

Suspension of Retiree Pens in the Construction

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ion Benefits Industry

Temporarily loosening suspension of benefits rules for multiemployer pension plans may allow organizations to meet the current demand for labor in the construction industry by encouraging retirees to return to work. Such programs must be carefully designed to maintain compliance with federal law.

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Federal law allows retirement plans the option to suspend the pension benefits of any participant who has retired but returns to work in disqualifying “Section 203(a)(3)(B) Service.”¹ This rule has traditionally been used by plans to prevent retirees from “double dipping” and to preserve employment opportunities for the active workforce. However, because of the unprecedented demand for skilled construction workers, many trustees are rethinking their approach to suspension of benefits. Instead of penalizing those who return to work, unions, employer groups and pension plan trustees are promoting temporary changes to entice retirees to fill open positions.

The United States is experiencing a heavy construction boom, with megaprojects underway in several parts of the country. At the same time, unions, employers and project owners are dealing with an aging and shrinking construction workforce. It is estimated that on top of normal hiring rates, the industry needed to recruit an additional half-million construction workers in 2024 to keep up with demand.² While apprenticeship classes are growing, it takes time for newly indentured apprentices to become productive journeyworkers.

To help bridge the gap and fill open positions, many groups are encouraging retirees to return to active service. While retirees always have the option to suspend monthly retirement payments and return to work, very few are interested in doing so. By temporarily loosening suspension of benefits rules, groups can provide a strong incentive to retirees by allowing them to continue to draw retirement benefits while simultaneously earning the same wage and benefit package as other collectively bargained employees.

When carefully planned, this type of program can be a tremendous benefit to the retiree, the retirement plan and the industry. This article explores the suspension of benefits rules and discusses issues to be considered if the suspension rules are modified.

Caution: Plans Cannot Allow Sham Retirements and Must Comply With the Separation of Employment Requirements

Before considering any changes to suspension rules, trustees need to understand that the Internal Revenue Service (IRS) requires participants to experience a bona fide separation of employment before they begin receiving retirement benefits. Unless a plan allows in-service distributions,³ trustees may not allow participants to retire and immediately return to work under lenient suspension rules. For example, in a private letter ruling,⁴ the IRS explained:

“ . . . employees who ‘retire’ on one day in order to qualify for a benefit under the Plan, with the explicit understanding between the employee and 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.”

To comply with the separation requirements, it is important that trustees apply a suspension of benefits moratorium and extension thereof only to those who have been separated from employment with all contributing employers and retired for a reasonable period. For example, a plan that intends to lift the suspension of benefits rules for one year beginning on March 1, 2025 may require a person to have retired by October 1, 2024 to qualify. Many plans also require retirees to sign a form at retirement acknowledging the separation requirements and attesting that they have no plans to return to covered service. Regardless of the approach taken, the plan must ensure that participants have experienced a bona fide separation from employment and are legitimately retired before returning to work.

Overview of ERISA Suspension of Benefits Rules

ERISA Section 203 contains the minimum vesting standards that apply to defined benefit (DB) and defined contribution (DC) retirement plans.⁵ In addition to mandating vesting schedules, this section states that a participant’s ben-

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efits must be nonforfeitable at normal retirement age—In other words, they cannot lose these benefits. Despite this requirement, Section 203-3(a) allows a retirement plan to suspend early retirement benefits for any type of reemployment. Section 203(a)(3)(B) and the accompanying regulations⁶ also allow a normal retirement benefit to be suspended when a retiree returns to work for 40 or more hours of service⁷ in a month:

- By an employer that maintains the plan under which such benefits were being paid in the case of a single employer plan
- By a multiemployer plan if the plan is in the same industry, in the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

While boards have the right to permanently remove the suspension of benefits provisions from their plans, trustees understand that the construction industry is cyclical. When work opportunities are scarce, it is not in the best interests of the industry or stakeholders to allow retirees to continue to work in covered employment and take jobs that would otherwise be held by union members who are not yet eligible for retirement. For that reason, any modifications to make suspension rules more lenient are usually temporary and will last only as long as there is a heavy demand for labor.

Caution: Suspension of Benefits and Anticutback Rules

Both ERISA and the Internal Revenue Code prohibit any plan amendments that reduce or eliminate a participant’s accrued benefits, early retirement benefits, retirement type subsidies and other forms of optional benefits offered by retirement plans. Trustees who are considering changes to their suspension rules should be aware of two important issues relating to the anticutback rules.

