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New PBGC Interim Final Rule: Special Financial Assistance, Withdrawal Liability Rules, Contribution Obligations

Navigating New Rules and Requirements Under ARPA and the Impact to Multiemployer Plans and Participating Employers

TUESDAY, SEPTEMBER 14, 2021

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New PBGC Interim Final Rule: Special Financial Assistance, Withdrawal Liability Rules, Contribution Obligations

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Agenda

- Background of multiemployer pension plan system
- What withdrawal liability is and how it is triggered
- Controlled group liability
- Business transactions and withdrawal liability
- Disputing withdrawal liability assessments
- PBGC interim final rule
- Key takeaways for investors employers

Background

Multiemployer Plans (aka Taft-Hartley Plans)

- Approximately 1,400 multiemployer pension plans cover 10 million U.S. workers and retirees.
  - Almost all are not fully funded for withdrawal liability purposes.
  - Many face insolvency and mass withdrawals.
- Governed by ERISA and Section 302 of the Labor Management Relations Act (LMRA or Taft Hartley Act).
- Employers contribute to an independent trust fund, trusteed by equal numbers of union and employer representatives.
- Trusts for pensions have statutory withdrawal liability. Separate trusts provide welfare benefits (health, life insurance, disability), which may provide for contractual withdrawal liability.
- Employers are not sponsors or fiduciaries of the plans, but fund trusts through current contributions and withdrawal liability.

Current Contributions

- Collective Bargaining Agreement ("CBA") creates and defines the contribution obligation.
- CBA often binds employer to terms in the plan documents.
- Plans audit employers' compliance with contributions.
- Employer's obligations under trust rules may control over inconsistent terms in CBA as to who and what hours are covered, and what rates apply.
- "In a collection action based on [ERISA] a multiemployer plan can enforce, as written, the contribution requirements found in the controlling documents." *Bakery & Confectionary Workers Union Trust Fund v. Ralph's Grocery*, 118 F.3d 1018 (4th Cir. 1997).

Multiemployer Pension System Issues

- Multiemployer pension plans face serious challenges from poor funding levels, poor investments and changes in trucking, coal, construction, printing and textile industries.
- Greater contributions required under Pension Protection Act, which requires annual actuarial certifications to monitor funding and, if necessary, corrective actions including possible surcharges on employers and plan redesign reducing benefits.
- "Endangered" ("yellow-zone") and "critical" ("red-zone") status plans must adopt Funding Improvement Plans or Rehabilitation Plans, to which employers' collective bargaining agreements must conform.
- Multiemployer Pension Reform Act (MPRA) permits suspension of benefits for plans in "critical and declining status"

Multiemployer Pension System Issues

- 1 million (out of 10 million) participating in multiemployer pension plans are in the 100 plans that are projected to be unable to pay full benefits.
- Pension Benefit Guaranty Corporation ("PBGC") multiemployer program deficit approximately $60 billion.
- PBGC likely to exhaust asset reserves by 2026.
- GAO reports that the number of insolvent multiemployer pension plans could more than double in the next three years.
- Many employers have withdrawn from these plans, and many have liquidated. Remaining employers face higher participation costs and risk of greater withdrawal liability, including mass withdrawal liabilities.
- Employers and their controlled group members, investors, and lenders must evaluate the risk of withdrawal liabilities.

Multiemployer Pension Reform Act of 2014 (MPRA)

- Signed into law on 12/16/14 and effective for plan years beginning in 2015.
- Repealed "sunset" provisions of the PPA multiemployer funding rules.
- Authorized multiemployer plan trustees to suspend benefits for active and retired participants where plan in "critical and declining status" and plan meets certain detailed requirements.
- Disregard of PPA surcharges and certain other contributions when calculating withdrawal liability.
- Expansion of PBGC authority to approve partitions and facilitate plan mergers.
- Doubling of PBGC premiums for multiemployer plans.
- Clarification of PPA and IRC rules impacting multiemployer plans.

