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View From Groom: A Brief Guide to Benefit Suspensions Under the Multiemployer Pension Reform Act

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The Multiemployer Pension Reform Act of 2014 (''MPRA'') includes many provisions that affect the operation of multiemployer pension plans. The most significant of these provisions applies to deeply troubled plans that are projected to exhaust their assets in the coming years. Subject to a variety of constraints, including government approval, MPRA provides multiemployer plans that are headed towards insolvency with the option of suspending a portion of participants' accrued benefits. This authority is available only if the plan sponsor and actuary conclude that the suspensions are necessary for the plan to remain solvent and suspending benefits will preserve long-term benefits above the Pension Benefit Guaranty Corporation (''PBGC'') guarantee level.

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This article discusses some of the statutory requirements for benefit suspension authority, along with the factors that plan sponsors may consider in deciding whether and how to exercise this authority.

Benefit Suspension Overview

MPRA defines a benefit suspension as ''the temporary or permanent reduction of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the suspension of benefits.''[1] On the surface, this provision represents a dramatic departure from the long-standing ERISA prohibition against reducing a benefit that a participant has earned.[2] But as discussed below, the only plans that are empowered to use this authority are those that face much greater benefit losses on the horizon. In this sense, the new provisions for such plans do not suddenly throw open the door to benefit reductions, as reductions will occur with or without the use of these provisions. Rather, they allow the trustees to mitigate the harm caused by benefit losses by modifying the timing, size, and distribution of reductions across the participant population.

To access the benefit suspension authority under MPRA, a plan must be certified as being in ''critical and declining'' status. A plan is in critical and declining status if the actuary projects it will become insolvent in the current plan year, or in the 14 succeeding plan years.[3] If the plan has two or more inactive participants for every active participant, or if the funded ratio is less than 80%, the projection period expands to include the 19 succeeding plan years. Most plans facing insolvency will satisfy one or both of these additional criteria, resulting in a total projection period of 20 years (current year plus 19 succeeding years). While future events are always uncertain, for plans in critical and declining status, the economic circumstances that are necessary for the plan to survive are sufficiently unlikely that it is rea-

[1] ERISA § 305(e)(9)(B)(i).
[2] ERISA § 204(g).
[3] ERISA § 305(b)(6).

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sonable to conclude that insolvency is practically inevitable.

Limitations of the PBGC Guarantee

In evaluating whether or not to implement the benefit suspension provisions, it is vital that the plan sponsor understand the consequences of insolvency. When a multiemployer pension plan exhausts its assets, PBGC will step in and pay a portion of the benefits promised by the plan. There are limits to this support, however, and under the statutory formula not all benefits are eligible for PBGC guarantee.[4] One result of this formula is that the maximum benefit PBGC will pay to a multiemployer plan participant with 30 years of service is $1,073 per month. Any benefit such a participant has earned above this level is forfeited when the plan exhausts its assets, and benefits below this level generally are only subject to a partial guarantee. For many multiemployer plan participants, the PBGC guarantee represents significantly less than half of their plan benefits.

A plan sponsor should also understand that PBGC has projected that its existing assets and expected revenues are insufficient to support the multiemployer guarantee going forward, and the agency itself is likely to become insolvent within ten years.[5] This projection is particularly important because PBGC does not currently have the backing of the United States Treasury. A 2013 report by the Government Accountability Office concluded that, if the agency exhausts its assets and Congress does not approve a taxpayer bailout, the guarantee could effectively be reduced to 10% or less of the current statutory level.[6] If this happens, participants in deeply troubled multiemployer plans would be at risk for losing their benefits nearly in their entirety.

Benefit Suspensions as Last Resort to Improve Funding

In order to implement benefit suspensions, the plan sponsor must first have taken all other reasonable measures to avoid insolvency.[7] Typically these measures include a combination of increases in the employer contribution rate and decreases in the benefits earned by non-retired participants. Prior law includes a similar requirement for plans in critical status that are not expected to emerge from critical status by the end of the rehabilitation period.[8]. Unlike prior law, which provides no guidance as to the factors that a plan sponsor may consider when determining how to apply the ''all reasonable measures'' requirement, MPRA enumerates a list of factors that plan sponsors may consider. The contents of this list suggest that, at least in the context of benefit suspensions, ''all reasonable measures'' is a flexible standard that involves balancing the need for contributing employers to remain in business, active participants to receive at least a minimal level of benefit accrual, and retirees to have an acceptable level of retirement security.

