

Dealing with PBGC on Participant Issues

U.S. Administration on Aging
Pension Counseling and Information Program
National Training Conference

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The PBGC-Focused Law Firm

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2

Presentation Overview

- PBGC overview & statistics
- PBGC's process for trustee plans
- Benefits paid by PBGC
- Other topics of interest
- PBGC resources

3

PBGC Overview

- Established in 1974 by ERISA
- Requirements for terminating an underfunded plan have changed over the years
- Minimal involvement when a sufficient plan terminates (standard termination)
- Trusteeship and continued benefit administration when an underfunded plan terminates

4

PBGC Statistics (FY 2011)

- **Coverage of ongoing plans**
 - Single-employer: 34M participants in 25,000 plans
 - Multiemployer: 10M participants in 1,500 plans
- **Benefit administration in trustee plans**
 - FY2011: paid almost \$5.5B to 873,000 retirees in 4,300 plans
 - FY2011: 628,000 deferred vested participants

5

PBGC Statistics (FY 2011) (continued)

- **FY2011 intake**
 - Trusteed 134 underfunded plans with 57,000 participants
 - Received 1425 standard termination filings
- **Customer service metrics**
 - American Customer Satisfaction Index = 86
 - Customer Contact Center handles 2300 calls/day
 - 85% of participant applications are processed within 45 days
 - Average time to issue benefit determinations for a plan is 2.9 years

6

PBGC's Process for Trusteed Plans

- **PBGC becomes trustee (agreement or court order)**
 - Takes over plan assets
 - Assumes responsibility for benefit payments
 - Notifies participants of the trusteeship
- **Initial communications**
 - ERISA's required notice of PBGC trusteeship
 - Information about PBGC resources & how to apply
 - Notification of any payment changes
 - Large plans may have plan-specific website info

7

PBGC's Process (cont.)

- **Cutbacks to "estimated" benefits**
 - Final benefits require audits and valuation
 - Cutbacks reduce overpayments
 - PBGC or Plan Administrator estimates the guaranteed/funded benefit
 - Most participants' benefits are not affected
- **Audits and valuations**
 - To determine and value plan assets
 - To identify the liable controlled group
 - To value recoveries from controlled group members

8

PBGC's Process (cont.)

- **Actuarial case report**
 - Determines the PBGC benefit to which each participant is entitled
 - Values each benefit
 - Allocates plan assets under ERISA § 4044
 - Determines plan § 4022(c) amounts & allocates to participant benefits
- **Benefit determinations**
 - Letters describe each participant's benefit
 - Benefit statement with data used and summary of calculations

9

PBGC's Process (cont.)

▪ Appeals

- 45-day appeal period (can request additional time – state why and how much time)
- Filing an appeal postpones implementation of the determination
- Participant can request a further explanation or request additional information (FOIA)
- "Data errors" identified in the process result in a corrected benefit determination, with new appeal rights
- Appeals cases get an in-depth review by a member of the Appeals Board

10

PBGC's Process (cont.)

▪ Appeals must:

- Be in writing & clearly marked as an appeal
- Specifically explain why PBGC's determination is wrong and the result you are seeking
- Describe relevant information you believe is known by PBGC
- Include copies of documents that provide additional information that the Appeals Board should consider
- Be mailed, faxed, e-mailed or delivered directly to the Appeals Board

11

PBGC's Process (cont.)

▪ Appeals tips:

- File timely or request an extension before the deadline (must state why the extension is needed)
- Extension request may ask for an explanation of specific aspects of the benefit determination
- Basis for extension may be participant's filing of a FOIA request for the participant's file and/or other relevant documents (attach FOIA request)
- Extension requests stop the 45-day clock
- If appeal/extension request not timely, must have extenuating circumstances
- Hardship is **not** a basis for changing a determination

12

PBGC's Process (cont.)

▪ Benefit determination implementation

- Final benefit adjustment is not implemented until appeals period has passed or appeal has been decided
- Downward changes only made if the change is \$5 per month or more
- All upward changes are made, with backpayments (and interest)
- Lump-sums valued at \$5K or less (at DoPT) are paid with interest; annuity option for most
- 80% of the time, estimated = final

13

PBGC's Process (cont.)

▪ Recoupment

- Most annuity benefits that have been overpaid by PBGC are subject to "recoupment"
- Recoupment is a percentage reduction to future benefit payments -- generally not more than 10%
- Interest is not charged on the overpayment
- The reduction ends when the overpayment has been repaid

14

Benefits Paid by PBGC

- Pension benefits under the terms of the plan
- Entitlement as of DoPT / Bankruptcy Petition Date (BPD)
- Statutory limits
 - Accrued-at-normal (affects only supplements)
 - Maximum guarantee (adjusted for age & form)
 - Phase-in at greater of 20%/\$20 of monthly increase for increases within 5 years

15

Benefits Paid by PBGC (cont.)

