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Multiemployer Plans — Special Rules

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This Portfolio revises and supersedes 359-5th T.M., *Multiemployer Plans — Special Rules*. Portfolio 359-5th T.M. should be discarded.

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Multiemployer Plans — Special Rules

PORTFOLIO DESCRIPTION

Tax Management Portfolio, *Multiemployer Plans — Special Rules*, No. 359-6th, examines the provisions of ERISA and the Internal Revenue Code applicable to multiemployer defined benefit pension plans, including the plan qualification, funding and withdrawal liability rules imposed upon such plans, the special rules for plans in endangered or critical status enacted by the Pension Protection Act of 2006, and the availability of special financial assistance for certain financially troubled multiemployer plans under the American Rescue Plan Act of 2021. The Portfolio also examines collective-bargaining, fiduciary, tax and administrative issues that are unique to multiemployer pension plans.

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A. In General

Multiemployer pension plans are collectively bargained, jointly administered pension plans, generally organized by industry and/or region. Multiemployer plans are sometimes referred to as "Taft-Hartley" plans after the collective bargaining act (although it is also possible to have a single employer Taft-Hartley plan that is not subject to the special rules for multiemployer plans). Multiemployer plans are concentrated in industries with high worker mobility or seasonal employment, such as the construction industry, or where the companies may be too small to justify single employer plans. Some plans cover only a particular trade or craft, such as electrical workers, while other plans are industry-wide. Multiemployer plans are common in the following manufacturing industries: food, textiles, the garment industry, printing and publishing, leather products, lumber and wood products, furniture and fixtures, and metalworking. Multiemployer plans can vary greatly in size. Smaller plans are known as "locals" because they cover collectively bargained employees of a local chapter of a union. There are also "regional," "national" and "international" plans that cover both U.S. residents and workers in other countries where the union has a presence, such as Canada. There can be significant administrative differences between locals and larger multiemployer plans.

Unlike most defined benefit pension plans, multiemployer plan benefits are somewhat portable, i.e., an employee can change employment among the employers that are contributing sponsors in the same plan or another plan with a reciprocity agreement without losing plan benefits or having to requalify for participation.

A multiemployer plan differs from a single employer plan in that it is adopted and administered by a joint union/employer board of trustees, pursuant to Taft-Hartley, to provide benefits or contributions negotiated under a collective bargaining agreement between one or more unions and at least two employers. In larger plans, the trustees may empower committees of one or more trustees to make certain binding decisions or to oversee certain activities, such as approving retirement applications and overseeing the investment of plan assets. Under the National Labor Relations Act, benefits are a mandatory subject of collective bargaining.

In many ways, multiemployer pension plans are simply a subspecies of pension plans, and many of the same rules apply to both multiemployer and single employer plans. Most of these rules come from the Employee Retirement Income Security Act (ERISA),[1] which itself includes many provisions of the Internal Revenue Code (I.R.C.) and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). ERISA's Title I fiduciary rules and Title I and II vesting, participation, and benefit accrual rules generally apply to both types of plans in the same manner, subject to certain special considerations discussed below. For example, in describing multiemployer plans for purposes of the IRS determination letter program, the IRS indicates that multiemployer plans are identified as being subject to the qualification rules under I.R.C. §401(a)[2] that apply to single employer plans, including, but not limited to rules applicable to, (1) eligibility, (2) vesting, (3) joint and survivor annuity requirements, and (4) distributions. However, some rules, such as certain limits under I.R.C. §415, apply differently to multiemployer plans.[3]

In the area of employer funding liability, however, the treatment of multiemployer plans differs from that of single employer plans. MPPAA imposes withdrawal liability on contributing employers who cease contributing to a multiemployer plan, or whose rate of contributions falls off dramatically. Case law contains fiduciary and benefit precedents that are of special interest to multiemployer plans, if not unique to them.

This Portfolio examines the special rules for multiemployer plans. Many of those rules are found in MPPAA, which amended ERISA to address certain problems that ERISA left unresolved. MPPAA was the product of a Pension Benefit Guaranty Corporation (PBGC) study and of extensive legislative debate as to the best way to grapple with multiemployer plan issues. When Congress was considering MPPAA, the financial condition of multiemployer plans was eroding and serious problems had developed in certain industries.

A multiemployer pension plan ordinarily insulates its beneficiaries from the adverse financial effects of any one employer's shutdown, as long as there are many other employer-sponsors that continue to employ the active participants and to contribute to the common trust fund. If the entire contribution base is in sustained decline, however, the fewer remaining contributors are forced to absorb a greater share of the funding costs of benefits for workers previously employed by former contributing employers. Before MPPAA, if the plan terminated because of such a sustained decline, only the employers remaining in the plan at the time of plan termination had to pay termination liability to the PBGC. The fear of being among the few employers left in the final days of a declining multiemployer plan caused a "race to the exit," as employers sought to leave before the plans terminated, generating a cycle of plan decline. In other words, the threat of liability contained in ERISA before MPPAA may have helped cause the problem it was designed to prevent.

MPPAA was intended to maintain the financial health of multiemployer plans that were in solid financial shape and to cut off the race to the exit by imposing an exit penalty in the form of withdrawal liability. Many of the issues that MPPAA

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[1] All "ERISA" section references herein are to the Employee Retirement Income Security Act of 1974, as amended, and the Labor regulations promulgated thereunder, unless otherwise specified.

[2] All "I.R.C." section references herein are to the Internal Revenue Code of 1986 as amended, and the Treasury regulations promulgated thereunder, unless otherwise specified.

[3] IRM 7.11.6.1.1(3) (09-06-17).

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addresses with respect to pension plans have their parallels in multiemployer health plans, for which there is no similar comprehensive legislation, except for the rules for the coal industry enacted by the Energy Policy Act of 1992. Furthermore, the MPPAA rules have again become highly relevant in view of the funding crisis that defined benefit pension plans began to experience at the beginning of the 21st century.

Congress addressed the funding crisis affecting multiemployer plans when it passed the Pension Protection Act of 2006 (2006 PPA). The 2006 PPA made minor changes to the minimum funding standards established under MPPAA and created a set of rules for underfunded multiemployer plans. Specifically, the 2006 PPA established the categories of "endangered," "seriously endangered," and "critical" for the most severely underfunded multiemployer plans and required plan actuaries to certify the plan's status annually. If a plan falls into one of these categories, the plan sponsor must adopt and abide by a special plan until its funding status improves. Changes made by the 2006 PPA became effective for plan years beginning after 2007 and were set to expire in 2014 but were later made permanent.

Under MPPAA, financially troubled multiemployer plans facing insolvency entered "reorganization status," which affected a plan's funding, benefit levels and reporting and disclosure obligations. After 2006 PPA established critical and endangered status for underfunded plans, many practitioners considered the reorganization rules unnecessary and burdensome. The Multiemployer Pension Reform Act of 2014 (MPRA) repealed the rules on reorganization status, effective for plan years beginning after December 31, 2014. Instead of reorganization, MPRA created a new category called "critical and declining" status. MPRA permits plans that qualify as critical and declining to suspend benefits for retirees. MPRA also made the 2006 PPA changes permanent and enhanced some other techniques to improve multiemployer plan funding status and shore up the PBGC. For example, MPRA facilitates the PBGC's ability to assist plan mergers and partition plans.

Finally, Congress authorized special financial assistance (SFA) to severely underfunded multiemployer plans, paid through the PBGC, as enacted under the American Rescue Plan Act of 2021 (ARPA).[4] Special financial assistance is financial support through direct monetary transfers, sufficient to pay all benefits through the end of the 2051 plan year (although the determination of that amount has been the subject of some controversy), with no obligation for the plan to ever repay the amounts to the PBGC.[5] Among the procedural and substantive requirements necessary to receive SFA, multiemployer plans that cut retirees' benefits under MPRA must reinstate those benefits in order to be approved for SFA.[6]

B. Multiemployer Plan Status

A plan is a multiemployer pension plan if it is an employee pension benefit plan:

(1) to which more than one employer must contribute; and

(2) maintained pursuant to one or more collective bargaining agreements between at least one employee organization and more than one employer.[7]

A plan retains its status as a multiemployer plan following termination if it was a multiemployer plan during the plan year prior to its termination date.[8] The definition of multiemployer plan does not require that each contributing employer maintain the plan pursuant to a collective bargaining agreement. Accordingly, every employer that maintains the plan need not do so pursuant to a collective bargaining agreement. However, all employees who benefit under a multiemployer plan must do so pursuant to some form of participation agreement between their employer and the plan, even if the agreement is not collectively bargained.

A *multiple* employer pension plan, in contrast, is a plan that benefits the employees of more than one unrelated employer, but is not subject to a collective bargaining agreement. Multiple employer plans are treated for most purposes, including termination liability, as if they were single employer plans.

Not every entity or practice providing benefits is considered an ERISA plan. Payroll deductions, holiday gifts, sales to employees, hiring halls, remembrance funds, strike funds, "industry advancement funds," certain group insurance programs and unfunded scholarship programs are excluded,[9] as are sick pay plans.[10] A multiemployer insurance trust holding a group policy is not a pension plan subject to ERISA, nor is the payment of short-term disability benefits from an employer's general assets.[11] Pension plans generally fall into two categories: defined benefit plans and defined contribution plans. ERISA's minimum funding and withdrawal liability rules, however, apply only to defined benefit pension plans.

A plan is considered a multiemployer plan even if all but a small percentage of covered employees are employed by one contributing employer.[12] Although not every contributing employer must maintain the plan pursuant to a collective bargaining agreement for a plan to be a multiemployer plan, a plan cannot bootstrap itself into multiemployer status if the sole employer that is party to a collective bargaining agreement is the sponsoring union that bargains collectively with its own office workers. The same is apparently true if the only relevant col-

[4] Pub. L. No. 117-2, §9704, enacted March 11, 2021.

[5] *See* ERISA §4262(j), added by Pub. L. No. 117-2, §9704(b). *See also* §432(b)(7); §432(k), added by Pub. L. No. 117-2, §9704(d).

[6] ERISA §4262(k)(1); I.R.C. §432(k)(2)(A).

[7] ERISA §3(37)(A); I.R.C. §414(f); ERISA §4001(a)(3) (definition for PBGC purposes). *See Irigaray v. Dairy Emps. Local 17*, 153 F. Supp. 3d 1217 (E.D. Cal. 2015) (plans generally qualify as multiemployer plans on definition under ERISA §3(37) alone and no legal authority exists to support claim that mismanagement and misallocation of plan assets by plan sponsor, trustees, or union invalidates the existence of such plans). An employee organization is defined in ERISA §3(4) and usually is a labor union. 29 C.F.R. §2510.3-37. Multiemployer employee welfare benefit plans are beyond the scope of this Portfolio.

[8] §414(f)(3).

[9] 29 C.F.R. §2510.3-1(b) through §2510.3-1(k).

[10] *Abella v. W.A. Foote Mem'l Hosp., Inc.*, 740 F.2d 4 (6th Cir. 1984), *reh'g denied*, 5 EBC 2120 (6th Cir. 1984).

[11] *Donovan v. Dillingham*, 668 F.2d 1196 (11th Cir. 1982), on reh'g, 688 F.2d 1367 (11th Cir. 1982), *on remand*, 5 EBC 2092 (N.D. Ga. 1984); *Taggart Corp. v. Life & Health Benefits Admin., Inc.*, 617 F.2d 1208 (5th Cir. 1980). *See also Diak v. Dwyer, Costello & Knox, P.C.*, 33 F.3d 809 (7th Cir. 1994) (applying the *Donovan* standards, court held that providing informal, ad hoc arrangements with individuals, coupled with past practice, to provide benefits at retirement did not establish ERISA-covered pension plan).

[12] For this purpose, all trades or businesses under common control are treated as a single employer. §414(f)(2).

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lective bargaining agreement is between the sponsoring union and the employees of the plan itself.[13]

Because multiemployer plans are maintained pursuant to one or more collective bargaining agreements, I.R.C. §413 (covering collectively bargained plans) applies to multiemployer plans. Section 413 details how certain qualification and other rules apply to collectively bargained pension plans.[14] In general, the I.R.C.'s vesting rules and the rules governing liability for the §4971 tax on failure to satisfy the minimum funding standard apply as though all collectively bargained participants were employed by a single employer. For purposes of the rules governing participation, nondiscrimination, and partial termination, all collectively bargained employees covered by the same benefit formula are treated as employed by a single employer. For purposes of the exclusive benefit rule of I.R.C. §401(a)(2), the minimum funding standard and the I.R.C.'s limits on deductibility of employer contributions,[15] all participants are treated as if they were employed by a single employer. Special rules exist for applying the limits on annual benefits under I.R.C. §415(b) to participants in multiemployer plans. Sponsors of plans that cover any collectively bargained employees must use Form 5300 to apply for determination letters.[16]

Certain plans that became multiemployer plans for the first time because of the change in the definition in 1980 were permitted to irrevocably elect single employer plan status.[17] However, under a transition rule, a plan that previously elected not to be treated as a multiemployer plan may revoke the prior election and elect to be a multiemployer plan, using procedures prescribed by the PBGC, if, for each of the three plan years before August 17, 2006, it would have been a multiemployer plan but for the election. In addition, a plan that meets certain criteria may elect, using procedures prescribed by the PBGC, to be a multiemployer plan if: (1) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by tax-exempt organizations; (2) the plan was established before September 2, 1974; and (3) for each of the three plan years immediately preceding the first plan year for which the election is effective, the plan has met these criteria.[18] Such revocations are irrevocable and are effective starting with any plan year beginning on or after January 1, 1999, and ending before January 1, 2008, as designated by the plan. However, a plan that elects multiemployer status ceases to be a multiemployer plan as of the plan year beginning immediately after the first plan year for which the majority of its employer contributions were made or required to be made by organizations that were not tax-exempt. For purposes of the I.R.C. and ERISA, a plan making the election as described above to be treated as a multiemployer plan is treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers under that agreement or participation in the plan by one or more employees of an employer under the agreement, regardless of whether the plan was created, established or maintained for such employees by virtue of another document that is not a collective bargaining agreement.[19] Elections and revocations under this rule had to be made by August 17, 2007.

For purposes of Title I, a qualified football coaches' plan generally is treated as a multiemployer plan. A qualified football coaches plan is a defined contribution plan established and maintained by a tax-exempt organization, the membership of which consists entirely of individuals who primarily coach football as full-time employees of four-year colleges or universities.[20]

C. Purchase of Annuity Before Standard Termination

Although the legality of the practice is uncertain, some plan sponsors purchase irrevocable commitments to pay plan benefits before a standard plan termination. An irrevocable commitment is an obligation made by an insurer to pay benefits to a named participant or beneficiary. The terms of the contract must provide that the obligation cannot be cancelled without the consent of the participant or beneficiary except in cases of fraud or mistake, and the contract must be legally enforceable by the participant or beneficiary. Plan administrators may consider purchasing an irrevocable commitment to benefit from favorable interest rates or to progressively prepare for plan termination.

The PBGC expressed concerns that this practice allows plan sponsors to avoid legal protections provided under the standard termination process.[21] However, the PBGC announced that it plans no immediate regulatory activity or guidance related to plan sponsors purchasing annuities outside the standard process for terminating pension plans.[22] The PBGC may still audit and take enforcement action against plans that make a final distribution of assets without going through the standard termination process, discussed below.

D. Multiemployer Welfare Plans

Welfare benefit plans are defined in ERISA as employee benefit plans other than pension benefit plans.[23] Welfare benefit plans provide medical, surgical, hospital, sickness, accident, disability, death, unemployment, vacation, training, day care, scholarship, legal service benefits, or any other Labor Management Relations Act (LMRA) §302(c)(5) benefits.[24] Welfare plans are subject only to the parts of ERISA that regulate fiduciary conduct and reporting and disclosure.[25] ERISA's rules on

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[13] DOL Opinion Letter 91-35A.

[14] §413(b).

[15] *See* §404.

[16] For information on the determination letter process, see 360 T.M., *Qualified Plans — Determination Letter Procedures.*

[17] ERISA §3(37)(E), §4303; I.R.C. §414(f)(5); former 29 C.F.R. Part 2971 (1981).

[18] I.R.C. §414(f)(6), as added by Pub. L. No. 109-280, §1106(b), and as amended by Pub. L. No. 110-28, §6611(a)(2), effective August 17, 2006; ERISA §3(37)(G), added by Pub. L. No. 109-280, §1106(a), and amended by Pub. L. No. 110-28, §6611(a)(1), and Pub. L. No. 110-458, §111(c), effective August 17, 2006.

[19] I.R.C. §414(f)(6)(F); ERISA §3(37)(G)(vii).

[20] ERISA §3(37)(F). The organization must have been in existence on September 18, 1986. This definition generally is intended to apply to the American Football Coaches Association.

[21] 74 Fed. Reg. 61,074 (Nov. 23, 2009).

[22] 75 Fed. Reg. 82,095 (Dec. 29, 2010).

[23] ERISA §3(1).

[24] ERISA §3(1).

[25] *See, e.g.,* ERISA §101(a), Title I, Subtitle B, Part 1 and Title I, Part 4.

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minimum funding, vesting, and benefit accrual do not apply. Welfare plans can be funded. Funded welfare plans are often called voluntary employees' beneficiary associations.[26]

Taxation of welfare plan benefits paid to participants varies from benefit to benefit and is governed by numerous I.R.C. provisions.[27]

Comment: Typically, the parties to a collective bargaining agreement will negotiate a contribution rate and a benefit schedule for a multiemployer welfare plan. The benefit schedule is designed to actuarially approximate the amount of benefits that can be purchased based on projected contribution levels. In a multiemployer plan, different employers may negotiate different contribution and benefit levels. Multiemployer VEBAs provide a wide variety of benefits, such as health and accident benefits (including retiree healthcare), short- and long-term disability benefits, and group-term life insurance benefits (including a so-called "retired lives reserve" feature for retirees). Often, more than one type of benefit is included in an overall "wrap around" plan document. In fact, it is not unusual in the multiemployer world for a single welfare benefit document to serve double duty as both the plan document and the summary plan description (SPD). The advantages of such an approach are obvious, i.e., drafting costs are saved by having one document instead of two, the plan document is drafted "in plain English" so as to be understood by participants and beneficiaries and there is no risk of the SPD containing language that is contrary to the text of the plan document and vice versa. However, there are certain disadvantages to the single document approach that the drafter should consider. For example, it is sometimes difficult to precisely detail complicated benefits and exclusions in an SPD-type format. Second, if more than one employee group participates in the VEBA, some employers may not want their employees to know what benefits the employees of other employers are receiving. This latter concern can be addressed by creating a base plan document/SPD, with a separate schedule of benefits and exclusions for each employee group included as an appendix. Another problem that arises from the "one document" approach is that plan boards of trustees and plan administrators may become more informal in their administrative procedures when a single document is modified than would be the case with a formal plan document and a separate SPD. It is important to keep the trustees and plan administrator focused on the fact that, because a single document is performing double duty, both the formalities applicable to plan documents and those applicable to SPDs apply. Therefore, changes should be adopted by formal written plan amendments. Once the amendment is adopted, it usually is necessary to send out either a Summary of Material Modifications (SMM) or a revised SPD explaining the change. Sometimes, the SMM takes the form of simply sending participants a copy of the amendment to their plan booklet together with a cover note informing them that the trustees adopted the enclosed change at their recent meeting.

One court has held in an unpublished opinion that the trustees of a multiemployer health fund abused their discretion when they made unilateral changes to the methodology used for calculating the employer's contribution rates. The Third Circuit ruled that the change in methodology contradicted the written terms of a collective bargaining agreement between the employer and the union, explaining that although the trustees may have had the authority to raise the dollar rate per active employee, they did not have the authority to contradict the bargained-for collective bargaining agreement by requiring the employer to make contributions on a per-retiree basis. The trustees had made these changes in order to account for the fact that the employer, although contributing amounts set out in a collective bargaining agreement for active employees, was contributing less per month than the cost of its own retirees who were being provided benefits under the plan.[28]

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[26] I.R.C. §501(c)(9), §501(c)(17) and §501(c)(20). For a discussion of the tax treatment of VEBAs, see 395 T.M., *VEBAs and Other Welfare Benefit Funding Arrangements*.

[27] *See, e.g.*, rules governing group-term life insurance (I.R.C. §79); accident and health (I.R.C. §105); educational assistance (I.R.C. §127); and dependent care assistance (I.R.C. §129). I.R.C. §501(c)(9), §419, §419A.

[28] *United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Health & Welfare Fund v. Super Fresh Food Markets, Inc.*, 352 Fed. Appx. 721 (3d Cir. 2009).

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II. Qualification Issues Affecting Multiemployer Pension Plans

While this Portfolio is primarily focused on rules that only apply to multiemployer plans, certain qualification rules that apply to most qualified retirement plans have special considerations for their application to collectively bargained plans. In general, the vesting rules and the excise tax on failure to satisfy the I.R.C.'s minimum funding standard apply as though all participants were employed by a single employer. For purposes of participation, nondiscrimination, and partial termination, all employees who are covered by the same benefit computation formula are considered to be employed by a single employer. For purposes of the exclusive benefit rule, the minimum funding standard and the I.R.C.'s limits on deductibility of plan contributions, all participants are considered as though they were employed by a single employer. Other I.R.C. provisions contain special rules for multiemployer plans, primarily for funding, vesting, and limitations on benefits.

The following sections describe the application of the fiduciary, and other rules, arising under Title I of ERISA to multiemployer plans.

A. *Minimum Participation, Coverage and Nondiscrimination Rules*

The minimum coverage and nondiscrimination requirements of §410 and §401(a)(4) are applied to a multiemployer plan as if all employees of employers who are parties to the collective bargaining agreement, and who are subject to the same benefit formula, are employed by a single employer.[29] Union employees are also treated as employed by the same employer, provided such employees separately satisfy the minimum coverage and nondiscrimination requirements.[30] A collectively bargained plan that covers professional employees may treat all covered employees as employed by a single employer only for purposes of the §410(a) minimum participation (e.g., minimum age and service requirements) rules, and not the minimum coverage requirements of §410(b).[31]

The "employed by a single employer" treatment provides a degree of administrative simplicity, but the broader relief for collectively bargained plans is the exclusion of all noncollectively bargained employees for nondiscrimination and coverage testing.[32] If only the collectively bargained employees are considered the testing population for the nondiscrimination and coverage test, it is virtually certain the plan covers all employees in the testing population. This certainty is why it is occasionally said that collectively bargained plans are exempt from coverage and nondiscrimination testing — the exemption is practical, not a technical exemption. This contrasts with the actual exemption the collectively bargained portion of a multiemployer plan has from the minimum participation requirements of §401(a)(26).[33]

1. *Collectively Bargained Employees*

Generally, an employee who performs services during a plan year as both a collectively bargained and a noncollectively bargained employee is treated as collectively bargained for hours of service performed as a collectively bargained employee and as noncollectively bargained for hours of service performed as a noncollectively bargained employee.[34]

In applying these tests, a plan is divided into two component plans: one for employees covered (or treated as covered) by a collective bargaining agreement (CBA); and a second for noncollectively bargained employees that must satisfy the nondiscrimination rules on an employer-by-employer basis.[35]

When more than 2% of the employees covered by the collective bargaining agreement are professional employees, none of the employees covered by the CBA are considered to be covered by a collective bargaining agreement. This means that the entire group of employees subject to that agreement, and not just the professional employees, must satisfy the nondiscrimination rules as if the group were not collectively bargained.[36] A "professional employee" is one who follows a certain enumerated professional career, such as an actuary or medical doctor, etc., and is highly compensated. Engineers are not considered professional employees for purposes of this definition.[37]

Certain former collectively bargained employees who remain covered by the plan as noncollectively bargained employees may be treated as collectively bargained.[38] Only employees who are or were members of a unit covered by a CBA that provides for their participation in the plan in the current year can have their status changed from noncollectively bargained to collectively bargained. The CBA, rather than the plan, must provide for continued coverage, although a participation agreement or similar document may be taken into account. Employees who satisfy this requirement also must satisfy one of the following three rules to be treated as collectively bargained employees.[39]

The first rule, known as the "part-year" rule, treats an employee who performs services as both a collectively bargained and noncollectively bargained employee during a plan year for (1) one or more employers that are parties to the CBA, (2) the plan or related plans, or (3) the union, can be treated as collectively bargained for that year if at least half of the employee's hours of service for the year were performed as a collectively bargained employee.[40]

Under the second rule, known as the "collective bargaining cycle" rule, an employee who was collectively bargained for all hours of service during a plan year can be treated as collectively bargained for all service during the entire period of the collective bargaining agreement or, if later, until the end of the next plan year. The plan's accrual rules must not treat such

[29] §413(b)(1), §413(b)(2).

[30] §413(b)(8). *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984).

[31] §413(b)(9).

[32] §410(b)(3)(A), §401(a)(4). Reg. §1.410(b)-6(d).

[33] §401(a)(26)(D).

[34] Reg. §1.410(b)-6(d)(2)(i).

[35] Reg. §1.410(b)-7(c)(4)(i)(A) and §1.410(b)-7(c)(4)(ii)(B).

[36] Reg. §1.410(b)-6(d)(2)(iii)(B).

[37] Reg. §1.410(b)-9, §1.401(a)(26)-8.

[38] Reg. §1.410(b)-6(d)(2)(ii).

[39] Reg. §1.410(b)-6(d)(2)(ii)(A).

[40] Reg. §1.410(b)-6(d)(2)(ii)(B).

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an employee more favorably than similarly situated employees who are collectively bargained.[41]

The third rule, known as the "alumni" rule, allows employees treated as collectively bargained due to the "collective bargaining cycle" rule above to continue being treated as collectively bargained indefinitely if (1) they are performing services for one or more of the employers that are parties to the CBA for the plan or for the union, (2) the plan's benefit accrual provisions treat them no more favorably than similarly situated collectively bargained employees, and (3) no more than 5% of employees covered by the plan are noncollectively bargained employees.[42]

The definition of who is a collectively bargained employee must be applied to all employees on a reasonable and consistent basis for the plan year.[43]

Practice Insight: It is important not to overlook the fact that many multiemployer plans also benefit some noncollectively bargained employees. Typically, these are employees of the pension fund itself and employees of the union that sponsors the plan who may not be covered by a CBA. Practitioners should question fund office personnel to determine whether the plan covers any noncollectively bargained employees. The benefits of these employees must satisfy nondiscrimination testing under §401(a)(4) and §410, considering only such noncollectively bargained employees as the entire testing population.

2. Testing Procedures

Special procedures permit plan sponsors to substantiate the data they use in nondiscrimination testing.[44] Because the administrator of a multiemployer plan may not have direct access to the employer-specific data needed for nondiscrimination testing but not needed for determining participant benefits, Rev. Proc. 93-42 provides additional ways for multiemployer plans to satisfy the nondiscrimination requirements. These rules supplement other methods, such as snapshot testing and using a three-year testing cycle, which are available to both single employer and multiemployer plans.

Each participating employer must satisfy the nondiscrimination rules for its disaggregated population of noncollectively bargained employees benefiting under the plan. Failure to satisfy the nondiscrimination rules may result in disqualification of the plan for all participating employers. The IRS, however, has the authority to retain the qualified status of a multiemployer plan for innocent employers when the plan has followed procedures reasonably designed to obtain from each employer appropriate information substantiating that the portion benefiting the employer's noncollectively bargained employees satisfies the nondiscrimination requirements, and where it is reasonable for the plan administrator to rely on that information.[45] For example, a plan administrator may rely on a participating employer's certification that the portion of the plan benefiting its disaggregated population of noncollectively bargained employees satisfies the nondiscrimination requirements if it is reasonable to rely on the certification.

[41] Reg. §1.410(b)-6(d)(2)(ii)(C).
[42] Reg. §1.410(b)-6(d)(2)(ii)(D).
[43] Reg. §1.410(b)-6(d)(2)(i) and §1.410(b)-6(d)(2)(ii)(F).
[44] Rev. Proc. 93-42, *modified by* Rev. Proc. 95-34.
[45] Rev. Proc. 93-42, §6.02.

B. Vesting Requirements

In general, the I.R.C.'s vesting rules apply to a multiemployer plan as if all participating employers were a single employer.[46]

C. Service Crediting

1. Participation and Vesting Service

For participation and vesting purposes, service is credited for work with any employer who shares in maintaining the plan, provided that the employee is employed in either covered service or contiguous noncovered service. Thus, the plan not only must credit all service for an employee who moves from covered service with one employer maintaining the plan to covered service with another employer maintaining the plan, the plan must also credit all service for an employee who moves from contiguous noncovered service to covered service or vice versa.[47]

Contiguous noncovered service is service not covered by the CBA if the employee shifts from covered to noncovered service (or vice versa) without a quit, discharge, or retirement occurring between such change, unless the change occurs because of a transfer between members of a controlled group.[48] Using that definition to determine the converse term, noncontiguous noncovered service occurs when the employee moves from one participating employer to another participating employer and shifts from covered service to noncovered service, or vice versa. The noncovered period of service does not have to be credited for vesting or participation purposes.

A multiemployer plan is not required, for vesting purposes, to credit service with a participating employer after a complete withdrawal of that employer from the plan, a partial withdrawal of that employer in conjunction with the decertification of the collective bargaining representative or with any participating employer after the termination date of the plan under ERISA §4048.[49]

2. Credit for Past Service

When an employer joins a multiemployer plan, its employees often receive partial or full credit for their service prior to joining the plan. The credit can be provided for purposes of eligibility to participate, eligibility for certain types of benefits, vesting and/or benefit accrual. A multiemployer plan can cancel these past service credits if the employer withdraws from the plan.[50] Cancellations may be prohibited, however, if proper disclosure was not made or the forfeiture was not justified by actuarial considerations.[51]

A multiemployer defined benefit or money purchase plan that conditions service credit or contribution allocations on an employer making its required contributions, however, vi-

[46] §413(b)(4).
[47] *See* 29 C.F.R. Reg. §2530.210(c)(1).
[48] *See* 29 C.F.R. Reg. §2530.210(c)(3)(iv).
[49] §411(a)(4)(G).
[50] §411(a)(3)(E).
[51] *Elser v. IAM Nat'l Pension Fund*, 684 F.2d 648 (9th Cir. 1982); *Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982); *Cent. Tool Co. v. IAM Nat'l Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981).

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olates the “definitely determinable benefit” rule for pension plans because it allows an employer’s actions to determine the amount of participants’ benefits. Although past service credit can be rolled back under certain circumstances when an employer withdraws from a multiemployer plan and, in the case of plans in financial difficulty, benefits can be cut back to the “resource benefit level,” an ordinary failure by an employer to make required contributions cannot deprive participants of benefits to which they otherwise are entitled. Until the plan collects the delinquent contributions from the employer, the delinquency could trigger or add to a minimum funding deficiency.[52] In this situation, the plans would have to pursue collection proceedings against the delinquent employer. Employees’ benefits would continue to accrue until the plan’s benefit formula was amended. Any amendment reducing or ceasing the rate of future accruals could be implemented only after an ERISA §204(h) notice was provided to affected participants. For plan years beginning after 2007, notice of an amendment that significantly reduces the rate of future accruals also must be provided to each contributing employer.[53]

Because the definitely determinable benefit rule does not apply to profit-sharing plans, multiemployer profit-sharing plans can provide that a contribution delinquency will affect only the allocations to the accounts of employees of the delinquent employer. This does not violate the I.R.C.’s definite allocation formula requirement.[54] ERISA §204(h) notice requirements do not apply to profit-sharing plans.

3. *Service Under Reciprocity Agreements Between Plans*

Multiemployer pension plans may cover employees who are not collectively bargained employees of contributing employers, including employees of a union, retirement fund and affiliated funds. If noncollectively bargained employees participate, the plan document must specifically provide for this participation and require the employer of the noncollectively bargained employees to enter into a “participation agreement” or “side agreement” with the multiemployer plan’s trustees.[55]

Multiemployer plans also can enter into reciprocity agreements with other multiemployer plans, usually plans in different locations that cover similar jobs and with affiliated chapters of the home fund’s union. Again, the plan’s terms must permit such agreements. This type of reciprocity agreement allows participants to aggregate their service under several plans to qualify for a benefit from a plan and specify how much of the participant’s benefit each plan must pay.[56]

In a typical reciprocity agreement, the trustees of two plans maintained by local or regional affiliates of a national union may agree that each plan will apply covered service by the employee for an employer participating in the other plan toward the benefit earned under the employee’s home plan.

There are various types of reciprocity agreement designs. A frequently used design is the “money follows the man” method. Under this method, the plan covering a temporary participant collects contributions from the participant’s temporary employer and remits them to the employee’s home plan. The home plan provides a benefit based upon the home plan’s benefit formula. Another type of agreement uses a prorated method under which the employee receives benefit accruals under each plan based on the relative hours of covered employment the employee performed under the plan. Under the prorated method, the benefit provided is calculated based on the hours worked under the plan divided by the total hours worked by the employee during the year.[57]

Plan sponsors also use variations of these methods in designing reciprocity agreements to fit their needs. A reciprocity agreement will not cause the signatory plans to become disqualified provided certain requirements are satisfied.[58]

For example, a qualified plan must be maintained pursuant to a definite written program.[59] All employees participating in a collectively bargained plan are treated as employed by each of the employers maintaining the plan for purposes of the I.R.C.’s "exclusive benefit rule."[60] The money-follows-the-man type of agreement, at first glance, appears to violate these rules because it provides for amounts to be contributed to the employee’s home plan by an employer that is not signatory to the home plan. If the terms of the home plan permit it to enter into reciprocity agreements, the agreement entered into by the two plans will be considered to be a part of the home plan’s "definite written program" and the temporary employer will be considered to be maintaining the home plan for the limited purposes of satisfying §401(a)(1) and the exclusive benefit rule. Therefore, including appropriate language permitting reciprocity agreements is a must. Maintaining accurate records of how service has been credited pursuant to a reciprocity agreement is also vital should a multiemployer plan become the subject of an IRS audit. In addition, the plan administrator is responsible for asking the participant if he or she has any reciprocity service under another plan and to investigate to determine how much additional service should be credited to the participant pursuant to such agreement. The plan’s summary plan description should also contain language reminding participants to ask the plan administrator if they believe that they may be entitled to service credit under a reciprocity agreement.

In *Smith v. Contini*,[61] the Third Circuit held that if a plan (Plan 1) recognizes under a reciprocity agreement years of service accumulated by employees under another plan (Plan 2),

[52] *See* 29 C.F.R. §2530.210; Rev. Rul. 85-130.

[53] ERISA §204(h)(1), as amended by Pub. L. No. 109-280, §503(c)(1); I.R.C. §4980F(e)(1), as amended by Pub. L. No. 109-280, §502(c)(1).

[54] *See* Reg. §1.401-1(b)(1)(ii). *See* discussion in 370 T.M., *Distributions from Qualified Plans — Taxation and Qualification.*

[55] *See* IRM 4.72.14.1.6(11) (12-02-19), obsoleted by the internal only publication of *Employee Plans Technical Guidelines, Multiemployer Plan Examination Guidelines*, effective November 22, 2022. At the time of this writing, the IRS has removed all technical material from the IRM, and informally indicated the intent to re-publish the material as a Technical Guide for its exam agents.

[56] *See* IRM 4.72.14.1.7 (12-02-19), obsoleted by the internal only publication of *Employee Plans Technical Guidelines, Multiemployer Plan Examination Guidelines*, effective November 22, 2022.

[57] *See* IRM 4.72.14.1.7 (12-02-19), obsoleted by the internal only publication of *Employee Plans Technical Guidelines, Multiemployer Plan Examination Guidelines*, effective November 22, 2022.

[58] Section 401(a)(1) provides in part that a plan will be qualified if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions.

[59] Reg. §1.401-1(a)(2).

[60] §413(b)(3).

[61] 205 F.3d 597 (3d Cir. 2000).

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then Plan 1 cannot disregard that service for vesting purposes. In *Smith*, under a reciprocity agreement between two multiemployer plans maintained by two Teamsters locals, Plan 1 provided a "pro rata" pension to participants who otherwise would not qualify for a benefit based solely on their service under that plan. Plan 1 paid a pro rata pension only to participants with at least 15 years of combined service under the two plans, a requirement that exceeded the statutory 10-year cliff vesting rule then in effect. The court held that, because Plan 1 was subject to the vesting rules, despite the fact that ERISA and the I.R.C. permit a plan to disregard service with an employer during a period in which that employer did not maintain the plan, when a plan provides a pension based on service earned under another plan, it cannot disregard that service for vesting purposes. As a result, participants with 10 or more years of service based on their combined service under the two plans were entitled to pro rata pensions.

Note: In *Smith*, the participants continued to work for the same employer, even though their employment was transferred to the jurisdiction of the plan of another local union. Thus, their service was earned while working for a single employer without interruption. It is unclear whether the result would be the same if the employees' service under Plan 2 had been for a different employer, particularly one that sponsored Plan 2 but not Plan 1. The result in that situation might depend upon the plan's language.

D. Miscellaneous Qualification Requirements

1. "Thirteenth Check" Distributions

Some multiemployer pension plans distribute additional benefits to participants in payment status as a sort of *de facto* cost-of-living adjustment. Participants who receive these checks receive distributions that exceed the annuity benefits they normally would receive. This practice is known as issuing a "thirteenth check," i.e., a check in addition to the 12 monthly annuity checks that a participant typically receives. A plan can permit such extra distributions in some or all years, though repeated plan amendments permitting a thirteenth check may give rise to a claim that the extra check has become a permanent plan provision protected by the anti-cutback rule.[62] If a plan does not contain appropriate enabling language, paying such distributions may violate a number of qualification rules, including the definitely determinable benefit rule,[63] the §415 limits, the anti-backloading rules, and the requirement that a plan's fiduciaries operate it in accordance with its documents.[64] Any extra checks to noncollectively bargained retirees must satisfy the nondiscrimination rules for former employees.[65]

2. Limits on Accruable Benefits

Benefits provided under a qualified defined benefit plan cannot exceed a life annuity greater than the lesser of $160,000 per year (as adjusted for inflation) or the participant's defined benefit compensation limit.[66] A special rule exempts multiemployer defined benefit plans from the compensation limit, resulting in the application of only the dollar limit to multiemployer defined benefit plan limits.[67]

The entire benefit payable to a participant in a multiemployer plan is considered for §415(b) purposes, not the separate benefit earned from each employer maintaining the plan.[68]

Generally, the §415(b) limits apply on a combined basis for all defined benefit plans sponsored by the same employer.[69] Multiemployer plans, however, are not combined or aggregated with other multiemployer plans for purposes of applying the §415(b) limits.[70] Additionally, a multiemployer plan is not combined or aggregated with any other plan that is not a multiemployer plan for purposes of applying the dollar limit on annuity benefits to the other plan.[71] This leaves open the possibility that multiemployer plan benefits could be combined with benefits from a single employer defined benefit plan sponsored by the same employer for purposes of applying the §415(b) compensation limit to the single employer plan.

The exception from aggregating plan benefits for §415 purposes was effective for plan years beginning after 2001,[72] and plans that previously incorporated the benefit aggregation language from the prior version of the statute did not automatically eliminate the aggregation language and a possible benefit increase for some participants.[73]

A multiemployer plan participant is not treated as separating from service with a contributing employer for §415 purposes if the participant continues to be an employee of another contributing employer.[74]

Generally, if the §415(b) limits are exceeded for two or more plans that are aggregated for such purposes, one of the plans is disqualified until, considering only the benefits of the remaining qualified plans, the benefit limits are satisfied.[75] If one of those plans is a multiemployer plan, the non-multiemployer plan is disqualified.[76]

The $10,000 de minimis benefit exception of §415(b)(4) applies to multiemployer plan participants without regard to whether they have participated in one or more other plans maintained by another contributing employer, provided that none of the other plans was maintained as a result of collective bargaining involving the same employee representative as the multiemployer plan.[77]

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[62] Reg. §1.411(d)-4, Q&A-1(c)(1); *DeCarlo v. Rochester Carpenters Pension, Annuity, Welfare & S.U.B. Funds*, 823 F. Supp. 115 (W.D.N.Y. 1993).

[63] *See* Reg. §1.401-1(b)(1).

[64] *See* ERISA §404(a)(1)(D).

[65] Under Reg. §1.401(a)(4)-10.

[66] §415(b)(1). For current and previous indexed compensation limit amounts, see the Worksheets in 371 T.M., *Employee Plans — Deduction, Contributions, and Funding*.

[67] §415(b)(11); Reg. §1.415(b)-1(a)(6)(ii).

[68] Reg. §1.415(a)-1(e).

[69] §415(f)(1).

[70] §415(f)(2)(B), as redesignated by Pub. L. No. 110-458, §108(g); Reg. §1.415(f)-1(g)(1).

[71] §415(f)(2)(A); Reg. §1.415(f)-1(g)(2)(ii).

[72] Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, §654(c).

[73] *McCulloch v. Bd. of Trs. of SEIU Affiliates Officers and Emps. Pension Plan*, 487 F. Supp. 3d 228 (S.D.N.Y. 2020).

[74] Reg. §1.415(a)-1(f)(5)(ii).

[75] Reg. §1.415(g)-1(b)(3)(i).

[76] Reg. §1.415(g)-1(b)(3)(ii)(A).

[77] Reg. §1.415(b)-1(f)(3).

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3. Compensation Limit

Qualified plans can only take into account a participant's compensation up to a specified limit.[78] For multiemployer plans, the annual compensation limit applies separately with respect to pay from each unrelated employer maintaining the plan (instead of the employee's total compensation from all employers maintaining the plan).[79]

Example: In a year in which the compensation limit was $330,000, an employee participating in a multiemployer plan was employed by three unrelated employers maintaining the plan, and for the plan year received compensation of $105,000, $170,000, and $95,000 from the three employers. Since the compensation limit applies separately to pay received from each unrelated employer maintaining the plan, the plan can take into account the full $370,000 of the employee's compensation earned in service with all employers maintaining the plan without violating the compensation limit.[80]

4. Top-Heavy Rules

Multiemployer plans are treated as plans of each employer maintaining the plan to the extent that benefits under the plan are provided to employees of the employer because of service with that employer.[81]

A multiemployer plan need not include top heavy language in the plan document, provided that the plan (1) is not top-heavy in operation; and (2) covers only collectively bargained employees (if retirement benefits were the subject of good faith bargaining) or employees of the sponsoring union.[82]

5. Return of Mistaken Employer Contributions

Once contributions have been made to a qualified plan trust, the funds are subject to ERISA's requirements, including the requirement that trust assets are held for the exclusive purpose of providing benefits to participants and beneficiaries.[83] Accordingly, trust assets subject to ERISA generally cannot be returned to contributing employers, since such a transaction would not be considered paying benefits to participants and beneficiaries. However, certain amounts mistakenly contributed to an ERISA plan can be returned to the contributing employer.[84]

Under I.R.C. §401(a)(2), multiemployer plans can return mistaken contributions within six months of the date the plan administrator determines the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan qualifies under §401(a)), without violating the exclusive benefit rule.[85] Contributions may also be returned if conditioned on the plan's initial qualification or if the contribution is conditioned on its deductibility.[86] Withdrawal liability payments that are determined to be overpayments may also be returned to the contributing employer within six months of such determination.[87]

Generally, earnings on the mistaken contributions cannot be returned to the employer, and the amount of mistaken contributions returned to the employer are reduced by any losses.[88]

Note: Single employer plans can return mistaken contributions only if the contributions were made due to a mistake of fact, not a mistake of law.[89]

Whether a contribution was made due to mistake of fact has been the subject of significant examination by sponsors and government regulators. An excess contribution made based on an incorrect asset value has been determined to be a mistake of fact,[90] as has an excess contribution based on an incorrect participant and beneficiary count.[91]

Courts have held that a fund is not required to return contributions made by mistake.[92] Whether a refund is required depends on the effect of the refund on the fund.[93] Interest usually is not awarded.[94] Generally, earnings attributable to an excess contribution are not returned to the employer, and any losses attributable to an excess contribution must reduce the amount to be returned to the employer. However, when an employer overpays its withdrawal liability, the plan will not fail to satisfy §401(a)(2) if the overpayment with interest is returned to the employer.[95] In addition, the amount of the excess contribution or overpayment generally must be included in gross income by the employer if the excess amount resulted in a tax benefit for the employer in a prior taxable year. Any interest credited or paid on the refund of mistaken withdrawal liability payments must be included in gross income by the employer. If the erroneous payments were not made by mistake, but due to intentional underreporting, there may be no right to a refund.[96] If a plan provides refunds, the determination as to whether a refund

[78] §401(a)(17). For a discussion of the application of the compensation limit to qualified plans, see 371 T.M., *Employee Plans — Deductions, Contributions, and Funding.*

[79] Reg. §1.401(a)(17)-1(b)(4).

[80] Preamble to T.D. 8362, 56 Fed. Reg. 47,603 (Sept. 19, 1991).

[81] Reg. §1.416-1T, Q&A-2.

[82] Reg. §1.416-1T, Q&A-38. For more information on the top-heavy rules, see 351 T.M., *Plan Qualification — Pension and Profit-Sharing Plans.*

[83] ERISA §403(c)(1).

[84] ERISA §403(c)(2).

[85] ERISA §403(c)(2)(A). *See also* Rev. Rul. 77-200, and Rev. Rul. 91-4; *Irigaray Dairy v. Dairy Emps. Local 17*, 153 F. Supp. 3d 1217 (E.D. Cal. 2015) (mismanagement of plan assets is not, as a matter of law, a basis for a mistake of fact under ERISA §403(c)(2)).

[86] ERISA §403(c)(2)(B), §403(c)(2)(C).

[87] ERISA §403(c)(3).

[88] Reg. §1.401(a)(2)-1(b)(2)(ii)(A).

[89] ERISA §403(c)(2)(A)(i).

[90] PLR 201424032.

[91] PLR 201839010.

[92] *Phila. Journal, Inc. v. Teamsters Pension Fund of Phila.*, 891 F.2d 282 (3d Cir. 1989); *British Motor Car Distrib. v. S.F. Auto. Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989); *Teamsters Local 639 Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865 (4th Cir. 1981); *Producers Dairy Delivery Co. v. W. Teamsters Pension Fund*, 654 F.2d 625 (9th Cir. 1981); *Crown Cork & Seal v. Teamsters Pension Fund*, 549 F. Supp. 307 (E.D. Pa. 1982), aff'd without op., 720 F.2d 661 (3d Cir. 1983); *Fuller Cinder Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 2 EBC 2458 (E.D. Mich. 1982); *E.M. Trucks v. Cent. States, Se. & Sw. Areas Pension Plan*, 517 F. Supp. 1122 (D. Minn. 1981). *See also* PLR 8736071 (contributions made to multiemployer plan while union was not certified as bargaining representative were not made due to mistake of law or fact).

[93] *See Airco Indus. Gasses v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028 (3d Cir. 1988); *Dumac Forestry Servs. v. IBEW*, 814 F.2d 79 (2d Cir. 1987).

[94] *See Airco Indus. Gasses*, 850 F.2d 1028, 1037; *Dumac Forestry Servs.* 814 F.2d 79, 83.

[95] Reg. §1.401(a)(2)-1(b)(2)(ii)(B). *See also* 29 C.F.R. §4219.31(d).

[96] *Martin v. Keldorn*, 546 F. Supp. 889 (N.D. Ill. 1982).

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is available is reviewable.[97] Most, but not all, courts have found a federal court cause of action, implied under ERISA §502 or in common law under 28 U.S.C. §1331.[98] A refund claim generally may not be raised as a defense or counterclaim to a collection action, although some courts have allowed counterclaims.[99]

E. Deductibility of Contributions

Technically, there are two different deductible limits that apply to multiemployer defined benefit plans. One limit is the three-pronged limit that applied to all defined benefit plans prior to 2008;[100] with the prong most likely to be applicable being the plan's normal cost plus an amount necessary to amortize the unfunded accrued liability over 10 years.[101] As a practical matter, however, the other limit that is much more likely to apply is the deductible limit specifically applicable to multiemployer plans. According to that provision, the deductible limit for contributions to a multiemployer defined benefit plan is an amount not less than the excess (if any) of 140% of the plan's current liability, over the value of the plan's assets.[102]

A number of special deductibility rules apply to multiemployer plans. For example, multiemployer plans are exempt from the special combined plan limitation for defined benefit and defined contribution plans with overlapping coverage.[103] Additionally, each limitation under §404(a) is determined as if all participants in a collectively bargained plan were employed by a single employer. The amounts contributed to the plan by each employer for the portion of the taxable year that is included in the plan year do not exceed the deductible contribution limits if anticipated employer contributions for the plan year (determined in a manner consistent with the manner in which actual employer contributions are determined) do not exceed the deductible contribution limits.[104]

Thus, at the beginning of each plan year, working from the terms of the collective bargaining agreements and past contribution levels, the plan estimates what its contributions will be for the plan year. If the estimate does not exceed the plan-wide limit, each employer may (without having to make any further determination and without regard to subsequent events that may occur during the plan year) deduct all contributions it makes for the portion of its taxable year that is included within the plan year.[105] If the anticipated contributions exceed the deduction limit, the nondeductible portions of each employer's contributions must be allocated among the employers.[106]

Deductions for qualified plan contributions are allowed only upon payment,[107] creating a general rule (even for accrual basis taxpayers) that a deduction may be claimed for a contribution to a tax-qualified plan only in the taxable year in which the amount is contributed. A grace period rule deems a payment as made on the last day of the prior taxable year if it is made on account of the prior taxable year and is made by the due date for filing the employer's federal income return for the prior taxable year.[108] Some employers have attempted to deduct under §404(a)(6) contributions to multiemployer plans for the first several months of the following taxable year, arguing that such contributions should be treated in the same manner as those that relate back to the prior taxable year. Courts, however, have held that such contributions were not made "on account of" the prior taxable year and therefore were not deductible for the prior year under §404(a)(6).[109]

When contributions to a multiemployer plan exceed the deductible limits, the problem is often corrected by the trustees adopting amendments to increase benefits. Amendments having retroactive effect, however, must satisfy certain requirements,[110] including that multiemployer plans to adopt an amendment up to two years after the close of the plan year in which the change became effective, as long as the amendment generally does not reduce benefits.[111]

1. Transfers to Fund Health Benefits Under Section 420

Multiemployer plans may make qualified transfers of excess pension assets to retiree health accounts or life insurance accounts under §420.[112] Section 420 applies to multiemployer

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[97] *See, e.g., Award Serv., Inc. v. N. Cal. Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985).

[98] Jurisdiction exists: *Plucinski v. IAM Nat'l Pension Fund*, 875 F.2d 1052 (3d Cir. 1989) (no ERISA claim; claim is common law); *Dumac Forestry Servs. v. IBEW*, 814 F.2d 79 (2d Cir. 1987), *on remand*, 9 EBC 1271 (N.D.N.Y. 1988); *Whitworth Bros. Storage Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 794 F.2d 221 (6th Cir. 1986); *Chase v. Trustees of W. Conference of Teamsters Pension Trust Fund*, 753 F.2d 744 (9th Cir. 1985); *Peckham v. Bd. of Trs. of Int'l Bhd. of Painters & Allied Trades Union & Indus. Nat'l Pension Fund*, 719 F.2d 1063 (10th Cir. 1983), modified and vacated by 724 F.2d 100 (10th Cir. 1983). No jurisdiction: *Dime Coal Co. v. Combs*, 796 F.2d 394 (11th Cir. 1986).

[99] *S. Cent. United Food & Commercial Workers Unions v. C & G Markets, Inc.*, 836 F.2d 221, (5th Cir. 1988) (allowing interest as well); *Plumbers & Steamfitters Local Union No. 152 v. Bland*, 745 F. Supp. 1172 (N.D. W. Va. 1990); *Ethridge v. Masonry Contractors*, 536 F. Supp. 365 (N.D. Ga. 1982).

[100] §404(a)(1)(A).

[101] §404(a)(1)(A)(iii).

[102] §404(a)(1)(D).

[103] §404(a)(7)(C)(v).

[104] §413(b)(7).

[105] *See Am. Stores Co. v. Commissioner*, 108 T.C. 178 (1997), aff'd, 170 F.3d 1267, (10th Cir. 1999) (explaining relationship between §413(b)(7) and §404(a) deduction limitation, court disallows deductions for post-year-end contributions to multiemployer plan on ground that payment is "on account of" previous taxable year under §404(a)(6) only if deduction for that year was consistent with plan's anticipatory treatment of payment); PLR 200410028 (plan's actual contributions for plan year that exceeded §404(a) nevertheless were fully deductible for plan year under §404(a) and §413(b)(7) because plan's anticipated contribution for plan year did not exceed §404(a) deduction limit and actuarial and other assumptions that comprised determination of anticipated contribution for plan year were reasonable); GCM 39677 (Oct. 30, 1987) (exception under §413(b)(7) does not apply if anticipated employer contributions exceed §404(a) limit).

[106] Section 413(b)(7) provides that the portions of each employer's contributions must be allocated in accordance with regulations prescribed by the Secretary, but the IRS has not provided any guidance. *See* PLR 200302050 and PLR 200330047. For further discussion of §413(b)(7), see 371 T.M., *Employee Plans — Deductions, Contributions, and Funding.*

[107] §404(a).

[108] §404(a)(6).

[109] *See Am. Stores Co. v. Commissioner*, 170 F.3d 1267 (10th Cir. 1999); *Airborne Freight Corp. v. United States*, 153 F.3d 967 (9th Cir. 1998); *Lucky Stores, Inc. v. Commissioner*, 153 F.3d 964 (9th Cir. 1998).

[110] §412(d)(2).

[111] A discretionary amendment to retroactively increase accrued benefits in accordance with this exception does not adversely affect the plan's qualification. *See* IRM 7.11.1.13 (10-14-22) (incorporating TE/GE-07-1215-0026, dated December 16, 2015).

[112] §420(a), as amended by Pub. L. No. 109-280, §842(a)(1), and Pub. L. No. 112-141, §40241 and §40242. Section 420 was amended by the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, §40241 and §40242, to (1) allow transfers of excess pension assets to retiree health accounts until December 31, 2021, and (2) allow transfers that are made after July 6, 2012, and before December 31, 2021, to a separate plan account established to

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plans by treating any reference to an employer in §420 as a reference to all employers maintaining the plan (or to the plan sponsor, if appropriate). The IRS has the authority to apply §420 to reflect the fact that the plan is not maintained by a single employer.[113]

2. *Excise Tax on Nondeductible Contributions*

Section 4972 imposes on a contributing employer a tax equal to 10% of the nondeductible contributions under the plan. Because, in the case of a multiemployer plan, the amount of nondeductible contributions is determined based upon the plan as a whole, rather than with respect to individual employers, the amount of nondeductible contributions must be allocated among the employers maintaining the plan to determine each employer's tax liability.[114] Alternatively, the multiemployer plan can elect not to take into account any nondeductible contributions, except to the extent that such contributions do not exceed the plan's full funding limit.[115]

3. *Deductibility of Withdrawal Liability Payments*

Withdrawal liability payments are considered plan contributions for tax-deduction purposes,[116] and are deductible as a pension contribution without regard to any other pension contribution deduction limitations.[117] When withdrawal liability payments, when combined with other plan contributions, deductions cannot exceed the plan's full funding limitation, the deductibility of other plan contributions may be limited.[118]

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fund retiree life insurance benefits. The deadline for transferring excess pension assets to retiree health accounts or retiree life insurance accounts has been extended to December 31, 2032. §420(b)(4), as amended by Pub. L. No. 117-328, Div. T, §606(a)(1). For further discussion of §420, see 351 T.M., *Plan Qualification — Pension and Profit-Sharing Plans*.

[113] §420(e)(6), as amended by Pub. L. No. 112-141, §40242(b)(1).

[114] IRM 4.72.14.5.10(9), 4.72.14.5.10(10) (09-26-17), obsoleted by the internal only publication of *Employee Plans Technical Guidelines, Multiemployer Plan Examination Guidelines*, effective November 22, 2022.

[115] §4972(c)(7).

[116] §404(g).

[117] Reg. §1.404(g)-1(a).

[118] Reg. §1.404(g)-1(c).

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III. Administrative and Non-Qualification Issues Affecting Multiemployer Plans

A. Fiduciary Duties

1. Dual Role of Trustees

The fiduciaries of multiemployer pension and funded welfare plans are subject to ERISA's fiduciary standards of prudence and exclusive purpose, as well as the prohibited transaction rules of ERISA and the I.R.C.[119] Courts recognize the dual role of a multiemployer plan's labor-management board of trustees, the members of which represent management or labor in the collective bargaining sense, yet have a fiduciary duty to the plan and its participants and beneficiaries. It is not *per se* improper for an individual to serve both roles.[120]

Accommodating this dual role, however, does not mean that a trustee of a multiemployer plan may serve any master other than the fund.[121] Problems can arise where the two roles of a person with fiduciary duties are adverse and both roles must be played simultaneously. Thus, a trustee cannot be on both sides of the same transaction, especially not if the transaction benefits the trustee.[122] Similarly, a trustee cannot simultaneously promise lifetime benefits in his role as a trustee and limit them in his role as negotiator/employer,[123] nor can an individual use his role as trustee to advance union bargaining goals by refusing to accept contributions of employers that resisted union goals.[124] However, if a collective bargaining agreement limits trustee authority by setting benefits, the trustee commits no breach by observing the agreement's terms.[125]

2. Co-Fiduciary Liability

Fiduciary liability rules are no different for multiemployer plans than for non-multiemployer employer plans, except (as discussed above) as necessary to accommodate the dual roles of multiemployer plan trustees. The co-fiduciary liability rules, however, have a special significance in the multiemployer plan context.[126] Under these rules, a fiduciary is liable for a breach of fiduciary duty by another fiduciary if the fiduciary:

(1) participates in the breach or conceals the breach, knowing it to be a breach;

(2) fails to comply with his or her own fiduciary duties of exclusive purpose, prudence, diversification and following of plan documents;[127] or

(3) has knowledge of the breach but does not take reasonable actions to correct the breach.

Inadequate monitoring also can create co-fiduciary liability.[128]

> *Example*: A plan is considering constructing a building, and one trustee proposes a cost-plus contract by a particular bidder without competitive bidding. The trustee is unable to provide satisfactory answers to questions such as, "Why not seek competitive bids?" The Department of Labor takes the position that the minority trustees, seeing their co-trustees on the verge of an imprudent act that would violate ERISA §404(a), should take steps that "might include" seeking a court injunction, notifying the Labor Department and publicizing the vote. Mere resignation will not suffice. The Labor Department also recommends extensive documentation of actions and of objections.[129]

In general, steps that need to be taken in a fiduciary liability situation depend on the facts and circumstances of the case. It is clear, however, that the co-fiduciary's role must have a causal connection to the breach before liability will be found.[130]

3. Settlor vs. Non-Settlor Functions of Trustees

It is often important to distinguish whether a plan sponsor who also serves as a plan fiduciary is acting as the sponsor, or "settlor" of the plan, or a fiduciary in performing certain acts. Settlor functions generally include the establishment, design, and termination of a plan, while fiduciary activities generally include, *inter alia*, the implementation of those decisions. For a plan established or maintained jointly by one or more employers and one or more employee organizations, the term "plan sponsor" is defined as the joint board trustees who establish or maintain the plan.[131] Accordingly, multiemployer plan trustees may perform settlor functions and fiduciary acts, depending on the circumstance.

The distinction is important for multiple reasons, including whether the payment of any related expenses would be due to a settlor function and whether ERISA's fiduciary standards apply. The DOL indicates that while the reasonable expenses of administering or managing a plan may be paid for with plan as-

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[119] ERISA §404, §406, §408; I.R.C. §4975.

[120] ERISA §408(c)(3); *United Indep. Flight Officers v. United Air Lines*, 756 F.2d 1262 (7th Cir. 1985); *Evans v. Bexley*, 750 F.2d 1498 (11th Cir. 1985); *NLRB v. Clerks and Checkers Local 1593*, 644 F.2d 408 (5th Cir. 1981); *Donovan v. Bierwirth*, 538 F. Supp. 463 (E.D.N.Y. 1981), *later op.*, 2 EBC 2430, *aff'd as modified*, 680 F.2d 263 (2d Cir. 1982), later proceeding, 754 F.2d 1049 (2d Cir. 1985); *Herman v. Painting Industry Ins. Fund*, 2 EBC 2438 (S.D.N.Y. 1981) (trustee may represent employer before delinquency committee); *Curran v. Freitag*, 432 F. Supp. 668 (S.D. Ill. 1977).

[121] *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), rev'g and rem'g 614 F.2d 872 (3d Cir. 1980).

[122] *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979); *Dole v. Formica*, 14 EBC 1397 (N.D. Ohio 1991) (excessive rent to union breaches fiduciary duty); *Marshall v. Davis*, 517 F. Supp. 551 (W.D. Mich. 1981) (plan trustees must be free to exert maximum economic power on fund's behalf); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979); *Gilliam v. Edwards*, 492 F. Supp. 1255 (D.N.J. 1980) (union business manager and fund trustee violated ERISA §408(b) by causing plan to enter "one sided" contract with him for administrative services); *Curran v. Freitag*, 432 F. Supp. 668 (S.D. Ill. 1977).

[123] *See Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976).

[124] *Truck Drivers Local Union No. 449*, 3 EBC 2577 (N.L.R.B. 1982), enforcement *denied*, 728 F.2d 80 (2d Cir. 1984).

[125] *UMW Health & Ret. Funds v. Robinson*, 455 U.S. 562 (1982); *but see Sinai Hosp. of Balt. v. Nat'l Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982) (contracts with some employers restricting benefit increases cannot bind trustees if trustees given authority to set benefits).

[126] ERISA §405.

[127] *See Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979).

[128] *Brink v. DaLesio*, 496 F. Supp. 1350 (D. Md. 1980), aff'd in part, rev'd in part and vac'd in part, 667 F.2d 420 (4th Cir. 1981).

[129] 29 C.F.R. §2509.75-5, FR-10. *See also* 29 C.F.R. §2509.75-8, FR-16.

[130] *Brandt v. Grounds*, 687 F.2d 895 (7th Cir. 1982); *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983), aff'd, 734 F.2d 10 (4th Cir. 1984); *Robbins v. First Am. Bank of Va.*, 514 F. Supp. 1183 (N.D. Ill. 1981).

[131] ERISA §3(16)(B)(iii).

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sets, expenses incurred in connection with the performance of settlor functions generally are not expenses related to administration or management of the plan and therefore cannot be paid for with plan assets.[132] In applying these distinctions, the DOL has specifically noted that certain activities that would be settlor activities in the context of a single employer plan might be fiduciary activities in the context of a multiemployer plan, specifically that decisions relating to the establishment, design, and termination of plans, and, except in the case of multiemployer plans, generally are not fiduciary activities.[133]

Most federal courts have held that multiemployer boards of trustees can act as settlors when they amend plans.[134] The Third Circuit emphasized the definition of the term "plan sponsor," noting that there may be situations in which single employer and multiemployer plans should be treated differently, but held that the amendment of the multiemployer plan in that case (to increase required employee contributions) was a settlor, rather than a fiduciary, function.

The DOL also views multiemployer plan trustees performing settlor functions are not subject to ERISA's fiduciary requirements, unless the plan document indicates otherwise. For example, trustees who allocated employer contributions among related multiemployer plans maintained under the same collective bargaining agreement, which included a binding fixed formula for such allocation, were engaged in a fiduciary act.[135] The DOL opined that if the trustees exercised discretion in determining how to allocate employer contributions among the related plans, they would have been engaging in fiduciary conduct because the plans could have had competing interests in the fixed pool of money.

DOL considered whether a multiemployer board of trustees, acting pursuant to collective bargaining agreement authority to establish a trust fund, a defined benefit and a defined contribution plan, along with the authority to amend the trust and the plans, was acting as a fiduciary when employer contributions that otherwise would have been used to fund the multiemployer defined contribution plan were diverted to a defined benefit plan. DOL opined that such actions were settlor acts. When the governing documents, such as collective bargaining agreements, trust documents, and plan documents, contemplate that the board of trustees of a multiemployer plan will act as fiduciaries in carrying out activities that otherwise would be settlor in nature, DOL indicated that these activities are subject to ERISA's fiduciary rules. However, when the relevant documents are silent, then the trustees' activities that are settlor in nature generally will be viewed as being carried out by the trustees in a settlor capacity, and not as fiduciary activities. The DOL therefore concluded that the trustees did not violate their fiduciary duty in amending the two plans to allocate employer contributions away from the defined contribution plan to the defined benefit plan. As a result, the DOL noted, it would not be appropriate for a multiemployer plan to pay for expenses relating to activities that a multiemployer plan trustee carries out in a settlor capacity.[136]

Similarly, if a contributing employer wanted to make a contribution purchasing past service credit for their owner, a former employee and retiree, when the plan's joint trustees considered a plan amendment granting such past service for specified classes of employees and retirees was not necessarily viewed as a fiduciary activity. DOL opined that when the relevant plan documents were silent regarding whether the trustees' actions would be governed by ERISA's fiduciary provisions, trustees' actions that are settlor in nature will be viewed as carried out by the trustees in a settlor capacity.[137]

4. *Segregation and Transmittal of Participant Contributions*

Under DOL regulations, amounts that a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan become "plan assets" subject to ERISA within certain time frames.[138] Specifically, participant contributions must be transmitted to the plan as of the earliest date on which they reasonably can be segregated from the employer's general assets.[139] In the case of pension plans, this date cannot be later than the 15th business day of the month following the month in which the amounts were received by the employer (for amounts paid to the employer) or in which the amounts otherwise would have been withheld from the participant's wages (for amounts paid by the participant).[140]

The DOL considered whether the rules should be adapted to accommodate the special needs of multiemployer plans and the collective bargaining process, where collective bargaining, employer participation and similar agreements often set specific due dates for the contributions by all participating employers to minimize costs and minimize administrative burdens.[141] As a threshold matter, DOL indicated that the requirement that contributions be transmitted to the plan no later than the 15th day of the month following the month in which they were payable, is an absolute standard, applicable equally to both single and multiemployer plans. The 15th day rule, however, is not a safe harbor, even for single employer plans. That is, if the sponsoring employer of a single employer plan can segregate the contributions from its general assets earlier than this date, then the employer's due date is accelerated to the date on which the assets reasonably can be segregated. Although this aspect of the regulations apply in the same manner to multiemployer plans as to single employer plans, the DOL noted that, in determining when assets reasonably can be segregated, in the case of single employer plans, whether a plan maintains a "reasonable process" for the expeditious and cost-effective transmittal of

[132] *See* Adv. Op. Nos. 2003-04A, 2001-01A, and 97-03A. *See also* letter to Kirk F. Maldonado from Elliot I. Daniel (March 2, 1987).

[133] Adv. Op. Nos. 97-03A and 2001-01A. See also *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), which held that employer appointed trustees of a multiemployer plan do not represent the interests of the contributing employers, but act as fiduciaries of the plan.

[134] *See Walling v. Brady*, 125 F.3d 114 (3d Cir. 1997); *Gard v. Blankenburg*, 33 Fed. Appx. 722 (6th Cir. 2002); *Curtiss Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Hartline v. Sheet Metal Workers' Nat'l Pension Fund*, 286 F.3d 598 (D.C. Cir. 2002); *Pope v. Cent. States, Se. & Sw. Areas Health & Welfare Fund*, 27 F.3d 211 (6th Cir. 1994).

[135] Adv. Op. No. 80-8A.

[136] Field Assistance Bulletin 2002-02.

[137] Adv. Op. No. 2006-04A.

[138] 29 C.F.R. §2510.3-102.

[139] 29 C.F.R. §2510-102(a).

[140] 29 C.F.R. §2510.3-102(b). 29 C.F.R. §2510.3-102(d) describes the circumstances under which the maximum time period may be extended.

[141] Field Assistance Bulletin 2003-2.

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contributions will be taken into account. In the case of a multiemployer plan, due to its special nature, however, such a reasonable process could be a process set forth in a collective bargaining or similar agreement and can take into account the administrative burden of a multiemployer plan's having to monitor many different employers to determine when each employer's plan assets can be segregated.[142]

Instead of going employer-by-employer at significant expense, multiemployer plan trustees may take into account how quickly all of its contributing employers reasonably can segregate plan assets and forward them to the plan. As a result, multiemployer trustees, in monitoring the transmittal of contributions, can take into account the cost to the plan and to participants of individually monitoring each employer.[143] If, in the trustees' judgment, the costs to the plan would outweigh the benefits of more expeditiously placing the contributions into trust, the trustees should be able to establish a uniform due date for contributions that may not necessarily be the most expeditious method, so long as it is reasonable under the circumstances and does not violate the 15th day rule. Note, however, that the mere fact that plan settlors via collective bargaining establish dates for the transmittal of participant contributions does not relieve plan trustees from their fiduciary duty to determine that the established time frames reflect an appropriate balancing of costs and protections. If the trustees determine that time frames established in collective bargaining and similar agreements do not do so, and therefore would cause an unreasonable delay in transmittal of participant contributions, the trustees must take steps to collect participant contributions from employers consistent with their fiduciary obligations. Thus, uniform contribution dates may be used, but only if their use is justifiable.

