Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also Part I, §§ 411, 7805; §§ 1.411(d)-4, 301.7805-1.)

Rev. Proc. 2005-23

SECTION 1. PURPOSE

.01 In general. The purpose of this revenue procedure is to limit the retroactive application of the decision in Central Laborers' Pension Fund v. Heinz, 124 S.Ct. 2230 (June 7, 2004) for retirement plans qualified under § 401(a) of the Internal Revenue Code (Code).

.02 Scope of treatment. With regard to qualified retirement plans that adopted certain amendments before June 7, 2004, section 3 of this revenue procedure generally provides that the Service will not disqualify a plan solely on account of a plan amendment adding or expanding a suspension of benefit provision, as prohibited under Central Laborers'. The treatment under this revenue procedure applies only with respect to amendments described in section 3.01 and not to other plan amendments that may violate § 411(d)(6). The limitation on the retroactive application of Central Laborers' under this revenue procedure has no effect on the rights of any party under section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA) or any other law.

SECTION 2. BACKGROUND

Section 411 requires a qualified plan to meet certain minimum vesting standards. Under § 411(a), an employee's right to the accrued benefit derived from employer contributions must become nonforfeitable within a specified period of service, and certain other conditions must also be met. Section 411(a)(3) provides circumstances under which an employee's benefit is permitted to be forfeited without violating § 411(a). In particular, § 411(a)(3)(B) provides that a right to an accrued benefit derived from employer contributions is not treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

This definition of employment for which benefit payments are permitted to be suspended is further described in 29 CFR § 2530.203-3, which interprets section 203(a)(3)(B) of ERISA, the counterpart to § 411(a)(3)(B) of the Code. Employment that satisfies the conditions described in the statute and regulations is referred to as "section 203(a)(3)(B) service." See 29 CFR § 2530.203-3(c).

Section 411(d)(6)(A) generally provides that a plan is not treated as satisfying the requirements of § 411 if the accrued benefit of a participant is decreased by a plan amendment. Under § 411(d)(6)(B) and regulations thereunder, a plan amendment that has the effect of eliminating or reducing an early retirement benefit, a retirement-type subsidy, or an optional form of benefit, with respect to benefits attributable to service before the amendment, is treated as reducing accrued benefits for any employee who satisfies the pre-amendment conditions for that benefit (either before or after the amendment).

Under § 7805(b)(8), the Commissioner is authorized to prescribe the extent, if any, to which a judicial decision relating to the internal revenue laws is to be applied without retroactive effect.

In Central Laborers', the plaintiffs were two inactive participants in the Central Laborers' Pension Fund, a multiemployer pension plan. The two participants commenced payment of their benefits in 1996 after accruing enough pension credits to qualify for early retirement payments under a plan provision that paid them the same monthly benefit they would have received had they commenced payment at normal retirement age. The plan terms required that payments be suspended if a participant engaged in "disqualifying employment." At the time the two participants commenced payment, the plan defined disqualifying employment to include only employment covered by the plan. At that time, employment covered by the plan (and thus, disqualifying employment) did not include work as a construction supervisor, the position in which the two participants were employed after they commenced benefits. Accordingly, the participants' benefit payments were not suspended in 1996. However, in 1998, the plan was amended to expand its definition of disqualifying employment to include any employment in the construction industry in the geographic area covered by the plan, and the plan stopped payments to the two participants on account of their disqualifying employment as construction supervisors. The two participants sued to recover the suspended payments, claiming that the amendment expanding the plan's suspension provisions violated section 204(g)

of ERISA (the counterpart to § 411(d)(6) of the Code).

The Supreme Court, holding for the two participants, ruled that section 204(g) prohibits a plan amendment expanding the categories of post-retirement employment that results in suspension of the payment of early retirement benefits already accrued. The Court found that while ERISA permits certain conditions that are elements of the benefit itself (such as suspensions under § 411(a)(3)(B) of the Code or section 203(a)(3)(B) of ERISA), such a condition may not be imposed after a benefit has accrued and that the right to receive benefit payments on a certain date may not be limited by a new condition narrowing that right. The Court agreed with the 7th Circuit that "[a] participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Central Laborers', 124 S.Ct. at 2235-36, quoting Heinz v. Central Laborers' Pension Fund, 303 F.3d 802, 805 (7th Cir. 2002). However, the Court stated:

> Nothing we hold today requires the IRS to revisit the tax-exempt status in past years of plans that were amended in reliance on the agency's representations in its manual by expanding the categories of work that would trigger suspension of benefit payments as to already-accrued benefits. The Internal Revenue Code gives the Commissioner discretion to decline to apply decisions of this Court retroactively. 26 U.S.C. § 7805(b)(8) . . . This would doubtless be an appropriate occasion for exercise of that discretion.

