

# Benefits Requiring Employer Consent

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## A. Background

In 1988, the Treasury Department issued regulations, generally effective for plan years beginning on or after January 1, 1989, that prohibited plans from making the availability of a benefit, such as an early retirement benefit, conditional on the employer's consent (Treas. Reg. § 1.411(d)-4 Q-4 through Q-9).

Under the regulations, a plan sponsor had three choices:

- 1) eliminate the consent requirement
- 2) eliminate the benefit conditioned on the consent,<sup>1</sup>

**Note 1:** The regulations provided that elimination of the benefit would not violate the anti-cutback rules of Internal Revenue Code section 411(d)(6) if the benefit was eliminated within the time period permitted by the regulations.

– or –

- 3) condition the availability of the benefit on objective criteria set forth in the plan. A plan amendment to do one of these three things was not necessary by the effective date of the regulations if: the plan sponsor selected (as reflected by plan operation) one of the options, the plan consistently operated according to the selection, and the plan was amended consistent with the selection retroactively to the effective date of the regulations. The amendment must have been adopted by the earlier of plan termination or the end of the time period for making Tax Reform Act of 1986 amendments.<sup>2</sup>

**Note 2:** The TRA '86 amendment period did not end until the mid-1990s.

## B. Scope

This internal guidance applies to PBGC-trusted plans that condition entitlement to a benefit on the employer's consent.

## C. Definitions

1. **"Benefits"** include benefits and optional benefit forms that are protected by the anti-cutback rules of section 411(d)(6) of the Internal Revenue Code. In addition, ancillary benefits such as social security supplements and certain disability benefits are included in this definition.
2. **"Effective date of Treasury regulations restricting employer consent"** (Treas. Reg. § 1.411(d)-4 Q-4 through Q-9) is generally the first day of the first plan year beginning on or after January 1,

1989. However, a plan that was either adopted or made effective on or after August 1, 1986 — i.e., a "new plan" — is prohibited from having an employer consent provision, unless the plan applied for an IRS determination letter prior to July 11, 1988. The new plan rule also applies to amendments of existing plans to add benefits with employer consent. In addition, a plan could not be amended on or after January 30, 1986, to add a consent requirement to a benefit that was in the plan prior to January 30, 1986.

The new rules applied on a delayed basis to collectively bargained plans that were operating pursuant to collective bargaining agreements ratified before March 1, 1986, and not due to expire until after the first day of the first plan year beginning on or after January 1, 1989. Such plans received an extension on compliance to the earlier of expiration of the agreement or the first day of the first plan year beginning on or after January 1, 1991.

3. **"Employer"** means an employer, plan administrator, fiduciary, trustee, actuary, or other person or entity whose consent is a condition to receiving the benefit.

## D. Employer Consent

Employer consent provisions permit an employer, either directly or indirectly, through the exercise of discretion or the use of subjective conditions, to deny or limit the availability of a benefit for which the employee is otherwise eligible. Under the Treasury regulations, a plan may not provide, for example, that only employees who are designated by the employer, plan administrator, fiduciary, or other person, are eligible to receive a subsidized early retirement benefit.

Limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective criteria specifically set forth in the plan, is not impermissible employer consent.<sup>3</sup> For example, a plan may leave it to the employer, plan administrator, fiduciary, or other person to determine whether age, service, disability, or other objective criteria for a benefit have been met.

**Note 3:** See Treas. Reg. section 1.411(d)-4, Q&A-4 (b).

## E. Internal Guidance Statement

### 1. Terminating Before Becoming Subject to the Restrictions on Employer Consent

If a plan's termination date precedes the effective date of the Treasury regulations, the previous internal guidance applies.

### 2. Plans Terminating After Becoming Subject to the Restrictions on Employer Consent

#### a. Plan Provisions that Require Employer Consent

If a plan's termination date is on or after the effective date of the Treasury regulations (see section C.2 above), and if the plan provision conditions entitlement to a benefit (e.g., a subsidized early retirement benefit) on employer consent or the mutual consent of both the employer and employee, PBGC will treat a participant as entitled to the

benefit under the plan if the conditions for the benefit other than employer consent were satisfied before the plan termination date.

**Example 1 - Subsidized early retirement benefit with employer consent**

The plan reads as follows:

"A participant shall be eligible for subsidized early retirement benefits if the participant has attained the age of 55 but not the age of 62, has at least 15 years of continuous service, and, upon application, the participant receives the consent of the employer."

In this example, PBGC will deem the consent requirement to have been eliminated and will treat as entitled to the subsidized early retirement benefit any participant who, at the plan termination date, had attained the age of 55 but not 62, and had worked at least 15 years for the employer.

**Example 2 - Subsidized early retirement benefit with mutual consent**

The plan reads as follows:

"Any participant who has at least 15 years of credited service and (i) attained the age of 55 years and whose combined age and years of credited service equals 70 or more, or (ii) whose combined age and years of credited service equals 80 or more, and who meets one of the following requirements:

- a) the participant's continuous service is broken by reason of a layoff;  
or
- b) the participant's continuous service is broken by reason of permanent shutdown of a plant;  
or
- c) the participant cannot work by reason of physical disability;  
or
- d) the participant considers that it would be in his interest to retire and the Company considers that such retirement would likewise be in its interest and it approves an application for retirement under mutually satisfactory conditions shall be eligible to retire and receive subsidized early retirement benefits."

In this example, PBGC will deem the consent granted in subsection (d) above and will treat as entitled to the subsidized early retirement benefit any participant who, as of the plan termination date, had at least 15 years of credited service and (i) had attained the age of 55 years and had combined age and years of credited service equaling 70 or more, or (ii) had combined age and years of credited service equaling 80 or more.

**b. Amendments Eliminating Plan Benefits that Had Been Subject to Employer Consent**

Generally, if a plan previously had provided a benefit conditioned on employer consent or the mutual consent of employer and employee, PBGC presumes that the amendment eliminating the benefit was proper and timely and that the plan does not provide the benefit on plan termination. However, if PBGC finds evidence that the plan paid the

discretionary benefit after becoming subject to the Treasury regulations, the amendment eliminating the benefit may have been improper. In addition, if PBGC finds evidence that the amendment eliminating the benefit was adopted after the end of the permissible amendment period under the Treasury regulations, the amendment is untimely. In the case of a possibly improper or untimely amendment, the participant may be entitled to the benefit under the plan if the conditions for the benefit other than employer consent were satisfied before the plan termination date. Request guidance by emailing [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov) before making an entitlement determination in these situations.

## **F. Consultation**

Applying the rules regarding employer consent can be complicated. If questions arise about whether the Treasury regulations apply, whether a plan operationally provided the benefit after becoming subject to the Treasury regulations, how a plan applied a consent provision, or other technical matters, OBA staff should refer the matter to [PSDGuidance@pbgc.gov](mailto:PSDGuidance@pbgc.gov).