B. Miscellaneous Title I Issues

1. Key Prohibited Transaction Exemptions

ERISA does not require independent fiduciaries. Therefore, Congress prohibited certain transactions between the plan and its fiduciaries and certain other parties.[144] The list of prohibited transactions is so broad that any transaction involving plan funds is effectively prohibited unless a specific exemption applies. The DOL, which issues prohibited transaction class exemptions, has exempted certain types of transactions commonly entered into by multiemployer plans.

In a multiemployer plan, a plan fiduciary's failure to enforce contribution requirements can constitute a prohibited transaction, for example, as a prohibited extension of credit between the plan and a contributing employer. Multiemployer plans are permitted to enter into written agreements with a delinquent contributing employer to extend the time for making a contribution or to accept less than the full amount owed.[145] Alternatively, a multiemployer plan may determine an unpaid delinquent employer contribution as uncollectible, which determination also must be in writing.

Multiemployer plans are also permitted to make construction loans to a contributing employer, provided that a written commitment for permanent financing upon completion of construction previously has been obtained from another party. Multiemployer plans also may lease office space and provide administrative services or sell goods to a contributing employer, employee organization, employer association, or to certain other parties connected to the plan, provided that the plan creates, maintains, and makes available appropriate records of the transactions.[146]

2. Protection Against Retaliation for Exercising ERISA Rights

In addition to the typical ERISA causes of action under §502 and §510 of ERISA, it is unlawful for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under ERISA or for giving information or testifying in an inquiry or proceedings relating to ERISA before Congress.[147] The provision amends the anti-retaliation section of ERISA to provide protection for employers that contribute to multiemployer plans and others and is intended to close a loophole in whistleblower protections. Legislative history indicates that retaliation against a contributing employer for testifying before Congress or against an individual for exercising his or her rights to petition for redress of grievances would amount to unlawful retaliation under ERISA.[148]

3. Annual Reporting

Multiemployer plans file only one annual Form 5500, not one form for each employer. The Form 5500 instructions provide detailed information on multiemployer plan reporting requirements.[149]

C. Miscellaneous Title IV Issues

1. PBGC Premiums

Multiemployer plans covered by the PBGC's termination insurance must pay premiums to the agency.[150] Premiums are paid annually by using the PBGC Comprehensive Premium Filing package. The due date for annual premiums generally coincides with the latest date plan administrators may file Form 5500.[151]

Multiemployer plans pay a flat rate premium, which is based on the number of participants as of a "snapshot" date. For plan years beginning after 2014, the yearly premium for multiemployer plans is $26 per participant in the plan during the applicable plan year, with the amount adjusted to reflect

[142] Field Assistance Bulletin 2003-2.
[143] Field Assistance Bulletin 2003-2.
[144] ERISA §406.
[145] PTE 76-1, Part A.
[146] PTE 76-1, Parts B and C, and PTE 77-10.
[147] Pub. L. No. 109-280, §205, amending ERISA §510, effective August 17, 2006.
[148] *See* Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006"* (JCX-38-06) (Aug. 3, 2006) at 69.
[149] *See* Instructions to Form 5500.
[150] ERISA §4007. For a discussion of premium payments and guaranteed benefits for single-employer plans, see 357 T.M., *Pension Plan Terminations — Single Employer Plans.*
[151] For a discussion of filing these forms, see 361 T.M., *Reporting and Disclosure Under ERISA.*

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changes in the national average wage index after 2015.[152] For a table of current and prior annual premium rates published by the PBGC, see the Worksheets of 361 T.M., *Reporting and Disclosure Under ERISA*.[153]

Whenever the PBGC determines that the moneys of any fund are in excess of its current needs, it can request the investment of such funds as it deems advisable by the Secretary of the Treasury in obligations issued or guaranteed by the United States.[154] Notwithstanding the foregoing, the amount of premiums received under ERISA §4006 to be used for basic benefits under ERISA §4022A in a fiscal year commencing with fiscal year 2016 and ending with fiscal year 2020 will be placed in a noninterest bearing account within such fund in such amounts as set forth under ERISA §4005(b)(3)(B). Any funds received during any applicable fiscal year will first be allocated to the noninterest bearing account in the amount specified under ERISA §4005(b)(3)(B). Any financial assistance, as provided under ERISA §4261, will be withdrawn proportionately from the noninterest-bearing and all other accounts within the fund.[155]

2. *PBGC Guaranteed Benefits*

The PBGC guarantees the payment of a certain level of benefits when a multiemployer pension plan becomes insolvent.[156] The PBGC does not guarantee benefits that have been in effect for less than five years. ERISA specifies the maximum benefit that the PBGC guarantees for multiemployer plans.[157]

The maximum benefit guarantee is the sum of:

(i) 100% of the first $11 of a participant's monthly benefit accrual rate and

(ii) 75% of the monthly benefit accrual rate in excess of $11, up to a maximum accrual rate of $33, for each year of service.

Example: If a worker has 30 years of service and a benefit accrual rate of $23 per month, the maximum guarantee is $600 per month or $7,200 per year ([(100% × $11) + (75% × $12)] × 30 years = $600 per month).[158]

The PBGC will not treat a pre-retirement survivor annuity as forfeitable just because the participant has not died as of the date the plan became insolvent or terminated.[159] This provision applies retroactively to benefit payments becoming payable on or after January 1, 1985, except in cases where the surviving spouse died before December 16, 2014.[160]

D. ERISA Litigation Issues

1. *Collection Actions*

ERISA requires that employers obligated to make contractual contributions must do so and provides a federal cause of action to enable plans to collect contributions.[161] The collection action is generally based on the terms of (i) the collective bargaining agreement between each employer and the union and (ii) the trust agreement between each employer and the multiemployer plan fund. The terms of the collective bargaining agreement, including each employer's contribution obligation, may continue to apply after the expiration of the agreement, if the agreement has an "evergreen" provision extending the terms of the agreement until a new agreement has been reached or a properly timed notice of termination is made.[162] Arbitration generally is not required to collect from a delinquent employer,[163] even when arbitration is required by the trust document,[164] though at least one court has enforced an arbitration clause in the collective bargaining agreement.[165] A plan may receive special remedies in a court action, including:

(1) the unpaid contributions;

(2) interest on the unpaid contributions;

(3) the greater of interest on the unpaid contributions or liquidated damages (up to 20%); and

(4) reasonable attorney's fees and costs.[166]

In at least one case, punitive damages have been awarded as well.[167]

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152 ERISA §4006(a)(3)(A)(vi), added by the Multiemployer Pension Reform Act of 2014 (MPRA), Pub. L. No. 113-235, Div. O, §131(a)(1), and ERISA §4006(a)(3)(M), added by MPRA, Pub. L. No. 113-235, Div. O, §131(a)(2). For 2013 and 2014, the premium was $12 per participant, as adjusted for inflation after 2013. ERISA §4006(a)(3)(A)(v) and §4006(a)(3)(J), added by the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, §40222. Former ERISA §4006(a)(3)(I) was redesignated as ERISA §4006(a)(3)(J), effective for plan years beginning after December 31, 2013. Pub. L. No. 113-67, Div. A, §703(b)(1)(A). For plan years beginning before 2013, the premium was $8 per participant, as adjusted for inflation. ERISA §4006(a)(3)(A)(iv) and §4006(a)(3)(H). Former ERISA §4006(a)(3)(G) was redesignated as ERISA §4006(a)(3)(H), effective for plan years beginning after December 31, 2013. Pub. L. No. 113-67, Div. A, §703(b)(1)(A).

153 The PBGC publishes the flat rate premium on its website, at http://www.pgbc.gov.

154 ERISA §4005(b)(3)(A), as redesignated by MPRA, Pub. L. No. 113-235, Div. O, §131(b)(1).

155 ERISA §4005(b)(3)(B), added by MPRA, Pub. L. No. 113-235, Div. O, §131(b)(2).

156 ERISA §4022A, §4245, §4281. Plans covered by the PBGC's termination insurance must pay premiums to the agency. ERISA §4007.

157 ERISA §4022A, §4022B. See the Worksheets to 361 T.M., *Reporting and Disclosure Under ERISA*.

158 ERISA §4022A(c). *See* PBGC Technical Update 00-7.

159 ERISA §4022A(c)(4), added by Multiemployer Pension Reform Act, Pub. L. No. 113-235, Div. O, §110(a).

160 Pub. L. No. 113-235, Div. O, §110(b).

161 ERISA §515.

162 *Cent. States, Se. & Sw. Areas Pension Fund v. Transervice Logistics, Inc.*, 56 F.4th 516 (7th Cir. 2022).

163 *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), aff'g and rem'g 700 F.2d 433 (8th Cir. 1983); *but see AFTRA Funds v. WCCO TV*, 734 F. Supp. 893 (D. Minn. 1990), rev'd, 934 F.2d 987 (8th Cir. 1991).

164 *Carpenters Health & Welfare Trust Fund for Cal. v. Bla-Delco Constr. Inc.*, 8 F.3d 1365 (9th Cir. 1993).

165 *Roofers Local 195 Pension Health & Accident, Annuity & Joint Apprenticeship Training Funds v. Shue Roofing, Inc.*, 32 EBC 2917 (N.D.N.Y. 2004).

166 ERISA §502(g). *See, e.g., O'Hare v. Gen. Marine Transp. Corp.*, 740 F.2d 160 (2d Cir. 1984); *San Pedro Fishermen's Welfare Trust Fund Local 33 v. Di Bernardo*, 664 F.2d 1344 (9th Cir. 1982); *Martin v. Keldorn*, 546 F. Supp. 889 (N.D. Ill. 1982) (penalties awarded because underpayment due to intentional underreporting). One employer did avoid damages by paying interest to the plan during the controversy. *Cent. States, Se. & Sw. Areas Pension Fund v. C. J. Rogers Transp. Co.*, 544 F. Supp. 308 (E.D. Mich. 1982).

167 *Winterrowd v. Freedman & Co.*, 724 F.2d 823 (9th Cir. 1984); *compare Walker v. Jaffe*, 5 EBC 2736 (W.D. Tex. 1983).

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Liquidated damages, however, may not be appropriate if all contributions are paid at the time of suit.[168] The action must be brought in federal court.[169] Venue lies where the plan is administered as well as where the defendant is found, and courts generally defer to the fund's choice of venue, denying motions to transfer venue from the plan's place of administration,[170] though other requests for transfers for the convenience of either party to an action have been granted.[171] Process can be served in the district where the defendant is found.[172] Filing a grievance with respect to the subject matter of a collection dispute generally is not a required prerequisite to bringing suit.[173] The statute of limitations is determined by reference to the most appropriate state law, almost always the law of contracts.[174]

A plan may violate ERISA's fiduciary rules if it fails to attempt to collect unpaid contributions from a delinquent employer (assuming the amount is collectible and clearly owing), although the DOL issued a prohibited transaction class exemption permitting a plan to extend the time for payment and/or to settle a claim or determine it to be uncollectible.[175] Failure to attempt to collect also may violate a union's duty of fair representation under the NLRA.[176]

In general, defenses relating to the union, such as abandonment, are not permitted in a collection action.[177] The defense that the collection action is void (i.e., defects in the trust or bargaining agreement) may be raised,[178] but MPPAA's legislative history discourages consideration of "extraneous" defenses in a collection action and the courts have heeded this admonition.[179] A jury trial is available in same circuits.[180]

Many collection actions are brought under both ERISA and LMRA §301. The fact that an action raises issues under NLRB jurisdiction does not deprive the court of jurisdiction over these issues.[181] Courts, however, do not have jurisdiction under ERISA to enforce plan contributions during the period between the expiration of the bargaining agreement and impasse.[182]

Affiliates, shareholders and officers generally are not liable for unpaid contributions of an employer corporation.[183] The corporate veil may be pierced, however, if there is sufficient evidence that the corporation is a sham, that corporate structure has been ignored (for example, the company is undercapitalized, personal expenses are paid out of corporate assets, and non-arm's length, undocumented loans to officers are made) or that an affiliated company is an "alter ego" of the corporation.[184] Alter ego status may be found if there is common ownership, management and labor relations, interrelated ownership and inadequate capital.[185] State laws imposing personal liability generally have been held to be preempted by ERISA.[186]

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[168] *Mich. Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991); *Idaho Plumbers & Pipefitters v. United Mech. Contractors Inc.*, 875 F.2d 212 (9th Cir. 1989); *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476 (8th Cir. 1988).

[169] ERISA §502(e)(1).

[170] *Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113 (D.D.C. 2008); *Int'l Painters & Allied Trades Indus. Pension Fund v. Tri-State Interiors, Inc.*, 357 F. Supp. 2d 54 (D.D.C. 2004).

[171] *See Youngblood v. Life Ins. Co. of N. Am.*, No. 3:16-CV-34-TBR, 2016 BL 117285 (W.D. Ky. Apr. 13, 2016) (venue that is not plaintiff's home forum and that has little connection to case does not trump opposing party's well-supported motion to transfer to more convenient forum).

[172] ERISA §502(e)(2).

[173] *Robbins v. Prosser's Moving & Storage Co.*, 4 EBC 1081 (8th Cir. 1983), *rem'd*, 466 U.S. 364 (1984); *Trs. of Local 478 Trucking & Allied Indus. Pension Fund v. Siemens Corp.*, 721 F.2d 451 (3d Cir. 1983).

[174] *See Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512 (9th Cir. 1987); *Robbins v. Iowa Rd. Builders Co.*, 828 F.2d 1348 (8th Cir. 1987); *Cent. States Se. & Sw. Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir. 1986); *Trs. of Operative Plasterers' Pension Fund v. Plasterers Local Union No. 5*, 794 F.2d 1217 (7th Cir. 1986); *Teamsters Pension Trust Fund of Phila. v. John Tinney Delivery Serv.*, 732 F.2d 319 (3d Cir. 1984) (Pennsylvania's Wage Payment and Collection Law statute of limitations was applied); *O'Hare v. Gen. Marine Transp. Corp.*, 5 EBC 2298 (2d Cir. 1984); *Smith v. Kerrville Bus Co.*, 748 F.2d 1049 (5th Cir. 1984); *Cent. States, Se. & Sw. Areas Pension Fund v. Jordan*, 127 LRRM 2795 (N.D. Ill. 1987) (statute of limitations for oral contracts was applied).

[175] Prohibited Transaction Class Exemption 76-1. *See Rosen v. Hotel & Restaurant Employees*, 637 F.2d 592 (3d Cir. 1981); *Huge v. Old Home Manor, Inc.*, 419 F. Supp. 1019 (W.D. Pa. 1976). An innovative attempt to penalize employers that were delinquent to the benefit fund by prohibiting subcontracting to those employers was held to violate the NLRA when enforced by "self-help" in *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976), on recon., 660 F.2d 406 (9th Cir. 1981).

[176] *Brown v. UAW*, 512 F. Supp. 1337 (W.D. Mich. 1981), aff'd, 689 F.2d 69 (6th Cir. 1982).

[177] *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990); *Laborers' Int'l Union Pension Fund v. Pacific Ascorp*, 12 EBC 1864 (D.D.C. 1990).

[178] *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *IAM National Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944 (D.C. Cir. 1983); *Container Mechanics Welfare-Pension Fund v. Universal Enters.*, 5 EBC 1199 (S.D. Ga. 1983), *aff'd* 751 F.2d 1177 (11th Cir. 1985); *Asbestos Workers Local 53 v. Insulation Contractors*, 5 EBC 1316 (E.D. La. 1983); *Continental Food Products Inc. and Bakery Workers Pension Fund*, 5 EBC 1326 (Arb. 1984).

[179] *Martin v. Garman Constr. Co.*, 945 F.2d 1000 (7th Cir. 1991); *Berry v. Garza*, 919 F.2d 87 (8th Cir. 1990); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990); *Trs. of Plumbers and Pipefitters Nat. Pension Fund v. Woodhill Supply, Inc.*, Civ. Action 91-1246 (D. Md. 1991).

[180] *See, e.g., Sheet Metal Workers Local 19 v. Keystone Heating & Air Conditioning*, 934 F.2d 35 (3d Cir. 1991), *on remand*, 14 EBC 2686 (E.D. Pa. 1992); *Bugher v. Freightner*, 722 F.2d 1356 (7th Cir. 1983).

[181] *See. e.g., Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *Trs., Colorado Iron Workers Training Fund v. A & P Steel, Inc.*, 812 F.2d 1518 (10th Cir. 1987); *Carpenters Local Union 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982).

[182] *Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). *But see Painters Trust v. Sandvig-Ostergard, Inc.*, 737 F. Supp. 1131 (W.D. Wash. 1990).

[183] *See, e.g., Mass. Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988); *Solomon v. Klein*, 770 F.2d 352 (3d Cir. 1985).

[184] *See, e.g., Operating Engineers v. Reed*, 726 F.2d 513 (9th Cir. 1984); *Combs v. Indyk*, 554 F. Supp. 573 (W.D. Pa. 1982).

[185] *See, e.g., Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516 (9th Cir. 1984); *Greater St. Louis Constr. Laborers Welfare Fund v. Mertens Plumbing & Mech., Inc.*, 552 F. Supp. 2d 952 (E.D. Mo. 2007); *Plumbers Local 98 Defined Benefit Fund v. Wolf Mech., Inc.*, 43 EBC 1693 (E.D. Mich. 2007); *Connords v. Black Beauty Coal*, Civ. Action 90-0286 (S.D. W.Va. 1991). *Cf. Burke v. Hamilton Equip. Installers, Inc.*, 528 F.3d 108 (2d Cir. 2008), *aff'g* 39 EBC 1726 (W.D.N.Y. 2006) (furniture company formed by son of company owner that defaulted on its obligations to pay withdrawal liability could not be held liable under alter ego or veil piercing theory because it was not formed until years after defaulting company ceased business and had no connection to defaulting company or its alter ego); *Bd. of Trs., Chi. Plastering Inst. Pension Trust Fund v. William A. Duguid Co.*, 761 F. Supp. 1345 (N.D. Ill. 1991). *See Greater Kan. City Laborers Pension Fund v. Superior Gen. Contractors, Inc.*, 104 F.3d 1050 (8th Cir. 1997) (corporate law standard, not labor law standard, for determining alter ego status applies in pension fund's action to collect unpaid contributions under ERISA).

[186] *Mich. Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991); *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986).

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2. Benefit Claims

ERISA §502 provides a cause of action for plan participants and beneficiaries to recover benefits due, to enforce or clarify the terms of the plan, to compel production of documents, for breach of ERISA fiduciary standards, and for injunctive or other equitable relief and to compel production of a final benefit statement. ERISA also has been held to incorporate a federal common law of pensions.[187] In addition, Racketeer Influenced and Corrupt Organizations Act (RICO) actions may be based on ERISA breaches.[188]

ERISA §502 describes precisely the persons who may bring an action under ERISA: (1) a participant or a beneficiary may bring an action to receive benefits; or (2) a participant, beneficiary or fiduciary may bring an action to redress fiduciary breaches or other violations. The section has been strictly construed.[189] Some courts have denied standing to participants who have terminated with no benefits or have cashed out of the plan.[190]

Actions may be brought in state or federal court, but actions brought in state court may be removed to federal court.[191] Venue is the district in which the plan is administered, where the actions on which the claim is based took place or where the defendant is located.[192]

ERISA sets forth no explicit standard for judicial review of plan denials of benefit claims. After extensive analysis of the question in the lower courts, the U.S. Supreme Court addressed the issue in a case involving severance benefits. The court referred to general trust law concepts and imposed a de novo standard of review, except with respect to issues as to which the plan document vests discretion in the plan fiduciary. As to these issues, the standard is "abuse of discretion."[193] Following this case, courts have refined the questions of what plan language is required to effectively vest discretion in the fiduciary,[194] the meaning of "abuse of discretion" review,[195] and the guidelines for de novo review.[196]

A few courts have found that a §502 action provides a right to a jury trial, but the weight of authority is to the contrary.[197]

Attorneys' fees and costs are available in the court's discretion.[198] The factors taken into consideration are:

(1) degree of culpability of the offending party;

(2) the offending party's ability to pay;

(3) the deterrence value of an award;

(4) the significance of the legal issues involved or the benefits to the larger group; and

(5) (in some courts) the relative merits of the position.[199]

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[187] *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981) (pre-ERISA claims under state law remediable under ERISA §502(g)); *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715 (7th Cir. 1981).

[188] *McClenden v. Cont'l Group*, 602 F. Supp. 1492 (D.N.J. 1985).

[189] ERISA §502(a); *see, e.g., DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506 (6th Cir. 2014), cert. denied, 135 S. Ct. 980 (2015) (contributing employers do not have a valid cause of action against trustees for negligent mismanagement of plan assets; participants and beneficiaries do); *Niagara of Wis. Paper Corp. v. Paper Indus. Pension Fund*, 5 EBC 1496 (D. Minn. 1983), *summary judgment granted*, 603 F. Supp. 1420 (D. Minn. 1984), *later proceeding*, 6 EBC 1315 (D. Minn. 1984), 6 EBC 1494 (D. Minn. 1985), *cf. Yancy v. Am. Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); *Walker v. Jaffe*, 5 EBC 2736 (W.D. Tex. 1983).

[190] *Saladino v. ILGWU Nat'l Retirement Fund*, 5 EBC 1821 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 473 (2d Cir. 1985).

[191] ERISA §502(e)(2); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), on remand, 826 F.2d 452 (6th Cir. 1987).

[192] ERISA §502(e)(2).

[193] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

[194] *See, e.g., Deyman v. Sun Life Assurance Co. of Canada*, 148 F. Supp. 2d 1316 (S.D. Fla. 2001); *DeFelice v. Am. Int'l Life Assurance Co. of N.Y.*, 112 F.3d 61, 65 (2d Cir. 1997); *Donato v. Metro. Life Ins. Co.*, 19 F.3d 375, 379–80 (7th Cir. 1994); *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043 (7th Cir. 1989); *Boyd v. Trustees, UMW Health & Ret. Plan*, 873 F.2d 57 (4th Cir. 1989); *DeNobel v. Vitro*, 885 F.2d 1180 (4th Cir. 1989); *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137 (11th Cir. 1989); *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522 (5th Cir. 1989) (note same result in consideration before and after *Bruch*); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989); *Batchelor v. IBEW Local 861 Pension & Ret. Fund*, 877 F.2d 441 (5th Cir. 1989); *Rabin v. Chesebrough Pond's, Inc.*, 1991 U.S. Dist. LEXIS 21754 (D. Conn. 1991). However, in *Diaz v. Prudential Ins. Co. of Am.*, 424 F.3d 635 (7th Cir. 2005), the Seventh Circuit changed the way in which it ascertains the proper standard of review and noted that it "hereby disapprove[s]" of its prior decisions, *Donato* and *Bali*, both cited above. The plans in *Donato* and *Bali* stated that the determination of disability made by the plan would be based on information "satisfactory to us" or "satisfactory to the Committee," respectively. The Seventh Circuit decided that those phrases were enough to show that the plans had discretionary authority under the contract to determine benefit eligibility, and the court considered the benefit determinations using deferential review. In order to receive disability benefits, the long-term disability plan in *Diaz* required "proof of continuing disability, satisfactory to Prudential, indicating that [the claimant is] under the regular care of a doctor." The court concluded that "the critical question is whether the plan gives the employee adequate notice that the plan administrator is to make a judgment within the confines of pre-set standards, or if it has the latitude to shape the application, interpretation, and content of the rules in each case." The court determined that the plan in *Diaz* was the former and that the district court should have reviewed the plan's decision using a de novo standard of review.

[195] *See, e.g., Batchelor v. IBEW Local 861 Pension & Ret. Fund*, 877 F.2d 441 (5th Cir. 1989); *Jett v. Blue Cross & Blue Shield of Ala., Inc.*, 890 F.2d 1137 (11th Cir. 1989); *Davis v. Ky. Fin. Cos. Ret. Plan*, 887 F.2d 689 (6th Cir. 1989).

[196] Contract law concepts were applied in *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486 (1st Cir. 1989); *Miller v. Eichleay Engineers, Inc.*, 886 F.2d 30 (3d Cir. 1989); *Schultz v. Metro. Life Ins. Co.*, 872 F.2d 676 (5th Cir. 1989).

[197] *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998) (no jury); *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251 (2d Cir. 1996) (no jury); *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989) (no jury); *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988) (no jury under ERISA §502(a)(3); remand re right to jury trial under ERISA §502(a)(1)(B)); *Turner v. CF & I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985) (no jury); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982) (no jury); *Souza v. Trs. of the W. Conference of Teamsters Pension Fund*, 663 F.2d 942 (9th Cir. 1981) (no jury); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980) (no jury); *Wardle v. Cent. States, Se. & Sw. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980) (no jury); *Paladino v. Taxicab Indus. Pension Fund*, 588 F. Supp. 37 (S.D.N.Y. 1984) (jury); *Stamps v. Mich. Teamsters Joint Council No. 43*, 431 F. Supp. 745 (E.D. Mich. 1977) (jury).

[198] ERISA §502(g)(1). The Eleventh Circuit has ruled that courts do not have discretion under ERISA §502(g)(1) to require an attorney to pay another party's fees. *Peer v. Liberty Life Assurance Co. of Bos.*, 992 F.3d 1258 (11th Cir. 2021).

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Attorneys' fees may be assessed against the government under the Equal Access to Justice Act,[200] but are difficult to secure under ERISA alone.[201]

Compensatory damages (i.e., lost benefits and injunctive relief) are available remedies under ERISA §502. ERISA separately provides broad relief for fiduciary breaches, but the U.S. Supreme Court held that this provision is not applicable to individual benefit claims.[202] Punitive damages initially were allowed in many jurisdictions if the breach was wanton or willful, and early case law suggested that damages also might be available for mental or emotional distress, but the U.S. Supreme Court limited those damages.[203] The case law requires claim exhaustion of plan remedies,[204] but not "issue" exhaustion.[205] Failure to exhaust may lead to dismissal or a remand to the plan.[206] The exhaustion requirement is a creation of the courts, based on ERISA's legislative history.[207] A court might not require exhaustion if the plan administrators or other persons have thwarted exhaustion of remedies or exhaustion would be futile.[208] ERISA contains its own statute of limitations, essentially six years from the act or omission, or three years from date the plaintiff had actual knowledge (six years if fraud is involved).[209] Occasionally, a state statute of limitations is used.[210]

Practice Insight The statute of limitations in ERISA §413 applies only to fiduciary breaches and other claims arising under ERISA's fiduciary duty rules; it does not apply, for example, to cases involving benefits claims or to enforce other kinds of statutory rights. For such non-fiduciary claims, courts generally apply the most analogous state statute of limitations.[211]

Review of benefit denials also may be available under ERISA §510, which protects participants from retaliation for claim benefits and from employment actions taken with a motive of depriving a person of benefits. For example, a corporation that systematically terminated employees just prior to their attaining eligibility for benefits violated ERISA §510.[212] Motive is an important element of a §510 case.[213]

In the Pension Protection Act of 2006, Congress made it unlawful, in the case of a multiemployer plan, for the plan sponsor or any other person to discriminate against any contributing employer for exercising rights under ERISA or for giving information or testifying in an inquiry or proceedings relating to ERISA before Congress.[214]

The Multiemployer Pension Reform Act of 2014 (MPRA),[215] added a civil cause of action under ERISA §502(a) for employee representatives and contributing employers have a civil cause of action to enforce ERISA §101(k), which gener-

[199] *McElwaine v. U.S. W., Inc.*, 176 F.3d 1167 (9th Cir. 1999); *Foltice v. Guardsman Products, Inc.*, 98 F.3d 933, 936 (6th Cir. 1996); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225–26 (1st Cir. 1996); *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Frary v. Shorr Paper Products, Inc.*, 494 F. Supp. 565 (N.D. Ill. 1980); *Ford v. N.Y. Cent. Teamsters Pension Fund*, 506 F. Supp. 180 (W.D.N.Y. 1980), aff'd, 642 F.2d 664 (2d Cir. 1981). *See Bos v. Bd. of Trs.*, 818 F.3d 486 (9th Cir. 2016) (plaintiff was not eligible to recover fees under ERISA §502(g)(1) because action giving rise to his request did not arise under ERISA §502(e) and did not necessarily depend upon resolution of any ERISA question, let alone a substantial one); *Micha v. Grp. Disability Benefits Plan for Gynecologic Oncology Assocs. Partners, LLC*, 597 Fed. Appx. 905 (9th Cir. 2015), (unpub. Op.) (third-party insurer owed attorneys' fees to a disability plan following a dispute over coverage), cert. denied, 135 S. Ct. 2894 (2015).

[200] Pub. L. No. 96-481. *See Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147 (4th Cir. 1996) (upholding award of attorney's fees to prevailing party under Equal Access to Justice Act).

[201] *See Donovan v. Cunningham*, 541 F. Supp. 276 (S.D. Tex. 1982), aff'd, rev'd and vac'd, 716 F.2d 1455 (5th Cir. 1983); *Donovan v. Dillingham*, 668 F.2d 1196 (11th Cir. 1982), on reh'g, 688 F.2d 1367.

[202] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

[203] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134. For earlier cases, see, e.g., *Eaton v. D'Amato*, 581 F. Supp. 743 (D.D.C. 1980) (punitive available); *Free v. Briody*, 732 F.2d 1331 (7th Cir. 1984) (available if willful, wanton, or malicious breach); and *UAW v. Fed. Forge, Inc.*, 583 F. Supp. 1350 (W.D. Mich. 1984).

[204] *Denton v. First Nat'l Bank of Waco*, 765 F.2d 1295 (5th Cir. 1985); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *R. M. Bowler Contract Hauling Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 547 F. Supp. 783 (S.D. Ill. 1982); *Int'l Molders & Allied Workers Union v. Aquarius Shoe Corp.*, 511 F. Supp. 361 (E.D. Mo. 1981). Exhaustion may not be required if the claim can be characterized as something other than a claim for benefits under a plan or contract, such as a claim under ERISA §510 of discharge to prevent benefits from vesting. *Gavalik v. Cont'l Can Co.*, 3 EBC 1311 (W.D. Pa. 1982), *later proceeding*, 3 EBC 2023 (W.D. Pa. 1982); *contra, Kross v. W. Elec. Co.*, 534 F. Supp. 251 (N.D. Ill. 1982), aff'd in part and rev'd in part, 701 F.2d 1238 (7th Cir. 1983). ERISA requires plans to provide notice of decisions, with reasons, written in straightforward language, and a review procedure, and to provide each participant with a description of the procedures to be followed. ERISA §102(b), §503. *See also Springer v. Wal-Mart Assocs.' Grp. Health Plan*, 908 F.2d 897 (11th Cir. 1990); *Denton v. First Nat'l Bank of Waco*, 765 F.2d 1295 (5th Cir. 1985).

[205] *Wolf v. Nat'l Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984).

[206] *Compare Denton v. First Nat'l Bank*, 765 F.2d 1295 (5th Cir. 1985), *with Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), *and Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071 (E.D. Pa. 1979).

[207] *Denton v. First Nat'l Bank*, 765 F.2d 1295 (5th Cir. 1985); *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Taylor v. Bakery & Confectionery Fund*, 455 F. Supp. 816 (E.D.N.C. 1978).

[208] *Haw. Teamsters & Allied Workers, Local 966 v. City Express, Inc.*, 751 F. Supp. 1426 (D. Haw. 1990); *Carter v. Signode Indus., Inc.*, 688 F. Supp. 1283 (N.D. Ill. 1988), later proceeding, 694 F. Supp. 493 (N.D. Ill. 1988); *DePina v. Gen. Dynamics Corp.*, 674 F. Supp. 46 (D. Mass. 1987); *Dameron v. Sinai Hosp. of Balt., Inc.*, 626 F. Supp. 1012 (D. Md. 1986), later proceeding, 644 F. Supp. 551 (D. Md. 1986), aff'd in part and rev'd in part, 815 F.2d 975 (4th Cir. 1987). *See also Hall v. Nat'l Gypsum Co.*, 105 F.3d 225 (5th Cir. 1997) (holding that exhaustion was unnecessary where the committee empowered to review claim disputes had been abolished).

[209] ERISA §413.

[210] *Dameron v. Sinai Hosp. of Balt., Inc.*, 595 F. Supp. 1404 (D. Md. 1984) (state statute of limitations used in challenge to offsets).

[211] *See, e.g., Wang Labs., Inc. v. Kagan*, 990 F.2d 1126 (9th Cir. 1993); *Dameron v. Sinai Hosp. of Balt., Inc.*, 815 F.2d 975 (4th Cir. 1987); *Gavalik v. Cont'l Can Co.*, 812 F.2d 834 (3d Cir. 1987).

[212] *Gavalik v. Cont'l Can*, 812 F.2d 834 (3d Cir. 1987). *But see Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995) (corporate organizational change that results in the termination of employees is not the sort of action that ERISA §510 was primarily designed to cover, because ERISA §510 refers to action targeted at individual employees unless there was some ERISA-related characteristic, such as having a clearly above-average proportion of employees with pension rights about to vest). Note that ERISA §510 protection applies to interference with rights that do not vest, i.e., welfare plan benefits, as well as to pension plan benefits. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997).

[213] *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231 (4th Cir. 1991).

[214] ERISA §510, as amended by Pub. L. No. 109-280, §205, effective August 17, 2006. The provision amended the anti-retaliation section of ERISA to provide protection for employers that contribute to multiemployer plans and others and is intended to close a loophole in whistleblower protections. It is intended that retaliation against any employer that has an obligation to contribute to a plan due to testifying before Congress or an individual's exercising his or her rights to petition for redress of grievances would amount to unlawful retaliation under ERISA under the provision. *See* Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (JCX-38-06) (Aug. 3, 2006) at 69.

[215] Pub. L. No. 113-235, Div. O, §111(d), effective for plan years beginning after December 31, 2014.

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ally provides that administrators of multiemployer defined benefit plans must provide, upon written request, plan information to plan participants and beneficiaries, employee representatives, or any employer with an obligation to contribute to the plan.[216]

For a detailed discussion of ERISA causes of action, see 374 T.M., *ERISA — Litigation, Procedure, Preemption and Other Title I Issues.*

3. *Preemption of State Law Claims*

Both ERISA and federal labor laws, as interpreted by the courts, contain broad preemption provisions. This area has seen more U.S. Supreme Court review than any other area of ERISA. ERISA preempts all state laws that relate to an employee benefit plan.[217] Even laws that are consistent with ERISA are preempted.[218] Indirect intrusions into ERISA's domain are preempted, such as state laws that preclude plans from offsetting benefits by the amount of any workers' compensation benefits received,[219] fair employment laws that preclude exclusion of pregnancy-related disabilities in disability plans,[220] and on taxes premiums.[221] A state garnishment statute, however, has been held not to be preempted as it relates to welfare plan benefits.[222]

Similarly, application of state escheat laws has been upheld with respect to unclaimed benefits under ERISA plans.[223]

ERISA contains statutory exceptions to preemption — the "savings" clause excludes from preemption state insurance, banking and securities laws, and is coupled with the "deemer" clause, which exempts plans from the scope of those laws.[224] Under these provisions, insured welfare plans are subject to state insurance laws, such as mandated benefit laws.[225] Other statutory exceptions are for criminal laws (narrowly interpreted),[226] the Hawaii health system,[227] and multiple-employer welfare arrangements (MEWAs).[228]

Cracks have appeared in the preemption armor, however, notably in the auto insurance subrogation area,[229] but also in an occasional fraud or tort claim, and some claims concerning health plans.[230] The domestic relations area had been a source of erosion, but this was finally resolved by statute.[231]

ERISA does not preempt other federal law claims, such as contract claims based on securities laws,[232] discrimination laws,[233] the federal labor law and labor standards law.[234]

For a detailed discussion of the ERISA preemption doctrine, see 374 T.M., *ERISA — Litigation, Procedure, Preemption and Other Title I Issues.*

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[216] *See* ERISA §502(a)(11), added by MPRA, Pub. L. No. 113-235, Div. O, §111(d).

[217] ERISA §514(a). *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1 (1st Cir. 1999); *Ogden v. Mich. Bell Tel. Co.*, 595 F. Supp. 961 (E.D. Mich. 1984); *Felts v. Graphic Arts Employee Benefit Trust*, 680 S.W.2d 891 (Tex. App. 1984). As to labor laws, see *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957); *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); Bickel and Wellington, *Legislative Purpose and the Judicial Process: Lincoln Mills Case*, 71 Harv. L. Rev. 1 (1957); Hays, *The Supreme Court and Labor Law — October Term 1959*, 60 Colum. L. Rev. 901 (1960). *But see Abernethy v. EmblemHealth, Inc.*, 790 Fed. Appx. 250 (2d Cir. 2019) (because contractual claims were derived from a separate promise in employment and separation agreements, and not grounded on obligations in the medical plan, retired officers' state law claims against employer after it cancelled retiree medical coverage are not preempted by ERISA); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995) (because state surety law does not touch upon any rights or duties incident to ERISA plan or conflict with any ERISA cause of action, claim on a surety bond is not preempted by ERISA); *Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995) (state contract claim on surety bond is not preempted by ERISA as claim was not related to employee benefit plan and did not conflict with any enforcement mechanism specified in ERISA); *Thiokol Corp. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994), aff'd, 76 F.3d 751 (6th Cir. 1996) (state "single business tax" that included assets of ERISA plan in tax base not preempted).

[218] *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

[219] *Greater Wash. Bd. of Trade v. District of Columbia*, 506 U.S. 125 (1992); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). See also *Huppeler v. Oscar Mayer Foods Corp.*, 32 F.3d 245 (7th Cir. 1994) in which the Seventh Circuit, following *Alessi*, held that it was not a violation of ERISA's anti-forfeiture provisions for an employer to offset an employee's pension benefit by the amount of workers' compensation payments that he was awarded under state law, and the collectively bargained pension plan permitted the offset.

[220] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), aff'g in part and rem'g *Delta Air Lines, Inc. v. Kramarsky*, 666 F.2d 21 (2d Cir. 1981).

[221] *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991).

[222] *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988).

[223] *See, e.g., Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir. 1989); *Attorney General v. Blue Cross & Blue Shield of Michigan*, 424 N.W. 2d 54 (Mich. Ct. App. 1988). Compare *Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999), in which the Seventh Circuit held that a state unclaimed property law, which required that benefits payable under an ERISA plan that were not claimed within five years be turned over to the state, was preempted by ERISA. The court distinguished the escheat law cases, stating that, unlike the law at issue in *Vega*, escheat laws determine title to property. If state law vests title to the state in unclaimed benefits, those benefits belong to the state instead of the original beneficiary, the court pointed out. Under the law at issue in *Vega*, however, the court stated that the state wanted to step into the shoes of the plan, not the beneficiary, by holding plan assets, which ERISA bars. The Seventh Circuit also distinguished the garnishment cases, noting that the act of garnishment merely eliminates an intermediate transaction in the collection process by permitting benefits otherwise payable to the beneficiary to be seized by the creditor; it does not reduce plan assets.

[224] ERISA §514(b)(2)(A) and §514(b)(2)(B).

[225] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), on remand, 821 F.2d 277 (5th Cir. 1987); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Ins. Board v. Muir*, 819 F.2d 408 (3d Cir. 1987).

[226] *Trustees, Sheet Metal Fund v. Aberdeen Blower, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983).

[227] Hawaii's state health care system was held to be preempted in *Standard Oil Co. v. Agsalud Ind.*, 454 U.S. 801 (1981), and Congress added a special exception to ERISA in response. ERISA §514. *See Council of Hawaii Hotels v. Agusdull*, 594 F. Supp. 449 (D. Haw. 1984).

[228] ERISA §514(b)(6). MEWAs enjoy a rift in the regulatory scheme — they are not subject to ERISA because they are not collectively bargained, yet they skirt state insurance regulation. The partial carve-out from preemption of state regulated MEWAs has not completely resolved the problem.

[229] *FMC Corp. v. Holliday*, 495 U.S. 945 (1990).

[230] *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981) (tortious interference preempted); *Providence v. Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal. 1981) (fraud, bad faith and emotional distress claims not preempted).

[231] The controversy in this area was resolved to a large extent by the amendment of ERISA by the Retirement Equity Act of 1984, Pub. L. No. 98-397. *See* ERISA §206(d); I.R.C. §401(a)(13), §414(p). *See, e.g., Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980); *Marriage of Campa*, 444 U.S. 1028 (1980); *Boggs v. Boggs*, 520 U.S. 833 (1997) (ERISA preempts state community property statute).

[232] *See, e.g., Teamsters v. Daniel*, 439 U.S. 551 (1979); *Childers v. Nw. Airlines, Inc.*, 688 F. Supp. 1357 (D. Minn. 1988).

[233] *E.g.*, Title VII of the Civil Rights Act and the Age Discrimination in Employment Act, Pub. L. No. 90-202. *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), aff'g in part and rem'g, 666 F.2d 21 (1981).

[234] Vietnam Veterans Readjustment Assistance Act, 38 U.S.C. 2021; *see Accardia v. Pennsylvania Railroad*, 383 U.S. 225 (1966); *Alabama Power v. Davis*, 431 U.S. 581 (1977) (predecessor statute).

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E. *Accounting Disclosures for Multiemployer Plans*

Rules adopted by the Financial Accounting Standards Board require employers to account for multiemployer plan contributions as well as provide separate disclosures in the company's annual financial statements. An employer must recognize its required contribution to the multiemployer plan as pension or other postretirement benefit cost and recognize a liability for any contributions due at the reporting date.[235] Also, the employer must recognize, measure, and disclose contingencies if it is either probable or reasonably possible that the employer will incur withdrawal liability or be required to make up a funding shortfall pursuant to a maintenance of benefits clause.[236]

Under amendments to FASB rules, employers' annual financial statements must include more specific disclosures about the multiemployer plans in which they participate.[237] These rules are effective for public companies for fiscal years ending after December 15, 2011, and for private companies for fiscal years ending after December 15, 2012.[238] The employer must create a table that provides information on each significant multiemployer plan,[239] such as the plan's employer identification number and plan number, funding status, and expiration date(s) of collective-bargaining agreement(s) requiring contributions to the plan, if any. This table must provide the amount of the employer's contributions to the plan during the period covered by the company's financial statement, and indicate whether the employer's contribution represents more than 5% of total contributions to the plan. Additional information to be disclosed includes:

- a description of the multiemployer pension plans in which the employer participates that explains how the risks differ from those of single employer pension plans;
- plan design and financial information (such as amount of plan assets) if it is not available in the public domain (for example, via the plan's Form 5500); and
- a table describing total annual contributions made by the employer to all plans that are not individually significant, and total annual contributions made by the employer to all plans.[240]

Multiemployer plans that provide postretirement benefits other than pensions, such as health care, tuition assistance, legal services, or life insurance benefits, must disclose the amount of such contributions. The disclosures also must include a description of the nature of the benefits and the types of employees covered by these benefits (for example, disclosing whether medical benefits are provided to active employees as well as retirees). The employer must disclose any changes that affect the comparability of total employer contributions from year to year, such as a business combination or divestiture, a change in the contractual employer contribution rate, or a change in the number of employees covered by the plan.[241]

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[235] Financial Accounting Standards Board Accounting Standards Codification (FASB ASC) ¶715-80-35-1, available at asc.fasb.org.

[236] FASB ASC ¶715-80-50-2; FASB ASC Topic 415.

[237] ASU No. 2011-09, Compensation—Retirement Benefits—Multiemployer Plans (ASC 715-80): Disclosures about an Employer's Participation in a Multiemployer Plan. Examples and illustrations are provided at FASB ASC ¶715-80-55-6 through -8.

[238] FASB ASC ¶715-80-65-1.

[239] A plan's significance is determined based on the amount of the employer's contribution to the plan, as well as other factors such as the severity of the plan's underfunded status. FASB ASC ¶715-80-50-5.

[240] FASB ASC ¶715-80-50-4 through ¶715-80-50-10.

[241] FASB ASC ¶715-80-50-11. See FASB ASC ¶715-80 for the definition of postretirement benefits.

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IV. Funding Rules for Multiemployer Plans

A. *In General*

Defined benefit pension plans are funded over time. As a result, at any given moment there may not be enough assets in the plan to pay all vested benefits. Rather, the pension plan is funded by periodic contributions to an I.R.C. §501(a) tax-exempt trust in amounts calculated to produce plan assets which, when considered along with the investment return on those assets plus anticipated future contributions, are sufficient to pay all anticipated benefit claims. An actuary prepares estimates of current and projected liabilities and calculates the minimum contribution required in accordance with the minimum funding standard of I.R.C. §412. The difference between liability for accrued benefits and assets is known as "unfunded accrued liability." Actuaries also examine "unfunded vested liability" (the difference between assets and liability for vested benefits). For a discussion of the minimum funding standard for single employer plans, see 371 T.M., *Qualified Plans — Deductions, Contributions, and Funding.*

In a multiemployer plan, the dynamics of funding are somewhat different because they are adapted to the collective bargaining process. Usually, contribution levels are established by collective bargaining agreement and are fixed for the term of the agreement (usually two to three years). Benefit levels typically are set by contract or by the trustees, based on the agreed level of contributions. Sometimes the parties disagree as to which entity has authority to raise benefits under a given set of circumstances. In some multiemployer plans, employers' funding obligations are based explicitly on benefit levels. In other cases, benefits levels are calculated based on the agreed-upon contribution by the employer. The I.R.C. and ERISA minimum funding rules are applied based on benefits promised by the plan, with some adjustments for the collective bargaining process.

Plans are subjected to constant pressure to increase benefits, either directly or through service credits, eligibility or vesting liberalization, COLA-driven increases, or other such devices. When benefits increase, so do plan liabilities, and the increase is factored into the plan's funding program by the plan's actuary. For this reason, funding is not static. Also, instability can arise because funding is projected based on actuarial assumptions regarding earnings and inflation, among other things, because actual earnings and inflation are likely to differ from the assumed levels.

The Pension Protection Act of 2006 (2006 PPA)[242] added I.R.C. §431, which revises the funding rules for multiemployer plans and I.R.C. §432, which provides a regime designed to improve the funding status of multiemployer plans in effect on July 16, 2006, that are severely underfunded.

[242] Pub. L. No. 109-280, §201, §202, §211, and §212, effective for plan years beginning after 2007. Any amount amortized under pre-2006 PPA I.R.C. §412(b) and ERISA §302(b) over any period beginning with a plan year beginning before 2008 will continue to be amortized under that provision. I.R.C. §431(b)(4); ERISA §304(b)(4).

B. *Minimum Funding Standard for Multiemployer Defined Benefit Plans*

The Pension Protection Act of 2006 (2006 PPA)[243] modified the structure of the minimum funding standard. Section 412 still requires that a plan satisfy the minimum funding standard, but the detailed rules for multiemployer plans were moved to §431 (just as the detailed rules for single-employer plans were moved to §430). Accordingly, §412(a)(2)(C) provides that a multiemployer plan shall be treated as satisfying the minimum funding standard for a plan year if the employers make contributions to or under the plan for any plan year which, in the aggregate, are sufficient to ensure that the plan does not have an accumulated funding deficiency under §431 as of the end of the plan year. Rules that are common to all plans, such as requests for funding waivers, are in §412.

The minimum funding standard for multiemployer plans after the passage of the 2006 PPA under §431 is largely the same as it was under former §412. A plan must establish and maintain a funding standard account. The plan's actuary must report the entries in the funding standard account and any accumulated funding deficiency on the Schedule MB[244] that is part of the filing of Form 5500 with the DOL.

1. *Funding Standard Account*

A multiemployer defined benefit plan must establish a funding standard account.[245] An accumulated funding deficiency of a multiemployer plan for any plan year is the excess (if any) of total charges to the funding standard account for all plan years over total credits to such account for such years.[246]

2. *Charges to the Account*

Subject to certain transitional liabilities resulting from the change from the pre-2006 PPA funding standard for multiemployer plans to the post-2006 PPA rules,[247] for a plan year, a multiemployer plan's funding standard account is charged with the sum of the plan's normal cost for the plan year (the cost of funding benefits accrued for that year), plus the following liabilities, which must be amortized in equal annual installments over a period of 15 years (longer periods applied to certain items before the enactment of the 2006 PPA):

(1) for plans that come into existence on or after January 1, 2008, any unfunded past service liability;

[243] Pub. L. No. 109-280.

[244] After the 2006 PPA, the DOL and IRS decided to replace the Schedule B (Actuarial Information) with a Schedule SB for single-employer plans and a Schedule MB for multiemployer plans (and money purchase pension plans).

[245] I.R.C. §431(b)(1); ERISA §304(b)(1). For plan years prior to 2008, see former I.R.C. §412(b) and former ERISA §302(b).

[246] I.R.C. §431(a), amended by Pub. L. No. 113-235, Div. O, §108(b)(3)(A); ERISA §304(a), amended by Pub. L. No. 113-235, Div. O, §108(a)(3)(B). For plan years prior to 2015, if the plan was in reorganization for the plan year, the accumulated funding deficiency of the plan was determined under former ERISA §4243. Former I.R.C. §431(a)(2); former ERISA §304(a)(2). The reorganization rules under ERISA §4241 through §4244A and I.R.C. §418 through §418D were repealed effective for plan years beginning after December 31, 2014. Pub. L. No. 113-235, Div. O, §108(a)(1) and (b)(1), respectively.

[247] *See* I.R.C. §431(b)(2)(D) and §431(b)(2)(E); ERISA §304(b)(2)(D) and §304(b)(2)(E).

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(2) any net increase in unfunded past service liability arising from plan amendments adopted in the plan year;

(3) any net experience loss;

(4) any net loss resulting from changes in actuarial assumptions; and

(5) the amount necessary to amortize each waived funding deficiency for each prior plan year.[248]

3. Credits to the Account

A multiemployer plan's funding standard account for a plan year is credited with the sum of the amount considered contributed by employers for the plan year plus the amount necessary to amortize in equal annual installments over 15 years the following amounts:

(1) any net decrease in unfunded past service liability arising from plan amendments adopted in the plan year;

(2) any net experience gain;

(3) any net gain resulting from changes in actuarial assumptions;

(4) any waived funding deficiency; and

(5) any liability under pre-2006 PPA law resulting from the difference between the debit balance in the funding standard account over the debit balance in the "alternative minimum funding standard account" (a concept that existed under pre-2006 PPA law) for plans that elected to use the alternative minimum funding standard.[249]

Withdrawal liability payments are treated as employer contributions for purposes of the funding standard account.[250]

Any amortizable amounts that arose under pre-2006 PPA law (i.e., those arising in plan years beginning before 2008) continue to be amortized over the number of years provided under the former rules.[251] Under pre-2006 PPA law, unfunded past service liability was amortized over 40 years for plans that were in existence on January 1, 1974, and over 30 years for plans that came into existence after that date. Any increases in past service liability resulting from plan amendments were amortized over 30 plan years and net experience losses were amortized over 15 plan years. Losses resulting from a change of actuarial assumptions were amortized over 30 years.[252] Liabilities under multiemployer plans that arose in a plan year beginning before September 26, 1980, MPPAA's enactment date, were amortized under the old rules: 40 years for unfunded past service liabilities, 20 years for experience losses or gains and 30 years (as in single employer plans) for losses due to changes in actuarial assumptions. In addition, changes in past service liability arising from plan amendments adopted before September 26, 1980, but arising during the three plan years beginning on or after September 26, 1980, were amortized under the old rules. There is also a special rule for liability changes arising during the two years after September 26, 1980, resulting from the changing of a group of participants from one benefit level to another, if the schedule of benefits was adopted before MPPAA's enactment date.[253]

4. Interest Charges and Credits

The amortizable charges and credits to the funding standard account may be netted against each other.[254] The net amortizable amount for each category of charge or credit is charged or credited with interest at a rate determined by the IRS.[255] In addition, certain adjustments must be made when a multiemployer plan leaves reorganization status.[256] For any year in which the plan has a funding deficiency in excess of the full funding limitation, the funding standard account is credited with such excess, and any related amortizable liabilities are considered fully amortized.[257]

5. Extension of Amortization Periods

The various items making up the unfunded accrued liability of multiemployer pension plans must be amortized, i.e., paid off over time with interest. A multiemployer plan may obtain an automatic five-year amortization extension, plus another five years with IRS approval.[258] The IRS is required to grant an application for an extension of the amortization period for up to five years with respect to any unfunded past service liability, investment loss or experience loss. The plan's actuary must certify that: (1) absent the extension, the plan would have an accumulated funding deficiency in the current plan year and any of the nine succeeding plan years; (2) the plan sponsor has adopted a plan to improve the plan's funding status; (3) taking into account the extension, the plan is projected to have sufficient assets to timely pay its expected benefit liabilities and other anticipated expenditures; and (4) required notice is provided.[259]

The IRS also may grant an additional extension of the amortization period for an additional five years if it determines that such an extension would provide adequate protection for

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[248] I.R.C. §431(b)(2)(A) through §431(b)(2)(C); ERISA §304(b)(2)(A) through §304(b)(2)(C). For plan years prior to 2008, see former I.R.C. §412(b)(2) and former ERISA §302(b)(2).

[249] I.R.C. §431(b)(3); ERISA §304(b)(3). For plan years prior to 2008, see former I.R.C. §412(b)(3) and former ERISA §302(b)(3).

[250] I.R.C. §431(b)(7)(A); ERISA §304(b)(7)(A).

[251] I.R.C. §431(b)(4); ERISA §304(b)(4).

[252] Former I.R.C. §412(b)(2) and former ERISA §302(b)(2).

[253] Former I.R.C. §412(b)(6); former ERISA §302(b)(6).

[254] I.R.C. §431(b)(5); ERISA §304(b)(5).

[255] I.R.C. §431(b)(6); ERISA §304(b)(6).

[256] I.R.C. §431(b)(7)(B); ERISA §304(b)(7)(B).

[257] I.R.C. §431(c)(5); ERISA §304(c)(5).

[258] The user fee for a five-year automatic extension of the amortization period is $7,500. Rev. Proc. 2024-4, App. A, §.01(3). *See* Announcement 2020-14 (announcing increase from $1,000, effective January 4, 2021).

[259] I.R.C. §431(d)(1); ERISA §304(d)(1). *See, e.g.,* PLR 201922043, PLR 201842009, PLR 201710040, PLR 201624024, PLR 201443036, PLR 201443037. Although the automatic extension provision was to expire with respect to any application submitted after December 31, 2014, MPRA made this provision permanent on December 16, 2014. Former I.R.C. §431(d)(1)(C), struck by Pub. L. No. 113-235, Div. O, §101(b)(2); former ERISA §304(d)(1)(C), struck by Pub. L. No. 113-235, Div. O, §101(b)(1). Where an automatic 5-year extension is revoked (e.g., due to request of taxpayer), the funding standard account must be re-determined without taking the 5-year amortization into account. All Schedules MB of Form 5500 previously filed must be amended to reflect the revocation. If the revocation has not resulted in an accumulated funding deficiency for any year, the taxpayer can simply attach a reconciliation of the funding standard account to the Schedule MB. *See* PLR 201721024. *See also* PLR 201727011 (failure to meet conditions of IRS ruling letter approving extended amortization period results in loss of extension on prospective, not retroactive, basis and requires redetermination of funding standard account as of year of failure).

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participants under the plan and their beneficiaries and that denial of the additional extension would result in a substantial risk to the voluntary continuation of the plan, or a substantial curtailment of pension benefit levels or employee compensation, and be adverse to the interests of plan participants in the aggregate. The IRS must act upon an application for an additional extension within 180 days after filing and must notify the plan of the specific reasons for rejection of the application.[260]

Plans that have amortization extensions under §431(d) cannot adopt amendments that would increase liabilities of the plan by reason of an increase in benefits, a change in the accrual of benefits, or a change in the rate at which benefits become nonforfeitable under the plan when a §431(d) amortization extension is in effect.[261] If the plan does make an amendment, the amortization extension does not apply to any plan year ending on or after the date on which the amendment is adopted. An exception exists for a plan amendment that (i) the Secretary determines to be reasonable and only provides a *de minimis* increase in liabilities, (ii) only repeals an amendment described in §412(d)(2), or (iii) is required as a condition of qualification.[262]

In PLR 201744022, the plan adopted a rehabilitation plan, then requested a 5-year amortization extension. After it was certified in endangered status, the plan adopted a funding improvement plan that included a proposed schedule requiring higher annual increases in contributions. The plan requested a ruling that the proposed amendment would merely restore some of the benefits that were removed as part of the rehabilitation plan and was not an increase in benefits under §412(c)(7) because the benefits after the amendment would be less than the benefits in place for the plan year for which the amortization extension was granted. The IRS denied the request, ruling that the proposed amendment was an increase in benefits because benefits after the proposed amendment would not be less than the benefits reflected in the request for the amortization extension, which was based on benefits under the rehabilitation plan. The IRS also ruled that the proposed amendment satisfied the exception under §412(c)(7)(B)(i) that allows for reasonable amendments that reflect a de minimis increase in liability.

In PLR 202329011, the plan had an amortization extension under §431(d), then requested to amend the plan to provide a one-time 13th check to participants in payment status, asserting that this would be a de minimis increase in liabilities. If the request was approved, the additional check would not have been an acceleration of a future plan year's payment. The IRS denied the request because the plan sponsor failed to demonstrate that the proposed plan amendment was reasonable under §412(c)(7)(B). The amendment was not reasonable because the permanency and adequacy of the proposed contribution increase was uncertain and it was unclear how the proposed plan amendment would: (1) be in the interests of plan participants in the aggregate; and (2) help to retain or attract new members to the plan.

6. Shortfall Method

The shortfall method is a method of determining charges to a plan's funding standard account by adapting the underlying funding method of certain collectively bargained plans.[263] The only plans that may use the shortfall method are collectively bargained multiemployer plans, where plan contributions are made at a rate specified in a collective bargaining agreement.[264] The shortfall method is designed to "correct" for year-to-year fluctuations in the hours of service (or units of production) upon which the employer contributions are based. The method is not intended to correct funding shortfalls that may result if the bargained contribution rate is set too low to fund the plan's benefit liabilities.

Under the shortfall method, the charges to the funding standard account are computed based upon an estimated number of units of service or production for which a certain amount per unit is charged. This amount is estimated by an actuary based on the plan's experience and its reasonable expectations for the plan year. An estimated unit charge is calculated by dividing an "annual computation charge," plus any prior shortfall amortization charge or credit amount (but disregarding any credit balance or funding deficiency), by the estimated number of units (hours, tons, for example) produced. This charge is multiplied by the actual number of units produced. The resulting amount is the amount charged to the funding standard account on Schedule MB to Form 5500, rather than the annual computation charge from which the unit charge was calculated. The excess of the amount charged over the annual computation charge becomes a shortfall gain (if positive) or a shortfall loss (if negative).

The 2006 PPA does not affect a multiemployer plan's ability to adopt the shortfall funding method, generally with the IRS's permission. Automatic approval to adopt, use or cease using the shortfall funding method is available if: (1) the plan has not used the shortfall funding method during the 5-year period ending on the day before the date the plan is to use the shortfall funding method; and (2) the plan is not operating under an amortization period extension and did not operate un-

[260] I.R.C. §431(d)(2); ERISA §304(d)(2). *See* PLR 201437021 (request for modification of 7-year amortization extension granted under former §412(e) because market fluctuation during plan years ending September 30, 2008, and September 30, 2009, caused general decline in assets followed by severe protracted recession, which constituted unforeseen circumstance meriting modification of original grant's conditions); PLR 201427030 (request for modification of 10-year amortization extension denied under former §412(e) (current §431(d)(2)(B)) because it did not carry out purposes of ERISA and, because plan was insolvent and had already terminated, no participants would be harmed by denial); PLR 200840052 (IRS denied request for 10-year extension of amortization period for unfunded liabilities because automatic 5-year extension is available and 10-year extension would result in large credit balances). For procedures for requesting an extension of the amortization period, see Rev. Proc. 2010-52, superseding Rev. Proc. 2008-67, effective for requests submitted on or after January 1, 2011. See 360 T.M., *Qualified Plans — IRS Determination Letter Procedures*, for general guidance for submitting the request, including the address to which the request should be sent.

[261] I.R.C. §412(c)(7). *See* PLR 201948011 (request for amendment to change the period considered for determining whether a plan participant has earned the requisite hours to be eligible for disability benefits granted; the IRS ruled that the proposed amendment satisfies the exception under §412(c)(7)(B)(i), and therefore does not interfere with the amortization extension approval previously issued).

[262] I.R.C. §412(c)(7)(B); ERISA §302(c)(7)(B).

[263] Reg. §1.412(c)(1)-2.

[264] The shortfall method is not available for single-employer plans for plan years beginning after 2007. Pub. L. No. 109-280, §201(b), §201(d)(1). *See* PLR 201208042 (defined benefit pension plan formed by trustees to fulfill single employer's obligations under collective bargaining agreements may not use shortfall funding method).

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der such an extension during such 5-year period. Benefit restrictions apply during a period in which a multiemployer plan is using the shortfall funding method. In general, plan amendments increasing benefits cannot be adopted while the shortfall funding method is in use.[265]

7. Tax on Accumulated Funding Deficiency

Section 4971(a) and §4971(b) impose an excise tax on an employer responsible for contributing to or under a plan if the plan has an accumulated funding deficiency. The tax imposed by §4971(a) is 5% of the accumulated funding deficiency. If the accumulated funding deficiency is not corrected by the end of the taxable period, §4971(b) imposes an additional tax equal to 100% of the accumulated funding deficiency to the extent not corrected. For a plan year, the liability under §4971 for collectively bargained plans, of each employer that maintains the plan, is determined first based upon their respective delinquencies in making required contributions, and then based upon their respective contribution liabilities.[266] The tax applies to an accumulated funding deficiency under a pension plan. The funding deficiency, however, is determined with respect to the plan as a whole, not with respect to individual employers. Therefore, the deficiency must be allocated among its adopting employers.[267] A funding deficiency can be attributable entirely to the delinquency of one or several employers in making contributions required under a collective bargaining agreement.[268]

A funding deficiency sometimes can result not from delinquent contributions, but from the employers' aggregate failure to avoid a funding deficiency. If the employers contribute exactly what they are required to contribute under the collective bargaining agreement, and the contributions are not sufficient to satisfy the minimum funding requirement, a funding deficiency can arise. This can occur, for example, when the charges to the funding standard account exceed the contributions required for all employers maintaining the plan because some employers have withdrawn from the plan and withdrawal liability payments may not cover the difference. In such a case, the IRS generally will allocate the tax to an individual employer by multiplying the total tax attributable to the aggregate failure by a fraction, the numerator of which is the contribution the employer is required to make for the plan year and the denominator of which is the total contribution all employers are required to make for the plan year.[269]

If an employer withdraws from a plan, the employer remains liable for any I.R.C. §4971 tax with respect to the portion of any accumulated funding deficiency attributable to that employer for plan years up to and including the year of withdrawal. Where a withdrawing employer fails to make withdrawal liability payments (due to bankruptcy or some other reason) employers remaining in the plan may have to increase their contributions to avoid a funding deficiency.[270]

Practice Insight: After the 2006 PPA, an employer that maintains a multiemployer plan subject to §432 will not be subject to the §4971(a) and §4971(b) excise taxes because the plan is considered in critical status[271] once there is an accumulated funding deficiency, no matter how well funded the plan may be. For a plan in critical status, taxes under §4971(a) or §4971(b) are not imposed; only §4971(g) taxes are imposed.[272]

Section 4971(g)[273] imposes excise taxes on plans in critical or endangered status, and is discussed in V.I., below. For plans in endangered status, the §4971(g) tax is in addition to the excise tax imposed under §4971(a) or §4971(b).

8. Valuation of Assets

The I.R.C. permits the valuation of a multiemployer plan's assets, for funding purposes, to be determined using any reasonable actuarial method that takes into account fair market value and is permitted under regulations.[274] A plan may use actual fair market value on the date of the valuation (i.e., the price at which the property would change hands between a willing buyer and seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts).[275] Under the pre-2006 PPA regulations, the plan may use any method that takes into account either the fair market value of the assets or a prescribed average value.[276] Fair market value or average value can be used either directly or indirectly by placing upper and lower limits on the values produced. Whatever method is chosen, the actuarial valuation method must result in a value of plan assets that is not less than 80% of the fair market value of the assets and not more than 120% of the fair market value.[277] The valuation method generally can include a smoothing methodology that takes into account reasonable expected investment returns and average values of the plan assets. If the valuation method uses the average value of the plan assets, values may be used for a stated period not to exceed the five most recent plan years, including the current year.[278]

Note: These are boundaries to which the actuarial valuation can be adjusted. The plan still cannot adopt a method that is designed to produce a result above or below the actual fair market value or the average fair market value of the assets. A

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[265] Pub. L. No. 109-280, §201(b), effective for plan years beginning after 2007 (Pub. L. No. 109-280, §201(d)). The shortfall funding method provisions were set to expire for plan years beginning after 2014, but MPRA made the provisions permanent. Pub. L. No. 113-235, Div. O, §101(a), repealing Pub. L. No. 109-280, §221(c)(1), effective December 16, 2014.

[266] I.R.C. §413(b)(6).

[267] In general, the IRS uses Prop. Reg. §54.4971-3 as the basis upon which the excise tax is allocated.

[268] *See* Prop. Reg. §54.4971-3(b)(2).

[269] *See* Prop. Reg. §54.4971-3(b)(3). *See Gastronomical Workers Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 49 EBC 2099 (1st Cir. 2010) (district court's ruling that group of hotels must make additional dollar-specific contributions to multiemployer pension fund to address accumulated funding deficiency was vacated because funding deficiency no longer existed when court made its ruling).

[270] *See* Prop. Reg. §54.4971-3(e).

[271] As defined in §432(b)(2).

[272] §4971(g)(1).

[273] Added by Pub. L. No. 109-280, §212(b)(1), and amended by Pub. L. No. 110-458, §102(b)(2)(I), effective for plan years beginning after 2007. This provision was set to expire for plan years beginning after 2014, but MPRA made the provision permanent. Pub. L. No. 113-235, Div. O, §101(a), repealing Pub. L. No. 109-280, §221(c)(1), effective December 16, 2014. For a discussion of plans in critical or endangered status, see V., below.

[274] I.R.C. §431(c)(2)(A); ERISA §304(c)(2)(A); former §412(c)(2)(A) (pre-2006 PPA).

[275] Reg. §1.412(c)(2)-1(c).

[276] Reg. §1.412(c)(2)-1(b)(4)(i), §1.412(c)(2)-1(b)(4)(ii).

[277] Reg. §1.412(c)(2)-1(b)(6). *See* Rev. Proc. 2000-40, §3.11–§3.17 (criteria for automatic approval of funding valuation method change).

[278] Reg. §1.412(c)(2)-1(b)(7). *See* Rev. Proc. 2000-40, §3.11–§3.17.

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method that is designed to produce a result between fair market value and average value is permitted, however.[279]

The values for the preceding years must be adjusted to reflect all additions to, and reductions of, plan assets since the valuation date for the particular year. The adjustments reflect the fact that the average value intended is an average for the assets held by the plan in the current year. It is not an average of the volume of assets held in the plan over a period of years.[280] No adjustment is made for increases or decreases in the total value of plan assets that result from the purchase, sale or exchange of plan assets or from the receipt of payment on a debt obligation held by the plan.[281] Similarly, no positive or negative adjustment is made to reflect appreciation or depreciation in a plan asset since the earlier valuation date. The appreciation or depreciation is picked up in subsequent years' valuations and is reflected in the average.