American Rescue Plan Act of 2021 (ARPA)

- In the interim, several Congressional attempts to find legislative solution.
- In 2018, bicameral Joint Select Committee on Solvency of Multiemployer Pension Plans.
- In March 2021, American Rescue Plan Act of 2021 ("ARPA") is enacted, creating special program administered by PBGC to extend solvency of severely underfunded plans by providing one-time payments ("special financial assistance") allowing plans to continue payment benefits through 2051.
- In July 2021, PBGC issued interim final rule providing clarity on various aspects of SFA program
  - In turn, should help PBGC's MEPP insurance fund avoid insolvency
- Projected to provide approximately $94 billion in payments to more than 200 plans with 3 million participants.
- IRS simultaneously issued Notice 2021-38 providing guidance on impact of minimum funding requirements and reinstatement of certain suspended benefits by plans receiving SFA

What is Withdrawal Liability?

ERISA Creates Withdrawal Liability

- Employer who ceases to contribute is required to pay proportionate share of the Plan's unfunded vested liabilities, even if the employer had fully paid the contributions required by CBA.
- There are several different calculation methods.
- Withdrawal can be triggered by any significant reduction in the duty to contribute, including layoffs, plant closures, sales, or changes in the bargaining agreement.
- In an asset sale where the buyer assumes the seller's contribution obligation and complies with certain ERISA rules, the seller may avoid withdrawal liability.
- Special rules under ERISA for certain industries, including construction, entertainment, retail food, trucking and coal.
- Both PBGC and multiemployer plans look to controlled group members to satisfy unfunded benefit liabilities.

Withdrawal Liability

- Withdrawal liability is payable only upon the occurrence of a withdrawal, as defined by ERISA.

- A withdrawing employer is liable to the pension plan for employer's share of plan's unfunded vested benefits ("UVBs"), if any; determination of UVBs depends on actuarial assumptions and methodologies, as well as the "date of withdrawal."

- Title IV of ERISA generally specifies two types of employer withdrawals that can trigger payment of liability:
  - Complete withdrawals; and
  - Partial withdrawals

Complete Withdrawal

- "Complete Withdrawal" is
  - A permanent cessation of the employer's obligation to contribute under the plan; or
  - A permanent cessation of the employer's covered operations under the plan.

- May be triggered by layoffs, plant closures or sale of the business.

Complete Withdrawal

- Permanent cessation of employer's obligation to contribute
  - Upon expiration and non-renewal of CBA that obligated employer to contribute to the plan (unless employer has an ongoing duty under NLRA to continue to contribute under the terms of the expired CBA)
  - Where a fund terminates an employer's participation in the fund. *See, e.g., Borntrager v. Central States Pension Fund*, 577 F.3d 913 (8th Cir. 2008)
  - Where the employees decertify the union.
- Permanent cessation of covered operations under the plan
  - Business activities for which employer required to contribute under CBA cease
  - Where employer had obligation to contribute based on hours-worked and permanently ceases such covered work. *See, e.g., Speckman v. Barford Chevrolet Co.,* 535 F. Supp. 488 (E.D. Mo. 1982)

Partial Withdrawal

- ERISA defines a partial withdrawal as follows:
  - 70% decline in employer contributions over three plan years, or
  - A cessation of contribution obligation under one, but not all bargaining agreements, and continuation of work in CBA jurisdiction of the type for which contributions were previously required, or a transfer of such work to another location or another entity owned or controlled by employer, or
  - A cessation of contribution obligation at one but not all facilities, and continuation of work at the facility of type for which contributions previously required.

