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DOL Final Regulations for Multiemployer Defined Benefit Plans Address Access to Information and Penalties for Certain Funding Failures

The DOL issued two sets of final regulations affecting multiemployer defined benefit plans. One addresses the PPA requirement to provide certain actuarial and financial information to interested parties upon request. The other clarifies the DOL position regarding the imposition of penalties for plans in critical or endangered status that do not timely adopt a funding improvement or rehabilitation plan, and for plans in endangered status that do not meet their funding improvement plan benchmarks.

Final Regulations on Access to Multiemployer Plan Information

Background

The Pension Protection Act of 2006 (PPA) amended ERISA Section 101(k) to require that administrators of multiemployer defined benefit pension plans provide certain actuarial and financial documents to participants, beneficiaries, employee representatives and contributing employers upon written request.

In September 2007, the Department of Labor (DOL) issued proposed regulations on this requirement. Now, the DOL has issued final regulations, which clarify certain requirements regarding the disclosure of information, and address many concerns of the multiemployer community that arose from the original statute.

Final Regulations

Generally, a plan administrator must respond to a written request for documents within 30 days by providing a copy of any –

- periodic actuarial report (including sensitivity testing) received by the plan for any plan year which has been in the plan's possession for at least 30 days before the written request is received
- quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor (without regard to whether such advisor is a fiduciary) or fiduciary which has been in the plan's possession for at least 30 days before the written request is received
- application filed with the IRS requesting an extension of amortization periods for the plan's unfunded liability along with the IRS' subsequent determination.

Periodic Actuarial Report. According to the regulations, a "periodic actuarial report" means an actuarial report prepared by the plan actuary and received by the plan at regularly scheduled, recurring intervals, and also includes studies, tests (including sensitivity tests), documents, analyses or other information (whether or not called a "report") received by the plan from its actuary that depict alternative funding scenarios based on a range of alternative actuarial assumptions, whether or not received by the plan at regularly scheduled, recurring intervals.

If the plan has not had possession of a report for 30 days at the time a request is received, the administrator must furnish a notice within 30 days informing the requestor of the existence of the report and the earliest date on which the report can be furnished.

Frequency. A plan administrator is not required to furnish to any requestor more than one copy of a document during any 12-month period. However, plans are not allowed to choose static or fixed periods (such as plan or calendar years) for this purpose, and therefore must essentially track the 12-month period on a request-by-request basis.

> ***BUCK COMMENT.*** *Limiting the number of requests is optional. Therefore, since tracking document request periods may be administratively burdensome, plans will want to consider not imposing the limitation on requestors.*

Six-Year Limit. The final regulations provide that only reports and applications that have been in the plan's possession for six years or less as of the date of a request must be provided.

Information Not Required to be Disclosed. The final regulations provide that disclosed reports or applications may not include any information that the plan administrator reasonably determines to be individually identifiable information regarding any plan participant, beneficiary, employee, fiduciary, contributing employer, or entity providing services to the plan. Other information not to be disclosed includes information such as trade secrets and other non-public information (e.g., processes, procedures, formulas, methodologies, techniques, customer lists, risk-evaluation tools, investment and trading strategies, information showing poor performance or violations of law) 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.

Charge for Information. A plan administrator may impose reasonable charges to cover the cost of furnishing the requested documents, which may not exceed the lesser of –

- the actual cost to the plan for the least expensive means of acceptable reproduction of the document
- 25 cents per page

plus the cost of mailing or otherwise delivering the requested documents (adopting ERISA's existing reasonable-charge standard). The regulations also adopt ERISA's standard to optionally provide the requested documents electronically.

Who Can Request Information. The regulations define those entitled to request and receive information under Section 101(k) as any plan participant, any beneficiary receiving benefits under the plan, any labor organization representing participants under the plan, or any employer that is a party to any of the plan's collective bargaining agreements or who otherwise may be subject to withdrawal liability. Also entitled to receive information is a properly authorized third party (e.g., attorney or family member) acting on behalf of a participant or beneficiary who is entitled to request documents.

> ***BUCK COMMENT.*** *Although not specifically mentioned in the regulations, we assume that an attorney acting on behalf of any labor organization or contributing employer is also entitled to request and receive documents.*

Final Regulations on Penalties for Certain Funding Failures

Background

PPA added rules for multiemployer defined benefit pension plans that are in endangered or critical status. In the first year that a plan is certified to be in endangered or critical status, the plan sponsor generally has 240 days after receiving such certification to adopt a funding improvement or a rehabilitation plan. Plans that are in endangered status need to meet certain benchmarks by the end of their funding improvement periods (e.g., increasing the plan's funded percentage by a prescribed amount).

Effective for plan years beginning on or after January 1, 2008, PPA gives the DOL the authority to assess a civil penalty of not more than $1,100 a day against the sponsor of a plan –

- in critical or endangered status for each violation of the requirement to timely adopt a funding improvement or rehabilitation plan
- in endangered status (which is not in seriously endangered status) that fails to meet the applicable benchmarks by the end of the funding improvement period.

In September 2009, the DOL issued proposed regulations on these penalties, and issued final regulations on February 26, 2010 without change from the proposed version.

Final Regulations

In general, the final regulations set forth how the maximum penalty amounts are computed, identifies the circumstances under which a penalty may be assessed, sets forth certain procedural rules for the DOL and plan sponsors, and provides a means for plan sponsors to contest an assessment by the DOL.

Prior to assessing a penalty, the DOL will provide the plan sponsor with written notice of its intent to assess a penalty, the amount of such penalty, the period to which the penalty applies, and the reason(s) for the penalty (citing the specific provision(s) violated). The plan sponsor will generally have 30 days from the date of the notice

to contest it by showing that there were mitigating circumstances for noncompliance. After receiving a timely contesting statement from a sponsor, the DOL will review the facts and will notify the sponsor of its determination to waive the penalty (in whole or in part) and/or assess a penalty. The sponsor then has 30 days to file for a request for a hearing to contest the sanction.

Failure of a sponsor to timely contest an intent to assess a penalty will be deemed to be a waiver of that right and also to be an admission of the facts alleged in the notice. The DOL notice would then become a final order 45 days from its date of issue.

Responsible Parties. The regulations clarify that if more than one person is responsible as plan sponsor, then all such persons (e.g., the entire joint board of trustees) shall be jointly and severally liable. The liability would not be considered a liability of the plan (i.e., would not constitute a reasonable expense of administering an ERISA plan), regardless of the relative degree of fault attributable to any individual (e.g., whether a particular trustee or trustees voted for or against a funding improvement or rehabilitation plan).

> ***BUCK COMMENT.*** *Trustees will want to review with their carriers of fiduciary liability insurance whether any of these DOL penalties would be covered by their current policies.*

Conclusion

These DOL final regulations provide much needed guidance for sponsors of multiemployer defined benefit plans. Buck's consultants are ready to discuss this guidance with you and help you set up or revise administrative procedures.