The plan must consistently use an approved valuation method,[282] and the same day or days must be used for each plan year in which a valuation is performed.[283]

Note: The actuary must describe the method of valuation on the plan's Form 5500 Schedule MB in sufficient detail for another actuary to arrive at a reasonably similar result.[284]

A change in asset valuation method or the date is considered a change in funding method that requires IRS approval.[285] Rev. Proc. 2000-40 sets forth a list of changes to funding methods that may be made without prior IRS approval.[286] The procedure provides automatic approval to change several categories of funding method of the plan, including certain changes in the asset valuation method to any of the following:[287]

- fair market value, as defined in Reg. §1.412(c)(2)-1(c);
- average value, as defined in Reg. §1.412(c)(2)-1(b)(7), or to any alternative formulation that is algebraically equivalent to this average;
- average value, modified to use a phase-in, or to any alternative formulation that is algebraically equivalent to this average value;
- smoothed market value (with or without phase-in), or to any alternative formulation that is algebraically equivalent to the smoothed value; or
- average value, modified to use the alternative phase-in, or to any alternative formulation that is algebraically equivalent to this average.

Automatic approval also is available for a change in the valuation date to the first day of the plan year, and a change from the funding method used to value ancillary benefits to the funding method used to value retirement benefits.[288]

For automatic approval to be effective, a funding method change must satisfy rules concerning the continued maintenance of certain amortization bases, the creation of an amortization base resulting from the change in method, and the amortization period for the method change base.[289] Automatic approval is not available if Form 5500 Schedule SB is not timely filed or does not reflect the valuation method, the plan administrator has not agreed to the change, a minimum funding waiver or extension of amortization has been requested or applies, or the plan is under an Employee Plans examination, has been notified of an impending referral for examination, or is in Appeals or litigation for issues raised in an examination.[290] In addition, automatic approval is not available for a change to the asset valuation method, or the valuation date, if it was changed in any of the four preceding plan years.[291]

Plan administrators and sponsors wishing to make a funding method change not included in Rev. Proc. 2000-40 must request approval from the IRS.[292]

A special valuation election is available to multiemployer plans for a bond or other evidence of indebtedness as long as it is not in default as to principal or interest. The plan administrator may elect to value the bond on an amortized basis running from the initial cost at purchase to par value at maturity or earliest call date.[293] The regulations require a written statement of the election to be attached to the plan's annual return.[294] The election to value at book value, rather than market value, applies to all bonds held by the plan for the plan year for which it is made and to any bonds subsequently acquired by the plan.[295] Revocation of the election requires the consent of the IRS.[296]

If a bond or other evidence of indebtedness is in default, it must be valued as any other plan asset with a reasonable valuation method, taking into account fair market value.[297]

9. Special Rules Under the 2010 Pension Relief Act

Congress provided two temporary special funding rules for multiemployer defined benefit pension plans under the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (2010 Pension Relief Act).[298] The 2010 Pension Relief Act permits multiemployer plans to separately amortize experience losses or gains attributable to net investment losses incurred in either or both of the first two plan years ending after August 31, 2008. This item will be amortized

[279] Reg. §1.412(c)(2)-1(b)(5).
[280] Reg. §1.412(c)(2)-1(b)(8).
[281] Reg. §1.412(c)(2)-1(b)(8)(i).
[282] Reg. §1.412(c)(2)-1(b)(1).
[283] Reg. §1.412(c)(2)-1(b)(3).
[284] Reg. §1.412(c)(2)-1(b)(2).
[285] §412(d)(1).
[286] Rev. Proc. 2017-56, §2.05, states that Rev. Proc. 2000-40 continues to provide automatic approval for certain changes in funding method for defined benefit plans that are not subject to §430.
[287] Rev. Proc. 2000-40, §3.10–§3.12, §3.15–§3.17.
[288] Rev. Proc. 2000-40, §3.13–§3.14.
[289] Rev. Proc. 2000-40, §5.
[290] Rev. Proc. 2000-40, §6.01.
[291] Rev. Proc. 2000-40, §6.02(3).
[292] Rev. Proc. 2017-57 sets forth the procedures for obtaining approval from the IRS. See 360 T.M., *Qualified Plans — IRS Determination Letter Procedures*, for the address to which the request should be sent. Also see the funding method discussion in 371 T.M., *Employee Plans — Deductions, Contributions, and Funding*.
[293] I.R.C. §431(c)(2)(B); ERISA §304(c)(2)(B); former §412(c)(2)(B). *See* Temp. Reg. §11.412(c)-11(a).
[294] Temp. Reg. §11.412(c)-11(b). *See* Prop. Reg. §1.412(c)(2)-2, EE-99-78, 47 Fed. Reg. 54,093 (Dec. 1, 1982) (intended to supersede Temp. Reg. §11.412(c)-11 once finalized).
[295] Temp. Reg. §11.412(c)-11(c).
[296] Temp. Reg. §11.412(c)-11(d).
[297] Temp. Reg. §11.412(c)-11(c).
[298] Pub. L. No. 111-192.

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in equal annual installments over a period of 29 plan years.[299] This provision is available only if the plan actuary certifies the plan's solvency over the amortization period. If this extended amortization period is elected, the automatic five-year amortization extension under I.R.C. §431(d) is no longer available; if the five-year extension was granted prior to the election of a 30-year amortization period for net investment losses, the automatic extension will not cause the amortization period to exceed 30 years.[300]

The 2010 Pension Relief Act also provides an expanded smoothing period for multiemployer plans that meet solvency standards. Eligible plans could change their asset valuation method to spread the difference between expected and actual returns for either or both of the first two plan years ending after August 31, 2008, over a period of no more than 10 years, and/or provide that the value of plan assets for either or both of those plan years is not less than 80% or greater than 130% of the fair market value of such assets. A change in valuation method in accordance with this provision is deemed approved by the Secretary of the Treasury.[301]

Any reduction in unfunded accrued liability that results from applying both the separate amortization and expanded smoothing period is treated as a separate experience amortization base, to be amortized over 30 plan years. Restrictions on benefit increases apply to a multiemployer plan that elects either of these relief rules, and the plan sponsor is required to provide notice of the election to participants, beneficiaries, and the PBGC.[302]

The provisions of the 2010 Pension Relief Act applicable to multiemployer plans generally are effective as of the first day of the first plan year ending after August 31, 2008. However, if a plan's election for relief under this provision would affect the plan's funding standard account for the first plan year ending after August 31, 2008, then the election is disregarded for purposes of applying additional funding rules for multiemployer plans in critical or endangered status. Restrictions on benefit increases under this provision are effective on June 25, 2010.[303]

10. *Special Rules Under the American Rescue Plan Act of 2021*

In the American Rescue Plan Act of 2021 (ARPA),[304] Congress provided special financial assistance to certain multiemployer plans, and provided funding relief for plans that did not receive financial assistance. The special financial assistance is discussed in VIII., below. The funding relief is similar to the funding relief provided by the 2010 Pension Relief Act.

Section 431(b)(8)(F)[305] provides that a multiemployer plan that meets the solvency test as of February 29, 2020, may elect to apply a special amortization rule with respect to net investment losses that are incurred in either or both of the first two plan years ending after February 29, 2020. In addition, the net investment losses are increased by the COVID-19 losses for the plan year. The sum of the COVID-19 losses plus the net investment losses is treated separately from other experience losses and is amortized over an extended amortization period. The extended amortization period begins with the plan year the net investment loss is first recognized in the actuarial value of the assets and ends with the last plan year in the 30-year period beginning with the plan year in which the net investment loss is incurred. Accordingly, similar to the 2010 Pension Relief Act provision, the extended amortization period is 29 years.

C. *Funding Disclosures*

1. *Annual Funding Notice*

ERISA requires that multiemployer defined benefit plans provide an annual notice regarding the plan's funding status to plan participants and beneficiaries, the plan's contributing employers, participants' labor organizations (unions), and the PBGC.[306] The Pension Protection Act of 2006 changed the information that must be provided in the ERISA §101(f) annual funding notice and accelerated the time when multiemployer plans must provide this notice, for plan years beginning after 2007.[307] In addition to plan identification information, the annual funding notice must include the following information, as of the end of the plan year to which the notice relates:

(1) the number of (i) participants who are retired or separated from service and receiving benefits, (ii) retired or separated participants entitled to future benefits and (iii) active participants, which for plan years beginning after December 31, 2023, must be in tabular format for the plan year to which the notice relates and the two preceding plan years;

(2) the plan's funding policy and the asset allocation of its investments expressed as percentages of total plan assets;

(3) information on any plan amendment, scheduled benefit increase or reduction or other known event taking effect in the current plan year that has a material effect on plan liabilities or assets for the year;

[299] The reason that the amortization period is 29 years rather than 30 years is because the law provides the amortization period ends with the last plan year in the 30-plan-year period beginning with the eligible loss year. However, the amortization period does not begin until the first plan year after the eligible loss year, and therefore is a 29-plan-year period. *See* Notice 2010-83, Q&A-A-3.

[300] I.R.C. §431(b)(8)(A) and ERISA §304(b)(8)(A), added by Pub. L. No. 111-192, §211(a); Notice 2010-83, Q&A-A-1 through A-9.

[301] I.R.C. §431(b)(8)(B) and ERISA §304(b)(8)(B), added by Pub. L. No. 111-192, §211(a); Notice 2010-83, Q&A-V-1 through V-4.

[302] I.R.C. §431(b)(8)(B)(iii), §431(b)(8)(D), and §431(b)(8)(E), and ERISA §304(b)(8)(B)(iii), §304(b)(8)(D), and §304(b)(8)(E), added by Pub. L. No. 111-192, §211(a); Notice 2010-83, Q&A-R-1 through R-3 and N-1 through N-6. Relief may be elected for an eligible plan year even if the Form 5500 already was filed for the plan year. Notice 2010-83, Q&A-F-1 through F-3; Notice 2010-56.

[303] Pub. L. No. 111-192, §211(b).

[304] Pub. L. No. 117-2, Subtitle H, §9701–§9708, enacted March 11, 2021.

[305] *See also* ERISA §304(b)(8)(F).

[306] ERISA §101(f); 29 C.F.R. §2520.101-5, RIN 1210-AB18, 80 Fed. Reg. 5626 (Feb. 2, 2015), applicable to notices for plan years beginning on or after January 1, 2015. 29 C.F.R. §2520.101-5(f)(5) clarifies that notification must be provided to employers that are parties to the collective bargaining agreements through which the plan is maintained or that otherwise may be subject to withdrawal liability under ERISA §4203, as of the last day of the plan year to which the notice relates. Under 29 C.F.R. §2520.101-5(a)(2)(i), there are limited exceptions to the notice requirement for certain multiemployer plans experiencing insolvency or terminating by mass withdrawal.

[307] ERISA §101(f), as amended by Pub. L. No. 109-280, §501(a), Pub. L. No. 110-458, §105(a)(1), §105(a)(2), and Pub. L. No. 117-328, Div. T, §343, effective for plan years beginning after December 31, 2023. Transition rules for reporting a plan's funded percentage applied for plan years beginning in 2006 and 2007. Pub. L. No. 109-280, §501(d).

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(4) a statement that a person may obtain a copy of the plan's annual report upon request, through the Department of Labor website, or through a website maintained by the plan sponsor;

(5) whether the plan's funded percentage for the plan year to which the notice relates and the two preceding plan years is at least 100% (and, if not, the actual percentages);

(6) the value of plan assets and liabilities for the plan year to which the notice relates and the two preceding plan years;

(7) whether the plan is in "endangered" or "critical" status and, if so, a summary of the plan's funding improvement or rehabilitation program and a statement describing how to obtain a copy of such program and the actuarial or financial data that demonstrate any action taken toward fiscal improvement; and

(8) a statement that the plan administrator will provide, upon written request, a copy of the plan's annual report to any labor organization representing participants and beneficiaries and to any contributing employer.

The Multiemployer Pension Reform Act of 2014 (MPRA)[308] requires multiemployer plans to indicate on the annual funding notice whether the plan is in critical and declining status and, if so, to include the projected date of insolvency, a clear statement that insolvency might lead to benefit reductions, and a statement as to whether the plan has taken legally permitted actions to prevent insolvency.[309]

Annual funding notices must be provided within 120 days after the end of the plan year to which they relate. If a plan does not cover more than 100 employees for the preceding year, the notice must be provided upon filing of the plan's annual report, i.e., within seven months after the end of the plan year unless the report's due date is extended. The Labor Department has provided a model notice for this purpose.[310]

2. *Multiemployer Plan Information Available Upon Request*

ERISA §101(k)[311] requires a multiemployer plan administrator to provide copies of certain specified plan information within 30 days of a written request by a participant or beneficiary, employee organization or contributing employer.

Multiemployer plan administrators must provide upon request copies of:[312]

(1) the current plan document;

(2) the latest summary plan description;

(3) the current trust agreement, including amendments, or any other instrument or agreement under which the plan is established or operated;

(4) if requested by an employer, any participation agreement that relates to the employer's plan participation during the current or any of the past five plan years;

(5) the annual report under ERISA §104 for any plan year;

(6) the annual funding notice under ERISA §101(f) for any plan year;

(7) any actuarial report (including any sensitivity testing) for any plan year that has been in the plan's possession for at least 30 days;

(8) any quarterly, semi-annual or annual financial report prepared for the plan by an investment manager or advisor or other person who is a plan fiduciary that has been in the plan's possession for at least 30 days;

(9) audited financial statements for any plan year;

(10) a copy of any application for an extension of amortization periods filed with the IRS; and

(11) if the plan was in critical or endangered status for a plan year, the latest funding improvement or rehabilitation plan, with applicable contribution schedules (other than a contribution schedule applicable to a specific employer).

Documents described in items (5) through (9) need only be retained by the plan administrator and provided upon written request for a period of six years. The rest of the documents need only be provided upon a party's written request once during any 12-month period.[313]

Any actuarial report or financial report provided to a participant, beneficiary or employer under ERISA §101(k) must not include any individually identifiable information regarding any participant, beneficiary, employee, fiduciary or contributing employer, or reveal any proprietary information about the plan, any contributing employer or any plan service provider. The information may be provided in written, electronic or other appropriate form.[314] The plan administrator can impose a reasonable charge for copying, mailing, and other costs of furnishing copies or notices, subject to a maximum amount prescribed by regulations.[315]

Employee representatives and contributing employers have standing to sue the plan to enforce ERISA §101(k).[316]

[308] Pub. L. No. 113-235, Div. O.

[309] ERISA §101(f)(2)(B)(vi), added by MPRA, Pub. L. No. 113-235, Div. O, §201(a)(4), effective December 16, 2014. Pub. L. No. 113-235, Div. O, §201(c). See V.D., below, for a discussion of critical and declining status.

[310] ERISA §101(f)(3); 29 C.F.R. §2520.101-5(d). *See* 29 C.F.R. §2520.101-5, Appendix B (model notice). See Worksheet 4 for a copy of the model annual funding notice, which has been modified to note changes under the SECURE 2.0 Act of 2022, Pub. L. No. 117-328, Div. T, §343, as well as changes for plans eligible for special financial assistance (see VIII., below).

[311] Added by Pub. L. No. 109-280, §502(a)(1), effective for plan years beginning after 2007; 29 C.F.R. §2520.101-6 and §2520.104b-30, RIN 1210-AB21, 75 Fed. Reg. 9334 (Mar. 2, 2010) (effective April 1, 2010). Former ERISA §101(k) was redesignated as ERISA §101(l).

[312] ERISA §101(k)(1), as amended by Pub. L. No. 113-235, Div. O, §111(a).

[313] ERISA §101(k)(3), as amended by Pub. L. No. 113-235, Div. O, §111(b), ERISA §107, as amended by Pub. L. No. 113-235, Div. O, §111(c). Changes made by Pub. L. No. 113-235, Div. O, §111 are effective for plan years beginning after December 31, 2014.

[314] ERISA §101(k)(2), as amended by Pub. L. No. 110-458, §105(b)(1).

[315] ERISA §101(k)(3).

[316] ERISA §502(a)(11).

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V. Zone Status

As the funding status of multiemployer plans declined, Congress both created different funding rules for plans in different zones of funded status, and created or expanded several transactions a multiemployer plan could engage in to improve its financial position or zone status. Before delving into those funding rules and transactions, it is important to properly understand and categorize a plan's status.

A. *Overview*

I.R.C. §432, as added by the Pension Protection Act of 2006 (2006 PPA),[317] provides special rules for multiemployer defined benefit plans in effect on July 16, 2006, that have an accumulated funding deficiency, are projected to have an accumulated funding deficiency, or are significantly underfunded. ERISA §305 contains parallel provisions.[318] The term "accumulated funding deficiency" is defined in IV.B.1., above. The special rules of §432 require that a multiemployer plan be placed in a category, which has become known as a "zone." There are several legal, administrative, and funding requirements that flow from the determination of which "zone" a plan falls within. Various penalties or excise taxes apply if there is a failure to comply with the requirements.

The determination of a plan's "zone status" is made and certified by the plan's actuary. Originally, the categories were critical, endangered, or neither critical nor endangered. A plan that is critical is referred to as in the "red zone," a plan that is endangered is referred to as in the "yellow zone," and a plan that is in neither the red nor yellow zones is referred to as in the "green zone." Effective December 16, 2014, the Multiemployer Pension Reform Act of 2014 (MPRA) created a new category, called "critical and declining status," for multiemployer plans that are experiencing severe financial trouble and facing insolvency.[319] See V.D., below, for a discussion of the rules for plans in critical and declining status, and VII., for a discussion of the benefit suspension rules.

[317] Pub. L. No. 109-280.

[318] Pub. L. No. 109-280, §202, enacting ERISA §305 and amending ERISA §502 and §302(b); Pub. L. No. 109-280, §212, as amended by Pub. L. No. 110-458, §102(b)(3), enacting I.R.C. §432 and amending I.R.C. §4971 and §412(b); all provisions are generally effective for plan years beginning after 2007. Pub. L. No. 109-280, §206 provides an exception from the rules enacted in §201, §202, §211 and §212 of the Act for benefit increases made pursuant to an agreement with the PBGC before June 30, 2005, as long as the increases are funded in accordance with the agreement. Further, for a multiemployer plan with respect to which benefits were reduced pursuant to a plan amendment adopted on or after January 1, 2002, and before June 30, 2005, and which, pursuant to the plan document, the trust agreement, or a formal written communication from the plan sponsor to participants provided before June 30, 2005, provided for the restoration of such benefits, the amendments made by Pub. L. No. 109-280, §202 and §212 do not apply to such benefit restorations to the extent that any restriction on the provision or accrual of such benefits would otherwise apply by reason of those amendments. Pub. L. No. 109-280, §202(f)(3) and §212(e)(3). *Note*: The provisions enacted in Pub. L. No. 109-280, §202 and §212 were set to expire for plan years beginning after 2014. Pub. L. No. 109-280, §221(c)(1). However, MPRA made these provisions permanent. Pub. L. No. 113-235, Div. O, §101(a), repealing Pub. L. No. 109-280, §221(c)(1), effective December 16, 2014.

[319] I.R.C. §432(a)(3), added by Pub. L. No. 113-235, Div. O, §201(b)(1)(C); ERISA §305(a)(3), added by Pub. L. No. 113-235, Div. O, §201(a)(1)(C).

The actuary for a multiemployer plan must, by the 90th day of each plan year, certify to the Secretary of the Treasury and to the plan sponsor the plan's "zone status" (i.e., whether the plan is in endangered status, critical status, critical and declining status, or none of these) for the plan year.[320] If a plan is certified to be in endangered status, the plan sponsor must adopt a "funding improvement plan" that is reasonably expected to enable the plan to achieve certain funding improvements by the end of a 10-year funding improvement period (with a possible substitution of a 15-year period for a plan in seriously endangered status). Similarly, the sponsor of a plan that has been certified to be in critical status must adopt a rehabilitation plan that is reasonably expected to enable the plan to emerge from critical status by the end of its 10-year rehabilitation period. A funding improvement plan or rehabilitation plan must be updated each year after the initial endangered year (referred to as the "initial determination year" or "initial critical year").

Nothing in the law prohibits a contributing employer from withdrawing from a multiemployer plan that is in endangered or critical status, or requires the employer to continue to make contributions pursuant to a funding improvement or rehabilitation plan.[321]

The sponsor of a multiemployer plan in endangered or critical status must provide notice of the plan's certified status to participants and beneficiaries, the bargaining parties, the Pension Benefit Guaranty Corporation (PBGC), and the Secretary of Labor, not later than 30 days after the date of the certification. If the plan is in critical status, the notice must explain that adjustable benefits, as defined in §432(e)(8), may be reduced.[322] The annual certification must be provided regardless of whether the plan is in endangered or critical status. Section 432 thus creates an early warning system and a curative mechanism for multiemployer plans that are severely underfunded.

Practice Insight: It is not clear whether a plan in critical and declining status must provide the notice that would be required if the plan was merely in critical status. The argument has been that §432(b)(3)(D)(i) only requires that plans that are or will be in endangered or critical status notify the participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor. The omission of a reference to critical and declining status implies no notice is required. On the other hand, a plan that is considered critical and declining has to be determined to be critical and additionally be projected to become insolvent during a specified period. The counterargument is that since the plan meets the requirements to be considered critical, the notice is required. This question has not yet been addressed in formal guidance.

The IRS issued proposed regulations in 2008 providing guidance for multiemployer defined benefit plans regarding determination, certification and notification of endangered or crit-

[320] I.R.C. §432(b)(3), amended by Pub. L. No. 113-235, Div. O, §102(b), §104(b) (both effective for plan years beginning after December 31, 2014), and §201(b) (effective December 16, 2014); ERISA §305(b)(3), amended by Pub. L. No. 113-235, Div. O, §102(a), §104(a), and §201(a).

[321] *Trustees of the Local 138 Pension Trust Fund v. F.W. Honerkamp Co.*, 692 F.3d 127 (2d Cir. 2012) (unpub. op.).

[322] I.R.C. §432(b)(3)(D), amended by Pub. L. No. 113-235, Div. O, §102(b)(3), §104(b)(2) (both effective for plan years beginning after December 31, 2014); ERISA §305(b)(3)(D), amended by Pub. L. No. 113-235, Div. O, §102(a)(3), §104(a)(2).

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ical status under I.R.C. §432.[323] Prop. Reg. §1.432(a)-1(a) summarizes the I.R.C.'s restrictions and requirements applicable to plans in endangered status and critical status. Prop. Reg. §1.432(a)-1(b) supplies definitions that apply for purposes of I.R.C. §432 and the regulations, including guidance for plans that change their status in subsequent years (e.g., emerging from and re-entering critical status). Prop. Reg. §1.432(b)-1 sets forth the factors for determining whether a plan is in endangered status or critical status, as well as the requirements for the annual certification by the plan's enrolled actuary and for the notice to employees required for plans that are in endangered or critical status. These proposed regulations largely mirror the I.R.C. provisions discussed below and are proposed to apply to plan years ending after March 18, 2008, but only with respect to plan years that begin on or after January 1, 2008. See below for further discussion. The proposed regulations do not reflect changes in the law made by the MPRA.

B. Plans in Endangered Status

A multiemployer plan is treated as in endangered status for a plan year if the plan actuary determines that the plan is not in critical status for that year and, as of the beginning of the plan year, either:

(1) its funded percentage (plan assets divided by accrued liability)[324] is less than 80%; or

(2) it has, or is projected to have, an accumulated funding deficiency for the plan year or any of the next six plan years.[325]

A plan is in "seriously endangered" status if both (1) and (2) above apply.[326]

A plan is deemed to not be in endangered status if the plan is projected to no longer be in endangered status after 10 plan years, according to the plan actuary's certification.[327] This rule applies only if the plan was not in critical or endangered status for the immediately preceding plan year.

Practice Insight: The actuary first has to determine the plan is not critical. Accordingly, the actuary first determines whether the plan is critical and, if so, stops there as the remainder of the requirements for endangered status are moot. That procedure is why critical status is called the red zone, and endangered status is called the yellow zone.

1. Funding Improvement Plan

In the first year for which a plan is in endangered status, the plan sponsor must adopt a funding improvement plan within 240 days after the deadline for the actuarial certification.[328] Within 30 days after the adoption of the funding improvement plan, the plan sponsor must provide to the bargaining parties one or more schedules showing revised benefit structures, revised contribution structures, or both, which may reasonably be expected to enable the plan to meet the applicable benchmarks in the funding improvement plan.[329] In general, endangered plans must show a 33% improvement in funded status over a period of 10 years. Seriously endangered plans have 15 years to achieve a 20% improvement in funded status.

Note: The requirements of I.R.C. §432(c)(1) and ERISA §305(c)(1) do not apply to a year in a funding plan adoption period or funding improvement period (both of which are discussed below) due to the plan's being in endangered status for a preceding plan year, i.e., the initial determination year with respect to the funding improvement plan to which it relates.[330]

One schedule prepared by the plan sponsor must show reductions in the rate of future benefit accruals necessary to achieve the benchmarks, assuming no amendments to increase contributions (other than amendments increasing contributions necessary to achieve benchmarks after the maximum reduction in future benefit accruals). Another schedule must show increases in future contributions necessary to achieve benchmarks, assuming no amendments to reduce future benefit accruals under the plan. Two benchmarks are required to be included in the funding improvement plan:

(1) At the close of the funding improvement period, the plan's funded percentage must be increased by at least 33% (20% for a plan in seriously endangered status) of the difference between 100% and the funding percentage at the beginning of the first plan year for which the plan was certified to be in endangered status.[331]

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[323] REG-151135-07, 73 Fed. Reg. 14,417 (Mar. 18, 2008).

[324] I.R.C. §432(j)(2), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(j)(2), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3).

[325] I.R.C. §432(b)(1), as amended by MPRA, Pub. L. No. 113-235, Div. O, §104(b)(1), effective for plan years beginning after December 31, 2014; ERISA §305(b)(1), as amended by Pub. L. No. 113-235, Div. O, §104(a)(1); Prop. Reg. §1.432-1(b)(1). Note that the proposed regulations do not reflect changes made by MPRA.

[326] I.R.C. §432(b)(1); ERISA §305(b)(1).

[327] I.R.C. §432(b)(1) and §432(b)(5), as amended by MPRA, Pub. L. No. 113-235, Div. O, §104(b)(1); ERISA §305(b)(1) and §305(b)(5), as amended by Pub. L. No. 113-235, Div. O, §104(a)(1).

[328] I.R.C. §432(c)(1)(A); ERISA §305(c)(1)(A). *See* Notice 2020-35 (COVID-19 emergency relief under §7508A postpones deadline to July 15, 2020, if due on or after March 30, 2020, and before July 15, 2020). If, within 60 days of the due date for adoption of a funding improvement plan, the plan sponsor of a plan in endangered status has not agreed on a funding improvement plan, then any member of the board or group that constitutes the plan sponsor may require that the plan sponsor enter into an expedited dispute resolution procedure for the development and adoption of a funding improvement plan. I.R.C. §432(h), as amended by Pub. L. No. 110-458, §102(b)(2)(F), effective as if included in Pub. L. No. 109-280, and redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(h), as amended by Pub. L. No. 110-458, §102(b)(1)(G), and redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3).

[329] I.R.C. §432(c)(1)(B)(i); ERISA §305(c)(1)(B)(i). "Bargaining party" is defined in I.R.C. §432(j)(1), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3) (effective after December 31, 2014) and ERISA §305(j)(1), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3) (effective after December 31, 2014). In the case of a plan described in I.R.C. §404(c) (certain negotiated plans) or a continuation of such a plan, the association of employers that is the employer settlor of the plan is treated as a bargaining party and is treated as the plan sponsor for purposes of I.R.C. §432. I.R.C. §432(j)(1)(A)(ii); ERISA §305(j)(1)(A)(ii). *See also* Prop. Reg. §1.432(a)-1(b)(3) and §1.432(a)-1(c)(1). Note that the proposed regulations do not reflect changes made by MPRA.

[330] I.R.C. §432(c)(2); ERISA §305(c)(2).

[331] I.R.C. §432(c)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §105(b)(1), effective for plan years beginning after December 31, 2014, and I.R.C. §432(c)(3)(B); ERISA §305(c)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §105(a)(1), effective for plan years beginning after December 31, 2014, and ERISA §305(c)(3)(B). For plan years before 2015, this benchmark was measured by comparing the plan's funded percentage at the end of the funding improvement period to the funded percentage at the beginning of the funding improvement period.

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(2) There must be no accumulated funding deficiency for the last plan year during the funding improvement period (taking into account any extension of amortization periods, which is discussed in IV., above).[332]

The funding improvement period for any funding improvement plan is the 10-year period (15-year period for a plan in seriously endangered status) beginning on the first day of the first plan year of the multiemployer plan beginning after the earlier of: (1) the second anniversary of the date of the adoption of the funding improvement plan, or (2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of endangered status for the initial determination year and covering, as of that due date, at least 75% of the active participants in the multiemployer plan.[333] If the plan's actuary certifies that the plan is no longer in endangered status and is not in critical status, the funding plan adoption period or funding improvement period ends as of the close of the preceding plan year. If the plan's actuary certifies for a plan year in any funding plan adoption period or funding improvement period that the plan is in critical status, the funding plan adoption period or funding improvement period ends as of the close of the plan year preceding the first plan year in the rehabilitation period with respect to such status.[334] If the plan's actuary certifies for the first plan year following the close of the funding improvement period that the plan is in endangered status, the endangered status rules under I.R.C. §432(c) (and §432(d) and ERISA §305(c) and §305(d)) will apply as if that first plan year were an initial determination year, except that the plan may not be amended in a manner inconsistent with the funding improvement plan in effect for the preceding plan year until a new funding improvement plan is adopted.[335]

The 20% increase in funded percentage and the 15-year funding improvement period for a seriously endangered plan that is more than 70% funded at the beginning of the initial determination year apply only if the plan's actuary certifies, within 30 days after the certification of seriously endangered status for the initial determination year, that based on the terms of the plan and the collective bargaining agreements in effect at the time of such certification, the plan is not projected to meet the benchmarks without regard to the use of the 20% and 15-year period.[336] If the actuary makes such certification, the plan may, in formulating its funding improvement plan, take into account the 20% and 15-year period only for plan years in the funding improvement period beginning on or before the date on which the last of the collective bargaining agreements expires.[337]

The plan sponsor must annually update the funding improvement plan (and file the update with the plan's annual report under ERISA §104) and also must annually update any schedule of contribution rates to reflect the experience of the plan.[338] A schedule of contribution rates provided by the plan sponsor and relied upon by the bargaining parties in negotiating a collective bargaining agreement must remain in effect for the duration of that collective bargaining agreement.[339]

If a collective bargaining agreement that was in effect at the time the plan entered endangered status expires, and the bargaining parties fail to agree on changes to contribution or benefit schedules necessary to meet the applicable benchmarks in accordance with the funding improvement plan, then the plan sponsor must implement its own default schedule for reductions in future benefit accruals beginning 180 days after the date on which the collective bargaining agreement expires.[340] If a collective bargaining agreement reflecting a funding improvement plan expires, then plan sponsors may impose subsequent, updated contribution schedules beginning 180 days after the date on which the collective bargaining agreement expires when parties to a collective bargaining agreement cannot come to an agreement with terms consistent with the updated schedule.[341] Any failure to make a scheduled contribution is treated as a delinquent contribution under ERISA §515.[342]

2. Rules for Plan Operation During Adoption and Improvement Periods

During the adoption period (i.e., the period beginning on the date the plan's status is certified for the initial determination year and ending on the date the plan adopts a funding improvement plan), no plan amendment can be adopted that increases the plan's liabilities by increasing benefits, changing the rate of benefit accrual or accelerating the plan's vesting schedule unless it is required to retain the plan's tax-qualified status or to comply with other applicable law.[343] Furthermore, the plan sponsor may not accept a collective bargaining agreement or participation agreement that provides for reduced contributions with respect to any participant, a suspension of contributions

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[332] I.R.C. §432(c)(3)(A)(ii), as amended by Pub. L. No. 113-235, Div. O, §105(b)(2), effective for plan years beginning after December 31, 2014; ERISA §305(c)(3)(A)(ii), as amended by Pub. L. No. 113-235, Div. O, §105(a)(2). For plan years before 2015, the rule specified that there could be no accumulated funding deficiency in any plan year during the funding improvement period.

[333] I.R.C. §432(c)(4)(A); ERISA §305(c)(4)(A); Prop. Reg. §1.432(a)-1(b)(8). For plans in seriously endangered status, the period is 15 years; but see the special rules for seriously endangered plans more than 70% funded under I.R.C. §432(c)(5) and ERISA §305(c)(5). I.R.C. §432(c)(4)(B); ERISA §305(c)(4)(B).

[334] I.R.C. §432(c)(4)(C); ERISA §305(c)(4)(C). The funding plan adoption period is the period beginning on the date of the actuarial certification for the initial determination year and ending on the day before the first day of the funding improvement period. I.R.C. §432(c)(8); ERISA §305(c)(8).

[335] I.R.C. §432(c)(4)(D); ERISA §305(c)(4)(D).

[336] I.R.C. §432(c)(5)(A)(i); ERISA §305(c)(5)(A)(i).

[337] I.R.C. §432(c)(5)(A)(ii); ERISA §305(c)(5)(A)(ii).

[338] I.R.C. §432(c)(6)(A), §432(c)(6)(B); ERISA §305(c)(6)(A), §305(c)(6)(B). *See* Notice 2020-35 (COVID-19 emergency relief under §7508A postpones deadlines to July 15, 2020, if due on or after March 30, 2020, and before July 15, 2020).

[339] I.R.C. §432(c)(6)(C); ERISA §305(c)(6)(C).

[340] I.R.C. §432(c)(7) as amended by Pub. L. No. 110-458, §102(b)(2)(C)(ii), effective as if included in Pub. L. No. 109-280, Pub. L. No. 110-458, §112; ERISA §305(c)(7), as amended by Pub. L. No. 110-458, §102(b)(1)(D), effective as if included in Pub. L. No. 109-280, Pub. L. No. 110-458, §112. *See* I.R.C. §432(c)(1)(B)(i)(I); ERISA §305(c)(1)(B)(i)(I).

[341] I.R.C. §432(c)(7)(B), as amended by MPRA, Pub. L. No. 113-235, Div. O, §107(b)(1); ERISA §305(c)(7)(B), as amended by Pub. L. No. 113-235, Div. O, §107(a)(1).

[342] ERISA §305(c)(7)(D).

[343] I.R.C. §432(d)(2)(B), as amended by MPRA, Pub. L. No. 113-235, Div. O, §106(b), effective for plan years beginning after December 31, 2014; ERISA §305(d)(2)(B), as amended by Pub. L. No. 113-235, Div. O, §106(a), effective for plan years beginning after December 31, 2014.

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for any period of service or any new direct or indirect exclusion of younger or newly hired employees from participation.[344]

After the funding improvement plan is adopted, the plan may not be amended to increase benefits unless the increase is paid for out of additional contributions not contemplated by the funding improvement plan, and the plan is still reasonably expected to reach the benchmark on schedule.[345] The plan actuary must certify these statements.

Prior to 2015, there was a special rule for plans in seriously endangered status. Under this rule, the plan sponsor was required to take all reasonable actions consistent with the terms of the plan and applicable law that were expected, based on reasonable assumptions, to achieve (a) an increase in the plan's funded percentage, and (b) postponement of an accumulated funding deficiency for at least one additional plan year. Such actions included applications for extensions of amortization periods under I.R.C. §431(d), use of the shortfall funding method in making funding standard account computations, amendments to the plan's benefit structure, reductions in future benefit accruals, and other reasonable actions consistent with the terms of the plan and applicable law.[346] This rule was eliminated by MPRA §106, effective for plan years beginning after December 31, 2014.[347]

C. Plans in Critical Status

A multiemployer plan is in critical status for a plan year if the plan falls into one or more of the following four categories:

(1) (a) Its funded percentage is less than 65%, and (b) the fair market value of plan assets, plus the present value of anticipated employer contributions for the current plan year and each of the next six plan years, is less than the present value of all vested benefits plus plan administrative expenses projected to be payable during this seven-year period.[348]

(2) It has an accumulated funding deficiency for the current plan year or is projected to have one for any of the next three plan years (four plan years if the funded percentage is 65% or less), not taking into account any extension of amortization periods.[349]

(3) (a) Its normal cost for the current plan year, plus interest on its unfunded benefit liabilities as of the last day of the prior year, exceeds the present value of anticipated employer and employee contributions for the current plan year, (b) the present value of vested benefits of inactive participants exceeds the present value of vested benefits of active participants, and (c) it has an accumulated funding deficiency for the current plan year, or is projected to have one in the next four plan years, not taking into account any extension of amortization periods.[350]

(4) The sum of (a) the market value of plan assets, and (b) the present value of anticipated employer contributions for the plan year and each of the next four plan years is less than the present value of benefits (plus administrative expenses) projected to be payable during this 5-year period.[351]

Multiemployer plans may elect to be in critical status if the plan actuary projects that the plan will be in critical status in any of the five succeeding plan years.[352] The plan sponsor must provide notice to the IRS if the plan elects to be in critical status and to the PBGC if the plan is projected to be in critical status for any of the next five plan years (but not the current plan year).[353]

1. Rehabilitation Plan

If a multiemployer plan is in critical status for a plan year, the plan sponsor must adopt a rehabilitation plan not later than 240 days following the required date for the actuarial certification of critical status.[354] Within 30 days after the adoption of the rehabilitation plan, the plan sponsor must provide the bargaining parties with one or more schedules showing revised benefit structures, contribution structures, or both, designed to enable the plan to emerge from critical status.[355] The plan sponsor al-

[344] I.R.C. §432(d)(2)(A), as amended by Pub. L. No. 113-235, Div. O, §106(b), effective for plan years beginning after December 31, 2014; ERISA §305(d)(2)(A), as amended by Pub. L. No. 113-235, Div. O, §106(a), effective for plan years beginning after December 31, 2014.

[345] I.R.C. §432(d)(1)(B), as amended by Pub. L. No. 113-235, Div. O, §106(b), effective for plan years beginning after December 31, 2014; ERISA §305(d)(1)(B), as amended by Pub. L. No. 113-235, Div. O, §106(a), effective for plan years beginning after December 31, 2014.

[346] Former I.R.C. §432(d)(1)(C), prior to amendment by Pub. L. No. 113-235, Div. O, §106(b); former ERISA §305(d)(1)(C), prior to amendment by Pub. L. No. 113-235, Div. O, §106(a). For a discussion of extension of amortization periods, see IV.B.5., above.

[347] Pub. L. No. 113-235, Div. O, §106(c).

[348] I.R.C. §432(b)(2)(A); ERISA §305(b)(2)(A). "Funded percentage" is the percentage equal to a fraction, the numerator of which is the value of the plan's assets, as determined under I.R.C. §431(c)(2), and the denominator of which is the accrued liability of the plan, determined using actuarial assumptions described in I.R.C. §431(c)(3). I.R.C. §432(j)(2), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(j)(2), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3), effective after December 31, 2014.

[349] I.R.C. §432(b)(2)(B); ERISA §305(b)(2)(B). An accumulated funding deficiency is determined without regard to any amortization extension under I.R.C. §431(d). If a plan has a funded percentage of 65% or less, the 3-year period for projecting whether it will have an accumulated funding deficiency increases to four years.

[350] I.R.C. §432(b)(2)(C); ERISA §305(b)(2)(C).

[351] I.R.C. §432(b)(2)(D); ERISA §305(b)(2)(D).

[352] I.R.C. §432(b)(4), added by Pub. L. No. 113-235, Div. O, §102(b)(1); ERISA §305(b)(4), added by Pub. L. No. 113-235, Div. O, §102(a)(1)

[353] I.R.C. §432(b)(3)(D)(i) and I.R.C. §432(b)(3)(D)(iv), added by Pub. L. No. 113-235, Div. O, §102(b)(3); ERISA §305(b)(3)(D)(i) and ERISA §305(b)(3)(D)(iv), added by Pub. L. No. 113-235, Div. O, §102(a)(3), effective for plan years beginning after December 31, 2014. Certification regarding whether the plan is in critical or endangered status is made on Form 15315 within 90 days after the beginning of the plan year for which the certification is made.

[354] I.R.C. §432(e)(1)(A); ERISA §305(e)(1)(A). *See* Notice 2020-35 (COVID-19 emergency relief under §7508A postpones deadline to July 15, 2020, if due on or after March 30, 2020, and before July 15, 2020). If, within 60 days of the due date for adoption of a rehabilitation plan, the plan sponsor of a plan in critical status has not agreed on a rehabilitation plan, then any member of the board or group that constitutes the plan sponsor may require that the plan sponsor enter into an expedited dispute resolution procedure for the development and adoption of a rehabilitation plan. I.R.C. §432(h), as amended by Pub. L. No. 110-458, §102(b)(2)(F), and redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(h), as amended by Pub. L. No. 110-458, §102(b)(1)(G), and redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3), effective after December 31, 2014.

[355] I.R.C. §432(e)(1)(B)(i); ERISA §305(e)(1)(B)(i). The schedule(s) must reflect reductions in future benefit accruals and adjustable benefits, and in-

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so may choose to provide the parties with additional information relating to contribution rates, benefit reductions, alternative schedules or other information relevant to the plan's emergence from critical status.[356] One schedule must be designated as the default schedule. The default schedule assumes that there are no increases in contributions other than those necessary to emerge from critical status after future benefit accruals and other benefits have been reduced to the maximum extent permitted by law. If the bargaining parties cannot agree upon a schedule, the default schedule applies.[357] In this case, the default schedule must be implemented by the plan sponsor within 180 days after the expiration of a collective bargaining agreement that was in effect at the time the plan entered critical status if the bargaining agreements fail to agree on changes necessary to meet applicable benchmarks. Plan sponsors also may impose subsequent, updated contribution schedules when parties to a collective bargaining agreement cannot come to an agreement.[358]

Note: The above requirements (of I.R.C. §432(e)(1) and ERISA §305(e)(1)) do not apply to a plan year in a rehabilitation plan adoption period or rehabilitation period (both of which are discussed below) due to the plan's being in critical status for a preceding plan year, i.e., the initial critical year with respect to the rehabilitation plan to which it relates.[359]

A rehabilitation plan consists of the actions, including options or a range of options, to be proposed to the bargaining parties, designed to enable the plan to emerge from critical status by the end of a 10-year period. The actions or options offered may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions if agreed to by the bargaining parties, or any combination of these actions.[360]

If the plan sponsor determines that, based on reasonable actuarial assumptions and upon exhausting all reasonable measures, the plan cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period, then the rehabilitation plan must provide reasonable measures to emerge from critical status at a later time or to forestall possible insolvency.[361] Under these circumstances, the rehabilitation plan must set forth the alternatives considered, explain why the plan is not reasonably expected to emerge from critical status by the end of the rehabilitation period, and specify when, if ever, the plan is expected to emerge from critical status.[362]

A rehabilitation plan must provide annual standards for meeting its requirements and must include the schedules required under I.R.C. §432(e)(1)(B)(i) and ERISA §305(e)(1)(B)(i).[363]

The plan sponsor must annually update the rehabilitation plan (and file the update with the plan's annual report under ERISA §104) and also must annually update any schedule of contribution rates to reflect the experience of the plan.[364] A schedule of contribution rates provided by the plan sponsor and relied upon by the bargaining parties in negotiating a collective bargaining agreement must remain in effect for the duration of that collective bargaining agreement.[365]

The rehabilitation period is the 10-year period that begins after the earlier of:

(1) the second anniversary of the rehabilitation plan's adoption; or

(2) the expiration of the collective bargaining agreements in effect on the due date for the actuarial certification of critical status for the initial critical year and covering, as of such due date, at least 75% of active participants.

If a plan emerges from critical status before the end of the 10-year period, the rehabilitation period ends with the plan year preceding the plan year for which the determination of that emergence is made.[366] A plan will remain in critical status until the plan actuary certifies that (1) the plan does not fall into any of the categories of critical status in I.R.C. §432(b)(2), (2) the plan is not projected to have an accumulated funding deficiency for the plan year or any of the nine succeeding plan years, without regard to the use of the shortfall method and taking into account any extension of amortization periods under I.R.C. §431(d), and (3) the plan is not projected to become insolvent in the next 30 plan years.[367]

Each employer that is obligated to contribute to a plan in critical status must pay a surcharge of 5% of the contribution required under the collective bargaining agreement in the first

creases in contributions, that the plan sponsor determines are reasonably necessary to emerge from critical status. One schedule must be designated as the default schedule and assume that there are no increases in contributions under the plan other than the increases necessary to emerge from critical status after future benefit accruals and other benefits (other than benefits that are not permitted to be reduced or eliminated under I.R.C. §411(d)(6)) have been reduced to the maximum extent permitted. I.R.C. §432(e)(1) (flush language); ERISA §305(e)(1) (flush language).

[356] I.R.C. §432(e)(1)(B)(ii); ERISA §305(e)(1)(B)(ii).

[357] I.R.C. §432(e)(1) (flush language); ERISA §305(e)(1) (flush language). Any reduction in the rate of future accruals under the default schedule cannot reduce the rate of future accruals below: (1) a monthly benefit (payable as a single life annuity commencing at the participant's normal retirement age) equal to 1% of the contributions required to be made with respect to a participant, or the equivalent standard accrual rate for a participant or group of participants under the collective bargaining agreements in effect as of the first day of the initial critical year; or (2) if lower, the accrual rate under the plan on the first day of the initial critical year. I.R.C. §432(e)(6), as amended by Pub. L. No. 110-458, §102(b)(2)(D)(iii); ERISA §432(e)(6), as amended by Pub. L. No. 110-458, §102(b)(1)(E)(iii).

[358] I.R.C. §432(e)(3)(C), as amended by Pub. L. No. 113-235, Div. O, §107(b)(2); ERISA §305(e)(3)(C), as amended by Pub. L. No. 113-235, Div. O, §107(b)(1). *See* Notice 2020-35 (COVID-19 emergency relief under §7508A postpones deadline to July 15, 2020, if due on or after March 30, 2020, and before July 15, 2020).

[359] I.R.C. §432(e)(2); ERISA §305(e)(2).

[360] I.R.C. §432(e)(3)(A)(i); ERISA §305(e)(3)(A)(i).

[361] I.R.C. §432(e)(3)(A)(ii); ERISA §305(e)(3)(A)(ii).

[362] I.R.C. §432(e)(3)(A) (flush language); ERISA §305(e)(3)(A) (flush language).

[363] I.R.C. §432(e)(3)(A) (flush language); ERISA §305(e)(3)(A) (flush language).

[364] I.R.C. §432(e)(3)(B)(i) and §432(e)(3)(B)(ii); ERISA §305(e)(3)(B)(i) and §305(e)(3)(B)(ii).

[365] I.R.C. §432(e)(3)(B)(iii); ERISA §305(e)(3)(B)(iii).

[366] I.R.C. §432(e)(4)(A), as amended by Pub. L. No. 110-458, §102(b)(2)(D)(ii); ERISA §305(e)(4)(A), as amended by Pub. L. No. 110-458, §102(b)(1)(E)(ii).

[367] I.R.C. §432(e)(4)(B), as amended by Pub. L. No. 113-235, Div. O, §103(b), effective for plan years beginning after December 31, 2014; ERISA §305(e)(4)(B), as amended by Pub. L. No. 113-235, Div. O, §103(a), effective for plan years beginning after December 31, 2014. For plans that received an automatic extension of amortization periods, the first clause is disregarded, and such plans will only reenter critical status if projected to have an accumulated funding deficiency in the next five years or projected to become insolvent in the next 30 years.

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year of critical status and 10% for subsequent years in which the plan remains in critical status. Failure to pay the surcharge is treated as a delinquent contribution under ERISA §515. However, the surcharge ceases to apply once the employer agrees to a collective bargaining agreement that includes terms consistent with a schedule presented by the plan sponsor under the funding rehabilitation plan (with respect to employees covered by the collective bargaining agreement), beginning on the effective date of such agreement. The surcharge does not apply to an employer until 30 days after it has been notified by the sponsor that the plan is in critical status and that the surcharge is in effect.[368]

A rehabilitation plan can reduce certain "adjustable" benefits that otherwise would be protected by the I.R.C.'s anti-cutback rule, including early retirement benefits and retirement-type subsidies.[369] Adjustable benefits also include benefits, rights and features under the plan, including post-retirement death benefits, 60-month guarantees, disability benefits not yet in pay status, and similar benefits. In general, no reduction will apply to participant's normal retirement benefit, nor to retirees whose benefits commenced before the date the notice for the initial critical year is provided.[370] No reduction in benefits can occur until 30 days after participants, beneficiaries, employers and employee organizations receive notice of the reduction.[371]

Surcharges and reductions in benefits generally are disregarded in determining the plan's unfunded vested benefits for purposes of calculating an employer's withdrawal liability under ERISA §4201 and §4211.[372] Benefit reductions or suspensions while a plan is in critical and declining status also are disregarded for this purpose, unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension.[373] Also, generally effective for plan years beginning after December 31, 2014, withdrawal liability is determined without regard to contribution increases required by a funding improvement or rehabilitation plan.[374]

2. *Rules for Plan Operation During Adoption and Rehabilitation Periods*

A plan may not be amended after the date of the adoption of a rehabilitation plan to be inconsistent with the rehabilitation plan. The plan also may not increase benefits, including future benefit accruals, unless the plan actuary certifies that such increase is paid for out of additional contributions not contemplated by the rehabilitation plan and, after accounting for the benefit increase, the plan still is reasonably expected to emerge from critical status by the end of the rehabilitation period on the schedule contemplated in the rehabilitation plan.[375]

A plan must restrict the payment of benefits in excess of a single life annuity (plus any Social Security supplement) beginning on the date the plan sends notice of its critical status certification.[376] This restriction does not apply to amounts that may be immediately distributed without the employee's consent under I.R.C. §411(a)(11) or to makeup payments made due to a retroactive annuity starting date or a similar payment of benefits owed for a prior period. In addition, the plan must not make any payment to purchase an irrevocable commitment from an insurer to pay benefits.[377]

Each year after the initial critical or endangered year, the plan sponsor must update the rehabilitation plan, including the schedule of contribution rates and must file the updates with the plan's annual report.[378] The actuary's determination of a plan's normal cost, accrued liability, and improvements in funded percentage must be based on the unit credit funding method (whether or not that method is used for the plan's actuarial valuation).[379]

During the period beginning when the plan's critical status is certified for the first time and lasting until the date the plan adopts a rehabilitation plan, the plan sponsor may not accept a collective bargaining agreement or participation agreement with respect to the multiemployer plan that provides for (1) a reduction in the level of contributions for any participants, (2)

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[368] I.R.C. §432(e)(7); ERISA §305(e)(7).

[369] I.R.C. §432(e)(8)(A), as amended by Pub. L. No. 110-458, §102(b)(2)(D)(iv)(I); ERISA §305(e)(8)(A). A constitutional challenge to this provision brought by pension plan participants was dismissed based on lack of standing. *Arendt v. Harris*, 56 EBC 2005 (9th Cir. 2013) (unpub). The PBGC has amended the definitions of "nonforfeitable benefits" and "unfunded vested benefits" to include adjustable benefits that have been reduced by a plan sponsor pursuant to ERISA §305(e)(8) or I.R.C. §432(e)(8), to the extent such benefits otherwise would be nonforfeitable benefits. PBGC Reg. §4211.2 and §4219.2(b); RIN 1212-AB07, 73 Fed. Reg. 79,628 (Dec. 30, 2008). For dates of applicability, see 73 Fed. Reg. at 79,634.

[370] I.R.C. §432(e)(8)(A)(ii) and §432(e)(8)(B); ERISA §305(e)(8)(A)(ii) and §305(e)(8)(B). Notice requirements for plans in critical and endangered status are discussed in V.F., below.

[371] I.R.C. §432(e)(8)(C), as amended by Pub. L. No. 110-458, §102(b)(2)(D)(iv)(II) through (IV); ERISA §305(e)(8)(C), as amended by Pub. L. No. 110-458, §102(b)(1)(E)(iv).

[372] I.R.C. §432(g), added by MPRA, Pub. L. No. 113-235, Div. O, §109(b)(4), and amended by Pub. L. No. 113-235, Div. O, §201(b)(6); ERISA §305(g), added by Pub. L. No. 113-235, Div. O, §109(a)(4), and amended by Pub. L. No. 113-235, Div. O, §201(a)(7)(A). Changes made by Pub. L. No. 113-235, Div. O, §109 are effective for benefit reductions and contribution increases that go into effect during plan years beginning after December 31, 2014, and to surcharges the obligations for which accrue on or after December 31, 2014. Pub. L. No. 113-235, Div. O, §109(c). Changes made by Pub. L. No. 113-235, Div. O, §201 are effective December 16, 2014. Pub. L. No. 113-235, Div. O, §201(c). Prior to 2015, see former I.R.C. §432(e)(9); former ERISA §305(e)(9). See IX.C.1., below, for a discussion of calculating withdrawal liability.

[373] I.R.C. §432(g)(1), as amended by Pub. L. No. 113-235, Div. O, §201(b)(6); ERISA §305(g), as amended by Pub. L. No. 113-235, Div. O, §201(a)(7)(A). See VII., below, for a discussion of benefit suspensions while in critical and declining status.

[374] I.R.C. §432(g)(3), as amended by Pub. L. No. 113-235, Div. O, §109(b)(4); ERISA §305(g)(3), as amended by Pub. L. No. 113-235, Div. O, §109(a)(4).

[375] I.R.C. §432(f)(1); ERISA §305(f)(1).

[376] I.R.C. §432(f)(2); ERISA §305(f)(2). Under Prop. Reg. §1.432(a)-1(a)(3)(iii)(D), the plan would be required to correct any benefit payments that were restricted in error. Notice requirements for plans in critical and endangered status are discussed in V.F., below.

[377] I.R.C. §432(f)(2)(B); ERISA §305(f)(2)(B).

[378] I.R.C. §432(e)(3)(B); ERISA §305(e)(3)(B).

[379] I.R.C. §432(j)(8), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(j)(8), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3), effective after December 31, 2014. Prior to 2015, see former I.R.C. §432(i)(8) and former ERISA §305(i)(8). The proposed regulations would limit the scope of this provision to use the unit credit funding method solely for purposes of determining a plan's funded percentage and the I.R.C. §432(b)(2)(C)(i) comparison of contributions with the sum of the plan's normal cost and interest on the amount of unfunded liability. Thus, whether a plan is projected to have an accumulated funding would be determined based on the plan's actual funding method, rather than the unit credit method. Prop. Reg. §1.432(a)-1(b)(7), 1.432(b)-1(c)(4). Note that the proposed regulations do not reflect changes made by MPRA.

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a suspension of contributions with respect to any period of service, or (3) any new direct or indirect exclusion of younger or newly hired employees from plan participation. Further, during the rehabilitation plan adoption period, no plan amendment that increases the liabilities of the plan by reason of any increase in benefits, any change in the accrual of benefits, or any change in the rate at which benefits become nonforfeitable under the plan may be adopted unless the amendment is required as a condition of plan qualification under the I.R.C. or to comply with other applicable law.[380]

D. Plans in Critical and Declining Status

A plan is in critical and declining status if the plan falls into critical status (as defined in §432(b)(2) for the current plan year) and the plan is projected to become insolvent within the meaning of §418E during the current plan year or any of the 14 succeeding plan years (a 15-year period). If the plan has a ratio of inactive participants to active participants that exceeds 2:1, or if the funded percentage is less than 80%, then a 20-year period is used to project whether the plan will become insolvent.

For this purpose, "funded percentage" is the percentage equal to a fraction, the numerator of which is the value of the plan's assets,[381] and the denominator of which is the accrued liability[382] of the plan.[383]

A plan in critical and declining status can suspend the payment of accrued benefits pursuant to I.R.C. §432(e)(9) and ERISA §305(e)(9). The suspension of benefits is discussed in VII., below.

E. Actuarial Certification of a Plan's Status

A plan's actuary must certify to the plan sponsor and the IRS whether or not the plan is in endangered status, critical status, or critical and declining status for each plan year.[384] If the certification is for a plan year that falls within the plan's funding improvement period or rehabilitation period from a prior certification of endangered or critical status, the actuary also must certify whether the plan is making scheduled progress in meeting the requirements of its funding improvement or rehabilitation plan. Generally, the annual certification also must include:

- whether the plan would be in endangered status but for the special rule in §432(b)(5), discussed in V.B, above;[385]
- whether the plan will be in critical status for any of the five succeeding plan years;[386] and
- whether the plan is or will be in critical and endangered status for that plan year.[387]

The certification must be made no later than the 90th day of each plan year of a multiemployer plan. Failure to certify the plan's status is treated as a failure to file the plan's annual report under ERISA §502(c)(2) and is subject to a penalty of up to $1,000 per day (as adjusted for inflation).[388]

The actuary's determination of a plan's zone status involves making projections of plan assets and plan liabilities for current and future plan years. These projections must be based on the actuary's best estimates of anticipated experience under the plan, using reasonable actuarial assumptions and methods, except that any projection of activity in the industry or industries covered by the plan, including future covered employment and contribution levels, must be based on information provided by the plan sponsor acting reasonably and in good faith. The projected present value of liabilities as of the beginning of the plan year must be determined based on the most recent of either (1) the actuarial statement required under ERISA §103(d) in the most recently filed annual report, or (2) the actuarial valuation for the preceding plan year.[389] With respect to projecting employer contributions, the actuary must assume either that anticipated employer contributions will continue for the current and future plan years in accordance with the terms of the currently applicable collective bargaining agreement(s), or that employer contributions for the most recent plan year will continue indefinitely, but only if the plan actuary determines there have been no significant demographic changes that would make this assumption unreasonable.[390]

F. Notice of Endangered or Critical Status

The plan sponsor must provide notification of endangered or critical status to the plan participants, beneficiaries, the bargaining parties, the PBGC, and the Department of Labor of the plan's status no later than 30 days after the date by which the plan actuary must submit a certification to the IRS and the plan sponsor regarding whether the plan is in endangered or critical

[380] I.R.C. §432(f)(3), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(2), effective after December 31, 2014; ERISA §305(f)(3), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(2), effective after December 31, 2014. Prior to 2015, see former I.R.C. §432(f)(4) and former ERISA §305(f)(4). *See* PLR 201147038 (rehabilitation plan may not allow participants who are eligible for subsidized early retirement benefits to "retire" on one day in order to qualify for early retirement subsidy, and then immediately return to work with payment of early retirement pension benefit suspended, because it would disqualify plan under I.R.C. §401(a)).

[381] As determined under I.R.C. §431(c)(2).

[382] Determined using actuarial assumptions described in I.R.C. §431(c)(3).

[383] I.R.C. §432(j)(2); ERISA §305(j)(2).

[384] I.R.C. §432(b)(3)(A); ERISA §305(b)(3)(A); 29 C.F.R. §2520.101-6(c)(1)(i), RIN 1210-AB21, 75 Fed. Reg. 9334 (Mar. 2, 2010). See Prop. Treas. Reg. §1.432(b)-1(d) for more specific instructions regarding the content and submission of this certification.

[385] I.R.C. §432(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §104(b)(3); ERISA §305(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §104(a)(3). Changes made by Pub. L. No. 113-235, Div. O, §104 are effective for plan years beginning after December 31, 2014. Pub. L. No. 113-235, Div. O, §104(c).

[386] I.R.C. §432(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §102(b)(2)(A); ERISA §305(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §102(a)(2)(A). Changes made by Pub. L. No. 113-235, Div. O, §102 are effective for plan years beginning after December 31, 2014. Pub. L. No. 113-235, Div. O, §102(c).

[387] I.R.C. §432(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §201(b)(3); ERISA §305(b)(3)(A)(i), as amended by Pub. L. No. 113-235, Div. O, §201(a)(3). Changes made by Pub. L. No. 113-235, Div. O, §201 are effective December 16, 2014. Pub. L. No. 113-235, Div. O, §201(c).

[388] I.R.C. §432(b)(3)(C); ERISA §305(b)(3)(C). *See* 29 C.F.R. §2575.3. For a table of the current and prior DOL penalties imposed on an ERISA plan, see the Worksheets in 361 T.M., *Reporting and Disclosure Under ERISA*.

[389] I.R.C. §432(b)(3)(B)(i) and §432(b)(3)(B)(iii); ERISA §305(b)(3)(B)(i) and §305(b)(3)(B)(iii). MPRA added separate provisions regarding how to make projections relating to critical status in succeeding plan years and how to make projections relating to critical and declining status. Note that one of these provisions will likely be renumbered in a future technical corrections act. I.R.C. §432(b)(3)(B)(iv), added by Pub. L. No. 113-235, Div. O, §102(b)(2)(B) and §201(b)(4); ERISA §305(b)(3)(B)(iv), added by Pub. L. No. 113-235, Div. O, §102(a)(2)(B) and §201(a)(5).

[390] I.R.C. §432(b)(3)(B)(ii); ERISA §305(b)(3)(B)(ii).

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status.[391] The annual certification is made on Form 15315 within 90 days after the beginning of the plan year for which the certification is made. If the plan is or will be in critical status, the notice must explain the possibility that (1) adjustable benefits[392] may be reduced and (2) the reductions may apply to participants and beneficiaries whose benefit payments begin on or after the notice is provided for the plan year in which the plan enters critical status.[393] If the plan provides benefits that are restricted under I.R.C. §432(f)(2), the notice must also include an explanation that the plan cannot pay single sums and similar benefits described in §432(f)(2) that are greater than the monthly amount due under a single life annuity. A plan sponsor that sends the model notice issued by the DOL satisfies this requirement.[394]

Additional notices must be provided:

(1) If a plan elects to be in critical status, the plan sponsor must notify participants and beneficiaries, the bargaining parties, the PBGC, DOL, and IRS within 30 days.[395]

(2) If a plan has not elected to be in critical status and it is certified to be in critical status for any of the next five plan years (but not the current plan year), then the plan sponsor must notify the PBGC within 30 days.[396]

(3) If a plan would be in endangered status but for the special rule in §432(b)(5), discussed in V.B., above, then the plan sponsor must provide notice to the bargaining parties and the PBGC.[397]

(4) If a plan that is in critical and declining status for the plan year proposes to suspend benefits, then the plan sponsor must satisfy notice requirements.[398] This notice fulfills the requirements of an ERISA §204(h) notice. *See* the discussion in VII.C.2., below.

If adjustable benefits are in fact reduced under the rehabilitation plan, the plan sponsor must give notice of the reduction at least 30 days before the general effective date of the reduction to: (1) plan participants and beneficiaries; (2) each employer who has an obligation to contribute (under ERISA §4212(a)) under the plan; and (3) each employee organization that represents plan participants employed by the employer for collective bargaining. The notice must contain: (1) sufficient information to enable participants and beneficiaries to understand the effect of any reduction on their benefits, including an estimate (on an annual or monthly basis) of any affected adjustable benefit that a participant or beneficiary would otherwise have been eligible for as of the general effective date of the reduction; and (2) information as to the plan participants' rights and remedies and methods for contacting the DOL for further information and assistance if appropriate.[399]

Under IRS regulations, a notice required under I.R.C. §432(b)(3)(D) for an amendment adopted to comply with the benefit restrictions of I.R.C. §432(f)(2) is treated as also having complied with the requirement to provide notice with respect to an amendment under ERISA §204(h).[400] However, in the case of an amendment to which I.R.C. §432 applies for a multiemployer plan in endangered status, the normal timing and content rules for an ERISA §204(h) notice under I.R.C. §4980F would apply (so that any required ERISA §204(h) notice must be provided at least 15 days before the effective date).[401]

G. Nonbargained Employee Participation

If an employer contributes to a multiemployer plan with respect to both bargained and nonbargained employees, and if the plan is in endangered status or in critical status, benefits of and contributions for the nonbargained employees, including surcharges on those contributions, are determined as if the nonbargained employees were bargained. Specifically, the benefits and contributions are determined as if the nonbargained employees were covered under the first to expire of the employer's collective bargaining agreements in effect when the plan entered endangered or critical status.[402] If an employer contributes to a multiemployer plan only with respect to nonbargained employees, I.R.C. §432 and ERISA §305 apply as if the employer were the bargaining party and its participation agreement with the plan were a collective bargaining agreement with a term ending on the first day of the plan year beginning after the employer is provided the schedule(s) of revised benefit or contribution structures discussed above.[403]

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[391] I.R.C. §432(b)(3)(D)(i); ERISA §305(b)(3)(D)(i); Prop. Reg. §1.432(b)-1(e). The DOL has provided a model notice to facilitate compliance with this requirement. Prop. 29 C.F.R. §2540.305-1, RIN 1210-AB26, 73 Fed. Reg. 15,688 (Mar. 25, 2008).

[392] As defined in I.R.C. §432(e)(8).

[393] I.R.C. §432(b)(3)(D)(ii); ERISA §305(b)(3)(D)(ii).

[394] Prop. Treas. Reg. §1.432(b)-1(e)(2).

[395] I.R.C. §432(b)(3)(D)(i), as amended by Pub. L. No. 113-235, Div. O, §102(b)(3)(A); ERISA §305(b)(3)(D)(i), as amended by Pub. L. No. 113-235, Div. O, §102(a)(3)(A). Changes made by Pub. L. No. 113-235, Div. O, §102 are effective for plan years beginning after December 31, 2014. Pub. L. No. 113-235, Div. O, §102(c).

[396] I.R.C. §432(b)(3)(D)(v), as amended by Pub. L. No. 113-235, Div. O, §102(b)(3)(B) and redesignated by Pub. L. No. 113-235, Div. O, §104(b)(2)(A); ERISA §305(b)(3)(D)(v), as amended by Pub. L. No. 113-235, Div. O, §102(a)(3)(B) and redesignated by Pub. L. No. 113-235, Div. O, §104(a)(2)(A).

[397] I.R.C. §432(b)(3)(D)(iii), as amended by Pub. L. No. 113-235, Div. O, §104(b)(2)(B); ERISA §305(b)(3)(D)(iii), as amended by Pub. L. No. 113-235, Div. O, §104(a)(2)(B). The IRS will provide a model notice. I.R.C. §432(b)(3)(D)(iv), as amended by Pub. L. No. 113-235, Div. O, §104(b)(2)(C); ERISA §305(b)(3)(D)(iv), as amended by Pub. L. No. 113-235, Div. O, §104(a)(2)(C). Changes made by Pub. L. No. 113-235, Div. O, §104 are effective for plan years beginning after December 31, 2014. Pub. L. No. 113-235, Div. O, §104(c).

[398] I.R.C. §432(e)(9)(F), added by Pub. L. No. 113-235, Div. O, §201(b)(5); ERISA §305(e)(9)(F), as amended by Pub. L. No. 113-235, Div. O, §201(a)(6). Changes made by Pub. L. No. 113-235, Div. O, §201 are effective December 16, 2014. Pub. L. No. 113-235, Div. O, §201(c).

[399] I.R.C. §432(e)(8)(C) and ERISA §305(e)(8)(C), as amended by Pub. L. No. 110-458, §102(b)(2)(D)(iv)(II) through (IV) and (1)(E)(iv), respectively, effective as if included in Pub. L. No. 109-280, Pub. L. No. 110-458, §112.

[400] Treas. Reg. §54.4980F-1, Q&A-9(g)(3)(ii)(C), applicable to amendments effective on or after January 1, 2008; T.D. 9472, 74 Fed. Reg. 61,270 (Nov. 24, 2009).

[401] Prop. Treas. Reg. §54.4980F-1, Q&A-11(a)(7), generally proposed to apply to amendments effective on or after January 1, 2008; REG-110136-07, 73 Fed. Reg. 15,101 (Mar. 21, 2008). The IRS indicated that the interaction of the I.R.C. §432(e)(8)(C) notice with the requirements for an ERISA §204(h) notice will be addressed as part of its §432 regulations project. T.D. 9472, 74 Fed. Reg. at 61,275.

[402] I.R.C. §432(i)(1), as redesignated by Pub. L. No. 113-235, Div. O, §109(b)(3), effective after December 31, 2014; ERISA §305(i)(1), as redesignated by Pub. L. No. 113-235, Div. O, §109(a)(3), effective after December 31, 2014. Prior to 2015, see former I.R.C. §432(h)(1) and former ERISA §305(h)(1).

[403] I.R.C. §432(i)(2); ERISA §305(i)(2).

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H. ERISA Enforcement and Compliance

The plan sponsor is liable for a civil penalty of not more than $1,100 per day (as adjusted for inflation):

(1) for each violation of the requirement to adopt a timely funding improvement plan or rehabilitation plan for a multiemployer plan in endangered or critical status; or

(2) in the case of a plan in endangered status (but not seriously endangered status), for failure by the plan to meet the applicable benchmarks by the end of the funding improvement period with respect to the plan.[404]

In addition, a civil cause of action under ERISA exists, in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status, if the plan sponsor (1) does not adopt a timely funding improvement or rehabilitation plan, or (2) fails to update or comply with the terms of the funding improvement or rehabilitation plan. The action may be brought by an employer that has an obligation to contribute to the multiemployer plan, or by an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of a funding improvement or rehabilitation plan.[405]

A civil cause of action under ERISA exists for employee representatives and contributing employers to enjoin or sue the plan for equitable relief to enforce ERISA §101(k), regarding plan sponsors' obligation to provide plan information upon request.[406] This provision also allows contributing employers to sue to enforce ERISA §101(l), regarding notice of potential withdrawal liability.