- **Different maximum for SSA disability**
 - Plan benefit must meet SSA definition
 - MG is not adjusted for age below 65
- **Additional funded benefits**
 - Participants who retired (or could have) three years before DoPT/BPD may receive more if assets are enough
 - Additional §4022(c) benefits paid in underlying form
- **Form of benefit after trusteeship**
 - Annuities only unless *de minimis* ($\leq \$5K$)
 - "PBGC optional forms" available after trusteeship

16

Other Topics of Interest

- **Missing Participants – Standard Terminations**
 - Plan administrator purchases an annuity or sends funds to PBGC for any missing participants
 - "Diligent search" required
 - PBGC does its own search, and maintains the "Internet Missing Participant List"
 - Participants should contact the employer first, then PBGC
 - Benefits generally paid as a lump-sum

17

Other Topics of Interest

- **Missing Participants – Trusteed Plans**
 - "Unlocatable" entitled participants -- PBGC will always pay a PBGC benefit, no matter when the participant applies
 - PBGC conducts periodic searches for unlocatable participants
 - "Woodwork" participants (those regarding whom PBGC has no records) who prove entitlement are also paid
 - Benefit rules for both are the same as for any other participant in a trusteed plan

18

Other Topics of Interest

- **Spousal benefits**
 - PBGC pays the form elected before trusteeship
 - After trusteeship, PBGC offers married p's
 - Joint-and-survivor annuities (50%, 75%, 100%)
 - Joint-and-survivor 50% pop-up annuity
 - Straight-life annuity
 - 5-, 10- or 15-year certain-and-continuous annuities
 - Spousal consent rules apply
 - PBGC guarantees and pays Qualified Preretirement Survivor Annuities

19

Other Topics of Interest

- **QDROs**
 - PBGC reviews all QDROs from the plan
 - May require clarification on existing QDROs
 - QDRO Coordinators review all post-trusteeship DROs
 - Qualified DROs get benefit determinations
 - Extensive guidance and models are available on PBGC's website

20

Additional PBGC Resources

- **See the resource list for:**
 - Links to PBGC's website
 - Publications available
 - Other resources

21

Questions?

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22

PBGC RESOURCES

PBGC's Website: <http://www.pbgc.gov/>

General information:

- Frequently asked questions on a wide range of topics: <http://www.pbgc.gov/about/faq.html>
- How pension plans end: <http://www.pbgc.gov/about/pg/other/how-pension-plans-end.html>
- To know if a plan is trusteeed: <http://www.pbgc.gov/wr/trusteed/plans.html>
- To know if a plan is insured by PBGC: <http://www.pbgc.gov/about/pg/other/insurepension.html>
- Information about employer annual funding notices:
<http://www.pbgc.gov/wr/other/special/annual-funding-notice-for-defined-benefit-pension-plans.html>

What PBGC Guarantees:

- <http://www.pbgc.gov/wr/benefits/guaranteed-benefits/your-guaranteed-pension.html>
- <http://www.pbgc.gov/wr/benefits/guaranteed-benefits/guarantees-for-disabled-participants.html>
- <http://www.pbgc.gov/about/pg/other/how-the-bankruptcy-date-rule-can-affect-your-benefits.html>

PBGC Benefit Options:

- <http://www.pbgc.gov/wr/benefits/payments/your-pbgc-benefit-options.html>

Qualified Domestic Relations Orders:

- <http://www.pbgc.gov/documents/qdro.pdf>

Transactions with PBGC: Guidance for Participants and Beneficiaries in trusteeed plans:

- On-line transactions: <http://www.pbgc.gov/wr/transactions.html>
- How to apply: <http://www.pbgc.gov/wr/benefits/payments/if-you-are-not-yet-receiving-benefits.html>
- Information for retirees: <http://www.pbgc.gov/wr/benefits/payments/if-you-are-already-receiving-benefits.html>

Finding a Lost Pension:

Missing participants in standard terminations:

- <http://www.pbgc.gov/res/factsheets/page/missing-participant-program.html>
- http://www.pbgc.gov/documents/finding_a_lost_pension.pdf

Missing participant search: <http://search.pbgc.gov/mp/>

Information on PBGC Appeals Board:

- <http://www.pbqc.gov/wr/benefits/appeals.html>
- <http://www.pbqc.gov/wr/benefits/appeals/your-right-to-appeal.html>
- <http://www.pbqc.gov/Documents/yourrighttoappeal.pdf>

FOIA information:

