CHEIRON CLIENT ADVISORY

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DOL Regulations Spell Out Penalties for Noncompliance by Multiemployer Plans in Developing Funding Plan

The Department of Labor ("DOL") issued a final regulation for imposing statutory civil penalties on Trustees of multiemployer plans in critical or endangered status that fail to adopt a Funding Improvement or Rehabilitation Plan by the statutory deadline. The sanctions also apply to Trustees of endangered (but not seriously endangered) plans that fail to meet the benchmarks for improving their funded ratio by the end of the Funding Improvement Period. The amount of the sanction will be based on the degree of willfulness involved in the failure, but it cannot exceed $1,100 per day. The regulation is effective March 29, 2010, and contains a detailed procedure for plans to challenge any proposed civil penalties.

Trustees should take into account these critical points:

1. The Trustees are jointly and severally *personally* liable for the civil penalties. Thus, the plan cannot reimburse the Trustees for the civil penalties;

2. The amount of the penalties is based on the degree of willfulness. If the failure is due to circumstances beyond the Trustee's control, it would seem that the Trustees have a good case for arguing that the proposed penalties should be reduced or eliminated. For example, if the Trustees are unable to agree on a default rehabilitation schedule for a critical status plan because of a difference in opinion whether adjustable benefits may be

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IRS Guidance on HEART Act Suggests Need for Plan Amendments

Congress enacted the Heroes Earnings Assistance and Relief Tax Act of 2008 (the "HEART Act") to expand the rights of employees killed or disabled while in military service. Fourteen years earlier, Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). While that law provided reemployment and related rights with respect to pension, profit-sharing and 401(k) plans, it did not provide any protections for former employees who were killed or became so disabled that they could not resume their former employment.

On January 21, 2010, the IRS released Notice 2010-15 to provide guidance (in Q & A format) on HEART Act provisions relating to plan qualification and income tax issues for the employees and beneficiaries. The HEART Act imposes mandatory requirements on

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reduced or eliminated in the default plan and have submitted their dispute to arbitration, they could argue that the reason for the delay in adopting a rehabilitation plan was due to a good faith difference in the interpretation of the statute, and the failure was not willful.

3. If the Trustees fail to contest the initial notice of proposed sanctions, they are deemed to accept the factual allegations in the notice and have waived their rights to further challenges.

The procedure for issuing and challenging proposed sanctions is as follows:

1. Notice of Intent to Assess -- The DOL issues a notice of intent to assess a civil penalty to the plan, which contains the amount of the penalty, the reasons for the action, and the period to which the penalty applies. For example, the notice may state that the DOL intends to assess a penalty of $1,100 per day from the due date of the Funding Improvement Plan to the date such plan is adopted because the parties failed to adopt a plan by the statutory deadline.

2. Statement of Reasonable Cause -- Within 30 days of service of the notice of intent to assess from DOL, the Trustees may file a statement of reasonable cause why the penalty should be reduced or not assessed. The statement must be filed under penalties of perjury and may include a statement that the statute was complied with or a description of mitigating circumstances why the penalty should be reduced or not assessed.

***Cheiron observation:** Possible examples of lack of willfulness on the part of Trustees include a deadlock among the Trustees concerning the details of an alternative plan, an unanticipated significant loss in the plan's investments, or failure of the bargaining parties to negotiate the increased contribution rates required by the funding improvement plan adopted by the Trustees.*

If the Trustees fail to file a statement of reasonable cause, they are deemed to have admitted the facts set forth DOL's notice, waived the right to appear before DOL or contest the facts, and the DOL notice becomes a final order assessing the proposed penalty 45 days from the date of service of the notice on the Trustees.

3. DOL will review the statement of reasonable cause and make a determination whether to assess the proposed penalty or reduce it. DOL will then send the Trustees a notice of its determination. If DOL determines it will assess any penalty, even a reduced penalty, the DOL notice is treated as a pleading for purposes of the rules governing administrative proceedings. There is no time limit imposed on DOL to issue a determination on the notice of reasonable cause. If the Trustees do not request a hearing within 45 days of issuance of DOL's determination, it will become final and binding.