I. Excise Taxes on Failures Relating to Multiemployer Plans in Endangered or Critical Status

The 2006 PPA enacted several rules that apply to multiemployer plans in endangered or critical status relating to the excise taxes under §4971 on the failure to meet minimum funding standards.[407] Except as provided in §4971(g), excise taxes are not imposed on a multiemployer plan in critical status.[408] For multiemployer plans in endangered status, excise taxes under §4971(g) may apply in addition to taxes under other sections of §4971.[409]

An excise tax is imposed on each failure to make the contribution required under a funding improvement plan or rehabilitation plan within the required time. The tax is equal to the amount of the required contribution the employer failed to make in a timely manner and is payable by the employer responsible for the untimely or missing contribution.[410] See II.E., above.

If a plan in seriously endangered status fails to meet applicable benchmarks by the end of the funding improvement period, the plan is treated as having an accumulated funding deficiency under §4971 for the last plan year in the funding improvement period (and each succeeding plan year until such benchmarks or requirements are met). The amount of the plan's accumulated funding deficiency would be the greater of the amount of the contributions necessary to meet the benchmarks under the funding improvement plan, or the amount that the accumulated funding deficiency would be otherwise. Similarly, a plan that is in critical status and either fails to meet the requirements of §432(e) by the end of the rehabilitation period or has received a certification under §432(b)(3)(A)(ii) for three consecutive plan years that the plan is not making the scheduled progress in meeting its requirements under the rehabilitation plan, is treated as having an accumulated funding deficiency for the last plan year in the rehabilitation or three-consecutive-year period.[411]

In addition, an excise tax is imposed if a multiemployer plan in critical status fails to adopt a rehabilitation plan within the time prescribed under §432. The amount of this tax with respect to any plan sponsor per taxable year is the greater of: (1) the amount of tax imposed under §4971(a) for the taxable year; or (2) the amount equal to $1,100 multiplied by the number of days during the taxable year that are included in the period beginning on the first day of the 240-day period for adopting a rehabilitation plan under §432(e)(1)(A) and ending on the day on which the rehabilitation plan is adopted. This tax is payable by each plan sponsor, i.e., the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.[412]

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[404] ERISA §502(c)(8); 29 C.F.R. §2575.3. For a table of the current and prior DOL penalties imposed on an ERISA plan, see the Worksheets in 361 T.M., *Reporting and Disclosure Under ERISA*.

[405] ERISA §502(a)(10), as added by Pub. L. No. 109-280, §202(c), effective for plan years beginning after 2007. *See WestRock RKT Co. v. Pace Indus. Union-Mgmt. Pension Fund*, 856 F.3d 1320 (11th Cir. 2017) (employer lacks cause of action under ERISA §502(a)(10) to challenge amendment to rehabilitation plan that required withdrawing employer to pay portion of fund's accumulated funding deficiency because employer failed to allege properly that amendment violated ERISA §305 in any manner); *Keyes Fibre Corp. v. Pace Indus. Union-Management Pension Fund*, No. 3:17-cv-0613, 2017 BL 372047 (M.D. Tenn. Oct. 17, 2017) (an employer withdrawing from a multiemployer pension fund had no cause of action under ERISA §502 to challenge a unilateral modification to the fund's rehabilitation plan requiring the employer to pay a pro rata portion of the fund's accumulated funding deficiency, because employers are not included in ERISA §502, and are therefore unable to challenge an amendment to a rehabilitation plan which has been adopted, updated, and complied with by a fund).

[406] ERISA §502(a)(11), added by Pub. L. No. 113-235, Div. O, §111(d)(3), effective for plan years beginning after December 31, 2014.

[407] §4971(g), as added by Pub. L. No. 109-280, §212(b)(1), generally effective for plan years beginning after 2007. Changes made to §4971 by 2006 PPA were set to expire for plan years beginning after 2014, but MPRA made the provisions permanent. Pub. L. No. 113-235, Div. O, §101(a), repealing Pub. L. No. 109-280, §221(c)(1), effective December 16, 2014.

[408] §4971(g)(1)(A).

[409] §4971(g)(1)(B).

[410] §4971(g)(2). The IRS may waive part or all of the tax if the failure is due to reasonable cause and not willful neglect. Reasonable cause includes, for this purpose, unanticipated and material market fluctuations, the loss of a significant contributing employer, or other factors to the extent that the payment of the tax would be excessive or otherwise inequitable relative to the failure involved. §4971(g)(5).

[411] §4971(g)(3). The IRS may waive part or all of the tax if the failure is due to reasonable cause and not willful neglect. Reasonable cause includes, for this purpose, unanticipated and material market fluctuations, the loss of a significant contributing employer, or other factors to the extent that the payment of the tax would be excessive or otherwise inequitable relative to the failure involved. §4971(g)(5).

[412] I.R.C. §4971(g)(4)(C), as amended by Pub. L. No. 110-458, §102(b)(2)(I)(ii), effective as if included in Pub. L. No. 109-280 (generally effective for plan years beginning after 2007). *See* Pub. L. No. 110-458, §112.

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J. Temporary Delay of Designation as Endangered or Critical Status for 2008 and 2009

The Worker, Retiree, and Employer Recovery Act of 2008 (2008 Recovery Act),[413] provided a temporary delay as to the designation of endangered or critical status. Under the 2008 Recovery Act, for the first plan year beginning during the period of October 1, 2008, through September 30, 2009, a plan sponsor could have elected to retain the plan's status for the preceding plan year for purposes of I.R.C. §432. As a result, a plan may have avoided endangered or critical status for the 2009 plan year if its funding levels were adequate in 2008. If a plan that was in endangered or critical status for the preceding plan year elected to retain such status, it was not required to update its funding improvement plan or rehabilitation plan until the plan year following the relief period.[414] Elections were required to be made by the later of June 30, 2009, and the date that is 30 days after the due date of the annual certification of I.R.C. §432 status for the election year.[415] Once made, this election could have been revoked only with the consent of the Treasury Secretary.[416] The IRS was to automatically approve a revocation request if certain requirements were met.[417]

Special notice rules applied when an election was made to freeze a plan's I.R.C. §432 status. If a plan was in neither endangered nor critical status as a result of the election, the plan sponsor must have provided a notice in lieu of the notice that was otherwise required if the plan had been certified to be in endangered or critical status. The notice was required to be provided to the participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor. If the election was made before the date the annual certification of the plan's I.R.C. §432 status is submitted to IRS, the notice was required to be provided no later than 30 days after the date of the certification. If the election was made after the date the annual certification was submitted, the notice was required to be provided no later than 30 days after the date of the election. If the plan was certified to be in critical status for the election year but was in endangered status by reason of an election under the 2008 Recovery Act, the notice that was required to be provided was the notice that would have been provided under I.R.C. §432(b)(3)(D) if the plan had been certified to be in endangered status for the election year.[418]

Section 205 of the 2008 Recovery Act provided for an elective extension of the funding improvement period or rehabilitation period for multiemployer plans in endangered or critical status for a plan year beginning in 2008 or 2009. Thus, a plan's 10-year funding improvement period or rehabilitation period, whichever was applicable, may have been extended to 13 years. Similarly, the sponsor of a plan that was in seriously endangered status that was eligible for a 15-year funding improvement period may have extended the plan's funding improvement period to 18 years.

The interaction between the 2008 Recovery Act, §204 and §205, affected a plan sponsor's decision to elect the relief provided under either section.

> *Example:* A plan sponsor elected under the 2008 Recovery Act, §204, for the plan year beginning in 2009 to freeze the plan's I.R.C. §432 status as neither endangered nor critical. If, however, the plan is subsequently in endangered or critical status for the plan year beginning in 2010, then the 2008 Recovery Act, §205, election to extend the funding improvement period or rehabilitation period to 13 years (or 18 years, if applicable) would no longer be available because the initial endangered year or initial critical year for the plan (the year when the plan first enters endangered or critical status) would not be until 2010 (a year as of which no election under the 2008 Recovery Act, §205, is available).

> *Example*: A plan sponsor elected for the plan year beginning in 2009 both to freeze the plan's I.R.C. §432 status as endangered, as permitted under the 2008 Recovery Act, §204 (rather than operate in accordance with an actuarial certification of critical status for that year), and to extend the funding improvement period to 13 years as permitted under the 2008 Recovery Act, §205. If, however, the plan is subsequently certified as being in critical status for the plan year beginning in 2010, then the election to extend the funding improvement period to 13 years would no longer apply because the funding improvement plan would have to be replaced by a rehabilitation plan. Also, the sponsor could not then elect to extend the rehabilitation period to 13 years because the initial critical year for the plan would not be until 2010, a year for which no election is available.[419]

K. Temporary Delay of Designation for Certain Years Under the American Rescue Plan Act of 2021

Section 9701 of the American Rescue Plan Act of 2021 (ARPA)[420] permits a multiemployer plan sponsor to make a "freeze election" under which the plan's zone status under I.R.C. §432 for the plan year (the "election year") is the same as the plan's zone status for the preceding year. The freeze election allows the plan's status to remain the same notwithstanding the actuary's certification for the election year. The freeze election can be made for the first plan year beginning on or after March 1, 2020, or the next succeeding plan year. Thus, a plan with a calendar plan year, the election year can be 2021 or 2022.

If a freeze election applies to a multiemployer plan for a plan year (that is, the plan year is an election year), then the

See also Pub. L. No. 109-280, §214 (pre-2009 exemption from excise taxes for certain small multiemployer plans).

[413] Pub. L. No. 110-458, §204.

[414] A plan sponsor that wishes to take advantage of Pub. L. No. 110-458, §204, under which no updates to a funding improvement plan or rehabilitation plan are required until the year following the election year, must make the election even if the plan's status for the election year would be the same regardless of whether the election is made.

[415] See Notice 2009-31, modified by Notice 2009-42, for guidance on the election and notice procedures that apply when a plan sponsor makes an election to retain its critical or endangered status.

[416] Pub. L. No. 110-458, §204(c)(1).

[417] *See* Rev. Proc. 2009-43.

[418] Pub. L. No. 110-458, §204(c)(2). *See* Notice 2009-31, modified by Notice 2009-42.

[419] Notice 2009-31.

[420] Pub. L. No. 117-2, enacted March 11, 2021.

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plan's zone status for the preceding year applies for the plan year (elected zone status), and the plan must be operated in accordance with the elected zone status for that plan year, rather than the plan's zone status as certified by the plan's actuary under §432(b)(3) for that plan year.

Example: A plan is certified to be in critical status for a plan year (but was certified to be in a different zone status for the preceding year), and the plan sponsor makes a freeze election for the plan year, then the plan is not treated as being in critical status for the election year. Because the plan is not treated as being in critical status for the election year, the plan sponsor is not required to adopt a rehabilitation plan in that year and cannot assess employer surcharges under §432(e)(7), reduce adjustable benefits under §432(e)(8), or restrict lump sum distributions under §432(f)(2).[421]

The plan sponsor of a multiemployer plan for which a freeze election is made for a plan year, and that was in endangered or critical status for the preceding plan year, is not required to update its funding improvement plan, rehabilitation plan, or schedules as otherwise required under §432(c)(6) or §432(e)(3)(B) until the plan year following the election year.[422] Thus, for example, if a multiemployer plan for which a freeze election is made was certified as being in critical status in both the election year and the preceding year, then the plan sponsor is not required to update the plan's rehabilitation plan for the election year. However, the actuary for a multiemployer plan that is in a funding improvement period or rehabilitation period must certify whether the plan is making the scheduled progress under its funding improvement plan or rehabilitation plan, as applicable, regardless of whether the plan year is an election year.[423]

If elections under §9701(a) of the ARPA are made for two plan years, then the plan's zone status for both years is the plan's zone status for the plan year immediately preceding the first election year.

Example: If the sponsor of a multiemployer plan with a plan year beginning on April 1 makes freeze elections for both the plan year beginning April 1, 2020, and the plan year beginning April 1, 2021, then the plan's zone status for both plan years is the plan's zone status for the plan year beginning April 1, 2019. This is true even if the plan's actuary had previously certified the plan's zone status for the plan year beginning on April 1, 2020.[424]

A freeze election must be made at the time and in the manner prescribed by the Secretary of the Treasury (or the Secretary's delegate) and, once made, may be revoked only with the consent of the Secretary.[425] If a freeze election changes a plan's zone status for a plan year, the freeze election must be made within 30 days after the plan actuary certifies the plan's zone status (or, if earlier, 30 days after the due date for that certification). If a freeze election does not change a plan's zone status for a plan year, the freeze election must be made by the last day of the election year. However, a freeze election will be treated as timely if it is made by December 31, 2021.[426]

If a freeze election is made before the annual certification of the plan's zone status for the election year is submitted to the IRS, then the election must be included with the submission of the certification. If the freeze election is made after the submission of the certification, then the election must be submitted to the IRS not later than 30 days after the due date for making the election.[427]

In the case of a plan that has been certified to be in endangered status or critical status for a plan year, but that is in neither endangered status or critical status as a result of the freeze election (which means the plan was green for the preceding plan year), the plan sponsor must provide notice of the election to the participants and beneficiaries, the bargaining parties, PBGC, and the DOL in lieu of the notice that is otherwise required under §432(b)(3)(D). The notice must include such information about the election as the Secretary (in consultation with the Secretary of Labor) may require.[428] The notice must be written in a manner calculated to be understood by the average employees to whom the notice applies. The notice must include each of the following items:[429]

- The name of the plan, the EIN of the plan sponsor, the EIN of the plan, and the plan number.
- A statement that a freeze election has been made under the American Rescue Plan Act of 2021 to treat the plan as being neither in endangered nor critical status and the year or years to which the election applies.
- The plan's endangered or critical status for the election year as certified by the plan's actuary (that is, the plan's status in each election year if no freeze election were made).
- An explanation that: (1) the freeze election applies for the current plan year (and the immediately preceding year, if applicable); and (2) if the plan is in endangered or critical status for the following plan year, the plan sponsor will provide notice of the plan's §432 status for that following year, that steps will have to be taken to improve the plan's funded situation, and that those steps may include increases in contributions and reductions in future benefit accruals.

421 Notice 2021-57, §III.A.
422 Pub. L. No. 117-2, §9701(a)(2).
423 Notice 2021-57, §III.A.
424 Notice 2021-57, §III.A.
425 Pub. L. No. 117-2, §9701(c)(1)(A).
426 Notice 2021-57, §III.C.1.
427 Pub. L. No. 117-2, §9701(c)(1)(B).
428 Pub. L. No. 117-2, §9701(c)(2)(A).
429 Notice 2021-57, §III.D.

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• Solely in the case of a plan that was certified to be in critical status for the election year, an explanation that, if the plan is in critical status for the following year, the steps that will have to be taken to improve the plan's funded situation will include a surcharge on employer contributions and the suspension of the payment of lump sums and similar accelerated distributions for individuals who commence receiving benefits after notice is provided of the plan's critical status, and may include amendments to reduce early retirement benefits or other adjustable benefits for those individuals.

• Information on how to obtain additional information about the election from the plan administrator.

The notice to participants and beneficiaries must be provided either in the form of a paper document or in an electronic form that satisfies the requirements of Reg. §1.401(a)-21.

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VI. Mergers, Transfers, and Partitions

A variety of transactions are permitted in certain circumstances or under certain restrictions, in order for a multiemployer plan to obtain a sounder financial standing or simply to transfer participant benefits to another plan or the PBGC. Transactions intended to financially benefit the plan, such as facilitated mergers, transfers, and partitions are permitted only for the most severely underfunded multiemployer plans, specifically, those multiemployer plans in critical and declining status.

A. Mergers and Transfers

While single employer plans are subject to certain I.R.C. requirements when merging plans or transferring assets,[430] multiemployer plans are exempt from those requirements[431] and subject to PBGC requirements.

Pursuant to authority to modify the statutory requirements,[432] mergers of multiemployer plans, or the transfer of assets and liabilities from one multiemployer plan to another multiemployer plan, are subject to four concurrent requirements:

- No participant's or beneficiary's accrued benefit is lower immediately after the merger or transfer than the benefit immediately before the transaction[433] (unless such benefit is suspended[434] contemporaneously with the merger or transfer, in which case this requirement can be waived by the PBGC).[435]

- Each plan has an actuarial valuation of assets and liabilities performed as of a date not earlier than the first day of the last plan year ending before the proposed effective date of the transaction.[436] For a significantly affected plan involved in a transfer, the valuation must separately identify assets, contributions, and liabilities being transferred and must be based on the actuarial assumptions and methods expected to be used by the plan immediately after the transfer.

- Plans existing after the transaction are expected to be solvent under specified criteria, or participants' and beneficiaries' benefits are not reasonably expected to be subject to benefit suspensions.[437]

- The PBGC must be notified by each plan sponsor involved in the transaction at least 120 days before the effective date of the merger or transfer. The time of the notice is increased to 270 days for a facilitated merger and decreased to 45 days if the plan is not seeking a compliance determination under 29 C.F.R. §4231.10 for the merger.[438] The PBGC can accept notifications provided in fewer days upon a demonstration that extending the date of the transaction to comply with the specified number of days will harm the participants and beneficiaries.[439]

1. Procedural Requirements

A plan that is not significantly affected by the merger or transfer will be considered solvent after the transaction if the plan's fair market value of assets immediately after the transaction at least equals five times the benefit payments for the plan year immediately preceding the proposed effective date of the transaction, or, for each of the first five plan years beginning after the transaction, the plan's expected assets plus contributions and investment earnings at least equal expected expenses and benefit payments.[440] A significantly affected plan is considered solvent if two funding requirements and two cash flow requirements are satisfied. One funding requirement is that expected contributions for each of the five plan years immediately following the transaction at least equal the required minimum contributions, and the other is that expected contributions during a period selected by the plan actuary at least equal the unfunded accrued benefits plus the expected normal cost for the period. The cash flow requirements are that both expected asset values immediately following the transaction at least equal expected benefit payments for the five plan years immediately following the transaction, and expected contributions for the plan year following the transaction at least equal expected benefit payments for that year.[441]

2. Key Terms

For purposes of the actuarial valuation requirement, a significantly affected plan is one that transfers assets or receives a transfer of unfunded benefit liabilities equal to or exceeding 15% of pre-transfer assets, is created by a spinoff, merges, or makes a non-de minimis transfer after a mass withdrawal termination.[442] For purposes of the plan solvency requirement, a significantly affected plan also includes a plan involved in a non-de minimis merger or transfer with another plan that terminated due to a mass withdrawal.[443]

A compliance determination may be requested that the proposed merger or transfer is not a prohibited transaction, including that the fiduciaries are not acting on behalf of a party with interests adverse to those of the participants and beneficiaries. A compliance determination is not required for a multiemployer plan merger or transfer.[444]

B. Facilitated Merger

A multiemployer plan merger may be facilitated by the PBGC to enable one or more of the involved plans to avoid or postpone insolvency.[445] Facilitation can take the form of training, technical assistance, mediation, communication with stakeholders, and support with related requests to other govern-

[430] §414(l).
[431] §414(l)(1), §414(l)(2)(D)(iii).
[432] ERISA §4231(a).
[433] 29 C.F.R. §4231.3(a)(1).
[434] For a discussion of benefit suspensions for multiemployer plans, see VII., below.
[435] 29 C.F.R. §4231.4(b).
[436] 29 C.F.R. §4231.5.
[437] 29 C.F.R. §4231.3(a)(3).
[438] 29 C.F.R. §4231.8(a).
[439] 29 C.F.R. §4231.8(g).
[440] 29 C.F.R. §4231.6(a).
[441] 29 C.F.R. §4231.6(b).
[442] 29 C.F.R. §4231.2 and §4231.5.
[443] 29 C.F.R. §4231.2 and §4231.6.
[444] 29 C.F.R. §4231.3(b).
[445] ERISA §4231(e)(1).

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mental agencies, as well as financial assistance.[446] The PBGC may facilitate a merger once it determines that the proposed merger is in the interest of participants and beneficiaries of at least one plan and not reasonably expected to be adverse to the overall interests of participants and beneficiaries in any of the other plans involved.

In order to facilitate a merger determined to be necessary to enable one or more of the plans to avoid or postpone insolvency, the PBGC may provide financial assistance with respect to the guaranteed benefits.[447] To extend this financial assistance, one or more of the multiemployer plans involved in the merger must be in critical and declining status and the PBGC must:

- reasonably expect that the financial assistance will reduce the expected long-term loss with respect to the plans involved, and that the assistance is necessary for the merger plan to become or remain solvent;
- certify that its ability to meet existing financial assistance obligations to other plans will not be impaired; and
- pay the assistance exclusively from the fund for basic benefits guaranteed for multiemployer plans.[448]

Within 14 days of a facilitated merger, the PBGC must notify the congressional committees of jurisdiction, specifically the House Education and Workforce Committee and the Ways and Means Committee, and the Senate Finance Committee and the Health, Education, Labor, and Pensions (HELP) Committee.[449] Consequences of failure to notify the committees of jurisdiction are unspecified, but should fall exclusively on the PBGC.

The PBGC approved the first facilitated merger under MPRA in January 2020, providing three annual installments of $8.9 million to facilitate the merger of two Laborers International local plans.[450]

C. Transfers

While multiemployer plans are only subject to PBGC requirements when transferring benefits between multiemployer plans, transfers between multiemployer and single employer plans are subject to PBGC and I.R.C. requirements, both of which require that a participant's accrued benefit cannot be less after the transfer than before.[451]

If the single employer plan terminates within 60 months following a transfer, the multiemployer plan is liable to the PBGC. The amount of liability is the lesser of:

- the difference between 30% of the single employer's net worth and the single employer plan's asset insufficiency under ERISA §4062 or §4064; or
- the value (determined at the time of transfer) of the UVBs transferred to the single employer plan that are guaranteed under the PBGC's single employer guarantee program.[452]

The liability of the multiemployer plan to the PBGC may be less than that of a withdrawing employer to the plan because it is based on guaranteed benefits rather than UVBs. The transfer may be accompanied by a release from withdrawal liability. If the single employer plan terminated, the employer then would have termination liability under ERISA §4062.[453]

A multiemployer plan may apply to the PBGC for a determination that liability under ERISA §4232 does not apply because the interests of participants are already adequately protected. The PBGC's approval (or failure to act on the application within 180 days) removes such liability.[454]

No liability applies to a transfer that undoes a previous merger of a single and multiemployer plan if the liabilities transferred out equal those previously transferred in and the assets transferred out are equivalent to those that would have been funded if the single employer plan had remained separate.[455] This "in and out" rule is designed to protect multiemployer plans that merge with, and later spin off, single employer plans.[456] Benefits accrued while the plans were merged and contributions paid during that time apparently stay in the multiemployer plan. Generally, a transfer cannot take place without the consent of the "transferee" plan. A plan to which the "in and out" rule applies, however, may satisfy such consent by an advance agreement.[457]

Benefits under a transferee single employer plan are guaranteed at the single employer level without any transition from multiemployer guarantees.[458]

There are restrictions on the extent to which the transfer rules apply to plans in reorganization or that have terminated in a mass withdrawal.[459]

The merger of a single-employer plan into a multiemployer plan, however, is not a permissible means of terminating a single-employer plan.[460]

To transfer assets, a multiemployer plan must provide asset transfer rules that do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities.[461] The rules must be uniform with respect to each transfer,

[446] 29 C.F.R. §4231.12(a)(1).
[447] 29 C.F.R. §4231.12(a)(2).
[448] ERISA §4231(e)(2).
[449] ERISA §4231(e) (flush language).
[450] *See* PBGC News Release 20-01, *PBGC Approves Facilitated Merger of Two Multiemployer Pension Plans* (Jan. 14, 2020).
[451] ERISA §4232(b); I.R.C. §414(l).

[452] ERISA §4232(c).
[453] PBGC Opinion Letter 87-12.
[454] ERISA §4232(c)(2).
[455] ERISA §4232(c)(3).
[456] Joint Explanation, §2, 126 Cong. Rec. S10111 and S10121 (Daily Ed., July 29, 1980).
[457] ERISA §4232(e).
[458] ERISA §4022 and §4232(d).
[459] ERISA §4232(f). Note that the reorganization rules under I.R.C. §418 through §418D and ERISA §4241 through §4244A were repealed effective for plan years beginning after December 31, 2014. MPRA, Pub. L. No. 113-235, Div. O, §108(a)(1) and §108(b)(1).
[460] *Beck v. PACE Intl. Union*, 551 U.S. 96 (2007), rev'g 427 F.3d 668 (9th Cir. 2005). The Supreme Court adopted the view of both the PBGC and the DOL that "merger is an alternative to (rather than an example of) plan termination." The Court focused on ERISA's distinct and separate treatment of mergers and plan terminations to conclude that "one is not an example of the other." For further discussion of plan terminations, see 357 T.M., *Pension Plan Terminations — Single Employer Plans.*
[461] ERISA §4234. See, e.g., *Ganton Techs. v. Nat'l Indus. Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996), in which a multiemployer plan did not violate ERISA §4234(a) asset transfer rules when it used to transfer assets attributable to withdrawing employer, to employer's new plan, because ERISA §4234 does not require multiemployer plan trustees to transfer assets and liabilities to participants or to another plan at their request. ERISA §4234 requires trustees to

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but can be flexible enough to take into account the potential financial impact on the multiemployer plan of any particular transfer. Plan rules that operate in a manner that is consistent with the "in and out" rule are deemed to satisfy this requirement. Transfers of assets made pursuant to reciprocity agreements are not subject to these rules. In designing or operating plan rules for transfers, plans sponsors and fiduciaries should follow ERISA's fiduciary provisions.[462]

D. Partitions

The partition rules were designed to shore up a plan's financial integrity, by transferring a portion of the plan's guaranteed benefit obligations from the plan to the PBGC, thus relieving the plan of some of its financial obligations. Under the partition rules in effect prior to 2015, the PBGC had authority to sever liabilities that are directly attributable to service with an employer facing bankruptcy and assume those liabilities. The PBGC rarely used its authority to partition plans prior to 2015, but changes made by the Multiemployer Pension Reform Act of 2014 (MPRA) may increase opportunities for using this tool.

A partition is no longer contingent on an employer's bankruptcy and instead is available when the multiemployer plan as a whole is facing insolvency.[463] A multiemployer plan in critical and declining status[464] is eligible for partition if the PBGC:

- determines, after consulting the Participant and Plan Sponsor Advocate,[465] that the plan sponsor has taken (or is taking concurrently with the application for partition) all reasonable measures to avoid insolvency, including the maximum benefit suspensions;[466]

- reasonably expects that partition is necessary to allow the plan to remain solvent and will reduce the PBGC's expected long-term loss with respect to the plan; and

- certifies to Congress that the partition would not impair the agency's ability to meet its financial assistance obligations to other plans.[467]

The cost to the PBGC is paid exclusively from the fund for basic benefits guaranteed for multiemployer plans.[468]

The plan sponsor of an eligible plan must apply to the PBGC for a partition order,[469] which must include specified plan information (such as the current plan document and SPD and a list of the employers currently obligated to contribute plan),[470] partition information (including, if applicable, a copy of suspension of benefits applications),[471] actuarial and financial information, participant census data, and financial assistance information. Notice of the application to partition must be provided to each interested party (which generally encompasses each participant, beneficiary, alternate payee, contributing employer, and each union with a collective bargaining agreement related to the plan) within 30 days of the PBGC indicating the application for partition is complete.[472] The PBGC will approve or deny the application within 270 days of informing the plan sponsor that the application is complete.

The application must contain a detailed description of the proposed partition, including the proposed structure, proposed effective date and any larger integrated transaction of which the proposed partition is a part, including an application for suspension of benefits or a merger. The plan sponsor also must provide a narrative description of the events that led to its decision to submit the application; a detailed description of all measures it has taken, or is taking, to avoid insolvency, and any measures it considered taking but did not take; a description of the estimated benefit amounts it has determined are necessary to be partitioned for the plan to remain solvent; and a copy of the draft notice of application for partition.[473]

The PBGC will issue a written notice to the plan sponsor describing information missing from an incomplete application, as well as a written notice when the PBGC determines the application is complete. The PBGC will make a determination on the application within 270 days.[474] For a plan requiring both partition and benefit suspensions to remain solvent, this initial determination that an application is complete will be conditioned on the plan sponsor's filing of an application for benefit suspensions with Treasury within 30 days after receiving written notice from PBGC of its determination the application is complete.[475]

Notice of the application must be provided to interested parties within 30 days of submission.[476] The notice must include identifying information about the plan, relevant partition application dates, a statement of whether the plan has submitted an application for suspension of benefits, a description of the ERISA partition provisions, the impact of the partition on interested parties, a summary of partition application, and contact information for the plan sponsor, PBGC and participant and plan sponsor advocate.[477] The PBGC provided a model notice in the appendix to its interim final rule implementing ERISA §4233.[478]

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transfer assets in connection with liabilities only if the trustees agree to transfer liabilities.

[462] Joint Explanation, §4, 126 Cong. Rec. S10111 and S10121 (Daily Ed., July 29, 1980). See, e.g., *Ganton Techs. v. Nat'l Indus. Group Pension Plan*, 76 F.3d 462, in which a multiemployer plan trustee did not violate its fiduciary duty to act in accordance with plan instruments or to act exclusively in the interest of participants and beneficiaries when it adopted a "blanket" no-asset transfer rule and allegedly refused to consider the interests of employees of the withdrawing employer when they declined to transfer plan assets to the employer's new plan.

[463] ERISA §4233.

[464] ERISA §4233(b)(1) cross-references ERISA §305(b)(4) for the definition of critical and declining status, but the probable intention was to cross-reference ERISA §305(b)(6). For a discussion of critical and declining status, see V.D., above.

[465] *See* ERISA §4004.

[466] *See* I.R.C. §432(e)(9); ERISA §305(e)(9).

[467] ERISA §4233(b).

[468] ERISA §4233(b)(5).

[469] ERISA §4233(a)(1).

[470] 29 C.F.R. §4233.6.

[471] 29 C.F.R. §4233.7(d).

[472] 29 C.F.R. §4233.11(a).

[473] 29 C.F.R. §4233.6.

[474] 29 C.F.R. §4233.10.

[475] The PBGC may, at the request of a plan sponsor, issue a preliminary approval of the application conditioned on Treasury issuing a final authorization to suspend under ERISA §305(e)(9)(H)(vi) and any other terms and conditions set forth in the conditional approval. 29 C.F.R. §4233.12(c).

[476] ERISA §4233(a)(2); 29 C.F.R. §4233.11(a).

[477] 29 C.F.R. §4233.11(c).

[478] 29 C.F.R. §4233, Appendix A, as amended by RIN 1212-AB55, 87 Fed. Reg. 57,824 (Sept. 22, 2022).

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The PBGC will notify the plan sponsor in writing of its decision on an application. Upon approval, the PBGC will issue a partition order.[479] The PBGC must notify Congress and any affected participants and beneficiaries no later than 14 days after ordering a partition.[480]

The partition order will provide for a transfer of liabilities from the plan that is partitioned (original plan) to the plan created by the partition order (successor plan). It will describe the liabilities to be transferred to the successor plan under ERISA §4233(c) and the manner in which financial assistance will be provided by PBGC under ERISA §4261.[481] The amount transferred must be the minimum amount of plan liabilities necessary for the original plan to remain solvent.[482] The successor plan is a successor plan for purposes of the multiemployer benefit guarantee under ERISA §4022A, and an insolvent plan under ERISA §4245.[483] The plan sponsor and plan administrator of the original plan also serve as plan sponsor and plan administrator, respectively, for the successor plan.[484] If an employer withdraws from the original plan within 10 years of the partition date, then withdrawal liability is computed with respect to both the original plan and the successor plan. If the withdrawal occurs more than 10 years after partition, then liability is computed solely with respect to the original plan.[485]

Both plans must be amended to reflect the benefits payable under the partition order.[486] The only benefit amounts payable under the successor plan are successor plan benefits, which are the portion of the accrued nonforfeitable monthly benefit that would be guaranteed by the PBGC as of the effective date of the partition, calculated under the terms of the original plan, without reflecting any changes relating to a benefit suspension under ERISA §305(e)(9).[487] When a participant's or beneficiary's benefit is partially transferred to the successor plan, the PBGC guarantee applicable to the benefit becomes payable under the successor plan. The benefit remaining in the original plan as of the effective date of the partition, if any, is not subject to a new guarantee, and any increase in the PBGC guarantee amount payable under the original plan arises solely (if at all) due to an increase in the accrued benefit under a plan amendment following the effective date of the partition or an additional accrual attributable to service after the effective date of the partition.[488] PBGC will provide financial assistance to the successor plan in an amount sufficient to enable the successor plan to pay only the PBGC-guaranteed amount transferred to the successor plan pursuant to the partition order.[489]

The original plan continues to have certain obligations after partition. Although benefits for certain participants and beneficiaries are transferred to the successor plan pursuant to the partition order, the original plan is responsible for paying, for each month the benefits are in pay status, the excess of the monthly benefit under the plan (taking into account benefit suspensions and plan amendments after the effective date of partition, if any) over the monthly benefit guaranteed by the PBGC.[490] The original plan also is responsible for paying PBGC premiums with respect to transferred participants for a 10-year period after the partition date.[491] If the plan provides a benefit improvement[492] after the partition effective date, then for the 10-year period following the partition effective date, the plan must pay the PBGC an annual amount equal to the lesser of (1) the total value of the increase in benefit payments for the year that is attributable to the benefit improvement, or (2) the total benefit payments from the plan created by the partition for the year.[493] This amount is due at the same time as (and in addition to) PBGC premium payments.

The portion of the plan partitioned from the original plan is treated as terminated under ERISA §4041A(d), since there are no contributing employers for that portion of the plan after the partition. As a terminated plan, the PBGC assumes administration of the plan. PBGC continues to have jurisdiction over the original plan and the successor plan to carry out the partition order, ERISA §4233 and the regulations thereunder.[494] Consistent with ERISA §4233 and the regulations thereunder, PBGC may make changes to the partition order in response to changed circumstances.[495]

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[479] 29 C.F.R. §4233.12(b).

[480] ERISA §4233(f).

[481] 29 C.F.R. §4233.14(a).

[482] ERISA §4233(c).

[483] ERISA §4233(d)(1); 29 C.F.R. §4233.15(a). The successor plan will be treated as a terminated multiemployer plan to which ERISA §4041A(d) applies. This treatment will not be taken into account for purposes of determining the withdrawal liability of contributing employers to the original plan. 29 C.F.R. §4233.15(b).

[484] ERISA §4233(d)(2); 29 C.F.R. §4233.15(c).

[485] ERISA §4233(d)(3).

[486] 29 C.F.R. §4233.14(b)(1).

[487] 29 C.F.R. §4233.16(a). See 29 C.F.R. §4233.2 for the definition of "successor plan benefits."

[488] 29 C.F.R. §4233.16(b).

[489] 29 C.F.R. §4233.16(c). The receipt of benefits payable under a successor plan receiving PBGC assistance will be treated as the receipt of guaranteed benefits under ERISA §4022A.

[490] ERISA §4233(e)(1).

[491] ERISA §4233(e)(3).

[492] *See* I.R.C. §432(e)(9)(E)(vi); ERISA §305(e)(9)(E)(vi). *See also* Prop. Reg. §1.432(e)(9)-1(e), REG-102648-15, 80 Fed. Reg. 35,262 (June 19, 2015) (effective when published as final).

[493] ERISA §4233(e)(2).

[494] 29 C.F.R. §4233.17(a).

[495] 29 C.F.R. §4233.17(b).

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VII. Benefit Suspension

A. In General

Under the Multiemployer Pension Reform Act of 2014 ("MPRA"), a plan that is in critical and declining status is permitted to suspend benefits to participants, beneficiaries or alternate payees, as determined under ERISA §4022A, without running afoul of anti-cutback rules or being held liable for missed benefit payments.[496] The suspension of benefits may be permanent or temporary (e.g., expire as of a date specified in the plan amendment implementing the suspension) and may apply regardless of whether benefits are in pay status.[497]

Practice Insight: Though the statute consistently refers to a benefit "suspension," the effect is closer to a forfeiture by the participant, as once the benefit has been suspended, the plan is no longer liable for the benefits.[498]

A pension plan that suspends the benefits provided to participants and beneficiaries under MPRA is immune from liability for any reduction in benefits resulting from the approved MPRA application.[499] Although the participants and beneficiaries whose benefits are suspended generally have no cause of action arising under MPRA, vested participants in a pension plan may be able to claim that the United States government, acting through the Treasury, the DOL, or PBGC, violated the takings clause of the Fifth Amendment of the U.S. Constitution by authorizing cuts to pension benefits under the MPRA.

In *King v. United States*,[500] the Court of Federal Claims held that vested participants have a constitutionally cognizable property interest in receiving a certain level of unreduced benefits under their vested pension benefits. However, because of changes to the regulatory landscape due to the enactment of the American Rescue Plan Act of 2021 ("ARPA"), the court postponed its analysis of whether government action occurred that gave rise to a taking.[501] The court later determined that the vested participants failed to demonstrate a government action (i.e., appropriation, occupation, or seizure of the property interest for the government's own use) for the physical-takings test to apply. The court found that the reduced portion of the participants' benefits equated to the loss of a contractual right to a specific level of pension benefits, and stated that the regulatory-takings test is more appropriate for cases involving abrogated contractual rights in multiemployer pension plan agreements.[502] However, the court found that the vested participants also failed to show a regulatory taking of their vested pension benefits because the economic impact on the participants was not substantial, [503] there was minimal government interference with the participants' reasonable investment-backed expectations, and the character of the government action was relatively unobstructive.[504]

Practice Insight: The American Rescue Plan Act of 2021 ("ARPA") likely precludes a regulatory takings claim because a pension plan must commit to restoring the benefits it pays to plan participants to the same levels it was paying prior to any MPRA-authorized reductions.[505] Additionally, as a practical matter, interest in and use of the special financial assistance program created by ARPA has supplanted benefit suspensions as the means of mitigating underfunding in multiemployer plans. However, the issue may arise in later years with respect to a plan that was not eligible for special financial assistance but wants to reduce benefits under the MPRA.

B. Eligible Plans

Before a plan sponsor of a plan in critical and declining status may suspend benefits, the plan actuary must certify that the plan is projected to avoid insolvency taking into consideration the proposed suspension of benefits (or partition under ERISA §4233).[506] In addition, the plan sponsor must determine, in a written record to be maintained throughout the period of the benefit suspension, that although all reasonable measures to avoid insolvency have been taken, the plan is still projected to become insolvent unless benefits are suspended.[507]

In determining that all reasonable measure to avoid insolvency have been taken, the following factors may be taken into account:

- Current and past contribution levels;
- Levels of benefit accruals (including any prior reductions in the rate of benefit accruals);
- Prior reductions (if any) of adjustable benefits;
- Prior suspensions (if any) of benefits;
- The impact of plan solvency of the subsidies and ancillary benefits available to active participants;
- Compensation levels of active participants relative to employees in the participants' industry generally;
- Competitive and other economic factors facing contributing employers;
- The impact of benefit and contribution levels on retaining active participants and bargaining groups under the plan;
- The impact of past and anticipated contribution increases under the plan on employer attrition and retention levels; and

[496] I.R.C. §432(a)(3)(B), added by Pub. L. No. 113-235, Div. O, §201(b)(1); §432(e)(9)(A) and §432(e)(9)(B)(iii), added by Pub. L. No. 113-235, Div. O, §201(b)(5); ERISA §305(a)(3)(B), added by Pub. L. No. 113-235, Div. O, §201(a)(1); ERISA §305(e)(9)(A) and §305(e)(9)(B)(iii), added by Pub. L. No. 113-235, Div. O, §201(a)(6). *See* Reg. §1.432(e)(9)-1(b).

[497] I.R.C. §432(e)(9)(B)(i); ERISA §305(e)(9)(B)(i); Reg. §1.432(e)(9)-1(b)(1)(i), and Reg. §1.432(e)(9)-1(b)(2)(i).

[498] Reg. §1.432(e)(9)-1(b)(1)(ii).

[499] ERISA §305(e)(9)(B)(iii).

[500] 159 Fed. Cl. 450 (2022).

[501] *King v. United States*, 159 Fed. Cl. 450 (2022).

[502] *King v. United States*, 165 Fed. Cl. 613, 630 (2023).

[503] *See King v. United States*, 165 Fed. Cl. 613, 642 (finding a 29% reduction in the value of pension benefits is insufficient to support a taking). The participants' benefits were fully restored, and participants received make-up lump-sum payments for the amount that was withheld from them under the American Rescue Plan Act of 2021.

[504] *King v. United States*, 165 Fed. Cl. 613, 650.

[505] *King v. United States*, 165 Fed. Cl. 613, 641 (restored benefits and make-up payments under ARPA weighed against economic impact on plan participants). For further discussion on the ARPA and the reinstatement of suspended benefits, see VIII.D.1., below.

[506] §432(e)(9)(C).

[507] Reg. §1.432(e)(9)-1(c)(3), §1.432(e)(9)-1(c)(4).

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• Measure undertaken by the plan sponsor to retain or attract contributing employers.[508]

C. Application Process

The extensive benefit suspension process involves gaining approval from the government, providing notice, meeting certification and documentation requirements, and submitting to a participant vote. A plan amendment also is required to suspend benefits.[509] While the application requirements are specified in a revenue procedure issued by the IRS, which includes a submission checklist and model notice to participants and beneficiaries, the application is filed with and the benefit suspension program is administered by the Treasury Department.[510]

1. Agency Approval

The plan sponsor (or its authorized representative) of a plan in critical and declining status that elects to suspend benefits must submit an application for approval by the Treasury Department in consultation with the PBGC and DOL.[511] The application must be submitted electronically in a searchable format.[512] The application must be signed and dated by an authorized trustee who is a current member of the board of trustees or by an authorized representative of the plan sponsor.[513] The Treasury Department will acknowledge its receipt and let the plan sponsor know whether the submission is complete within two business days.[514]

Benefits may be suspended only if the plan actuary certifies that the plan is in critical and declining status as defined in I.R.C. §432(b)(6) for the plan year in which the application is submitted and the suspension will help avoid insolvency and the sponsor maintains a written record throughout the suspension showing that the plan would be insolvent without it.[515] The application must include these actuarial certifications.[516] The plan sponsor must make initial and annual determinations that the plan is projected to become insolvent unless benefits are suspended. A plan satisfies the initial determination requirement only if the plan sponsor determines that (1) all reasonable measures to avoid insolvency, within the meaning of §418E, have been taken, and (2) the plan is projected to become insolvent within the meaning of §418E unless the proposed suspension of benefits is implemented for the plan. To satisfy the initial determination requirement, the plan sponsor may rely on the actuarial certification made pursuant to I.R.C. §432(b)(3)(A)(i) that the plan is in critical and declining status for the plan year.[517] The annual determination is made using the standards that apply under Reg. §1.432(e)(9)-1(d)(5) when determining whether a proposed benefit suspension is sufficient to avoid insolvency but not materially in excess of that limit.[518] The application procedures also require disclosure of a 10-year history of certain critical assumptions, as well as sample calculations demonstrating that the limitations on individual suspensions are satisfied.[519] Applicants must follow the template included in Appendix B to Rev. Proc. 2017-43 when describing actuarial assumptions used for projections.[520]

Within 30 days of receiving the application, the Treasury Department will publish a notice in the Federal Register soliciting comments from the plan's contributing employers, employee organizations, participants and beneficiaries, and other interested parties.[521] The application will be available on the Treasury Department's website. The agencies must approve or deny the application within 225 days of the submission; if they take no action in that time, then the application is deemed approved.[522] The agencies will review the factors that the plan sponsor used to determine that the plan would become insolvent unless benefits were suspended, and will accept the plan sponsor's determinations unless they are "clearly erroneous."[523] If the agencies reject the application, the Treasury Department will provide notice to the plan sponsor detailing the specific reasons for the rejection and specific requirements that were not satisfied.[524]

[508] Reg. §1.432(e)(9)-1(c)(3)(ii).

[509] I.R.C. §432(a)(3)(B), added by Pub. L. No. 113-235, Div. O, §201(b)(1)(C); ERISA §305(a)(3)(B), added by Pub. L. No. 113-235, Div. O, §201(a)(1)(C); Reg. §1.432(e)(9)-1(a)(1); Rev. Proc. 2017-43, *superseding* Rev. Proc. 2016-27.

[510] Rev. Proc. 2017-43, §2. Rev. Proc. 2017-43 applies to applications submitted on or after September 1, 2017. Rev. Proc. 2016-27 applies to submissions made on or after April 26, 2016, and prior to September 1, 2017. Submissions on or after June 19, 2015, but prior to April 26, 2016, are governed by Rev. Proc. 2015-34.

[511] I.R.C. §432(e)(9)(G); ERISA §305(e)(9)(G); Reg. §1.432(e)(9)-1(g)(1)(i).

[512] Reg. §1.432(e)(9)-1(g)(1)(iii).

[513] Rev. Proc. 2017-43, §2.01.

[514] Reg. §1.432(e)(9)-1(g)(1)(ii).

[515] I.R.C. §432(b)(3)(A), §432(e)(9)(C); ERISA §305(e)(9)(C); Reg §1.432(e)(9)-1(c)(1)(i).

[516] Rev. Proc. 2017-43, §3.01, §3.02.

[517] Reg. §1.432(e)(9)-1(c)(3)(iii). Rev. Proc. 2017-43, §3.01 provides that documentation supporting the certification must be included and must contain a plan-year-by-plan-year projection of the available resources and the benefits that are due under the plan, demonstrating that the plan is projected to become insolvent during the period described in I.R.C. §432(b)(6) that applies to the plan. The projections must separately identify the market value of assets and cash-flow items for (1) contributions, (2) withdrawal liability payments, (3) benefit payments, (4) administrative expenses, and (5) net investment return. When describing the projected withdrawal payments, applicants must separately identify projected payments that are attributable to employers who have already withdrawn from those attributable to expected future withdrawals by employers.

[518] Reg. §1.432(e)(9)-1(c)(4).

[519] Rev. Proc. 2017-43, §6.03, §6.04.

[520] Rev. Proc. 2017-43, §4.01.

[521] I.R.C. §432(e)(9)(G)(ii); ERISA §305(e)(9)(G)(ii); Reg. §1.432(e)(9)-1(g)(2).

[522] Reg. §1.432(e)(9)-1(g)(4)(iv) permits the IRS and plan sponsor to mutually agree in writing to stay the 225-day period.

[523] I.R.C. §432(e)(9)(G)(iv), §432(e)(9)(G)(v); Reg. §1.432(e)(9)-1(g)(5); ERISA §305(e)(9)(G)(iv), §305(e)(9)(G)(v). *See, e.g.*, Treas. Dept. Letter to Composite Roofers Local 42 Pension Plan (Fund) Application for Reduction of Benefits (February 6, 2020) (approving Fund's application to reduce benefits based on satisfaction of requirements in §432(e)(9)(C) through §432(e)(9)(F); reiteration of need for Treasury-administered §432(e)(9)(H) participant vote prior to final authorization to commence benefit reductions (discussed further at VII.C.4.)); Treas. Dept. Letter to Board of Trustees, Western Pennsylvania Teamsters & Employers Pension Fund Benefits Reduction Request (May 7, 2019); Treas. Dept. Letter to Board of Trustees, Ironworkers Local 17 Pension Fund Benefit Suspension Request (Dec. 16, 2016); Treas. Dept. Letter to Board of Trustees for the Local 805 Pension Fund Benefit Reduction Request (Oct. 9, 2018).

[524] I.R.C. §432(e)(9)(G)(iii); ERISA §305(e)(9)(G)(iii); Reg. §1.432(e)(9)-1(g)(4). *See, e.g.*, Treas. Dept. Letter to Board of Trustees, Ironworkers Local 16 Pension Fund (Nov. 3, 2016) (application for benefit suspension denied because actuarial assumptions submitted by fund failed to satisfy I.R.C. §432(e)(9)(D)(iv), which requires demonstration by reasonable estimation that fund will avoid insolvency). For additional examples of denied applications, see Worksheet 7 and Worksheet 9.

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Plan sponsors may submit an application for benefit suspension in combination with an application to the PBGC for a plan partition.[525] The PBGC will provide the initial review of a coordinated application, but only if the plan sponsor submits an application for benefit suspension to the Treasury Department within 30 days of receiving the PBGC's acknowledgement of a complete application for partition.[526] A plan sponsor applying for benefit suspension in combination with a plan partition may use the model combined notice provided in Appendix A of the PBGC regulations with the model notice provided in Rev. Proc. 2017-43.[527] The application for benefit suspension must indicate that the plan sponsor is requesting PBGC-approval of a proposed partition and must include the proposed effective date of the partition and a plan-year-by-plan-year projection of the amount of the reduction in benefit payments (i.e., guaranteed amounts covered by financial assistance under the successor plan for each year) attributable to the partition.[528]

2. *Notice Requirement*

Concurrent with the application to the Treasury Department, the plan sponsor must provide notice to participants and beneficiaries, contributing employers, and union representatives.[529] The plan sponsor must provide notice to beneficiaries of deceased participants and alternate payees, regardless of whether their benefits would be affected by the proposed suspension.[530] Notice must also be given to each employer who has an obligation to contribute under the plan and each employee organization that represents plan participants employed by a contributing employer.[531] The plan sponsor is required to make reasonable efforts to locate participants and beneficiaries. The notice may be provided electronically if this format is reasonably accessible to the recipient.[532] The IRS has provided a model notice to satisfy this requirement. When filing for an application for benefit suspension, an applicant must describe the method used to satisfy the notice requirement, including submission of a copy of the actual notice that was or will be given to affected parties.[533]

The notice must include the following items:

- sufficient information to enable a participant or beneficiary to understand the effect of any suspension of benefits, including an individualized estimate of the effect on that participant or beneficiary;
- a description of factors the plan sponsor considered in designing the benefit suspension;
- a statement that the application for approval will be available on Treasury's website and that comments on the application will be accepted;
- information as to rights and remedies of plan participants and beneficiaries;
- if applicable, a statement describing the appointment of a retiree representative; and
- information on how to contact Treasury for more information.[534]

If it is not possible to provide an individualized estimate on an annual or monthly basis of the quantitative effect of a benefit suspension, the plan must provide a narrative description of the effect of the suspension.[535] In addition, the notice must include the following information:

- a statement that the plan sponsor has determined that the plan will become insolvent unless the proposed suspension takes effect, and the year in which insolvency is projected to occur without a suspension of benefits;
- a statement that insolvency of the plan could result in benefits that are lower than benefits paid under the proposed suspension, and a description of the projected benefit payments upon insolvency;
- a description of the proposed suspension and its effect, including a description of the different categories or groups affected by the suspension, how those categories or groups are defined, and the formula that is used to calculate the amount of the proposed suspension for individuals in each category or group;
- a description of the effect of the proposed suspension on the plan's projected insolvency;
- a description of whether the suspension will remain in effect indefinitely or will expire by its own terms; and

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[525] Reg. §1.432(e)(9)-1(g)(1)(vi). Note, although the agencies are not required to issue identical application rulings, similar statutory requirements may suggest parallel decisions. *See, e.g.*, PBGC Letter Issued in 2016 to Board of Trustees, Road Carriers — Local 707 Pension Fund (the Fund), in which the PBGC denied partition on the Fund's coordinated application citing failure to satisfy all statutory requirements imposed by ERISA §4233(b). The PBGC denied partition on the basis that the Fund's application was projected on "unreasonably optimistic assumptions," which did not demonstrate partition would keep the Fund solvent. Similar to the partition requirements imposed by ERISA §4233(b)(3), I.R.C. §432(e)(9)(D)(iv) mandates that Treasury may only grant benefit suspension if statutory requirements, including that suspension is projected to ensure the Fund avoids insolvency, are met. Treasury subsequently denied benefit suspension on its portion of the application, citing the PBGC's partition denial and the Fund's failure to satisfy I.R.C. §432(e)(9)(D)(iv) as the basis for its decision. *See also* Treas. Dept. Letter to Board of Trustees, Road Carriers Local 707 Pension Fund (June 24, 2016).

[526] 29 C.F.R. §4233.10(d).

[527] 29 C.F.R. §4233.13(b). See 29 C.F.R. §4233.13(a) for the rules regarding interagency cooperation.

[528] Rev. Proc. 2017-43, §6.02.

[529] I.R.C. §432(e)(9)(F); ERISA §305(e)(9)(F). Any notice that meets the suspension of benefits notice requirements also satisfies ERISA §204(h) (notice of significant reduction in benefits). ERISA §305(e)(9)(F)(iv).

[530] Reg. §1.432(e)(9)-1(f)(1)(i).

[531] I.R.C. §432(e)(9)(F); ERISA §305(e)(9)(F). Any notice that meets the suspension of benefits notice requirements also satisfies ERISA §204(h) (notice of significant reduction in benefits). ERISA §305(e)(9)(F)(iv).

[532] I.R.C. §432(e)(9)(F)(iii)(III); ERISA §305(e)(9)(F)(iii)(III). Permissible electronic methods include those permitted under 29 C.F.R. §2520.104b-1(c) and Reg. §54.4980F-1, Q&A-13(c). Reg. §1.432(e)(9)-1(f)(3)(ii)(A). *See* 29 C.F.R. §2520.104b-1(f) and §2520.104b-31 (electronic delivery safe harbor that could be used for mandatory pension benefit plan disclosures under ERISA Title I instead of or with 29 C.F.R. §2520.104b-1(c)), added by RIN 1210-AB90, 85 Fed. Reg. 31,884 (May 27, 2020), applicable July 27, 2020; *see* 85 Fed. Reg. at 31,889 (safe harbor covers multiemployer plan participants). Although the statute allows notice to be provided in "written, electronic, or other appropriate form," Reg. §1.432(e)(9)-1(f)(3)(ii)(B) provides that notice must exclusively be provided in written or electronic form.

[533] Rev. Proc. 2017-43, §4.05, and Appendix A.

[534] Reg. §1.432(e)(9)-1(f)(1)(i).

[535] Reg. §1.432(e)(9)-1(f)(2)(ii)(A).

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• a statement describing the right to vote on the suspension application.[536]

Notice must be given no earlier than four business days before the application is submitted and no later than two business days after the Treasury Department notifies the plan sponsor that its application is complete. If the plan sponsor locates additional individuals who are entitled to notice after this time period has elapsed, then it must provide notice to them as soon as is practicable.[537]

Any notice given following these guidelines satisfies the requirement for notice of a significant reduction in benefits under I.R.C. §4980F.[538]

3. Retiree Representative

As an additional safeguard, sponsors of plans with 10,000 or more participants are required to select a participant in pay status to act as a representative and advocate for the interests of the retired and deferred vested participants and beneficiaries.[539] The retiree representative must be chosen by the plan sponsor at least 60 days prior to submitting the application to suspend benefits. The plan is required to pay reasonable expenses incurred by the retiree representative, including legal and actuarial support, and must provide the retiree representative with relevant information such as plan documents and data upon request. Duties performed by the retiree representative generally are not considered fiduciary duties. However, if the retiree representative is also a plan trustee, then his duties associated with an application to suspend benefits are fiduciary duties subject to the prudent man standard of care and prohibited transaction rules.

A retiree representative is required if the plan sponsor's most recently filed Form 5500 reported a total of 10,000 or more participants as of the end of the plan year.[540] Plans that have fewer than 10,000 participants are permitted to select a retiree representative, subject to the same rules except for those concerning plan size and the timing of the appointment.[541]

4. Participant Vote

Once an application for suspension is approved, participants and beneficiaries must vote on the benefit suspension before it can take effect.[542] Unless a majority of participants and beneficiaries eligible to vote, not merely a majority of participants and beneficiaries who cast a vote, vote to reject the suspension, the suspension will go into effect.[543] If a majority of participants and beneficiaries vote to reject the suspension, the plan sponsor may submit a new suspension application to the Treasury Department for approval.

The participant vote is administered by the Treasury Department within 30 days of approving the application.[544] The plan sponsor is required by statute to provide ballots for the vote, subject to the approval of the agencies.[545] However, the plan sponsor may not distribute the ballots itself to preserve the validity of the vote and privacy of the voter. Instead, the plan sponsor provides a list of eligible voters, and the Treasury Department or a service provider designated by the Treasury Department distributes the ballot and assigns each eligible voter a unique identifier that may be used to cast a vote.[546] The plan sponsor must provide the list within seven days of the approval of its application to suspend benefits.[547] For each eligible voter, the plan sponsor's list must include the individualized estimate required under §432(e)(9)(F) (discussed above); the last known mailing address; and a current email address for eligible voters who previously received the §432(e)(9)(F) notice electronically, or who regularly receive plan-related communications in electronic form.[548] The plan sponsor must pay all costs associated with assembling and distributing the ballot.[549]

Ballots must include the following information:[550]

• various descriptive information about the proposed benefit suspension;

• a description of factors considered by the plan sponsor in designing the benefit suspension;

• a description of whether the suspension will remain in effect indefinitely or will expire by its own terms;

• a statement in support of suspension from the plan sponsor;

• a statement in opposition compiled from comments received during the approval process;[551]

• a statement that the suspension has been approved by the Treasury Department, in consultation with the PBGC and DOL;

• a statement that the plan sponsor has determined that the plan will become insolvent unless the benefit suspension takes effect, and an accompanying statement that this determination is subject to uncertainty;

• a statement that the plan's insolvency could result in benefits lower than the benefits paid under the suspension;

[536] Reg. §1.432(e)(9)-1(f)(2)(ii).

[537] Reg. §1.432(e)(9)-1(f)(3).

[538] Reg. §1.432(e)(9)-1(f)(4).

[539] I.R.C. §432(e)(9)(B)(v); ERISA §305(e)(9)(B)(v); Reg. §1.432(e)(9)-1(b)(4)(i).

[540] Reg. §1.432(e)(9)-1(b)(4)(i)(A).

[541] Reg. §1.432(e)(9)-1(b)(4)(v).

[542] I.R.C. §432(e)(9)(H); ERISA §305(e)(9)(H); Reg. §1.432(e)(9)-1(h).

[543] Reg. §1.432(e)(9)-1(h)(2)(v). *See, e.g.*, Treas. Dept. Letter to Board of Trustees, Western Pennsylvania Teamsters & Employers Pension Fund, Final Authorization of Application for Benefit Reduction (June 20, 2019) (final authorization to commence benefit reductions after majority of eligible voters failed to return ballot); (granting final authorization to suspend benefits following participant vote).

[544] I.R.C. §432(e)(9)(H)(ii); ERISA §305(e)(9)(H)(ii).

[545] I.R.C. §432(e)(9)(H)(iii); ERISA §305(e)(9)(H)(iii); Reg. §1.432(e)(9)-1(h)(3)(iii).

[546] Reg. §1.432(e)(9)-1(h)(2)(ii) through Reg. §1.432(e)(9)-1(h)(2)(iii).

[547] Reg. §1.432(e)(9)-1(h)(2)(iii)(B)(2).

[548] Reg. §1.432(e)(9)-1(h)(2)(iii)(B)(2); Reg. §1.432(e)(9)-1(h)(2)(iii)(B)(4).

[549] Reg. §1.432(e)(9)-1(h)(2)(iii)(B)(6).

[550] Reg. §1.432(e)(9)-1(h)(3)(i). Voters who cannot be located are treated as voting to reject the suspension at the same rate as votes to whom ballots were provided. Reg. §1.432(e)(9)-1(h)(4)(ii).

[551] The statement in opposition is compiled by the DOL. Reg. §1.432(e)(9)-1(h)(3)(iv).

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- a statement that the PBGC's insolvency would result in benefits lower than benefits paid in the case of the plan's insolvency;
- a statement that the plan's actuary has certified that the plan is projected to avoid insolvency if it suspends benefits, and that the actuary's projection is subject to uncertainty;
- a statement that the benefit suspension will go into effect unless a majority of the voters rejects it, so a failure to vote has the same effect on the outcome as a vote in favor of benefit suspension;
- a copy of the individualized estimate that was provided as part of the notice (with corrections if the estimate changed); and
- a description of the voting procedures, including the deadline for voting.

The plan sponsor must take necessary steps to inform participants about the proposed benefit suspension. Depending on the size and resources of the plan and the geographic distributions of its participants, the plan sponsor may have to hold in-person meetings, communicate by telephone or internet, mail information, or take other steps to inform participants and beneficiaries.[552]

The votes will be collected and tabulated by the Treasury Department or its designated service provider using an automated voting system. Eligible participants may cast votes through a website or by telephone. The voting period generally remains open for 30 days following the date the application is approved, and closes no earlier than 21 days after the ballot distribution date.[553]

The agencies may overrule an adverse vote only for plans deemed to be systemically important.[554] The agencies have 14 days after a certified participant vote rejecting a proposed benefit suspension to determine whether the plan is systemically important.[555] A plan is systemically important when PBGC assistance is projected to exceed $1 billion if benefits are not suspended.[556] No later than 44 days after this determination, the Participant and Plan Sponsor Advocate selected by the PBGC under ERISA §4004 may submit recommendations to the Treasury Department on the benefit suspension or any revisions to the benefit suspension.[557] If the plan is determined to be systemically important, then within 90 days of the date the participant vote results are certified, either the Treasury Department will permit the benefit suspension to be implemented as proposed by the plan sponsor or the agencies will modify the proposal and allow the modified benefit suspension to go forward.[558] Within 60 days of the vote, the Treasury Department must notify the plan whether the originally proposed suspension or a modified suspension is permitted to be implemented.[559]

The Treasury Department, in consultation with the PBGC and DOL, gives the final authorization to suspend benefits no later than seven days after a participant vote or, if the Treasury Department has overruled an adverse participant vote, at a time sufficient to allow the suspension to be implemented within 90 days of the date the vote is certified.[560]

5. *Judicial Review*

Generally, a participant or beneficiary affected by a benefit suspension does not have a cause of action under I.R.C. §432(e)(9) or ERISA §305(e)(9).[561] However, the MPRA authorizes a cause of action challenging a suspension of benefits after the Treasury Department's final authorization following the participant vote.[562] The statute does not specify which parties can bring this cause of action.

A plan sponsor may challenge the Treasury Department's denial of an application for benefit suspension.[563]

The statute of limitations for an action challenging a suspension of benefits or a denial of an application to suspend benefits is one year after the earliest date on which the plaintiff acquired or should have acquired actual knowledge as to the existence of a cause of action.[564]

D. Limitations

A variety of limitations apply to the amount of benefit that can be suspended.

1. *Guarantee-Based Limitation*

Monthly benefits may not be reduced to less than 110% of PBGC guarantees.[565] Thus, benefits and benefit increases that have been in effect for at least five years generally cannot be eliminated entirely.

2. *Age-Based and Disability-Based Limitation*

Limitations apply with respect to participants or beneficiaries age 75 or older and benefits based on disability. No benefit may be suspended for participants or beneficiaries who have attained age 80 or older no later than the month that includes the effective date of the suspension.[566] For participants and beneficiaries who are between age 75 and age 80 as of the ef-

[552] I.R.C. §432(e)(9)(H)(iv); ERISA §305(e)(9)(H)(iv).

[553] Reg. §1.432(e)(9)-1(h)(2)(iv). Treasury, in consultation with the PBGC and DOL, may specify a later date to end the voting period in appropriate circumstances.

[554] I.R.C. §432(e)(9)(H)(v); ERISA §305(e)(9)(H)(v).

[555] I.R.C. §432(e)(9)(H)(v)(I); ERISA §305(e)(9)(H)(v)(I); Reg. §1.432(e)(9)-1(h)(5)(i).

[556] I.R.C. §432(e)(9)(H)(v)(III); ERISA §305(e)(9)(H)(v)(III); Reg. §1.432(e)(9)-1(h)(5)(iv)(A). The $1 billion amount is indexed for inflation beginning for calendar years after 2015. I.R.C. §432(e)(9)(H)(v)(III); ERISA §305(e)(9)(H)(v)(III); Reg. §1.432(e)(9)-1(h)(5)(iv)(B). For current and prior amounts, see Worksheet 1 in 371 T.M., *Employee Plans — Deductions, Contributions, and Funding*.

[557] I.R.C. §432(e)(9)(H)(v)(II); ERISA §305(e)(9)(H)(v)(II); Reg. §1.432(e)(9)-1(h)(5)(ii).

[558] I.R.C. §432(e)(9)(H)(v)(I); ERISA §305(e)(9)(H)(v)(I).

[559] Reg. §1.432(e)(9)-1(h)(5)(iii).

[560] I.R.C. §432(e)(9)(H)(vi); ERISA §305(e)(9)(H)(vi); Reg. §1.432(e)(9)-1(h)(2)(v), §1.432(e)(9)-1(h)(6). *See e.g.*, Treas. Dept. Letter to Ironworkers Local 17 Pension Fund Authorizing Benefit Suspension (Jan. 27, 2017), providing final authorization to suspend benefits after a participant vote concluded in favor of benefit suspension.

[561] I.R.C. §432(e)(9)(I)(iii); ERISA §305(e)(9)(I)(iii).

[562] I.R.C. §432(e)(9)(I)(ii); ERISA §305(e)(9)(I)(ii).

[563] I.R.C. §432(e)(9)(I)(i); ERISA §305(e)(9)(I)(i).

[564] I.R.C. §432(e)(9)(I)(iv); ERISA §305(e)(9)(I)(iv).

[565] I.R.C. §432(e)(9)(D)(i); ERISA §305(e)(9)(D)(i); Reg. §1.432(e)(9)-1(d)(2)(i). *See* Reg. §1.432(e)(9)-1(d)(2)(iii), §1.432(e)(9)-1(d)(2)(iv), and §1.432(e)(9)-1(d)(2)(v).

[566] Reg. §1.432(e)(9)-1(d)(3)(i).

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fective date of the suspension, their benefits are partially protected. The maximum suspendable benefit for an individual in this group is calculated by multiplying the amount of the otherwise suspendable benefit by a percentage based on how many months the individual has to attain age 80 as of the month following the effective date of the suspension.[567]

No benefits based on disability (as defined under the plan) may be suspended.[568] Disability benefits include the entire amount paid to a participant pursuant to the participant becoming disabled, regardless of whether the participant would have been paid some portion of the benefit if the participant had not become disabled.[569]

3. *Aggregate Suspension Limitation*

Any suspension of benefits in the aggregate must be at a level that is reasonably estimated to enable the plan to avoid insolvency.[570] A suspension of benefits (considered, if applicable, in combination with a partition of the plan) satisfies this requirement, generally, if (1) the plan's solvency ratio is projected on a deterministic basis to be at least 1.0 for each plan year throughout an extended period beginning on the first day of the plan year that includes the effective date of the suspension, (2) based on stochastic projections reflecting variance in investment return, the probability that the plan will avoid insolvency through the extended period is greater than 50%, and (3) the projection shows that during each of the last five plan years of that period, neither the plan's solvency ratio nor its available resources is projected to decrease.[571]

In addition, the aggregate benefit suspension must be "reasonably calculated to achieve, but not materially exceed" the level necessary to prevent insolvency,[572] which is met by, *inter alia*, a decrease in the periodic payment equal to the greater of (1) a 5% reduction in the periodic payment proposed for a participant, or (2) 2% of the periodic payment determined without regard to the proposed reduction would not be sufficient to enable the plan to avoid insolvency.[573]

4. *Equitable Distribution*

Benefit suspensions that apply to participants also apply to beneficiaries and alternate payees.[574] MPRA includes a list of several factors that must be considered to ensure that benefit suspensions are equitably distributed, including age and life expectancy, length of time in pay status, and years to retirement for active employees.[575]

If a suspension of benefits provides for different treatment for different participants and beneficiaries (other than as a result of any individual limitation), then a suspension of benefits will meet the requirement of equitable distribution only if (1) the participants and beneficiaries are divided up into separate categories within which members receive consistent treatment, (2) any difference in treatment among different categories is based on relevant factors reasonably selected by the plan sponsor (e.g., age and life expectancy of the participants or differences between active and retiree benefits),[576] and (3) any such difference in treatment is based on a reasonable application of those relevant factors.[577]

A special ordering rule applies benefit suspensions first to benefits attributable to service for an employer that withdrew from the plan without paying the full amount of its withdrawal liability, and lastly to benefits attributable to service for an employer who withdrew from the plan prior to December 16, 2014, and established a single employer plan assuming liability for certain benefits under the previous plan.[578] A suspension of benefits under a plan that is subject to §432(e)(9)(D)(vii) is first applied to the maximum extent permissible to benefits attributable to service with an employer who withdrew from the plan and failed to pay (or is delinquent with respect to paying) the full amount of its withdrawal liability. The plan may then apply the suspension to other benefits only if a suspension of these benefits alone does not enable the plan to avoid insolvency.