1. **Central Laborers' Pension Fund v. Heinz (2004) decision:**

This U.S. Supreme Court decision prohibits a plan from implementing more restrictive suspension rules to benefits that have already been accrued. For example, if a plan contained no restrictions on postretirement work, the trustees could implement new suspension provisions but would need to do so on a prospective basis only. Any benefits earned by participants through the date of the change could not be affected. When properly adopted, a temporary suspension of benefits moratorium will not be impacted by the *Heinz* restrictions.

2. **Temporary benefit changes and accrued benefit rule:**

Applicable IRS regulations⁸ provide that a pattern of repeated temporary plan amendments may eventually be considered a permanent part of the plan—and thus protected from cutbacks. There is relatively little guidance on this regulation, but in a 1992 revenue ruling,⁹ the IRS explained that plans should ensure that (1) the amendment must be made on account of a specific business condition, (2) the amendment must relate to that specific business condition and (3) the business condition must be temporary, as opposed to permanent. Trustees who intend to temporarily modify the postretirement work restrictions should consult with counsel and ensure that the minutes and communications with participants/retirees squarely address and document each of these three elements. In

addition, if work demands are seasonal or cyclical, it may be wise to allow the suspension moratorium to expire during months of lower employment.

Overview of Rules and Impact of a Suspension Moratorium on Participants Not in Pay Status by Normal Retirement Date

Participants who are not yet in pay status at the time of their normal retirement date are subject to specific rules governing their benefit depending on their working status, age and plan rules as well as whether a suspension of benefits moratorium has been implemented.

Participants Not Working in Disqualifying Employment

Employment that disqualifies a participant from benefits generally occurs when they work 40 or more hours per month outside of the collective bar-

gaining agreement, but still within the same industry, trade or craft and within the plan's jurisdiction. For instance, if a participant worked 15 years as a union electrician and then accepted an electrical project manager position in the same geographical area, that new role would be considered disqualifying employment. However, if that same participant worked in an unrelated industry, that employment likely would not be disqualifying. Participants who are not engaged in disqualifying employment are entitled to an actuarial increase to their retirement benefits if they postpone their retirement beyond their normal retirement date. This increase compensates for the delayed start of payments, maintaining the overall value of their retirement benefits regardless of their retirement date. In simpler terms, this means the participant will receive a higher monthly benefit payment, but they will likely draw that benefit for a

takeaways

- Under federal law, pension plans can suspend the pension benefits of any participant who has retired but returns to work in certain types of jobs. Traditionally, plans have used this rule to prevent retirees from double dipping.
- To help address labor shortages in the construction industry, some plans are encouraging retirees to return to work and are loosening suspension of benefits rules or implementing moratoriums on these rules. This allows retirees to continue to draw their retirement benefits while earning the same wage and benefit package as other employees.
- The Internal Revenue Service (IRS) requires participants to experience a bona fide separation of employment before they begin receiving retirement benefits. Unless a plan allows in-service distributions, trustees may not allow participants to retire and immediately return to work under lenient suspension rules.
- Trustees should make sure that any suspension of benefits moratoriums changes do not violate anticutback rules. They also should be aware of how a suspension moratorium affects participants at normal retirement age who are not in pay status.
- Plans that implement a suspension moratorium need to have a procedure in place for the calculation of potential additional accruals of benefits for retirees who return to covered employment.
- Trustees should communicate the changes to the suspension rules to affiliated health plans in advance. Health plan trustees will need to determine how benefits will be impacted when retirees decide to return to work.

shorter period. A suspension of benefits moratorium will not change this requirement.

For example, assume Joe is not working in disqualifying employment and has an annual accrued benefit of \$20,000 but chooses to delay his retirement for two years past his plan's normal retirement date of 65. Regardless of whether his plan has adopted a suspension moratorium, he will be entitled to an actuarial increase on his accrued benefit. This increase is typically based on an actuarial calculation utilizing the interest rate and mortality assumption used by the plan but can sometimes be a simple formula based on the number of months of the delay. Depending on the method used by his plan, it would be reasonable to expect Joe's accrued benefit to increase to \$25,000 at age 67.

Participants Working in Covered Employment

Participants who engage in work that requires contributions paid on their behalf into the fund are working in what is defined as *covered employment*. The impact of continued covered employment on a participant's retirement benefit will vary depending on whether they receive an annual suspension notice¹⁰ starting at their normal retirement date and whether the plan has implemented a suspension moratorium.

