



LABORERS' INTERNATIONAL UNION OF NORTH AMERICA  
NATIONAL (INDUSTRIAL) PENSION FUND

**GUIDANCE UPDATE**

10/1/10

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**Re: Employer Contribution Surcharge & Contribution Delinquencies**

In a notice sent to all contributing employers on April 30, 2010 and in the Funding Rehabilitation Plan that was sent to all contributing employers in August 2010, the Pension Fund described the automatic employer contribution surcharge that is imposed by the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC) as amended by the Pension Protection Act of 2006 (PPA). Some bargaining parties have requested additional information regarding the surcharge. This Guidance Update is being provided in response to those requests.

The Pension Fund is not pleased that Congress imposed the contribution surcharge. But, the Fund is legally required to collect it, just as employers are legally required to timely pay it.

**Amount and Duration of the Surcharge**

In general, a 5% surcharge is owed on all employer contributions due for work performed (or compensation paid) during the period June 1, 2010 through December 31, 2010. A 10% surcharge is owed on all employer contributions due for work performed (or compensation paid) on and after January 1, 2011.

However, the surcharge obligation ceases for any particular employer once the Preferred Schedule or Default Schedule under the Rehabilitation Plan goes into effect with regard to the employer's employees. The Preferred Schedule or Default Schedule may be agreed to by the employer and the union. Or, as described in the Rehabilitation Plan, the Default Schedule must be imposed by operation of law if the employer and union fail to agree to the Preferred Schedule within a certain period.

The surcharge is based on the total amount of employer contributions owed to the Pension Fund for a month, and is payable at the same time as the employer's regular monthly contributions.

**Example 1:** A contributing employer owes contributions totaling \$10,000 for work performed (or compensation paid) in June 2010. The contribution payment and report are due by July 20, 2010 under the Fund's rules. In addition to the \$10,000, the employer must include in its July 20th contribution payment a surcharge of \$500 for a total payment of \$10,500.

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Example 2: A contributing employer owes contributions totaling \$10,000 for work performed (or compensation paid) in January 2011. The contribution payment and report are due by February 20, 2011 under the Fund's rules. In addition to the \$10,000, the employer must include in its February 20th contribution payment a surcharge of \$1000 for a total payment of \$11,000.

### **The Federal Law Provisions**

The automatic employer contribution surcharge was enacted by Congress as part of the PPA's amendments to ERISA and the IRC. The legislative rationale was that the surcharge would give the bargaining parties an economic incentive to agree on a schedule under a pension fund's rehabilitation plan and thereby avoid further surcharges. The relevant provisions of ERISA and the IRC, as added by the PPA, are as follows:

(7) Automatic employer surcharge

(A) Imposition of surcharge

Each employer otherwise obligated to make contributions for the initial critical year shall be obligated to pay to the plan for such year a surcharge equal to 5 percent of the contributions otherwise required under the applicable collective bargaining agreement (or other agreement pursuant to which the employer contributes). For each succeeding plan year in which the plan is in critical status for a consecutive period of years beginning with the initial critical year, the surcharge shall be 10 percent of the contributions otherwise so required.

(B) Enforcement of surcharge

The surcharges under subparagraph (A) shall be due and payable on the same schedule as the contributions on which the surcharges are based. Any failure to make a surcharge payment shall be treated as a delinquent contribution under section 1145 of this title [ERISA Section 515] and shall be enforceable as such.

(C) Surcharge to terminate upon collective bargaining agreement renegotiation

The surcharge under this paragraph shall cease to be effective with respect to employees covered by a collective bargaining agreement (or other agreement pursuant to which the employer contributes), beginning on the effective date of a collective bargaining agreement (or other such

agreement) that includes terms consistent with a schedule presented by the plan sponsor under paragraph (1)(B)(i), as modified under subparagraph (B) of paragraph (3).