Special Industry Rules

- ERISA provides special rules for certain plans in the following industries: Construction, Entertainment, Trucking, Retail Food, and Coal.
- Rules applicable to these industries may alter the conditions under which a withdrawal and/or partial withdrawal occur, the effect of a withdrawal or the method for calculating withdrawal liability.
- Example: **Complete Withdrawal** occurs for **Construction Industry** employers only if (i) employer ceases to have an obligation to contribute under the plan and (ii) continues to perform work in the CBA jurisdiction.
- Example: If adopted by plan, **Partial Withdrawal** occurs for **Retail Food** employers upon 35% decline in contributions (instead of 70% decline)

Adjustments to Withdrawal Liability

- The *de minimis* rule requires that small amounts of withdrawal liability be overlooked. ERISA §4209(a).
- Net worth limitation upon sale of all assets and insolvency. ERISA §4225.
- 20-year cap on withdrawal liability periodic payments, except for mass withdrawals.
- Special rules increase liability for mass withdrawals:
  - *De minimis* rule and 20-year cap do not apply; different actuarial assumptions may apply.
  - "Redetermination liability" and "reallocation liability."

Mass Withdrawal

- Under ERISA §4219, "mass withdrawal" occurs
  - Upon withdrawal of every employer from the plan, or
  - Upon withdrawal of substantially all the employers pursuant to an agreement to withdraw.
- An employer that withdraws during the three plan years preceding the mass withdrawal date during which substantially all employers withdraw is presumed to have withdrawn pursuant to an agreement to withdraw.
  - This presumption may be rebutted by a preponderance of the evidence.
- Employer's assessed normal liability, plus redetermination and reallocation liability
- Different actuarial assumptions used for mass withdrawals.

Dates for Determining and Calculating Withdrawal Liability

- ERISA §4203(e) defines the date of a complete withdrawal as "the date of cessation of the obligation to contribute or the cessation of covered operations." ERISA §4205(a) defines date of a partial withdrawal as the last day of the plan year in which such partial withdrawal occurs.
- The date of valuation for calculating withdrawal liability is usually the last day of the plan year preceding the date of withdrawal.
- The valuation date for a 70% decline partial withdrawal is the last day of the first plan year in the three-year testing period.

Controlled Group Liability

Controlled Group Concept under ERISA

- Under ERISA, certain employee benefit liabilities are a joint and several obligation of the plan sponsor or contributing employer **and** of each member of its "controlled group"
- Applicable in the context of single-employer and multiemployer plans
  - Minimum funding, termination liabilities, multiemployer plan withdrawal liability, PBGC premiums
- Liability arises without regard to controlled group member's knowledge or intent.
- The entire amount of the liability may be asserted against each member of the controlled group, but only one satisfaction permitted.
- PBGC and multiemployer plans are motivated to pursue controlled group members to satisfy unfunded benefit liabilities.

Controlled Group Liability

- For purposes of withdrawal liability, all corporations and other "trades or businesses" under common control are treated as a single "employer" and are jointly and severally liable for the withdrawal liability of any controlled group member.
- Under "controlled group" rules, if several members of a controlled group contribute to the same multiemployer plan, when one member stops contributing, there may be no withdrawal, or at most a partial withdrawal.
- If one member of the controlled group withdraws, all members have joint and several liability and must timely exercise their rights to challenge the assessment of liability.
- Notice to employer of withdrawal liability constitutes notice to all controlled group members and triggers the time period for raising defenses of all controlled group members.
  - Employers who fail to timely initiate arbitration waive their right to challenge determination and are immediately liable for amount of withdrawal liability demanded

As of What Date is Controlled Group Determined?

- For complete withdrawal liability, date of withdrawal. ERISA §4203(e). *Trucking Employees of NJ Welfare Fund v. Bellezz Co.*, 57 Fed. Appx. 972, 2003 WL 262505 (3rd Cir. 2003).
- For partial withdrawal liability, last day of the plan year in which the partial withdrawal occurs. ERISA §4205(a).
- Determined in arbitration if dispute exists. But disputes over whether an entity **was ever** an employer or member of controlled group are for the court to decide. *See Central States Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir. 1992); *Central States Fund v. Slotky*, 956 F.2d 1369, 1374 (7th Cir. 1992).
- Dates of withdrawal can be hotly disputed.