If the plan has not temporarily modified its suspension rules and the participant receives an annual suspension notice upon reaching their normal retirement date and continues to work 40 or more hours per month, they likely will not receive an actuarial increase for the period of continued employment. Instead, their benefit will continue to grow according to the plan's standard accrual formula.¹¹ In other words, they will earn the same annual benefit as any other participant, but they won't receive an extra increase to compensate for their delayed retirement.

If the participant does not receive an annual suspension notice or the plan temporarily modifies its suspension rules, the situation becomes more complex. Depending on the specific plan design, the participant might be eligible for either the actuarial increase, the standard benefit with additional accruals or both.

Working Retirees: Suspension of Benefits Moratorium and Its Impact on Additional Benefit Accruals

Plans that implement a suspension moratorium need to have a procedure in place for the calculation of poten-

tial additional accruals of retirees who return to covered employment and determine whether the retiree's monthly benefit will increase because of such employment. This presents unique challenges and varying complexities to plan administrators. Depending on the plan language, retirees may accrue additional benefits in addition to their regular monthly payments. Alternatively, the retiree may be awarded only the greater of the monthly benefit payments or the new accrued benefit. These scenarios are further described below.

Monthly Benefit and Additional Accrued Benefits (No "Offset" Applied)

Some plans allow retirees to continue receiving their monthly retirement benefit while simultaneously earning standard wages and accruing additional benefits based on their new service. Typically, at the start of the next plan year, the monthly benefit would be increased to reflect the additional accrual. This approach provides a strong incentive for retirees to return to work but requires careful actuarial consideration to maintain plan funding levels. The plan actuary will need to determine the financial impact of offering such a generous benefit. If the portion of the contribution rate that goes toward funding accruals is low in comparison with the portion allocated to the general funding of the plan, this could still result in a financial benefit to the plan.

Greater of Accrued Benefit or Value of Benefits Paid ("Offset" Applied)

Alternatively, some plans stipulate that retirees are entitled to the greater of the additional accrual earned during the reemployment period (calculated as an actuarial present value for their remaining lifetime) or their retirement benefits received during the period of reemployment. This offset calculation is typically measured on a plan year basis, but some plans use different measurement periods.

For a simple example of one methodology, assume that the working retiree is receiving an annual benefit of \$50,000, the additional annual accrual for the postretirement employment was \$2,000 and the actuarial present value factor for an annual benefit at the current age is 10.0. The present value of the additional accrual is equal to the annual accrual multiplied by the actuarial present value factor, so $\$2,000 \times 10.0 = \$20,000$. Since the value of the benefits received (\$50,000) is greater than the present value of the additional accrual (\$20,000), the result would be no increase to the participant's current benefit.

The offset method is the most financially advantageous to the plan since it typically does not lead to an increase in retiree benefits. However, it is still very generous to the working retiree since they are receiving both their retirement benefit as well as the wages from covered employment. For plans that are underfunded and experiencing worker shortages, employing working retirees and using the offset method can generate a surplus by allowing the plan to retain additional contributions that would otherwise be used to fund accrued benefits.

Impact on Health and Welfare Plans and Contributions for Working Retirees

The interaction between working retirees and health and welfare funds is another critical consideration. If the pension plan has a sister health fund, trustees should be aware of the eligibility requirements and seek input from the health plan before a suspension moratorium is adopted. Early retirees often have subsidized self-pay rates, and a plan can have different options to credit incoming contributions for the working retirees. It is important that the health plan trustees are given time to understand the moratorium, consider their options to deal with incoming contributions and communicate that decision to the retiree population.

In addition, special consideration should be given to Medicare-eligible participants to comply with the Medicare Secondary Payer rules or to properly transition the participant between the active plan and the Medicare Advantage plan, if applicable.¹² With proper coordination on how the pension and health plans' rules are struc-

Temporary Plan Change to Allow Retirees to Return to Work—Example

A union in the Midwest has a megaproject underway in the jurisdiction that will last for years. In addition, several other large commercial projects will place a severe strain on the ability of the union to supply trained workers. Despite having a significant number of travelers in the jurisdiction, several open job calls remain unfilled, and the problem is only expected to get worse over time. Apprenticeship classes have been expanded, and organizing/recruiting efforts are in motion, but a significant skilled labor shortage persists. To help combat this problem, the plan trustees adopted a temporary suspension of benefits moratorium. Under this program, a retiree may return to covered employment and work unlimited hours while continuing to draw a monthly retirement check. This is a significant financial benefit to the retirees and provides some assistance to the union, employers and industry.