4. Request For Hearing – If the DOL determines that it will assess a penalty, the Trustees may request a hearing under sections 2570.150 through 2570.171 and file an answer in writing opposing DOL's determination setting forth specific circumstances or facts surrounding DOL's notice of determination that render it inappropriate.[1]

***Cheiron observation:** The Trustees should be careful to follow the above procedures, including requesting a hearing, to avoid an argument by DOL that they are foreclosed from challenging the assessment because they failed to exhaust their administrative remedies.*

Service of DOL notices and determinations may be accomplished by serving the notice or request in person, by leaving a copy of the item at the Trustees' principal place of business, principal office or home address, by depositing it in the regular mail first class to the last known address of the Trustee, or by sending it by certified mail. If service is by regular mail, service is complete only upon actual receipt by the addressee; if by certified mail, five days are added to the time for reply. Statements of Reasonable Cause by Trustees are deemed filed upon mailing with the United States Postal Service by certified or express mail.

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1. The regulation also adds sections 160 to 171 to Part 2570 of the DOL regulations to establish the procedures and rules governing hearings on any penalties assessed under the regulation.

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DOL Issues Final Rules on Multiemployer Plan Document Disclosure; Regulations Effective April 1

The Department of Labor ("DOL") issued a final regulation under ERISA section 101(k) requiring the plan administrator of a multiemployer plan to provide copies of certain actuarial and financial documents after receipt of a written request. Generally, the covered documents must be provided not later than 30 days after receipt of the written request. The new regulation is effective April 1, 2010. Under the law, and regulations issued last year, the DOL may assess a penalty of up to $1,000 a day for each violation of the requirement to provide documents.

Persons entitled to information

The following individuals and entities are entitled to request the actuarial and financial documents:

1. A plan participant;
2. Any beneficiary receiving benefits;
3. Any labor organization representing participants under the plan; and
4. Any employer that is party to the collective bargaining agreements pursuant to which the plan is maintained or who otherwise may be subject to withdrawal liability.

Available Documents

The documents that must be made available are any:

1. Actuarial reports prepared by an actuary of the plan and received by the plan at regularly scheduled, recurring intervals; and any study, test (including a sensitivity test), document, analysis or other information (whether or not called a "report") received by the plan from an actuary of the plan that depicts alternative funding scenarios based on a range of alternative actuarial assumptions, whether or not such information is received by the plan at regularly scheduled, recurring intervals;

   Cheiron observation: *The DOL views actuarial reports as including not only the annual valuation report and the notice of status (critical, endangered, or neither) prepared by the plan actuary, but also any documented sensitivity testing that the plan may have received.*

2. Quarterly, semi-annual, or annual financial reports prepared for the plan by any plan investment manager or advisor (without regard to whether such advisor is a fiduciary) or other fiduciary; and

   Cheiron observation: *It appears this would have application to multiemployer defined contribution plans as well as defined benefit plans.*

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Conclusion

The DOL regulation establishes the basis and procedure by which DOL will assess civil penalties against Trustees for failure to timely adopt a Funding Improvement or Rehabilitation Plan, and failure of an endangered pension plan to meet the funding improvement benchmarks. The civil penalties are based on the DOL's determination of the degree to which the failure was willful and offers the Trustees a procedure for challenging any proposed penalties. Trustees should be careful to follow the DOL procedures to avoid waiving their right to contest the sanction. There are legal questions regarding whether the plan can pay for the Trustees contesting the penalties. If the plan receives a notice of intent to impose civil penalties, it should be referred to fund counsel immediately.

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pension plans, and also provides several options for treatment of military service for former employees killed or disabled. This article will address both the mandatory and optional provisions of the HEART Act that apply to pension plans.