No Shareholder, Director or Officer Liability, but Beware of Controlled Group

- In general, there is no shareholder, director or officer responsibility for withdrawal liability solely by virtue of their status.
- However, the Seventh Circuit held an individual personally liable for withdrawal liability because the individual owned the stock of the withdrawing corporate employer and also engaged in activities that qualified as trades or businesses by (i) owning and leasing property to the employer and (ii) providing management services as an independent contractor. *Central States Pension Fund v. Nagy*, 2013 U.S. App. LEXIS 7912 (7th Cir. 2013).
- Seventh Circuit confirmed that certain leasing activity is categorically a "trade or business" for purposes of controlled group liability.

PBGC and IRS Controlled Group Regulations

- ERISA §4001(b)(1): "[U]nder regulations prescribed by [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."
- ERISA §4001(a)(14) requires PBGC to adopt regulations "consistent and coextensive" with IRS regulations defining common control in Code §§414(b) and (c).
- Applicable PBGC regulations generally incorporate IRS regulations under Code §414 "[f]or purposes of title IV of ERISA."
  - *See* 29 C.F.R. §4001.3.

What is a Controlled Group? The Tax Rules

- Controlled Group = a group of organizations that are treated as a single employer under the standards of Internal Revenue Code Sections 414(b) or (c)
  - Corporations, partnerships, proprietorships, trusts or estates can all be controlled group members
  - Tax rules allow limited liability companies (LLCs) to elect to be treated as partnerships or as corporations
- Two general sets of standards
  - Controlled group consisting of corporations
  - Controlled group consisting of trades or businesses, whether or not incorporated

The "Trade or Business" Condition

- "Trade or business" is not defined by ERISA or regulations
  - Term often used but not defined in Internal Revenue Code.
- Supreme Court's test (*Comm'r v. Groetzinger*, 480 U.S. 23 (1987)):
  - Must be engaged in an activity for the primary purposes of income or profit, **and**
  - The activity must be conducted with continuity and regularity.
- Passive holding of investments not a trade or business
  - Individuals engaged in passive investment were found not to be conducting trade or business. *Higgins v. Comm'r*, 312 U.S. 212 (1941); *Whipple v. Comm'r*, 373 U.S. 193 (1963)

Corporations in a Controlled Group

- **Method #1 – Parent-Subsidiary Group**
  - One or more chains of corporations connected through at least 80% stock ownership, by vote or value, with a common parent corporation
  - Example – P Corp is the sole owner of all outstanding stock of S1 Corp and S2 Corp; P, S1 and S2 are all members of a controlled group
- **Method #2 – Brother-Sister Group**
  - Five or fewer persons who are individuals, estates or trusts
  - Together they own at least 80% of the total vote or value of stock of each of multiple corporations
  - And the sum of their overlapping stock ownership is more than 50%
- **Method #3 – Combined Group**

Organizations in a Controlled Group

- **Method #1 – Parent-Subsidiary Group**
  - One or more chains of organizations conducting trades or businesses connected through a "controlling interest"
  - For a trust, 80% actuarial interest (assumes maximum exercise of discretion in favor of beneficiary)
  - For a partnership, 80% capital or profits interest
  - For a sole proprietor, ownership
  - For a corporation, 80% of total vote or value of all classes
- **Method #2 – Brother-Sister Group**
  - Same standards as for corporations, using the controlling interest definitions above
- **Method #3 – Combined Group**

Business Transactions and Withdrawal Liability

Business Transactions & Withdrawal

- Reorganizations (mergers, spin-off, or change in structure) are not a withdrawal if no interruption in contributions and the obligation to contribute continues. ERISA §4218.
- BUT **sale of assets** cuts off seller's contribution obligation, and ERISA §4204 must be followed for seller to avoid withdrawal liability.
- ERISA 4212(c) permits a court to disregard transactions whose purpose is to "evade or avoid" withdrawal liability.