Practice Insight: Some practitioners have surmised that this special ordering rule applies solely to UPS's withdrawal from the Central States, Southeast and Southwest Areas Pension Fund in 2007.

A suspension of benefits described in §432(e)(9)(D)(vii)(II), which encompasses all other benefits that may be suspended under §432(e)(9)(D)(vii), is not applied to the maximum extent permissible before any suspension is applied to benefits described in §432(e)(9)(D)(vii)(III). The final regulations provide, however, that the suspension of benefits under §432(e)(9)(D)(vii)(II) must be greater than or equal to the application of the suspension of benefits described in §432(e)(9)(D)(vii)(III). The final regulations provide that this requirement is met if no individual's benefits that are §432(e)(9)(D)(vii)(III) benefits are reduced more than that individual's benefits would have been reduced if, holding constant the benefit formula, work history, and all other relevant factors used to determine the individual's benefits, those benefits were attributable to service with any other employer.

E. Benefit Improvements

While a benefit suspension is in effect, the plan sponsor may provide benefit improvements (i.e., resumption of benefits, increase in benefits, increase in the benefit accrual rate, or faster vesting) only under certain conditions.[579] The conditions appear to be designed to ensure that participants in pay status are treated at least as well as participants not yet in pay status. If the benefit improvement is a resumption of benefits that ap-

[567] I.R.C. §432(e)(9)(D)(ii); ERISA §305(e)(9)(D)(ii). *See* Reg. §1.432(e)(9)-1(d)(3) (guidance on how to calculate age-based limitation, including examples).

[568] I.R.C. §432(e)(9)(D)(iii); ERISA §305(e)(9)(D)(iii). *See* Reg. §1.432(e)(9)-1(d)(4).

[569] Reg. §1.432(e)(9)-1(d)(4)(ii)(A).

[570] I.R.C. §432(e)(9)(D)(iv); ERISA §305(e)(9)(D)(iv); Reg. §1.432(e)(9)-1(d)(5)(i)(A).

[571] Reg. §1.432(e)(9)-1(d)(5)(ii).

[572] I.R.C. §432(e)(9)(D)(iv); ERISA §305(e)(9)(D)(iv); Reg. §1.432(e)(9)-1(d)(5)(i)(B).

[573] Reg. §1.432(e)(9)-1(d)(5)(iii)(A).

[574] I.R.C. §432(e)(9)(B)(iv); ERISA §305(e)(9)(B)(iv).

[575] I.R.C. §432(e)(9)(D)(vi); ERISA §305(e)(9)(D)(vi). *See* Reg. §1.432(e)(9)-1(d)(6).

[576] *See* Reg. §1.432(e)(9)-1(d)(6)(ii).

[577] Reg. §1.432(e)(9)-1(d)(6)(i).

[578] I.R.C. §432(e)(9)(D)(vii); ERISA §305(e)(9)(D)(vii).

[579] I.R.C. §432(e)(9)(E); ERISA §305(e)(9)(E). *See* Reg. §1.432(e)(9)-1(e).

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plies only for participants in pay status, the only condition is that the resumption of benefits must be equitably distributed to some or all participants and beneficiaries in pay status.[580]

However, if a benefit improvement for participants not in pay status by the first day of the plan year the benefit improvement takes effect would increase plan liabilities, then the benefit improvement is not allowed unless (1) the present value of the total liability for a benefit improvement for participants and beneficiaries whose benefit commencement dates were before the first day of the plan year for which the benefit improvement takes effect is not less than the improvement for participants and beneficiaries who were not in pay status by that date, (2) equitable benefit improvements are made for all participants and beneficiaries whose benefits commenced prior to the beginning of the plan year in which the benefit improvement takes effect, and (3) the plan actuary certifies that, taking into account the benefit improvements, the plan is projected to avoid insolvency indefinitely.[581]

These conditions do not apply for benefit increases that are determined to be reasonable and de minimis by the agencies or that are required to comply with tax qualification rules or other applicable law.[582] Actuarial assumptions used to determine (1) above must be reasonable, taking into account the experience of the plan and other reasonable expectations.[583]

[580] I.R.C. §432(e)(9)(E)(iii); ERISA §305(e)(9)(E)(iii). *See* Reg. §1.432(e)(9)-1(e)(3). See I.R.C. §432(e)(9)(D)(vi) and ERISA §305(e)(9)(D)(vi) for the factors to take into account for equitable distribution.

[581] I.R.C. §432(e)(9)(E)(i); ERISA §305(e)(9)(E)(i). *See* Reg. §1.432(e)(9)-1(e)(2).

[582] I.R.C. §432(e)(9)(E)(iv); ERISA §305(e)(9)(E)(iv). *See* Reg. §1.432(e)(9)-1(e)(4).

[583] Reg. §1.432(e)(9)-1(e)(2)(ii)(A)(1).

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VIII. Special Financial Assistance

The American Rescue Plan Act of 2021 (ARPA) directs the PBGC to provide special financial assistance to individual multiemployer plans meeting specified criteria.[584] Special financial assistance is financial support through direct transfers from the PBGC, intended to be sufficient to pay all benefits through the end of the 2051 plan year, with no obligation for the plan to ever repay the amounts to the PBGC. For example, the Central States Teamsters Pension Fund received $36 billion from the PBGC in order to prevent benefit suspensions or plan insolvency.[585]

A. Eligibility

Eligible plans must submit an application for special financial assistance from the PBGC by December 31, 2025.[586] Revised applications must be submitted by December 31, 2026.

A multiemployer plan may apply for special financial assistance if the plan:

- was in critical and declining status during a plan year beginning in 2020, 2021, or 2022;[587]
- had an approved suspension of benefits as of March 11, 2021;[588]
- is in critical status[589] at any time in 2020 through 2022, with a modified funded percentage less than 40% and a ratio of less than 2:3 active to inactive participants;[590] or
- became insolvent after December 16, 2014, and has remained insolvent but has not been terminated as of March 11, 2021.[591]

B. Processing Applications

PBGC regulations establish a variety of requirements for what must be submitted as part of the plan's application and how the application will be processed.[592]

1. Information Required

A variety of information must be included in the application, which must be electronically filed with the PBGC.[593]

In addition to basic information concerning the plan name, address, and contact information,[594] the application must include all relevant plan documentation, including any plan amendments necessary in order to receive special financial assistance, the most recent IRS determination letter, the most recent rehabilitation plan or funding improvement plan (if applicable), withdrawal liability documentation, and a variety of actuarial and financial information.[595] The application must also include documentation of a death audit used to identify deceased plan participants.[596]

The plan must be amended to include specified language requiring the plan to be administered according to the conditions imposed on plans receiving special financial assistance.[597] By requiring plan terms indicating the conditions must be complied with, all the various government enforcement tools under Title I of ERISA are brought into play.

The eligibility criteria the plan satisfies in order to receive special financial assistance must be included, as well as the priority group (which governs when the plan's application may be filed) to which the plan belongs.[598]

If the plan suspended participant benefits under ERISA §305(e)(9) or ERISA §4245(a), the application must describe how previously suspended benefits must be reinstated for participants.[599]

2. PBGC Action

An application for special financial assistance filed with the PBGC must be approved or denied within 120 days of the application submission date.[600] If no action is taken, the application is deemed approved and the PBGC must notify the plan sponsor of the payment of the special financial assistance.[601]

The PBGC may only deny an application for being incomplete, having assumptions or proposed changes in assumptions that are unreasonable, or for the plan not being an eligible multiemployer plan.[602]

Payment of special financial assistance will be made by the PBGC in a lump sum or substantially so within 90 days of the approval of the plan's application, though an ultimate dead-

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[584] *See* Pub. L. No. 117-2, §9701 through §9708, enacted March 11, 2021.

[585] White House Fact Sheet, (Dec. 8, 2022), *President Biden Announces Historic Relief to Protect Hard-Earned Pensions of Hundreds of Thousands of Union Workers and Retirees*, https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/08/fact-sheet-president-biden-announces-historic-relief-to-protect-hard-earned-pensions-of-hundreds-of-thousands-of-union-workers-and-retirees/.

[586] ERISA §4262(f).

[587] I.R.C. §432(k)(3)(A)(i); ERISA §4262(b)(1)(A).

[588] I.R.C. §432(k)(3)(A)(ii); ERISA §4262(b)(1)(B).

[589] Critical status must be certified by the plan's actuary, not elected by the sponsor under ERISA §305(b)(4). 29 C.F.R. §4262.3(c)(1).

[590] I.R.C. §432(k)(3)(A)(iii); ERISA §4262(b)(1)(C). Ratio determined using active and other participant counts from the plan's Form 5500. 29 C.F.R. §4262.3(a)(3)(iii).

[591] I.R.C. §432(k)(3)(A)(iv); ERISA §4262(b)(1)(D). *See also* 29 C.F.R. §4262.3(a)(4).

[592] See 29 C.F.R. Part 4262, amended and adopted by RIN 1212-AB53, 87 Fed. Reg. 40,968 (July 8, 2022), final rule effective August 8, 2022. For the interim final rules that applied before August 8, 2022, see RIN 1212-AB53, 86 Fed. Reg. 36,598, 36,627 (July 12, 2021).

[593] 29 C.F.R. §4262.10(b); *see* 29 C.F.R. §4000.3(b)(4), as amended by RIN 1212-AB53, 86 Fed. Reg. 36,598, 36,627 (July 12, 2021). For special financial assistance application filing instructions, see https://www.pbgc.gov/arp-sfa/more-resources.

[594] 29 C.F.R. §4262.7(a).

[595] 29 C.F.R. §4262.7(e), §4262.8. *See also General Instructions for Multiemployer Plans Applying for Special Financial Assistance*, at https://www.pbgc.gov/arp-sfa/more-resources.

[596] 29 C.F.R. §4262.8(a)(11). *See also General Instructions for Multiemployer Plans Applying for Special Financial Assistance*, at https://www.pbgc.gov/arp-sfa/more-resources.

[597] 29 C.F.R. §4262.6(e).

[598] 29 C.F.R. §4262.7(b), §4262.7(c).

[599] 29 C.F.R. §4262.7(c).

[600] 29 C.F.R. §4262.11(a).

[601] 29 C.F.R. §4262.11(a)(3).

[602] 29 C.F.R. §4262.11(a)(2). See 29 C.F.R. §4262.5(b) regarding PBGC review of the reasonableness of assumptions. The PBGC provides guidelines for changed assumptions. 29 C.F.R. §4262.5(b); PBGC SFA 22-07, *Special Financial Assistance Assumptions*, at https://www.pbgc.gov/sites/default/files/sfa/sfa-assumptions-guidance.pdf.

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line of September 30, 2030, for payment is established for later applications.[603]

3. Application Timing

Since the PBGC must approve or deny a plan's application for special financial assistance within 120 days, and the PBGC anticipates significant interest in seeking special financial assistance, a priority system has been established indicating when certain plans may apply. The following dates may be accelerated by the PBGC if application submissions or processing do not meet expectations, with any accelerated submission dates posted on PBGC.gov:[604]

- A plan that is insolvent or projected to become insolvent by March 11, 2022 may file beginning on July 9, 2021.
- A plan that suspended benefits under ERISA §305(e)(9) as of March 11, 2021, or a plan expected to be insolvent within one year of filing its application may file beginning on January 1, 2022.
- A plan in critical and declining status that has at least 350,000 participants may file beginning on April 1, 2022.
- A plan projected to become insolvent by March 11, 2023, may file beginning on July 1, 2022.
- A plan projected to become insolvent by March 11, 2026, may file beginning on February 11, 2023.
- A plan projected to have a present value of financial assistance payments from the PBGC under ERISA §4261 of at least $1 billion if special financial assistance is not provided may file beginning on February 11, 2023.

C. Amount of Special Financial Assistance

The statute indicates the amount of the special financial assistance is the "amount required for the plan to pay all benefits due" from the "measurement date" to the last day of the 2051 plan year,[605] potentially covering almost 30 years of benefit payments by the plan. The measurement date is the last day of the third calendar month immediately preceding the date of the plan's initial application, effective for initial applications filed after August 7, 2022.[606] So a plan that filed its initial application on July 1, 2023, the measurement date would be April 30, 2023.

While the statute does not have an explicit reduction in the amount of the special financial assistance for existing plan assets, PBGC regulations interpret the "amount required" language to limit the special financial assistance to the present value of the unfunded portion of plan obligations (i.e., benefit payments and administrative expenses, less existing and projected plan assets), not the entire present value of plan obligations.[607] Reducing the special financial assistance by the present value of plan assets significantly lowers the amount of assistance to multiemployer plans. The PBGC indicates their interpretation is based on their belief that the word "required," as modified by the phrase "for the plan" requires determining the amount of special financial assistance by taking into account plan resources already available to pay benefits.[608] In other words, the PBGC believes the phrase "amount required for the plan to pay all benefits due," is intrinsically equivalent to the phrase "amount required for the plan to pay all benefits due, taking into account existing and projected plan assets."

Note: PBGC regulations indicate the special financial assistance is limited by the "present value of future contributions," without regard to whether those future contributions are anticipated to be paid before or after 2051.

The determination of the amount of the special financial assistance differs depending on whether the plan previously suspended benefits under ERISA §305(e)(9) or not. For plans that did not previously suspend benefits, the amount of special financial assistance is the amount necessary to have projected assets, from both SFA and other plan sources, that at least equal zero by the end of the plan year ending in 2051.[609]

Note: In some cases, SFA payments were inflated due to inaccurate participant data used for plan asset projections. Unlike plans, the PBGC can verify data with Social Security's death records to ensure accurate funding. In such instances, the PBGC strongly supports the repayment of any SFA payments made based on inaccurate census data and supports the DOL's position that such repayments would not violate relevant ERISA or IRC provisions.[610]

For plans that previously suspended benefits under ERISA §305(e)(9) (MPRA plans), since a condition of receiving special financial assistance is that previously suspended benefits must be reinstated, that amount must be taken into account. Accordingly, the amount of special financial assistance for MPRA plans is the greater of (1) the amount determined using the same methodology as non-MPRA plans (described in the preceding paragraph), (2) an amount sufficient to ensure that plan projected assets, from both SFA and other plan sources, are expected to be rising as of the end of the plan year ending in 2051, and (3) the present value of benefits paid and expected to be paid through the end of the 2051 plan year attributable to the reinstatement of previously suspended benefits.[611]

Practice Insight: The different methodology for determining the amount of special financial assistance for plans that suspended benefits was in response to comments that while gaining approval to suspend benefits required a showing that the benefit suspension would allow the plan to avoid insolvency "indefinitely," obtaining special financial assistance not only required reinstating suspended benefits, but also that the assistance would allow the plan to avoid insolvency through 2051.

As noted above, projected plan assets and liabilities for a plan that previously suspended benefits under ERISA

[603] 29 C.F.R. §4262.12(f), §4262.12(g).

[604] 29 C.F.R. §4262.10(d)(2).

[605] ERISA §4262.

[606] 29 C.F.R. §4262.2. The measurement date was modified from the interim regulations, under which the measurement date is the last day of the calendar quarter immediately preceding the date of the plan's initial application, effective for initial applications filed before August 8, 2022.

[607] 29 C.F.R. §4262.4(a), §4262.4(b), §4262.4(c).

[608] *See* Preamble, RIN 1212-AB53, 87 Fed. Reg. at 40,975 (July 8, 2022).

[609] 29 C.F.R. §4262.4(a)(1).

[610] *See* PBGC *Statement on Department of Labor's Statement of Enforcement Policy Regarding Return of Excess Special Financial Assistance Payments*, available on the PBGC website, www.pbgc.gov (referencing DOL *Statement of Enforcement Policy Regarding Return of Excess Special Financial Assistance Payments*, available on the DOL website, www.dol.gov).

[611] 29 C.F.R. §4262.4(a)(2).

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§305(e)(9) is determined assuming the reinstatement of such amounts.[612] Other assumptions used to determine projected plan assets and liabilities include administrative expenses expected to be paid by the plan through 2051,[613] and expected payments to the plan during that period, including employer contributions and withdrawal liability payments (reflecting a reasonable allowance for amounts considered uncollectible).[614] Future asset values are estimated using different interest rate assumptions for SFA assets and assets from other plan sources. Existing and projected plan assets from other plan sources are projected using the interest rate used in the certification of the plan's funded status for the plan year ending in 2020, but not less than the lowest such rate for one of the four months preceding the SFA application, plus 200 basis points.[615] SFA assets are projected using the interest rate used in the certification of the plan's funded status for the plan year ending in 2020, but not less than the lowest such rate for one of the four months preceding the SFA application, plus 67 basis points.[616]

Practice Insight: The different interest rate assumptions for SFA and non-SFA assets reflect, in part, the more conservative investment restrictions on SFA assets. The SFA investment rate assumption will generally increase the amount of special financial assistance received by a plan.

D. Consequences of Receiving Special Financial Assistance

Once a plan receives special financial assistance from the PBGC, certain conditions are imposed on plan operations. Some of the conditions are intended to benefit participants, such as reinstatement of suspended benefits, but most conditions are intended to ensure that the special financial assistance is used to restore the plan to solvent financial status.

1. Reinstatement of Suspended Benefits

A multiemployer plan that receives special financial assistance must reinstate any benefits that were suspended. The reinstatement must be payable to participants and beneficiaries within three months of the payment of the special financial assistance to the plan as either a lump sum payment or equal monthly installments over five years.[617]

If the reinstated benefits are paid in equal monthly installments over five years, the amounts are treated as part of the annuity being received by the participant or beneficiary (i.e., a series of substantially equal periodic payments) and are not eligible rollover distributions.[618]

If the reinstated benefits are paid as a lump sum, whether the amount is considered an eligible rollover distribution depends on the amount of the distribution. If the lump sum reinstated benefit is less than or equal to the greater of 10% of the recipient's annual annuity or $750, the lump sum is also considered part of a series of substantially equal periodic payments and not an eligible rollover distribution. Larger reinstated benefits paid as a lump sum may be eligible rollover distributions.[619]

Practice Insight: For a sponsor of an eligible plan that is granted special financial assistance after 2021 and commences payment of previously suspended benefits and make-up payments, the deadline for adopting the amendment to provide these reinstatement payments is the later of (1) the amendment deadline specified in the 2021 Required Amendments List[620] that applies to plans eligible for special financial assistance (i.e., December 31, 2023), or (2) the amendment deadline that would apply if the amendment were a discretionary amendment (i.e., the end of the plan year in which the plan amendment is operationally put into effect).[621]

2. Assets Segregated and Invested

Special financial assistance, and any earnings thereon, must be segregated from other plan assets and only used to make benefit payments and pay plan expenses.[622] Assets in the segregated account must be primarily invested in fixed income securities such as corporate or government bonds, but up to one third of the assets in the segregated account can be invested in stocks and other return seeking investments.[623]

Practice Insight: It is not clear whether or how such segregated assets should be considered in determining whether plan assets are properly diversified for purposes of Title I of ERISA. For example, if other plan assets are invested exclusively in equities, may the plan still be considered properly diversified by considering the bond investments held in the segregated account?

3. Payment of Benefits and Plan Expenses

Special financial assistance, and any earnings thereon, may only be used to make benefit payments and pay plan administrative expenses.[624]

4. Benefit Increases

Retrospective benefit increases (e.g., past service benefits) generally are prohibited during the period covered by the special financial assistance.[625] Prospective benefit increases are prohibited unless the plan actuary certifies that increases in employer contributions are both projected to be sufficient to pay for the benefit increase and were not included in the determination of special financial assistance.[626]

[612] 29 C.F.R. §4262.4(b)(1), §4262.4(c)(1).
[613] 29 C.F.R. §4262.4(b)(2), §4262.4(c)(2).
[614] 29 C.F.R. §4262.4(c)(3).
[615] 29 C.F.R. §4262.4(e)(1).
[616] 29 C.F.R. §4262.4(e)(2).
[617] I.R.C. §432(k)(2)(A); 29 C.F.R. §4262.15.
[618] Notice 2021-38, §III.B.
[619] Notice 2021-38, §III.B.
[620] *See* Notice 2021-64.
[621] Notice 2022-62, n.6 (plan amendment to provide for reinstatement of suspended benefits treated as discretionary amendment). See Rev. Proc. 2022-40 for the plan amendment deadlines applicable for discretionary amendments.
[622] 29 C.F.R. §4262.14(a), RIN 1212-AB53, 87 Fed. Reg. 40,968 (July 8, 2022). For the interim permissible investment rules in effect before August 8, 2022, see RIN 1212-AB53, 86 Fed. Reg. 36,598, 36,627 (July 12, 2021).
[623] 29 C.F.R. §4262.14(b), §4262.14(c), and §4262.14(d). For additional information on permissible investments, see the American Rescue Plan Act FAQs, at https://www.pbgc.gov/arp-faqs.
[624] 29 C.F.R. §4262.13(b)(1).
[625] 29 C.F.R. §4262.16(b)(1).
[626] 29 C.F.R. §4262.16(b)(2).

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After 10 years, plans may request PBGC approval for retrospective or prospective benefit increases upon a demonstration that the benefit increase the plan will avoid insolvency.[627]

5. *Contribution Decreases and Allocations*

Contribution levels for contributing employers may not decrease unless the plan sponsor determines reducing contribution levels lessens the risk of loss to participants and beneficiaries. If the decrease affects annual contributions over $10 million and over 10% of all employer contributions, the PBGC must also determine the decrease lessens the risk of loss to participants and beneficiaries.[628]

6. *Transfers or Mergers*

During the period for which the plan receives special financial assistance, the plan cannot transfer, spinoff, or merge assets or liabilities without PBGC approval.[629] Similarly, during the same period, the plan sponsor cannot change the allocation of employer contributions between different plans maintained by the same sponsor.[630] The PBGC can grant exceptions to either restriction upon a showing that the plan will avoid insolvency or does not unreasonably increase the PBGC's risk of loss.[631]

PBGC approval for a transfer or merger does not necessarily change the status of other plans that are parties to the transaction for purposes of applying and receiving special financial assistance from PBGC. For example, if a multiemployer plan receives special financial assistance and PBGC approval to merge with another multiemployer defined benefit plan that has not received special financial assistance, and the plan that has not received special financial assistance is designated as the ongoing plan after the merger, the ongoing plan is not deemed to be in critical status under §432(b)(7) for funding purposes solely as a result of the merger.[632]

7. *Withdrawal Liability*

When a contributing employer withdraws from an underfunded multiemployer plan, the withdrawing employer is liable for a certain amount of the plan's unfunded benefit obligations. Receipt of special financial assistance has a clear impact on a plan's unfunded benefit obligations, but unrestricted recognition of those assets could incent some employers to withdraw from the plan and, in the view of the PBGC, result in an indirect transfer of special financial assistance to withdrawing employers by reducing their withdrawal liability. Accordingly, restrictions apply on the interest rate used to determine a plan's withdrawal liability and when to recognize the special financial assistance assets.

Mass withdrawal liability interest assumptions, which are generally less favorable to withdrawing employers than the interest assumptions used in other situations, must be used to determine a plan's unfunded vested benefit liability. The interest assumption requirement applies until the end of the tenth plan year after the first plan year in which the plan receives special financial assistance, or when the plan projects that it will exhaust the special financial assistance assets, assuming all benefits and plan expenses are paid from such amounts, whichever is later.[633]

Similarly, the plan recognizes the special financial assistance in a phase-in fraction ratably over the period of time from when the assets are received until when the assets are projected to be exhausted, assuming all benefits and plan expenses are paid from such amounts.[634]

> *Example*: Plan A received special financial assistance assets in Year 1. Plan A projects to exhaust SFA assets in Year 6. Employer P withdraws from Plan A and the determination year is Year 3. The phase-in fraction for determining liability is the number of years beginning with the determination year and ending with the exhaustion year divided by the number of years beginning with the payment year and ending with the exhaustion year. Therefore, the plan recognizes a phase-in fraction of 3/6, or 50% of the SFA assets (i.e., the total amount of SFA assets received by the plan are multiplied by the phase-in fraction) for determining the plan's unfunded vested benefit liability.[635]

Plan assets taken into account as of the end of a determination year used for the purpose of determining unfunded vested benefits may not be less than zero.[636] Make-up payments for previously suspended benefits that are already paid to participants from either special financial assistance assets or traditional financial assistance assets are excluded from the total amount of special financial assistance paid to the plan before multiplying by the phase-in fraction to determine the plan's withdrawal liability.[637]

Similar to the restrictions on changing allocation of employer contributions and plan mergers, plans can request an exception to the restrictions on determining withdrawal liability. The request for an exception must pass a high bar for approval, demonstrating that the exception lessens the risk of loss to participants and beneficiaries, does not increase expected employer withdrawals, and does not unreasonably increase PBGC's risk of loss.[638]

8. *Annual Reporting*

After receiving special financial assistance, the plan must file a statement indicating compliance with all conditions imposed on plans receiving special financial assistance each year through 2051.[639]

Additionally, all defined benefit plans covered by Title IV must provide an annual funding notice to participants, any labor

[627] 29 C.F.R. §4262.16(b)(3).
[628] 29 C.F.R. §4262.16(d)(1).
[629] 29 C.F.R. §4262.16(f).
[630] 29 C.F.R. §4262.16(e).
[631] 29 C.F.R. §4262.16(e)(2), §4262.16(f)(1).
[632] Rev. Rul. 2022-13.
[633] 29 C.F.R. §4262.16(g)(1).
[634] 29 C.F.R. §4262.16(g)(2).
[635] 29 C.F.R. §4262.16(g)(2)(xvi)(A) *Ex.* 1.
[636] 29 C.F.R. §4262.16(g)(2)(viii), as amended by RIN 1212-AB56, 88 Fed. Reg. 76,660 (Nov. 7, 2023), effective December 7, 2023.
[637] *See* 29 C.F.R. §4262.16(g)(2)(ix)(B), added by RIN 1212-AB56, 88 Fed. Reg. 76,660. *See also* American Rescue Plan Act FAQs, at https://www.pbgc.gov/arp-faqs.
[638] 29 C.F.R. §4262.16(g)(3), added by RIN 1212-AB53, 88 Fed. Reg. 4900 (Jan. 26, 2023), effective on January 26, 2023.
[639] 29 C.F.R. §4262.16(i).

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organization representing such participants, and the PBGC.[640] The annual funding notice is intended to inform participants of the current funded status of the plan and events expected to have a material impact on the plan's funded status during the year.[641] Accordingly, for a plan that receives special financial assistance assets, even though those assets are not included in the plan's funded percentage or the actuarial value of plan assets,[642] the plan administrator may explain the impact the SFA assets on the plan's funded percentage and actuarial value of plan assets.[643] While the SFA assets are not included in the actuarial value of plan assets, such assets are included in the fair market value of plan assets as of the last day of the year in which the notice is given.[644]

Receipt of SFA assets can trigger other changes to the plan's annual funding notice, such as the discussion of events with a material effect on plan assets or the description of the plan's investment policy.[645] For a discussion of these changes provided by Field Assistance Bulletin 2023-01, see 361 T.M., *Reporting and Disclosure Under ERISA*.

9. *Effect on Minimum Funding Calculations*

The amounts in the special financial assistance segregated account are not included in plan assets for purposes of determining the plan's required minimum funding contributions, including the determination of either the fair market value of assets or the actuarial value of assets.[646] For plans using a funding method that determines an actuarial gain or loss for each plan year, the payment of benefits or expenses from the segregated account will create an actuarial gain to be amortized over 15 years.[647]

Practice Insight: In a discrepancy amid provisions that otherwise duplicate each other, Title IV indicates that an eligible multiemployer plan that receives special financial assistance shall be considered in critical status until the end of the 2051 plan year.[648] but the I.R.C. indicates that the segregated special financial assistance assets shall not be taken into account for determining a plan's required minimum funding contributions.[649] While a plan that receives special financial assistance will almost certainly continue in critical status for multiple years following the receipt of the assistance, it is possible such a plan's financial status could improve sufficiently that it would not be considered in critical status by the 2051 plan year, even if the special financial assistance is not taken into account for funding purposes.

Despite being considered in critical status, the plan cannot apply for a new suspension of benefits,[650] though it is not clear whether this restriction continues indefinitely or only until the end of the 2051 plan year.

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[640] See Worksheet 4 for modifications to a model annual funding notice to account for special financial assistance.

[641] ERISA §101(f).

[642] I.R.C. §432(k)(2)(D)(i); Notice 2021-38, §III.D.

[643] DOL FAB 2023-01, Q1.

[644] DOL FAB 2023-01, Q2.

[645] DOL FAB 2023-01.

[646] Notice 2021-38, §III.D.

[647] I.R.C. §431(b)(3)(B)(ii); Notice 2021-38, §III.D.

[648] ERISA §4262(m)(4).

[649] I.R.C. §432(k)(2)(D)(i). There is not a corresponding provision for the funding requirements under Title I of ERISA.

[650] I.R.C. §432(k)(2)(E); ERISA §4262(m)(6).

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IX. Withdrawal Liability from Multiemployer Defined Benefit Pension Plans

A. *In General*

MPPAA protects participants in multiemployer pension plans by requiring employers that withdraw from such plans to pay their share of "unfunded vested benefits." This is known as "withdrawal liability." When an employer withdraws, the plan calculates the amount of liability and notifies the employer of the liability and demands payment. This "notice and demand" must include the amount of liability and a schedule of installment payments. When the employer receives the notice, it must begin paying according to the schedule.[651] The statute places a premium on prompt payment; it is a "pay now, dispute later" scheme. A withdrawing employer, however, owes nothing until the plan notifies it of its liability and demands payment.[652]

If an employer wishes to dispute a plan's assessment of withdrawal liability, it must arbitrate the issue. Upon receipt of the notice and demand, the employer has 90 days to request an informal review by the plan of the assessment. The employer then has roughly 120 additional days to demand arbitration.[653] If an employer fails to demand arbitration, the assessment becomes due on the schedule established by the plan.

When a plan sues to collect withdrawal liability, it may sue the withdrawing employer or any trade or business under "common control" with the employer because members of a "controlled group" are jointly and severally liable for the withdrawal.[654] The definition of a "controlled group" includes parent-subsidiary relationships.[655] Thus, any notice sent to one member of a controlled group is considered constructive notice to all other members of such a group.

Property leased by one controlled group member to another qualifies the lessor as a trade or business for purposes of ERISA §4001(b)(1).[656] Additionally, common law ERISA successor liability applies to single-employer plans without the need to differentiate between single and multiemployer plans for the purposes of ERISA §4212(c).[657]

To prevent employers with substantial pension liabilities from avoiding their obligations through deceptive transactions, MPPAA provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part . . . liability shall be determined and collected . . . without regard to such transaction."[658]

Withdrawal liability rules for multiemployer plans differ from ERISA's rules for single employer plans, which impose liability upon an employer when the plan terminates.[659] The theory behind withdrawal liability is that, if a withdrawing employer must fund its share of the plan's unfunded vested benefits when its obligation to contribute ends, there will be less burden upon the employers that remain in the plan, reducing the risk of a "race to the exit." The withdrawal liability rules apply both to plans that are experiencing financial difficulty and to financially healthy plans. Although the withdrawal liability rules clearly protect the funded status of multiemployer plans, they sometimes can deter employers from joining a plan that is not well funded.

The withdrawal liability rules impose liability equal to a share of the plan's unfunded vested benefits (UVB) on any employer that "withdraws" or partially withdraws from a multi-

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[651] *See Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986) (per curiam).

[652] *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 423 (1995).

[653] ERISA §4219(b), §4221(a)(1). *See Chi. Truck Drivers v. El Paso CGP Co.*, 525 F.3d 591 (7th Cir. 2008) (multiemployer plan's proof of claim for withdrawal liability filed during employer's bankruptcy proceeding did not comply with notice requirements of MPPAA, but employer gained actual knowledge of claim when its attorney notified employer of fund's proof of claim, and by waiting more than two years before it made demand for arbitration, employer lost its right to arbitrate dispute over withdrawal liability).

[654] ERISA §4001(b)(1). *See Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 943 F.3d 49 (1st Cir. 2019) (private equity funds that formed subsidiary limited liability companies to acquire portfolio companies did not exhibit the requisite common control to be jointly and severally liable for a portfolio company's multiemployer pension fund withdrawal; applying federal partnership factors from *Luna v. Commissioner*, 42 T.C. 1067 (1964), the court held that the incorporation of an LLC as part of their acquisition, the filing of separate tax returns, and maintenance of separate books and bank accounts implicated *Luna* factors against finding a partnership-in-fact and imposing withdrawal liability on the funds), *cert. denied*, 141 S. Ct. 372 (2020). *See, e.g., PBGC v. Findlay Indus., Inc.*, 902 F.3d 597 (6th Cir. 2018) (trust as controlled group member qualifies as trade or business for purposes of ERISA, is subject to common law ERISA successor liability and jointly and severally liable to PBGC for unfunded benefit liabilities).

[655] *See* I.R.C. §1563(a). *See also Bd. of Trs. of Trucking Employees of N. Jersey Welfare Fund v. Kero Leasing Corp.*, 377 F.3d 288 (3d Cir. 2004).

[656] In *PBGC v. Findlay Indus., Inc.*, 902 F.3d 597 (6th Cir. 2018). The Sixth Circuit joined the Seventh and Ninth Circuits in holding that property leased by one controlled group member to another qualifies the lessor as a trade or business for purposes of ERISA §4001(b)(1). A family trust that was a member of a commonly controlled group of entities was found to qualify as a trade or business for purposes of ERISA, and, therefore, deemed subject to common law ERISA successor liability.

[657] *PBGC v. Findlay Indus., Inc.*, 902 F.3d 597. The PBGC sued to recover assets from the family trust and successor company, which was owned in part by the former-CEO of Findlay Industries (Findlay), to provide for underfunded pension liabilities. Years earlier, Findlay transferred two parcels of real estate to its founder, who then transferred the properties to the irrevocable trust at issue. The family trust then leased the properties back to Findlay for roughly 16 years, and the former-CEO ultimately inherited an interest in the trust. After Findlay ended business operations, the former-CEO started new businesses, purchasing Findlay's valuable assets, ring the same employees, and selling the same products to Findlay's largest customer. The PBGC argued that the family trust was a trade or business commonly controlled by Findlay under ERISA, and therefore, subject to liability for the underfunded pension liabilities. The family trust was deemed a controlled trade or business, and the businesses in possession of the former assets of Findlay met the requirements to be treated as a successor employer under ERISA §4001(b)(1). Reversing and remanding the district court decision, the Sixth Circuit noted that use of the categorical test is preferable in preventing businesses from arranging their assets in such a way as to avoid controlled group liability for terminated pension obligations under ERISA. As a commonly controlled entity, the trust was found to be jointly and severally liable for the pension liabilities of Findlay. The Sixth Circuit found the application of the Groetzinger test — a fact-based analysis of whether an entity meets the requirements to be a trade or business under I.R.C. §261 and §61(a) — was inappropriate in this case, and the preferable method was to use a categorical test that more served the purposes of ERISA, in line with the Seventh and Ninth Circuits. Findlay argued that the Groetzinger test was more appropriate in this case where the definition of a trade or business was properly found under the I.R.C., and not ERISA, though it is undisputed that "trade or business" has yet to be defined by the Supreme Court under ERISA. *See, e.g., Commissioner v. Groetzinger*, 480 U.S. 23 (1987).

[658] ERISA §4212(c). *See, e.g., PBGC v. Findlay Indus., Inc.*, 902 F.3d 597 (extending common law ERISA successor liability for an underfunded pension to a single employer plan; noting that no distinction needed between single and multiemployer plans for the purposes of ERISA §4212(c)).

[659] The termination of a multiemployer plan has the potential to generate withdrawal liability. For further discussion on the termination of a multiemployer plan, see XI., below.

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employer plan. A withdrawing employer must fund its share of UVBs through annual payments to the plan. The liability, once triggered, is measured, reduced, offset, and adjusted under a number of special rules. The plan's choice of allocation rules, offsets and exemptions can significantly alter a particular employer's liability. There also are certain exceptions to the imposition of withdrawal liability.[660]

B. Basic Concepts

1. Complete Withdrawal

A complete withdrawal occurs when an employer permanently stops contributing to a multiemployer plan, either because it no longer has an obligation to contribute or because it has ceased all operations covered by the plan.[661] The withdrawal date is the date of the cessation of the obligation to contribute or of covered operations. Several courts have held that retaining a few "clean-up" employees does not preclude a complete withdrawal.[662] In a 1989 case, however, the Seventh Circuit required all operations to cease, not virtually or substantially all.[663] In other cases, the precise date of a collective bargaining agreement's expiration was strictly enforced, in lieu of the decertification date.[664] The Seventh Circuit has held that an employer did not partially withdraw in the year when its employees decertified the union, because it continued to make contributions to the plan and did not inform the plan of the decertification.[665]

If the agreement remains in effect due to ongoing negotiations which have not reached impasse under the National Labor Relations Act, the withdrawal date is postponed until impasse and actual cessation of contributions.[666] If there is a labor dispute, the withdrawal date is postponed. Once contributions permanently cease, the date of withdrawal relates back to the date the contribution obligation ceased.[667] This could be when the collective bargaining agreement expired,[668] or when impasse was declared if contributions continued during bargaining. Under federal labor law, employers must maintain the terms of an expired collective bargaining agreement (CBA) while bargaining is taking place, but once bargaining reaches an impasse, the employer can unilaterally impose its last offer. A last offer that extends the obligation to contribute past the date of impasse may delay the withdrawal date.[669] A withdrawal can also arise where the employer implements its final offer, the union goes on strike, and then the union disclaims interest in representing the company's employees. While MPPAA §412(a)(1)(B) provides that the PBGC study the necessity of adopting special rules in cases of union-mandated withdrawal, no changes in law resulted from the study published in 1991.[670]

An "obligation to contribute" can be imposed under one or more collective bargaining "or related" agreements or under "applicable labor-management relations laws."[671] The legislative history explains that the phrase "or related" includes "any situation in which an employer has directly or indirectly agreed to make contributions to a plan including cases in which an employer signs a collective bargaining agreement or memorandum of understanding, and in cases in which the employer agreed to be bound by an association agreement."[672]

In some cases, more than one employer is obligated to make the same contributions. These joint liability situations can occur when two employers have signed a CBA requiring contributions, but a contract between the two companies assigns responsibility to make contributions to one or the other. The PBGC takes the view, however, that in this situation both employers are obligated to contribute, although the plan first should look to the actual contributor for recovery.[673] In most cases involving the subcontracting of work from one employer

[660] ERISA §4201(a). *See Irigaray v. Dairy Emps. Local 17*, 153 F. Supp. 3d 1217 (E.D. Cal. 2015) (a contributing employer to a multiemployer pension plan has no defense to withdrawal liability under the MPPAA under federal common law based on technical or procedural deficiencies in the formation or operation of the union whose members are participants in the plan or the applicable pension fund).

[661] ERISA §4203(a).

[662] *See Crown Cork & Seal Co. v. Cent. States Se. & Sw. Areas Pension Fund*, 982 F.2d 857 (3d Cir. 1992); *Connors v. Econ. Bldg. Sys., Inc.*, 651 F. Supp. 849 (D.D.C. 1986); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.* 607 F. Supp. 570 (S.D.N.Y. 1985); *F.H. Cobb Co. v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 584 F. Supp. 1181 (N.D.N.Y. 1984); *Speckman v. Barford Chevrolet Co.*, 535 F. Supp. 488 (E.D. Mo. 1982).

[663] *Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208 (7th Cir. 1989). The court declined to follow other courts in their reliance on legislative history suggesting that less than 100% cessation was required. *See* H.R. Rep. No. 896 Part 1, 96th Cong., 1980 U.S. Code Cong. & Admin. News 2918, 2941.

[664] *Tech. Metallurgical Servs., Inc. v. Plumbers & Pipefitters Nat'l Pension Fund*, 39 EBC 2677 (5th Cir. 2007) (unpub. op.); *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986); *Pacific Iron & Metal Co. v. W. Conference of Teamsters Pension Fund*, 553 F. Supp. 523 (W.D. Wash. 1982). *But see 666 Drug, Inc. v. Tr. of 1199 SEIU Health Care Emps. Pension Fund*, 571 Fed. Appx. 51 (2d Cir. 2014) (withdrawal occurred in 2010, when employer received a disclaimer letter from union and ceased making contributions to plan, rather than upon expiration of collective bargaining agreement in 1999).

[665] *Cent. States, Se. & Sw. Areas Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005).

[666] *T.I.M.E.-DC, Inc. v. N.Y. State Teamsters Conference Pension & Ret. Fund*, 580 F. Supp. 621, 629 (N.D.N.Y. 1984), aff'd, 735 F.2d 60 (2d Cir. 1984); *I.A.M. Nat'l Pension Fund v. Schulze Tool & Die Co.*, 564 F. Supp. 1285 (N.D. Cal. 1983); *S & M Paving, Inc. v. Constr. Laborers Pension Trust of S. Cal.*, 539 F. Supp. 867 (C.D. Cal. 1982).

[667] PBGC Opinion Letter 86-4.

[668] *Garland Coal Co. and UMWA 1950 and 1974 Pension Trusts*, 7 EBC 1771 (Dreyer Arb. 1986); *Marvin Hayes Lines, Inc. and Central States, Southeast & Southwest Areas Pension Fund*, 8 EBC 1834 (Wechstein Arb. 1987).

[669] *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987). Pushing the date back reduced Cuyamaca's withdrawal liability by almost $1 million. The court found that the last offer was not a sham transaction under ERISA §4212. *See Malden Mills Indus., Inc. v. ILGWU Nat'l Ret. Fund*, 766 F. Supp. 1202 (D. Mass. 1991) (employer and union cannot retroactively agree to withdrawal date).

[670] *United Food & Commercial Workers Union-Employer Pension Fund v. Rubber Assocs., Inc.*, No. 5:14-cv-183, 2015 BL 47393 (N.D. Ohio 2015). The court did not provide a special withdrawal liability calculation after the union disclaimed its representation.

[671] ERISA §4212(a).

[672] 126 Cong. Rec. S11672 (Daily Ed., Aug. 26, 1980) (Comments of Sens. Williams and Javits). The obligation need not be created by a collective bargaining agreement. *Bowers v. Transp. Maritima Mexicana, S.A.*, 901 F.2d 258 (2d Cir. 1990); *accord Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Fund*, 909 F.2d 39 (2d Cir. 1990); *Seafood Workers Health Fund Union Trs. v. Seafood Workers Health Fund Mgmt. Trs.*, 571 F. Supp. 483 (D. Mass. 1983).

[673] PBGC Opinion Letter 85-14 and PBGC Opinion Letter 86-10. PBGC advisory opinion letters are not binding, but are interpretive rulings entitled to deference, according to the PBGC if not the courts. They represent views that the PBGC will take action to support. *See* PBGC Opinion Letter 87-7. *Cent. Pa. Teamster's Pension Fund v. Serv. Group, Inc.*, 645 F. Supp. 996 (E.D. Pa. 1985). *See also* PBGC Opinion Letter 85-5.

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to another, the subcontractor is liable.[674] In the case of leased employees, the case law has not reached a clear consensus.[675]

2. Employer

An "employer"[676] is any person acting directly or indirectly as an employer and its affiliates and trades or businesses under common control.[677] Joint employers under leasing arrangements may be liable[678] as well as contractors.[679]

Examples of how courts have determined who is the employer include *Central States, Southeast and Southwest Pension Fund v. Personnel, Inc.*,[680] where the Seventh Circuit held that the leasing of real estate to an employer corporation by its sole owner, who was part of a brother-sister controlled group, constituted a trade or business and the sole owner therefore was liable for withdrawal liability. In *Board of Trustees of Trucking Employees of North Jersey Welfare Fund v. Canny*,[681] a U.S. district court held that former corporate shareholders who divested themselves of their stock before the corporation withdrew from a multiemployer plan and who held equal interests in property leased to the corporation were liable for the corporation's withdrawal liability because their leasing enterprise was part of the employer's control group. In *Greenblatt v. Delta Plumbing & Heating Corp.*,[682] however, the Second Circuit held that a surety was not an employer absent some type of agency or ownership relationship or an assumption of the employer's functions with regard to the administration of an ERISA plan. Furthermore, in *Bleiler v. Cristwood Construction, Inc.*,[683] the Second Circuit held that a contractual relationship separate from the collective bargaining agreement by which the surety guaranteed payment of a certain sum if the contractor defaulted on its obligations also did not create an employment relationship.

A court held in *Rheem Manufacturing Co. v. Central States, Southeast and Southwest Areas Pension Fund*[684] that a manufacturing firm that leased truck drivers from an employee leasing firm was not an employer for purposes of withdrawal liability, even though, as between the manufacturing firm and its employee leasing company, it exercised the "lion's share of control." The court stated that Rheem, the manufacturer, was not an employer because MPPAA requires an employer to have an obligation to contribute to a plan that is "purely contractual" in nature, i.e., to be liable, Rheem would have to have signed a contract requiring it to contribute to the plan or have been obligated to contribute by some other contract law principle, such as agency or an alter ego theory. The court noted, among other things, that Rheem had never signed a CBA obligating it to pay employee wages or benefits. The court also rejected the plan's argument that Rheem was a joint employer obligated to contribute under labor-management relations law, declining to apply this concept to MPPAA.[685]

An employer includes all trades or business that are under the common control, within the meaning of ERISA §4001(b)(1), of the employer.[686] A partnership is treated as the employer of a partner who is an employee within the meaning of I.R.C. §401(c), and an owner of an unincorporated trade or business is considered to be his or her own employer.[687] Private equity firms that invest in a withdrawing employer's company may be liable for withdrawal liability if the firms' involvement in the withdrawing employer's business is sufficiently active as to render the firm a trade or business under common control with the withdrawing employer.[688]

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[674] *Superior Pocahontas Coal Co. v. Island Creek Coal Co.*, 840 F.2d 11 (4th Cir. 1988); *Combs v. Leishman*, 691 F. Supp. 424 (D.D.C. 1988). *Cf. Refined Sugars, Inc. v. Labor-Mgmt. Pension Fund Local 807*, 632 F. Supp. 630 (S.D.N.Y. 1986).

[675] *Drivers Hire, Inc. and Central States Southeast & Southwest Areas Pension Fund*, 11 EBC 2029 (Folk Arb. 1989); *Schaffer v. Eagle Indus., Inc.*, 726 F. Supp. 113 (E.D. Pa. 1989); *Global Leasing, Inc. v. Henkel Corp.*, 744 F. Supp. 595 (D.N.J. 1990).

[676] ERISA §3(5). *See N.Y. State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc.*, 426 F.3d 640 (2d Cir. 2005) (court acted within its authority when it determined whether a group of companies were "employers" under MPPAA, where multiemployer plan argued that federal courts lack jurisdiction to determine whether entities are employers under MPPAA and that such determination can be made only by arbitrator, because federal courts have authority under MPPAA to determine whether entity is employer per se, while arbitrators have authority to determine whether entity remained employer as of date it withdrew).

[677] 29 C.F.R. §4062 *et seq.*; PBGC Opinion Letter 82-13. *See UFCW Local One Pension Fund v. Enivel Props., LLC*, No. 6:11-cv-01144-GTS-ATB, 2014 BL 168588 (N.D.N.Y. 2014) (real estate holding company was not a trade or business under common control with withdrawing employer because company's primary purpose was personal, rather than profit seeking), aff'd, 791 F.3d 369 (2d Cir. 2015).

[678] PBGC Opinion Letter 85-14, PBGC Opinion Letter 86-10.

[679] *Bowers v. Transp. Maritima Mexicana, S.A.*, 901 F.2d 258 (2d Cir. 1990); *Carriers Container Council, Inc. v. Mobil Steamship Ass'n*, 896 F.2d 1330 (11th Cir. 1990); *Korea Shipping Corp. v. NYSA-ILA Pension Trust*, 880 F.2d 1531 (2d Cir. 1989). *But see Bleiler v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995) (contractors who are not signatories to collective agreements, but who assume financial guarantees of contribution payments, do not qualify as ERISA employers).

[680] 974 F.2d 789 (7th Cir. 1992). *See Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545 (7th Cir. 2013) (owner who leased property back to company was engaged in a trade or business sufficient to warrant holding owner personally liable for company's withdrawal liability; owner's related companies were jointly and severally liable); *Cent. States, Se. & Sw. Areas Pension Fund v. Messina Products LLC*, 706 F.3d 874, (7th Cir. 2013) (property owners' for-profit rental activities satisfied trade or business requirements necessary to hold them jointly and severally liable for withdrawal liability); *Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC*, 738 F. Supp. 2d 840 (N.D. Ill. 2010), aff'd, 668 F.3d 873 (7th Cir. 2011) (two real estate leasing businesses that were owned by family trusts controlled by owner of bankrupt company are jointly and severally liable for company's withdrawal liability), cert. denied, 132 S. Ct. 2688 (2012).

[681] 900 F. Supp. 583 (N.D.N.Y. 1995).

[682] 68 F.3d 561 (2d Cir. 1995).

[683] 72 F.3d 13 (2d Cir. 1995).

[684] 873 F. Supp. 173 (W.D. Ark. 1994), aff'd, 63 F.3d 703 (8th Cir. 1995). *See Cent. States, Se. & Sw. Areas Pension Fund v. Bomar Nat'l, Inc.*, 253 F.3d 1011 (7th Cir. 2001).

[685] *See also Transpersonnel, Inc. v. Roadway Express, Inc.*, 422 F.3d 456 (7th Cir. 2005).

[686] ERISA §3(37)(B). *See Cent. States, Se. & Sw. Areas Pension Fund v. CLP Venture, LLC*, 760 F.3d 745 (7th Cir. 2014) (several companies that were majority-owned by one individual are jointly liable for withdrawal liability assessment because of their common ownership with withdrawing company), cert. denied, 135 S. Ct. 964 (2015).

[687] ERISA §4001(b)(1).

[688] *See Sun Capital Partners III L.P. v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013) (under "investment plus" theory, two private equity funds that together held 100% stake in withdrawing employer may be liable as trade or business under common control with withdrawing employer), rev'g 903 F. Supp. 2d 107 (D. Mass. 2012), cert. denied, 134 S. Ct. 1492 (2014), on remand, 172 F. Supp. 3d 447 (D. Mass. 2016) (private equity funds that disclaimed intent to form partnership or joint venture and each had less than 80% ownership had partnership-in-fact PBGC was trade or business and was in common control with bankrupt entity); *Bd. of Trs., Sheet Metal Workers Nat'l Pension Fund v. Palladium Equity Partners*, 722 F. Supp. 2d 854 (E.D. Mich. 2010) (private equity firm is potentially liable for with-

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Disputes between an employer and the sponsor of a multiemployer plan concerning a determination under MPPAA must be resolved through arbitration and employers must make interim payments of withdrawal liability pending arbitration.[689] Disputes over whether a defendant is an "employer" subject to withdrawal liability, however, fall under the courts' jurisdiction because only "employers" are required to arbitrate under MPPAA.[690]

3. Events that Do Not Trigger Withdrawal Liability

A withdrawal does not occur solely because of a corporate reorganization described in ERISA §4062(d), a mere change in identity, form or place of organization, a liquidation into a parent or a merger, consolidation, spin-off or division of a company as long as the change does not interrupt employer contributions or obligations to contribute.[691] Thus, a switch from a partnership to a corporation (or vice versa) or a mere change in corporate structure, such as changing a division to a subsidiary, does not trigger liability.[692]

Where common control is an issue, the plaintiff must prove two facts to establish withdrawal liability on an organization other than the one that was originally obligated to the pension fund, i.e., the defendant organization must (1) be under common control with the owning entity and (2) be engaged in a "trade or business."[693]

For example, in *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*,[694] the First Circuit held that private equity funds, that formed and created subsidiary limited liability companies to acquire portfolio companies, did not exhibit the requisite common control to be jointly and severally liable for a portfolio company's underfunded pension fund withdrawal. In determining whether there was common control through an implied partnership-in-fact, the court applied factors from *Luna v. Commissioner*,[695] specifically, whether: (1) there is an agreement of the parties and their conduct in executing its terms, (2) the business is conducted in the joint name of the parties, and (3) the parties exercised mutual control and assumed mutual responsibilities. The court noted that the incorporation of an LLC as a vehicle to acquire the portfolio company, the filing of separate tax returns, and maintenance of separate books and bank accounts implicated *Luna* factors against finding a partnership-in-fact. The court further expressed reluctance to impose withdrawal liability on private investors for lack of congressional intent to do so and formal guidance from PBGC.

Additionally, in *Central States Pension Fund v. Neiman*,[696] the Seventh Circuit held that the defendant operated a sole proprietorship under common control with the withdrawing entity. In assessing whether the defendant operated a trade or business, the court relied on the test in *Commissioner v. Groetzinger*,[697] i.e., for an activity to be considered a trade or business, a person must engage in the activity (1) for the primary purpose of income or profit and (2) with continuity and regularity. The court found that the plan had demonstrated that certain "management fees" which the defendant received from the withdrawing entity (and reported on his Schedule C) were from an enterprise engaged in for income or profit and were regular and continuous payments in exchange for management services provided to the withdrawing entity.

Stock sales do not trigger withdrawal liability even if the employer's controlled group is broken up, if neither contributions nor the obligation to contribute are interrupted.[698] The legislative history is quite explicit:

> A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100% of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S.[699]

drawal liability based on its involvement in operations of withdrawing employer's business). *See also Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 9 F. Supp. 3d 863 (N.D. Ill. 2014), vacated, 778 F.3d 593 (7th Cir. 2015) (district court erred in granting summary judgment against multiemployer plan because it was not clear beyond dispute that lending company that owned withdrawing employer was merely a passive investor rather than a trade or business).

[689] ERISA §4221(a), §4221(d), and §4219(c)(2). *See Cent. States Se. & Sw. Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766 (7th Cir. 2010).

[690] *See, e.g., N.Y. State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc.*, 426 F.3d 640 (2d Cir. 2005); *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir. 1997); *Mason & Dixon Tank Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156 (6th Cir. 1988).

[691] ERISA §4218; PBGC Opinion Letter 83-18, PBGC Opinion Letter 84-7. The provision is not applicable in asset transactions. PBGC Opinion Letter 82-40.

[692] PBGC Opinion Letter 84-7, PBGC Opinion Letter 83-11. A spin-off does not trigger liability. *Teamsters' Pension Trust of Phila. v. Cent. Mich. Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988) (the spin-off was being challenged under §4212). A transfer of assets from one subsidiary to another also is not a withdrawal. *Dyck v. S. Pacific Milling*, 4 EBC 1345 (C.D. Cal. 1983).

[693] *See e.g., Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 943 F.3d 49 (1st Cir. 2019), cert. denied, 141 S. Ct. 372 (2020); *McDougall v. Pioneer Ranch LP*, 494 F.3d 571 (7th Cir. 2007); *Cent. States, Se. & Sw. Areas Pension Fund v. Neiman*, 285 F.3d 587 (7th Cir. 2002); *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001).

[694] 943 F.3d 49 (1st Cir. 2019).

[695] 42 T.C. 1067 (1964).

[696] 285 F.3d 587 (7th Cir. 2002).

[697] 480 U.S. 23 (1987). *See also PBGC v. Findlay Indus., Inc.*, 902 F.3d 597 (6th Cir. 2018) (categorical test in ERISA §4001(b) - and not the Groetzinger test - applicable to trust that leased property to entity under common control; trust held to be engaged in a trade or business under ERISA §4001(b)).

[698] ERISA §4218.

[699] Senate Labor and Finance Committees' Report, 126 Cong. Rec. S9833 (Daily Ed. 7/24/80). Substantially the same language appears in H.R. Rep. No. 96-869, Part 2 (H.R. 3904), Committee on Ways and Means, House of Representatives, p. 16. *See* PBGC Opinion Letter 92-1. *See also Penn Cent. Corp. v. W. Conference of Teamsters Pension Trust Fund*, 75 F.3d 529 (9th Cir. 1996) (parent corporation that completely withdrew from plan when it sold its last subsidiary in stock sale after its two other subsidiaries ceased operations is not exempt from withdrawal liability under corporate restructuring exception of ERISA §4218 for the two subsidiaries, where last subsidiary contributed to multiemployer plan and only last subsidiary ceased operations during the restructuring); *Cent. States Se. & Sw. Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338 (7th Cir. 1995) (employer not subject to withdrawal liability due to sale of subsidiary's stock since sale did not terminate existing corporate group causing "new, shrunken group to spring into existence," and employer kept another subsidiary that still contributed to plan).

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Nonetheless, actions taken with a principal purpose of evading or avoiding liability are disregarded.[700]

An asset sale, in contrast, will trigger withdrawal liability, unless ERISA §4204 applies.

A suspension of contributions during a "labor dispute," such as a strike or a lockout, is not a withdrawal.[701] While the term "labor dispute" is interpreted broadly, it does not include disputes with the plan or other parties.[702] A labor dispute can become a withdrawal if "facts and circumstances indicate that contributions have ceased permanently — for example, all employees covered … have been permanently replaced or the facility has been closed."[703] Courts have taken into account such factors as the existence and implementation of an impasse, the passage of time and the hiring of replacements.[704]

Oral agreements to make pension contributions for work not explicitly covered by a written agreement are considered voluntary and generally do not on their own create a contractual obligation under ERISA. As such, discontinuance of voluntary contributions made under an oral agreement does not trigger withdrawal liability. ERISA mandates that pension obligations be established through written agreements, and oral agreements or agreements made through conduct cannot modify or expand these written terms.[705]

In certain industries, such as construction, plans sponsored by the same union enter into reciprocity agreements, which transfer contributions made by an employee to a plan other than the usual plan to the employee's "home" fund. The PBGC has said that these agreements do not generally expose a contributor to the outside plan to withdrawal liability to the transferor plan, but that in some cases, such as large and recurrent transfers, withdrawal liability might apply. The key is whether the employer has undertaken an obligation to contribute to the home plan.[706]

4. *Consequences of Asset Sales*

An employer's sale of its assets has different consequences than a sale of stock. Whereas a stock sale does not usually trigger a withdrawal, an asset sale often is coupled with a complete or partial cessation of contributions or the obligation to contribute by the seller and, thus, can be a withdrawal. Some courts have held that a successor purchaser of assets may be liable for the seller's delinquent contributions to multiemployer funds.[707]

An asset sale, however, is not a withdrawal if the requirements of ERISA §4204 are satisfied.[708] Under ERISA §4204, the sale must be a bona fide arm's-length transaction between unrelated parties.[709] Also, the buyer must assume an obligation for substantially the same number of contribution base units (CBUs) as those for which the seller was responsible.[710] It is not clear at what level or for how long this obligation must last.[711]

The buyer must bond or place in escrow an amount equal to one year of the seller's contributions, calculated as the greater of the average of the past three years or the last year (to prevent sellers from diminishing liability just before a sale). A

[700] ERISA §4212(c); *see* PBGC Opinion Letter 84-7, PBGC Opinion Letter 82-17.

[701] ERISA §4218(2), applied in *T.I.M.E.-D.C., Inc. v. Trucking Emps. of N. Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983); *Sunstar Foods, Inc. v. UFCW Pension Fund*, No. 4-82-1515, 1984 BL 173 (D. Minn. 1984); *T.I.M.E.-D.C., Inc. v. N.Y. State Teamsters Pension & Ret. Fund*, 580 F. Supp. 621 (N.D.N.Y. 1984) aff'd, 735 F.2d 60 (2d Cir. 1984). *See also* PBGC Opinion Letter 82-21.

[702] *Commercial Carriers, Inc. v. IAM National Pension Fund*, 9 EBC 1101, 1111 (Cornelius, Arb. 1987); *Myers Coal Co. v. UMWA 1950 & 1974 Pension Plans*, AAA Case No. 16-621-00006-85p (Jaffe, Arb. 1985).

[703] Remarks of Rep. Thompson, 126 Cong. Rec. H7898 (Daily Ed., Aug. 26, 1980).

[704] *See, e.g., In re Centra, Inc. and Chicago Truck Drivers Pension Fund*, 15 EBC 2713 (Jaffee, Arb. 1992); *Marvin Hayes Lines, Inc. and Central States Southeast & Southwest Areas Pension Fund*, 8 EBC 1834 (Weckstein, Arb. 1987); *Combs v. Adkins & Adkins Coal Company, Inc.*, 597 F. Supp. 122, 126 (D.D.C. 1984); *Garland Coal Company and UMWA 1950 and 1974 Pension Trusts*, 7 EBC 1771 (Dreyer, Arb. 1986).

[705] *See Bulk Transp. Corp. v. Teamsters Union No. 142 Pension Fund*, 96 F.4th 1027(7th Cir. 2024) (pension fund required to return withdrawal liability funds collected from a company that made contributions for work not covered in its collective bargaining agreement, despite company's adoption by conduct of an earlier version of an addendum that did cover the work).

[706] *Robbins v. McNicholas Transp. Co.*, 819 F.2d 682 (7th Cir. 1987).

[707] A buyer may be liable for a seller's delinquent plan contributions where the buyer had notice of liability before the sale and there was continuity of operations between the buyer and seller. *See Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (3d Cir. 2011); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990). *See also Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839 (9th Cir. 2018) (imposing a constructive notice standard for successor withdrawal liability after an asset sale, but only where the purchaser qualifies as a successor, the plan is underfunded, and a purchaser using reasonable care or diligence would have discovered the withdrawal liability); *Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841 (7th Cir. 2015) (buyer's motion to dismiss denied because, even though seller withdrew from multiemployer plan *after* asset sale, seller received notice of contingent withdrawal liability that satisfied the successor liability notice requirement; question of continuity of operations was remanded to district court).

[708] ERISA §4204 can apply to a series of more than one sale. 29 C.F.R. §4204.21(b); *Kroger Co., and So. Cal. Food Workers Pension Fund*, 6 EBC 1345 (Nagle, Arb. 1985). *See Cent. States, Se. & Sw. Areas Pension Fund v. Georgia-Pacific LLC*, 639 F.3d 757 (7th Cir. 2011), *aff'g* 48 EBC 1997 (N.D. Ill. 2010) (sale of building products division did not trigger withdrawal liability because withdrawal was "solely because of" asset sale and buyer promised to pay contributions to plan).

[709] Unrelated parties are defined as those not having the relationships described in I.R.C. §267(b). ERISA §4204(d) *Mangan v. Owens Truckmen*, 7 EBC 1353 (Schwartz, Arb. 1986), *rev'd on other grounds*, 715 F. Supp. 436 (E.D.N.Y. 1989); PBGC Opinion Letter 88-7 (sale to related company not eligible for ERISA §4204 relief).

[710] *See HOP Energy, LLC v. Teamsters Local 553 Pension Fund*, 678 F.3d 158 (2d Cir. 2012) (buyer did not assume obligation where asset purchase agreement provided that buyer had right to reduce number of employees and, as a consequence, reduce number of contribution base units). One arbitrator interpreted ERISA §4201 in conjunction with ERISA §4205 (70% partial withdrawal rule) and ruled that no withdrawal occurs at an asset sale unless CBUs decline by 70%. *Terson Co. and Bakery Drivers Local 734 Pension Funds*, 4 EBC 1009 (Graham, Arb. 1983). This view was rejected in *Consolidated Enterprises, Inc. v. W.C. Teamsters Pension Fund*, 12 EBC 2078 (Slater, Arb. 1990) and *Kroger Co. and So. Cal. Food Workers Pension Fund*, 6 EBC 1345 (Nagle, Arb. 1985); *see also I.A.M. Nat'l Pension Fund v. Dravo Corp.*, 7 EBC 1892 (D.D.C. 1986).

[711] ERISA §4204(a)(1)(A). *Kroger Co. and Southern California Food Worker's Pension Fund*, 6 EBC 1345 (Nagle, Arb. 1985), analyzes several ERISA §4204 issues, including (1) whether purchasers obliged to contribute who do not do so are considered to be contributing for purposes of the "substantially same" contributions test (the arbitrator said no); (2) whether the CBUs of PBGCs closed prior to the ERISA §4204 sale should be excluded from the seller's base (no); (3) whether buyer contributions should be adjusted for extraneous events that would have affected the seller had the sale not occurred (no); (4) whether an asset sale involving a less than 70% decline is a withdrawal (relying on *Terson*, 4 EBC 1009 (Arb. 1983)) (yes). Kroger sold between 79% and 89% of assets in several sales, but closed other facilities. The arbitrator held that ERISA §4204 was not met. An arbitration decision is not a binding precedent.

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letter of credit also will suffice.[712] The bond or escrow (or letter of credit) is doubled if the plan is in reorganization when the sale occurs.[713] The bond need not initially cover all five years, but ERISA §4204 will be lost if a bond is not actually in place during the entire period.[714]

The contract of sale must provide that, if the buyer withdraws within the next five plan years, the seller is secondarily liable for any liability that the seller would have incurred upon the sale without the benefit of the special rule.[715] The seller's liability is fixed at the date of sale. The ERISA §4202 requirements must be met at the time of the transaction to qualify for relief.[716]

If the buyer withdraws or defaults on a contribution during the five plan years after the sale, the buyer's bond or escrow is paid to the plan.[717] If the buyer withdraws within the five years and then defaults on its withdrawal liability, the seller must pay withdrawal liability.[718] The statute suggests that liability arises even where the buyer defaults on the payment of withdrawal liability after the five-year period,[719] if the withdrawal itself occurred within the five-year period. The amount of the bond is credited against the liability of the entity that furnished the bond to the buyer.[720] It is unclear whether the seller's liability is net of the buyer's bond. The buyer may sell assets acquired in an ERISA §4204 sale and, in this case, bond and contribution requirements are based on the original seller's contributions as well as the intervening seller's. The buyer also may incorporate the assets and sell the stock without liability. The incorporated entity, however, carries with it the ERISA buyer's obligations under ERISA §4204.[721]

If the seller liquidates or distributes substantially all of its assets during the five years after the sale, the seller must place in escrow the present value of the withdrawal liability it would have owed but for the special rule. If the liquidation is only partial, the escrow still is required, but is pro-rated.[722] Because a distribution of assets often is a desirable result of a sale, the escrow requirement may be a significant impediment to use of the special rule.

A buyer ordinarily does not have a contribution history in the plan. Because most of the liability allocations are based upon a "rolling-five" year average contribution formula, as discussed below, if the buyer's liability was based solely on its own contributions, it would have assumed less liability due to its short contribution history. To prevent this, ERISA §4204(b)(1) requires that the buyer inherit the seller's contribution history. Only the year of sale and the previous four years of history count. The seller receives credit for the liability that the buyer assumes.

The PBGC can grant a variance or exemption from the bond/escrow and sale contract requirements of the sale rule on both an individual and a class basis.[723] A variance or exemption from the sale contract requirement, however, does not waive the seller's secondary liability under ERISA §4204(a)(2). The information must be included in a request for variance or exemption and notice of the request must be published in the Federal Register.[724] A requesting party may ask that certain information not be disclosed under the Freedom of Information Act.[725]

The regulations provide a de minimis exception as well as two tests: a net income test and a net tangible assets test. If either is test met, the bond requirement is waived.[726] In applying these tests, if the transaction involves the seller's obligation to contribute to more than one multiemployer plan, the total amount of the bond or escrow or of the unfunded vested benefits, as applicable, for all of the plans with respect to which the purchaser has not posted a bond or escrow, is used to determine whether the test is met.[727]

A purchaser will not qualify for a variance under these tests if, as of the earlier of the date of the plan's decision on the variance request or the first day of the first plan year beginning after the date of determination, the buyer is in a Chapter 11 bankruptcy or a similar proceeding of state insolvency law.[728]

The liability of employers who enter into an ERISA §4204 sale and later withdraw is adjusted to credit the employer with the contributions allocable to the sold units.[729]

5. *Partial Withdrawal*

a. *In General*

Withdrawal liability also is triggered when an employer "partially" withdraws from a plan. There are two basic forms of partial withdrawal: (1) a 70% decline in contribution base

[712] ERISA §4204(a)(1)(B); *see also* PBGC Opinion Letter 81-32.

