

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 84-13A
Sec. 203(a)(3)(B)

MAR 15 1984

Mr. Frank B. Reilly, Jr.
Crummy, Del Deo, Dolan & Purcell
Gateway I
Newark, New Jersey 07102

Dear Mr. Reilly:

This is in response to your request, on behalf of the Cooper-Jarrett, Inc., Retirement Plan for Non-Bargaining Employees (the Plan), for an advisory opinion concerning the application of the suspension of benefits regulation, 29 C.F.R. §2530.203-3, issued by the Department of Labor under the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to you.

Specifically, you have requested an opinion concerning the effect of the notification requirements (§2530.203-3(b)(4)) of the suspension of benefits regulation on three Plan participants, described below, who reached normal retirement prior to the effective date of the regulation (i.e., January 1, 1982), continued employment with the employer after the normal retirement date in the same capacity as prior to their normal retirement date, and later retired, one before, one after, and one on the effective date of the suspension of benefits regulation:

Participant	Normal Retirement Date	Actual Retirement Date	Benefit Commencement Date
A	11/1/77	1/1/82	1/1/82
B	2/1/80	3/29/82	4/1/82
C	1/1/81	8/21/81	9/1/81

With respect to the participants described above, you have indicated that retirement benefits were suspended during the period of post-normal retirement date employment, no actuarial adjustment has yet been made with respect to the participants' benefits, and notice, pursuant to §2530.203-3(b)(4), was not furnished prior to or on the actual retirement dates of the participants. With regard to these facts, you have posed the following questions:

1. If no actuarial adjustments are made with respect to each participant's benefits, will there be a forfeiture of benefits under Section 203 of ERISA?
2. If there is a forfeiture of benefits under Section 203 of ERISA with respect to any or all of the aforesaid participants, are any of the forfeitures "permissible" under Section 203(a)(3)(B) of ERISA?

3. If any or all of the forfeitures are not permissible under Section 203(a)(3)(B) of ERISA, what specifically renders them impermissible? Further, is a notice fully satisfying the requirements of Reg. 2530.203-3(b)(4) required in order to avoid an impermissible forfeiture under the circumstances presented herein or would any other form of notice suffice?
4. If any or all of the forfeitures are not permissible, would the making of an actuarial adjustment either remove the forfeitures or convert them to permissible forfeitures?
5. If an actuarial adjustment would either remove the forfeitures or render them permissible, how should the benefit be recalculated? Specifically, should the adjustment be made for the period from the normal retirement date to the actual retirement date, or should the adjustment be made from January 1, 1982 to the actual retirement date?

Under the minimum vesting standards for employee pension benefit plans contained in section 203 of ERISA, each pension plan must provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. In addition, an employee's rights to benefits derived from his own contributions may never be forfeited. With respect to benefits derived from employer contributions, a plan is required to provide that such benefits become nonforfeitable within the time limits of one of three alternative vesting schedules set forth in section 203(a)(2) of ERISA. Section 203(a)(3)(B) of ERISA permits, but does not require, a plan to provide that the right to an accrued benefit derived from employer contributions may be suspended under certain conditions. In the case of a plan other than a multi-employer plan, section 203(a)(3)(B) permits the suspension of benefits for periods during which the employee is employed by an employer who maintains the plan under which benefits would otherwise be paid. The Department's suspension of benefits regulation (29 CFR §2530.203-3), which was promulgated under 203(a)(3)(B), sets forth the circumstances and conditions under which such benefit payments may be suspended on or after January 1, 1982, the effective date of the regulation.

In its original notice adopting the suspension of benefits regulation, the Department stated that, to the extent the regulation would impose specific requirements not provided for in the Act, it would have only a prospective effect on the operation of plans and the rights of employees. In addition, the Department stated that suspension of benefit payments by plans prior to adoption of the regulation would be governed by section 203(a)(3)(B) of the Act without reference to the regulation. (46 FR 8894, January 27, 1981).¹

Under paragraph (b)(4) of the suspension of benefits regulation, a benefit payment cannot be permanently withheld by a plan unless the plan notifies the employee by personal delivery or first class mail during the first calendar month or payroll period in which the payments are withheld that his benefits are suspended.

In your letter, you ask several questions regarding the circumstances under which a prohibited forfeiture of benefits would occur and methods of avoiding such a forfeiture.

¹ See also Thompson v. Asbestos Workers Local 53 Pension Fund, 716 F.2d 340, 4 EBC 2307, 2309 (5th Cir. 1983), where the court applied the "statutory provision itself" with respect to a period of employment before the effective date of the Department's suspension of benefits regulation.

Those questions involve matters that are under the jurisdiction of the Internal Revenue Service (see section 3002(c) of ERISA and section 101 of Reorganization Plan No. 4 of 1978). In general, however, that agency has taken the position that section 411(a)(3) of the Code (the analogous provision to section 203(a)(3)(B) of ERISA) provides for a limited exception to the requirements of nonforfeitability of section 411(a) of the Code (and section 203(a) of ERISA). For specific information regarding whether a prohibited forfeiture has occurred, and the steps that may be necessary to avoid a forfeiture, we suggest that you contact the Office of Employee Plans and Exempt Organizations of the Internal Revenue Service.

Notwithstanding the fact that the Department does not have jurisdiction over forfeiture matters, we can state our views regarding whether or not suspension of a plan participant's benefits is consistent with section 203(a)(3)(B) and the regulations promulgated under that section. Accordingly, we have addressed those of your questions which relate to that issue.

In our view, service on or after January 1, 1982 would not be service for which benefits could be suspended under section 203(a)(3)(B) unless all of the requirements of the suspension of benefits regulation, including the notification requirements, have been complied with. In the case of periods of employment before January 1, 1982, however, a determination of whether benefits could be suspended would be made on the basis of section 203(a)(3)(B) itself, without reference to the specific requirements of the regulation.

Applying these principles to the situations described in your letter, it is our view that suspension of A's benefit payments for the period of November 1, 1977 (his normal retirement date) to January 1, 1982 (when he retired) is permissible under 203(a)(3)(B). That notification is lacking is irrelevant at this point since the regulation did not become effective until January 1, 1982.

Participant B, who reached normal retirement age on February 1, 1980, continued to work in the same position with the employer maintaining the Plan until retirement on March 29, 1982. Participant B's benefit payments commenced on April 1, 1982, without any actuarial adjustment for the period for which benefits were suspended. In the case of Participant B, the Plan could legitimately suspend benefit payments for the period from February 1, 1980 to January 1, 1982, because the withholding of payments for that period met the requirements for suspension under section 203(a)(3)(B) of the Act. However, B's benefits could not be suspended with respect to periods of service on or after January 1, 1982 (the effective date of the regulation), because the Plan failed to provide B with a notification in accordance with the requirements of §2530.203-3(b)(4).

Participant C, who reached normal retirement age on January 1, 1981, continued to work in the same position with the employer maintaining the Plan until retirement on August 21, 1981. Participant C's benefit payments commenced on September 1, 1981, without any actuarial adjustment for the period for which benefits were suspended. Any suspension of C's benefits would meet the requirements of section 203(a)(3)(B) of ERISA. Since C's employment terminated, and his benefits commenced, before January 1, 1982, the notification requirements of the suspension of benefits regulation are irrelevant.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs