



RESEARCH MEMO

A Look At The 204(h) Notice Requirements

In [Client Bulletins 2011-31](#), [2011-32](#) and [2011-33](#) we discussed the case of *CIGNA Corporation, et al., v. Amara, et al.*, 2011 WL 1832824 (S. Ct.), Cause No. 09-804 ("CIGNA case"). In that case, the U.S. Supreme Court settled the question of whether plan participants can seek relief under [ERISA Section 501\(a\)\(1\)\(B\)](#) based upon the terms of a Summary Plan Description (SPD) and/or summaries of Plan changes such as Summaries of Material Modifications (SMMs) or *ERISA* Section 204(h) notices ("204(h) notice") that are contrary to the terms of the Plan Document.

[Client Bulletin 2011-33](#) discussed SPDs and SMMs and noted that the CIGNA case also discussed the importance of a proper 204(h) notice. We will take a look at the requirements of a 204(h) notice in this *Research Memo*.

In short, *ERISA* Section 204(h) requires a defined benefit pension plan or a money purchase plan (individual account defined contribution plans subject to Code 412 funding rules) to notify participants and alternate payees of an amendment to the plan that either:

- provides for a significant reduction in the rate of future benefit accrual, or
- that **eliminates or significantly reduces** an *early retirement benefit or retirement-type subsidy*.

As the *CIGNA* case noted, a failure to give a proper and timely 204(h) notice may result in the underlying amendment being inoperative until the defect is cured.

Therefore, it is important to comply with the 204(h) notice regulations. A specially prepared copy of the 204(h) notice regulations with a detailed table of contents is available by "[clicking here](#)."

The regulations consist of 18 Q&As, which are each briefly summarized below. As always, questions about the details of how the regulation works are often found in the discussion in the *Preamble* to the regulations.

By now most plans understand and comply with the requirements of the 204(h) notice but, as continuing litigation shows, it is good to review the entire set of 204(h) regulations and 204(h) notice templates in an occasional self-audit.

The 2003 final 204(h) notice regulations as published in the *Federal Register* are available by "[clicking here.](#)"

In 2009, final 204(h) notice regulations were issued in response to changes made by the *Pension Protection Act (PPA)*.

The 2009 final 204(h) notice regulations as published in the *Federal Register* are available by "[clicking here.](#)" See also *Benefit News Briefs 2008-18* and *Special Bulletin 2009-65*.

Q-1. What are the notice requirements of Section 4980F(e) of the Internal Revenue Code and Section 204(h) of ERISA?

Each Section generally requires notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. The notice is required to be provided to plan participants and alternate payees who are applicable individuals, to certain employee organizations, and to contributing employers under a multiemployer plan. The plan administrator must generally provide the notice before the effective date of the plan amendment.

Q-2. What are the differences between Section 4980F and Section 204(h)?

The notice requirements of Section 4980F generally are parallel to the notice requirements of Section 204(h). Section 4980F imposes an excise tax on a failure to satisfy the notice requirements, while Section 204(h)(6), contains a special rule with respect to an egregious failure to satisfy the notice requirements.

Q-3. What is an "applicable pension plan" to which Section 4980F and Section 204(h) apply?

For purposes of Section 204(h), an applicable pension plan means a defined benefit plan that is subject to ERISA, or an *ERISA* covered individual account plan that is subject to the funding standards of Section 412 of the Internal Revenue Code. [Editor's note: *i.e.* a money purchase plan.]

Q-4. What is "Section 204(h) notice" and what is a "Section 204(h) amendment"?

A Section 204(h) notice is notice that complies with the Section 4980F(e) Code, Section 204(h)(1) of ERISA and these regulations. A Section 204(h) amendment is an amendment for which Section 204(h) notice is required under these regulations.

Q-5. For which amendments is Section 204(h) notice required?

A Section 204(h) notice is required for an amendment to an applicable pension plan that provides for a significant reduction in the rate of future benefit accrual or an amendment to an applicable pension plan that provides for the significant reduction of an early retirement benefit or retirement-type subsidy.

Q-6. What is an amendment that reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy for purposes of determining whether Section 204(h) notice is required?

Defined benefit plans

An amendment to a defined benefit plan reduces the rate of future benefit accrual only if it is reasonably expected that the amendment will reduce the amount of the future annual benefit commencing at normal retirement age (or at actual retirement age, if later) for benefits accruing for a year.

Individual account plans

For purposes of Section 4980F and Section 204(h), an amendment to an individual account plan reduces the rate of future benefit accrual only if it is reasonably expected that the amendment will reduce the amount of contributions or forfeitures allocated for any future year. Changes in the investments or investment options under an individual account plan are not taken into account for this purpose.

Q-7. What plan provisions are taken into account in determining whether an amendment is a Section 204(h) amendment?

All plan provisions that may affect the rate of future benefit accrual, early retirement benefits, or retirement-type subsidies of participants or alternate payees must be taken into account in determining whether an amendment is a Section 204(h) amendment.

Q-8. What is the basic principle used in determining whether a reduction in the rate of future benefit accrual or a reduction in an early retirement benefit or retirement-type subsidy is significant for purposes of Section 4980F and Section 204(h)?