Avoiding Withdrawal Upon Sale of Assets

- ERISA §4204 requires "a bona fide, arm's length sale of assets to an unrelated party"
- Purchaser must have an obligation to contribute for substantially the same number of contribution base units and must timely post a bond for five years (unless an exemption applies)
- Seller must agree, in the purchase agreement, to secondary liability in the event buyer defaults within five years
- Seller also must post bond or escrow in the event of liquidation or distribution of substantially all assets within the five-year period
- In a properly executed 4204 asset sale, the buyer effectively assumes the seller's contribution history.

Transactions to Evade or Avoid Withdrawal Liability

- ERISA §4212(c): "If a principal purpose of any transaction is to evade or avoid liability under [the provisions governing employer withdrawals from multi-employer plans, those provisions] shall be applied (and liability shall be determined and collected) without regard to such transaction."
- ERISA §4069 – if principal purpose of transaction is to evade pension liability and plan terminates within 5 years, seller and controlled group may be liable. *See PBGC v. White Consolidated Industries*, 998 F.2d 1192 (3rd Cir. 1993).
- Test for disregarding a transaction:
  - Was a principal purpose to evade or avoid withdrawal liability
  - The transaction need not be a sham or constitute fraud
  - *See Santa Fe Pacific Corporation v. Central States Pension Fund*, 22 F.3dd 725, 727 (7th Cir. 1994) ("It needn't be the only purpose; it need only have been one of the factors that weighed heavily in the Seller's thinking")

Transactions to Evade or Avoid Withdrawal Liability

- Can cover otherwise bona-fide, arms-length transactions. *See e.g.*, *SuperValu, Inc. v. Bd of Trustees of S.W. Pa. and W. Md. Teamsters & Employers Pension Fund*, 500 F3d 334 (3rd Cir. 2007) (Section 4212(c) applied to CBA where the union understood, and agreed with, company's goal of avoiding liability).
- Where § 4212(c) applies, the transaction in question must be disregarded in determining withdrawal liability
- Courts have allowed the assertion of liability against non-employers under this provision. See *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2d Cir. 1993) (assets transferred by an agreement that violates §4212(c) are recoverable from transferee).
- *PBGC v. White Consolidated Indus.,* 215 F.3d 407 (3d Cir. 2000), company engaged in an evasion by transferring underfunded plans in a highly-leveraged buyout.

Successor Liability in Asset Sales

- As a general rule, an asset purchaser does not assume the liabilities of the seller, with exceptions, *e.g.*, express or implicit assumption. PBGC Opinion Letter 78-10.
- BUT purchaser of assets may have successor liability for delinquent multiemployer plan contributions or withdrawal liability where there is sufficient continuity of operations and the alleged successor had notice of the liability. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture,* 920 F.3d 1323 (7th Cir.1990); *Tsareff v. Manweb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015)

Transactional Considerations

- Understanding the transaction structure's impact on benefit liabilities.
  - Stock Sale – Buyer responsible for seller's benefit plan liabilities
  - Asset Sale – Generally, the buyer does not assume the seller's liabilities absent express/implicit assumption.
    - BUT multiemployer plans will likely continue to aggressively assert successor liability claims. Recent successes in Seventh and Ninth Circuits likely to lead to claims in other jurisdictions.
- Due diligence is critical, regardless of structure.
- Successor liability case law envisions that consideration should be given to purchase price reductions, escrows and indemnities as to withdrawal liability.
- Is ERISA §4204 an option?
- Beware of potential "evade or avoid" claims under ERISA §4212(c).