[713] ERISA §4204(b)(2).

[714] PBGC Opinion Letter 83-8.

[715] ERISA §4204(a)(1)(C); *Hoffman Management Corp.*, 11 EBC 1489 (Cornelius, Arb. 1989), award *vac'd in part and enf'd in part*, 11 EBC 1505 (1989).

[716] *Brentwood Fin. Corp. v. W. Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456 (9th Cir. 1990); *Jasper v. Certified Indus., Inc.*, 645 F. Supp. 998 (E.D.N.Y. 1985); *Brentwood Robbins v. Winski Personnel Services, Inc.*, No. 83-C-2611 (N.D. Ill. June 7, 1985); *N.Y. State Teamsters Conference Pension Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003 (N.D.N.Y. 1985); *Don Huston, Inc. v. Central States Southeast & Southwest Areas Pension Fund*, 8 EBC 2319 (Dreyer, Arb. 1987).

[717] ERISA §4204(a)(1)(C).

[718] ERISA §4204(a)(1)(B); *Hoffman Management Corp.*, 11 EBC 1489 (Cornelius, Arb. 1989).

[719] ERISA §4204(a)(2).

[720] *Compare* ERISA §4204(a)(1)(C) and §4204(a)(2).

[721] PBGC Opinion Letter 90-1.

[722] ERISA §4204(a)(3).

[723] ERISA §4204(c). *See, e.g., Kroger v. So. California Food Workers Pension Fund*, 6 EBC 1345, n.14 (Arb. 1985). *See also* Approval of Exemption from the Bond/Escrow Requirement Relating to the Sale of Assets by an Employer Who Contributes to a Multiemployer Plan; Harrington Air Systems, LLC and J.C. Cannistraro, LLC, 80 Fed. Reg. 77,382 (Dec. 13, 2015) (granting a purchaser an exemption from the bond/escrow requirement of ERISA §4204(a)(1)(B) where seller was obligated to contribute to a multiemployer defined benefit pension plan, the purchaser acquired most of the seller's business assets, the parties structured the transaction to comply with ERISA §4204 and the PBGC determined that an exemption would more effectively carry out the purposes of Title IV of ERISA and would not significantly increase the risk of financial loss to the plan).

[724] 29 C.F.R. Part 4204.

[725] 29 C.F.R. §4204.21(f).

[726] 29 C.F.R. §4204.12, §4204.13(a)(1)–(2).

[727] 29 C.F.R. §4204.13(b).

[728] 29 C.F.R. §4204.13(c).

[729] *Borden, Inc. v. Bakery and Confectionery Union & Indus. Int'l Pension Fund*, 974 F.2d 528 (4th Cir. 1992); *I.A.M. Nat'l Pension Fund v. Cooper Indus., Inc.*, 635 F. Supp. 335 (D.D.C. 1986); PBGC Opinion Letter 83-10.

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units (CBUs); and (2) a partial cessation of contribution obligations.[730]

A partial cessation usually arises from a union decertification, a plant closing or a "bargain out." A special permissive "decline" rule exists for the retail food industry.[731] Each partial withdrawal reduces the liability imposed in subsequent complete or partial withdrawals.[732] This offset does not relieve the employer from payment of the earlier liability,[733] but it may reduce the amount of liability in the case of successive partial withdrawals than would have occurred if the same withdrawals took place at once.[734]

b. 70% Contribution Decline Rule

If there is a 70% decline in "contribution base units" (CBUs), e.g., work weeks, work hours, or other units based on which contributions must be made,[735] there is a partial withdrawal.[736] The decline is measured over a three-year "testing period" and compares CBUs in each of the three years with a "high base year." The high base year is the average of the two highest years in the five years before the testing period.[737] If an employer's CBUs do not exceed 30% of its CBUs for the high base year for each year in the testing period, a 70% decline has occurred.

The rule requires a 70% decline in each of three consecutive years. If the employer experiences a decline for two years but not the third, the base years roll forward for purposes of later calculations. Over time, the base level may decline each year, and the employer may continue to avoid a partial withdrawal, by using a "slow leak," even though the total decline may exceed 70%. There is therefore some potential here to manipulate the rules.

c. Partial Cessation Rule

The second test for a partial withdrawal is a "partial cessation of the employer's contribution obligation."[738] There are two alternative methods under which a partial cessation can occur.[739]

The first rule applies if the employer permanently ceases to have an obligation to contribute under at least one, but not all, of the relevant collective bargaining agreements (CBAs), but continues to perform work in the jurisdiction of the CBA that is of the type for which contributions previously were required.[740] For work transferred on or after August 17, 2006, a partial withdrawal also occurs if the employer transfers the work to an entity or entities that it owns or controls.[741] The obligation must cease with respect to all operations covered by the CBA.[742]

A partial withdrawal occurs only if the employer continues to perform work within the CBA's jurisdiction of the type for which contributions previously were required or transfers the same type of work to another location. In a case of first impression in the federal circuit courts interpreting the meaning of "transfer" under ERISA §4205(b)(2)(A)(i), the Seventh Circuit held that a transfer of work occurred, and thus, the employer trucking company incurred a partial withdrawal liability, when it closed two of its shipping terminals, terminated union drivers covered by a collectively bargained pension fund, and reassigned the same type of work in the same way as before the closures to non-union drivers not covered by the fund.[743]

A substitution of agreements, if the new agreement provides for contributions to the same plan, does not come within the rule.[744] There is a partial withdrawal only if contributions for the work are discontinued; not if contributions continue at the new location.[745] A partial withdrawal will occur if the union and the company "bargain out" of the plan at one but not all facilities, under one but not all CBAs and the union remains certified or where the union is decertified at one but not all facilities within the jurisdiction of a single plan, assuming the facility is under a separate agreement or the employer transfers work to another facility.[746]

The second partial cessation rule involves the termination of the requirement to contribute for a given facility. Here, a partial withdrawal occurs if the employer permanently ceases to be obligated to contribute with respect to work performed at one or more, but not all, of its facilities within the jurisdiction of a single plan, regardless of whether any CBA is terminated.[747] A partial withdrawal occurs only if the contribution obligation terminates with respect to the employees at that facility, but the

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[730] ERISA §4205(a). *See Cent. States, Se. & Sw. Areas Pension Fund v. Schilli*, 420 F.3d 663 (7th Cir. 2005) (decertification of union did not result in partial withdrawal and would not have been defense to ERISA §515 action for failure to make required contributions). *See also Midwest Operating Eng'rs Welfare Fund v. Clevland Quarry*, 844 F.3d 627 (union decertification does not eliminate contribution obligations fixed under collective bargaining agreement; contributions must be made between decertification and agreement's expiration unless agreement provides otherwise).

[731] ERISA §4205(c).

[732] ERISA §4206(b)(1).

[733] Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980, Sen. Committees of Labor and Human Resources and of Finance. 126 Cong. Rec. S10111, S10116 (Daily Ed., July 29, 1980).

[734] These rules, especially the partial cessation rule, went through major modifications in the course of their passage through the House and Senate, so that care must be used when relying on the legislative history.

[735] ERISA §4001(a)(11).

[736] ERISA §4205(a)(1).

[737] The date of an employer's partial withdrawal is "the last day" of the plan year in which the partial withdrawal occurs. *Marvin Hayes Linen, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 814 F.2d 297 (6th Cir. 1987). *See* PBGC Opinion Letter 82-5.

[738] ERISA §4205(a)(2).

[739] ERISA §4205(b)(2)(A).

[740] ERISA §4205(b)(2)(A)(i).

[741] ERISA §4205(b)(2)(A)(i), as amended by Pub. L. No. 109-280, §204(b).

[742] PBGC Opinion Letter 82-35.

[743] *Nestle Holdings, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 342 F.3d 801 (7th Cir. 2003).

[744] Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980; 126 Cong. Rec. S10111 (Daily Ed. July 29, 1980).

[745] PBGC Opinion Letter 83-20. *See also Caesars Entm't Corp. v. Int'l Union of Operating Eng'rs Local 68 Pension Fund*, 932 F.3d 91 (3d Cir. 2019).

[746] *See* comments of Sen. Williams (D.N.J.), 126 Cong. Rec. S11672 (Daily Ed., Aug, 26, 1980); remarks of Rep. Thompson, 126 Cong. Rec. H7900 (Daily Ed., Aug. 26, 1980): "It is important to emphasize and to understand that in no case do these rules impose liability on an employer for merely ceasing or terminating an operation; rather they address only situations where work of the same type is continued . . . but . . . contributions . . . are no longer required." The decertification provisions have been attacked as contravening labor laws and as unconstitutionally arbitrary but have been upheld. *Pacific Iron & Metal Co. v. W. Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523 (W.D. Wash. 1982).

[747] ERISA §4205(b)(2)(A)(ii).

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employer continues to perform the same work at the facility. Again, this usually occurs during a bargain out or a union decertification. It is unclear whether a shift of operations to another location constitutes continued work at the facility.[748] However, an employer that contracts to buy work covered under its CBA from a third party but permanently ceases to perform that work has not transferred the work to another location.[749]

In an ordinary facility closing, a partial withdrawal occurs only if the facility is under a separate CBA and the employer remains active in the jurisdiction of the agreement. In that case, the test is met because the employer ceases to have an obligation to contribute under one but not all of the CBAs tied to the plan and continues to perform work within the CBA's jurisdiction. If the employer has one CBA agreement covering all of the facilities in an area, closing or selling one such facility does not trigger a partial withdrawal unless it caused a 70% decline in CBUs.[750]

It may be possible to avoid a partial withdrawal when a decertification occurs by continuing to contribute to the fund. To do so, a written agreement satisfactory under the Labor Management Relations Act (LMRA) §302(c)(5)[751] must be executed.[752] The amount of liability for a minor "partial cessation" is not measured by the CBU decline resulting from that cessation, but can be much larger, measured by other CBU declines resulting from other events.

In certain cases, an employer that partially withdraws is liable only for the unpaid liability "attributable" to its employees.[753] As discussed below, special partial withdrawal rules can apply to specific industries.

6. Transactions Taken to Evade or Avoid Liability

If a transaction's principal purpose is to evade or avoid withdrawal liability, the transaction is ignored.[754] The undefined term "principal purpose" also appears in the I.R.C. and has been analyzed under tax law principles,[755] with the PBGC stating that merely structuring an otherwise bona fide transaction to avoid withdrawal liability does not, by itself, violate the rule.[756]

In *SUPERVALU, Inc. v. Southwestern Pennsylvania and Western Maryland Area Teamsters & Employers Pension Fund Board of Trustees*,[757] the Third Circuit held that an employer violated ERISA §4212(c) when it agreed with a union to terminate a CBA early to avoid the withdrawal liability that otherwise would have arisen when the CBA expired. The court held that even if the termination agreement was bona fide and part of an arm's-length transaction, its primary purpose was to change the date on which the employer would be considered to have withdrawn to avoid withdrawal liability for the 2002–2003 plan year.

In general, a plan sponsor's determinations of withdrawal liability are presumed to be correct.[758] If a sponsor asserts withdrawal liability based in whole or in part on a determination that a principal purpose of a transaction occurring before January 1, 1999, was to evade or avoid withdrawal liability and the transaction occurred at least five years before the date of the complete or partial withdrawal, however, the sponsor must prove by a preponderance of the evidence that the transaction was made so motivated.[759]

ERISA §4221(d) generally requires employers to make withdrawal liability payments while an arbitration or court case is pending. An employer that contests such a determination, however, need not make any payments until a final decision is rendered.[760]

C. Calculation of Withdrawal Liability

1. In General

An employer that withdraws from a multiemployer plan must pay its share of liability for the plan's "unfunded vested benefits" (UVB), i.e., vested liabilities minus assets. The amount of the share will depend on the date or dates on which the plan's assets and liabilities are valued, the actuarial assumptions and methods used to value the assets and benefits, and the allocation method chosen by the plan. Plans can choose to have employers' shares of UVB calculated under various alternative methods.[761] Other special rules, such as the "free-look" rule, can affect the calculation of liability. Each plan and employer should determine which rule best suits its needs. The differences can be significant.

ERISA provides various allocation formulas that plans can use to determine an employer's withdrawal liability. In addition, other methods can be approved by the PBGC. The two basic types of allocation methods are:

- The *pro rata* method, which allocates liability in proportion to the employer's share of the contributions over a specified period; and
- The direct attribution method, which requires tracing of the UVBs attributable to the employer's employees.

The statute provides three *pro rata* formulas and one direct attribution formula.

[748] PBGC Opinion Letter 82-22.

[749] PBGC Opinion Letter 86-17.

[750] PBGC Opinion Letter 82-5 and PBGC Opinion Letter 82-35.

[751] 29 U.S.C. §186.

[752] *Seafood Workers Health Fund Union Trs. v. Seafood Workers Health Fund Mgmt. Trs.*, 571 F. Supp. 483 (D. Mass. 1983).

[753] PBGC Opinion Letter 82-5, PBGC Opinion Letter 82-35.

[754] ERISA §4212(c).

[755] *See Banner Industries, Inc. & Central States Southeast & Southwest Areas Pension Fund*, 11 EBC 1149 (Graham, Arb. 1989), award *withdrawn and vac'd*, 12 EBC 1992 (1990), in which the arbitrator found that the transfer of ownership to an ESOP was a sham transaction when one of the motivating factors was avoidance of withdrawal liability. *See also Flying Tiger Line, Inc. v. Teamster Pension Trust Fund of Phila.*, 830 F.2d 1241 (3d Cir. 1987) (procedural skirmish in case involving ERISA §4212).

[756] PBGC Opinion Letter 85-15.

[757] 500 F.3d 334, 41 EBC 1685 (3d Cir. 2007). *But see Sun Capital Partners III L.P. v. New England Teamsters & Trucking Indus. Pension Fund*, 903 F. Supp. 2d 107 (D. Mass. 2012), rev'd on other grounds, 724 F.3d 129 (1st Cir. 2013), cert. denied 134 S. Ct 1492 (2014) (private equity funds' investment in withdrawing employer was not intended to evade liability because, unlike in *SUPERVALU*, withdrawal liability was not certain to arise).

[758] *See* ERISA §4221(a)(3)(A).

[759] ERISA §4221(e), redesignated by Pub. L. No. 110-458, §105(b)(2), effective as if included in Pub. L. No. 109-280, i.e., plan years beginning after December 31, 2007. *See* Pub. L. No. 109-280, §502(d).

[760] ERISA §4221(e)(2)(B).

[761] ERISA §4211. The statutory alternatives may be adopted without PBGC approval. 29 C.F.R. §4211.11.

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The plan must determine the amount of withdrawal liability and make a demand for payment as soon as practicable after a withdrawal occurs.[762] Sometimes it is not easy to determine whether the employer has withdrawn or is merely delinquent in making its contributions. A plan can request information from the employer to determine whether a withdrawal has occurred.[763] The employer must begin paying its withdrawal liability within 60 days after the date of demand for payment from the plan.[764] This liability is payable quarterly, unless the plan adopts another period.[765] ERISA contains a number of relief provisions to soften the impact of withdrawal liability, discussed below, which include:

- a de minimis reduction (which reduces small withdrawal liability obligations);
- a 20-year payment cap;
- a sale of assets rule;
- a net worth rule;
- a sole proprietor rule; and
- limitations for insolvent employers.

Any dispute between an employer and a multiemployer plan involving withdrawal liability must be submitted to arbitration, and ERISA provides procedures under which such arbitrations must be conducted.[766]

No plan amendment regarding withdrawal liability may be applied retroactively to an employer without its consent.[767] All rules must be applied uniformly to each employer.[768]

The basic allocation mechanism involves the use of the following fraction:

$$\frac{\text{Employer's contributions for a 5-year period}}{\text{All employers' contributions over that period}}$$

The fraction is applied to the UVBs of the plan or to the portion of UVBs being allocated.[769] Variations principally arise from using different 5-year measuring periods and applying the resulting fractions to different portions of UVB (different "pools").[770]

The determination of UVBs for purposes of calculating an employer's withdrawal liability must not take into account benefit reductions under ERISA §305(e) and I.R.C. §432(e). Surcharges, which apply to employers that are obligated to make contributions to a plan in critical status, are disregarded in determining the allocation of UVBs.[771] In addition, restrictions on lump sum payments, which apply to plans in critical status under ERISA §305(f)(2) and I.R.C. §432(f)(2), are disregarded for purposes of withdrawal liability.[772] Benefit reductions or suspensions while a plan is in critical and declining status also are disregarded for this purpose, unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension.[773] Also, generally effective for plan years beginning after December 31, 2014, withdrawal liability is determined without regard to contribution increases required by a funding improvement or rehabilitation plan.[774]

The law provides that the PBGC shall prescribe simplified methods for the application of the provisions regarding the disregard of adjustable benefits, benefit reductions, surcharges, and contribution increases. The simplified methods are discussed in IX.C.3., below.

a. *Presumptive Method*

The "presumptive" rule automatically applies unless the plan adopts an alternative rule. Under the presumptive method, the amount of unfunded vested benefits allocable to a withdrawing employer is the sum of the employer's proportional share of:

- the unamortized amount of the change in the plan's UVBs for each plan year for which the employer is obligated to contribute to the plan (i.e., multiple-year liability pools) ending with the plan year preceding the plan year of employer's withdrawal;
- the unamortized amount of the UVBs at the end of the last plan year ending before September 26, 1980, with respect to employers that had an obligation to contribute for the first plan year ending after that date; and
- the unamortized amount of the reallocated unfunded vested benefits (amounts the plan sponsor determines to be uncollectible or unassessable) for each plan year ending before the employer's withdrawal.[775]

Comment: When originally enacted, the presumptive rule was designed to be attractive for recruiting new employers into plans. As pre-1980 liability has become a less significant part

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[762] ERISA §4219(b).

[763] ERISA §4219(a).

[764] ERISA §4219(c)(2).

[765] ERISA §4219(c)(3).

[766] ERISA §4221.

[767] ERISA §4214(a); *See Sigmund Cohn Corp. and Machinists District No. 15 Pension Fund*, 14 EBC 1031 (Sands, Arb. 1991) *Milwaukee Brewery Workers Pension Plan and Jos. Schlitz Brewing Co.*, 9 EBC 2385 (Siegel, Arb. 1988).

[768] ERISA §4214(b).

[769] *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 US 414 (1995). *See Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990) (definition of UVBs discussed).

[770] Asset measurement is subject to some plan discretion. *See Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990); *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990).

[771] I.R.C. §432(g), added by MPRA, Pub. L. No. 113-235, Div. O, §109(b)(4), and amended by Pub. L. No. 113-235, Div. O, §201(b)(6); ERISA §305(g), added by Pub. L. No. 113-235, Div. O, §109(a)(4), and amended by Pub. L. No. 113-235, Div. O, §201(a)(7). Changes made by Pub. L. No. 113-235, Div. O, §109 are effective for benefit reductions and contribution increases that go into effect during plan years beginning after December 31, 2014, and to surcharges the obligations for which accrue on or after December 31, 2014. Pub. L. No. 113-235, Div. O, §109(c). Changes made by Pub. L. No. 113-235, Div. O, §201 are effective December 16, 2014. Pub. L. No. 113-235, Div. O, §201(c). Prior to 2015, see former I.R.C. §432(e)(9); former ERISA §305(e)(9).

[772] I.R.C. §432(g)(1); ERISA §305(g)(1).

[773] I.R.C. §432(g)(1), as amended by Pub. L. No. 113-235, Div. O, §201(b)(6); ERISA §305(g), as amended by Pub. L. No. 113-235, Div. O, §201(a)(7)(A). See VII., above, for a discussion of benefit suspensions.

[774] I.R.C. §432(g)(3), as amended by Pub. L. No. 113-235, Div. O, §109(b)(4); ERISA §305(g)(3), as amended by Pub. L. No. 113-235, Div. O, §109(a)(4).

[775] ERISA §4211(b)(1).

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of plans' liabilities for UVB, however, this aspect of the rule has less importance for new employers. The five-year phase-in of liability for new employers (see below) still makes the presumptive rule a good one for attracting new employers to a plan.

Each amount described in (1) through (3) above is reduced by 5% for each plan year after the plan year in which it arose. An employer's proportional share is based on a fraction equal to the sum of the contributions required to be made by the employer over total contributions made by all employers who were obligated to contribute under the plan, for the five plan years ending with the plan year in which such change arose, the five plan years preceding September 26, 1980, and the five plan years ending with the plan year such reallocation liability arose, respectively (the "allocation fraction").[776]

ERISA generally prohibits the adoption of any allocation method other than the presumptive method by a plan that primarily covers employees in the building and construction industry (a "construction industry plan"), subject to regulations that allow certain adjustments in the denominator of an allocation fraction.[777]

b. Modified Presumptive Method (Two Pool Rule)

The first alternative rule is a simpler version of the presumptive rule. It divides UVB into old pre-September 26, 1980 (Old UVB) and new post-September 25, 1980 (New UVB) "pools" and allocates each of them on a fractional five-year basis.[778]

Note: Under this rule, the Old UVB is allocated as under the presumptive rule, and then is reduced annually as if amortized over 15 years. Thus, Old UVB no longer is relevant because any Old UVB will have been fully amortized.

Under the modified presumptive method, a withdrawing employer is liable for a proportional share of:

- the plan's unfunded vested benefits as of the end of the plan year preceding the withdrawal (less outstanding claims for withdrawal liability that can reasonably be expected to be collected and the amounts set forth in (2) below allocable to employers obligated to contribute in the plan year preceding the employer's withdrawal and who were obligated to contribute in the first plan year ending after September 26, 1980); and

- the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980 (amortized over 15 years), if the employer was obligated to contribute to the plan for the first plan year ending on or after that date.

An employer's proportional share is based on the employer's share of total plan contributions over the five plan years preceding the plan year of the employer's withdrawal and over the five plan years preceding September 26, 1980, respectively. Plans that use this method fully amortize their first pool as of 1995. Employers that withdraw after 1995 are subject to the allocation of UVBs as if the plan used the "rolling-5 method" discussed below.[779]

Note: Because any Old UVB under the modified (two-pool) rule already has been fully amortized, the first alternative in ERISA §4211(c)(2) (the two-pool rule) and its variation in ERISA §4211(c)(3) (the rolling-5 method, discussed below) now are virtually identical.

Effective August 17, 2006, a plan, including a construction industry plan, can adopt an amendment that applies the presumptive method by substituting a different plan year (for which the plan has no UVBs) for the plan year ending before September 26, 1980.[780] Such an amendment would allow a plan to erase a large part of its UVBs attributable to plan years before the end of the designated plan year, and to start fresh with liabilities that arise in plan years after the designated plan year.

c. Rolling-5 Method (One Pool Rule)

Under the rolling-5 method, a withdrawing employer is liable for a share of the plan's UVBs as of the end of the plan year preceding the employer's withdrawal (less outstanding claims for withdrawal liability that can reasonably be expected to be collected), allocated in proportion to the employer's share of total plan contributions for the last five plan years ending before the withdrawal.[781] The rolling-5 rule shifts liability as employment/contribution patterns change over time. An employer's past five years and the withdrawal year position determines its allocation. As with the modified presumptive rule, employers theoretically can reduce their liabilities by cutting down their contribution levels.

d. Direct Attribution Method

Under the direct attribution method, an employer's withdrawal liability is based generally on the benefits and assets attributable to its own employees' service as of the end of the plan year preceding the employer's withdrawal. The employer also is liable for a proportional share of any unfunded vested benefits that are not attributable to service with employers obligated to contribute under the plan in the plan year preceding the withdrawal.[782]

Practice Insight: The direct attribution method can reduce distortions in liability allocations that occur when present day contribution patterns do not reflect the plan's history. Thus, an employer that was dominant, but has declined, or that once was generous with past-service credits, can be allocated a liability tied to its past history. The rule, however, also contains the potential for significant distortions of its own.

One potential area of distortion involves how employee service should be attributed to a particular employer, which is unclear. For example, employee service could be attributed to the employer for which the employee works at the time of the withdrawal, without regard to prior employment. Another pos-

[776] ERISA §4211(b)(2). *See United Food & Commercial Workers Union — Emp'r Pension Fund v. Rubber Assocs.*, 812 F.3d 521 (6th Cir. 2016) (Sixth Circuit refused to calculate withdrawal liability pursuant to direct attribution method rather than presumptive method where PBGC report that was never acted upon by Congress provided that, in case of union-mandated withdrawals, direct attribution method was possible alternate method that could be used).

[777] ERISA §4211(c)(1).

[778] ERISA §4211(c)(2).

[779] ERISA §4211(c)(2).

[780] *See* ERISA §4211(c)(5)(E) as added by Pub. L. No. 109-280, §204(c)(2).

[781] ERISA §4211(c)(3).

[782] ERISA §4211(c)(4); 29 C.F.R. §4211.13.

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sible distortion lies in the methods available for asset allocation. The statutory permission to use sampling or "representative" data also is potentially volatile. Plans should undertake an extensive analysis before implementing this rule.

e. Other Permissible Methods

The PBGC can prescribe by regulation standard approaches for alternative methods for determining an employer's allocable share of UVBs, and adjustments in any denominator of an allocation fraction under the withdrawal liability methods. The PBGC has prescribed, in 29 C.F.R. §4211.12, changes that a plan may adopt, without PBGC approval, in the denominator of the allocation fractions used to determine an employer's share of UVBs under the presumptive, modified presumptive and rolling-5 methods.

PBGC regulations set forth criteria, guidelines and procedures that plans may use to craft alternative rules for calculating withdrawal liability, subject to PBGC approval. The PBGC requires that, in using an alternative method, (1) UVBs must be allocated to the same extent as under a statutory method, (2) UVBs must be allocated based on the employer's share of contributions to the plan or unfunded vested benefits attributable to the employer and (3) any uncollectible liability must be fully allocated.[783]

A multiemployer plan may request PBGC approval of a plan amendment that establishes special complete or partial withdrawal liability rules.[784] The plan's complete withdrawal liability rules must be similar to the rules for the construction and entertainment industries set forth in ERISA §4203(b) and §4203(c). Partial withdrawal liability rules must be consistent with the complete withdrawal rules adopted by the plan.[785] Special withdrawal liability rules approved by the PBGC may cover an entire industry or industries or be limited to a segment of an industry and may be made retroactive.[786]

The PBGC will approve an application of special complete or partial withdrawal liability rules if it determines that the rules apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate, and that the special rules do not pose a significant risk to the insurance system. After receiving a request, the PBGC will publish a notice of the pendency of the request in the Federal Register, summarizing the request and inviting written comments. The comment period must be at least 45 days. After the end of the comment period, the PBGC will publish its decision in the Federal Register.[787]

2. Withdrawal Subsequent to Plan Merger

Because merging multiemployer plans can use different allocation methods, establishment dates and plan years, or otherwise differ significantly in asset size, liabilities and funding levels, plans generally require a great deal of flexibility to protect participants and beneficiaries from the effects of employer withdrawals while providing equitable treatment for contributing employers. To accomplish these goals, plans may wish to insulate employers from the pre-merger liability of the merging plan and allocate only post-merger liabilities among contributing employers. On the other hand, some plans may choose to pool all existing liabilities and allocate those amounts among each contributing employer.

PBGC regulations generally follow the first approach, while allowing plans to elect the second approach. The regulations prescribe modifications to the statutory presumptive, modified presumptive and rolling-5 methods[788] under which an employer's liability for a withdrawal from a merged plan consists of its share of its prior plan's UVBs as of the end of the plan year preceding the merger, plus its allocable share of the merged plan's UVBs. Plans may adopt, with PBGC approval, modifications of the allocation methods that would, among other things, make all employers share both the pre-merger and post-merger liabilities.[789] In addition, the PBGC permits liability for withdrawals that occur after the merger, but before the end of the first plan year beginning after the merger, to be computed as if each plan had remained separate.[790]

3. Simplified Adjustments to Withdrawal Liability Calculations

In determining the withdrawal liability applicable to a withdrawing employer, certain adjustments under ERISA §305(g) must be made to the determination of the plan's unfunded vested benefits, to the allocation of the plan's unfunded vested benefits to the employer, and to the determination of the employer's annual withdrawal liability payment. The various adjustments are as follows:[791]

- Unfunded vested benefits — benefit reductions under ERISA §305(e)(8) and §305(f) are disregarded, and benefit suspensions under ERISA §305(e)(9) are disregarded (unless the withdrawal occurs more than 10 years after the effective date of the benefit suspension);
- Allocation of unfunded vested benefits — surcharges and certain contribution increases required by a funding improvement plan or rehabilitation plan are disregarded; and
- Highest contribution rate — surcharges and certain contribution increases required by a funding improvement plan or rehabilitation plan are disregarded.

The current value of nonforfeitable benefits is determined after taking into account the reduction in benefits and the benefit suspensions. Therefore, the impact of disregarding benefit reductions and benefit suspensions is to increase withdrawal liability as the value of nonforfeitable benefits without taking into account the reductions and suspensions would be higher.

ERISA §305(g)(5) provides that the PBGC shall prescribe simplified methods for the application of the adjustments in determining withdrawal liability. On January 8, 2021, the PBGC issued final regulations[792] setting forth simplified methods for

[783] ERISA §4211(c)(5); 29 C.F.R. §4211.21 through §4211.24.
[784] ERISA §4203(f) and §4208(e)(3).
[785] 29 C.F.R. §4203.3(a).
[786] 29 C.F.R. §4203.3(b). See 29 C.F.R. §4203.4 for the procedures for filing a request for PBGC approval of plan amendments.
[787] 29 C.F.R. §4203.5.
[788] 29 C.F.R. §4211.32, §4211.33, and §4211.34. *See also* 29 PBGC. §4211.1.
[789] 29 C.F.R. §4211.36.
[790] 29 C.F.R. §4211.37.
[791] *See* ERISA §305(g).
[792] *See* RIN 1212-AB36, 86 Fed. Reg. 1256 (Jan. 8, 2021).

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making the adjustments for benefit reductions, suspensions, and certain contribution increases. The PBGC did not provide a simplified method for disregarding surcharges because the agency believed that plans have been able to apply the statutory requirements without the need for a simplified method.[793] The simplified methods apply for withdrawals in plan years beginning on or after February 8, 2021.

a. Benefit Reductions and Benefit Suspensions

A plan must disregard the benefit reductions and benefit suspensions in determining a plan's nonforfeitable benefits for purposes of determining withdrawal.[794] A plan may adopt the simplified method to disregard benefit reductions and benefit suspensions without PBGC approval.[795] Under the simplified method, withdrawal liability is determined as the sum of the employer's allocable share of unfunded vested benefits determined in accordance with ERISA §4211 without regard to 29 C.F.R. §4211.6 (but taking into account 29 C.F.R. §4211.4) plus the employer's proportional share of the value of benefit reductions and benefit suspensions determined under 29 C.F.R. §4211.16, and then adjusted by ERISA §4201(b)(1).[796]

The employer's proportional share of the value of a benefit reduction is determined by multiplying the value of the benefit reduction by a fraction equal to the employer's share of contributions over the five consecutive plan years preceding the employer's withdrawal. The value of the benefit reduction is the unamortized balance, as of the end of the plan year before the withdrawal, of the value of the benefit reduction (using a 15-year amortization period) as of the end of the plan year in which the reduction took effect. Alternatively, the employer's proportional share of contributions may be determined over the five consecutive plan year ending before the plan year in which the adjustable benefit reduction takes effect.[797]

The employer's proportional share of the value of a benefit suspension as of the end of the plan year before the employer's withdrawal is determined by applying either the "static value method" or the "adjusted value method" to the value of the suspended benefits. The value of the suspended benefits is calculated either as of the date of the benefit suspension, or as of the end of the plan year coincident with or following the date of the benefit suspension (the "authorized value").[798]

Under the static value method, for the plan year in which the benefit suspension takes effect and for each of the succeeding nine plan years, the authorized value is multiplied by a fraction equal to the employer's share of contributions over the five consecutive plan years preceding the plan year in which the benefit suspension takes effect. The denominator of the fraction used to determine the proportional share is increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during the 5-year period.[799]

Under the adjusted value method, the value of the benefit suspension is adjusted each year. The value of the suspended benefits as of the end of the plan year in which the benefit suspension takes effect is the authorized value described above. The value of the benefit suspension as of the end of each of the succeeding nine plan years (the "revaluation date) is the value, as of the revaluation date, of the benefits not expected to be paid after the revaluation date due to the benefit suspension. An employer's proportional share is the value of the suspended benefits as of the end of the year preceding the date of withdrawal multiplied by a fraction equal to the employer's share of contributions over the five consecutive plan years preceding the plan year in which the benefit suspension takes effect. The denominator of the fraction used to determine the proportional share is increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during the 5-year period.[800]

b. Certain Contribution Increases

A plan sponsor may amend the plan without PBGC approval to provide that the allocation fraction is determined using any of the simplified methods under 29 C.F.R. §4211.14.[801] For the numerator of the allocation fraction after the 2014 plan year, the plan may provide that the withdrawing employer's contributions for each plan year (a "target year") after the date that is the later of the last day of the first plan year that ends on or after December 31, 2014, and the last day of the plan year the employer first contributes to the plan (the "employer freeze date") is the product of (1) the employer's contribution rate in effect on the employer freeze date, plus any contribution increases used to provide an increase in benefits,[802] multiplied by (2) the employer's contribution base units for the target year.[803]

For the denominator of the allocation fraction, the plan may provide that the denominator for each plan year after the employer freeze date is calculated using the same principles as used for the numerator under 29 C.F.R. §4211.14(b).[804] Thus, the denominator will use the contribution rate for each employer as of the withdrawing employer's freeze date, plus contribution increases used to provide an increase in benefits, multiplied by each employer's contribution base units for each target year. The sum for each employer will determine the denominator of the fraction. This methodology requires data on each employer including knowing what contribution increases apply to provide an increase in benefits. This may be problematic if multiple schedules under a funding improvement plan or rehabilitation plan have varying contribution increase rates.

[793] *See* RIN 1212-AB36, 86 Fed. Reg. at 1264.

[794] 29 C.F.R. §4211.6(a).

[795] 29 C.F.R. §4211.16(a).

[796] 29 C.F.R. §4211.16(b). The PBGC issued Technical Update 10-3 in 2010 to set forth a simplified method for disregarding the reduction in benefits. Comments on the proposed regulations stated that some may have interpreted Technical Release 10-3 as making the adjustments in §4201(b)(1) before adding the proportional share of benefit reductions. *See* RIN 1212-AB36, 86 Fed. Reg. at 1260.

[797] *See* 29 C.F.R. §4211.16(d). Note that if the alternative 5-year period is used, an adjustment is needed for the denominator if the plan uses an allocation method other than the presumptive method.

[798] 29 C.F.R. §4211.16(c)(1).

[799] 29 C.F.R. §4211.16(c)(2).

[800] 29 C.F.R. §4211.16(c)(3).

[801] 29 C.F.R. §4211.14(a).

[802] That is, contribution increases described in 29 C.F.R. §4211.4(b)(2)(ii).

[803] 29 C.F.R. §4211.14(b).

[804] 29 C.F.R. §4211.14(c).

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Accordingly, the regulations allow the plan to provide for the use of the "proxy group method" for the denominator.[805] Under the proxy group method, for a plan year beginning after the "plan freeze date"[806] employer contributions are calculated based upon an average of representative contribution rates that exclude contribution increases that are required to be disregarded in determining withdrawal liability.[807] Under this method, in determining the denominator of the allocation fraction, the contributions taken into account for any plan year (beginning with the base year) are the plan's adjusted contributions for the plan year.[808]

The base year is the first plan year beginning after the plan freeze date. The adjusted contributions of a plan for a plan year are the plan's total (unadjusted) contributions for the plan year by all employers, multiplied by the adjustment factor for the plan. The adjustment factor for the plan year is the quotient, for all rate group history groups that are represented in the proxy group, of total adjusted contributions for the plan year divided by total contributions for the plan year.[809]

The adjusted contributions of a rate history group that is represented in the proxy group of a plan for a plan year are the total contributions for the plan year attributable to employers in the rate history group, multiplied by the adjustment factor for the rate history group. The adjustment factor for the rate history group is the quotient, for all employers in the rate history group that are also in the proxy group, of total adjusted contributions for the plan year divided by total contributions for the plan year.[810]

The adjusted contributions of an employer under a plan for a plan year are the employer's contribution base units for the plan year, multiplied by the employer's contribution rate per contribution base unit at the end of the plan year, reduced by the sum of the employer's contribution rate increases since the plan freeze date that are required to be disregarded in determining withdrawal liability.[811]

The proxy group of a plan for a plan year is a group of included employers satisfying all of the following requirements:[812]

- the employers in the proxy group represent at least 10% of active plan participants on at least one day of the plan year;
- there is at least one employer in the proxy group from each rate history group of the plan for the plan year that represents, on at least one day of the plan year, at least 5% of active plan participants; and
- there is consistency in the composition of the proxy group from year to year.

[805] 29 C.F.R. §4211.14(d).

[806] The last day of the first plan year that ends on or after December 31, 2014. *See* 29 C.F.R. §4211.14(d)(2)(i).

[807] 29 C.F.R. §4211.14(d)(1).

[808] 29 C.F.R. §4211.14(d)(8).

[809] 29 C.F.R. §4211.14(d)(7).

[810] 29 C.F.R. §4211.14(d)(6).

[811] 29 C.F.R. §4211.14(d)(5).

[812] 29 C.F.R. §4211.14(d)(4).

A rate history group of a plan for a plan year is a group of included employers[813] satisfying all of the following requirements:[814]

- each included employer is only in one rate history group;
- the employers in the rate history group have substantially the same contribution history (or the same percentage increases in contributions from year to year), but there need not be more than 10 rate history groups; and
- there is consistency in the composition of rate history groups from year to year.

Therefore, starting from the beginning of the proxy group simplified method, employers are grouped into rate history groups. Then, representative employers representing at least 10% of active plan participants are drawn from the rate history groups to form the proxy group. Adjusted contributions (excluding contribution increases that must be disregarded) are determined for employers in the proxy group, and then for the employers in the rate history group, and finally for the plan, based upon the adjusted contributions of rate history groups represented in the proxy group.

4. *Actuarial Assumptions Used in Calculating Withdrawal Liability*

A plan may calculate UVB for withdrawal liability purposes based on its own actuarial assumptions if they are reasonable in the aggregate.[815] Alternatively, a plan may rely on assumptions from the PBGC (although no such assumptions have been promulgated).[816] However, as discussed below, the PBGC has proposed regulations under ERISA §4213(a)(2).

In determining a plan's UVB, actuaries can rely on the most recent, complete actuarial valuation used for minimum funding purposes and reasonable estimates for the interim years.[817] Absent complete data, a plan may rely on available data or representative sampling data.[818]

Minor variances in actuarial assumptions can result in enormous differences in withdrawal liability. As a result, the propriety of the assumptions has been the source of much litigation. Based on MPPAA's strong presumptions in favor of the plan's determinations, arbitrators generally, but not always, have upheld plan assumptions and the courts generally have

[813] Defined in 29 C.F.R. §4211.14(d)(2)(iv).

[814] 29 C.F.R. §4211.14(d)(3).

[815] ERISA §4213(a)(1). *Compare* ERISA §304(c)(3) and I.R.C. §431(c)(3), as added by the Pension Protection Act of 2006, Pub. L. No. 109-280, §201(a) and §211(a), respectively, which provide that, for purposes of the minimum funding rules, *each* actuarial assumption and method used to calculate costs, liabilities and interest rates for a multiemployer plan must be reasonable and in combination offer the actuary's best estimate of anticipated experience under the plan.

[816] ERISA §4213(a)(2); 29 C.F.R., Subtitle B, Chapter XL, Subchapter I (29 C.F.R. §4203.1 *et seq.*). *See Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021) (because PBGC has not promulgated regulations requiring alternative assumptions or methods for calculating withdrawal liability, default rule of ERISA §4213(a)(1) applies; calculation must be based on assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan).

[817] ERISA §4213(b)(1).

[818] ERISA §4213(b)(2).

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upheld the arbitrators.[819] However, employers have successfully challenged aspects of the interest rate assumption at the appellate court level.

a. Best Estimate of Experience

Employers have challenged the use of one interest rate for minimum funding and another (lower) interest rate to determine withdrawal liability. In particular, employers have challenged the use of the "Segal Blend" and the use of the PBGC rates to determine withdrawal liability. The Segal Blend is a weighted blend of the interest rate used for minimum funding purposes and annuity rates published by the PBGC. The grounds for the challenge are that these rates do not represent the actuary's best estimate of anticipated experience under the plan as required by ERISA §4213(a)(1).[820] Several courts have addressed this challenge.

In *N.Y. Times Co. v. Newspaper & Mail Deliverers'—Publishers' Pension Fund*,[821] the court held the use of the Segal Blend was not based upon the actuary's best estimate of anticipated experience under the plan. The district court decision was appealed to the Second Circuit, but a settlement was reached before the circuit court issued an opinion. In contrast, the district court in *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*,[822] upheld the use of Segal Blend.

In *Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund*,[823] the Sixth Circuit held that the use of the Segal Blend was not based upon the actuary's best estimate of anticipated experience under the plan. The Sixth Circuit stated that the actuary justified the rate used for withdrawal liability by considering a hypothetical mass withdrawal, rather than the anticipated experience under the plan. Also, the court was not persuaded by arguments that treating a withdrawal as a one-time settlement is an "accepted actuarial practice" as reflected in Actuarial Standard of Practice No. 27. The court stated that "ERISA does not yield to the Actuarial Standards of Practice, the standards must succumb to the statutory requirements."

In *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Co.*,[824] the District of Columbia Circuit held that the use of interest rates based upon the PBGC projected risk-free rates was not based upon the actuary's best estimate of anticipated experience under the plan. The court held that the assumptions used for minimum funding and for withdrawal liability need not be identical but must be similar because they both must be the actuary's best estimate of anticipated experience under the plan.[825]

Similarly, in *GCIU-Employer Retirement Fund v. MNG Enterprises, Inc.*,[826] the Ninth Circuit held that the actuary's use of the PBGC rate — without considering the "experience of the plan and reasonable expectations" — did not satisfy the "best estimate" standard. The Ninth Circuit affirmed the district court's view and order that the 8% funding rate should be used to determine withdrawal liability.

On October 14, 2022, the PBGC published a proposed regulation under ERISA §4213(a)(2).[827] The proposed regulation would allow the interest rate used to determine withdrawal liability to be any interest rate ranging from plan funding rates to the rates prescribed by the PBGC under ERISA §4044.[828] Other actuarial assumptions would each have to be reasonable and, in combination, offer the actuary's best estimate of anticipated experience under the plan. The proposed regulation garnered a number of comments. In particular, comments requested clarification as to whose responsibility it is to choose the interest rate within the prescribed range.

b. Assumption Change After Measurement Date

Aside from the specific interest rate used to determine withdrawal liability, a separate issue is whether the actuarial assumptions (and the interest rate in particular) can be changed after a plan year has ended. With withdrawal liability determined as of the last day of the plan year preceding the withdrawal (the measurement date), the question is when the actuarial assumptions need to be set.

In *National Retirement Fund v. Metz Culinary Management, Inc.*,[829] the Second Circuit addressed the issue where the new actuary for the plan changed the interest rate from 7.25% to 3.25% in June 2014. Metz Culinary Management withdrew from the plan in May 2014. The Second Circuit held that interest rate assumptions for withdrawal liability purposes must be determined as of the last day of the year preceding the employer's withdrawal from a multiemployer pension plan. Absent any change to the previous plan year's assumption made

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[819] *See Mich. UFCW Food Employers Pension Fund v. Eberhard Foods, Inc.*, 831 F.2d 1258 (6th Cir. 1987); *Carl Colteryahn Dairy, Inc. v. W. Pennsylvania Teamsters Fund*, 16 EBC 2100 (W.D. Pa. 1993); *Combs v. Classic Coal Corp.*, 12 EBC 1229 (D.D.C. 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991); *Casablanca Industries v. UFCW Local 23-Giant Eagle Pension Fund*, 7 EBC 2705 (Jaffe, Arb. 1986). *But see Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021).

[820] In arbitration, the use of the PBGC rates has had a mixed reception. *See e.g., Perkins Trucking Co. and Local 807 Pension Fund*, 4 EBC 1489 (O'Loughlin, Arb. 1983) (applied PBGC rate); *Penn Textile Corp.*, 3 EBC 1609 (Pritzker, Arb. 1982) (rejected PBGC rates). Arbitrators may increase unreasonably low rates, however. *See, e.g., Woodward Sand Co.*, 3 EBC 2351 (Kaufman, Arb. 1982) (increased assumption to 7.9% from 6.5%); *contra, Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991) (5.5% is not unreasonable), *rev'g Classic Coal Corp. v. UMW 1950 and 1974 Pension Plans*, 5 EBC 1449 (Nagle, Arb. 1984); *Palmer Coking Coal Co. v. UMW 1950 and 1974 Pension Plans*, 5 EBC 2369 (Gordon, Arb. 1984) and *Calvert and Youngblood Coal Co. v. UMW 1950 and 1974 Funds*, 5 EBC 2361 (Polak, Arb. 1984). The plans argued that they were permitted to use their own funding assumptions by a statutory safe harbor, ERISA §4213. *Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990); *Mich. UFCW/Food Employers Pension Fund v. Eberhard Foods*, 831 F.2d 1258 (6th Cir. 1987); *Hertz Corp. and Commission Drivers Local 187*, 4 EBC 1367 (Mittelman, Arb. 1983); *Eberhard Foods, Inc. and RSEU Joint Pension Fund*, 6 EBC 1961 (Glover, Arb. 1985). Blended rates had become rather popular and had received the blessing of arbitrators prior to the circuit decisions. *See Joy Mfg. Co. and IAM Pension Fund*, 5 EBC 1129 (Hannan, Arb. 1984); *Ells and Construction Laborers Pension Trust*, 5 EBC 1161 (Zimring, Arb. 1984).

[821] 303 F. Supp. 3d 236 (S.D.N.Y. 2018).

[822] 331 F. Supp. 3d 365 (D.N.J. 2018).

[823] 15 F.4th 407 (6th Cir. 2021).

[824] 39 F. 4th 730 (D.C. Cir. 2022).

[825] *See also Emps.' Ret. Plan of the Nat'l Educ. Ass'n v. Clark County Educ. Ass'n*, 664 F. Supp. 3d 24 (D.D.C. 2023).

[826] 51 F.4th 1092 (9th Cir. 2022).

[827] *See* Prop. 29 C.F.R. Part 4213, RIN 1212-AB54, 87 Fed. Reg. 62,316 (Oct. 14, 2022).

[828] The PBGC changed the structure of ERISA §4044 interest assumptions from select and ultimate rates to a yield curve. *See* 29 C.F.R. §4044.54, added by RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024), effective July 8, 2024, and applicable to calculations for valuation dates on or after July 31, 2024. For additional discussion on the final regulations, see IX.C.4.c., below.

[829] 946 F.3d 146 (2d Cir. 2020), cert. denied, 141 S. Ct. 246 (2020).

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by the measurement date, the interest rate assumption in place from the previous plan year will roll over automatically. Accordingly, the 7.25% rate had to be used to determine withdrawal liability.

The District of Columbia Circuit, in *Trustees of the IAM National Pension Fund v. M&K Employee Solutions, LLC*,[830] found the reasoning in *Metz* to be counter to the text of the MPPAA and concluded that, for withdrawal liability purposes, plan actuaries may set actuarial assumptions for a measurement date after that date based on information that was available "as of" the measurement date.[831] The court agreed with the district court that the text of the MPPAA reflects a legislative balance struck between the competing considerations of actuarial flexibility and fairness to employers, but that this flexibility is limited to assumptions based on the body of knowledge available on or before the measurement date.[832]

c. Plans Receiving Special Financial Assistance

For plans receiving special financial assistance (see VIII., above), the PBGC provides that, as one of the conditions, plans must use the interest assumptions in 29 C.F.R. §4044.54, in determining the unfunded vested benefits for purposes of determining withdrawal liability for a specified period. The specified period begins with the first plan year in which the plan received the special financial assistance, and ends on the later of the end of tenth plan year after the first plan year in which the plan receives payment of the special financial assistance or the last plan year by which the plan is projected to exhaust any special financial assistance assets.[833]

On June 6, 2024, the PBGC published final regulations under ERISA §4044 updating the actuarial assumptions used to determine the present value of multiemployer plan benefits in certain withdrawal liability calculations, such as for plans which receive special financial assistance.[834] For valuation dates on or after July 31, 2024, the final regulations change the structure of ERISA §4044 interest assumptions from select and ultimate rates to a bond yield curve, where future benefits are discounted to the valuation date using yields for which the time to maturity equals the length of the discounting period.[835] The interest assumption is based on a blend of two publicly available yield curves determined as of the last day of a month and are adjusted to the extent necessary so that the resulting liabilities align with private-sector group annuity prices.[836] The blended yield curve is based one-third on government bonds and two-thirds on corporate bonds.[837]

5. "Gap" Interest Dispute

Once withdrawal liability is determined, it accrues interest. Interest also must be paid on refunds of withdrawal liability.[838] The question of whether interest accrues in the year of withdrawal has resulted in considerable litigation.[839] In *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*,[840] the U.S. Supreme Court held that an employer's installment schedule for payment of withdrawal liability must be calculated on the assumption that interest accrues from the first day of the year following the year of withdrawal.

6. Abatement of Complete Withdrawal Liability

PBGC regulations provide for the abatement of withdrawal liability and provide procedures regarding related plan amendments if a withdrawn employer later resumes contributions.[841] The regulations permit a plan to be amended to adopt rules for reducing or waiving complete withdrawal liability under conditions other than those set forth in existing rules, if the conditions relate to events occurring or factors existing after the year in which the employer completely withdraws. The PBGC must approve such amendments by the date of the first scheduled withdrawal liability payment that is due after the employer resumes covered operations or, if later, by the 15th calendar day after the amendment's adoption date. The amendments do not apply until approved by the PBGC. Retroactive application to the amendment's adoption date, however, is permitted.[842]

A problem can occur when a "returning" employer claims never to have withdrawn completely. Such an employer may have to choose between conceding withdrawal and applying for reentry or forgoing reentry and litigating withdrawal liability.

7. Calculating Partial Withdrawal Liability and Abatement

a. Amount of Liability

The amount of liability for a partial withdrawal is a ratable portion of complete withdrawal liability; i.e., it is based on a fraction that compares the employer's contribution base units

[830] 92 F.4th 316 (D.C. Cir. 2024), *aff'g* No. 1:21-cv-02152-RCL, 2022 BL 344725 (D.D.C. Sept. 28, 2022) *and Trs. of the IAM Nat'l Pension Fund v. Ohio Magnetics, Inc.*, 656 F. Supp. 3d 112 (D.D.C. 2023).

[831] *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, 92 F.4th 316 (D.C. Cir. 2024).

[832] Referencing *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 135.

[833] *See* 29 C.F.R. §4262.16(g), as amended by RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024), effective July 8, 2024.

[834] *See* 29 C.F.R. Part 4044, as amended by RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024), effective July 8, 2024, and applicable to calculations for valuation dates on or after July 31, 2024 (generally finalizing rules proposed at 88 Fed. Reg. 56,563 (Aug. 18, 2023), and changing references to Appendix B to 29 C.F.R. Part 4044 (which provides interest rates for valuation dates occurring before July 31, 2024) to 29 C.F.R. §4044.54).

[835] *See* 29 C.F.R. §4044.54, added by RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024). *See also* PBGC White Paper, *PBGC's Valuation Methodology: Derivation of ERISA 4044 Yield Curve,* at https://www.pbgc.gov/sites/default/files/documents/4044-final-rule-white-paper.pdf. Historical ERISA §4044 Select & Ultimate Rates and current ERISA §4044 Yield Curves are available on the PBGC website at https://www.pbgc.gov/prac/interest/erisa-4044-interest-assumption.

[836] 29 C.F.R. §4044.54(d)(1). Adjustments, referred to as "spreads," are determined and published by PBGC on a quarterly basis, while the 4044 yield curves are posted each month once available to www.pbgc.gov. For "spreads" as of the last days of July, August, and September 2024 (Third Quarter 2024 Spreads), see 29 C.F.R. §4044.54(e), Table 1, as revised by 89 Fed. Reg. 54,347 (July 1, 2024), effective July 31, 2024.

[837] 29 C.F.R. §4044.54(d)(2).

[838] 29 C.F.R. §4219.32; *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990).

[839] *E.g., Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 14 EBC 1518 (D. Md. 1991); *aff'd in part and rev'd in part,* 974 F.2d 528 (4th Cir. 1992), *In re The Sherwin-Williams Co. & New York State Teamsters Conference Pension and Retirement Fund,* 17 EBC 2725 (Gertner, Arb. 1997).

[840] 513 U.S. 414 (1995), aff'g 3 F.3d 994 (7th Cir. 1993).

[841] 29 C.F.R. §4207.3, §4208.2.

[842] ERISA §4207.

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(CBUs) after the partial withdrawal and its average CBUs for the five years preceding the withdrawal (or the five years used to determine the high base year, if the withdrawal was under the 70% decline rule in ERISA §4205(a)(1)).[843] While the calculation of total liability is based on the contribution level, however, the part that becomes payable upon a partial withdrawal is determined based on CBUs. Furthermore, the liability associated with a "partial cessation" involving a partial withdrawal may be much greater than the actual liability for the small group if there have been significant CBU declines before the partial cessation.[844]

The de minimis reduction in ERISA §4209, discussed below, applies to partial withdrawals so that a ratable portion of withdrawal liability is computed only on the total liability remaining after the de minimis reduction.[845] The liability cap and net worth limits of ERISA §4206, however, apply after the pro rata calculation has been made.[846]

If, after a partial withdrawal, another partial or complete withdrawal occurs, a plan must adjust the liability for any subsequent withdrawal to prevent duplication.[847]

b. Abatement of Partial Withdrawal Liability

Partial withdrawal liability incurred under the 70% decline rule "abates" (is reduced) if and when the plan recovers from the partial withdrawal.[848] There are three abatement rules, and the PBGC may prescribe other rules and approve acceptable alternative rules that plans adopt.[849]

Two of the rules completely abate liability. The first rule looks to the subsequent CBUs of the withdrawing employer. If the employer, for two years after the "partial withdrawal year," is obligated to contribute 90% of the CBUs it was obligated to contribute in the "high base year," its obligation to make partial withdrawal payments ceases.[850] If this test is met for one year, the employer can furnish a bond in lieu of paying withdrawal liability.[851]

The second rule looks to the condition of both the plan and the employer. If the employer in the two years following the withdrawal has CBUs that exceed 30% of the high base year, and if, in those years, total plan CBUs are at least 90% of the CBUs in the employer's year of partial withdrawal, the employer's obligation to pay partial withdrawal liability ceases.[852]

Under a "partial abatement" rule, if the employer's CBUs equal or exceed 110% of its CBUs in the partial withdrawal year, its liability is reduced ratably.[853] Partial abatement is allowed only if the employer's CBUs exceed the greater of the 110% test or the total CBUs in the year of its withdrawal.[854] Reduced liability is determined by recalculating the liability.[855] Plan decisions on employer abatement applications are subject to review and arbitration under ERISA §4219 and §4221.[856]

8. Caps, Limitations, and Exceptions to Withdrawal or Partial Withdrawal Liability

ERISA contains numerous exceptions to, and limits on, liability. Many are partially or totally discretionary. Each one can alter significantly an individual employer's withdrawal liability and, consequently, all employers' withdrawal liability.[857]

a. De Minimis Reduction

The de minimis reduction exempts smaller employers due to the high cost of determining and collecting a small employer's liability. A large business with only a minor participation in a plan, however, also can take advantage of this rule. Both complete and partial withdrawals are subject to a de minimis reduction.[858]

Liabilities of less than $50,000 (or, if less, 0.75% of the plan's UVBs) are completely eliminated by the reduction rule. This reduction acts as a "vanishing" deductible if the employer's liability exceeds $100,000, because the de minimis reduction is decreased by the excess of the employer's liability over $100,000. As a result, an employer with $150,000 in withdrawal liability has no de minimis reduction.[859]

In addition to the mandatory rule above, a sponsor can amend a multiemployer plan to use a de minimis reduction of $100,000 or, if less, 0.75% of the plan's UVBs. In this case, the excess over $150,000 is applied against the reduction, so that no reduction is made on liabilities that exceed $250,000.[860] The

[843] ERISA §4206(a). Note that, under the 70% decline rule, the determination is made as if the partial withdrawal had occurred at the end of the first plan year in the three-year testing period. ERISA §4206(a)(1)(B).

[844] *See Cent. States, Se. & Sw. Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605 (7th Cir. 2000) (29 C.F.R. §4206.9, which calls for 10-year allocation period for determining partial plan termination withdrawal liability, is valid).

[845] ERISA §4206(a)(1).

[846] ERISA §4206(a).

[847] ERISA §4206(b)(1). In *GCIU-Emp'r Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214 (9th Cir. 2018), the Ninth Circuit held that the adjustment in §4206(b)(1) applies before the limitation on annual payments (the "20-year-cap"), which is discussed in IX.C.8.c., below. In doing so, the court disagreed with PBGC Opinion Letter 85-4, and the 2016 Enrolled Actuaries Meeting Questions to the PBGC and the Summary of Their Responses (the "2016 Blue Book"). In *Perfection Bakeries, Inc. v. Retail Wholesale & Dep't Store Int'l Union & Indus. Pension Fund*, No. 2:22-cv-573-ACA, 2023 BL 232515 (N.D. Ala. July 7, 2023), the district court similarly held that the partial withdrawal adjustment applies before the 20-year cap is applied, and rejected PBGC Opinion Letter 85-4.

[848] ERISA §4208.

[849] ERISA §4208(e); *see* 29 C.F.R. §4208.9.

[850] ERISA §4208(a)(1). The statute does not specify which high base year should be used. One possibility is the high base year that was used to determine the partial withdrawal. This can be inferred from the statutory reference to ERISA §4205(b)(1)(B)(ii), which defines "high base year." PBGC regulations use the average high two years of the five years preceding the partial withdrawal as the base year to determine the withdrawal. 29 C.F.R. §4208.4(a)(1), §4208.4(d).

[851] The amount of the bond is determined by the plan sponsor, but cannot exceed 50% of the employer's annual liability payment. ERISA §4208(a)(2); 29 C.F.R. §4208.5.

[852] ERISA §4208(b).

[853] ERISA §4208(c).

[854] 29 C.F.R. §4208.4(c)(1).

[855] 29 C.F.R. §4208.6.

[856] If a plan is amended to include the retail food industry rule, discussed below, the general abatement rule does not apply. The retail food industry rule, however, contains its own Abatement provision. ERISA §4205(c)(2) and §4205(c)(3).

[857] ERISA §4225 permits plan sponsors to establish a fund to reimburse plans for liabilities "shifted" from withdrawing employers to those remaining by the various caps, limits and exceptions.

[858] ERISA §4209.

[859] A plan with no UVB may assess liability, but cannot reduce liability using the de minimis rule. *Ben Hur Constr. Co. v. Goodwin*, 784 F.2d 876 (8th Cir. 1986). As with all plan amendments permitted by ERISA §4201 through §4220, an amendment adopted after May 1, 1983, must be submitted to the PBGC for approval.

[860] ERISA §4209(b); *see* ERISA §4214.

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provision is somewhat ambiguous and may be read to allow de minimis reductions from zero to $100,000, i.e., to allow a plan to have no de minimis reduction at all. No de minimis reduction is permitted if there has been a mass withdrawal.

Example: An employer withdraws from a plan with only the mandatory rule in effect. The plan's total UVB is $7 million. The employer's liability is reduced by $50,000 (rather than 0.75% of the plan's UVB, which would have been $52,500), less the employer's share of UVB in excess of $100,000. If the employer's UVB is $75,000, the reduction is $50,000 and the liability is $25,000. If the employer's UVB is $125,000, the reduction is $25,000 (the reduction of $50,000 is reduced by the excess of the employer's liability over $100,000), and the liability is $100,000. If the employer's liability is $150,000, there is no reduction because the $50,000 reduction is entirely eliminated by the excess of the employer's liability over $100,000. If this plan adopts a discretionary amendment, the de minimis reduction amount used is $52,500 (i.e., 0.75% of the plan's UVB). The discretionary plan amendment reduces the employer's liability by $52,500, less the employer's UVB in excess of $150,000. If the employer's UVB was $175,000, the reduction would be $27,500 ($52,500 minus the excess of the employer's liability over $150,000). Therefore, the liability would be $147,500. The reduction completely disappears when the employer's UVBs reaches $202,500.

b. "Free-Look" Rule

The free-look rule[861] encourages new employers to join the plan despite the risk of withdrawal liability. The rule permits employers that meet certain conditions to enter the plan and later leave it without incurring withdrawal liability. The rule applies only to a plan that specifically adopts it.[862]

ERISA §4210 lists the conditions the employer must meet to use the rule. The employer must leave the plan within fewer than six years from its date of entry, or, if earlier, within the plan's vesting period.[863] The section does not address how the rule applies if the plan uses graduated vesting. The employer must have made less than 2% of the total contributions to the plan in each year of membership and cannot have taken a previous "free look."[864] In addition, a plan can provide a free look only if:

(1) it is amended to disregard past service liability; and

(2) its assets equal eight or more times the benefit payments for the year before the employer's entry.[865]

Even though past service is disregarded under the free-look rule, accrued benefits could increase if the service that accrued while the employer was in the plan later vests through service by the same employees working for other contributing employers. The legislative history adds:

> Of course, the rule requiring that a plan provide for cancellation of benefits where the employer ceases contributions to the plan would not require any reduction of benefits to participants or beneficiaries whose benefits are in pay-status at the time of the cessation and who are not working in employment covered by the plan.[866]

An employer that is eligible for free-look relief nonetheless may be allocated liability upon a mass withdrawal.[867]

Practice Insight: Although the free-look rule was designed to encourage new entrants into plans, the realities of labor relations may make it difficult for an employer to cease its obligations to contribute within six years. Nevertheless, it might be possible for the employer to reach a pre-joinder agreement with the union permitting the employer to unilaterally withdraw if it chooses.

c. 20-Year "Cap"

The 20-year cap was designed to limit employer withdrawal liability, but has had little practical effect.[868] Withdrawal liability is payable in level annual installments amortized over a specified period, based on the assumptions used for the plan's most recent actuarial valuation.[869] If this period exceeds 20 years, the employer's liability is limited to 20 annual installments. The 20-year cap does not apply, however, to "mass withdrawals," discussed below.[870]

d. Special Sales Limitation

In some situations, a liability limit based on net worth applies.[871] This limit is designed to preserve small employers' access to credit. A sliding scale limits the liability of employers that sell all or substantially all of their assets in an arm's-length transaction between unrelated parties.[872] The limit is calculated at the time of the sale, not at the time of the withdrawal.[873] It does not apply to employers undergoing reorganization under state or federal bankruptcy law.[874] If the limit applies, the

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[861] ERISA §4210. The rule officially is titled "Nonapplicability of Withdrawal Liability for Certain Temporary Contribution Obligation Periods; Exception."

[862] ERISA §4210(b)(1), as redesignated by Pub. L. No. 109-280, §204(c)(1)(B), effective for withdrawals occurring on or after January 1, 2007. For plan withdrawals occurring before January 1, 2007, the "free look" rule was not available to construction industry plans. Former ERISA §4210(b)(1), struck by Pub. L. No. 109-280, §204(c).

[863] Committee Print, S.1076, *The Multiemployer Pension Plan Amendments Act of 1980, Summary and Analysis of Consideration,* Committee on Labor and Human Resources, U.S. Senate (April 1980), p. 16. *See Rippeto v. Midtown Auto Plaza Ford, Inc.*, No. 4:14-cv-00495-RWS, 2014 BL 144376 (E.D. Mo. May 23, 2014) (unpub. op.) (car dealership was not entitled to "free look" exemption because the six years that the dealership was required to contribute to the plan exceeded the five years required for a plan participant's benefits to vest).

[864] ERISA §4210(a)(3), §4210(a)(4).

[865] ERISA §4210(b). Before January 1, 2007, the free-look rule was available only to plans that did not primarily cover employees in the building and construction industry. Former ERISA §4210(b)(1), prior to amendment by Pub. L. No. 109-280, §204(c)(1) .

[866] H.R. Rep. 96-869, Part 2 (H.R. 3904), Committee on Ways and Means, House of Representatives (Apr. 23, 1980), p. 12.

[867] 29 C.F.R. §4219.15(c).

[868] ERISA §4219(c)(1)(B).

[869] ERISA §4219(c)(1)(A).

[870] ERISA §4219(c)(1)(D).

[871] ERISA §4225(a).

[872] "Substantially all" is interpreted by reference to the tax rules. (I.R.C. §354(b)(1)(A) applied to a sale of 83% to 95% of operating assets.)

[873] *Trus. of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926 (9th Cir. 1986); *Tom Boy, Inc. and Central States, Southeast & Southwest Areas Pension Fund,* 10 EBC 2532 (Glanzer, Arb. 1989).

[874] ERISA §4225(a)(1), §4225(d).

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employer's withdrawal liability is limited to the greater of (1) a portion of the employer's "liquidation or dissolution value," determined without regard to withdrawal liability or (2) if the plan uses the attributable method of allocating withdrawal liability, the UVBs attributable to that employer.[875]

The portion of liability imposed is 30% of the employer's liquidation or dissolution value if it does not exceed $5 million, and increases under a graduated scale up to 80% for a liquidation value that exceeds $25 million.[876] The limit is an aggregate limit; if an employer withdraws from more than one plan, its total liability to all plans cannot exceed the limit, and the limit must be apportioned among the plans.[877] The PBGC has stated that the limit is not available to construction industry employers in the "typical case."[878]

e. Insolvent Employers

The liability of an employer in "liquidation or dissolution" is limited to:

(1) 50% of the employer's UVB; plus

(2) the remaining 50% of the employer's UVB not in excess of the employer's net worth, reduced by 50% of the UVB.[879]

The rule applies on a controlled group basis, and therefore is not available to non-insolvent controlled group members.[880] For the limit to apply, the liquidation or dissolution does not have to be formal, but the employer had to be insolvent and wind up its business affairs.[881] The limit is not dependent on a sale of assets. The relief is not available to a company in Chapter 11 reorganization.[882]

The insolvency provision was an attempt to balance the needs of employers in obtaining credit and the plan's funding needs. It put the plan on a par with general creditors for 50% of the withdrawal liability, and for the remaining 50% it puts the plan in a position inferior to general creditors (withdrawal liability has no priority status in bankruptcy).[883]

In *Carpenters Pension Trust Fund v. Moxley*,[884] the Ninth Circuit allowed an employer's withdrawal liability assessment to be discharged in Chapter 7 bankruptcy.

f. Individual Exemption

The withdrawal liability attributable to the obligation of an employer that operates in a business form with the potential for personal liability (e.g., a sole proprietorship or partnership) cannot be enforced against property exempt from the insolvency estate under the Bankruptcy Code or similar state laws.[885] This exemption covers personal and real property (up to certain dollar limits), insurance, pensions and certain other assets.

g. Employer Limit on Withdrawal from More than One Plan

If an employer withdraws from several plans as part of the same sale, liquidation or dissolution, its liability is allocated to each plan based on the ratio that its liability to each plan bears to its total liability, calculated before applying the ERISA §4225 limits.[886]

h. Successive Withdrawals

To avoid duplication, any subsequent full or partial withdrawal liability of an employer is offset by the amount of any previous partial withdrawal liability of that employer with respect to the plan, less any reduction or abatement of such liability. Each partial withdrawal is subject to a de minimis "adjustment."[887]

i. Reduction of Complete Withdrawal Liability

The PBGC regulations allow reductions in liability when an employer resumes covered operations under the plan or renews contribution obligations to the plan.[888]

j. Transfer of Liabilities

When liability of a withdrawing employer is transferred to another plan, the withdrawn employer's liability is reduced by the value of the transferred UVBs.[889] A similar rule applies to certain transfers of liability in connection with a change in bargaining representatives.[890]

k. Labor Disputes

A labor dispute will not result in a withdrawal.[891]

9. Lost Liability: ERISA §4204 and Piecemeal Sales

Corporations often dispose of assets and stock in a series of transactions instead of in one large transaction. For example, assume an employer has three subsidiaries and two divisions, each making 20% of the contributions of the group. The em-

[875] ERISA §4225(a)(1), as amended by Pub. L. No. 109-280, §204(a)(2), effective for sales occurring on or after January 1, 2007. PBGC Opinion Letter 82-8 provides some guidance in the definition of "attributable."

