



July 2016

# PENSION ANALYST

Important information—Plan administration and operation



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## IRS issues final rules on suspension of benefits for multiemployer plans

### Who's affected

These developments affect sponsors of and participants in qualified multiemployer defined benefit plans.

### Background and summary

On December 16, 2014, President Obama signed into law the Consolidated and Further Continuing Appropriations Act, 2015. Although this law provided funding for most of the federal government through September 2015, it also contained the [Multiemployer Pension Reform Act of 2014 \(the "Act"\)](#). The Act provides that certain multiemployer plans that are in critical and declining status may suspend or reduce benefits payable to plan participants and beneficiaries, provided certain conditions are satisfied. However, no suspension may take effect prior to a participant vote with respect to the suspension.

In 2015, the IRS published temporary regulations and Revenue Procedure 2015-34, which provided guidance for plan sponsors regarding suspension of benefits. The IRS also issued temporary regulations relating to the ballot package and the administration of the participant vote.

On April 28, 2016, the IRS published [final rules](#) pertaining to the suspension of benefits provision, the ballot package and the administration of the participant vote. The final rules also provide guidance regarding:

- Contingent suspensions;
- Conditions for suspensions;
- Appointment of a retiree representative; and
- Notice requirements.

The IRS also recently published [Revenue Procedure 2016-27](#), which contains revised procedures for applications for a suspension of benefits. These procedures replace the procedures set forth in Revenue Procedure 2015-34.

### Action and next steps

The information contained in this *Pension Analyst* impacts plan administration and design. Plan sponsors should read the information contained in this newsletter and discuss any impact on their plans with their enrolled actuary and fund counsel.

The final regulations and the provisions of Revenue Procedure 2016-27 apply to suspensions for which the approval or denial is issued on or after April 26, 2016. In the case of a systematically important plan, the final rules apply with respect to any modified suspension implemented on or after that date. A "systematically important plan" is a plan that the PBGC projects will have a present value of financial assistance payments that exceeds \$1 billion if benefits are not suspended.

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The Act provides that certain multiemployer plans that are in “critical and declining status” may suspend benefits. A plan is in critical and declining status if the plan is:

- In critical status; and
- Projected to become insolvent within:
  - The current plan year or any of the 14 succeeding plan years; or
  - Any of the 19 succeeding plan years if the plan has a ratio of inactive participants to active participants that exceeds 2 to 1 or if the plan’s funded percentage is less than 80 percent.

The IRS recently issued final rules regarding suspension of benefits to enable a plan sponsor to submit a suspension of benefits application to the IRS.

## Final rules

### Plan amendments

In general, a plan sponsor may not amend a qualified plan to decrease a participant’s accrued benefit. This is known as the “anti-cutback rule.” However, a plan sponsor of a multiemployer plan that is in critical and declining status may, by plan amendment, provide a suspension of benefits. The final rules clarify that the plan amendment must satisfy the plan qualification requirements. For example, the plan amendment must be adopted in a plan year in which the plan is in critical and declining status.

### Definition of suspension of benefits

The final rules confirm that a “suspension of benefits” is a temporary or permanent reduction of any current or future payment obligation of the plan to any participant, beneficiary or alternate payee under the plan, whether or not in pay status at the time of suspension. A suspension remains in effect until the earlier of when the:

- Plan sponsor provides benefit improvements; or
- Suspension expires by its own terms. If a suspension does not expire by its own terms, it continues indefinitely.

A “benefit improvement” is:

- A resumption of suspended benefits;
- An increase in benefits;
- An increase in the rate at which benefits accrue; or
- An increase in the rate at which benefits become nonforfeitable under the plan.

### Contingent suspensions

The final rules clarify that a suspension can take into account individual-level contingencies (such as retirement, death or disability) for individuals who have not commenced benefits before the effective date of a suspension. For example, a suspension of benefits can reduce early retirement subsidies with respect to participants who have not commenced benefits before the effective date of the suspension, provided the terms of the plan after the suspension satisfy the qualification

requirements. For example, a contingency that reduces an early retirement subsidy must provide that the early retirement benefit is not less valuable than the post-suspension accrued benefit.

## Conditions for suspension

In order to suspend benefits:

- The plan's actuary must certify that the plan is projected to avoid insolvency, assuming the suspension of benefits continues until the suspension expires by its own terms, or if no expiration date is set, indefinitely; and
- The plan sponsor must determine in writing that although all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of suspension) the plan is still projected to become insolvent unless benefits are suspended. In making this determination, the plan sponsor may consider factors such as current and past contribution levels, levels of benefit accruals, compensation levels of active participants, competitive and other economic facts facing contributing employers, and measures undertaken to retain or attract contributing employers.

