time of the Heinz decision or the Final 411(d)(6) regulations. But the final regulations implementing Heinz note at 71 Fed. Reg 45379, 45380, Note 2 that section 411(d)(6) does not prohibit a plan amendment that reduces or suspends benefits under a multiemployer plan as permitted under section 411(a)(3)(F) (*e.g.*, a plan amendment to reduce benefits as permitted under section 418D or to suspend benefit payments as permitted under section 418E). Code 418E fulfilled a role similar to 432.

Recalculation of Pension Benefits after Post Retirement Return to Work

Factors	Additional Accruals	Benefit Election	Age Adjustment	411(b)(1)(H) offset	Actuarial Adjustment
BENEFIT NOT SUSPENDED					
Retirement and return to CE before NRA	Yes	New benefit election	No	No	No
Retirement; return to CE after NRA	Yes	New benefit election if initial retirement was pre-NRA	No	Yes	No
Retirement; return to non-CE before or after NRA	No	NA- no accruals	No	NA	No
Participant continues in CE after NRA	Yes	Upon benefit commencement	NA	Yes	Yes, if benefit delayed past NRA
Participant in non-CE after NRA	No	NA-no accruals	No	NA	No
No retirement but no employment after NRA	No	Upon benefit commencement	NA	No	Yes, if benefit delayed past NRA
BENEFIT SUSPENDED					
Retirement; return to CE; benefits resume before NRA	Yes	New benefit election	Yes	No	No
Retirement; return to CE; benefits resume after NRA	Yes	New benefit election if initial retirement was pre-NRA	Yes, if benefits were reduced based on age at initial retirement	Yes	No, suspension notice given
Retirement; return to non-CE; benefits resume before NRA	No	NA-no accruals	Yes, if benefits were reduced based on age at initial retirement	NA	No, suspension notice given
Retirement; return to non-CE; benefits resume after NRA	No	NA-no accruals	Yes, if benefits were reduced based on age at initial retirement	NA	No, suspension notice given
Participant continues in CE after NRA	Yes	Upon benefit commencement	NA	Yes	No, deemed suspension notice given
No retirement; Participant in non-CE after NRA	No	NA-No accruals	No	NA	No, deemed suspension notice given