

PBGC Finalizes and Expands Mediation Program

PUBLISHED: January 30, 2019

AUTHORS: Katie Kohn, Michael Kreps, Michael Prame

The Pension Benefit Guaranty Corporation (“PBGC”) launched a pilot Mediation Program in October 2017 with support from the PBGC Participant and Plan Sponsor Advocate (“Advocate”) and benefit plan advocacy groups like the American Benefits Council. The program initially was offered as a way to resolve termination liability collection and Early Warning Program disputes. In January 2019, PBGC announced that it made the Mediation Program permanent, and expanded the program to also cover fiduciary breach cases. PBGC intends that the Mediation Program facilitate improved relations with plan sponsors and other stakeholders and reduced costs of settlement negotiations and other proceedings. Cost reduction is especially important given PBGC’s dwindling premium base, as noted by the Advocate in her 2018 Annual Report. Ultimately, PBGC hopes that the Mediation Program makes it easier for companies to maintain defined benefit pension plans.

Plan sponsors involved in an Early Warning Program (*i.e.*, the program under which PBGC monitors corporate transactions that may pose risk to the insurance program by negatively impacting a sponsor’s ability to continue the pension plan), termination liability (*i.e.*, liability arising from termination of a PBGC-insured defined benefit pension plan), or fiduciary breach (*i.e.*, asserted liability of fiduciaries of terminated plans for actions that violate the fiduciaries’ duties of loyalty and prudence) dispute with PBGC should consider pursuing dispute resolution under the Mediation Program. Likely in furtherance of PBGC’s goal that the Mediation Program become an integral part of PBGC’s dispute resolution process, PBGC intends to inform sponsors of the availability of mediation in the initial demand letter to the sponsor in these cases. Participation in the Mediation Program is voluntary.

In order to request to participate in the program, the sponsor of a terminated plan must submit within 120 days of the plan termination date certain information required under PBGC’s regulations (29 C.F.R. § 4062.6) regarding the sponsor’s and its controlled group’s net worth, including, for example, audited financial statements, information regarding sales or sales offers, and appraisals. With respect to sponsors involved in an Early Warning Program dispute with PBGC, PBGC requires that it receive “sufficient” responses to PBGC’s information requests. In addition to these information requirements, PBGC maintains that the Mediation Program is not available in certain circumstances, such as where a plan sponsor has a limited ability to pay the liability to PBGC, the dispute is the subject of a court proceeding, or time is of the essence and the parties have not entered into a tolling agreement.

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Should the sponsor be accepted to participate in the Mediation Program, mediation will be conducted by a mediator from the Federal Mediation and Conciliation Service, which is an independent federal government agency. PBGC and the plan sponsor or counterparty split the cost of the mediation.

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