The Heart Act adds several sections to the Internal Revenue Code ("IRC") affecting defined benefit plans. The only mandatory rule is contained in new Section 401(a)(37), which requires that a qualified plan include provisions concerning the way certain benefits are calculated with respect to a participant who *dies* while performing qualified military service.[1] The effective date is for deaths and disabilities occurring on or after January 1, 2007.

Death Benefits

Section 401(a)(37) requires that a plan provide that the survivors of a participant who dies while performing qualified military service are entitled to any additional benefits (*other than benefit accruals relating to the period of qualified military service*) that would have been provided had the participant resumed employment and then terminated employment on account of *death*. The plan is required to provide vesting credit for qualified military service, but is not required to provide accrual credit. Additional benefits are anything that would be provided *under the plan* if the participant had resumed employment and then terminated employment on account of death. This includes accelerated vesting, ancillary life insurance benefits, and other survivor's benefits such as pre-retirement survivor's annuity that are contingent on a participant's termination of employment on account of death. (Q&A-1 of Notice 2010-15)

- If death benefits are based upon the accrued benefit, section 401(a)(37) does not require that additional accruals be imputed for the period of qualified military service when determining the death benefits.

- Service credit for vesting purposes must be provided for the period of a deceased participant's military service. (Q&A-3) Section 401(a)(37) only applies if there are reemployment rights. This is determined by USERRA. (Q&A-4)

Optional Amendments

New section 414(u)(9) of the IRC and IRS guidance also allow plans to provide accrual credit to deceased and disabled veterans and vesting credit to disabled veterans for their period of military service. Note: A disabled individual, actually re-employed under the USERRA provisions, will receive accrual and vesting credit for military service. The credit for military service for vesting and/or accruals for deceased former employees and non-reemployed disabled veterans applies *only if* all individuals who die or become disabled as a result of performing qualified military service are credited with service and benefits on reasonably equivalent terms. The effective date for section 414(u)(9) is for deaths and disabilities occurring on or after January 1, 2007.

- Because the application of section 414(u)(9) is permissive, it can be applied as of any date on or after January 1, 2007. (Q&A-5)

- Although a plan must provide vesting credit for qualified military service to a participant who dies in such service, it need not provide vesting credit for a disabled participant. If the plan counts for benefit accrual purposes the qualified military service for a participant who becomes *disabled* while performing military service, the plan does *not* have to credit that service for vesting purposes. However, the plan may credit the service for vesting purposes pursuant to other applicable rules, including section 1.401(a)(4)-11(d)(3) of IRS regulations concerning the nondiscrimination rules and imputed service.

Other Provisions

Section 105 of the Act amended the IRC to add section 3401(h) and section 414(u)(12). New section 3401(h) provides that "differential wage payments" are wages for income tax withholding. In general,

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1. Section 104 of the HEART Act made changes to sections 401(k), 403(b) and 457 of the IRC, so that all 403(b) annuities and 457(b) plans have to satisfy section 401(a)(37). Thus, section 401(a)(37) applies to *all* qualified plans (private or public), 403(b) annuities, and governmental eligible deferred compensation plans under section 457(b).

"differential wage payments" are payments by the employer with respect to any period during which the individual is performing military service while on active duty for more than 30 days. Prior to this change in law (which is effective for payments made after December 31, 2008) such payments were not included in wages.

***Cheiron observation:** This has the effect of taxing and requiring withholding on the payments and makes it easy to treat the amounts as compensation for pension purposes.*

Section 414(u)(12) clarifies the treatment for pension purposes of differential wage payments. These changes apply to years beginning after December 31, 2008. Under section 414(u)(12), for purposes of applying the IRC to a retirement plan:

- An individual receiving differential wage payments is treated as an employee of the employer making the payment;
- The differential wage payment is treated as compensation, which the plan may or may not take into account for pension purposes;
- The plan is not treated as failing the nondiscrimination and coverage rules as a result of providing the extra pension credit. The pass on satisfying the various nondiscrimination rules, etc., applies only if all employees of the employer performing military service as described in section 3401(h)(2)(A) (which picks up the more than 30 days requirement) are entitled to receive differential wage payments on reasonably equivalent terms and, if eligible to participate in a retirement plan maintained by the employer, make contributions based on the payments on reasonably equivalent terms.