Central Laborers', 124 S.Ct. at 2238, n.4.

SECTION 3. EXERCISE OF AUTHORITY UNDER § 7805(b)(8)

.01 In general. Pursuant to the Commissioner's authority under § 7805(b)(8), a plan will not be treated as having failed to satisfy the requirements of § 401(a) merely because an amendment adopted before June 7, 2004, violated § 411(d)(6) by adding or expanding a provision under which a suspension of benefits occurs on account of section 203(a)(3)(B) service. This treatment applies only if a reforming amendment, as described in section 3.02, is adopted and the plan complies operationally with that amendment, as described in sections 3.02, 3.03, and 3.04. For purposes of this revenue procedure, an amendment adopted before June 7, 2004, that violated § 411(d)(6) by adding or expanding a provision under which a suspension of benefits occurs on account of section 203(a)(3)(B) service is referred to as the original amendment, and the amendment required under section 3.02 is referred to as the reforming amendment. This section 3.01 applies to any such original amendment

regardless of whether the amendment provided for a suspension of payment of the accrued benefit or for a suspension of the payment of early retirement benefits or retirement-type subsidies such as those at issue in Central Laborers', and regardless of whether the plan as amended by the original amendment provided that subsequent benefit payments under the plan were actuarially adjusted to take into account the fact that benefits were not paid during the suspension period. For purposes of this revenue procedure, a provision under which a suspension of benefits occurs on account of section 203(a)(3)(B) service includes a provision that results in a plan not providing actuarial increases as a result of such service after normal retirement age. If a plan has more than one original amendment that violated § 411(d)(6) by adding or expanding a provision under which a suspension of benefits occurs on account of section 203(a)(3)(B) service, this revenue procedure applies separately to each amendment.

.02 Reforming amendment. (1) General requirements. The reforming amendment must provide that, beginning on June 7, 2004, the provisions of the original amendment that suspend benefits do not apply with respect to benefits that had accrued as of the applicable amendment date for the original amendment and must provide certain participants with an option to commence payment of their benefits, as described in section 3.04. For purposes of this revenue procedure, the applicable amendment date for a plan amendment is the later of the effective date of the amendment or the date the amendment is adopted. However, the reforming amendment is permitted to provide that the suspension of benefit provisions of the original amendment will continue to apply with respect to benefits that had accrued after the applicable amendment date for the original amendment. Further, a plan may continue to apply the suspension of benefit provision as in effect immediately prior to the original amendment with respect to all accrued benefits (accruing both before and after the original amendment).

(2) Broader reforming amendments permitted. The reforming amendment is permitted to provide greater benefits to participants than the minimum required under section 3.02(1). For example, in addition to satisfying the minimum requirements of this section 3, a reforming amendment might provide that the suspension of benefit provisions of the original amendment cease to apply beginning on a date earlier than June 7, 2004, and might also provide a corresponding opportunity for participants to apply for retroactive benefits commencing on that earlier date. Similarly, the reforming amendment might apply to the entire accrued benefit of those participants with an accrued benefit on the applicable amendment date of the original amendment, rather than just to benefits that had accrued as of the applicable amendment date, so that the suspension of benefit provisions of the original amendment as reformed only apply to those participants who commence participation after that applicable amendment date.

(3) Effective date and remedial amendment period. The reforming amendment must be effective as of a date not later than June 7, 2004. Section 4 provides a remedial amendment period for the reforming amendment.

.03 Payment of retroactive benefits requirement. (1) In general. In order for a plan to obtain the treatment provided in section 3.01, the reforming amendment described in section 3.02 must provide for the payment of retroactive benefits (beginning as of June 7, 2004, or such earlier date on which the reforming amendment is made effective pursuant to section 3.02(3)) to an affected plan participant (including any appropriate interest or actuarial increase) with respect to benefits that had accrued as of the applicable amendment date for the original amendment. For purposes of this section 3.03, an affected plan participant means (a) a participant who commenced receipt of benefits and whose benefits were suspended on account of the original amendment or (b) a participant who applied to commence benefits, whose application (including the form of payment) was approved, and whose benefits were suspended before payments commenced.

(2) Effective date for retroactive payment of benefits for affected participants. The plan must provide for the payment of retroactive benefits described in section 3.03(1) effective not later than January 1, 2006. The plan must be in operational compliance with the reforming amendment by January 1, 2006, with respect to benefits payable through December 31, 2005, and must maintain compliance for all periods on or after that date.

