

MULTIEMPLOYER REVIEW

Update on Issues Affecting Taft-Hartley Plans

Tools for plans in critical and declining status

Bob Behar, EA, FSA, MAAA | Victor Harte, EA, MAAA | Nina Lantz, ASA, EA, MAAA

In a separate *Multiemployer Review*, we summarized the key provisions of the Multiemployer Pension Reform Act of 2014 (MEPRA) that was part of the Consolidated and Further Continuing Appropriations Act of 2015 that President Obama signed on December 16, 2014. MEPRA has made significant changes to the rules that apply to multiemployer pension plans, including the creation of a new status for very poorly funded plans called “critical and declining status.” The trustees of these plans may apply to the Pension Benefit Guaranty Corporation (PBGC) for merger assistance or partitioning the plan, and/or apply to the Secretary of the Treasury to suspend previously accrued and protected benefits if certain requirements are met.

This *Multiemployer Review* defines this new status and outlines the most significant rules and procedures related to plan mergers, plan partitions, and benefit suspensions. These rules were effective on December 16, 2014, the date of enactment of MEPRA. This review is based on our current understanding of the MEPRA provisions, which could change after the IRS publishes regulations or other specific guidance.

Critical and declining status

A plan is in critical and declining status if it is certified to be in critical status and it is projected to be insolvent within 15 years, or within 20 years if there are at least twice as many inactive as active participants or if the plan’s PPA funded percentage is less than 80%. Some have referred to these plans as “deep red.” A plan certified as in critical and declining status shall not emerge from that status until the plan is certified to be no longer in critical or endangered status and the plan is projected to avoid insolvency. A plan in critical and declining status will also need to disclose the plan’s projected date of insolvency, a statement that benefit reductions are possible, and whether the trustees have taken actions to avoid insolvency.

Plan mergers

Upon request by the trustees, the PBGC may help facilitate a merger of two or more plans if it determines that a merger is in the interests of the participants and beneficiaries of at least one of the plans and is not reasonably expected to be adverse to the interests of both plans. In addition, the PBGC may provide financial assistance to the merged plan if at least one of the plans is in critical and declining status if it determines that such financial support is necessary to avoid or postpone insolvency and if certain other requirements are met.

Plan partitions

The trustees may apply to the PBGC to partition a plan if the plan is in critical and declining status. A plan is eligible for partition if the PBGC determines that all reasonable measures have been taken to avoid insolvency including the maximum benefit suspensions as described below, the partition is necessary for the plan to remain solvent, and certain other requirements are met. A notice of the application must be sent to participants and beneficiaries.

The amount of liability transferred to the new plan created by the partition is limited to the minimum amount needed for the partitioned plan to remain solvent. Employers that withdraw within 10 years of a plan partition will be assessed withdrawal liability from both the partitioned plan and the new plan created by the partition. If the withdrawal occurs more than 10 years after partition, withdrawal liability will be assessed only from the partitioned plan. The partitioned plan is responsible for paying any benefits in excess of the PBGC guarantee to transferred participants and beneficiaries when they commence benefits. The partitioned plan must also pay PBGC premiums on the transferred participants for the 10-year period following the partition.

Benefit suspensions

Trustees of critical and declining status plans may apply to the Secretary of the Treasury to suspend benefits they deem appropriate. Suspension of benefits can mean either a temporary or permanent reduction of any payment obligation of the plan to any plan participant, beneficiary, or alternate payee whether in pay status or not.

Plans with 10,000 or more participants shall select a retiree representative to advocate for the interests of retired participants, deferred vested participants, and beneficiaries of the plan. The plan shall provide for reasonable expenses for the retiree representative, including reasonable legal and actuarial support.

Benefit suspensions may be permitted for a plan year if, as a result of the suspensions, the plan will be projected to avoid insolvency indefinitely and the fund maintains a written record during the period of the benefit suspension that suspensions are needed to avoid insolvency and all reasonable measures to avoid insolvency have been taken.

In determining whether all reasonable measures have been taken, trustees may consider:

- Contribution levels
- Benefit accrual levels
- Prior adjustments of adjustable benefits
- Prior benefit suspensions
- Subsidies and ancillary benefits available to active participants
- Compensation levels of the active participants compared with the industry
- Competitive and economic factors facing the employers
- The impact of benefit and contribution levels on retaining active participants and bargaining groups
- The impact of past and anticipated contribution increases on employer attrition and retention levels
- Measures taken by the trustees to retain or attract contributing employers

A benefit suspension shall remain in effect until either the trustees provide for a benefit improvement or until it expires on its own terms. The plan shall not be liable for any payments not made as a result of a suspension of benefits.

