

Pension Plan Fix-It Handbook

Employee Benefits Series

THOMPSON

September 2012 | Vol. 19, No. 12

IRS Notice on Contingent Events Provides Guidance on Communications

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In the March 2012 newsletter we discussed amending your defined benefit plan for the funding-based benefit limitations of Code Section 436. The end of the column advised plan sponsors to review participant communications and administrative procedures and revise as necessary. This column focuses on participant communications based on guidance IRS issued in Notice 2012-46. The box on page 2 highlights key sections of ERISA Section 206 and Section 436.

Background

The Pension Protection Act of 2006 added Section 436, with parallel rules in ERISA Section 206(g) as well as the notice requirement in ERISA Section 101(j). For purposes of this column, we will refer to the participant notice as the “101(j) notice.”

Prohibited payments

Prohibited payments generally include:

- any payment in excess of the monthly amount paid under a single life annuity (plus any Social Security supplements described in Code Section 411(a)(9)) to a participant or beneficiary whose annuity starting date occurs during any period that the AFTAP is less than 60 percent;
- any payments for the purchase of an irrevocable commitment from an insurer to pay benefits; and
- any other payment the DOL Secretary specifies by regulations.

A prohibited payment does not include a payment that may be distributed immediately; that is, present value does not exceed \$5,000.

The 101(j) notice is required for:

- unpredictable contingent events, such as plant shutdowns;
- accelerated benefit payments, such as lump-sum distributions; and
- plans with severe funding deficiencies, such as an adjusted funding target attained percentage less than 60 percent.

Generally, a plan’s AFTAP is certified by an actuary, or can be based on certain presumptions as allowed by law.

ERISA Section 101(j) requires the plan administrator of a single-employer defined benefit plan to provide a written notice to plan participants and beneficiaries, generally within 30 days after the plan becomes subject to the unpredictable contingent event or accelerated benefit payment limitation. In the case of the severe funding deficiency limitation, the Section 101(j) notice must be provided within 30 days after the earlier of the valuation date for the plan year for which the plan’s AFTAP is less than 60 percent or the date the AFTAP is presumed to be less than 60 percent under ERISA Section 206(g)(7).

ERISA Section 502(c)(4) provides that the U.S. Department of Labor may assess a penalty of not more than \$1,000 a day for each violation of the notice requirement.

IRS Notice 2012-46

The IRS issued guidance regarding the 101(j) participant notice in IRS Notice 2012-46. The notice is in the form of 10 questions and answers including sample language for the 101(j) notice. The guidance is effective Nov. 1, 2012; however, employers may rely on it now.

See Andersen, p. 2

Andersen (continued from p. 1)

Who should receive the 101(j) notice?

Generally, a 101(j) notice should be provided to each participant and beneficiary entitled to benefits under the plan on the first date that the plan becomes subject to the applicable limitations. The 101(j) notice is provided only to participants or beneficiaries to whom the limitation applies or could apply. The 101(j) notice does not have to be provided to any participant or beneficiary for whom it is reasonably expected that the limitation could not apply once the limitation becomes applicable. In addition, there are special rules for certain occurrences.

Unpredictable contingent event

If an unpredictable contingent event occurs, the 101(j) notice must be distributed on or before the latest of:

- the date the Worker Adjustment and Retraining Notification Act notice is distributed, if the unpredictable contingent event triggers a WARN notice;

- 60 days before the actual occurrence of the related unpredictable contingent event; or
- 30 days after the date the employer makes a decision to cause the related unpredictable contingent event to occur.

Prohibited payments

Participants whose benefits commence during a period in which the AFTAP is at least 60 percent but less than 80 percent are subject to restricted benefits. A plan may allow participants to bifurcate their benefit, with the restricted portion deferred to a later date. If the limitation ceases to exist, and the plan permits another annuity starting date for the remainder of the benefit, a 101(j) notice must be provided within 30 days after the date on which the limitation ceases to apply.

What information must be in the 101(j) notice?

- plan name, Employer Identification Number, plan number;

See Andersen, p. 3

ERISA/IRS section	Provision overview*	Notice requirement
206(g)(1)/436(b)	<p>If a plan provides an unpredictable contingent event benefit, the benefit cannot be paid if the AFTAP for the plan year is less than 60 percent or would be less than 60 percent taking into account the occurrence of the unpredictable contingent event benefit.</p> <p>An unpredictable contingent event benefit is a benefit paid solely because of a plant shutdown (or similar event as allowed by the IRS) or an event other than the attainment of any age, performance of service, death, disability etc.</p>	<p>Within 30 days after the plan becomes subject to the benefit limitation on unpredictable contingent event benefits.</p>
206(g)(2)/436(c)	<p>Limitations on plan amendments increasing liability for benefits.</p>	<p>No notice required.</p>
206(g)(3)/436(d)	<p>A plan is restricted from making “prohibited payments” (see separate box on Page 2) if the plan’s AFTAP is below 80 percent or the plan sponsor is in bankruptcy and the AFTAP is less than 100 percent.</p> <p>If the AFTAP is at least 60 percent but less than 80 percent, the plan cannot pay any prohibited payment in excess of 50 percent of the amount the payment would be but for the benefit limitation.</p>	<p>Within 30 days after the plan becomes subject to a limitation on prohibited payments</p> <p>The 101(j) notice requirement applies separately to each of these limits (Q&A 4). The notices may be combined if more than one limit is effective at the same time.</p>
206(g)(4)/436(e)	<p>If the plan’s AFTAP is below 60 percent for a plan year, all benefit accruals cease as of the plan year valuation date.</p>	<p>Within 30 days after the date benefit accruals under the plan are required to cease; does not have to be provided to former employees or beneficiaries if they are not eligible to accrue benefits under the plan on the date the limitation first applies.</p>
		<p>At such other time as may be determined by the DOL Secretary.</p>

*Special contributions may be made to avoid the benefit limitations.

Andersen (continued from p. 2)

- the effective date of the limitation;
- the class of participants and beneficiaries affected;
- the name, address and telephone number of the contact person from whom more information may be obtained;
- a general description of the limitation, such as a description of benefits that may not be paid or a statement that benefit accruals have stopped;
- where applicable, a statement that the limitation applies because of the level of the plan's "funding percentage," including the specific AFTAP and whether the limitation applies as a result of an actuarial certification or presumption;
- in the case of bankruptcy, a statement that the limit applies because of the bankruptcy and the plan's AFTAP hasn't been certified as at least 100 percent;
- in the case of an unpredictable contingent event or prohibited payment, a description of the limitation in sufficient detail to make evident the difference between the plan's benefits that would be payable with and without the limitation; and
- a description of the conditions under which the limitation will cease to apply and a description of plan provisions applicable after the limitation ceases to apply.

Plans that permit new annuity starting dates must include:

- a statement that the limitation on the prohibited payment no longer applies; and
- a statement that the participant or beneficiary is eligible to elect the applicable part of the distribution that constituted a prohibited payment, including any deadlines and application procedures for that purpose.

The notice must be written in a manner that can be understood by the average plan participant. A single, combined notice may be provided if the plan is subject to more than one limitation.

The notice must be in writing and may be furnished in any paper or electronic form DOL permits.

Comments requested

IRS is requesting comments on whether a new 101(j) notice should be required to be provided at additional dates such as:

- whenever a limitation ceases to apply;
- when individuals become participants or beneficiaries after the first date the limitation applies; or
- when participants and beneficiaries join the plan at later dates but the limitation still applies.

Finding Out More

To see Notice 2012-46, go to this link: http://www.irs.gov/irb/2012-30_IRB/ar09.html. 



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