Before adopting the suspension moratorium, the trustees consulted with the bargaining parties to determine the work outlook in the jurisdiction over the next few years. They also considered the work outlook for other neighboring unions to determine whether the labor shortage could be managed with travelers (workers from union locals outside of the project's geographic area). Ultimately, it was determined that even with travelers, newly organized members and additional apprentices, the bargaining parties would still have difficulty meeting industry demand. The trustees then worked with the plan actuary to determine the cost impact and learned that the additional contributions from working retirees would benefit the plan.

After deciding to implement a suspension of benefits moratorium, the board made the option available only to those who had been retired for at least six months. The trustees also communicated the reasons for the temporary change and noted that it would be closely monitored. The initial moratorium was set to expire after six months but has been extended several times. The program works well for the retirees, the plan and the bargaining parties. The suspension moratorium cannot solve the labor shortage, but it helps the union and employers entice retirees to fill a portion of the open job calls.



tured, a working retiree can be a financial benefit to both the pension and health funds.

Communication and Additional Considerations

Communication with retirees about a suspension moratorium can be challenging. When implementing a moratorium on the suspension of ben-

efits for retirees returning to covered employment, it is important to include direct language specifying the eligible class of retirees, the length of the moratorium, the type of work permitted, benefit accrual rules, impact on health plan eligibility, etc. Plan trustees should work closely with fund counsel to be sure that the moratorium language is narrowly tailored to address the labor

shortage in the jurisdiction and does not have a negative financial impact on the plan. If the plan will use the offset method described above, clear communication is especially important. Actuarial calculations are already a complex concept to explain to participants, and the offset needs to be clearly understood before the retirees return to work.

Finally, trustees should give due consideration to the administrative complexity that the moratorium will create. For example, is the administrator comfortable calculating the actuarial offset, or does the fund need to engage the actuary to determine these calculations? Does the plan document properly provide how the postretirement benefits are determined, or should additional amendments be adopted? The trustees, administrator and plan professionals need to be on the same page regarding the plan's intentions.

Conclusion

When considering relaxing the suspension of benefits rules, trustees should be cognizant of the ripple effects that such a change will have on the benefit plans, active participants and the bargaining parties. These decisions can have long-lasting ramifications, affecting immediate labor needs, opportunities for retirees, plan funding and the next generation of union members. Extending the availability for retirees to "double dip" when work slows could result in a loss of development among younger members, leading to future worker shortages and causing a cycle of contraction that could ultimately harm the plan and industry. Therefore, trustees must navigate any changes with caution, utilizing their fund professionals to map out the impact of these changes while maintaining compliance with federal law. When implemented effectively, these changes can serve as a valuable tool to bolster workforce participation, enhance plan sustainability and support industry needs. 🗣️

Endnotes

1. Employee Retirement Income Security Act (ERISA) 203(a)(3)(B); Internal Revenue Code (IRC) 411(a)(3)(B); 29 CFR 2530.203-3(a). The rules for suspending the benefits of early retirees are much more lenient, and plans could potentially prohibit any type of postretirement work. As a practical matter, most plans only prohibit early retirees from working in the same industry, trade and craft as active plan participants.

2. "Construction industry will need more than half a million workers in 2024." National Roofing Contractors Association.

bios



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3. Under the SECURE Act, plans may offer in-service distributions as early as age 59½ but must be amended to do so.

4. Private Letter Ruling 201104738.

5. Historically, the suspension rules have not been a concern to defined contribution (DC) plans because a participant could take a full distribution from the plan before returning to work. However, as more DC plans allow periodic distribution options, plan fiduciaries need to consider the impact of the suspension rules.

6. 29 CFR 2530.203-3 "Suspension of pension benefits upon reemployment."

7. Special rules apply to plans that do not calculate the actual hours or service and to those who work in the maritime industry. See 29 CFR 2530.203-3(c).

8. 1.411(d)-(4)(c).

9. IRS Rev. Rul. 92-66.

10. 29 CFR 2530.203-3(b)(4). Plan fiduciaries should discuss the annual notification requirements with legal counsel to ensure compliance with the suspension regulations. Absent proper communication, plan participants may be entitled to actuarial increases that were not intended.

11. IRC 411(a)(3)(b); ERISA 203(a)(3)(B); 2530.203-3.

12. For more in-depth information on the impact working retirees have on a health fund, see "Returning Retirees: Considerations for Health Plan Fiduciaries," by Paul Catenacci, *Benefits Magazine*, May/June 2024.