  ***Cheiron observation:** This means a defined benefit plan that provides benefits based upon differential wages will have to treat employees performing military service in a similar fashion.*
- The treatment of differential wage payments as compensation for pension purposes is not mandatory.

Timing of Plan Amendments

All qualified plans will have to be amended for the changes made by section 104(a) of the Act, which added section 401(a)(37) to the Code. Under section 104(d)(2) of the Act, for a non-governmental plan, the amendments are to be made no later than the last day of the plan year beginning on or after January 1, 2010. For a governmental plan, it is the last day of the plan year beginning on or after January 1, 2012, rather than 2010. However, the plan must be operated in accordance with section 401(a)(37) and the amendment must be retroactive.

Action Items

The HEART Act made changes that affect all defined benefit plans. Both plan documents and plan operation need to be reviewed to see what has been done to date, and what changes are needed this year.

Required modifications for defined benefit plans: Review plan documents for compliance with section 401(a)(37) and make amendments as necessary in light of the new guidance. Modify plan operations immediately, if needed, to pay benefits with respect to participants who died while performing qualified military service in compliance with the law and the new guidance.

Optional modifications for defined benefit plans: Determine whether the plan has credited, or wants to credit, benefit accrual service for those who died or became disabled while performing qualified military service. Make decisions about whether the plan will treat differential wages as compensation (if not already made). Check that all employees performing military service are entitled to receive differential wage payments on reasonably equivalent terms. Make any necessary changes to the plan document or plan operation.

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3. Application filed with the Secretary of the Treasury (under ERISA section 304 and IRC section 431(d)) requesting an extension of the amortization period and the determination of the Secretary pursuant to the application.

Limitations

The new regulations contain some limitations on the documents that must be disclosed. Accordingly, the following do not have to be furnished:

1. Any report or application furnished to the requester within the previous 12 months;

2. Any report or application that has been in the plan's possession for six years or more;

   ***Cheiron observation:** The six-year cut-off reflects the statutory requirement (elsewhere in the law) that information used to provide reports and certifications need be kept for only six years. However, this does not affect the requirement of section 209 of ERISA which effectively requires that the plan keep records pertinent to the determination of benefits.*

3. Any actuarial report or financial report that has not been in the plan's possession for at least 30 days (however, the plan has to inform the requester not later than 30 days after receipt of the request of existence of the document and the earliest date on which the document can be furnished by the plan);

   ***Cheiron observation:** This provision gives the plan an opportunity to review the document before it is disclosed.*

4. Any information or data which served as the basis for any report or application that must be disclosed (although this does not limit other rights that a person may have to review or obtain information under the law);

   ***Cheiron observation:** This also would not affect the requirement to furnish information under applicable standards of practice.*

5. Any information within a report or application that the plan administrator reasonably determines to be individually identifiable information with respect to any plan participant, beneficiary, employee, fiduciary, or contributing employer, except that such limitation shall not apply to an investment manager, advisor, or other person (other than an employee of the plan) preparing a financial report; and

6. Any information within a report or application that the plan administrator reasonably determines to be proprietary information regarding the plan, any contributing employer, or entity providing services to the plan.

Proprietary information is defined to mean trade secrets and other non-public information (for example, processes, procedures, formulas, methodologies, techniques, or strategies) that, if disclosed, may cause, or increase a reasonable risk of, financial harm to the plan, a contributing employer, or entity providing services to the plan. The plan administrator may treat information relating to a contributing employer or entity providing services to the plan as other than proprietary if the contributing employer or service provider has not identified the information as proprietary. The plan administrator has to inform the requester if any information is withheld as being individually identifiable information or proprietary information.