In recent years, many severely underfunded plans have found it necessary to implement draconian measures in an attempt to improve funding. It is not unusual for contribution rates to have doubled or more in just a few years, which has made it very difficult for contributing employers to be competitive in their marketplaces. Active participants have seen their benefit accrual rates reduced dramatically, while subsidized early retirement and death benefits have been scaled back or eliminated.[9] Taken together, the combination of contribution rate increases and benefit accrual decreases could mean that active participants are sacrificing twice as much out of their wage package as they used to, and getting half as much in return. At the same time, due in part to the high levels of plan funding that existed in the late 1990's, recently retired participants may be receiving pensions that are substantially larger than current active participants can ever expect to receive. These considerations are relevant not only to meeting the statutory test for access to benefit suspensions, but also to the plan sponsor decision as to whether to voluntarily suspend a portion of the benefits payable to retired participants.

Restrictions

MPRA includes several other constraints on the use of the benefit suspension provisions. First, after taking into account the suspensions, the plan must be projected to remain solvent indefinitely.[10] MPRA does not permit reducing accrued benefits as a means to delay the demise of the plan; rather, the suspensions must be reasonably expected to save the plan. MPRA also does not permit a suspension that would reduce any participant benefit to below 110% of the PBGC guarantee.[11] Lastly, both participants receiving disability benefits and participants age 80 and over must be excluded from the suspensions, with phased-in protection for participants above age 75.[12]

These additional constraints raise several other issues that may be relevant to a plan sponsor's decision.

[4] Under ERISA § 4022A(c)(1), for each year of service a participant has earned, the PBGC multiemployer guarantee formula covers 100% of the first $11 per month of benefit accrual, plus 75% of the next $33 per month of benefit accrual.

[5] See the 2013 PBGC Projections Report, which estimates that the Multiemployer Program has a 90% likelihood of insolvency by 2025.

[6] Multiemployer Plans and PBGC Face Urgent Challenges, Government Accountability Office, March 5, 2013.

[7] ERISA § 305(e)(9)(C)(ii).

[8] ERISA § 305(e)(3)(A)(ii)

[9] PPA added ERISA § 305(e)(8), which allows multiemployer plans in critical status to apply reductions to early retirement subsidies, death benefits, and other ancillary plan features to benefits earned by non-retired participants in past years.

[10] ERISA § 305(e)(9)(C)(i).

[11] ERISA § 305(e)(9)(D)(i).

[12] ERISA § 305(e)(9)(D)(ii) and (iii).

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As noted, MPRA requires that the benefit suspensions not result in any participant benefits dropping below 110% of the PBGC guarantee. In order for some plans to remain solvent, it will be necessary for most or even all participants' benefits to be suspended down to this level. In other plans, solvency can be achieved through more modest sacrifices that keep all benefits far above the 110% threshold. The amount of long-term benefits that can be preserved through early intervention is likely to be a major component of plan sponsor decisions. In addition to the statutory protections on vulnerable participants, plan sponsors are likely to seek additional ways to ensure that the benefit suspensions focus on the participants that are least likely to face hardship. For example, if a plan adopted very generous benefit improvements during a time when assets exceeded liabilities, the sponsor may look to apply the suspensions to these benefits, while protecting participants with less generous benefit levels.

Approval Process

Once a plan sponsor decides that it is necessary to adopt benefit suspensions, there are two additional steps before this decision is implemented. First, the trustees must receive approval from the Treasury Department confirming that the criteria for suspensions have been satisfied.[13] Second, the plan participants most vote to ratify the suspensions.[14] While effective communication with plan participants is beneficial for many reasons, the participant vote requirement makes this communication especially significant. Participants would likely appreciate and benefit from understanding how the plan came to be distressed, the actions that the plan sponsor has already taken to improve funding levels, and the consequences of rejecting the suspensions and allowing the plan to fail.

Conclusion

For the sponsors of multiemployer plans facing insolvency, there are no easy answers. For some plans, the new benefit suspension provisions of MPRA provide a way to preserve participant benefits above what participants would otherwise receive, while giving the plan a chance for a meaningful recovery. When deciding whether or not to apply for approval to use these provisions, plan sponsors need to consider many complex issues related to the statutory requirements, the future of the plan, and the long-term interests of all plan participants.

[13] ERISA § 305(e)(9)(G).

[14] ERISA § 305(e)(9)(H) discusses the ratification process, including the ability of the Treasury Department to override a participant vote for ''systemically important plans''.