(D) Surcharge not to apply until employer receives notice

The surcharge under this paragraph shall not apply to an employer until 30 days after the employer has been notified by the plan sponsor that the plan is in critical status and that the surcharge is in effect.

(E) Surcharge not to generate increased benefit accruals

Notwithstanding any provision of a plan to the contrary, the amount of any surcharge under this paragraph shall not be the basis for any benefit accrual under the plan.

[ERISA Section 305(e)(7), 29 U.S.C. §1085(E)(7), and its analog IRC Section 432(e)(7), 26 U.S.C. §432(e)(7)]

An employer has an "obligation to contribute" to the Pension Fund "if it has an obligation to contribute arising-- (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law,..." [ERISA Sections 305(i)(7), 4212(a), 29 U.S.C. §§1085(i)(7), 1392(a)].

An employer obligated to contribute to the Pension Fund includes municipalities, counties, states and other public employers that agree to contribute to the Fund for their employees. [*City of Warwick v. Laborers' National (Industrial) Pension Fund*, 2009 U.S. Dist. Lexis 14008, 186 LRRM 2209 (U.S.D.C. D. R.I., Feb. 23, 2009)].

### **Consequences of Failure to Pay the Surcharge**

If an employer fails to pay the contribution surcharge for any month that it is due, the following consequences will apply.

1. The employer is treated as being delinquent in paying contributions under the Pension Fund's governing documents. Interest at the rate of 1.5% per month compounded is assessed on the delinquent surcharge amount from the date due until the date paid.
2. The employer's delinquency constitutes a violation of ERISA Section 515, 29 U.S.C. §1145. ERISA provides the Pension Fund with a statutory cause of action in Federal court to enforce Section 515 and collect the delinquent surcharge (and contributions and accrued interest charges) from the employer. Moreover, ERISA *requires* the court to award the Pension Fund double interest

and attorneys fees in addition to the delinquent payments and other relief. [ERISA Section 502(a), (g)(2); 29 U.S.C. §§1132(a), (g)(2)]. The Pension Fund files all collection lawsuits in the United States District Court for the District of Columbia in whose jurisdiction the Fund's administrative office is located. ERISA provides for nationwide service of process on delinquent employers.

3. IRC Section 4971(g)(2), 26 U.S.C. §4971(g)(2), imposes a 100% Federal excise tax on any employer that fails to pay the contribution surcharge:

- (2) Failure to comply with funding improvement or rehabilitation plan

- (A) In general

If any funding improvement plan or rehabilitation plan in effect under section 432 with respect to a multiemployer plan requires an employer to make a contribution to the plan, there is hereby imposed a tax on each failure of the employer to make the required contribution within the time required under such plan.

- (B) Amount of tax

The amount of the tax imposed by subparagraph (A) shall be equal to the amount of the required contribution the employer failed to make in a timely manner.

- (C) Liability for tax

The tax imposed by subparagraph (A) shall be paid by the employer responsible for contributing to or under the rehabilitation plan which fails to make the contribution."

The failure by an employer to pay the contribution surcharge constitutes a failure to comply with the Pension Fund's Rehabilitation Plan. The Rehabilitation Plan, consistent with the PPA, requires payment of the contribution surcharge.

An employer that fails to pay a surcharge when due is required by the IRC to file IRS Form 5330 (Return of Excise Taxes Related to Employee Benefit Plan) with the IRS to report and pay the excise tax imposed by Section 4971(g)(2). See line 10a of Form 5330 ("Section 4971(g)(2) tax on failure to comply with a funding improvement or rehabilitation plan (see instructions)").

4. In short, if an employer refuses or fails to pay the contribution surcharge, it will incur more than double costs. It will eventually have to pay the Pension Fund the surcharge plus interest. It will be required to pay an amount equal to the delinquent surcharge to the IRS as an excise tax. And, if the Pension Fund has to sue the employer under ERISA to collect the surcharge, the employer will be required by the court to pay double interest and reimburse the Pension Fund's attorney's fees and litigation costs, in addition to the employer's own costs.