***Cheiron observation:** The preamble states that the DOL believes that the use of the proprietary information exception will be rare. This exception may have a greater application to investment advisors who employ proprietary investment strategies and tools. It should be anticipated that an entity providing services to the plan will need to specify to the plan administrator, which, if any, information it regards as proprietary. We will be reviewing our own reports to clients to determine whether there is any information that we regard as proprietary, but anticipate that there will be little such information.*

Reasonable Charges

The plan administrator may impose a reasonable charge to cover the costs of furnishing the documents subject to certain limits. The charge may not exceed the lesser of (A) the actual cost to the plan for the least expensive means of acceptable reproduction of the document or documents or (B) 25 cents per

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Welfare Plan Change Impacting Pension Benefits Violates Anti-cutback Rule, Appeals Court Holds

The United States Court of Appeals for the Third Circuit has ruled that an amendment to a welfare plan that had the effect of reducing indirectly the value of an optional form of distribution from a pension plan violated the anti-cutback provisions of ERISA. The Court's precedential opinion in *Clement Battoni, Jr. et al. v. IBEW Local No. 102 Employee Pension Plan, et al.* was released Feb. 5, 2010.

The case arose out of the merger of two Unions and their respective pension and welfare plans. The employees in one of the plans were permitted to elect payment of their pension in a lump-sum. The Trustees amended the surviving welfare plan. The amendment to the welfare plan stipulated that any employee that took advantage of the pension provision allowing for a lump sum distribution would not qualify for benefits from the surviving welfare plan. Those same employees would be eligible to receive benefits from the surviving welfare plan benefits if they elected a different type of distribution from the merged pension plan, such as a joint and survivor benefit pension payment form.

The Court relied on existing case law and IRS regulations to rule that the amendment to the welfare plan was also an amendment to the pension plan because it had the effect of reducing the value of the protected lump-sum option. Having found that the welfare plan amendment also constituted an amendment to the pension plan, the Court applied the rule announced in *Heinz v. Central Laborers Pension Plan* that any amendment that diminishes the value of a protected optional form of benefit violates the anti-cutback rule and is prohibited by section 204(g) of ERISA (the ERISA equivalent of section 411(d)(6) of the Internal Revenue Code).

In reaching its decision the Court rejected the argument by the plans that, because the amendment was made only to the welfare plan, ERISA sec. 204(g), which applies only to pension plans, did not apply. The Court reasoned that the amendment to the welfare plan had the effect of reducing the value of the lump-sum option. Therefore, it was also to be treated as an amendment to the pension plan. The Court noted, in effect, that the protection of the anti-cutback rule would be frustrated if imposing conditions on the receipt of non-pension benefits based on an employee's choice of a protected optional form of distribution were exempt from the rule.

Cheiron comment: *Because the case is marked "precedential" by the Court, it is binding on all cases that arise in the Third Circuit, which encompasses Pennsylvania, New Jersey and Delaware. Although this decision is precedent only in the Third Circuit, it is very possible that other Courts of Appeals would follow its reasoning and reach the same conclusion.*

As a result of this opinion, Trustees should not link the qualification of any other employee benefit with an election under a pension plan, absent an opinion from counsel that the restriction would not violate the anti-cutback rule.

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page, plus the cost of mailing or delivery of the document. The regulation cross-references DOL regulation 2520.104b-1 for the manner of furnishing the documents. That regulation contemplates the possibility of furnishing information electronically.

Cheiron observation: *A plan may have to ascertain the cost of printing out a document that is delivered to the plan electronically. Also, the regulation leaves open the question of the cost of furnishing information electronically.*

Conclusion

Plan administrators should act immediately to review documents for information that must be available pursuant to the new regulation. As part of such a review, plan administrators should determine what information should be withheld from a report or application in the event that the document is requested. Furthermore, plan administrators should consider what charges will be made for any documents requested under the regulation and how the charges compare with charges for other documents.

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