



RESEARCH MEMO

A Look at the "Notice" Requirement Under the Suspension of Benefits Regulation

Occasionally, we look at a topic in the way of a "refresher" on a subject. In this issue we are looking at the main "Notice" requirement under the suspension of benefits regulation of *ERISA* Section 203.

Background

Under the minimum vesting standards for pension 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.

However, Section 203(a)(3)(B) of *ERISA* (and Section 411(a)(3)(B) of the Code) permits, but does not require, a plan to provide that, under certain conditions, the right to an accrued benefit derived from employer contributions may be suspended for periods during which the employee is reemployed, without such suspension being deemed an impermissible forfeiture.

In the case of a multiemployer plan, suspension is permitted when the employee is reemployed during a calendar month for 40 or more hours of service:

- in any employment which is in the same industry,
- in the same trade or craft, and
- in the same geographic area covered by the plan, at the time the payment of benefits commenced.

A plan may provide for the suspension of *early retirement* benefits for any reemployment, without regard to the above requirement to the extent that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

Section 203(a)(3)(B) and the suspension of benefits regulations do not require plans to provide for or impose suspensions of benefits. In addition, a plan which has elected to provide for suspension of benefits is not required to provide for suspension of benefits to *the fullest extent* allowed under the law.

Way back on January 27, 1981, final regulations effective May 27, 1981 were published in the *Federal Register* at 46 FR 8894. A copy of the regulation as published in the *Federal Register*, including the *Preamble*, with a special table of contents is available by "[clicking here](#)." A copy of just the regulation text as published in the 2011 Code of Federal Regulations (CFR) is available by "[clicking here](#)."

One of the requirements of the regulation which must be met before an individual's benefits may be suspended concerns a Notice of suspension, as discussed below.

Notice Requirements

Before benefits may be suspended, the regulations require that the plan first provide Notice to the individual whose benefits are being suspended. The *Preamble* to the regulations notes:

This provision [allowing suspension of benefits], however, affects only the plan's right to begin *withholding* payments-it does not affect the plan's *entitlement* to ultimately withhold or recoup all payments which it is entitled to withhold under § 2530.203-3. Thus, the effect of this provision is that, *solely for purposes of a plan's entitlement to commence the withholding of benefits*, a retiree will not be deemed to be employed in Section 203(a)(3)(B) service *until the plan has complied with the notice requirements* of paragraph (b)(4) of the regulation. (emphasis added) 46 FR 8894, 8901.

The Notice rules are found at 29 CFR 2530.203-3(b)(4) and are summarized below.

No payment shall be withheld by a plan unless:

- the plan notifies the employee,
- *by personal delivery or certified mail*,
- during the first calendar month in which the plan withholds payments,
- that his benefits are suspended.

The Notice shall contain:

- a *description* of the *specific reasons* why benefit payments are being suspended,
- a *general description* of the plan provisions relating to the suspension of payments,
- a copy of such provisions,
- a *statement* to the effect that applicable Department of Labor regulations may be found in Section 2530.203-3 of the Code of Federal Regulations, and
- *information* about the plan's procedure for a *review* of the suspension of benefits.

In addition, two additional Notice rules *may* apply, depending on the terms and conditions of the Plan:

- *if* the plan requires the filing of a benefit resumption notice as a condition precedent to the resumption of benefits, *then* the suspension notification shall also describe the procedure for filing such notice and include the forms (if any) which must be filed.
- *if* a plan intends to offset any suspendible amounts actually paid during the periods of employment in Section 203(a)(3)(B) service, *then* the notice shall identify specifically the periods of employment, the suspendible amounts which are subject to offset, and the manner in which the plan intends to offset such suspendible amounts.

Reference To SPD To Satisfy The Notice Requirement

A plan may alternatively fulfill the Notice requirement by reference to the SPD, if certain conditions are met. Where the plan's summary plan description (SPD) contains information which is substantially the same as information required above, the suspension Notice may refer the individual to the relevant pages of the SPD for information as to a particular item, provided the individual is informed how to obtain a copy of the SPD, or relevant pages thereof, and requests for such information are honored within a reasonable period of time, not to exceed 30 days.

Once these requirements are met, the plan may withhold benefits until the individual ceases 203(a)(3) employment and may also use the offset rule to recoup any overpayment.

Notice Required By Plan

Additionally, not only must the plan give Notice before suspending benefits, the plan can also require the retiree to give Notice to the plan of any employment after the individual is in "pay status." A plan may also request from a retiree access to reasonable information for the purpose of verifying such employment. Furthermore, a plan may provide that a retiree must, at such time and with such frequency as may be reasonable, as a condition to receiving future benefit payments, either certify that he is unemployed or provide factual information sufficient to establish that any employment does not constitute Section 203(a)(3)(B) service if specifically requested by the plan administrator.

Closing

There are other rules under the suspension of benefit rules besides the Notice rule discussed herein. These rules are found in the regulation itself, as well as in the explanations in the *Preamble*, which discusses many aspects of the suspension rule in great detail. When questions about the meaning of the suspension rules arise, the best place to start is often with the *Preamble* and regulation text, a truism for understanding any regulation.

* * *

LEGAL DISCLAIMER: Information contained in this publication is not legal advice, and should not be construed as legal advice. If you need legal advice upon which you can rely, you should seek a legal opinion from your attorney.