Whether an amendment reducing the rate of future benefit accrual or eliminating or reducing an early retirement benefit or retirement-type subsidy provides for a reduction that is significant for purposes of Section 4980F (and Section 204(h) of ERISA) is determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted, or, if earlier, at the effective date of the amendment and the principles and examples under this Q&A.

Q-9. When must Section 204(h) notice be provided?

For a multiemployer plan, a Section 204(h) notice must be provided at least 15 days before the effective date of any Section 204(h) amendment.

Q–10. To whom must Section 204(h) notice be provided?

A Section 204(h) notice must be provided to each participant, alternate payee, employee organization representing participants and each employer that has an obligation to contribute to a covered multiemployer plan.

Q–11. What information is required to be provided in a Section 204(h) notice?

- The notice must include sufficient information to allow applicable individuals to understand the effect of the plan amendment.
- The information in a Section 204(h) notice must be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice.
- In the case of an amendment reducing the rate of future benefit accrual, the notice must include: (1) a description of the benefit or allocation formula prior to the amendment, (2) a description of the benefit or allocation formula under the plan as amended, and (3) the effective date of the amendment.
- In the case of an amendment that reduces an early retirement benefit or retirement-type subsidy (other than as a result of an amendment reducing the rate of future benefit accrual), the notice must describe: (1) how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit before the amendment, (2) how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit after the amendment, and (3) the effective date of the amendment.
- The notice must include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction for that individual.
- The requirement to include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction for that individual is deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples.
- To the extent any expected reduction is not uniformly applicable to all participants, the notice must either identify the general classes of participants to whom the reduction is expected to apply, or by some other method include sufficient information to allow each applicable individual receiving the notice to determine which reductions are expected to apply to that individual.

Q–12. What special rules apply if participants can choose between the old and new benefit formulas?

The information sufficient to enable the individual to make an informed choice must be provided within a period that is reasonably contemporaneous with the date by which the individual is required to make his or her choice and that allows sufficient advance notice to enable the individual to understand and consider the additional information before making that choice.

Q–13. How may Section 204(h) notice be provided?

A plan administrator must provide the Section 204(h) notice through a method that results in actual receipt of the notice or the plan administrator must take

appropriate and necessary measures reasonably calculated to ensure that the method for providing the Section 204(h) notice results in actual receipt of the notice. A Section 204(h) notice must be provided either in the form of a paper document (or in an electronic form that satisfies the requirements of the use of electronic notices). First class mail to the last known address of the party is an acceptable delivery method. Likewise, hand delivery is acceptable. **However, posting the notice is not considered an acceptable delivery method of the Section 204(h) notice.** A Section 204(h) notice may be enclosed with or combined with any other notice provided by the employer or plan administrator.

Q-14. What are the consequences if a plan administrator fails to provide Section 204(h) notice?

- In the case of any “egregious failure” to meet the notice requirements with respect to any plan amendment, the plan provisions are applied so that all applicable individuals are entitled to the greater of the benefit to which they would have been entitled without regard to the amendment, or the benefit under the plan with regard to the amendment. There is an “egregious failure” to meet the notice requirements if a failure to provide required notice is within the control of the plan sponsor and is either an intentional failure or a failure, whether or not intentional, to provide most of the individuals with most of the information they are entitled to receive. An intentional failure includes any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements.
- excise taxes that may apply to a failure to notify applicable individuals of a pension plan amendment that provides for a significant reduction in the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy, regardless of whether or not the failure is egregious.

Q-15. What are some of the rules that apply with respect to the excise tax under Section 4980F?

In the case of a multiemployer plan, the plan is responsible for reporting and paying the excise tax.

Q-16. How do Section 4980F and Section 204(h) apply when a business is sold?

Whether Section 204(h) notice is required in connection with the sale of a business depends on whether a plan amendment is adopted that significantly reduces the rate of future benefit accrual or significantly reduces an early retirement benefit or retirement-type subsidy.

Q-17. How are amendments to cease accruals and terminate a plan treated under Section 4980F and Section 204(h)?

- An amendment providing for the cessation of benefit accruals on a specified future date and for the termination of a plan is subject to Section 4980F and Section 204(h).
- A plan that is terminated in accordance with Title IV of ERISA is deemed to have satisfied Section 4980F and Section 204(h) not later than the termination date (or date of termination, as applicable) established under Section 4048 of ERISA.

- An amendment providing for a significant reduction in the rate of future benefit accrual or a significant reduction in an early retirement benefit or retirement-type subsidy has an effective date that is earlier than the termination date (or date of termination, as applicable) established under Section 4048 of ERISA, that amendment is subject to Section 4980F and Section 204(h).

Q-18. What are the effective dates of Section 4980F, Section 204(h), as amended by EGTRRA, and these regulations?

The regulations were all effective by the beginning of the 2008 Plan Year.

While not overly complex, at times the examples in a 204(h) notice are the hardest part, yet they seem to be the key to helping the participant understand the meaning and affect of the plan change. A proper and timely 204(h) notice is also a good line of defense to protect the plan against litigation for the changes a plan sometimes must make to protect its funding, etc.

In an upcoming issue we will look at the one more “disclosure” item that generates litigation – benefit estimate statements.

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