

**QUESTIONS AND ANSWERS
CONCERNING RECENT CHANGES TO THE INTERNATIONAL PAINTERS
AND ALLIED TRADES INDUSTRY PENSION FUND**

BACKGROUND

On April 1, 2009, General President James Williams notified local unions of significant changes to the International Painters and Allied Trades Industry Pension Fund. This memo summarizes those changes, explains the reasons why they were implemented, and the issues that affiliates must be aware of as they prepare for future collective bargaining negotiations.

QUESTION: Why did the Trustees make changes to the National Pension Fund?

ANSWER: The changes were made in response to the Pension Protection Act of 2006 (PPA). That federal law requires the trustees of underfunded pension plans to take steps to improve the funding level of the Plan within a specified time period. The law requires that trustees take steps to improve the financial health of an underfunded pension fund by requiring contribution increases, reduction in benefits, or both.

QUESTION: General President James Williams' letter talks about the pension plan being in the "yellow" zone under the PPA. What does that mean?

ANSWER: Under the PPA, pension plans are placed in different categories, depending upon their current funding level, and whether there is any projected funding deficiency over the next several years. The National Pension Fund is in the "yellow," or "endangered" zone, meaning that it has a current funding level that is less than 80%, but, there are no anticipated funding deficiencies within the next several years.

On an annual basis, the Plan's actuaries are legally required to certify the status of the Plan under the PPA, and that is what has occurred with the National Pension Fund. Once a pension plan is classified as endangered, the trustees are legally obligated to develop what is known as a "Funding Improvement Plan," which must reduce the Plan's underfunded status by one-third over either a ten, or thirteen year period. The thirteen year period is applicable if the Trustees elect to extend the normal timetable of ten years by an available three year extension.

General President James Williams' correspondence reflects that the Plan is currently 72.1% funded. Under the PPA, that means that the Plan is viewed as having a funding deficiency of 27.9% (100% - 72.1% = 27.9%). The law requires that one-third of that deficiency, or 9.3%, be eliminated over either the ten, or thirteen year period.

QUESTION: Under the law, how is that funding improvement to be accomplished?

ANSWER: The PPA requires the Trustees and the Plan actuary to develop a Funding Improvement Plan that consists of at least two schedules:

1. An “alternative” schedule, which essentially preserves the existing level of pension benefits, but is coupled with whatever contribution increase is needed to maintain those benefits and eliminate one-third of the funding deficiency.
2. A “default” schedule, which eliminates one-third of the funding deficiency primarily through benefit reductions. Under the default schedule, the future benefit accrual on contributions is reduced to zero. That means that under the default schedule, employees will receive no pension benefit for any future contributions at least until the funding deficiency is reduced.

The Trustees do not decide which schedule will actually be adopted in your area. Rather, which schedule is adopted, and who will pay for the cost of any resulting increase in contributions, is determined solely during the process of collective bargaining.

In terms of improving the Plan’s funding level, one schedule is not preferable to the other. Each schedule of contribution increases and/or benefit reductions must be able to improve the funding level by one-third. However, there will be significant cost differences in the schedules, which is addressed during contract negotiations.

QUESTION: Very briefly, what specific changes have been directed by the Trustees?

ANSWER: First, there can be no reduction in current contributions. Whatever contribution rate was in effect on March 1, 2009, may not be reduced in any manner. For example, that hourly contribution rate may not be reduced in negotiations, newly hired employees may not be excluded from the category of employees for whom contributions are made, and the negotiating parties cannot establish a “moratorium” on pension contributions. You must keep these limitations in mind as you bargain over pension benefits.

Secondly, future benefit accruals will be reduced. No matter whether the negotiating parties eventually adopt the alternative, or the default schedule, effective January 1, 2010, the accrual of benefits on hourly contributions will be reduced from one percent to five-tenths of one percent. Further, the higher accrual rate for increased contributions that occurred after January 1, 2006 will be reduced from two percent to one percent.

