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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor, Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Attn: Notice of Critical Status

We are writing to comment on the proposed model notice for multiemployer plans in critical status. The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to promote and protect the retirement security of American workers and their families. Workers covered by severely underfunded multiemployer plans will begin receiving critical status notices in the next few weeks. It is vitally important to the retirement security of these workers that the Department of Labor issue a model notice that will enable plan fiduciaries to furnish them with informative and understandable notices.

The Department of Labor's model notice under ERISA §305(b)(3)(D) should set the standard for providing information that is understandable to average plan participants and beneficiaries. In issuing a final model notice the Department should focus on the needs of those receiving the notice. Participants and beneficiaries must understand what benefits could be placed in jeopardy, because plans are permitted to apply future benefit reductions retroactively to the date of the notice.¹ Only if those receiving the notice are properly informed, will they fully understand the severity of possible benefit cutbacks and have the information they need to urge their union representatives to protect their earned benefits in the collective bargaining process.

The severity of the cutbacks, especially for the most vulnerable participants, such as participants near early retirement or anticipating a subsidized qualified joint and survivor annuity, can only be conveyed through personalized notices explaining the benefits that the individual could lose. The notices should provide trustees with flexibility to encourage plans to use the plan's familiar colloquial terminology such as "Rule of 85 pension" or "30-and-out pension" rather than the technical term, "subsidized early retirement benefit." Personalized notices would also eliminate

¹ "such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date such notice is provided" ERISA §305(b)(3)(D)(ii)(II)

an inevitable flood of inquiries from plan participants requesting additional information because they are unclear how they may be affected by the possible benefit reductions.

The statute requires that the critical-status notice alert participants and beneficiaries of three important facts about the pension plan;

- (1) The plan is in critical status,
- (2) The plan must adopt a rehabilitation plan, and
- (3) Adjustable benefits may be cut for anyone whose benefit commencement date is on or after the date of the critical status notice.

Critical Status

The notice should, in straightforward language, tell participants that the plan is in critical status, meaning that it is in severe financial distress. The proposed model notice provides several options to plan administrators for explaining to participants how the plan's actuary determined that the plan is in critical status. ERISA §305(b)(3)(D)(i) requires plans to "provide notification of the endangered or critical status to the participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation, and the Secretary." Although a more detailed explanation of the actuarial calculations would be useful to the other recipients of the notice, it would not provide useful information to participants and beneficiaries.

Participants need to know the consequences of a critical status certification rather than receive a complicated explanation of actuarial calculations leading to the critical status determination. Explanations to participants containing phrases such as, "accumulated funding deficiency" and comparisons to the "fair market value of plan's current assets", "expected employer contributions" and "value of vested benefits of inactive participants" are confusing and unnecessary. The manner in which an actuary arrived at his or her determination of critical status is less important than the fact that the plan is in critical status, and the notice should reflect the severity of the plan's underfunding. As the proposed model notice provides, additional information such as the actuarial calculations and the rehabilitation plan should be available to participants upon request.²

Rehabilitation Plan and Adjustable Benefits

The model notice provides two separate paragraphs for plans to use depending on whether they are in the initial critical status year or a subsequent critical status year. Both paragraphs describe the possibility of reduction in benefits by stating that certain benefits known as "adjustable benefits" may be eliminated. However adjustable benefits are not defined until the following paragraph and there they are described in a generic fashion. The model notice should specify that plans should list the specific benefits offered by the plan that fall under the definition of adjustable benefits.

² Actuarial calculations determining a plan's funding status would also be available upon written request under ERISA §101(k).

There is no need for the model notice to include the words “adjustable benefits” at all. It is a confusing phrase that softens its true meaning. Many multiemployer plan participants view their subsidized early retirement benefit as the main benefit for which they have continued to work in their physically demanding jobs. Participants and their spouses likely have no idea that the plan’s qualified joint and survivor annuity is subsidized. Participants are unlikely to associate those types of important benefits with a term implying that they are “adjustable.” The notice will only properly inform participants of the cuts if it provides individualized examples that compare the current benefits offered under the plan with those that would be paid if the plan were to cut all “adjustable benefits.”

One of the most important elements of this model notice is the language explaining to participants and beneficiaries that the benefit restrictions if adopted in the rehabilitation plan will only apply to participants who first begin taking benefit distributions after the date of the notice. Having a clear statement on this point is crucial for informing retirees already in pay-status that their benefits cannot be reduced, and for alerting those contemplating retirement that their benefits could be reduced. The model notice currently states that, “the reductions may only apply to participants and beneficiaries whose benefit commencement date is on or after [notice is provided].” We suggest that the Department use more accessible language such as, “Anyone who collects his or her first pension check after the date this notice was received may lose benefits if the union, employers and trustees approve such terms in the rehabilitation plan.”

The notice should explain that the proposed benefit restrictions and eliminations will only go into effect if the union and contributing employers agree to the rehabilitation plan in collective bargaining. The notice should further state that the rehabilitation plan may also include restrictions on future benefits earned under the plan, and require employers to make additional contributions into the plan. Participants will not receive an accurate explanation of the consequences of critical status unless the notice details all of the possible elements of the rehabilitation plan.

Pending Treasury Guidance

We applaud the Department’s effort to issue the model notice before most plans will send the actual notices. Unfortunately, the Department of the Treasury has not yet issued guidance on IRC §432 (corresponding to ERISA §305) leaving many unanswered questions about the possible benefit cutbacks in rehabilitation plans. The critical status notices sent to participants before the Treasury Department issues guidance may be lacking important information. We suggest that the Department of Labor modify the model notice as needed as expeditiously as possible once the Treasury issues guidance.

Thank you for the opportunity to comment.



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