Legal Update Article

PBGC Issues Interim Rule on Multiemployer Pension Bailout; Impact on Employers Unclear

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On July 9, 2021, the Pension Benefit Guaranty Corporation (PBGC) issued its interim final rule on the process for eligible troubled Multiemployer Pension Plans (MEPPs) to apply for and obtain Special Financial Assistance (SFA) under the American Rescue Plan Act of 2021 (ARPA). The Rule was posted on PBGC's website and became effective as guidance on July 9, 2021.

The PBGC expects the SFA to directly (through the restoration of previously reduced benefits) and indirectly (by providing enhanced retirement security) help more than three million MEPP participants and beneficiaries. PBGC's multiemployer insurance program is also expected to prosper; more than 100 plans that would have otherwise become insolvent during the next 15 years instead will forestall insolvency as a direct result of receiving SFA.

Much of the Rule focuses on the SFA eligibility, application, and calculation processes. Exercising authority granted to PBGC under the statute, however, the Rule imposes several restrictions and conditions on MEPPs receiving SFA. The impact of these provisions on employers remains unclear.

After noting that "payment of SFA was not intended to reduce withdrawal liability or to make it easier for employers to withdraw," the Rule requires a MEPP to use the "mass withdrawal interest assumptions" for a minimum of 10 years after receiving SFA. The interest rates prescribed for a mass withdrawal often are lower (in many instances, significantly lower) than the withdrawal liability interest rate currently used by many MEPPs. As a result, this requirement (which is effective for withdrawals after the plan year in which the plan receives SFA) would increase the amount of many employers' withdrawal liability.

Other provisions in the Rule could potentially *decrease* the amount of an employer's withdrawal liability, however. Prior to the Rule's issuance, many believed that the amount of SFA would be disregarded for withdrawal liability purposes. The Rule's preamble, however, indicates that this approach was considered and rejected. The Rule appears to include SFA as a plan asset in the withdrawal liability calculation. Since withdrawal liability represents the excess of liabilities over assets, this would tend to reduce an employer's withdrawal liability (subject to other conditions and limitations applicable to determining an employer's payment obligations). Expect vigorous comment and discussion over this provision.

A second condition placed on a MEPP receiving SFA is that any settlement of withdrawal liability in excess of $50 million requires PBGC approval. It is unclear how trustees' fiduciary duty will be impacted if they and the PBGC cannot agree on a resolution. At minimum, this condition will provide additional hurdles for large withdrawal liability settlements.

The Rule also addressed PBGC's mandate that SFA be used for its intended purpose and not diverted to other purposes by "reducing sources of plan income, such as employer contributions or withdrawal liability." Further, the Rule generally prohibits contribution rate decreases to ensure that SFA is not effectively transferred to contributing employers through decreased contribution obligations. This is done by mandating (with limited exception) that contribution rates cannot be less than those provided through the end of any collective bargaining agreements in effect on March 11, 2021. In this regard, the Rule seemingly ignores the existing and ongoing burden imposed on contributing employers, specifically as it relates to contribution rates.

Several provisions in the Rule seem intended to foreclose nefarious conduct by MEPPs in the application process. For example, the Rule generally requires a MEPP to use an interest rate based on the fund's most recently completed certification of plan funding status when calculating the amount of SFA for which it is eligible. While this rate may be changed on the SFA application, PBGC warned MEPPs that it would perform a "searching analysis of any changed assumptions," highlighting that this "presents many opportunities for judgment calls that may be influenced by the goal of maximizing SFA." This analysis will be of interest to employers (and their counsel) that have argued for decades that MEPPs have intentionally manipulated interest rate assumptions to artificially overstate employer withdrawal liability, an issue currently on appeal to U.S. Court of Appeals.

Under ARPA, the SFA received by each MEPP must be invested in investment-grade bonds or other investments permitted by PBGC. These conservative investments have historically produced modest yet consistent returns. These lower anticipated rates of return, however, likely will operate to increase employer withdrawal liability for MEPPs receiving SFA.

In sum, the overall impact of the Rule on employers remains unclear. Employers who contribute to MEPPs receiving SFA can expect no contribution rate relief. While the mandated use of lower interest rates to calculate withdrawal liability would increase the amount of liabilities and, therefore, the amount of withdrawal liability, the inclusion of SFA as a MEPP asset would tend to *reduce* employer withdrawal liability.

We will continue to monitor this dynamic situation as it develops. Please contact the authors or the Jackson Lewis attorney with whom you normally work with any questions.