[876] ERISA §4225(a)(2), as amended by Pub. L. No. 109-280, §204(a)(1), effective for sales occurring on or after January 1, 2007.

[877] ERISA §4225(e). Joint Explanation §5d, 126 Cong. Rec. S10111, S10117 (Daily Ed., July 29, 1980.

[878] PBGC Opinion Letter 88-2.

[879] ERISA §4225(b).

[880] *Cent. States, Se. & Sw. Areas Pension Fund v. Chatham Props.*, 929 F.2d 260 (6th Cir. 1991); *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991).

[881] *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp 1289 (D.N.J. 1991) (reduction of withdrawal liability applicable to insolvent employers under ERISA §4225 was properly denied to non-insolvent members in bankrupt employer's controlled group); *Buy-Low of Cassopolis, Inc. v. Bd. of Trustees, Food Workers Pension Fund*, 5 EBC 2641 (Bowles, Arb. 1984).

[882] *In re Lissner Corp.*, 115 B.R. 604 (N.D. Ill. 1990) (bankruptcy motion withdrawn so court may consider ERISA §4225 issues); *In re Granada Wines*, 26 B.R. 131 (Bankr. D. Mass. 1983), aff'd sub nom. *Granada Wines, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 748 F.2d 42 (1st Cir. 1984) (relief not available in Chapter 11 reorganization); *but see In re Advance-United Expressways, Inc.*, 86 B.R. 602 (Bankr. D. Minn. 1988) (relief available in Chapter 11 liquidation; federal court may retain jurisdiction and not refer issue to bankruptcy court).

[883] *See, e.g., Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986).

[884] 734 F.3d 864 (9th Cir. 2013).

[885] ERISA §4225(c). The Bankruptcy Code is Title 11 of the U.S.C.

[886] ERISA §4225(e).

[887] ERISA §4206(b)(1). *See Cent. States, Se. and Sw. Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605 (7th Cir. 2000) (29 C.F.R. §4206.9, which calls for 10-year allocation period for determining partial plan termination withdrawal liability, are valid).

[888] 29 C.F.R. §4207.3 and §4208.3.

[889] ERISA §4211(e).

[890] ERISA §4235.

[891] ERISA §4218(2).

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ployer closes two subsidiaries. The closure creates less than a 70% decline and the employer does not transfer the work outside of the two closed subsidiaries, so there is no partial withdrawal. The employer then sells the remaining subsidiary in a stock sale, incorporates one of the divisions (not a withdrawal under ERISA §4218(1)), and spins off its stock to shareholders. Finally, it sells the last division in a sale meeting the requirements of ERISA §4204 (but retaining 15% of assets). The plan loses more than 40% of the employer's contributions and whatever declines may occur in the buyer's operations after the ERISA §4204 sale. Nonetheless, the plan has no liability claim.[892] In theory, the plan eventually could collect on the liability of the employer if the subsidiaries and divisions are sold or cease to contribute. If, however, they are sold to a large company participating in the plan, they too could be closed or sold without liability. It also is not clear that these subsidiaries carry the lost 20% with them. Perhaps this result is not surprising, however, as ERISA does permit a 70% decline without liability.[893] The success of a seriatim disposition depends on the exact numbers, as well as what theories of measurement are used, such as whether the "substantially all" test of ERISA §4204 counts closed facilities.[894]

Use of ERISA §4204 also raises an issue of whether and how contributions of the sold company should be credited against later withdrawal liability of the seller. The PBGC's view is that the plan may credit the seller's withdrawal liability with the liability amount transferred in the asset sale in keeping with its general principle that a plan should not receive a double recovery.[895] The PBGC has not, however, issued advice on the extent of the credit, stating that the issue is more appropriate for judicial (and arbitral) resolution.[896] In one case, an employer was able to exclude facilities sold in compliance with ERISA §4204 from later calculations of liability. The §4204 sales would not have resulted in withdrawal liability.[897]

No liability ever disappears. All UVBs must be allocated somewhere. If nothing else, they become "reallocated" as "new" UVBs under the applicable allocation rules. Under ERISA §4212(c), a transaction designed to avoid withdrawal liability is ignored in calculating such liability.[898]

10. Effect of Plan Merger on Withdrawal Liability Determination

In general, the initial plan year (the first complete plan year beginning after the effective date of the merger)[899] is treated as a fresh start year for the various methods. Thus, for example, under the presumptive method, the unfunded vested benefits are determined as of the end of the initial plan year, and then the change in unfunded vested benefits is determined for each plan year after the initial plan year. However, the employer's share of the unfunded vested benefits for the initial plan year is the sum of (1) the employer' allocable share of the unfunded vested benefits that would have been allocable if the employer withdrew on the first day of the initial plan year (determined as if each plan had remained a separate plan), plus (2) a pro rata share of the remaining unfunded vested benefits determined as of the end of the initial plan year, after subtracting the amounts that would have been allocated to employers had they withdrawn on the first day of the initial plan year. The unfunded vested benefits for the initial year are subsequently reduced by 5% per year.[900]

For a complete discussion of the effect of a multiemployer plan merger, see VI., above.

11. How and When Liability Is Assessed and Paid

When an employer withdraws, the plan sponsor must notify the employer "as soon as practicable" of the amount of liability and the schedule for payment and demand that payment begin.[901] Personal service is required.[902] Notice to any member of a controlled group, even a bankrupt member, is treated as notice to the entire group.[903] The only exception is when the ob-

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[892] A less elaborate version of this approach was partly successful in *Herman Segall, Inc. and ILGWU Retirement Fund,* 3 EBC 2449 (Pillsbury, Arb. 1982), in which ERISA §4225 was applied to the sale.

[893] ERISA §4205(a)(1); *Terson Co. and Bakery Drivers Local 734 Pension Fund*, 4 EBC 1009 (Graham, Arb. 1983).

[894] *Kroger Co. and Southern California Food Workers Pension Fund,* 6 EBC 1345 (Nagle, Arb. 1982) addresses several of the theories. *See also In the Matter of Southland Corp. and Central States, Southeast and Southwest Areas Pension Funds,* 17 EBC 1817 (Glanzer, Arb. 1993) (employer could not avoid withdrawal liability for series of dispositions made pursuant to preconceived plan).

[895] PBGC Opinion Letter 83-10.

[896] *See* PBGC Opinion Letter 83-10.

[897] *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 974 F.2d 528 (4th Cir. 1992).

[898] ERISA §4069 provides parallel provisions for transactions designed to avoid termination liability for single employer pension plans.

[899] 29 C.F.R. §4211.2.

[900] 29 C.F.R. §4211.32, §4211.37.

[901] ERISA §4219(b)(1) and §4202. *See Giroux Bros. Transp., Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996) (timeliness of plan sponsor's demand is governed exclusively by ERISA §4219(b)(1) and disputes must go to arbitration). A letter that demanded an estimated withdrawal liability and included a payment schedule substantially complied with the notice requirements of ERISA §4219(b)(1), even though the fund sent the employer a subsequent letter that demanded immediate payment of a recalculated liability amount that was somewhat lower. *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Loyal Casket Co.*, 44 EBC 1184 (N.D. Ill. 2008).

[902] *Beasley v. George Wollman, Inc.*, 1986 WL 4827 (E.D. Pa. 1986); *Debreceni v. George Lamoureaux & Co.*, 629 F. Supp. 598 (D. Mass 1986).

[903] *See IAM Nat'l Pension Fund v. Slyman Indus., Inc.*, 901 F.2d 127 (D.C. Cir. 1990); *Chi. Truck Drivers Pension Fund v. Cent. Transp., Inc.*, 888 F.2d 1161 (7th Cir. 1989); *W. Conference of Teamsters Pension Fund v. Allyn Transp. Co.*, 832 F.2d 502 (9th Cir. 1987); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986). Actual notice received by the employer may overcome deficiencies in the statutory notice. See *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co.*, 525 F.3d 591 (7th Cir. 2008), which arose when a former member of a controlled group subject to withdrawal liability was in a Chapter 7 bankruptcy proceeding. The court explained that in a typical Chapter 11 bankruptcy, the debtor continues to control the business as debtor-in-possession, so notice to the debtor-in-possession is essentially notice to the employer. In contrast, a Chapter 7 bankruptcy is conducted by a trustee who is neither the agent of the debtor nor the fiduciary of the debtor and has no general duty to inform the debtor of the filing of a proof of claim. Thus, a proof of claim filed in a Chapter 7 bankruptcy is not likely to come to the attention of the employer or to a member of the controlled group. According to the Seventh Circuit, when a plan sponsor asserts a claim against a former member of a controlled group, it is advisable to send that notice directly to the former owner, so that it has a clear opportunity to contest liability. The Seventh Circuit further advised that a participant suspects it might be adjudged a member of a controlled group (and therefore subject to withdrawal liability) should commence arbitration, so if a court holds that the party is a member of such a group and is subject to such liability, the party will not have waived the issues reserved for arbitration. On remand, the district court held that MPPAA's 60-day default payment rule (ERISA §4219(c)(2)) applied because the proof of notice established a "sched-

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jecting entity claims it was not actually a group member.[904] The employer must give the sponsor any information requested by the sponsor that the sponsor "reasonably determines to be necessary," within 30 days of the sponsor's written request.[905]

In addition, for plan years beginning after 2007, the sponsor or administrator of a multiemployer plan must provide to any employer with an obligation to contribute to the plan, within 180 days of a written request, notice of: (1) the estimated amount that would be the employer's withdrawal liability if it withdrew from the plan on the last day of the year preceding the date of the request; and (2) an explanation of how the estimated liability amount was determined, including the actuarial assumptions and methods used to determine the value of plan liabilities and assets, the data regarding employer contributions, UVBs, annual changes in UVBs and the application of any limits on the estimated withdrawal liability. An employer is not entitled to receive more than one notice of withdrawal liability under ERISA §101(l) during any 12-month period. The plan administrator may impose a reasonable charge for copying, mailing and other costs of furnishing copies or notices, subject to a maximum amount that may be prescribed by regulations. The required information may be provided in written, electronic or other appropriate form to the extent reasonably available to the persons to whom the information must be provided.[906]

With respect to the plan sponsor's duty to provide notice when an employer withdraws, the "as soon as practicable" requirement has proven to be somewhat more lenient than employers had hoped. Courts have implied that a delay of up to six years is acceptable.[907] Even mid-course revisions are acceptable.[908]

Liability payments must be made in level annual payments based on the average level of contribution base units (CBUs) for the three consecutive highest plan years within the previous 10 years, multiplied by the highest contribution rate at which the employer had an obligation to contribute within those 10 years.[909] The question has arisen of what is the highest contribution rate where an employer has different rates under the CBAs for which it contributes to the plan. The PBGC stated in Opinion Letter 90-2 that using an average of the contribution rates was allowable. However, in *Board of Trustees of the IBT Local 863 Pension Fund v. C&S Wholesale Grocers, Inc.*,[910] the Third Circuit held that the highest contribution rate means "the single highest contribution rate established under any of the three CBAs." A second issue addressed by the Third Circuit was whether the highest contribution rate included surcharges paid prior to the enactment of MPRA.[911] The Third Circuit concluded the surcharges were not an obligation to contribute under ERISA §4212, and that the highest contribution rate did not include the surcharges. The Ninth Circuit agreed with the Third Circuit in *Board of Trustees of the Western States Office & Professional Employees Pension Fund v. Welfare & Pension Administration Service, Inc.*[912]

The payments are made over the period of years necessary to fully amortize the liability, subject to the 20-year cap. The amortization period must be determined in accordance with assumptions used for the plan's most recent actuarial valuation.

The annual payments must be made in quarterly installments or other intervals specified by plan rules beginning no later than 60 days after demand. Some plans have imposed earlier payment dates.[913] Interest at the rate of short-term commercial loans[914] accrues on payments not made when due unless the plan adopts a different rate pursuant to 29 C.F.R. §4219.33.[915] Prepayment of "gap period interest" — the interest for the year in which the withdrawal occurred — is permitted.

Acceleration is provided in the event of "default,"[916] i.e., a failure to make any payment when due if not cured within 60 days after the employer receives written notice thereof. Some plans have attempted to shorten the default period by including a notice of default in the demand itself. In addition, plans can adopt rules that provide for other instances of default where there is a substantial likelihood that an employer will be unable to pay its liability.[917]

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ule" for withdrawal liability payment. According to the district court, the Seventh Circuit recognized in its decision that the MPPAA provides for a default due date if a schedule fails to specify such a date. *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co.*, 48 EBC 2686 (N.D. Ill. 2010).

[904] *Chi. Truck Drivers Pension Fund v. Rentar Indus., Inc.*, 12 EBC 1029 (N.D. Ill. 1989); *contra Teamsters Pension Trust Fund v. Laidlaw Indus., Inc.*, 745 F. Supp. 1016 (D. Del. 1990).

[905] ERISA §4219(a). *See Nissen Baking Co. v. New England Teamsters & Trucking Indus. Pension Fund*, 737 F. Supp. 679 (D. Me. 1990); *Superior Forwarding Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 6 EBC 2694 (E.D. Ark. 1985); *Combs v. Manor Mines, Inc.*, 5 EBC 1475 (D.D.C. 1984); *Oolite Industries, Inc. and Central States Southeast & Southwest Areas Pension Fund*, 8 EBC 2009 (Cornelius, Arb. 1987).

[906] ERISA §101(l), enacted by the Pension Protection Act of 2006, Pub. L. No. 109-280, §502(b)(1). Regulations may permit a longer time than 180 days as may be necessary in the case of a plan that determines withdrawal liability using certain methods. ERISA §101(l)(2)(A)(ii).

[907] The PBGC has taken the position in amicus curiae that a notice is not untimely if it is given before the expiration of the six-year statute of limitations. *See ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988); *Ludington News Co. and Michigan/UFCW/Employers Pension Fund*, 9 EBC 1913 (Cornelius, Arb. 1988). *See also Brentwood Fin. Corp. v. W. Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456 (9th Cir. 1990) (two-year delay not unreasonable).

[908] *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990) (arbitrator's refusal to consider plan's revised withdrawal liability assessment on ground of unreasonable delay was abuse of discretion because correctness of revision was undisputed and employer had nearly nine months between receiving revised assessment and rescheduled arbitration hearing date); PBGC Opinion Letter 90-2. *See also Cent. States, Se. & Sw. Areas Pension Fund v. Hunt Truck Lines, Inc.*, 43 F. Supp.2d 942 (N.D. Ill. 1999).

[909] ERISA §4219(c)(1)(C).

[910] 802 F.3d 534 (3d Cir. 2015).

[911] As stated above, MPRA explicitly provided in §432(g) that surcharges that arose after December 31, 2014, were not taken into account in calculating the highest contribution rate. See also 29 C.F.R. §4219.3(a), added by RIN 1212-AB36, 86 Fed. Reg. 1256 (Jan. 8, 2021) where plans must disregard surcharges and certain contribution increases in determining the highest contribution rate.

[912] 24 F.4th 1278 (9th Cir. 2022).

[913] *Cent. States Se. & Sw. Areas Pension Fund v. Commercial Cartage Co.*, No. 86 C 3268 (N.D. Ill. Apr. 23, 1987).

[914] The average prime rate published by the Federal Reserve Board.

[915] *See* 29 C.F.R. §4219.32(b).

[916] ERISA §4219(c)(5). *Cent. States, Se. & Sw. Areas Pension Fund v. E & L Dev't Inc.*, 53 EBC 2873 (N.D. Ill. 2012) (withdrawing employer owes liquidated damages equal to 20% of its unpaid withdrawal liability payments where pension fund properly accelerated total amount due).

[917] *Connors v. B & H Trucking Co.*, 871 F.2d 132 (D.C. Cir. 1989).

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PBGC regulations preclude plans from declaring a default while a timely filed arbitration demand is pending.[918] A pending arbitration, however, will not forestall a collection action, with its attendant penalties for failure to pay.[919]

Plans can adopt rules for other terms and conditions relating to the satisfaction of withdrawal liability[920] and special provisions can be made to take into account the employer's creditworthiness.[921] The prohibited transaction rules of ERISA §406(a) do not apply to actions required or permitted by the withdrawal liability sections ERISA or to arrangements relating to withdrawal liability involving the plan.[922]

The PBGC finds certain information helpful when reviewing proposals to adopt alternative terms and conditions to satisfy withdrawal liability, namely information in support of an assertion that the proposed alternative would retain employers in the plan, and that without the proposed alternative, employers would withdraw from, or significantly reduce contributions to, the plan in ways that would undermine plan solvency.[923] Generally, factors PBGC considers in its review include whether a proposal will realistically maximize the collection of withdrawal liability, is in the interests of participants, is consistent with ERISA and PBGC rules, and will not create an unreasonable risk of loss to the PBGC loan insurance program. Additionally, PBGC considers whether the assumptions used to determine the proposed alternative terms and conditions are reasonable and supported by credible data, reasonable in scope and application, and applied and operated uniformly with respect to all employers (allowing for consideration of an employer's creditworthiness).[924]

[918] 29 C.F.R. Part 4219, Subpart C; PBGC Opinion Letter 82-27. The PBGC also has taken this position in litigation. "Brief of Defendant Pension Benefit Guaranty Corporation in Opposition to Plaintiffs' Motion for Preliminary Injunction," pp. 9–10 (Nov. 5, 1981), *The Terson Co. v. PBGC*, 565 F. Supp. 203 (N.D. Ill. 1982).

[919] *Combs v. Manor Mines, Inc.*, 5 EBC 1475 (D.D.C. 1984). In *Central States, Southeast & Southwest Areas Pension v. C.J. Rogers Transportation Co.*, 544 F. Supp. 308 (E.D. Mich. 1982), the employer avoided liquidated damages by paying the interest.

[920] ERISA §4219(c)(7), §4224. *See* PBGC Policy Statement on Requests to Review Multiemployer Plan Alternative Terms and Conditions to Satisfy Withdrawal Liability, 83 Fed. Reg. 14,524 (Apr. 4, 2018). The PBGC advised that a rule providing the same payment schedule for all employers in a terminating plan is not permissible. PBGC Opinion Letter 82-24.

[921] ERISA §4214(b).

[922] ERISA §408(b)(10); ERISA §4219(d), as amended by Pub. L. No. 113-235, Div. O, §201(a)(7)(B), effective December 16, 2014.

[923] PBGC Policy Statement on Requests to Review Multiemployer Plan Alternative Terms and Conditions to Satisfy Withdrawal Liability, 83 Fed. Reg. 14,524, 14,526 (Apr. 4, 2018). PBGC finds it helpful to understand: (1) how the alternative payment amount or schedule is determined; (2) employer eligibility requirements; (3) how Expected cash flows, expected unfunded liability, expected recovery of withdrawal liability, and projected insolvency dates under the statutory withdrawal liability rules compare with those likely under the alternative terms and conditions for satisfying withdrawal liability; (4) assumptions underlying the comparison of existing and alternative rules (taking into account the historical experience of the plan), including explanations and substantiations of assertions for the employers' ability to meet their pension obligations and the extent to which employers will elect to participate in the alternative terms and conditions; and (5) information on the composition of contributing employers, as applicable, such as contributions, active participants, contribution base units, the ability of employers to meet their pension obligations, and withdrawal liability estimates of significant employers, including how the alternative terms and conditions apply to significant employers. 83 Fed. Reg. at 14,526 (Apr. 4, 2018).

[924] 83 Fed. Reg. at 14,527 (Apr. 4, 2018).

12. Enforcement of Withdrawal Liability

a. Review of Plan Withdrawal Liability Demands

If the employer disagrees with the sponsor's figures, it may, within 90 days, ask for a review by the sponsor.[925] After the review, arbitration and litigation are available. If review is not timely requested, however, arbitration is barred.[926] Courts have been reluctant to toll the 90-day review period, even in the event of bankruptcy.[927]

If requested by the employer, the plan must provide the employer, without charge, "general" information necessary to compute liability. A reasonable charge may be assessed for providing "unique" information.[928]

b. Defenses to Withdrawal Liability

There are several possible defenses to a withdrawal liability demand. Each must be timely raised in the review process and in arbitration (or perhaps in injunction proceedings before arbitration, in an appropriate case):

- lack of a withdrawal — if the employer continues to be a signatory to the agreement and is seeking work, the employer can argue that it has not withdrawn;[929]
- errors in the calculation of liability — the demand should be reviewed carefully for errors in calculation of liability (often these stem from incorrect data);[930]
- failure to properly apply an exception, limit or special rule;[931]
- actuarial issues — the interest rate used to calculate withdrawal liability can greatly affect the amount of withdrawal liability, and some successful challenges to the

[925] The employer must clearly ask for a review. A mere request for information will not suffice. *Niagara of Wis. Paper Corp. v. Paper Indus, Union-Mgmt. Pension Fund*, 800 F.2d 742 (8th Cir. 1986).

[926] *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719 (9th Cir. 2000); *Bowers v. Transp. Maritima Mexicana, S.A.*, 901 F.2d 258 (2d Cir. 1990); *Bd. of Trs. of the W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1400 (9th Cir. 1984); *Bd. of Trs. of Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Canny*, 900 F. Supp. 583 (N.D.N.Y. 1995); *Niagara of Wis. Paper Corp. v. Paper Indus. Union-Mgmt. Pension Fund*, 603 F. Supp. 1420 (D. Minn. 1984); *United States Steel Corp. and Cent. States Se. & Sw. Areas Pension Fund*, 10 EBC 2324 (McAllister, Arb. 1989). In Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) *Pension Fund v. El Paso CGP Co.*, 38 EBC 1380 (N.D. Ill. 2006), arbitration was denied to a group of four companies that waited almost three years to contest their joint withdrawal liability determination. The fund filed proof of claim of withdrawal liability in January 2002, and no company requested review of that determination prior to November 18, 2004, when the fund sent notice and demand to all companies. After receiving the notice and demand, the companies made payments to the fund and in August 2005 demanded arbitration. Because the demand for arbitration was untimely, the fund could accelerate any unpaid withdrawal liability.

[927] *IAM Nat'l Pension Fund v. Slyman Indus., Inc.*, 901 F.2d 127 (D.C. Cir. 1990); *McDonald v. Centra, Inc.*, 118 B.R. 903 (D. Md. 1990); *In re Centra, Inc. and Chicago Truck Drivers Pension Fund*, 15 EBC 2713 (Jaffe, Arb. 1992).

[928] ERISA §4221(e).

[929] *Coal Drilling Services, Inc. and UMW 1974 Pension Plan*, 5 EBC 1833 (Polak, Arb. 1984).

[930] *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990) (propriety of including benefit increases in calculation).

[931] *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 14 EBC 1518 (D. Md. 1991).

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rate used have resulted in lowered liability (the lower the interest rate assumption, the higher the funding liability);[932] other assumptions also may have a large effect;[933]

• controversy over the date of withdrawal;[934]

• calculations of assets and liabilities;[935]

• improper application of controlled group rules;[936]

• arbitrary and capricious adoption or interpretation of, or failure to adopt, special rules;[937]

• constitutional attacks, although these have been defeated in the courts except for attacks on the presumptions[938] and the payment of interest on refunds of interim withdrawal liability payments;[939]

• retroactive adoption of rules;

• creative counterclaims; and[940]

• termination of voluntary contributions not covered by a written agreement. [941]

Laches claims generally have not prevailed.[942]

c. *Arbitration Procedures, Presumptions, and Time Limits*

Disputes concerning withdrawal liability (and its exceptions, limits and other issues) are arbitrable.[943] Arbitration may be initiated by either party within 60 days after the plan sponsor notifies the employer of its final determination of liability or, if earlier, within 120 days of the employer's seeking review of the initial determination. Arbitration may be initiated jointly within 180 days of the plan sponsor's initial determination.[944]

The arbitration requirement is strictly enforced by courts, and the demand must be timely and properly made.[945] Defenses not timely raised in arbitration will be barred by the arbitrator,[946] even if the defenses are not within the arbitrator's jurisdic-

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[932] See the discussion of interest rates in IX.C.4., above.

[933] *See, e.g., Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990) (assumption that all benefits earned for last employer permitted).

[934] *Malden Mills Indus., Inc. v. ILGWU Nat'l Fund*, 766 F. Supp. 1202 (D. Mass. 1991); *Sunstar Foods, Inc. v. UFCW Pension Fund*, 5 EBC 1349 (D. Minn. 1984) (withdrawal date not until after strike); *Speckman v. Barford Chevrolet Co.*, 535 F. Supp. 488 (E.D. Mo. 1982); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 549 F. Supp. 404 (S.D.N.Y. 1982), aff'd, 725 F.2d 843 (2d Cir. 1984), later proceeding, 607 F. Supp. 570 (S.D.N.Y. 1985); *ITU Pension Plan and Ft. Worth Star Telegram*, 5 EBC 1193 (Mittelman, Arb. 1984); *Steel Weldments Division and Trustees of Iron Workers Local 473 Pension Trust*, 5 EBC 1596 (Dreyer, Arb. 1984).

[935] *Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990) (death benefits not part of UVB; insurance contracts undervalued); *Masters, Mates and Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990) (five-year moving average asset valuation); *Bd. of Trs., Mich. United Food & Commercial Workers Unions v. Eberhard Foods, Inc.*, 831 F.2d 1258 (6th Cir. 1987).

[936] *Cent. States, Se. & Sw. Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483 (7th Cir. 2000); *Transp. Motor Express, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 724 F.2d 575 (7th Cir. 1983).

[937] *Great Atlantic & Pacific Tea Co. v. Carmen*, 781 F. Supp. 1086 (E.D. Pa. 1992) (employer's withdrawal liability payments refunded where retail food plan adopted invalid 35% liability abatement amendment); *Hertz Corp. and Commission Drivers Local 187 Pension Fund*, 4 EBC 1367 (Mittelman, Arb. 1983) (rule upheld); *Hankin Transport Personnel, Inc. and Teamsters 641 Pension Fund*, AAA Case No. 15-621-0019-88-V (Apr. 20, 1991); *Del Monte Corp. and Bakery and Confectionery Union Pension Fund*, 8 EBC 1574 (Nagle, Arb. 1986).

[938] *See, e.g., Connolly v. PBGC*, 475 U.S. 211 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984), rev'g and rem'g 705 F.2d 1502 (1983); *Peick v. PBGC*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, 4 EBC 2473 (7th Cir. 1983) (an early thorough analysis of the arguments). The plan sponsor's presumptions were held invalid due to inherent bias of plan trustees in *United Retail & Wholesale Employers Teamsters Union Local 115 Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), aff'd, 481 U.S. 735 (1987). Mandatory arbitration was upheld in *Connors v. Ryan's Coal Co.*, 923 F.2d 1461 (11th Cir. 1991). An individualized relief provision ("rifle shot" legislation) was upheld in *Central States Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 766 F. Supp. 650 (N.D. Ill. 1991). In *Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the U.S. Supreme Court held that MPPAA's arbitration and assessment procedures did not violate an employer's constitutional right to an impartial decisionmaker with respect to its withdrawal liability, as well as its Fifth Amendment rights to substantive due process and just compensation for property taken by the federal government. The Court reasoned that MPPAA's provisions giving the trustees' initial determination of withdrawal liability do not violate due process rights because the trustees are acting in an enforcement capacity, not an adjudicatory role.

[939] *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990).

[940] For example, a claim of breach of contract and breach of implied covenant of good faith due to a wrongful refusal to represent employees. *Thompson Bldg. Materials, Inc. v. Teamsters Local 952*, 5 EBC 1647 (C.D. Cal. 1984) (claim was arbitrable and/or within the jurisdiction of the NLRB).

[941] *Bulk Transport v. Teamsters Union, No. 142 Pension Fund*, 96 F.4th 1027(7th Cir. 2024) (pension fund could not enforce withdrawal liability for the termination of contributions made outside the explicit written terms of the agreement, even if the employer had adopted certain practices or agreements by conduct).

[942] The PBGC took the position as amicus curiae that a notice cannot be untimely if given prior to the expiration of the six-year statute of limitations. *Brentwood Fin. Corp. v. W. Conference of Teamsters Pension Fund*, 902 F.2d 1456 (9th Cir. 1990) (two-year delay not unreasonable); *ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988); *Ludington News Co. and Michigan/UFCW/Drug Employers Pension Fund*, 9 EBC 1913 (Cornelius, Arb. 1988). *But see In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990).

[943] ERISA §4221.

[944] ERISA §4221(a)(1). *See* 29 C.F.R. §4221.1 *et seq.* (procedures for initiating and conducting arbitration proceedings).

[945] *See Steelworkers Pension Trust v. Renco Grp., Inc.*, 694 Fed. Appx. 69 (3d Cir. 2017) (unpub. op.) (conflicts over MPPAA employer status, adequacy of trust's notice to alleged withdrawing employer, and timeliness of demand for arbitration in $86 million pension withdrawal liability assessment dispute arising from RG Steel bankruptcy must be resolved in arbitration under ERISA §4221(a)(1)); *Cent. States, Se. & Sw. Areas Pension Fund v. Allega Concrete Corp.*, 772 F.3d 499 (7th Cir. 2014) (employer failed to properly provide notice of its arbitration demand when it provided notice to fund within statutorily required time frame but provided notice to American Arbitration Association more than two weeks after period expired).

[946] *Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mech., Inc.*, 909 F.2d 1379 (10th Cir. 1990); *ILGWU Nat'l Ret. Fund v. Smart Modes of Cal., Inc.*, 735 F. Supp. 103 (10th Cir. 1990); *Phila. Journal, Inc. v. Teamsters Pension Fund of Phila.*, 891 F.2d 282 (3d Cir. 1989); *Crown Cork & Seal Co. v. Cent. States Se. & Sw. Areas Pension Fund*, 881 F.2d 11 (3d Cir. 1989); *Robbins v. Chipman Trucking, Inc.*, 848 F.2d 196 (7th Cir. 1988); *Robbins v. B & B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987); *Cent. States, Se. & Sw. Areas Pension Fund v. Rogers*, 843 F. Supp. 1135 (E.D. Mich. 1992); *N.Y. State Teamsters Conference Pension & Ret. Fund v. Seaway Motor Express, Inc.*, 12 EBC 1431 (N.D.N.Y. 1990); *Teamsters Pension Trust Fund of Phila. v. Laidlaw Indus., Inc.*, 745 F. Supp. 1016 (D. Del. 1990); *Combs v. Leishman*, 691 F. Supp. 424 (D.D.C. 1988); *Trs. of the Amalgamated Ins. Fund v. Vi-Mil, Inc.*, 1987 WL 14665 (S.D.N.Y. 1987); *Cent. Transp., Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 639 F. Supp. 788 (E.D. Tenn. 1986), aff'd, 816 F.2d 678 (6th Cir. 1987); *W. Conference of Teamsters Pension Trust Fund v. H.F. Johnson & Midland Terminal, Inc.*, 606 F. Supp. 231 (W.D. Wash. 1985), rev'd, 830 F.2d 1009 (9th Cir. 1986); *Combs v. W. Coal Corp.*, 611 F. Supp. 917 (D.D.C. 1985); *Western Conference of Teamsters Pension Fund v. F.C. Parsons, Inc.*, 5 EBC 2277 (W.D. Wash. 1984); *J.L. Denio, Inc. and Operating Engineers Pension Trust*, 8 EBC 1978 (Slater, Arb. 1987).

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tion.[947] Clerical and de minimis errors made by the parties are not excused by arbitrators.[948] Arbitrators rarely make exceptions,[949] and such exceptions often are accompanied by warnings that no further exceptions will be made.[950]

In general, an employer is treated as waiving its right to challenge a calculation of its withdrawal liability if it does not first file an arbitration, because arbitration is mandatory under ERISA §4221.[951] This has produced interesting results in some cases. For instance, in *New York State Teamsters Conference Pension and Retirement Fund v. Express Services, Inc.*,[952] the Second Circuit held that federal courts have the authority to determine whether an entity is an employer, while arbitrators were authorized to determine whether the entity remained an employer as of date it withdrew.

ERISA §4221(a)(2) requires that arbitration be conducted in accordance with "fair and equitable procedures" promulgated by the PBGC. The rules of the American Arbitration Association are used most commonly. PBGC regulations set forth methods for obtaining PBGC approval for alternative arbitration procedures that may be used in lieu of the procedures in the regulations, although the regulations do not permit informal procedures.[953] Arbitrations must be conducted "in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power) and enforced in the United States courts as an arbitration proceeding carried out under Title 9, United States Code."[954] Discovery is available in the arbitration but not during the review process.[955]

In general, ERISA provides that determinations made by a plan with respect to withdrawal liability are presumed correct unless it is shown by a preponderance of the evidence that the determination was clearly erroneous. A plan's determination of its unfunded vested benefits for a plan year is presumed to be correct unless it is shown by a preponderance of the evidence that:

- the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations);[956] or
- the plan's actuary made a significant error in applying the assumptions or methods.[957]

These presumptions, however, have been invalidated on a constitutional basis by some courts.[958] Others have upheld them.[959] Absent presumptions, the burden of proof generally rests with the employer.[960] Questions of fact and issues collateral to the determination of liability, however, may shift some burden to the plan.[961]

ERISA contains an exception to the general rule[962] that a plan sponsor's determinations are presumed correct. Under this exception, the plan sponsor bears the burden of proving by a preponderance of the evidence that a transaction was made with the intent to avoid or evade withdrawal liability. The sponsor bears this burden if it claims that the employer is liable for withdrawal liability in whole or in part because the principal purpose of a transaction that occurred before 1999 was to evade or avoid withdrawal liability and the transaction occurred at least five years before the date of the complete or partial withdrawal.[963]

ERISA §4221(f)[964] changes the rules for contesting the plan sponsor's determination of withdrawal liability where the plan alleges that a transaction was undertaken after 1998 to evade or avoid withdrawal liability. The provision allows employers accused of avoiding withdrawal liability to elect a special rule under which they do not have to make withdrawal li-

[947] *Giroux Bros. Transp., Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996); *Vaughn v. Sexton*, 975 F.2d 498, 502 (8th Cir. 1992); *Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mech. Inc.*, 909 F.2d 1379 (10th Cir. 1990); *Teamsters Pension Trust Fund v. Allyn Transp. Co.* 832 F.2d 502 (9th Cir. 1987).

[948] *Cent. States Se. & Sw. Areas Pension Fund v. Nat'l Transit Cartage Co.*, 13 EBC 2093 (N.D. Ill. 1991); *Assonet Sand & Gravel Corp. and New England Teamsters & Trucking Industry Pension Fund*, 13 EBC 2318 (McCausland, Arb. 1991).

[949] *Banner Indus., Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989); *Chi. Truck Drivers Pension Fund v. Rentar Indus., Inc.*, 12 EBC 1029 (N.D. Ill. 1989), *aff'd*, 951 F.2d 152 (7th Cir. 1991). *But see ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129 (3d Cir. 1986); *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991).

[950] *Banner Indus., Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989).

[951] *Bd. of Trs. Sheet Metal Workers' Nat'l Pension Fund v. BES Servs., Inc.*, 469 F.3d 369 (4th Cir. 2006). *See ILGWU Nat'l Ret. Fund v. Meredith Grey, Inc.*, 94 Fed. Appx. 850 (2d Cir. 2003) (unpub. opin.) (company that allegedly was not told for 12 years that firm under common control had withdrawn from multiemployer plan is jointly and severally liable for that firm's withdrawal liability even if it never received notice of liability assessment).

[952] 426 F.3d 640 (2d Cir. 2005).

[953] 29 C.F.R. §4221.14. The PBGC approved alternative procedures as developed by the International Foundation of Employee Benefit Plans (IFEBP) and the American Arbitration Association (AAA), under the title "Multiemployer Pension Plan Arbitration Rules." *See Hankin Transp. Personnel, Inc. v. Teamsters Local 641 Pension Fund*, AAA No. 15-621-0019-88-V (Apr. 20, 1991).

[954] ERISA §4221(b)(3).

[955] *John J. Nissen Baking Co. v. New England Teamsters & Trucking Indus. Pension Fund*, 737 F. Supp. 679 (D. Me. 1990) (no discovery during review process). *See also Houston Natural Gas Co. and Central States Southeast & Southwest Areas Pension Fund*, 12 EBC 1019 (Elkin, Arb. 1989).

[956] ERISA §4221(a)(3)(B)(i). Overturning the arbitration, the U.S. District Court for the District of Columbia held that one unreasonable assumption does not render all assumptions unreasonable. *Combs v. Classic Coal Corp.*, 12 EBC 1229 (D.D.C. 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991).

[957] ERISA §4221(a)(3)(B)(ii); *see* 29 C.F.R. §4221.10(c).

[958] *Teamsters Local 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), aff'd, 481 U.S. 735 (1987).

[959] *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985); *Bd. of Trs. of the W. Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984); *Wash. Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, 3 EBC 2545 (E.D. Va. 1982), *aff'd in part and rev'd in part*, 718 F.2d 628 (4th Cir. 1983).

[960] *Car Colteryahn Dairy, Inc. and Western Pa. Teamsters Pension Fund*, AAA No. 55-621-0018-85 MEPP (Eisler, Arb. 1988); *Fraser Shipyards, Inc. and IAM National Pension Fund*, 7 EBC 2562 (Cornelius, Arb. 1986).

[961] *Milwaukee Brewery Workers' Pension Plan and Jos. Schlitz Brewing Co.*, 9 EBC 2385 (Siegal, Arb. 1988); *H.C. Elliott, Inc. and Carpenters Pension Trust Fund*, 13 EBC 1962 (Kagel, Arb. 1991).

[962] Under ERISA §4221(a)(3)(A).

[963] ERISA §4221(e), as redesignated by Pub. L. No. 110-458, §105(b)(2), effective for plan years beginning after December 31, 2007.

[964] Added by Pub. L. No. 109-280, §204(d), and redesignated by Pub. L. No. 110-458, §105(b)(2), applicable to any person that receives a notification under ERISA §4219(b)(1) on or after August 17, 2006, with respect to a transaction that occurred after December 31, 1998.

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ability payments while their claim is heard through an arbitration proceeding, a court of competent jurisdiction or as otherwise permitted by law. Under the special rule, the employer would not have to make payments unless a final decision is reached upholding the plan sponsor's determination.

The special rule applies only if:

• the employer provides notice to the plan sponsor within 90 days after the sponsor notifies the employer of its liability; and

• if a final decision on the arbitration proceeding, or in court, of the withdrawal liability dispute has not been rendered within 12 months from the date of such notice, the employer provides to the plan a bond issued by a corporate surety or an amount held on escrow by a bank or similar financial institution, in an amount equal to the sum of the withdrawal liability payments that otherwise would be due for the 12-month period beginning with the first anniversary of such notice.

The bond or escrow must remain in effect until there is a final decision of the withdrawal liability dispute through arbitration or in court.

PBGC regulations provide that an employer that complies with the specific procedures of ERISA §4221(e) or §4221(f) is not in default under ERISA §4219(c)(5)(A).[965]

Costs of arbitration are generally borne equally and each party pays its own attorneys' fees.[966]

d. Collection of Liability Pending Review

Pending the plan's review and the arbitrator's decision, the employer must pay installments of the liability as demanded.[967] Courts generally have required payment during any dispute, even of shareholders of dissolved companies and of members of a bankrupt's controlled group.[968] In some early cases, injunctions were issued precluding collection of liability during court review, but courts have moved away from this approach and parties find it difficult to meet the burden of showing irreparable harm in such a case.[969] The Sixth Circuit held that, with no exceptions, the statutory language does not allow federal courts to issue injunctions barring employers from collecting interim withdrawal liability payments pending arbitration.[970] Courts that have adopted an irreparable injury exception have held that they have the discretion to exercise it only once the employer has show that the plan lacks a colorable or non-frivolous claim.[971] The Third Circuit, however, has held that interest must be paid on refunds in order to overcome constitutional objections.[972] PBGC regulations also require interest on refunds.[973] The liability is adjusted later if changed by the arbitrator.[974]

e. Judicial Review and Enforcement

(1) Review of Arbitrator's Decision

Within 30 days after the arbitrator's award is issued, an action may be brought in U.S. district court to enforce, modify, or vacate the award under ERISA §4301.[975] The 30-day period runs from the date of the plan's demand. Plan sponsors also may demand withdrawal payments under ERISA §515. Because collection may be sought under ERISA §515, the 30-day limit is of little practical effect.[976] In any such action there is a rebuttable presumption (by a clear preponderance of the evidence) that the arbitrator's factual findings were correct.[977] Courts review legal conclusions de novo.[978]

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[965] 29 C.F.R. §4219.1(c); RIN 1212-AB07, 73 Fed. Reg. 79,628 (Dec. 30, 2008) (referring to former ERISA §4221(f) and §4221(g), prior to redesignation by Pub. L. No. 110-458, §105(b)(2), effective as if included in Pub. L. No. 109-280, Pub. L. No. 110-458, §112). For dates of applicability, see 73 Fed. Reg. 79,634.

[966] 29 C.F.R. §4221.10. *Assonet Sand and Gravel Corp. and New England Teamsters Pension Fund*, 13 EBC 2318 (McCausland, Arb. 1991); *Cent. States, Se. & Sw. Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 766 F. Supp. 650 (E.D. Ill. 1991); *Woodward Sand Co. and Operating Engineers Pension Trust*, 3 EBC 2351 (Kaufman, Arb. 1982). *But see Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704 (8th Cir. 2002) (plan's mandatory arbitration provision requiring that participants split the cost of arbitration violates ERISA §503, which prohibits employee benefit plans from enforcing any claims procedure that unduly inhibits or hampers initiation or processing of plan claims, because threat of having to pay arbitrator's expenses discourages pursuit of legitimate claims by those who cannot afford such costs).

[967] ERISA §4221(d); *Transport Inc. and UMW 1974 Pension Plan*, 4 EBC 2625 (Arb. 1984). If an employer fails to make its withdrawal liability payments during arbitration, the plan may go to court to enforce the employer's obligation to pay. *See, e.g., Combs v. Manor Mines, Inc.*, 5 EBC 1475 (D.D.C. 1984); *Comm'n Salesmen, Drivers & Helpers Union Local 187 Pension Fund v. Hertz Corp.*, 3 EBC 1801 (E.D. Pa. 1982). *See also Nat'l Shopmen Pension Fund v. DISA Indus. Inc.*, 653 F.3d 573 (7th Cir. 2011) (when multiemployer pension fund increased its assessment of withdrawal liability while employer's arbitration demand was pending, employer was required to continue to arbitrate and pay reassessed amount).

[968] *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152 (7th Cir. 1991); *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Cent. Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991); *Cent. States Se. & Sw. Areas Pension Fund v. Chatham Props.*, 929 F.2d 260 (6th Cir. 1991); *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115 (4th Cir. 1991); *Carriers Container Council, Inc. v. Mobile Steamship Association, Inc.*, 896 F.2d 1330 (11th Cir. 1990); *Cent. States, Se. & Sw. Areas Pension Funds v. Minneapolis Van & Warehouse Co.*, 764 F. Supp. 1289 (N.D. Ill. 1991).

[969] *United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), aff'd, 481 U.S. 735 (1987); *Marvin Hayes Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 806 F.2d 655 (6th Cir. 1986); *Cent. States, Se & Sw. Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 639 F. Supp. 1468 (N.D. Tex. 1986); rev'd, 826 F.2d 320, 8 EBC 2397 (5th Cir. 1987).

[970] *Findlay Truck Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 726 F.3d 738 (6th Cir. 2013).

[971] *See Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir. 1997). *See also Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621 (5th Cir. 1994); *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152 (7th Cir. 1991). A bond will not stay an interim payments order. *Korea Shipping Corp. v. N.Y. Shipping Ass'n*, 880 F.2d 1531 (2d Cir. 1989); *IAM Nat'l Pension Fund v. Cooper Indus., Inc.*, 789 F.2d 21 (D.C. Cir. 1986); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641 (7th Cir. 1986). An injunction was granted in *Victor Construction Co. v. Construction Laborers Pension Trust*, 3 EBC 1414 (C.D. Cal. 1982), and denied in *Washington Star Co. v. International Typographical Union*, 3 EBC 1630 (D.D.C. 1982) and in *Acri Wholesale Grocery Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 4 EBC 1249 (S.D. Iowa 1983).

[972] *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990).

[973] 29 C.F.R. §4219.32.

[974] ERISA §4221(d).

[975] ERISA §4221(b)(1), §4221(d), §4301(b).

[976] *Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.*, 683 F. Supp. 986 (E.D. Pa. 1988), aff'd, 862 F.2d 1020 (3d Cir. 1988).

[977] ERISA §4221(c). *See, e.g., Trs. of the Cent. Pension Fund of the Int'l Union of Operating Engineers & Participating Employers v. Wolf Crane Serv., Inc.*, 374 F.3d 1035 (11th Cir. 2004).

[978] *See, e.g., Trs. of the Cent. Pension Fund of the Int'l Union of Operating Engineers & Participating Employers v. Wolf Crane Serv., Inc.*, 374 F.3d 1035

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Federal district courts have exclusive jurisdiction over MPPAA controversies and concurrent jurisdiction with state courts over collection actions.[979] Costs and attorneys' fees are discretionary[980] against either party.[981] A losing defendant must pay costs and attorneys' fees under ERISA §515.[982] The statute of limitations is the later of six years after the cause arose or three years after the plaintiff knew or should have known it had arisen (except in case of fraud, which has a statute of limitations of six years from the fraud's discovery). The statute begins to run upon the liability demand, subject to laches.[983] In the rare case of detriment to the employer, a laches claim may prevail.[984]

Notwithstanding the above, in *Board of Trustees of District 15 Machinists' Pension Fund v. Kahle Engineering Corp.*,[985] the Third Circuit has held that a multiemployer plan can sue to recover unpaid withdrawal liability nine years after the employer first defaulted on scheduled payments. Although MPPAA has a six-year limitations period, the court held that the employer's obligation to make scheduled withdrawal liability payments to the plan was like an obligation to make installment payments. Therefore, the plan could sue to collect payments due during the six years before the plan filed the lawsuit. The Third Circuit rejected the Seventh Circuit's approach in *Central States, Southeast & Southwest Areas Pension Fund v. Navco*[986] that the limitations period begins to run with the first default.

The U.S. Supreme Court upheld the Third Circuit's approach in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*[987] In that case, a multiemployer pension plan's action to collect delinquent withdrawal liability from an employer, filed more than six years after it missed its first payment but within six years of dates scheduled for succeeding payments, was timely under ERISA §4301(f)'s six-year limitations period as to all but first payment. The Court held that a new cause of action, with its own limitations period, arises from the date each payment is missed even where the plan may accelerate and collect the entire debt if the employer defaults. According to the Court, a cause of action does not ripen under MPPAA until the employer fails to make a withdrawal liability payment on time. Thus, a plaintiff who does not sue in time to recover the first payment still may recover any later payments that came due within six years of the complaint.

Venue lies where the plan is administered or where the defendant resides or does business.[988]

In any action under ERISA §4301 or ERISA §4221, the PBGC must be served with a copy of the complaint.

(2) Direct Resort to the Courts (Before Arbitration)

Although the statutory preference for arbitration is strong, courts sometimes consider strictly legal issues before arbitration. Direct resort to courts can help soften the impact of the presumptions otherwise required by MPPAA. Many of the cases have involved constitutional issues.[989] Courts, however, also have reviewed questions such as who is an employer,[990] when a withdrawal occurred,[991] what is a "facility" under ERISA §4217,[992] the application of the labor dispute rule,[993] the timeliness of an arbitration demand,[994] the application of the transfer

(11th Cir. 2004) (court abused its discretion by using "very deferential" standard of review articulated by Federal Arbitration Act in reviewing arbitrator's legal conclusions regarding withdrawal liability; court should have used de novo standard because FAA is inconsistent with MPPAA's broad mandate allowing courts to enforce, vacate, or modify arbitrator awards); *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990); *Parmac, Inc. v. IAM Nat'l Pension Fund*, 872 F.2d 1069 (D.C. Cir. 1989); *Trs. of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208 (7th Cir. 1989); *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989); *Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926 (9th Cir. 1986).

[979] ERISA §4301(c). *See Trs. of Colo. Pipe Indus. Pension Trust v. Howard Elec. & Mech., Inc.*, 909 F.2d 1379 (10th Cir. 1990).

[980] ERISA §502(g). *See Nat'l Stabilization Agreement of Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981); *Metro. D.C. Paving Indus. Trust v. Jones & Artis Constr., Co.*, 2 EBC 2227 (D.D.C. 1981); *Cent. States, Se. & Sw. Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919 (E.D. Mich. 1981). These remedies are not available in an action to enforce a suretor's bond. *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984).

[981] *Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund*, 710 F. Supp. 983 (S.D.N.Y. 1989), aff'd, 902 F.2d 185 (2d Cir. 1990).

[982] ERISA §502(g)(2)(D).

[983] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989); *Korman Corp. and Teamsters Pension Trust Fund of Philadelphia*, 10 EBC 1608 (Pereles, Arb. 1988); *W. Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009 (9th Cir. 1987); *ILGWU Nat'l Ret. Fund v. Smart Modes of Cal., Inc.*, 735 F. Supp. 103 (S.D.N.Y. 1990).

[984] *Trucking Emps. of N. Jersey Welfare Fund v. Kero Leasing Corp.*, 377 F.3d 288 (3d Cir. 2004). *In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990) (motion to reopen withdrawal liability action barred by laches when filed 20 months after bankruptcy stay lifted).

[985] 43 F.3d 852 (3d Cir. 1994).

[986] 3 F.3d 167 (7th Cir. 1993). *See also Asbestos Workers Local 53 Pension Fund and Petrin Corp.*, 21 EBC 1072 (Baroni, Arb. 1997).

[987] 522 U.S. 192 (1997).

[988] ERISA §4301(d). Compare general venue under ERISA §502(e)(2). *See, e.g., Carthage Mills Div. of Ashley F. Ward, Inc. v. Textile Workers Pension Fund*, 4 EBC 1329 (S.D. Ohio 1983); *C & S Wholesale Grocers, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 4 EBC 1097 (D. Vt. 1982).

[989] *See, e.g., PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

[990] If the issue is whether an employer remains an employer or whether the employer is subject to MPPAA, the dispute is arbitrable. *See, e.g., Steelworkers Pension Trust v. Renco Grp., Inc.*, 694 Fed. Appx. 69 (3d Cir. 2017) (unpub. op.); *Bauner Indus., Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 875 F.2d 1285 (7th Cir. 1989); *cf. ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879 (2d Cir. 1988); *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054 (7th Cir. 1988); *W. Conference of Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502 (9th Cir. 1987); *IAM Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987); *United Paperworkers Int'l Union Local No. 35 Pension Plan v. Arlington Sample Book Co.*, 5 EBC 1948 (E.D. Pa. 1984); *Baldwin v. Shopmen's Ironworkers Pension Trust of S. Cal.*, 3 EBC 1713 (C.D. Cal. 1982). If the issue is whether an entity has ever been an employer under MPPAA, the dispute must be resolved in the courts. *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir. 1997).

[991] *IAM Nat'l Pension Fund v. Stockton TRI Indus.*, 727 F.2d 1204 (D.C. Cir. 1984), on remand, 598 F. Supp. 267 (D.D.C. 1984) (characterized as an "exceptional case" in *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987)); *Sunstar Foods, Inc. v. UFCW*, 5 EBC 1349 (D. Minn. 1984); *IAM Nat'l Pension Fund v. Schulze Tool & Die Co.*, 564 F. Supp. 1285 (N.D. Cal. 1983); *Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, 3 EBC 2545 (E.D. Va. 1982), *aff'd in part and rev'd in part*, 718 F.2d 628 (4th Cir. 1983).

[992] *Meatcutters Union Local No. 88 & Food Employers Pension Plan v. Del Monte Supermarkets, Inc.*, 565 F. Supp. 27 (E.D. Mo. 1983), *vac'd by* joint motion, 4 EBC 2168 (8th Cir. 1983).

[993] *T.I.M.E.-DC, Inc. v. Trucking Emps. of N. Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983). *See also Garland Coal Co. and UMW 1950 and 1974 Pension Trusts* (Dreyer, Arb. 1986).

[994] *See Robins v. Chipman Trucking, Inc.*, 848 F.2d 196 (7th Cir. 1988); *Ells and Construction Laborers Pension Trust*, 5 EBC 1161 (Zimring, Arb.

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rules[995] and availability of laches.[996] Although arbitration is required by the statute only for disputes between employers and plan sponsors under ERISA §4201 through ERISA §4219, the bias is toward arbitration.[997] Even when a defendant goes directly to court, a timely demand for arbitration still is needed for two reasons:

(1) if the court refuses to hear the issue, arbitration would be waived for failure to file and the defense would be lost, and

(2) courts are suspicious of "legal" issues raised by a party who has waived arbitration and seems therefore to be casting the issue as legal in hopes of salvaging the defense.[998]

In some cases, the resort to the courts includes an injunction against the collection of withdrawal liability, but it may be difficult to show irreparable harm.[999] If the issue is whether an entity has ever been an employer under MPPAA, the dispute must be resolved in the courts.[1000]

f. Remedies and Collection

If no arbitration demand is made, or if the employer does not appeal but fails to comply with the arbitrator's decision, a collection action can be brought in federal court under ERISA §515 as if the action were for delinquent contributions.[1001] Under ERISA §502, when judgment is awarded to a plan, the court must award:

(1) the amount of unpaid contributions, plus interest, plus

(2) the greater of 20% of the unpaid contributions (as liquidated damages) or interest.

Attorneys' fees are mandatory as well.[1002] Waived defenses will not be considered as defenses to fund collection actions.[1003]

g. Who Is Liable?

For purposes of collecting withdrawal liability, all members of a controlled group (as of the appropriate liability date) may be sued.[1004] Controlled group membership is determined under the Internal Revenue Code.[1005] Absent corporate veil or alter-ego concepts under state law,[1006] shareholders are not personally liable.[1007] Some cases have used a constructive trust theory.[1008] Individuals, however, can become liable if they are sole proprietors in a business in a controlled group with a withdrawn

1984). However, arbitrators do resolve this issue if asked. *Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436 (E.D.N.Y. 1989); *Seaman Patrick Paper Co. and Central States, Southeast & Southwest Areas Pension Fund,* 10 EBC 1985 (Jaffe, Arb. 1989).

[995] *T.I.M.E.-DC, Inc. v. Mgmt.-Labor Welfare & Pension Funds of Local 1730 Int'l Longshoremen's Ass'n*, 756 F.2d 939 (2d Cir. 1985).

[996] *In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990).

[997] *Sheet Metal Workers' Nat'l Pension Fund v. BES Servs., Inc.*, 469 F.3d 369(4th Cir. 2006) (because consideration of ERISA §4225 is necessary to determine withdrawal liability, disputes under §4225 are subject to mandatory arbitration under ERISA §4221(a)(1), which references ERISA §4201); *Giroux Bros. Transp., Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996) (issues under ERISA §4219 normally cannot be litigated in federal court without arbitration); *Teamster Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115 (4th Cir. 1991) (definition of "employer" arbitrable), *cf. Cent. States, Se. & Sw. Areas Pension Fund v. Personnel, Inc.*, 14 EBC 1082 (N.D. Ill. 1991); *Cent. States, Se. & Sw. Areas Pension Fund v. Chatham*, 929 F.2d 260 (6th Cir. 1991) (effect of parent's bankruptcy on control group liability); *Local 478 Trucking & Allied Indus. Pens. Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991) (ERISA §4225(b) issues arbitrable); *UFCW Pension Plan v. Kowalski's Lexington Country Store, Inc.*, 753 F. Supp. 246 (E.D. Wis. 1990) (court ordered two arbitrations in fact pattern under ERISA §4204 — one between seller and plan and one between buyer and plan, based on a broad arbitration provision in the plan).

[998] *Bd. of Trs. of the W. Conference of Teamsters Pension Trust v. F.C. Parsons, Inc.*, 5 EBC 2277 (W.D. Wash. 1984); *Jos. Schlitz Brewing Co. v. PBGC*, 5 EBC 2561 (E.D. Wis. 1984).

[999] For example, an injunction granted in *Victor Construction Co. v. Construction Laborer's Pension Trust*, 3 EBC 1414 (C.D. Cal. 1982) and denied in *Washington Star Co. v. International Typographical Union*, 3 EBC 1630 (D.D.C. 1982); *Acri Wholesale Grocery Co. v. Central States Southeast & Southwest Areas Pension Fund*, 4 EBC 1249 (S.D. Iowa 1983); and *T.I.M.E.-DC, Inc. v. N.Y. State Teamsters Conference Pension & Retirement Board*, 580 F. Supp. 621 (N.D.N.Y. 1984).

[1000] *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir. 1997).

[1001] ERISA §4221(b)(1), §4221(d), §4301(b).

[1002] ERISA §502(g). *Brentwood Fin. Corp. v. W. Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456 (9th Cir. 1990); *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund*, 916 F.2d 1154, motion granted, 921 F.2d 126 (7th Cir. 1990); *Carriers Container Council, Inc. v. Mobile Steamship Association, Inc.*, 896 F.2d 1330 (11th Cir. 1990); *United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), aff'd, 481 U.S. 735 (1987); *O'Connor v. DeBolt Transfer, Inc.*, 737 F. Supp. 1430 (W.D. Pa. 1990); *IAM Nat'l Pension Fund v. Dravo Corp.*, 7 EBC 1892 (D.D.C. 1986). *See Cent. States, Se. & Sw. Areas Pension Fund v. Lady of Baltimore Foods, Inc.*, 766 F. Supp. 650 (N.D. Ill. 1991) (arbitrator had no authority to overturn award of fees in action to collect interim payments under ERISA §502(g)(2) even though employer prevailed).

[1003] *Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Arizona-Pacific Tank Lines*, 4 EBC 2355 (N.D. Cal. 1983). The legislative history contains several comments to the effect that collection actions are not to be dismissed based on unrelated defenses. *See* Remarks of Sen. Williams, 126 Cong. Rec. S10102 (Daily Ed., July 29, 1980); 126 Cong. Rec. S11673 Daily Ed., Aug. 26, 1980); Remarks of Rep. Thompson, 126 Cong. Rec. H7899 (Daily Ed., Aug. 26, 1980).

[1004] Senate Debate, 126 Cong. Rec. S11672 (Daily Ed., Aug. 26, 1980).

[1005] ERISA §4001(c); I.R.C. §414(c), §1563. *See Underground Contruction Co. and Carpenters' Pension Trust Fund for Northern California,* 14 EBC 1543 (Twohey, Arb. 1991) (joint venture not within group). *See also Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp 641 (N.D. Ill. 1986).

[1006] *See Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516 (9th Cir. 1984), later proceeding, *In re Kay*, 60 B.R. 174 (Bankr. C.D. Cal. 1986) (corporate veil pierced); *Ret. Fund of the Fur Mfg. Indus. v. Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989); *Soloman v. Klein*, 6 EBC 1368 (E.D. Pa. 1985), *aff'd,* 770 F.2d 352 (3d Cir. 1985) (may be state law claim against shareholder); *Alman v. Servall Mfg. Co.*, 6 EBC 2031 (D. Mass. 1984) (principal stockholder has liability); *United Paperworkers Int'l Union, Local No. 35Pension Plan v. Arlington Sample Book Co.*, 5 EBC 1948 (E.D. Pa. 1984) (sole shareholder not liable); *Trs. of the Ret. Fund of the Fur Mfg. Indus. v. Lazar-Wisotzky, Inc.*, 550 F. Supp. 35 (S.D.N.Y. 1982), aff'd without opinion, 738 F.2d 419 (2d Cir. 1984) (individual liable because obligated by collective bargaining agreement); *IAM Nat'l Pension Fund v. Wakefield Indus., Inc.*, 14 EBC 1890 (D.D.C. 1991); *Connors v. Princeton Coal Grp., Inc.*, 770 F. Supp. 1132 (S.D. W.Va. 1991); PBGC Opinion Letter 82-38.

[1007] *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877 (1st Cir. 1987); *Connors v. P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986).

[1008] *See Cent. States, Se. & Sw. Areas Pension Fund v. Nat'l Transit Cartage Co.*, 13 EBC 2093 (N.D. Ill. 1991) (real estate partnership that leased property to employer); *ILGWU Nat'l Ret. Fund v. Minotola Indus., Inc.*, 1991 WL 79466 (S.D.N.Y. May 3, 1991) (owners of the employer leased farmland to several unrelated tenants); *Local 478 Trucking & Allied Indus. Pension Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991) (real estate partnerships leased land to employer). *But see Cent. States, Se. & Sw. Areas Pension Fund v. Personnel, Inc.*, 14 EBC 1082 (N.D. Ill. 1991), *rev'd*, 974 F.2d 789 (7th Cir. 1992) (real estate investment activity of sole owner of employing corporation was trade or business).

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employer.[1009] Successor corporations also may be assessed, if the facts show the successor to be the alter ego of the original company.[1010] Disputes can arise over who is the true employer, for example, of leased employees.[1011] The group's composition at the time of withdrawal controls.[1012]

Under a collective bargaining agreement, a union may indemnify an employer from withdrawal liability as long as the employer remains primarily liable for its funding contribution.[1013]

h. Power of Trustees to Settle or Compromise

Trustees may settle claims for withdrawal liability.[1014] However, an underfunded multiemployer pension plan's trustees should be cautious when agreeing to subsequent payment plans following an employer's initial default on its withdrawal liability, as illustrated by *Bauwens v. Revcon Technology Group, Inc.*[1015] In *Bauwens*, an employer, after withdrawing from an underfunded multiemployer plan, repeatedly defaulted on its withdrawal liability payments, triggering a cycle of trustee lawsuits seeking immediate payment, followed by voluntary dismissals upon the employer's promise to cure. After five voluntary dismissals, the employer invoked claim preclusion under the "two dismissal rule," and further argued that the claim was time-barred, with the six-year statute of limitations having been triggered more than a decade prior when the first default spurred the trustees to accelerate the debt. The trustees attempted to persuade the court that the debt had been "decelerated," but the court rejected this stratagem, holding that no such principle exists within the MPPAA. Thus, because the trustees lacked any ability to decelerate the debt, the statute of limitations was deemed to have expired long ago, such that the employer prevailed.

The PBGC regulations on special financial assistance require that, as one condition of receiving assistance, a plan must obtain PBGC approval for a proposed settlement of withdrawal liability if the amount of the liability settled is greater than $50 million.[1016] The $50 million threshold is calculated as the lesser of (i) the allocation of unfunded vested benefits to the employer under ERISA §4211, or (ii) the present value of withdrawal liability payments assessed for the employer discounted using the interest assumptions specified under 29 C.F.R. §4044.54.[1017] PBGC will approve a proposed settlement if it determines the implementation of the settlement is in the best interest of participants and beneficiaries, and the settlement does not create an unreasonable risk of loss to PBGC.[1018]

D. Industry-Specific and Entity-Specific Rules

1. The Coal Funds

ERISA created a special rule for the pension funds for the bituminous coal industry, funded by current coal operators. A fund that was set up after the government seizure of the coal mines during the Second World War was frozen in 1974, and post-1975 retirees and all active participants were placed in the 1974 United Mine Workers of America (UMWA) Pension Fund ("1974 Fund"). Pre-1976 retirees were placed in the 1950 UMWA Pension Fund ("50s Fund"). The I.R.C. allows deductions of contributions to the 50s Fund and the 1974 Fund as a trade or business expenses and exempts the funds from the tax qualification rules of I.R.C. §401.[1019] Special withdrawal liability rules apply to both funds.[1020]

The presumptive rule for withdrawal liability for the 50s Fund is the simple rolling-five year modified presumptive rule of ERISA §4211(c)(3). The plan, however, can adopt one of the other statutory rules.[1021] Pension plans for the coal industry may add special conditions to the partial withdrawal rules.[1022] The annual withdrawal liability payment is based on a special

[1009] *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545 (7th Cir. 2013) (owner of withdrawing company is personally liable for withdrawal liability because owner leases property to company and performs property management services as independent contractor); *Cent. States, Se. & Sw. Areas Pension Fund v. Minneapolis Van & Warehouse Co.*, 764 F. Supp. 1289 (N.D. Ill. 1991); *Ret. Fund of the Fur Mfg. Indus. v. Robert Goldberg Furs, Inc.*, 754 F. Supp. 356 (S.D.N.Y. 1991).

[1010] *See Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839 (9th Cir. 2018) (applying a constructive notice standard to impose successor liability on a company that had constructive notice of withdrawal liability, a standard which exists only where (1) the purchaser qualifies as a successor; (2) the plan is underfunded, and (3) a purchaser using reasonable care or diligence would have discovered the withdrawal liability); *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir. 2015) (successor liability applied to company that took over customer base of withdrawing employer), cert. denied, 136 S. Ct. 2379 (2016); *Local 134 Bd. of Trs. of the Toledo Roofers Pension Plan v. Enter. Roofing & Sheet Metal*, No. 3:10-cv-01869-JGC, 2013 BL 144364 (N.D. Ohio 2013) (company owned by same family that owned withdrawing employer is liable for withdrawal liability payments under alter-ego theory); *Ret. Plan of the UNITE HERE Nat'l Ret. Fund v. Kombassan Holding A.S.*, 629 F.3d 282 (2d Cir. 2010) (holding company is alter ego of bankrupt women's clothing retailer and therefore incurred withdrawal liability when retailer withdrew from multiemployer plan); *Resilient Floor Covering Pension Fund v. M&M Installation, Inc.*, 630 F.3d 848 (9th Cir. 2010) (imposing alter ego liability required proof: (1) that two firms have "common ownership, management, operations, and labor relations," and (2) that nonunion firm is used "in a sham effort to avoid collective bargaining obligations"); *Bd. of Trs. Container Mechs. Welfare-Pension Fund v. Universal Enters.*, 5 EBC 1199 (S.D. Ga. 1983), *aff'd*, 751 F.2d 1177 (11th Cir. 1985); *Asbestos Workers Local 53 Pension Fund v. Insul.-Contractors, Inc.*, 5 EBC 1316 (E.D. La. 1983); *Continental Food Products, Inc. and Bakery Workers Pension Fund*, 5 EBC 1326 (Mittelman, Arb. 1984).

[1011] *Cent. Pa. Teamsters Pension Fund v. Power Packaging, Inc.*, 151 Fed. Appx. 145 (3d Cir. 2005) (district court reversed and summary judgment granted as leased employees were excluded from contribution obligation); *Global Leasing, Inc. v. Henkel Corp.*, 744 F. Supp. 595 (D.N.J. 1990) (leased employees).

[1012] *Connors v. Incoal, Inc.*, 907 F.2d 1227 (4th Cir. 1990).

[1013] *Shelter Distribution, Inc. v. Gen. Drivers, Warehousemen & Helpers Local Union No. 89*, 52 EBC 2217 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 233 (2012); *Pittsburgh Mack Truck Sales & Serv., Inc. v. Int'l Union of Operating Engineers, Local Union No. 66*, 580 F.3d 185 (3d Cir. 2009).

[1014] *See Struble v. N.J. Brewery Emps. Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984); PBGC Opinion Letter 87-12.

[1015] 935 F.3d 534 (7th Cir. 2019).

[1016] 29 C.F.R. §4262.16(h)(1).

[1017] The PBGC changed the structure of the ERISA §4044 interest assumptions from select and ultimate rates to a yield curve. *See* 29 C.F.R. §4262.16 and 29 C.F.R. §4044.54, RIN 1212-AA55, 89 Fed. Reg. 48,291, 48,305 (June 6, 2024), effective July 8, 2024, and applicable to calculations with valuation dates on or after July 31, 2024. For additional discussion on the final regulations, see IX.C.4.c., above.

[1018] 29 C.F.R. §4262.16(h)(2).

[1019] I.R.C. §404(c).

[1020] ERISA §4211(d)(1).

[1021] I.R.C. §404(c); ERISA §211(d)(1) and 29 C.F.R. §4211.3 permit these plans to adopt other statutory rules.

[1022] ERISA §4205(d).

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amortization rate, unless the annual payment otherwise provided is greater.[1023]

The de minimis rule, the insolvency rule and the special sales limit do not apply to the 50s Fund or the 1974 Fund. The asset sale exception of ERISA §4204 does not apply, but a variation of it has been adopted by the plans.[1024]

If either the 50s Fund or the 1974 Fund terminates due to the withdrawal of all employers with union acquiescence, a special withdrawal liability calculation applies if (roughly) 33% of the employers have withdrawn prior to the consensus withdrawal of the rest.[1025] The idea is to make some provision against a precipitous decline of the fund that could force a termination.

