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Stay in or Get Out? Employers Should Evaluate Their Options Under the PBGC's New Withdrawal Liability Guidance

By Morris L. Hawk

For employers who contribute to financially-troubled multiemployer pension plans (multiemployer plans), a lot has changed in the last six months. In March, Congress passed the American Rescue Plan Act of 2021 (ARP) which literally rescued multiemployer plans in critical, declining, or insolvent status by establishing Special Financial Assistance (SFA) for troubled plans. SFA are direct payments from the U.S. Treasury to fund benefits through 2051 (including previously suspended benefits, which must be restored to receive SFA). This month, the Pension Benefit Guaranty Corporation (PBGC) has issued interim regulations that set forth the application process for multiemployer plans to receive SFA and provide some clarity for employers as to how the infusion of those funds will impact employers' contributions and their potential withdrawal liability. Here is a brief summary of what employers should know.

Regular Contribution Levels Will Not Decrease

For regular employer contributions to multiemployer plans that receive SFA, the PBGC guidance is simple. A multiemployer plan receiving SFA will not be permitted to reduce contributions levels below that required by an employer's collective bargaining agreement as of March 11, 2021. The only exception to this rule is for large employers (annual contributions over $10 million and over 10% of the multiemployer plans annual contributions) where the PBGC determines that the risk of loss to the plan will be lessened by the reduction in contribution levels. Thus, for the vast majority of employers, contributions will not decrease even after the multiemployer plans to which they contribute receive SFA.

SFA Will Be Treated as Plan Assets and Will Reduce an Employer's Share of Unfunded Benefit Obligations for Calculation of Withdrawal Liability

As for withdrawal liability, the PBGC guidance is more complicated. The good news is that, as we predicted in March, the PBGC is treating the SFA as plan assets and thus including them in calculating an employer's withdrawal liability. (These increased assets will be offset by any suspended liabilities which are now restored). As the PBGC notes, treating the SFA as plan assets reduces the unfunded vested benefit obligations of the multiemployer plan. Since withdrawal liability is calculated based on an employer's allocable share of a multiemployer plan's unfunded vested benefits, the infusion of SFA into a multiemployer plan will tend to decrease an employer's withdrawal liability.

Interest Rate Assumptions for Mass Withdrawals Will Apply to All Employer Withdrawals for Ten Years After a Multiemployer Plan Has Received SFA

However, the PBGC makes clear that the purpose of ARP is to protect benefits for plan participants, not to reduce or subsidize an employer's withdrawal liability. So, the PBGC has mandated that, after a multiemployer plan has received SFA, it must calculate the withdrawal liability of any employer that withdraws for at least the next ten years using the interest rate assumptions currently used to calculate a mass withdrawal liability (i.e. the calculation currently reserved for situations when all employers leave a plan at the same time). Those interest rate assumptions are designed to approximate the market price that insurance companies would charge to assume a similar pension benefit-like liability and are generally

substantially higher than the interest rates that multiemployer plans ordinarily use to calculate withdrawal liability. These increased interest rates will tend to increase an employer's withdrawal liability.

The impact of these two countervailing rules will differ based upon the specific employer and multiemployer plan at issue and will require an actuarial analysis. The PBGC also states in the guidance that it will be issuing a separate rule prescribing actuarial assumptions in determining withdrawal liability which will also impact the calculation.

Takeaways for Employers

For many years, employers contributing to financially-troubled multiemployer plans have experienced increasing contribution levels and decreasing future benefits for their employees. The ARP guarantees that benefits for participants will remain the same and that suspended benefits will be restored (at least through 2051). Contribution levels will not decrease but given that the federal government is fully funding the plans, they are not likely to increase for financially-troubled multiemployer plans at anywhere near the rate experienced in the past (again, at least through 2051). But the question for employers remains: Should they stay in their multiemployer plans or should they consider negotiating an alternative retirement plan with their union; withdrawing from their current multiemployer plan when their current collective bargaining agreement expires; and paying withdrawal liability?

To make that determination, employers should consult with legal counsel and consider the following questions:

1. Does the multiemployer plan to which we contribute qualify for SFA?
2. If so, when will the plan be eligible to apply for assistance based on the PBGC's priority application list?
3. What is our current withdrawal liability?
4. When does our current collective bargaining agreement expire?
5. What would our potential withdrawal liability be if our plan receives SFA?

As always, our employee benefits team at Roetzel stands ready to assist you in this or any other employee benefits matter.

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