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Multiemployer Plans

PBGC Partition Rules Give Clear Guidance, Will Help Preserve Plans, Commenters Say

Regulations issued by the Department of Treasury and the Pension Benefit Guaranty Corporation will help troubled multiemployer plans from sliding into insolvency, but not without forcing participants and beneficiaries to make hard choices, pension professionals told Bloomberg BNA in recent interviews.

Under tight deadlines for implementing the Multiemployer Pension Reform Act of 2014, both agencies on June 17 issued proposed and interim final guidance on both plan partitions and benefit suspensions (42 BPR 1094, 6/23/15).

Prior to the MPRA, the PBGC had very limited authority to help troubled multiemployer plans improve their financial condition by partitioning off some of the unfunded liabilities. The MPRA gave the PBGC expanded discretion to approve plan partitions in situations beyond employer bankruptcies (41 BPR 2559, 12/30/14).

“The interim final rule definitely telegraphs that the PBGC will be active in using its partitioning authority,” said W. Andrew Douglass, a shareholder and practice chair in the Chicago office of Polsinelli PC.

The rules aren’t burdensome and let endangered plans understand the procedures they must follow before the PBGC can use its authority to approve partitions, Douglass said.

Before the passage of the MPRA, the PBGC had partitioned only three plans in its 40-year history (41 BPR 249, 2/4/14).

Moving Fast. Randy G. DeFrehn, executive director of the National Coordinating Committee for Multiemployer Plans, said he was “very pleased” that Treasury and the PBGC stayed as close as possible to the statutory deadlines set for releasing regulations. The MPRA gave Treasury, the PBGC and the Department of Labor 180 days from the date of enactment, Dec. 16, 2014, to issue guidance. The timeliness is important because “a couple of plans are very, very close to the edge,” and “need to move as fast as possible,” DeFrehn said.

The NCCMP’s proposal to preserve multiemployer plans, called “Solutions Not Bailouts,” formed the basis for the MPRA.

“The earlier they act, the less pain that has to be inflicted,” DeFrehn said.

Robert E. Andrews, former New Jersey congressman and of counsel with Dilworth Paxson LLP in Washing-

ton, said the guidance is “a necessary step in the right direction.”

After resigning from office in 2014, Andrews joined Dilworth Paxson’s government affairs group and lobbied on behalf of the NCCMP to push the group’s proposal through Congress.

“The purpose of this law is to empower trustees to make wise decisions to protect pensions in difficult economic circumstances,” Andrews said. “And I think these rules now give those trustees some guidance on how to do that and what they can and cannot do,” he said.

“While the rules might give trustees a roadmap, few plans may be eligible to take advantage of the provisions,” said George M. Kraw, founder of the Kraw Law Group in Mountain View and Newport Beach, Calif.

Among the first plans to follow that roadmap is the Central States Pension Fund. Thomas C. Nyhan, Central Fund’s executive director, said the plan’s trustees are currently reviewing the guidance and “will be working expeditiously to develop a fair rescue plan. Once that has been completed, we will be filing that rescue plan with Treasury and notifying all of our pension fund participants. We expect for that to happen sometime this summer.

“One thing, however, is abundantly clear: Without enactment of MPRA, the Central States Pension Fund would continue its steady and rapid slide to insolvency. That was true when I testified before Congress, and it remains true today. We must act now to save the fund.”

Nyhan urged the House Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions in October 2013 to consider the NCCMP’s benefit suspension recommendation. Without that tool, the fund faced insolvency within 10 to 15 years if it didn’t substantially reduce its liability with a large influx of assets, he told the subcommittee (40 BPR 2556, 11/5/13).

Partitions Before Reductions. The MPRA’s most controversial amendment to the Employee Retirement Income Security Act allows multiemployer pension plans that are in danger of not being able to pay pensioners’ benefits to voluntarily reduce benefits paid.

Until it was amended under the MPRA, tax code Section 411(d)(6), known as the “anti-cutback provision,” prohibited plans from reducing by amendment a participant’s accrued benefits.

Under the changes to the cutback rules, issued by Treasury and coordinated with the PBGC, a plan sponsor of a multiemployer plan in critical and declining status for a plan year can implement a suspension of benefits by plan amendment.

Most plan trustees would prefer to partition their plans without benefit adjustments, but may have little choice than to propose reductions, said Joshua Gotbaum, former director of the PBGC and guest scholar at the Brookings Institution. That's because the law requires plans to take "all reasonable measures," including benefit adjustments, he said.

If a plan submits a proposal stating it can save the plan with a benefit adjustment, "what the regs make clear is PBGC will say we will approve partition conditional on Treasury approving" the adjustment, Gotbaum said.

Not all see the rules as wholly beneficial. Kraw said that his "chief concern" is that participants should be protected from "unfair" pension reductions.

"The complexity of the process will provide opportunities to manipulate the cutbacks in ways that inequitably favor certain participants over others," Kraw said.

Repeal Unlikely. Companion bills introduced by Sen. Bernie Sanders (I-Vt.) and Rep. Marcy Kaptur (D-Ohio) would repeal the benefit cutback provisions of the MPRA (42 BPR 1095, 6/23/15).

The Keep Our Pension Promises Act is supported by consumer and plan participant advocacy groups such as the AARP and the Pension Rights Center.

While the bill has support, Andrews said it isn't likely to advance.

There are two "realistic choices" for how to help plans that aren't going to be able to provide their participants and beneficiaries the level of benefits that they were promised, Andrews said. The first is to let the plans collapse and go to the PBGC, which would result in "massive cuts" to people's pensions. The second is the rules "give trustees the tools to make careful decisions to protect as much of the pension as possible," he said.

"I completely agree with the sentiment in the senator's bill, but sentiment doesn't write the check. Somebody has to have the resources. I know that some

people say put more money in the PBGC, but that's a totally unrealistic option. It's a great press release, but it is misleading to the pensioners," Andrews said.

Gotbaum was equally as blunt in his assessment of the repeal, saying that an earlier bill with similar provisions failed to gain traction.

Sen. Robert Casey (D-Pa.) introduced a similar bill to the Sanders bill in 2010, which would have used taxpayer funds to help prop up the PBGC, Gotbaum said (37 BPR 1270, 6/8/10), but the bill never advanced.

Five years after the failed 2010 legislation, Sanders is also proposing to use taxpayer money to prop up the PBGC and multiemployer plans, Gotbaum said.

"It will not happen," Gotbaum said. "The danger is that by continuing to pretend that there is a tooth fairy, pension plans may decide not to go to the dentist, or may delay going to the dentist. People don't want to deal with the fact that some pension plans are bankrupt."

Nyhan also gave the Sanders bill long odds. "Sen. Sanders bill is well-intentioned, and Central States would welcome funding from the federal government, but it is difficult to understand where the votes would come from to enact it into law. Central States supported similar legislation for many years, but very few members of Congress were supportive. It is important to deal realistically with the dire situation confronting us, and we have an obligation to do so," he said.

Plan trustees may have no choice but to comply with the MPRA's partitioning and pension reduction provisions, Gotbaum said.

"I think the issue is whether or not trustees of some of these plans as fiduciaries are obligated to take advantage of MPRA" to save their plans, he said.

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