

Regulatory Update

Department of Labor Issues Final Rules on Disclosure Requirements for Multiemployer Plans

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The Department of Labor (DOL) has issued final regulations that affect plan administrators of multiemployer plans, multiemployer plan participants and beneficiaries, unions whose members are covered by multiemployer plans, and contributing employers and financial service providers to multiemployer plans. The new regulations, which went into effect on April 1, 2010, interpret Section 101(k) of ERISA. Section 101(k), was added by the Pension Protection Act of 2006 (PPA) to expand the disclosure of financial and actuarial information required by multiemployer pension plans.

In light of the substantial penalties imposed for failure to comply with Section 101(k) (up to \$1,000 per day), the new regulations will be of interest to plan administrators seeking to ensure that their systems facilitate compliance with the new rules. In light of the obligation to provide actuarial and financial reports, providers of actuarial and investment management services to multiemployer plans will be interested in the regulations as well. Information prepared by such service providers may now be required to be distributed more broadly than in the past, potentially raising concerns about disclosure of proprietary information.

Background on PPA Provisions and the Regulations

Section 101(k) of ERISA requires the administrator of a multiemployer plan to provide copies of certain actuarial and financial information upon the request of specified interested parties. Pursuant to Section 101(k), the required disclosures include:

- Periodic actuarial reports;
- Quarterly, semiannual, or annual financial reports prepared for the plan by any plan investment manager or advisor; and
- Applications filed with the Internal Revenue Service (IRS) requesting an extension of the amortization period for certain unfunded liabilities.

In addition, the PPA amended Section 502(c)(4) of ERISA to impose for a civil penalty of not more than \$1,000 per day for each violation of Section 101(k) of ERISA.

In the preamble to the new regulations, the DOL noted that Section 101(k) was added to ERISA “because more complete disclosures were considered an important element of measures enacted in PPA to strengthen the long term health of the multiemployer pension plan system.”¹ In addition to the new multiemployer plan disclosure requirements, the PPA also included provisions imposing new civil penalties applicable to multiemployer plans with funding in either “endangered” or “critical”

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status, both as defined in the PPA. The DOL also stated in the preamble that increased transparency provided by the regulations may “contribute to a greater sense of accountability to plan participants and beneficiaries.”²

- The regulations clarify and elaborate on certain terms used in Section 101(k) and address:
- The obligation to furnish the required documents;
- The documents required to be furnished;
- Limitations and exceptions on the documents required to be provided; and
- The parties entitled to request documents.

Obligation to Furnish the Required Documents: Timeframe, Method, and Charges

Timeframe

With one limited exception discussed below, the administrator of a multiemployer plan must provide the required documents (discussed below) upon the request of parties eligible to request those documents (also discussed below) within 30 days after receipt of the request. Given this relatively short timeframe, and the potentially severe penalties for noncompliance, multiemployer plan administrators need to confirm that processes are in place to identify requests covered by the regulations and respond in a timely manner.

Method

With respect to the method of providing the requested documents, a plan administrator must furnish requested documents consistent with the requirements of the regulations under Section 104 of ERISA relating to ERISA’s disclosure requirements generally, including the provisions relating to electronic disclosure. Because the new regulations deal only with *requested* information (as opposed to information required to be provided by operation of ERISA regardless of whether requested), satisfying the delivery requirements may be less of a concern to plan administrators because it would be expected that the requester will have provided contact information to which the disclosure should be sent.

Charge

A plan administrator may impose a reasonable charge to cover the cost of furnishing the documents required by this regulation. The reasonable charge may not exceed the lesser of the actual cost of reproducing the documents or 25 cents per page, in addition to the cost of mailing the documents.

Documents Required to Be Furnished

Periodic Actuarial Reports

For purposes of the regulations, “periodic actuarial reports” means any actuarial report prepared by an actuary of the plan and received by the plan at regularly scheduled, periodic intervals and any “study, test (including a sensitivity test) document, analysis or other information received by the plan from an actuary that depicts alternative funding scenarios based on a range of alternative actuarial assumptions,” *regardless* of whether the information is received at periodic intervals.³

The language quoted above was added to the final regulations to clarify that the documents required to be disclosed are not limited to those actuarial reports received at regularly scheduled, recurring intervals. The DOL wrote: “Thus, under this provision, a plan administrator would be required to disclose any sensitivity testing that the plan may request occasionally, such as in response to a

certification of critical or endangered status.”⁴ The DOL’s comment reinforces that the disclosure rules can be viewed as a companion to the PPA’s multiemployer funding rules and the new provisions regarding critical or endangered status.

Quarterly, Semiannual, or Annual Financial Reports

This category encompasses reports prepared for the plan by any plan investment manager or advisor regardless of whether the manager or advisor is a fiduciary within the meaning of ERISA. This category of documents may prompt investment managers and other financial services providers to evaluate the types of information provided in reports to their multiemployer plan clients. Reports that may have previously been provided only to the board of trustees or other finite group of plan officials may now be requested by plan participants, unions or contributing employers who may be under no obligation to treat the information included in those reports as confidential. As discussed below, there is an exception for “proprietary” information, but it may not cover all of the types of information that may be of concern to an investment manager and its application may be subjective and uncertain.