A plan sponsor must also make an annual determination regarding the status of the plan. No later than the last day of the plan year, the plan sponsor must determine that:

- All reasonable measures to avoid insolvency have been and continue to be taken; and
- The plan is projected to become insolvent unless the suspension of benefits continues.

The plan sponsor must keep a written record of the annual plan determination. The written record must be included in an update to the rehabilitation plan. The final rules provide that if a plan sponsor does not satisfy the annual determination requirement for a plan year (including maintaining a written record) then the suspension of benefits expires as of the first day of the next plan year.

## Limits on benefit suspensions

The following limitations apply to suspensions:

- An individual's monthly benefit may not be reduced below 110 percent of the monthly benefit guaranteed by the PBGC;
- Disability benefits may not be suspended; and
- Participants or beneficiaries who have attained age 80 may not have their benefits suspended. Participants and beneficiaries between ages 75 and 79 will have their benefits partially suspended based on a formula.

## Retiree representative

The final rules confirm a plan sponsor must select a plan participant in pay status, who may or may not be a plan trustee to act as a retiree representative if the plan has 10,000 or more participants reported on the most recently filed Form 5500, "Annual Return/Report of Employee Benefit Plan." The plan must select the retiree representative at least 60 days before the plan sponsor submits an application to the IRS to suspend benefits. The final rules also permit a plan sponsor with fewer than 10,000 participants to select a retiree representative.

The retiree representative serves as an advocate for the interests of retired and deferred vested participants and beneficiaries throughout the suspension approval process. In the discretion of the plan sponsor, the retiree representative may also continue in this role throughout the period of benefit suspension.

The plan must pay reasonable expenses incurred by the retiree representative, including reasonable legal and actuarial support, commensurate with the plan's size and funded status. The final rules clarify that the plan must pay other reasonable expenses incurred by the retiree representative, such as any reasonable expenses incurred in communicating with retired and deferred vested participants and beneficiaries of the plan about the proposed suspension of benefits. Upon request, the plan sponsor must promptly provide the retiree representative with relevant information, such as plan documents and data that are necessary for the retiree representative to perform his duties.

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## Notice of proposed suspension

Plan sponsors must provide a notice of proposed suspension to:

- All plan participants;
- Beneficiaries of deceased participants;
- Alternate payees (regardless of whether their benefits are proposed to be suspended) except those who cannot be contacted by reasonable efforts;
- Each contributing employer; and
- Each employee organization, which for purposes of collective bargaining represents plan participants employed by such an employer.

The notice must be given:

- No earlier than four business days before the date on which an application is submitted; and
- No later than two business days after the Secretary of Treasury notifies the plan sponsor that it has submitted a completed application.

The notice must be in writing and may be furnished in any written, electronic or other appropriate form to the extent such form is reasonably accessible to participants and beneficiaries.

The notice must contain information including, but not limited to:

- Sufficient information so that a participant or beneficiary can understand the effect of any suspension of benefits, including an individualized estimate (on an annual or monthly basis). If an estimate is not possible, a narrative description of the effect of the suspension may be provided;
- A description of the proposed suspension and its effect, including a description of the different categories or groups affected by the suspension, how those categories or groups are defined, and the formula that is used to calculate the amount of the proposed suspension for individuals in each category or group;
- A description of the effect of the proposed suspension on the plan's projected insolvency;
- A description of whether the suspension will remain in effect indefinitely or the date the suspension will expire if it will expire by its own terms;
- A statement describing the right to vote on the suspension application;
- A statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect and the year in which insolvency is projected to occur without suspension of benefits; and
- A statement that insolvency could result in benefits lower than benefits paid under the proposed suspension and a description of the projected benefit payments upon insolvency.

A plan administrator may include any additional information that the administrator determines would be necessary or helpful to understand the information contained in the notice, as long as it does not mislead or misinform the participants.

## IRS review of application

The IRS, in consultation with the PBGC and DOL, must approve the application to suspend benefits. The IRS will notify the plan sponsor within two business days whether the submission is complete. No later than 30 days after receipt of the application, the IRS must publish a notice in the Federal Register requesting comments from contributing employers, employee organizations and participants and beneficiaries regarding the benefit suspension.

The IRS must approve or deny the application to suspend benefits within 225 days after submission of the application. An application is deemed approved, unless within 225 days, the plan sponsor is notified that the application is incomplete.