- <http://www.pbqc.gov/about/pg/footer/foia.html>

PBGC Laws/Regulations, Legal Filings/Decisions, and Reported Cases:

- <http://www.pbqc.gov/res/laws-and-regulations.html>
- <http://www.pbqc.gov/res/other-guidance/legal-filings-and-decisions.html#legalfiling>
- <http://www.pbqc.gov/res/other-guidance/pbqc-litigation-outline.html>

Multiemployer Pension Plans:

- <http://www.pbqc.gov/prac/multiemployer/introduction-to-multiemployer-plans.html>
- <http://www.pbqc.gov/prac/multiemployer/multiemployer-benefit-guarantees.html>

PBGC CONTACT INFORMATION

Customer Contact Center (for participants): 1-800-400-7242

- E-mail address for CCC: mypension@pbqc.gov

Main PBGC Telephone Number: 202-326-4000

PBGC Problem Resolution Officer for Participants:

If you have called or written PBGC and have not received the service PBGC has promised, contact the PBGC Problem Resolution Officer for Participants:

- Call: 1-800-400-7242 and then dial extension 4014
- Email: participant.pro@pbqc.gov
- Write: PBGC Problem Resolution Officer (Participants); 1200 K Street, NW, Suite 9429; Washington, DC 20005-4026

General Inquiries Regarding Legal Issues: PBGC Office of Chief Counsel
202-326-4020

EBSA WEBSITE

Department of Labor Employee Benefits Security Administration:

- <http://www.dol.gov/ebsa/>
- <http://www.dol.gov/ebsa/Newsroom/fsbankruptcy.html>
[Fact Sheet: Your Employer's Bankruptcy – How Will It Affect Your Employee Benefits?]

TERMINATION OF PENSION PLANS DURING A BANKRUPTCY REORGANIZATION

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The “Contract Bar” Against Distress Termination

- When a unionized employer has a defined benefit pension plan, most union collective bargaining agreements (“CBAs”) will require the employer to maintain the defined benefit plan for employees.
- A distress termination of a plan cannot be effected if the termination of the plan will violate the terms of a collective bargaining agreement. ERISA § 4041(a)(3). This is known as the “contract bar.”
- Therefore, if a union is unwilling to alter the CBA requirement to maintain the Plan, an employer may seek to remove the requirement through the Section 1113 bankruptcy process.

Section 1113 of the Bankruptcy Code

Section 1113 is the process used by the debtor during bankruptcy to reject a collective bargaining agreement.

- Before filing an application to reject with the Bankruptcy Court, the company must make a proposal to the union for those changes to the CBA that are necessary to permit reorganization and assure fair and equitable treatment of all parties to the bankruptcy. 11 U.S.C. § 1113(b)(1)(A). The company must also provide the union with all relevant information needed to evaluate the proposal. 11 U.S.C. § 1113(b)(1)(B).
- Once the proposal is served, the company must meet with the union at reasonable times and confer in good faith in an attempt to reach agreement on modifications to the bargaining agreement. 11 U.S.C. § 1113(b)(2). Section 1113 does not specify how long this period of negotiations must last, but the Court will not approve rejection if the company has not made a sufficient effort to bargain in good faith.
- If negotiations over the proposal do not produce agreement, the company can file an application to reject the CBA with the Bankruptcy Court. A hearing is to be scheduled within 14 days of the application, but the Court may extend that time period for 7 days or longer by agreement of the parties, as is frequently the case. The Court must rule on the

application within 30 days of the commencement of the hearing, although the parties may agree to a longer period of time. 11 U.S.C. § 1113(d)(1).

- In ruling on an application to reject, the Bankruptcy Court does not determine the substantive terms of the parties' CBA. Instead, the Court's ruling is generally limited to granting or denying authority to reject, although some Courts have conditioned rejection upon the imposition by the debtor of only those terms contained in its Section 1113 proposal.

Distress Termination in Chapter 11 Bankruptcy

- If a pension plan's liabilities exceed its assets, a plan sponsor undergoing Chapter 11 bankruptcy may seek a distress termination of the pension plan. The distress termination must be approved by the Bankruptcy Court.
- In order to approve termination, the Court must find that "unless the plan is terminated, [the plan sponsor] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside of the chapter 11 reorganization process." ERISA § 4041(c)(2)(B)(ii)(IV). This is known as the "reorganization test."
- The reorganization test is a "but for" test, meaning that the plan sponsor must show that "but for" plan termination a successful reorganization is not possible. This is a more stringent standard than the Section 1113 "necessary" standard as it has been interpreted by the Courts.
- If the distress termination is approved, the plan termination date will relate back to the date of the bankruptcy filing.
- If the plan is terminated, PBGC has a claim against the debtor's estate for the unfunded liabilities of the plan.