Application for Extension Under Section 431(d) of the Code

Section 431(d) of the Code allows the plan sponsor of a multiemployer plan to apply to the IRS for an extension of the period required to amortize unfunded liability. Plan administrators must provide copies of any such application and the Department of the Treasury’s response upon the request of party entitled to request such documents.

Limitations and Exceptions on the Documents Required to Be Provided

There are some significant exclusions from the general obligation to provide documents.

Proprietary Information Exception

Section 101(k) of ERISA allows an exception from the disclosure requirement for information that the plan administrator reasonably determines to be “proprietary information” regarding the plan, any contributing employer or any service provider to the plan. Neither the statute nor the proposed regulations had included a definition of “proprietary information.” Commenters expressed concern that the open-ended term would give plan administrators too much discretion and would otherwise create undue uncertainty.

In the final regulations, the DOL added a definition of “proprietary information” for this purpose: “‘proprietary information’ means trade secrets and other non-public information (e.g. processes, procedures, formulas, methodologies, techniques, strategies) that, if disclosed by the plan, may cause, or increase a reasonable risk of, financial harm to the plan, a contributing employer, or entity providing services to the plan.”⁵ A plan administrator is required to notify a requester if it withholds requested information on this basis.

Despite adding this definition, plan investment managers and other financial service providers should keep in mind that the determination of whether particular information is proprietary is still determined by the plan administrator. Thus, if a service provider and plan administrator were to disagree about what information is proprietary, the plan administrator’s determination would likely prevail. In addition, in the preamble, the DOL stated that it “believes that the use of the proprietary information exception from the disclosure requirements of section 101(k) will be rare.”⁶ While the additional clarifying language may be helpful, plan service providers should nevertheless be prepared for wider disclosure of the reports provided to multiemployer plan clients.

Individually Identifiable Information Exception

Disclosed reports or applications shall not include any information that the plan administrator reasonably determines to be “individually identifiable information regarding any plan participant, beneficiary, employee, fiduciary or contributing employer.”⁷ In response to comments to the proposed regulations, the DOL added language clarifying that this exception does not apply to an investment manager, adviser or other person (other than a plan employee) preparing a financial report required to be disclosed. A commenter had expressed concern that this exception could be construed as prohibiting identification of an investment manager.

Exceptions and Limitations Related to Timing

Twelve Month Limitation. A plan administrator is not required to provide the same document to the same requester more than once in a 12 month period. If a plan administrator wishes to rely on this limitation, it may need to establish a system to monitor what documents have been requested, and by whom, in order to determine if a document has been requested more than once in a 12 month period.

Six Year Limitation. A plan administrator is not required to provide documents that have been in its possession for more than six years. This limitation may help plan administrators avoid having to maintain documents past the time that ERISA would otherwise require them to be maintained and may also be helpful to plan administrators as they implement document retention policies.

Thirty Day Limitation. With respect to actuarial reports and financial reports, a plan administrator is not required to provide documents that have not been in the plan’s possession for at least 30 days. This is the one exception to the general requirement that requested documents must be provided within 30 days of the request. If a plan administrator elects to rely on this limitation and exception, however, it must provide a notice to the requester informing the requester of the earliest date the document can be provided by the plan. This limitation helps plan administrators ensure time to evaluate and digest reports before they must be disclosed to others.

No Entitlement to Background Information

The regulations also exclude “[a]ny information or data which served as the basis for any report or application” required by the regulations to be provided. The new regulations, however, do not limit a person’s right to receive such information or data pursuant to other provisions of ERISA.

Parties Entitled to Request Documents

The following parties are entitled to request reports and applications:

- Any participant in the multiemployer plan (as defined in Section 3(7) of ERISA);
- Any beneficiary receiving benefits under the plan;
- Any labor organization representing participants under the plan; and
- Any employer that is a party to the collective bargaining agreement pursuant to which the plan is maintained.

In the preamble to the regulations, the DOL reiterated its past position that documents required to be provided to a participant or beneficiary are also required to be provided to an authorized representative of a participant or beneficiary, such as an attorney.

Action Items

Plan administrators should confirm that they and their administrative service providers are equipped to (1) identify the types of requests subject to the regulations and (2) respond to the requests in a timely manner (generally within 30 days).

Investment managers and other financial service providers should review the reports currently provided to multiemployer plan clients to determine if any of the information should be shielded from disclosure as “proprietary information” and discuss the potential exclusion of any such information with the plan administrator.

NOTES

- 1 75 Fed. Reg. 9334, 9338 (Mar. 2, 2010).
- 2 *Id.*
- 3 29 C.F.R. §2520.101-6(c)(1)(ii).
- 4 75 Fed. Reg. at 9336.
- 5 29 C.F.R. §2520.101-6(d)(5)(ii).
- 6 75 Fed. Reg. at 9337.
- 7 29 C.F.R. § 2520.1-1-6(d)(5)(i)(A).