Third, those local areas that wish to adopt the “alternative” schedule will be required to increase the hourly pension contribution rate that was in effect on March 1, 2009, by 35%, effective January 1, 2012. That 35% increase will not result in any additional pension benefit. Employees will continue to be eligible for disability and early retirement subsidies, as well as death benefits, under the alternative schedule.

Fourth, for those areas that accept the default schedule, the contribution rate that was in effect on March 1, 2009 will be increased by 15%. However, there will be significant reductions in future benefit accruals. If an area adopts the default schedule, employees will not receive any

benefit accrual for contributions made on or after January 1, 2012. In addition, such employees will not be eligible for disability and early retirement subsidies, or death benefits.

Again, in terms of improving the financial health of the Fund, it does not matter which schedule is eventually adopted during local negotiations. Each must result in the necessary improvement to the funding of the Plan within the ten or thirteen year period. The differences between the two schedules are one of cost, as well as benefits. The issue of which schedule will be adopted, and who will sustain the cost associated with that schedule, is left to the bargaining process.

QUESTION: How were the 35% and 15% increase numbers arrived at?

ANSWER: The short answer is that they were determined within the complex framework of the PPA, with the actuary determining that they were necessary.

Under the alternative schedule, the actuary concluded that if existing benefits were basically to be maintained, while at the same time, eliminating one-third of the funding deficiency, contributions rates must be increased by 35%. That determination was made based upon an analysis of issues such as the likely number of man hours worked under the Plan, that cost of future benefits, and the expected investment yield on plan assets.

The PPA also required the Trustees to establish a default schedule. By law, the default schedule had to reduce benefits to the maximum extent permissible in order to reduce the funding deficiency by one-third, but with an objective of having no contribution increase. Under the PPA, only in the event that benefit reductions were insufficient to reduce the funding deficiency could the default schedule also require a contribution increase. Obviously, the actuary concluded that benefit reductions alone were insufficient to reduce the funding deficiency, and that a 15% surcharge was required, as well.

QUESTION: Could the Fund get out of endangered status early, making the contribution increases unnecessary at some point?

ANSWER: That is always a possibility. For example, if employment levels exceed expectations, and the investment market performs better than was anticipated, it is conceivable that the Fund could re-enter the “green” zone ahead of schedule.

It is important to understand that prior to that time, generally, the Trustees cannot eliminate the 35% or 15% contribution increases, nor could they improve benefits levels unless those improvements can be funded from sources other than contributions required by the Improvement Plan. As a general proposition, until the Plan re-enters green zone status, the Trustees must continue with the combination of contributions increases and benefit reductions that were developed under the Funding Improvement Plan.

If the financial health of the Plan improved earlier than anticipated, and the Plan re-enters the green zone, the Trustees could then reassess whether the increases were still necessary. They

could determine whether to roll back the 15% and 35% increases, or, decide whether it is appropriate to restore benefits that were reduced under the Funding Improvement Plan.

Such an event is likely a ways off. Because the contemplated increases will not be required until January 1, 2012, such an improvement to the financial health of the Plan will not occur for a number of years.

QUESTION: When do we have to bargain over the two schedules?

ANSWER: The answer depends on your collective bargaining agreement.

- Existing Agreement With No Wage/Fringe Reopener – The PPA says that you must bargain over the adoption of either the alternative, or the default schedule, when your current collective bargaining agreement is up for renegotiation. If your current agreement does not expire for three more years, you are not legally required to reopen the agreement, just for purpose of negotiating one or the other schedule.
- Current Agreement With a Wage/Fringe Reopener – If your current collective bargaining agreement runs for several years, but has a wage/fringe reopener, you are obligated by terms of your contract to bargain over pension contributions, if requested by the union.
- Adoption By Allocation – It is also important to understand that if the local union has been given the unrestricted right to allocate package increases during contract anniversary dates, the union could, for example, unilaterally allocate the 35% increase necessary to adopt the alternative schedule. Such an adoption would be effective without any formal negotiations.

QUESTION: What if we cannot agree on either schedule during contract negotiations?

