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Grab Your Wallet Before the PBGC Does – Their Proposed Regulation Could Cost Employers Greatly

BY MARK M. TRAPP

In December 2014, Congress passed and President Obama signed the Multiemployer Pension Reform Act of 2014 (“MPRA”). The objective of the MPRA was to shore up struggling multiemployer pension plans, many of which are severely underfunded and getting worse. Among other things, the MPRA provided employers an incentive to continue participation in “endangered” or “critical” status plans by mandating that any increases to the employer’s contribution rate after 2014 will not count against the employer for purposes of determining withdrawal liability. 

Because the funded status of many of these plans is so low, this provision can mean significant savings for employers who withdraw from plans in critical or endangered status. The rehabilitation plans of typical critical status multiemployer plans have called for contribution rate increases anywhere from 4-8% or more annually so, in the five years since 2014, many employers have seen cumulative rate increases of from 20-25%, or more. But because the MPRA prohibits the use of such increases in calculating withdrawal liability, even while most withdrawn employer’s unfunded vested benefits have continued to go up, for many, their actual withdrawal liability has remained level or even decreased.

In the past few years, some plans, most notably the Central States, Southeast and Southwest Areas Pension Fund (“Central States”) have taken the position that this provision of the MPRA does not apply to them. They assert that because their contribution increases are “benefit bearing,” they fit within a narrow exception to the general rule under the MPRA to disregard contribution rate increases after 2014.

Unfortunately, in a recently-proposed regulation, the Pension Benefit Guaranty Corporation (“PBGC”) appears to side with Central States’ position. Its proposal, “[Methods for Computing Withdrawal Liability](#)” under the MPRA (“Proposal”), would allow plans to utilize post-2014 contribution rate increases in calculating withdrawal liability, contrary to the MPRA.

The MPRA Prohibits the Use of Post-2014 Rate Increases to Calculate Withdrawal Liability

The MPRA expressly forbids the use of post-2014 contribution rate increases in calculating withdrawal liability. Section 305(g)(3)(A) states:

“Any increase in the contribution rate ... that is required or made in order to enable the plan to meet the

requirement of the funding improvement plan or rehabilitation plan *shall be disregarded* ... in determining the highest contribution rate[.]” 29 U.S.C. § 1085(g)(3)(A)(emphasis added).

The statute does have a narrow exception: where “additional contributions” over and above those compelled by the rehabilitation plan are used to provide an increase in benefits or future benefit accruals. See 29 U.S.C. § 1085(f)(1)(B). In such a scenario, the plan actuary must certify two things: (1) that the increase is “paid for out of additional contributions not contemplated by the rehabilitation plan,” and (2) after taking into account the benefit increase, the plan is still reasonably expected to emerge from critical status by the end of the rehabilitation period.

The intent behind this strict requirement was to ensure that plans unable to meet their current obligations do not make things worse by increasing those obligations. Indeed, the MPRA prohibits plans in critical status from increasing benefits *unless* they can certify to the two statutory requirements above.

Accordingly, the clear rule under the MPRA is that a plan in critical status may not use post-2014 rate increases to calculate withdrawal liability against an employer paying only the amounts required by the terms of the plan’s rehabilitation plan.

The Proposal Would Allow Plans to Utilize Post-2014 Rate Increases to Calculate Withdrawal Liability

Despite the clear statutory language in the MPRA, the Proposal would allow a plan sponsor to include in its calculation of withdrawal liability post-2014 contribution increases. Adopting Central States’ position, the Proposal would allow a plan sponsor to include in the determination of contribution amounts taken into account for withdrawal liability purposes a so-called “benefit-bearing” contribution increase,” that is, “a contribution increase that funds an increase in benefits or accruals as an integral part of the plan’s benefit formula.” See 84 Fed. Reg. p. 2082.

By way of example, Central States benefit accrual rate is 1% of contributions. The Proposal would allow some portion of the post-2014 rate increases to be used against a withdrawn employer because the 1% accrual rate means that remaining employees are getting a “benefit increase.”

By adopting this position as its own, the PBGC has ignored the clear statutory language of the MPRA. In fact, the Proposal does not even mention the requirement that a plan actuary certify that any so-called benefit increase must be paid for out of additional contributions not contemplated by the rehabilitation plan. This is bureaucratic malpractice – in direct contravention of the MPRA, under which it is commanded to *prohibit* the use of post-2014 contribution increases, the PBGC has instead proposed to *allow* the use of such increases.

Conclusion

One thing is certain – if the proposed regulation is implemented as written, virtually all withdrawn employers will see significant increases in the amount of withdrawal liability for which they are responsible. Because withdrawal liability is almost always counted in the millions, even for small employers, we are talking real money here. Accordingly, any employer participating in a multiemployer pension plan should grab its wallet, before the PBGC does.

Conn Maciel Carey filed comments outlining these and additional arguments against the enactment of the Proposal as written. We will keep you apprised as it makes its way through the regulatory process. In the meantime, please feel free to contact us with any questions.