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PBGC Prescribes Plan for Multiemployer Plan Partitions to Promote Preservation

The PBGC has issued an interim final rule allowing more multiemployer plans to request a partition to fend off plan insolvency. The PBGC will coordinate these requests with those made to the Treasury Department for approval of benefit suspensions.

Background

The Multiemployer Pension Reform Act of 2014 (MPRA) signed into law by President Barack Obama on December 16, 2014, is intended to address an expected insolvency of the PBGC's insurance program for multiemployer pension plans. As explained in our January 12, 2015 *For Your Information*, under MPRA, the PBGC has authority to partition a plan upon application from a plan sponsor. A plan is eligible if:

- The plan is in critical and declining status.
- The PBGC determines that the plan sponsor has taken all reasonable steps to avoid insolvency — including the maximum benefit suspensions permitted for critical and declining status plans.
- The PBGC reasonably expects that the partition will reduce the corporation's long-term loss and the partition is necessary for the plan to remain solvent.
- The PBGC certifies to Congress that its ability to meet existing financial assistance obligations to other plans will not be impaired by the partition.
- The cost to the PBGC arising from the partition is paid exclusively from the fund established for basic benefits guaranteed by the multiemployer insurance program.

A partition is a process by which a plan transfers to a newly created successor plan the minimum amount of plan liabilities necessary for the partitioned (original) plan to remain solvent. Participants receive the PBGC guaranteed portion of their benefit from the successor plan and a residual benefit from the original plan equal to the excess of their monthly benefits over the guaranteed benefit paid by the PBGC.

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Additional rules apply to a partitioned plan for determining withdrawal liability and liability for PBGC premiums.

The partition rules are effective for plan years beginning after December 31, 2014.

In February, PBGC asked for public comments on guidance needed to implement this feature of MPRA.

PBGC Addresses Partition Rules

In interim final rules, PBGC sets out the application process and notice requirement for partitioning multiemployer plans. PBGC intends to provide guidance on facilitated mergers in a separate rulemaking. PBGC expects that fewer than 20 plans will be approved for partition over the next three years and that the total financial assistance they will provide will be less than $60 million per year.

The PBGC is soliciting public comments on these interim rules. Comments must be received by the PBGC by August 18, 2015.

Coordination with Suspension Rules. In light of the condition for a partition that the plan sponsor has taken all reasonable steps to avoid insolvency — including the maximum benefit suspensions permitted for critical and declining status plans — PBGC's rule has been coordinated with the Treasury guidance on benefit suspensions described in our June 29, 2015 *For Your Information*. Where an application for suspension of benefits to Treasury is made in combination with a partition application to PBGC, the suspension of benefits may not take effect before the effective date of the partition.

Timing of Applications and Approvals. For a coordinated filing and notice approach to obtaining approval of a suspension and partition, the plan sponsor initiates the process with a PBGC filing of all required information. Within 30 days, PBGC responds to the request and informs the plan sponsor of any additional required information. PBGC's notice that the application is complete marks the beginning of their 270-day review period and the 30-day period for providing notice to participants and beneficiaries as well as for filing an application for benefit suspensions with Treasury.

To provide a consolidated notice to participants, the plan sponsor will need to target delivery of the notice and the Treasury application to fit within that 30-day deadline, keeping in mind the eight-day window (four days before and four days after) around the date of the Treasury submission for the suspension participant notice.

PBGC's interim final rule contemplates consulting with Treasury and the DOL in the course of reviewing the application. Treasury's approval of the suspension must be finalized within 225 days of that application; PBGC's final word would ensue shortly after that deadline.

Content of PBGC Application. To be considered complete, the application must contain detailed participant census data as well as specified plan, partition, actuarial, financial and financial assistance information. The list of required items includes:

- Plan and contact identifying information
- Plan and trust documents along with a copy of the plan's most recent IRS determination letter
- The most recent SPD and all subsequent SMMs
- The most recent Form 5500 with all attachments
- The most recent rehabilitation or funding improvement plan
- Information on contributing employers; numbers of their participating employees
- Withdrawal liability payments for the last five years
- A description of the proposed partition and rationale for decisions, including a description of measures taken and considered along with a description of risks, assumptions and projections
- A copy of any application for suspension of benefits (in draft if not yet submitted)
- Classifications of and estimates of the numbers of participants to be transferred to the successor plan and information about estimated benefit amounts
- A copy of the draft notice to participants
- Detailed actuarial and financial information about plan liabilities and assets including details about assumptions, methodology, data, projections and solvency conclusions
- Estimated amount of financial assistance from the PBGC for the first year

Notice to Interested Parties. Participants, beneficiaries, alternate payees, contributing employers, relevant employee organizations and the PBGC must receive notice of the proposed partition within 30 days of PBGC's notice that the application is complete. Content requirements for the notices include:

- Identifying information and information about the date of the application and PBGC's 270-day deadline
- Information about an application for suspending benefits
- A description of the partition rules, how they work with the suspension of benefits, and information on PBGC guarantees
- A summary of the partition application contents
- Contact information for the plan sponsor, the PBGC, and the Participant and Plan Sponsor Advocate

PBGC's interim final regulation includes two model notices. One is used when submitting coordinated suspension and partition applications and the other when applying for partition only.

Operation of Partition. If the partition is approved, the benefits and liabilities to be partitioned are transferred to the successor plan. This successor plan is treated as a terminated multiemployer plan with financial support provided by PBGC to provide guaranteed benefits. Participants in this plan who also have benefits remaining in the original plan do not receive a second guarantee under the original plan unless there are additional accruals due to service or plan amendments under the original plan.

Administration of the successor plan remains with the plan sponsor of the original plan. Indeed, the monthly benefits under the two plans can be paid in a single monthly payment under a written cost-sharing or expense allocation agreement between the plans.

For ten years following the partition order, withdrawal liability for employers exiting the original plan will be computed taking into account the liabilities of both plans (with liability payments going to the original plan). For those ten years, the original plan will continue to pay PBGC premiums for the individuals in the successor plan. In addition, during this ten year period the original plan will be obligated to pay the PBGC an additional premium on account of any plan amendment improving benefits. The amount of the additional premium is the lesser of the value of the increased benefits or the amount of benefits paid for the plan year from the successor plan.

In Closing

There are many complexities and uncertainties involved in obtaining a partition. This includes the fact that PBGC's authority to order a partition will depend, in part, on whether the proposed partition would impair the agency's ability to meet existing financial assistance obligations to other plans. As a result, the PBGC encourages plan sponsors to contact them and engage in informal discussions on these and other issues before making any substantive decisions on how to approach a potential partition application.

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