ANSWER: If your agreement expires after January 1, 2012, and, during negotiations for a new contract you are unable to reach agreement on which schedule will be adopted, the PPA will resolve the issue for you. The law specifies that the default schedule will automatically go into effect the earlier of either 180 days following contract expiration, or, certification of impasse by the Secretary of Labor. Obviously, if you have been unable to reach agreement on pension benefits at contract expiration, the union would be free to strike.

QUESTION: Does the PPA specify who must absorb the cost of any contribution increase under a schedule?

ANSWER: No. Although the PPA obligates the employers to make the appropriate pension contributions, it is critically important to understand that the allocation of the financial burden of such increases is left entirely to the bargaining process.

In the construction industry, it is common to negotiate an increase to the wage/fringe package, with the understanding the local union may allocate that package for fringe benefits on the anniversary date of the agreement. In such a situation, it follows that any increase required under a particular schedule would come out of the existing negotiated package increase.

QUESTION: Is it possible that future increases could be required?

ANSWER: Although there is nothing that would suggest that that will be the case, contractors should understand that under the PPA, the Plan is required to make an annual assessment as to how well the Plan is meeting the benchmarks established by the Funding Improvement Plan. If employment levels were to plummet, or the investment market continued to be in turmoil, the Trustees may be required to take further action, which could include additional increases.

QUESTION: Is there any contract language that would cover such a possibility, that would protect the contractor?

ANSWER: Once again, the actual financial burden of satisfying the Funding Improvement Plan is left to the negotiating process. Contractors that are concerned about future potential increases could propose the following language for incorporation into their collective bargaining agreement:

“If, during the term of this agreement, any increase to the contribution rate specified in _____ is required under a schedule adopted to comply with the Pension Protection Act, or, any surcharge or excise tax is imposed upon such contributions, or, the trustees require any increase to such contribution rates, the wage rate specified in _____ shall immediately be reduced by an equivalent amount.”

QUESTION: I presently contribute to the national pension fund. If I decide to close my shop, and cease doing business in the industry, will I have any withdrawal liability to the fund?

ANSWER: Primarily, the answer depends upon whether you are an employer in the building and construction industry.

If you are only signatory to a building trades collective bargaining agreement, and you actually perform work within the construction industry – for example, drywall installation and finishing – a special rule under ERISA Section 4203 is applicable to your situation, known as the Building and Construction Industry Rule.

Under that rule, a “withdrawal” occurs for withdrawal liability purposes only if the employer:

1. continues to perform work within the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

2. resumes such work within five years after the date on which the obligation to contribute under the Plan ceases, and does not renew the obligation at the time of the resumption.

That means that if you are an employer that falls within the construction industry rule, and you permanently shut down your operations, you will not be subject to withdrawal liability.

However, some employers in our industry are not within the “construction industry” from a legal standpoint. For example, an employer that is signatory to a glazing agreement, and only does shop fabrication, will not be within the “construction industry” for purposes of withdrawal liability. As a consequence, that employer could be subject to withdrawal liability even if it simply went out of business, if the pension plan is underfunded.

QUESTION: Does withdrawal liability extend to a contractor’s personal assets?

ANSWER: There usually is no personal liability in the event that the company withdraws from a plan. However, it is important to understand that withdrawal liability may attach to businesses and organizations that fall within the definition of what is known as a “controlled group,” for pension law purposes. That means that in certain cases, liability may extend to businesses and organizations that were not ever bound by the collective bargaining agreement, and never made contributions to the pension fund. Whether such an entity will be deemed to fall within the “controlled group” is determined by the application of a fact specific test, that looks to factors such as the extent of commonality of ownership of the various organizations.

QUESTION: What is needed to convert the International Painters and Allied Trades Industry Pension Fund from a defined benefit plan, to a defined contribution plan?

ANSWER: Unfortunately, the short answer is that such a change cannot be made without the repeal of the Pension Protection Act. Although there may be additional obstacles to making such a change, the PPA would prevent such a modification of the Plan for the period covered by the Funding Improvement Plan, which may run until 2025.