Limitations on suspensions

The suspensions of benefits permitted in accordance with MEPRA have certain limitations:

- Monthly benefits cannot be reduced below 110% of the monthly benefit guaranteed by the PBGC. The maximum guaranteed monthly benefit is equal to 100% of the first \$11 of monthly accrual plus 75% of the next \$33 of monthly accrual times credited service, which provides a guaranteed benefit of \$12,870 per year for a plan participant with 30 years of service.
- Benefit suspensions cannot impact any participants who have attained age 80 on the effective date of the suspension. For participants between age 75 and 80 on the effective date, their benefit suspensions will be adjusted pro-rata based on the number of months before age 80.
- Disability benefits cannot be suspended.
- Benefit suspensions should only occur to the extent necessary to achieve, but not materially exceed, the level necessary to avoid insolvency and cannot take effect prior to a plan partition.
- Benefit suspensions shall be equitably distributed across the participant and beneficiary population taking into account factors, including:
 - Age and life expectancy
 - Length of time in pay status
 - Benefit amount
 - Type of benefit: normal retirement, early retirement, survivor
 - Benefit subsidies
 - Previous post-retirement benefit increases
 - History of benefit increases and reductions
 - Years to retirement for active employees
 - Discrepancies between active and retiree benefits
 - Extent that active participants may withdraw support for the plan, increasing the risk of employer withdrawals and the potential of additional benefit reductions
 - Extent that benefits are attributable to service with an employer that failed to pay its full withdrawal liability

Benefit improvements

While benefit suspensions are in effect, benefits cannot be increased for any participant or beneficiary not in pay status unless there is also an equitable benefit improvement to the plan participants and beneficiaries in pay status. Benefits may be resumed for participants and beneficiaries in pay status if such resumption is done in an equitable manner, taking into account the factors listed above for consideration of benefit suspensions. Benefit improvements determined to be reasonable and de minimis or which are required by law are not restricted.

These restrictions are in addition to those that apply to critical status plans.

Notice requirements

No suspension of benefits may be made unless a notice of the proposed suspension has been distributed to plan participants and beneficiaries, contributing employers, and each employee organization that represents plan participants concurrent with an application to suspend benefits that is submitted to the Secretary of Treasury.

Solicitation of comments and approval process

Within 30 days of receiving the application for suspension, the agencies (i.e., Secretary of the Treasury, in consultation with the PBGC and Department of Labor) will publish a notice in the *Federal Register* asking for comments from contributing employers, employee organizations, and plan participants and beneficiaries. The application will also be published on the website of the Department of the Treasury.

In general, if the plan is eligible for suspensions and the criteria outlined above have been satisfied, the agencies will approve the application. The application shall be deemed approved unless, within 225 days after it is submitted, the agencies deny the application. If the application is denied, the Secretary of the Treasury will provide a notice detailing the reasons for the rejection. In evaluating the application, the agencies will accept the trustees' determinations unless it concludes that they are clearly erroneous.

Participant ratification process

No suspension of benefits can take effect prior to a vote of the participants. Within 30 days after the agencies approve the suspension application, the Secretary of the Treasury will administer a vote of plan participants and beneficiaries. The suspension will go into effect unless a majority of all plan participants and beneficiaries—regardless of whether they choose to vote—vote to reject the suspension. Prior to such vote, the trustees should inform participants about the proposed benefit suspensions through in-person meetings, telephone or internet-based communications, mailed information, or other means.

Within 14 days of a vote that rejects a proposed suspension of benefits for very large plans, the agencies shall determine whether the plan is a systemically important plan. If so, the Secretary of the Treasury will, within 90 days of the date that the results of the vote are certified, permit the implementation of the suspension as proposed or on a modified basis as long as the plan is projected to avoid insolvency. A systemically important plan is defined as one in which the projected financial need from the PBGC exceeds \$1 billion (indexed each year after 2015) if the suspensions are not implemented.

Rules relating to withdrawal liability

For purposes of assessing withdrawal liability, benefit reductions or suspensions while in critical and declining status shall be disregarded unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension.

Bob Behar, EA, FSA, MAAA, is a principal and consulting actuary with the Chicago office of Milliman. Contact him at bob.behar@milliman.com.

Victor Harte, EA, MAAA, is a principal and consulting actuary with the Woodland Park, New Jersey, office of Milliman. Contact him at victor.harte@milliman.com.

Nina Lantz, ASA, EA, MAAA, is a principal and consulting actuary with the Portland, Oregon, office of Milliman. Contact her at nina.lantz@milliman.com.