

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER



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June 22, 2004

By E-Mail

CC: PA: LPD:PR(REG—128309--03)
Couriers Desk
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

<http://www.irs.gov/regs>

Dear Sir or Madam:

These comments are filed by the National Coordinating Committee for Multiemployer plans (NCCMP) in response to the request for public comments on the Proposed Regulations concerning Section 411(d)(6) Protected Benefits in the Federal Register of March 24, 2004 (69 Fed. Reg. 13769). In fact these comments address a topic which the preamble to the Proposed Regulations specifically reserve for future guidance, that is, those issues concerning Section 411(d)(6) Protected Benefits related to the recent decision of the United States Supreme Court in *Central Laborers' Pension Fund v. Heinz*, No. 02-891.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purposes is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

Although the Proposed Regulations do not address the issues related to the *Heinz* decision, we submit the following comments concerning areas of concern for multiemployer plans to aid in your consideration of these issues. We will submit additional comments in response to Proposed Regulations or other Guidance on these issues.

We have reviewed the decision of the United States Supreme Court in *Heinz* and have identified the following issues which should be addressed by guidance:

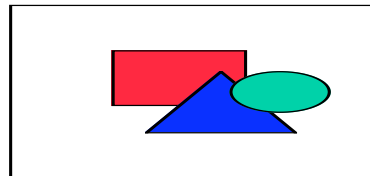
1. The guidance should clarify whether the decision applies only to reductions in early retirement benefits, so that suspension of benefits rules can be added or expanded for already accrued benefits payable after Normal Retirement Age. In its decision, the Court clearly frames the issue in terms of early retirement benefits, which is what were at stake in the case at bar, although some of the discussion in the decision does not appear to be strictly limited to early retirement benefits.
2. The guidance should clarify that amendments adding or expanding suspension of benefits must be applicable only to benefits not yet accrued. There is much confusion on this point and some plans believe that such amendments may be applied to all service of individuals who have not yet retired.
3. The guidance must clarify that the *Heinz* decision does not affect the addition of suspension of benefits rules initially and/or amendments to comply with the final regulations on suspension of benefits prior to the effective date of the Retirement Equity Act. The suspension of benefits regulations were finalized in December, 1981 effective January 1, 1982. Notice 82-23 provided that amendments to collectively bargained plans to comply with the suspension of benefits regulations could be adopted as late as December 31, 1984.
4. Similarly, the guidance must clarify that the decision does not affect the revision of suspension rules and the addition of benefit-offset provisions following the 1987 enactment of Internal Revenue Code section 411(b)(1)(H), which for the first time authorized such offsets.
5. The guidance should provide assurance that the Service will not revisit the qualified status of plans which have been amended to add suspension of benefits provisions or to expand suspension of benefits for previously accrued service. The guidance should also set out what actions plans must take to maintain their qualified status. We urge the Service to provide that any changes deemed necessary should only have to apply prospectively and that plans not be required to correct prior suspensions for purposes of maintaining qualified status. Suspensions affected by the *Heinz* decision may have occurred nearly two decades ago and the information necessary to determine if a given suspension would have been permitted under the Court's rationale may simply not be available. If the Service decides that previously adopted expansions of suspension rules need to be rescinded, we also urge that you issue transition rules concerning such amendments, which may include a special procedure and model plan language.
6. We urge the Service to issue regulations formalizing the position taken by the Service in the Multiemployer Examination Guidelines and authorizing the addition or expansion of benefit-suspension rules that comply with ERISA section 203(a)(3)(B). The concurrence in *Heinz* specifically stated the presumption that this could be done, a point that was not specifically rejected by the majority opinion.
7. The guidance should address whether plans could adopt a rule applicable to previously accrued service temporarily withholding benefit payments until an individual re-retires and then paying the actuarial equivalent of the payments temporarily withheld including any early retirement subsidy (i.e., withholding benefits temporarily but not suspending them).

8. The guidance should address whether plans can adopt amendments or policies temporarily relaxing the suspension rules with a sunset after which the suspension rules automatically return to the prior tougher rules. We believe that such amendments could be adopted without the relaxed rules becoming an accrued benefit under the conditions described in Revenue Ruling 92-66, 1992-2 C.B. 92. See also *DeCarlo v. Rochester Carpenters Pension Fund*, 823 F.Supp 115 (W.D.N.Y. 1993).

9. The guidance should clarify whether a plan can adopt an amendment applicable to future accruals that would provide for the temporary withholding of benefits for non-203(a)(3)(b) service provided that the actuarial equivalent of the payments withheld, including any subsidy, is repaid to the participant. We believe that this should be permitted since the temporary withholding would be a condition applicable to the benefit at the time it accrued and both the early retirement subsidy and form of benefit would be protected.

With our expertise concerning suspension of benefits rules in multiemployer plans, we welcome the opportunity to meet and work with the Service to develop guidance for the transition and develop workable rules for multiemployer plans. We will submit additional questions and issues as they are provided to us.

Sincerely,



Randy DeFrehn
Executive Director