.04 Option to commence payment. (1) In general. In order for a plan to obtain the treatment provided in section 3.01, a participant described in section 3.04(2) must be given an opportunity to elect retroactively the commencement of payment of benefits as of the first date on which (a) the reforming amendment is made effective and (b) the participant was eligible to commence receipt of benefits. See § 1.417(e)-1 for rules relating to retroactive annuity starting dates.

(2) Eligibility for option. A participant who is eligible for the option described in section 3.04(1) is one who --

(a) at any time after the applicable amendment date of the original amendment, was eligible to commence the receipt of benefits under the plan, determined without regard to the suspension of benefit provisions of the original amendment,

(b) at the same time, engaged in section 203(a)(3)(B) service for which benefits were not permitted to commence, as determined taking into account the original amendment, and

(c) is not an affected participant as defined in section 3.03 (e.g., is a participant who did not apply for benefits).

(3) Election period. The election period for the option set forth in section 3.04(1) begins within a reasonable time period after participants described in section 3.04(2) have received notification of the option in accordance with section 3.04(4) and ends no sooner than six months after notification. Reasonable efforts must be taken to notify all such participants. For those participants not located after a mailing to the last known address, reasonable efforts include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94-22, 1994-1 C.B. 608) or the Social Security Administration Employer Reporting Service.

(4) Notification requirement. The plan must provide notice of the option set forth in section 3.04(1) to each participant described in section 3.04(2). In addition to satisfying any generally applicable notice requirements, the notice of the option to commence payment of benefits must be designed to be readily understandable by the average plan participant. The notice must explain the option to commence retroactive payment of benefits, as described in section 3.04(1), and the period for making the election, as described in section 3.04(3). The notice must be sent on or before January 1, 2006.

.05 Terminated plans. A plan that was terminated with a termination date before June 7, 2004, is not required to adopt a reforming plan amendment or take the actions required in sections 3.02 through 3.05 in order to receive the treatment provided in section 3.01.

SECTION 4. EFFECT ON DETERMINATION LETTERS AND REMEDIAL AMENDMENT PERIOD

For purposes of any previously issued determination letter and for purposes of applying the rules in § 401(b), the Central Laborers' decision constitutes a change in law under § 401(a) that is effective on June 7, 2004 (the date of the Central Laborers' decision). Thus, if a favorable determination letter was issued with respect to a plan amendment that is adversely affected by the Central Laborers' decision, the plan sponsor cannot rely on the determination letter from and after June 7, 2004.[1] Further, a plan provision that is an original amendment as defined in section 3.01 is designated under § 1.401(b)-1(b)(3)(i) as a disqualifying provision resulting from a change in the qualification requirements under § 401(a). The last day of the remedial amendment period for this disqualifying provision is the same as the last day of the EGTRRA remedial amendment period for the plan.[2]

[1] See section 21 of Rev. Proc. 2005-6, 2005-1 I.R.B. 200.

[2] Pursuant to Notice 2001-42, 2001-2 C.B. 70, the EGTRRA remedial amendment period will not end earlier than December 31, 2005. Announcement 2004-71, 2004-40 I.R.B. 569, includes a proposed revenue procedure which, if finalized, would extend this remedial amendment period.

SECTION 5. PROPOSED REGULATION

The Treasury Department and the Service intend to propose regulations that reflect the holding in Central Laborers'. It is expected that the proposed regulations will provide guidance on when an amendment may add a benefit entitlement condition that is permitted under the vesting rules (e.g., a condition described in § 411(a)(3)) with respect to benefits accrued before the date of the amendment. It is further expected that, with respect to the types of benefits protected under § 411(d)(6), the proposed regulations will provide that such an amendment is not permitted with respect to benefits accrued before the applicable amendment date, but is permitted to the extent that the amendment applies with respect to benefits accrued after the applicable amendment date.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective April 18, 2005.

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1938.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section 3.04(4). This information is required to notify certain participants of the opportunity to elect retroactively the commencement of benefits. The collection of information is required to obtain a benefit. The likely respondents are retirement plan sponsors, administrators, and trustees.

The estimated total annual reporting and/or recordkeeping burden is 142,500 hours.

The estimated annual burden per respondent/recordkeeper varies from 250 hours to 750 hours, depending on individual circumstances, with an estimated average of 500 hours. The estimated number of respondents and/or recordkeepers is 285.

The estimated annual frequency of responses (used for reporting requirements only) is one.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

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