Challenging Withdrawal Liability Assessments

Notice of Withdrawal and Liability

- "As soon as practical" following withdrawal (ERISA §4219(b)), plan must provide employer notice of withdrawal and demand payment, giving the employer option of (i) lump sum payment or (ii) periodic payments (monthly or quarterly).
- Periodic payments are based on the employer's pre-withdrawal contribution rates.
- It is possible that the value of total periodic payments will be less than the lump sum withdrawal liability.

Disputing Withdrawal Liability

- Notice to any member of controlled group constitutes notice to all controlled group members. *I.A.M. Nat'l Pension Fund, Plan A v. Slyman Industries, Inc.*, 901 F.2d 127, 129 (D.C. Cir. 1990) (notice to bankrupt member of controlled group constituted notice to the other members of controlled group).
- Employer and controlled group members have 90 days to request review of withdrawal liability termination.
- Arbitration may be initiated by either the employer or the fund within 60 days after the earlier of (i) the date the fund denies the employer's request for a review or (ii) 120 days after employer's request for review.
- If employer fails to timely request arbitration, employer cannot dispute liability.

Challenging Withdrawal Liability

- When employer withdraws it must make withdrawal liability payments pursuant to the payment schedule determined by the plan.
- Challenges to Plan's withdrawal liability calculation does not excuse the employer from making required payments while the dispute is being arbitrated. 29 U.S.C. §1399(c)(1)(E)(2).
- ERISA provides detailed dispute resolution procedures, including mandatory arbitration. 29 U.S.C. § §1399 and 1401. If errors are found in the original computation, these may be corrected by the arbitrator, 29 U.S.C. §1401(d), or by judicial review, 29 U.S.C. §1401(b)(2). *Marvin Hayes Lines, Inc. v. Central States Pension Fund*, 814 F.2d 297, 299 (6th Cir. 1987).

Default and Acceleration of Liability

- If employer defaults on withdrawal liability payments, Plan may require employer to pay the entire withdrawal liability.
- ERISA §4219(c)(5) defines default as:
  - (A) the failure of an employer to make, when due, any payment under that section if the failure is not cured within 60 days after an employer receives written notification of the failure, or
  - (B) any other event defined in a plan's rules that indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability.
- *See Central States Pension Fund v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766 (7th Cir. 2010); *Central States Pension Fund v. Telegraph Paving Co.*, 2010 U.S. Dist. LEXIS 89856 (N.D. Ill. Aug. 31, 2010).

Request for Review

- Under ERISA §4219(b)(2), an employer has a right to request review of the withdrawal liability demand within 90 days after receiving the notice and demand.
- After review, the fund must notify the employer of the fund's decision on review, the basis for the decision, and the reasons for any change in its determination.
- Issues not properly raised at this stage may be waived.

Arbitration

- Must be initiated by either the employer or fund within 60 days after the earlier of
  - the date the fund denies the employer's RFR; or
  - 120 days after the employer's RFR
- If employer fails to timely and properly initiate arbitration, it is precluded from challenging the withdrawal liability assessment.
- Funds may have adopted AAA rules requiring specific steps to properly initiate arbitration, including payment of filing fees

Judicial Review

- Appeal of arbitration award to U.S. district court within 30 days of award
- Under ERISA §4221(c), there is "a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."
- Courts are deferential to the arbitrator's factual findings but review the arbitrator's legal conclusions independently. *See Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-12 (7th Cir. 1989).

PBGC Interim Final Rule

Eligibility Requirements

- Plan is eligible for SFA if it satisfies any of the following:
  - In "critical and declining" status in any plan year beginning in 2020 through 2022.
  - Had a suspension of benefits in accordance with MPRA as of March 11, 2021.
  - In "critical" status in any plan year beginning in 2020 through 2022, has a "modified" funded percentage of less than 40%, and has a ratio of active to inactive participants that is less than 2:3; or
  - Became insolvent after 12/16/2014, remains insolvent, and has not been terminated as of 3/11/2021

Amount of SFA

- Lump sum payment of amount required for plan to pay all benefits due as of date of payment through last day of plan year ending 2051
- Amount calculated taking into account all of a plan's existing and projected obligations and resources
  - Including present value of all future contributions, withdrawal liability payments and certain other payments through 2051
- Determined as of last day of calendar quarter preceding date on which plan files SFA application
- PBGC to scrutinize applications proposing changes to actuarial assumptions.
- SFA amount cannot be increased by certain events, such as plan mergers, asset transfers and benefit or contribution increases.