The final rules provide that in appropriate circumstances, the IRS may permit a plan sponsor that has withdrawn an application to submit a revised application for suspension that is subject to a different review process.

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## Participant vote on proposed suspension

No later than 30 days after the IRS has approved the suspension, ballot packages must be distributed to eligible voters who must vote to approve or reject the suspension. A participant vote requires three steps:

- A ballot package is distributed to eligible voters;
- The eligible voters cast their votes and the votes are collected and tabulated; and
- The IRS, in consultation with PBGC and DOL determines whether a majority of eligible voters has voted to reject the proposed suspension.

The ballot package includes:

- The approved ballot; and
- A unique identifier for each eligible voter, which is intended to ensure the validity of the vote and maintain the voters' privacy.

The plan sponsor is responsible for paying all costs associated with the ballot package, including postage and the costs related to printing, assembling and mailing the ballot packages. The ballot packages must be distributed by first-class U.S. mail. A supplemental copy of the mailed ballot package may also be sent by electronic communication to an eligible voter who has consented to receive electronic notifications. If ballot packages sent to eligible voters are returned as undeliverable, the plan sponsor must make reasonable efforts to locate those eligible voters.

The suspension will go into effect unless a majority of all active participants and beneficiaries reject the suspension. The final rules clarify that "eligible voters" include all plan participants including terminated vested participants and retirees and all beneficiaries of deceased participants, but not alternate payees. The ballot provided by the plan sponsor in connection with the vote for suspension must:

- Be written in a manner that can be readily understood by the average participant;
- Not include any false or misleading information; and
- Be approved by the IRS, in consultation with the DOL and PBGC.

If participants and beneficiaries reject a benefit suspension, the IRS, in consultation with the DOL and PBGC, must determine within 14 days after the vote whether a plan is [a systemically important plan](#). If the plan is a systemically important plan, the IRS must decide whether to implement:

- The proposed suspension; or
- A modified benefit suspension provided the plan is projected to avoid insolvency with the modification.

The final rules also provide guidance regarding the:

- Information that must be included on the ballot;
- Voting procedures and collection and counting of votes; and
- Determination of whether a majority of eligible voters has rejected the suspension.

## Revenue Procedure 2016-27

Revenue Procedure 2016-27 provides procedural requirements to apply for a suspension of benefits.

The application for benefit suspension must be submitted by the:

- Plan sponsor (generally, the joint board of trustees); or
- Authorized representative of the plan sponsor.

The application must be signed and dated by an authorized:

- Trustee who is a current member of the board of trustees; or
- Representative of the plan sponsor.

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The application must contain information including but not limited to:

- Terms of the proposed suspension;
- A statement under penalties of perjury that the application and enclosed documents contain all relevant facts relating to the application, and they are true, correct and complete; and
- A statement signed by an authorized trustee acknowledging that the application and supporting materials will be publicly disclosed on the IRS website.

In addition to the above, the application must provide information including, but not limited to:

- The plan actuary's certification of critical and declining status;
- The plan actuary's certification that the plan is projected to avoid insolvency;
- The plan sponsor's determination of projected insolvency;
- A demonstration that the limits on individual suspensions are satisfied;
- A demonstration that the proposed suspension is reasonably estimated to enable the plan to avoid insolvency;
- A description of the measures taken to avoid insolvency;
- A copy of the proposed ballot for ratification of the suspension;
- Plan sponsor information such as name, contact information and employer identification number (EIN) of the plan sponsor;
- If applicable, the name of the retiree representative;
- Plan documents such as the most recent plan document, including all amendments since the last restatement, the most recent summary plan description and any subsequent summaries of material modification, and the most recent determination letter;
- Collective bargaining agreements;
- Information from the most recently filed Form 5500, Annual Return/Report of Employee Benefit Plan; and
- The most recent rehabilitation plan.

To assist plan sponsors, the revenue procedure includes:

- A model notice of application for approval of a proposed suspension of benefits that plan sponsors may use to satisfy the notice requirement;
- A power of attorney and declaration of representative before the Department of Treasury; and
- A checklist to ensure that the application is complete. The completed checklist must be placed on top of the application.

The application must be submitted electronically to [www.treasury.gov/mpira](http://www.treasury.gov/mpira).

## Next steps

The suspension of benefits provisions and application process are complex. Plan sponsors should consult with their plan's enrolled actuary or fund counsel if they have any questions regarding the guidance discussed in this newsletter.

### Pension Analyst by Prudential Retirement

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans.

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