Review, Payment and Restrictions

- PBGC established priority application process with 6 categories for the most financially troubled plans
- SFA payments expected to be made within 60-90 days after approval.
- First SFA payment projected to be made by 12/31/2021.
- Anticipated that plans not satisfying one of six priority categories may apply by 3/11/2023.
- SFA funds and earnings have certain restrictions
  - Must be segregated from plan assets
  - May only be used to make benefit payments and pay administrative expenses
  - Must be invested in investment-grade bonds and certain other investments
- SFA can be used to pay benefits before other plan assets.

Withdrawal Liability

- If employer withdraws from plan that receives SFA after plan year in which the plan receives the SFA, withdrawal liability must be calculated using PBGC mass withdrawal interest assumptions.
- Mass withdrawal assumptions used until later of (i) 10 years after end of plan year in which plan receives SFA or (ii) last day of plan year in which plan no longer has SFA or any earnings in segregated account.
- SFA is treated as plan assets for withdrawal liability purposes.
- SFA significantly reduces risk of mass withdrawals (and elimination of 20-year cap).
- Rule does not modify payment schedule. Thus, changes should have no practical impact on effective liability.

Withdrawal Liability

- Rule contains footnote stating that PBGC intends to issue a separate rule (to be generally applicable and not limited to plans receiving SFA) prescribing actuarial assumptions that plans will be required to use to calculate withdrawal liability.
- PBGC preapproval needed for any settlement of withdrawal liability during SFA coverage period if present value of liability settled is greater than $50 million (using mass withdrawal assumptions).
  - Requests must include copies of proposed settlement agreement, employer's most recent 3 years of audited financial statements and five-year cash flow projections

Key Takeaways for Investors and Employers

Employer Options

- If multiemployer plan is poorly funded and facing insolvency in future, active employees may not receive much benefit from the employer's contributions or PBGC premiums.
- Even if plan is well-funded, PBGC premiums will likely be spent on insolvent plans and will provide no effective guarantee for current employees.
- Some employers conclude this is a problem without a practical solution
- Employer who wants to withdraw must consider
  - When CBA expires
  - How to pay withdrawal liability
  - Whether and when to offer an alternative retirement plan
  - Will union cooperate?
  - Is mass withdrawal imminent?
- "Hybrid" concept adopted by Central States and New England Teamsters Plans to offer "new employer" pool and option for employers to pay withdrawal liability and "start fresh"
  - BUT no protection against mass withdrawal liability

Mitigating Withdrawal Liability

- Actuarial analysis of lump sum vs. periodic payments is critical.
- For badly funded plans, the periodic payments may not amortize the lump sum payment and an infinite number of periodic payments may be required.
- In those circumstances, the present value of the stream of periodic payments may be substantially less than the lump sum liability. A fund facing insolvency may be willing to negotiate a substantial discount to the lump sum liability.
- Employers with well funded DB plans might consider negotiating a transfer of liabilities and assets with the fund.
- Risk of mass withdrawal significantly lower.
- Gross liability likely higher, but effective liability likely the same.

Key Takeaway for Investors and Employers

- Investors and employers contributing to poorly funded multiemployer plans should be alert to these new rules, evaluate whether their plans are eligible for the SFA program, and understand how the new guidance influences any potential withdrawal liability.
- Employers participating in SFA-eligible plans may want to understand what pre- and post-SFA withdrawal would look like.
- Consult with legal and actuarial advisers, as needed.

Questions or Comments?

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