If either the 50s Fund or the 1974 Fund (or any other I.R.C. §404(c) plan) goes into reorganization, a special minimum contribution requirement applies. Benefit increases after January 1, 1980, are treated specially.[1026] While the coal funds have spawned extensive litigation and law under MPPAA, none of it relates to the special rules.

The Bipartisan American Miners Act of 2019[1027] provides continued funding for the 1974 UMWA Pension Plan[1028] for fiscal years beginning after September 30, 2016, through transfers of excess amounts in the Abandoned Mine Reclamation Fund.[1029] The funding is conditioned on several requirements including: (1) the end of funding when the funded percentage under §432(j)(2) reaches 100%; (2) a general prohibition on benefit increases; (3) maintenance of critical status and the rehabilitation plan under §432(e), but not funding improvement plan requirements (see IV.C., above); (4) disregard of transfers in determining unfunded vested benefits for purposes of withdrawal liability under ERISA §4201; (5) the maintenance of contribution rates; and (6) for plan years beginning on or after December 20, 2019, enhanced annual reporting submitted electronically within 90 days of each plan year to the IRS and the PBGC.[1030]

2. *Building and Construction*

MPPAA contains a special withdrawal rule for employers contributing for "work performed in the building and construction industry," as defined in the Taft-Hartley Act.[1031] The plan must cover primarily building and construction industry employees, or must be amended to adopt the rule for those construction industry employers contributing to the plan. Only if "substantially all"[1032] of the employees for whom the employer contributes are in the industry is the employer deemed to be in the industry.[1033] If other employers in the contributing employer's controlled group contribute to the plan on behalf of employees who are *not* in the building and construction trade, the contributing employer may not meet the substantially all test. A withdrawal occurs only if the employer's contribution obligation ceases but it continues to work within the CBA's jurisdiction,[1034] or returns to do the same type of work within the jurisdiction within five years[1035] without resuming contribution obligations.[1036] The rule's theory is that:

> [A]n employer's leaving the jurisdiction of the plan or going out of business does not typically reduce the plan's contribution base. Rather, an employer reduces the plan's contribution base only if it continues to do what would have been covered work but does not have an obligation to contribute to the plan for that work. In order to protect the plan, the continuation of work without contributions is treated as a withdrawal in these industries. Other characteristics of the industr[y], including the mobility of both employers and employees and the intermittent nature of employment also persuade the [Senate] Committees that this special rule is needed.[1037]

There is a special partial withdrawal rule for the building and construction industry.[1038] An employer subject to the complete withdrawal rules for that industry is "liable" for a partial withdrawal only if its continued obligation to contribute to the plan is for no more than an "insubstantial portion of its work in the craft and area jurisdictions to the collective bargaining agreement of the type for which contributions are required." The rule is intended to apply when an employer has substantial-

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[1023] ERISA §4216.

[1024] ERISA §4211(d)(2).

[1025] ERISA §4216(a)(2).

[1026] ERISA §4243(d)(3). Note that the reorganization rules under I.R.C. §418 through §418D and ERISA §4241 through §4244A were repealed effective for plan years beginning after December 31, 2014. MPRA, Pub. L. No. 113-235, Div. O, §108(a)(1), §108(b)(1).

[1027] Pub. L. No. 116-94, Div. M, enacted December 20, 2019.

[1028] Defined under I.R.C. §9701(a)(3), but without regard to the limitation on participation to individuals who retired in 1976 and thereafter. Pub. L. No. 116-94, Div. M, §102(a)(3)(H).

[1029] *See* 30 U.S.C. §1232(i), as amended by Pub. L. No. 116-94, Div. M, §102. *See also* 30 U.S.C. §1232(h)(2)(C), as amended by Pub. L. No. 116-94, Div. M, §103.

[1030] The penalty for any failure to timely file the report required is treated as a failure to file a report required under I.R.C. §6058(a), but the penalty amount under I.R.C. §6652(e) is $100 per day (instead of $25). Note that this does not reflect the ten-fold increase in the penalty amount to $250 per day under §6652(e), as amended by Pub. L. No. 116-94, Div. O, §403(a), effective for returns required to be filed after December 31, 2019.

[1031] ERISA §4203(b)(1); PBGC Opinion Letter 82-9. A building and construction industry plan also may adopt the "free look" rule discussed in IX.C.8.b., above.

[1032] PBGC Opinion Letter 83-13 (92% of employees considered "substantially all"). *See Cent. States Se. & Sw. Area Pension Fund v. Bellmont Trucking Co.*, 610 F. Supp. 1505 (N.D. Ind. 1985) (85% test used for the trucking industry).

[1033] *See Union Asphalts & Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988) (transport building materials not construction). *Cf. Oolite Industries, Inc. and Central States, Southeast & Southwest Areas Pension Fund*, 8 EBC 2009 (Cornelius, Arb. 1987) (deferring to fund definition). *See also H.C. Elliott, Inc. and Carpenters' Pension Trust Fund,* 13 EBC 1962 (Kagel, Arb. 1991) (analyzed several issues relating to independent contractors).

[1034] ERISA §4203(b)(2). *See* PBGC Opinion Letter 87-5; *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for N. Cal.*, 859 F.2d 808 (9th Cir. 1988) (statute does not require that withdrawing party remain a direct employer); *Oregon-Washington Carpenters-Employers Pension Trust Fund v. BQC Constr., Inc.*, 485 F.Supp.2d 1206 (D. Or. 2007) (building and construction industry provision applies if substantially all employees for whom employer is obligated to contribute perform work in that industry).

[1035] The period is reduced to three years in the event of a mass withdrawal. ERISA §4203(b)(3).

[1036] The Senate explained that the mere expansion of the plan's jurisdiction after the obligation to contribute ended would not create a withdrawal. Joint Explanation, 126 Cong. Rec. S10111, S10116 (Daily Ed., 7/29/80).

[1037] Joint Explanation, 126 Cong. Rec. S10111, S10116 (Daily Ed., July 29, 1980).

[1038] ERISA §4208(d)(1). This section contains a typographical error. ERISA §4208(d)(1) states that it applies to an employer to which ERISA §4202(b) applies; however, ERISA §4203(b) is the correct citation.

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ly shifted its work mix in the jurisdiction so that only an insubstantial portion of the work in the jurisdiction is covered.[1039]

The term "insubstantial portion" has not been defined by Congress, the PBGC, or the courts. However, the Sixth Circuit in *Sofco Erectors*[1040] concluded that identifying the definition is a question of law and rejected the notion, suggested in PBGC Opinion Letter 95-2, that lack of a statutory definition amounts to a delegation to plan sponsors to determine whether an employer's ongoing contribution obligation is for an insubstantial portion of its prior obligation. The Sixth Circuit remanded *Sofco Erectors* with instructions to consider the definition in the first instance.

A plan in the construction industry must use the presumptive rule to allocate withdrawal liability, but, subject to PBGC approval, can adopt special rules for non-construction employers in the plan.[1041] The PBGC has opined that the special sales limit of ERISA §4225 is not available to construction industry employers in the "typical case,"[1042] i.e., one in which the employer finishes work at a particular site or location. Where the employer continues to perform the same type of work in the same geographic area, however, relief under ERISA §4225 may be available, depending upon the surrounding facts and circumstances.[1043]

Note: The construction industry practice of "pre-hire" agreements causes some special MPPAA issues. Although the National Labor Relations Act permits pre-hire agreements,[1044] the employer can void them should the union fail to achieve majority status. Such agreements, however, are enforceable until repudiated.[1045] The courts have not decided whether withdrawal liability is assessed when the agreement is repudiated.

In the case of withdrawals occurring on or after January 1, 2007, the 2006 PPA extended the rule allowing plans to exempt certain employers from withdrawal liability to plans primarily covering employees in the building and construction industries. In addition, a plan (including a plan primarily covering employees in the building and construction industry) can be amended to provide that the otherwise applicable withdrawal liability method will be applied by substituting the plan year specified in the amendment and for which the plan has no UVBs for the plan year ending before September 26, 1980.[1046]

3. Entertainment

Short-term employment is common in the entertainment industry. ERISA provides a special withdrawal rule for theater, motion pictures, radio, television, recording, music and dance and related industries.[1047] The legislative history indicates Congress wished to limit the exception to entertainment industry projects performed on a "temporary or project-by-project basis" that have the "characteristics of the construction industry"; a plan covering stable companies therefore is ineligible for the exception. The rule is similar to the construction industry rule, but the PBGC can regulate exceptions and the plan may exclude a group or class of employers.[1048]

An employer subject to the complete withdrawal rules for the entertainment industry is subject to partial withdrawal liability only to the extent provided in PBGC regulations.[1049]

4. Trucking, Moving, and Warehousing Industries

Another complete withdrawal rule exists for plans in the "long and short haul trucking industry, the household goods moving industry [and] the public warehousing industry."[1050] In these industries, an employer must furnish a bond or escrow equal to half of the withdrawal liability. A letter of credit also will suffice.[1051] Within five years of the withdrawal, the PBGC may determine that the employer's withdrawal has caused "substantial damage" to the plan and call the bond or escrow.[1052] Apparently, withdrawal liability is also then payable.[1053] For a plan to qualify for the special rule, substantially all required contributions must be made by employers primarily engaged in the short and long-haul trucking industries.[1054] The reason for this is to exclude companies who operate primarily in other industries but also employ truck drivers. Courts have defined "substantially all" as 85%.[1055]

5. Retail Food Industry

ERISA includes an optional, stricter, partial withdrawal rule for the retail food industry. The generally applicable 70% decline rule under ERISA §4205(a) allows large decreases in CBUs before withdrawal liability is triggered. The resulting losses to the plan eventually are absorbed by the remaining contributing employers, either in the course of funding or as withdrawal liability. In the retail food industry, however, a plan can elect to impose a rule under which a 35% decline triggers withdrawal liability.[1056] The decline is measured in the same manner as under the general rule. If the plan's overall CBUs rebound during the two years after the withdrawal, the liabili-

[1039] Joint Explanation, 126 Cong. Rec. S10111, S10116 (Daily Ed., July 29, 1980). *See also* remarks of Rep. Thompson, 126 Cong. Rec. H7898 (Daily Ed., Aug. 26, 1980).

[1040] *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407(6th Cir. 2021).

[1041] 29 C.F.R. §4211.3, §4211.21(b).

[1042] PBGC Opinion Letter 88-2.

[1043] PBGC Opinion Letter 88-2.

[1044] 29 U.S.C. §158(f).

[1045] *Todd v. Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir. 1982), aff'd, 461 U.S. 260 (1983).

[1046] ERISA §4211(c)(5)(E).

[1047] ERISA §4203(c).

[1048] Joint Explanation, 126 Cong. Rec. S10111, S10116 (Daily Ed., July 29, 1980).

[1049] ERISA §4208(d)(2). The reference to ERISA §4202(c) in ERISA §4208(d)(2) should be to ERISA §4203(c).

[1050] ERISA §4203(d).

[1051] ERISA §4203(d)(4). A delay in furnishing the bond was justified when the plan flip-flopped as to its status. *Hankin Transport Personnel and Teamsters 641 Pension Fund*, AAA Case No. 15-621-0019-88V (Arb. April 20, 1991).

[1052] PBGC Opinion Letter 82-20. An example of a PBGC determination of substantial damage is found in PBGC's determination in *In re Dehart Motor Lines, Inc.*, 50 Fed. Reg. 36,171 (Sept. 5, 1985).

[1053] ERISA §4203(d)(6).

[1054] *Cent. States, Se. & Sw. Areas Pension Fund v. Bellmont Trucking Co.*, 610 F. Supp. 1505 (N.D. Ind. 1985). *Cf.* IX.D.2.

[1055] *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund*, 916 F.2d 1154, motion granted, 921 F.2d 126 (7th Cir. 1990).

[1056] ERISA §4205(c)(1).

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ty is abated under rules that the plan must write and adopt.[1057] ERISA's regular abatement rules do not apply.[1058]

6. Other Industries

The PBGC may issue special withdrawal liability rules for other industries with characteristics "that would make use of such rules appropriate" where the special rules would not pose a "significant" risk to the PBGC insurance system.[1059] For example, rules were approved for a sheet metal workers' fund.[1060]

E. Deductibility of Withdrawal Liability Payments

Under the I.R.C., withdrawal liability payments are considered contributions for tax-deduction purposes.[1061] Treasury regulations define the term "employer liability" and establish limits.[1062]

[1057] ERISA §4205(c)(2). *Great Atlantic & Pacific Tea Co. v. Carman*, 781 F. Supp. 1086 (E.D. Pa. 1992) (plan attempted to adopt 35% rule but permitted abatement only if employer's CBUs rebounded; court found rule invalid and applied the 70% rule, relieving employer of liability).

[1058] ERISA §4205(c)(3).

[1059] ERISA §4203(f).

[1060] *Sheet Metal Workers Local Union No. 80*, 56 Fed. Reg. 49,804 (Oct. 1, 1991).

[1061] §404(g).

[1062] Reg. §1.404(g)-1.

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X. Insolvency

A. Test for Insolvency

A multiemployer pension plan is considered insolvent when it does not have enough "available resources" to pay benefits that are due.[1063] In addition, certain plans that are experiencing financial difficulties are required to conduct tests to anticipate insolvency.

Plans experiencing or likely to develop financial difficulties for any month in the current or next plan year are required to test for insolvency, and, if found to be insolvent, each year thereafter.[1064] Sponsors of plans in critical status are required to test for insolvency upon attaining critical status and every three years thereafter.[1065] The sponsor of a plan in critical status also may determine "at any time" that insolvency will occur in the next year.[1066]

Under the test for insolvency, unless the plan sponsor determines that the value of plan assets exceeds three times the total amount of benefit payments, the sponsor must determine whether the plan will be insolvent for any of the next five plan years. If the sponsor determines that the plan will be insolvent for any of the next five plan years, it must compare plan assets and benefit payments at least annually until it determines that the plan will not be insolvent in any of the next five plan years.[1067]

If, after performing a plan solvency determination, the plan sponsor finds plan resources insufficient to support payment of nonforfeitable benefit obligations when due, the sponsor must notify PBGC, participants and beneficiaries, and interested parties in writing of the plan's insolvent status.[1068]

B. Benefits Payable by Insolvent Plans

When a plan becomes insolvent, benefit payments are reduced to the level that can be paid (the "resource benefit level"), unless this is below the level of "basic benefits."[1069] A multiemployer plan cannot pay less than basic benefits. Available resources include the plan's cash, marketable assets, contributions, withdrawal liability payments and earnings, less reasonable administrative expenses and financial assistance payments owed to the PBGC. The suspension of benefit payments must apply in "substantially uniform proportions" to the benefits of all persons in pay status unless otherwise provided by the IRS. If a plan sponsor determines a resource benefit level for a plan year that is less than the level of basic benefits, the payment of all benefits other than basic benefits must be suspended for that plan year.[1070] If the sponsor erroneously determines that the plan was insolvent, or that it has excess resources at the end of the plan year, any excess resources must be distributed to the participants, but otherwise no retroactive payments are required.[1071]

Multiemployer plans in critical and declining status are permitted to suspend benefits under certain circumstances.[1072] The rules for benefits payable by insolvent plans under I.R.C. §418E(a) and §418E(c) and ERISA §4245(a) and §4245(c) do not apply to plans that suspend benefits in accordance with those rules.[1073]

C. Funding Consequences of Insolvency

An insolvent plan in critical status must be funded in accordance with its rehabilitation plan.[1074] Otherwise, no other special rules apply to funding insolvent plans, except PBGC aid.

Prior to 2015, an insolvent plan in reorganization had a minimum contribution requirement (MCR) based on the plan's "cash flow amount," i.e., the amount needed to pay benefits and expenses, if this amount exceeded the vested benefits charge.[1075] When a multiemployer plan was insolvent, the MCR was adjusted, as usual, by the fraction of current and valuation contribution bases, but the determination of the valuation base differed.[1076] If all collective bargaining agreements in effect when the plan became insolvent had expired, the valuation base was the greater of the contribution base units in the two years prior to the first plan year of insolvency. Adjustments to the MCR otherwise were the same. Thus, the MCR was limited by the safe harbor and offset by the overburden credit. Effective for plan years beginning after December 31, 2014, the Multiemployer Pension Reform Act of 2014 (MPRA) repealed the rules on reorganization status in I.R.C. §418 through §418D and ERISA §4241 through §4244A.

[1063] I.R.C. §418E(b)(1); ERISA §4245(b)(1).

[1064] 29 C.F.R. §4041A.25, as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. Plans without benefits subject to reduction that also lack assets sufficient to cover all nonforfeitable benefits when due must make determinations of plan solvency as required in I.R.C. §418E(d)(2), at least annually, and plan sponsors who suspect the plan will become insolvent in the current or next plan year (based on the plan's recent and anticipated financial experience) must also make a solvency determination no later than six months before the beginning of the applicable plan year, or as soon as practicable. The applicable plan year is (1) the year of plan termination for plans without benefits subject to reduction at termination, or (2) the year in which a pre-termination plan amendment that eliminated all benefits subject to reduction became effective. 29 C.F.R. §4041A.25(a) and §4041A.25(b).

[1065] I.R.C. §418E(d)(1), as amended by MPRA, Pub. L. No. 113-235, Div. O, §108(b)(2)(A) and §108(b)(2)(C); ERISA §4245(d)(1), as amended by Pub. L. No. 113-235, Div. O, §108(a)(2)(A) and §108(a)(2)(C). See V.C., above, for a discussion of critical status. Prior to 2015, the test was required for plans in reorganization status. The reorganization rules were repealed by MPRA, Pub. L. No. 113-235, Div. O, §108, effective for plan years beginning after December 31, 2014.

[1066] I.R.C. §418E(d)(2); ERISA §4245(d)(2).

[1067] I.R.C. §418E(d)(1) and ERISA §4245(d)(1).

[1068] Relevant parties must be notified by the later of 90 days before the beginning of the insolvency year, or 30 days after making the insolvency determination, and apply for PBGC financial assistance at least six months before the beginning of the applicable plan year, or as soon as practicable. 29 C.F.R. §4041A.25(d), 29 C.F.R. §4245.8(a), as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019).

[1069] I.R.C. §418E(a); ERISA §4245(a). ERISA §4001(a)(6) defines "basic benefits" for multiemployer plans as benefits guaranteed under ERISA §4022A, other than under ERISA §4022A(g). Guaranteed benefit amounts are adjusted annually. For current and previous guaranteed benefit amounts, see the Worksheets in 361 T.M., *Reporting and Disclosure Under ERISA*. ERISA §4022A(g) authorizes the PBGC to guarantee, in addition to the statutory benefit guarantees, "such other classes of benefits . . . as it deems appropriate."

[1070] I.R.C. §418E(c)(2), §418E(c)(3); ERISA §4245(c)(2), §4245(c)(3).

[1071] I.R.C. §418E(c)(4) through §418E(c)(6); ERISA §4245(c)(4) through ERISA §4245(c)(6).

[1072] *See* the discussion in V.D., above.

[1073] I.R.C. §418E(h); ERISA §4245(g).

[1074] *See generally* I.R.C. §432, discussed at V.C., above.

[1075] Former I.R.C. §418B; former ERISA §4243.

[1076] Former I.R.C. §418B(c)(2)(B); former ERISA §4243(c)(2)(B).

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D. Financial Aid from PBGC

If a plan sponsor has determined that a multiemployer plan cannot pay basic benefits, the plan must apply for financial aid from the PBGC,[1077] submitting the application at the time a notice of insolvency benefit level is filed.[1078] Pending a determination of the appropriate amount of financial assistance, the PBGC may provide financial assistance in amounts as it considers appropriate to avoid undue financial hardship to participants and beneficiaries.[1079] After the PBGC verifies the insolvency and the plan's inability to pay basic benefits, it must lend the money under equitable and appropriate conditions to prevent unreasonable loss to the PBGC.[1080] The plan must repay the loan under terms prescribed by the PBGC.[1081]

Plan sponsors must submit an initial application for financial aid no later than 90 days before the first day of the first month for which the plan will be unable to pay basic benefits (i.e., the month in which plan assets are projected to fall below the guaranteed benefit level).[1082] An application for aid is optional for a plan sponsor that determines the plan can pay basic benefits (i.e., plan assets exceed the guaranteed benefit level), but anticipates a cash crunch in one or more months of the year.[1083]

E. Determinations, Reporting, and Disclosure for Insolvent Plans

Before a multiemployer pension plan in critical status becomes insolvent, the sponsor must examine plan assets periodically. If assets do not exceed three times the benefits estimated to be payable in the following year, the plan sponsor must investigate whether the plan is likely to become insolvent within the next five years.

Final rules issued in May 2019 revised content, timing, and procedural requirements for insolvency notices.[1084] Simplified procedures substantially eliminate the need to reissue notices of insolvency after the initial insolvency year, and allow plan sponsors to issue combined notices for insolvency and insolvency benefit level for the same plan year.[1085]

1. Notice of Insolvency

If the plan sponsor of a multiemployer plan in critical status determines that the plan's available resources are or may be insufficient to pay benefits when due for a plan year, it must notify the PBGC and all "interested parties" by providing a "notice of insolvency." A single notice may cover more than one plan year.[1086] The sponsor must file the notice electronically with PBGC after it determines that the plan is or may become insolvent. The notice to participants and beneficiaries in payment status, however, may be delivered with the first benefit payment made after the insolvency determination.[1087] "Interested parties" are:

- contributing employers;
- labor organizations representing participants employed by such employers; and
- plan participants and beneficiaries.[1088]

Effective July 1, 2019, the notice of insolvency provided to interested parties must include:

- the plan's name;
- insolvency year;
- a statement that benefits above the amount that can be paid from available resources or the level guaranteed by PBGC, whichever is greater, will be suspended during the insolvency year, with a brief explanation of which benefits are guaranteed by PBGC under ERISA §4022;
- name and address and telephone number of plan administrator or other person designated by plan to answer inquiries regarding benefits;

[1077] I.R.C. §418E(f)(2); ERISA §4245(f)(2).

[1078] 29 C.F.R. §4245.8(a) (referencing ERISA §4261 and 29 C.F.R. §4281.47), as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019).

[1079] I.R.C. §418E(f)(2); ERISA §4245(f)(2). The actual application to the PBGC, authorized by ERISA §4245, is made under ERISA §4261.

[1080] ERISA §4261(a), §4261(b).

[1081] ERISA §4261(b)(2).

[1082] 29 C.F.R. §4245.8(a). Recurring applications must be filed as soon as practicable for any subsequent month for which the plan sponsor believes plan resources will remain insufficient to cover guaranteed benefits when due. Application contents and instructions, Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, are available on the PBGC website, www.pbgc.gov.

[1083] I.R.C. §418E(f)(1); ERISA §4245(f)(1).

[1084] RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. *See* PBGC's Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, Notice of Insolvency, Notice of Insolvency Benefit Level, and Combined Notice of Insolvency and Notice of Insolvency Benefit Level, available electronically through the PBGC e-Filing Portal at https://efilingportal.pbgc.gov. Note: The plan sponsor of a successor plan created by a partition under 29 C.F.R. §4233.14 is not subject to the notice requirements under 29 C.F.R. §4245.3 or 29 C.F.R. §4245.5, and must instead issue insolvency notices according to the partition order.

[1085] 29 C.F.R. §4245.3(a), §4281.45(b), 84 Fed. Reg. 18,715.

[1086] 29 C.F.R. §4245.3. While I.R.C. §418E(e) and ERISA §4245(e) were amended to reflect the repeal of the reorganization rules by MPRA, these amendments did not substantively change the notice of insolvency rules. *See* Pub. L. No. 113-235, Div. O, §108(a)(2)(D) and §108(b)(2)(D), effective for plan years beginning after December 31, 2014. The Treasury regulations do not reflect changes made by MPRA. Penalties payable to the PBGC could be imposed for failure to provide notice. ERISA §4302; 29 C.F.R. §4302.3 (annual adjustment). For a table of current and prior PBGC civil penalty inflation adjustments, see the Worksheets in 361, *Reporting and Disclosure Under ERISA*.

[1087] 29 C.F.R. §4245.3(b). Effective July 1, 2019, the sponsor must file the notice electronically with PBGC by the later of 90 days before the beginning of the insolvency year, or 30 days from the insolvency determination date. 29 C.F.R. §4245.3(b), 29 C.F.R. §4281.43(b), as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. For notices submitted prior to July 2019, PBGC filings were due no later than 30 days after the plan sponsor determined the plan was or might become insolvent. The notice to participants and beneficiaries will be delivered with the first benefit payment made more than 30 days after the insolvency determination.

[1088] 29 C.F.R. §4245.2. *See* 29 C.F.R. §4000.3(b)(4), 80 Fed. Reg. 55,742 (Sept. 17, 2015) (corrected by 80 Fed. Reg. 57,717 (Sept. 25, 2015)) (requiring electronic filing of notices of insolvency under ERISA §4245). RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019). A notice required under I.R.C. §418E or ERISA §4245(e) relating to the effects of the insolvency status for a multiemployer plan is treated as also having complied with the requirement to provide notice with respect to an amendment under ERISA §204(h). Treas. Reg. §54.4980F-1, Q&A-9(g)(3)(ii)(E). For the rules regarding delivery of the notice of insolvency to the PBGC and interested parties prior to July 1, 2019, see former 29 C.F.R. §4245.3(c) through §4245.3(d).

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• estimated total amount of the annual benefit payments under the plan (determined without regard to insolvency) for the insolvency year; and

• the estimated amount of the plan's available resources for the insolvency year.[1089]

Effective July 1, 2019, contents of the notice of insolvency to be filed with the PBGC must include information and certification in the notice of insolvency instructions provided on the PBGC's website.[1090]

Prior to July 1, 2019, the notice of insolvency to interested parties required the following information:

• the plan's name;

• the plan year or years for which the sponsor determined that the plan is or is expected to be insolvent;

• an estimate of the plan's annual benefit payments, determined without regard to the insolvency, for each insolvency year;

• an estimate of the plan's available resources for each insolvency year;

• a statement that, during the insolvency year, benefits above the amount that could be paid from available resources or the level guaranteed by the PBGC, whichever is greater, would be suspended, with a brief explanation of which benefits are guaranteed by the PBGC; and

• the name, address, and telephone number of the plan administrator or other person designated by the plan sponsor to answer inquiries concerning benefits during the plan's insolvency.[1091]

Prior to July 1, 2019, the notice of insolvency to be filed with the PBGC[1092] had to include:

• the plan's name;

• the name, address, and telephone number of the plan sponsor and of the plan sponsor's duly authorized representative, if any;

• the Employer Identification Number (EIN) assigned by the IRS to the plan sponsor and the Plan Identification Number (PIN) assigned by the sponsor to the plan, and, if different, the EIN or PIN last filed with the PBGC (if no EIN or PIN has been assigned, the notice must so indicate);

• the IRS office with jurisdiction over determination letters for the plan;

• the case number assigned to the plan by the PBGC or, if there is no case number, a statement of whether the plan previously has filed a notice of insolvency with the PBGC and, if so, the date it was filed;

• the plan year(s) for which the sponsor had determined that the plan was or could become insolvent;

• a copy of the plan document, including the last restatement and all subsequent amendments in effect, or to become effective, during the insolvency year(s);[1093]

• a copy of the most recent actuarial valuation for the plan and a copy of the most recent actuarial schedule to Form 5500 filed for the plan, if such schedule contains more recent information than the valuation;[1094]

• an estimate of annual benefit payments (determined without regard to the insolvency) for each insolvency year;

• an estimate of the plan's available resources for each insolvency year; and

• a certification, signed by the plan sponsor or a duly authorized representative that notices of insolvency have been given to all interested parties.[1095]

2. Notice of Insolvency Benefit Level

Once insolvency occurs, the plan sponsor must determine the plan's "resource benefit level," i.e., the highest level of monthly benefits[1096] that can be paid from the plan's available resources.[1097] The plan sponsor must do this for each year while the plan continues to be insolvent. The determination is made three months before the plan year begins.[1098] At the end of the plan year, the sponsor must review the resource benefit level. If it exceeds the level predicted, excess resources may have to be distributed to participants and beneficiaries.[1099]

For each insolvency year, the plan sponsor must notify the PBGC and interested parties, of the level of benefits expected to be paid during the year (the "insolvency benefit level"). When the determination of insolvency has been made, the plan sponsor must notify the IRS, the PBGC, contributing employers and the unions, and participants and beneficiaries of the resource benefit level before the start of the insolvency plan

[1089] *See* 29 C.F.R. §4245.4 (referencing 29 C.F.R. §4281.44), RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. *See also* PBGC Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, Notice of Insolvency and Combined Notice of Insolvency and Notice of Insolvency Benefit Level, available electronically through the PBGC e-Filing Portal at https://efilingportal.pbgc.gov.

[1090] *See* 29 C.F.R. §4245.4, §4281.44. PBGC's Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, Notice of Insolvency and Combined Notice of Insolvency and Notice of Insolvency Benefit Level, available electronically through the PBGC e-Filing Portal at https://efilingportal.pbgc.gov.

[1091] Former 29 C.F.R. §4245.4(b).

[1092] Former 29 C.F.R. §4245.4(a).

[1093] If, however, a copy of the plan document was submitted with a previous notice of insolvency or notice of insolvency benefit level, only submissions of subsequent amendments would be required, along with a statement of when the copy of the plan document was filed.

[1094] If the valuation or schedule previously was submitted to the PBGC, it could be omitted, and the notice was required to state the date on which the document was filed and that the information was still accurate and complete.

[1095] Former 29 C.F.R. §4245.4(a).

[1096] Under I.R.C. §418E(c)(1) and §418E(c)(3), and §418E(e); ERISA §4245(c)(1) and §4245(c)(3), and §4245(d)(3). While I.R.C. §418E and ERISA §4245 were amended to reflect the repeal of the reorganization rules by MPRA, these amendments did not substantively change the notice of insolvency benefit level rules. *See* Pub. L. No. 113-235, Div. O, §108(a)(2) and §108(b)(2), effective for plan years beginning after December 31, 2014. The Treasury regulations do not reflect changes made by MPRA.

[1097] I.R.C. §418E(b)(2) and §418E(c)(1); ERISA §4245(b)(2) and §4245(c)(1).

[1098] I.R.C. §418E(d)(3); ERISA §4245(d)(3).

[1099] I.R.C. §418E(c)(4)(A); ERISA §4245(c)(4)(A).

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year.[1100] The PBGC must be alerted if the plan sponsor "anticipates" that the resource benefit level may be less than or equal to basic benefits.[1101]

The notice of insolvency benefit level need not be given to interested parties other than participants and beneficiaries who are in payment status or are reasonably expected to enter payment status during the insolvency year, for an insolvency year immediately following the plan year in which a notice of insolvency is required to be delivered and was in fact delivered.[1102]

The notice of insolvency benefit level to participants in or entering pay status must include:

• the plan's name;

• insolvency year for which the notice is being sent;

• monthly benefit that the participant or beneficiary may expect to receive during the insolvency year;

• a statement that, in subsequent plan years, depending on the plan's available resources, this benefit level may be increased or decreased, but not below the level guaranteed by PBGC, and that the participant or beneficiary will be notified in advance of the new benefit level if it is less than the participant's full nonforfeitable benefit under the plan;

• amount of the participant's or beneficiary's monthly nonforfeitable benefit under the plan;

• amount of the participant's or beneficiary's monthly benefit that is guaranteed by PBGC; and

• name, address, and telephone number of the plan administrator or other person designated by the plan sponsor to answer inquiries concerning benefits.[1103]

Contents of the notice of insolvency benefit level to the PBGC must include information and certification in the instructions provided on PBGC website.[1104]

Prior to July 1, 2019, a notice of insolvency benefit level filed with the PBGC generally required the information set forth below. Items (7) through (10) below were required only if they differed from the information submitted to the PBGC with the notice of insolvency for that insolvency year or the notice of insolvency benefit level for a prior year. When any information was omitted under this exception, the notice needed to so state and indicate when the notice of insolvency or prior notice of insolvency benefit level was filed. The PBGC notice required:

• the plan's name;

• the name, address, and telephone number of the plan sponsor and of the sponsor's authorized representative, if any;

• the Employer Identification Number (EIN) assigned by the IRS to the plan sponsor and the Plan Identification Number (PIN) assigned by the sponsor to the plan, and, if different, the EIN or PIN last filed with the PBGC (if no EIN or PIN has been assigned, the notice must so indicate);

• the IRS office with jurisdiction over determination letters for the plan;

• the case number assigned to the plan by the PBGC;

• the plan year for which the notice is filed;

• a copy of the plan document, including any amendments in effect during the insolvency year;

• a copy of the most recent actuarial valuation for the plan and a copy of the most recent actuarial schedule to Form 5500 filed for the plan, if it has more recent information than the valuation;

• the estimated annual benefit payments, determined without regard to the insolvency, for the insolvency year;

• the estimated available plan resources for the insolvency year;

• the estimated annual benefit payments guaranteed by the PBGC for the insolvency year;

• the amount of financial assistance, if any, requested from the PBGC; and

• a certification, signed by the sponsor or an authorized representative that notices of insolvency benefit levels have been given to all interested parties.

In addition, when the plan requested financial assistance, the PBGC could require the sponsor to submit any additional information needed to process the request.[1105]

A notice of insolvency benefit level must include the following information if it is required to be delivered to participants and beneficiaries who are in payment status or are reasonably expected to enter payment status during the insolvency year:

• the plan's name;

• the plan year for which the notice is issued;

[1100] I.R.C. §418E(e)(2); ERISA §4245(e)(2). Beginning July 1, 2019, the plan sponsor must deliver the notices of insolvency benefit level within the later of 90 days before the beginning of the insolvency year, or 30 days after making the insolvency determination. 29 C.F.R. §4245.4, 29 C.F.R. §4281.44. Prior to July 1, 2019, the plan sponsor delivered the notices of insolvency benefit level no later than 60 days before the start of the insolvency plan year, unless the insolvency determination was made less than 120 days before the start of the insolvency plan year, in which case the notices had to be delivered within 60 days after the plan sponsor's determination. 29 C.F.R. §4245.5(c), §4245.5(d), and §4245.5(e) provide the delivery rules for the PBGC and interested parties, respectively. *See* 29 C.F.R. §4000.3(b)(4), 80 Fed. Reg. 55,742 (Sept. 17, 2015) (corrected by 80 Fed. Reg. 57,717 (Sept. 25, 2015)) (requiring electronic filing of notices of insolvency benefit level under ERISA §4245). Penalties payable to the PBGC coprovide notice. ERISA §4302; 29 C.F.R. §4302.3 (annual adjustment). For a table of current and prior PBGC civil penalty inflation adjustments, see the Worksheets in 361, *Reporting and Disclosure Under ERISA*.

[1101] I.R.C. §418E(e)(3); ERISA §4245(e)(3).

[1102] 29 C.F.R. §4245.5(b).

[1103] 29 C.F.R. §4245.6(b), RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. PBGC's Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, Notice of Insolvency Benefit Level, and Combined Notice of Insolvency and Notice of Insolvency Benefit Level are available electronically through the PBGC e-Filing Portal at https://efilingportal.pbgc.gov.

[1104] 29 C.F.R. §4245.6(a), RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. PBGC's Instructions for Notices and Filing Requirements for Terminated, Insolvent Multiemployer Plans PBGC, Notice of Insolvency Benefit Level, and Combined Notice of Insolvency and Notice of Insolvency Benefit Level are available electronically through the PBGC e-Filing Portal at https://efilingportal.pbgc.gov.

[1105] Former 29 C.F.R. §4245.6(a).

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- the monthly benefit expected to be paid to the participant or beneficiary during the insolvency year;

- a statement that in later plan years, depending on the plan's available resources, this benefit level may be increased or decreased but will not fall below the PBGC guaranteed level and that the participant or beneficiary will be notified in advance of the new benefit level if it is less than his or her vested benefit; and

- the name, address, and telephone number of the plan administrator or other person designated by the plan sponsor to answer inquiries concerning benefits during the plan's insolvency.[1106]

Prior to July 1, 2019, notices to interested parties, other than a participant or beneficiary in payment status or reasonably expected to enter payment status during the insolvency year, were required to include:

- the plan's name;

- the plan year for which the notice is issued;

- the estimated annual benefit payments, determined without regard to the insolvency, for the insolvency year;

- the estimated available plan resources for the insolvency year; and

- the amount of PBGC financial assistance requested, if any.[1107]

F. Benefits Guaranteed by the PBGC

The PBGC guarantees the payment of a certain level of benefits when a multiemployer pension plan becomes insolvent.[1108] A multiemployer plan is insolvent if it cannot pay benefits at least equal to the PBGC's guaranteed benefit limit when due. The PBGC does not guarantee benefits that have been in effect for less than five years. ERISA specifies the maximum benefit that the PBGC guarantees for multiemployer plans.[1109]

The maximum benefit guarantee is the sum of:

(i) 100% of the first $11 of a participant's monthly benefit accrual rate and

(ii) 75% of the next $33 for each year of service.

For example, if a worker has 30 years of service and a benefit accrual rate of $23 per month, the maximum guarantee is $600 per month or $7,200 per year ([(100% × $11) + (75% × $12)] × 30 years = $600 per month).[1110]

The Multiemployer Pension Reform Act (MPRA)[1111] provided a guarantee for pre-retirement survivor annuities under multiemployer pension plans that become insolvent. Specifically, the PBGC will not treat such an annuity as forfeitable just because the participant has not died as of the date the plan became insolvent or terminated.[1112] This provision applies retroactively to benefit payments becoming payable on or after January 1, 1985, except in cases where the surviving spouse died before December 16, 2014.[1113]

[1106] Former 29 C.F.R. §4245.6(c). *See* former 29 C.F.R. §4245.5 – §4245.6, 29 C.F.R. §4281.43 – §4281.44.

[1107] Former 29 C.F.R. §4245.6(b).

[1108] ERISA §4022A, §4245 and §4281. Plans covered by the PBGC's termination insurance must pay premiums to the agency. ERISA §4007.

[1109] ERISA §4022A and §4022B. *See* the Worksheets to 361 T.M., *Reporting and Disclosure Under ERISA*.

[1110] ERISA §4022A(c). *See* PBGC Technical Update 00-7.

[1111] Pub. L. No. 113-235, Div. O.

[1112] ERISA §4022A(c)(4), added by MPRA, Pub. L. No. 113-235, Div. O, §110(a).

[1113] Pub. L. No. 113-235, Div. O, §110(b).

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XI. Termination of Multiemployer Plans

The termination of a multiemployer defined benefit plan has the potential to generate withdrawal liability. Defined contribution plans are not subject to withdrawal liability.[1114]

A. *Termination Methods*

A multiemployer plan can terminate in one of two basic ways — by mass withdrawal or by plan amendment. A mass withdrawal occurs when all employers withdraw or cease to be obligated to contribute to the plan or when the PBGC partitions the plan.[1115] A plan amendment termination occurs when the plan is amended to provide that participants will receive no credit for service with any employer after a specified date,[1116] or an amendment that makes it no longer a covered plan by converting the plan into a defined contribution plan.[1117] Multiemployer plans that terminate must file a notice of termination electronically with the PBGC.[1118] Under appropriate circumstances, the PBGC itself can begin termination procedures.[1119] Plan sponsors, as well as fiduciaries, contributing employers and others, that are adversely affected by the PBGC's action to terminate, or any action by the PBGC except with respect to withdrawal liability disputes, have a cause of action to sue the agency for equitable relief.[1120]

Unlike single-employer plans, which generally purchase annuity contracts covering all benefit liabilities upon plan termination reducing plan assets and liabilities to zero, multiemployer plans continue to pay all vested benefits out of existing plan assets and withdrawal liability payments. The PBGC's guarantee of the benefits in a terminated multiemployer plan — payable as financial assistance to the plan — starts only when the plan is unable to make payments at the statutorily guaranteed level (as determined under ERISA §4281).[1121]

B. *"Freeze" and "Conversion" Terminations*

When a multiemployer plan terminates by freezing benefit accruals[1122] or by converting into a defined contribution plan by plan amendment,[1123] each employer's contributions for each plan year beginning on or after the plan termination date must equal or exceed the highest rate of employer contributions at which the employer had an obligation to contribute to the plan in the five preceding plan years ending on or before the plan termination date until full funding is achieved.[1124] The PBGC, however, can approve a lower contribution rate if it finds that the plan is or soon will be fully funded.[1125]

C. *"Mass Withdrawal" Termination or Partition by PBGC*

A mass withdrawal occurs when all contributing employers withdraw from a multiemployer plan. Alternatively, the PBGC can partition a portion of a plan to protect the remaining portion when an insolvent employer or other financial difficulty threatens the entire plan's solvency.[1126] When the PBGC partitions a plan, it must make certain findings and notify Congress and the participants and beneficiaries.[1127]

If the plan termination is due to a mass withdrawal or is the result of a partition, the consequences are more severe than if the plan were terminated by a plan amendment. In that case, the plan sponsor must limit the payment of benefits to vested benefits as of the date of termination; payment of ancillary benefits must cease.[1128] Unless plan assets are sufficient to pay all vested benefits, the plan sponsor can pay benefits only in annuity form.[1129] Small benefits ($1,750 or less) can be paid in a lump sum.[1130] For distributions after 2023, when a plan has sufficient assets, excluding a claim for unpaid withdrawal liability, to satisfy all obligations for nonforfeitable benefits and the plan sponsor decides to close out the plan, the plan may make a lump sum payment when the present value of the participant's entire nonforfeitable benefit does not exceed $7,000.[1131] The PBGC has issued rules for valuing plan assets and liabilities.[1132]

[1114] Benefit guarantees, PBGC financial aid and termination liability do not apply to defined contribution plans. *See* ERISA §3(34), §4021(b)(1) and §4041A(a).

[1115] ERISA §4041A(a)(2).

[1116] ERISA §4041A(a)(1). In combination with, or independently from an accrual freeze, some employers adopt amendments to not admit new employees into a plan.

[1117] ERISA §4041A(a)(3).

[1118] ERISA §4041A(f)(2) authorizes the PBGC to prescribe reporting requirements for terminated plans. Terminated plans must file a termination notice with PBGC no later than 30 days after the last employer withdrawal, or 30 days after the first day of the first plan year where no employer contributions were required, whichever is earlier. *See* 29 C.F.R. 4041A.11, RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. Notice of termination filings under ERISA §4041A made on or after January 1, 2016 must be filed electronically. 29 C.F.R. §4000.3(b)(4) and §4041A.11(d), 80 Fed. Reg. 55,742 (Sept. 17, 2015) (corrected by 80 Fed. Reg. 57,717 (Sept. 25, 2015)). For the required content of the notice, see 29 C.F.R. §4041A.12 (referencing instructions for notice of termination available on PBGC's website, www.pbgc.gov).

[1119] ERISA §4042.

[1120] ERISA §4003(f)(1).

[1121] *See* I.R.C. §418E(f)(2); ERISA §4245(f)(2). *See also* 29 C.F.R. §4041A.25(d) and 29 C.F.R. §4245.8(a), as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. For further discussion of PBGC financial assistance for insolvent plans, see VIII., and X.D., above.

[1122] Under ERISA §4041A(a)(1).

[1123] Under ERISA §4041A(a)(3), by adopting an amendment described in ERISA §4021(b)(1).

[1124] ERISA §4041A(e).

[1125] ERISA §4041A(e).

[1126] ERISA §4233, as amended by the Multiemployer Pension Reform Act, Pub. L. No. 113-235, Div. O, §122(a), effective for plan years beginning after December 31, 2014. Partition may be sought independently from the PBGC or in combination with an application for benefit suspension made to the Treasury Department. *See* 29 C.F.R. §4233.13(a). For a discussion of partition, the coordinated application process and its possible consequences, see VI.D., above.

[1127] ERISA §4233.

[1128] ERISA §4041A(c)(1).

[1129] ERISA §4041A(c)(2).

[1130] ERISA §4041A(f)(1). *See* 29 C.F.R. §4041.22(b). While the I.R.C. §411(a)(11) and ERISA §203(e)(1) limit on involuntary distributions from a qualified plan has risen to $3,500 to $5,000 and to $7,000 after 2023, the $1,750 limit in ERISA §4041A(f)(1) has not changed.

[1131] 29 C.F.R. §4041.43(b) (referencing the dollar amount in ERISA §203(e)(1)), as amended by RIN 1212-AB56, 88 Fed. Reg. 76,660 (Nov. 7, 2023). For payments of nonforfeitable benefits occurring before January 1, 2024, the threshold under the regulation was $5,000.

[1132] 29 C.F.R. §4041A.24, RIN 1212-AB13, 79 Fed. Reg. 30,459 (May 28, 2014), effective beginning with first post-termination valuation after June 27, 2014, and 29 C.F.R. part 4281, as amended by RIN 1212-AB13. For valuing deferred annuities, the mortality of the contingent annuitant during the deferral period is disregarded. Former 29 C.F.R. §4281.14(f), applicable to valuations with valuation dates on or after February 27, 2007. 71 Fed. Reg. 75,115 (Dec. 14, 2006), removed and reserved by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019 (now see 29 C.F.R. §4044.53(g), as refer-

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A number of otherwise applicable ameliorative provisions in the law do not apply when the plan termination is for due to a mass withdrawal or a partition. For instance, in a mass withdrawal or partition, all contributing employers must pay withdrawal liability; if all employers withdrew at the same time or in concert, however, they may not take advantage of the cap on liability,[1133] nor the de minimis exception.[1134] Withdrawal of substantially all employers within a three-year period creates a presumption that there was an agreement among all employers to withdraw.[1135]

On June 6, 2024, the PBGC published final regulations updating interest assumptions used to determine the present value of multiemployer plan benefits in certain withdrawal liability calculations. The final regulations adopt a blended yield curve for interest assumptions and enable the use of market interest rates as of the date of liability measurement as the basis for the interest assumptions. These interest assumptions are used to value liabilities when determining withdrawn employers' reallocation liability in the event of a mass withdrawal from a multiemployer plan.[1136]

Relief under ERISA §4225, the special rule for sales of substantially all of an employer's assets to a third party in an arm's length transaction, however, continues to be available.[1137] The amounts to be reallocated are determined as of the reallocation date. ERISA §4225 relief is not available unless the employer withdrew as a result of the ERISA §4225 sale.[1138] All liability must be fully allocated. Each employer's withdrawal liability is redetermined and uncollectible liability and liability that is not assessable due to ERISA §4225 is allocated to employers that withdrew in the termination year and the two prior years.[1139] The regulations contain notice procedures (to the PBGC and to employers) and filing rules.[1140] Disputes are arbitrable.[1141]

In general, an employer is treated as waiving its right to challenge a calculation of its withdrawal liability if it does not first file an arbitration proceeding as to whether it is entitled to reduction of liability due to its sale of assets and its insolvency, i.e., such disputes are subject to mandatory arbitration provisions of ERISA §4221.[1142]

When the plan terminates (and each year thereafter), the sponsor must determine, in writing, the value of vested benefits and of plan assets, including withdrawal liability claims.[1143] If the assets are less than the value of vested benefits, the plan must be amended to reduce benefits to the level at which assets are sufficient.[1144] Benefits cannot be reduced below the guaran-

enced in 29 C.F.R. §4281.13(b)). PBGC Opinion Letter 82-24, PBGC Opinion Letter 89-5, and PBGC Opinion Letter 90-4. PBGC finalized proposed changes to actuarial valuation information requirements, reducing the frequency of valuation obligations for a number of smaller plans terminated by mass withdrawal, in final rules issued in May 2019. 29 C.F.R. §4041A.24 and 29 C.F.R. §4281.11, as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), applicable to actuarial valuations prepared for plan years ending after July 1, 2019. Terminated and insolvent multiemployer plans with nonforfeitable benefits of $50 million or less (low-obligation valuations) must file an actuarial valuation with PBGC at least every five years, while plans with nonforfeitable benefits over $50 million or more (high-obligation plans) must file an actuarial valuation each year. Terminated plans must file an actuarial valuation for the year of plan termination, while plans closing out are not required to file an actuarial valuation for the year of the plan close out. Each actuarial valuation must be performed within 150 days, and filed with PBGC within 180 days, of the end of the plan year being valued. 29 C.F.R. §4041A.24(a), 84 Fed. Reg. 18,715. Generally, plans with low-obligation valuations or that are receiving financial assistance from PBGC may utilize alternative information to meet the actuarial valuation information requirements (e.g., a recent actuarial valuation, summary plan description, participant data schedule, or the prior submission date of such information to the PBGC), and must timely submit additional information if requested by PBGC. 29 C.F.R. §4041A.24(c), 84 Fed. Reg. 18,715 (May 2, 2019). Filing and valuation instructions, Instructions for Notices and Filing Reqirements for Terminated, Insolvent Multiemployer Plans PBGC, are available at www.pbgc.gov.

[1133] ERISA §4219(c)(1)(D). 29 C.F.R. §4219.14.

[1134] ERISA §4209; 29 C.F.R. §4219.13.

[1135] ERISA §4219(c)(1)(D); 29 C.F.R. §4219.12(g).

[1136] 29 C.F.R. §4281.13(a), RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024) (referencing 29 C.F.R. §4044.54), effective July 8, 2024, and applicable to calculations for valuation dates on or after July 31, 2024. For additional discussion of 29 C.F.R. §4044.54, see IX.C.4.c., above.

[1137] 29 C.F.R. §4219.15(c). *See* preamble to final regulation (before recodification of July 1, 1996), 51 Fed. Reg. 10,322 (Mar. 25, 1986).

[1138] PBGC Opinion Letter 88-5, PBGC Opinion Letter 89-3.

[1139] 29 C.F.R. Part 4219.

[1140] 29 C.F.R. §4219.16, §4219.17. Multiemployer plans sponsors must determine, collect, and assess withdrawal liability as required under ERISA §4219. Plan sponsors of multiemployer plans subject to actuarial valuation requirements (plans terminated by mass withdrawal, insolvent or soon to be insolvent plans terminated by plan amendment, and non-terminated, insolvent plans receiving PBGC financial assistance) must provide PBGC with certain information on withdrawal liability of the plan, including the aggregate amount due, amount due per employer, payments collected, and payments standing — beginning not later than 180 days after the end of the plan year in which the plan terminates, and continuing every year thereafter. 29 C.F.R. §4041A.23(b). Specific instructions for the contents of the withdrawal liability information notice are available on the PBGC website, www.pbgc.gov. In response to comments to Prop. Reg. §4041A.23, RIN 1212-AB38, 83 Fed. Reg. 32,815 (July 16, 2018), these instructions clarify the scope of information required by PBGC on the historical experience of a plan's withdrawal liability, noting that withdrawal liability information on plan years ending prior to July 1, 2019, is not required. 84 Fed. Reg. at 18,718. See IX.C., above, for further discussion of withdrawal liability requirements.

[1141] 29 C.F.R. §4219.16(g).

[1142] *Sheet Metal Workers' Nat'l Pension Fund Trustees v. BES Servs., Inc.*, 469 F.3d 369 (4th Cir. 2006).

[1143] ERISA §4281(b)(1); ERISA §4281(b)(2). Effective for valuations prepared for plan years ending after July 1, 2019, the actuarial valuation requirement is once every five years for terminated plans with a value of nonforfeitable benefits equal to or less than $50 million, while the actuarial valuation requirement is once every year for terminated plans with a value of nonforfeitable benefits of $50 million or more. Terminated plans must file an actuarial valuation for the year of plan termination, and close out plans need not file an actuarial valuation for the year of the plan close out. Each actuarial valuation must be performed within 150 days, and filed with PBGC within 180 days, of the end of the plan year being valued. 29 C.F.R. §4041A.24(a), 84 Fed. Reg. 18,715 (May 2, 2019). Generally, plans with less than $50 million in assets that are receiving financial assistance from PBGC may utilize alternative information to meet the actuarial valuation information requirements. 29 C.F.R. §4041A.24(c), 84 Fed. Reg. 18,715 (May 2, 2019). *See* 29 C.F.R. §4041A.24 and 29 C.F.R. §4281.11, as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), applicable to actuarial valuations prepared for plan years ending after July 1, 2019. Filing and valuation instructions, Instructions for Notices and Filing Reqirements for Terminated, Insolvent Multiemployer Plans PBGC, are available at www.pbgc.gov. Prior to July 2, 2019, the annual valuation requirement was reduced to once every three years for terminated plans with a value of nonforfeitable benefits equal to or less than $25 million. 29 C.F.R. §4041A.24, RIN 1212-AB13, 79 Fed. Reg. 30,459 (May 28, 2014), effective beginning with first post-termination valuation after June 27, 2014. For further discussion of duties of plan sponsors of insolvent multiemployer plans, see X., above.

[1144] ERISA §4281(c)(1). Plan sponsors must use actuarial valuations to perform funding level determinations, and when nonforfeitable benefits of a plan exceed plan assets (including withdrawal liability claims), amend the plan to reduce benefits and issue notices of benefit reduction. If plan assets remain insufficient to cover nonforfeitable benefits, the plan sponsor must then perform a solvency determination as outlined in 29 C.F.R. §4041A.25, and, if the plan is insolvent, file the applicable notices and apply for PBGC financial assistance.

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tee level[1145] and the notice and evenhandedness rules that apply to reorganization benefit reductions also apply here.[1146] Benefit levels cannot be reduced below the amount necessary to ensure that the plan's assets are sufficient to discharge liabilities as they become due.[1147] The reductions must be made within six months after the plan year of termination.[1148]

If the terminated plan becomes insolvent, i.e., it is unable to pay benefits at PBGC guaranteed levels, payments of benefits other than basic benefits are suspended, and the insolvency rules apply.[1149] The sponsor of a terminated plan that is insolvent has the same powers and duties of a sponsor of a plan in reorganization that is insolvent, including the authority to apply to the PBGC for financial assistance.[1150]

D. *Missing Participants*

The issue of how to handle the benefits due to former employees who cannot be located ("missing participants") has increased as a plan administrative hurdle over the last several years. If a terminated participant has a vested benefit, the benefit cannot be forfeited simply because the plan cannot locate the participant to distribute the benefit.[1151] The number of missing participants has increased over the years as permitted vesting schedules were shortened, increasing the number of terminated participants with short service and a vested benefit, and the elimination of some of the tools commonly used by plan administrators to find missing participants.[1152] While missing participants is an administrative issue for ongoing plans, it is a more significant issue for terminating plans since all benefits must be distributed from the plan trust in order for the plan to terminate.

Options are limited for plan administrators seeking to distribute missing participants' benefits. Distributing a missing participant's benefit and rolling it over into an IRA is permitted, but some financial institutions are reluctant to create an account for an individual who cannot be located. Applying 100% withholding tax to a distribution, in hopes that the IRS will apply the amount against any tax return filed by the individual, violates ERISA's fiduciary requirements in DOL's view,[1153] leaving plan administrators with the primary tool for dealing with missing participants — the PBGC's Missing Participant Program, which permits the plan to transfer the benefit liability due to the missing participant to the PBGC.[1154]

Under final regulations published by the PBGC on June 6, 2024, plan sponsors must use the actuarial assumptions prescribed in 29 C.F.R. §4044.51 through §4044.58 (i.e., interest, mortality, and expected retirement age assumptions) when determining certain amounts to transfer to PBGC's Missing Participant Program on behalf of a missing participant.[1155]

The program requires trustees of terminating multiemployer plans to engage in a diligent search for missing distributees. A diligent search under the final regulations requires the trustees to perform a search using (1) a commercial locator service (for any distributee), or (2) the records search method (for distributees with normal retirement benefits valued at no more than $50 per month).[1156] Components of the records search method include: (1) searching the plan's records; (2) searching the records of the contributing sponsor that is the most recent employer of the missing distributee; (3) searching the records of any retirement or welfare plans of the contributing sponsor in which the missing distributee was a participant; (4) contacting any beneficiary named by the missing distributee; and (5) using a free internet search method, such as a search engine, network or public record database, or social media.[1157] All com-

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84 Fed. Reg. 18,715 (May 2, 2019). For further discussion of duties of plan sponsors of insolvent multiemployer plans, see X., above.

[1145] ERISA §4281(c)(2).

[1146] *See* ERISA §4244A and §4281(c)(2)(C), §4281(d)(4). Note that the reorganization rules under I.R.C. §418 through §418D and ERISA §4241 through §4244A were repealed effective for plan years beginning after December 31, 2014. MPRA, Pub. L. No. 113-235, Div. O, §108(a)(1) and (b)(1). Under IRS regulations, a notice required under ERISA §4281 and 29 C.F.R. §4281.32 for an amendment of a multiemployer plan reducing benefits pursuant to ERISA §4281(c) is treated as also having complied with the requirement to provide notice with respect to an amendment under ERISA §204(h). Treas. Reg. §54.4980F-1, Q&A-9(g)(3)(ii)(F).

[1147] *See* ERISA §4281(c)(2)(A).

[1148] ERISA §4281(c)(2)(D).

[1149] ERISA §4281(d)(2)(A). Certain notice requirements apply. 29 C.F.R. Part 4281, as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. The PBGC requires electronic filing of notices of insolvency and insolvency benefits and applications for financial assistance under ERISA §4281. 29 C.F.R. §4281.3, 29 C.F.R. §4000.3(b)(4) and §4281.47(b), RIN 1212-AB28, 80 Fed. Reg. 18,172 (Apr. 3, 2015), as amended by RIN-1212-AB28, 80 Fed. Reg. 55,742 (Sept. 17, 2015) (corrected by 80 Fed. Reg. 57,717 (Sept. 25, 2015)), and RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019). Effective June 27, 2014, annual updates to the initial notice are no longer required. 29 C.F.R. §4281.43, RIN 1212-AB13, 79 Fed. Reg. 30,459 (May 28, 2014). Under PBGC final rules issued in May 2019, plan sponsors of insolvent multiemployer plans terminated by mass withdrawal must file an initial application for PBGC financial assistance applications at the same time it files insolvency notices. *See* 29 C.F.R. §4281.47(b), 84 Fed. Reg. 18,715. See X., above, for discussion of insolvency rules.

[1150] ERISA §4281(d)(3). Note that the reorganization rules under I.R.C. §418 through §418D and former ERISA §4241 through §4244A were repealed effective for plan years beginning after December 31, 2014. MPRA, Pub. L. No. 113-235, Div. O., §108(a)(1) and (b)(1). Final rules issued in March 2019 modify the timing and procedures for PBGC financial assistance applications. *See* 29 C.F.R. §4041A.25(d) and §4245.8(a), as amended by RIN 1212-AB38, 84 Fed. Reg. 18,715 (May 2, 2019), effective July 1, 2019. For further discussion of PBGC financial assistance for insolvent plans, see VIII., and X.D., above.

[1151] Reg. §1.411(a)-4(b)(6) permits the forfeiture of the benefit provided that the benefit is restored upon a claim for the benefit by the participant or beneficiary.

[1152] The Social Security Administration previously provided letter forwarding services to missing participants, but ceased that service on May 19, 2014. The IRS also previously provided letter forwarding services, but ceased that service on August 31, 2012. *See* Rev. Proc. 2012-35.

[1153] DOL Field Assistance Bulletin (FAB) 2014-01. While the FAB is directed at terminating defined contribution plans, there is no reason to believe DOL views the fiduciary duties of terminating defined benefit plans any differently.

[1154] ERISA §4050; 29 C.F.R. §4050.401 through §4050.407.

[1155] 29 C.F.R. Part 4050, as amended by RIN 1212-AA55, 89 Fed. Reg. 48,291 (June 6, 2024), effective July 8, 2024, and applicable to calculations for valuation dates on or after July 31, 2024. For a discussion of actuarial assumptions, see IX.C.4., above.

[1156] 29 C.F.R. §4050.404(a). A commercial locator service is a business that holds itself out as a finder of lost persons for a fee using information obtained by a consumer reporting agency. *See* 29 C.F.R. §4050.404(b).

[1157] 29 C.F.R. §4050.404(c)(1). The PBGC noted in the proposed regulation that searching plan records and contacting named beneficiaries may implicate privacy concerns under the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, and, if so, the trustees should resort to such sources of information as are readily identifiable and accessible. *See* Prop. 29 C.F.R. §4050.404(b), RIN 1212-AB13, 81 Fed. Reg. 64,700 (Sept. 20, 2016).

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ponents of the records search method must be completed, to the extent they are reasonably feasible and affordable.[1158]

The terminating multiemployer plan's trustees must file with the PBGC information about the missing distributees and the diligent search undertaken to find them.[1159] For any distributees who cannot be found, the trustees must either purchase an annuity representing the missing distributee's benefit, or deposit an amount specified in the regulation to the PBGC, which would pay benefits if the missing distributee appears.[1160] The diligent search must be made within nine months of the PBGC filing identifying the missing distributee.[1161]

Note: The IRS directed EP examiners not to challenge the qualified status of any plan for required minimum distribution (RMD) standard violations where the failure to make or commence RMDs to a participant or beneficiary owed payments is due to an inability to locate the individual despite a plan's execution of IRS-approved location methods.[1162] The IRS specified that this guidance addresses only the application of §401(a)(9) in certain circumstances involving a plan's action related to the benefits of a participant or beneficiary that the plan is unable to locate, and does not reach other plan qualification issues, including those under Title I of ERISA.

[1158] *See* 29 C.F.R. §4050.404(c)(2).

[1159] 29 C.F.R. §4050.405. *See* PBGC Form MP-400, Missing Participants Program Plan Information for Multiemployer DB Plans Insured by PBGC, and its related schedules, Schedule A, Individual Information — Annuity Purchases, and Schedule B, Individual Information — Transfer to PBGC.

[1160] 29 C.F.R. §4050.406; 29 C.F.R. §4041A.42(b). The benefit transfer amount is the actuarial present value of the distributee's benefit as determined using PBGC's missing participant assumptions (as defined in 29 C.F.R. §4050.402), plus: (a) for benefits in non-pay status with a normal retirement (or accrual cessation) date that precedes the benefit determination date, the aggregate value of payments of the straight life annuity that would have been payable beginning on the normal retirement date (or accrual cessation date, if later) accumulated at the missing participants interest rate from the date each payment would have been made to the benefit determination date, assuming the distributee's survival to the benefit determination date; and (b) for benefits in pay status, the aggregate value of payments of the pay status annuity due but not made, accumulated at the missing participants interest rate from each payment due date to the benefit determination date, assuming that the distributee survived to the benefit determination date. For assistance in calculating the present value of a distributee's benefit using PBGC's missing participant assumptions, see the Category 2 PV Calculator available under "Additional tools for certain calculations" at https://www.pbgc.gov/prac/missing-p-multiemployer. See Worksheet 11 for an example on accumulating the value of back payments for certain Category 2 calculations (e.g., for missing participants in pay status).

[1161] 29 C.F.R. §4050.404(d).

[1162] *See* IRM 4.70.13.3.4.1.2(13) (11-22-23); TE/GE-04-1017-0033, *Memorandum For Employee Plans (EP) Examinations Employees, Missing Participants and Beneficiaries and Required Minimum Distributions* (Oct. 19, 2017), applicable to all plan examinations open on or after October 19, 2017. The IRS requires a diligent search, which it considers to include all of the following: (1) plan searched its own records as well as related plan, plan sponsor, and publicly-available records or directories for alternative participant contact information; (2) plan searched for participant contact information via a commercial locator service, credit reporting agency, or proprietary Internet search tool for locating individuals; and (3) plan attempted to contact individual via United States Postal Service (USPS) certified mail to participant's last known address, and through appropriate means for any address or contact information, including e-mail addresses and telephone numbers.

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XII. Employer and Union Rights and Responsibilities

A. *Responsibility for Benefits and Eligibility Rules*

Multiemployer trusts and plans are creations of the collective bargaining process, and trustees of multiemployer plans may be granted broad or narrow responsibilities in the bargaining process.[1163] In some trusts, all aspects of the plan — benefits and eligibility rules, for instance — are mandatory subjects of the collective bargaining process. In other trusts, only contribution rates are bargained, and the trustees set benefit levels and all other rules.[1164] Courts look to the trust, the plan, the collective bargaining agreement and other documents for interpretation of the role of the trustees.[1165] Many trusts fall in between these parameters. Deadlocks of trustees are arbitrated, as required by LMRA §302(c)(5), which means that benefit decisions (with their resultant effect on plan liabilities and withdrawal liability) may be placed in the arbitrator's hands if the trustees have power over benefits.[1166] In these cases, the arbitrators typically base their decisions on the financial health of the plan, but views on what constitutes a "healthy" plan vary.[1167]

B. *Disengagement from Multiemployer Bargaining Units*

Many employers that are signatories to multiemployer pension plans conduct bargaining through multiemployer bargaining associations. These employers are bound by the association once bargaining begins.[1168] To separate from a multiemployer bargaining group, the employer must give the union clear and unequivocal notice of the withdrawal before bargaining begins.[1169]

C. *Gathering Payroll Data*

In single employer plans, payroll data may feed automatically into the plan's participant database. Multiemployer plans, however, must solicit that data from multiple employers. Due to multiple contributing employers, the unique portability of service, and the adversarial relationship between the employers and the union and among competing employers, multiemployer plans must take steps to assure that employers provide correct participant information. Multiemployer plans may use the monthly billings to obtain information from each employer; along with remitting the contribution owed, the employer provides the name, Social Security number, hours worked, date of birth, and other information for each employee for that period. In most multiemployer plans, service credit may not be determined until an employee actually applies for the benefit. Because obtaining correct information is essential for maintaining qualified status, multiemployer plans may use field auditors to check on the accuracy of the employer's information. Field auditors visit the employers to compare the remittance reports with payroll and other personnel records, and with union dues and other records maintained by the union or affiliated health and welfare plans. Another verification method is to send monthly reports of credited service to participants for their concurrence.

In addition, plan trustees have the right to audit employer payrolls to determine whether employers are contributing the correct amounts to the plan, at least when the trust agreement provides such a right.[1170] Controversies do arise over which records must be turned over to the plan in order to allow the trustees to substantiate that the correct contributions are being made. Employers, for instance, often wish to withhold salary information on non-union employees, such as management employees. Sometimes, this delicate issue is bridged when the parties agree to allow the employer to submit aggregate salary data on non-union employees, together with job descriptions (rather than names) of such individuals and a statement from the employer or its CPA that the aggregated data is true and correct. In other cases, the plan administrator may believe that he or she must see all compensation data, including data on non-union employees, to verify, among other things, that the appropriate employees of the employer are being treated as members of the collective bargaining unit and that appropriate contributions are being made on behalf of non-union employees.

D. *Labor Law of Plan Termination and Plant Shutdown*

The National Labor Relations Board (NLRB) takes the position that an employer must bargain about the effects of a plant shutdown. The U.S. Supreme Court has ruled that an employer need not bargain about the decision to close.[1171] Of course, pension issues may be one aspect of "effects bargaining."[1172]

[1163] Employers commit in a bargaining agreement to contribute to a plan or to be bound by a plan and/or trust. LMRA § 302(c)(5) requires a written agreement setting forth the basis of contributions.

[1164] *See NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (trustees may not set benefits unless given that power by collective bargaining agreement); *Hauskins v. Stratton*, 566 F. Supp. 1028 (W.D. La. 1983), aff'd, 721 F.2d 535 (5th Cir. 1983); *Botto v. Friedberg*, 568 F. Supp. 1253 (E.D.N.Y. 1982).

[1165] *United Mine Workers of Am. Int'l Union v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), aff'd, 902 F.2d 1558 (3d Cir. 1990); *United Mine Workers of Am. 1950 Benefit Plan & Trust v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177 (D.C. Cir. 1990), rem'd, 949 F.2d 1165 (D.C. Cir. 1991) (blanket referral to magistrate voided).

[1166] Arbitration is required by LMRA §302(c)(5) for "fund administration," a term that can be defined by the parties to the bargaining agreement. *Bay Area Painters Pension Trust Fund*, 2 EBC 1724 (McKay, Arb. 1981) (arbitrator increased benefits); *North Texas Carpenters Pension Plan*, 2 EBC 2313 (Frost, Arb. 1981); *Cement Masons Southern California Pension Fund*, 1 EBC 2185 (Block, Arb. 1979). *Compare Flinchbaugh v. Chi. Pneumatic Tool Co.*, 531 F. Supp. 110 (W.D. Pa. 1982) *and Borden, Inc. v. United Dairy Workers Pension Program*, 517 F. Supp. 1162 (E.D. Mich. 1981) (benefits are collective bargaining issue and not arbitrable) *with Geigle v. Flacke*, 768 F.2d 259 (8th Cir. 1985) (benefits are arbitrable). The issue may be avoided if benefit levels are outside the trustees' power.

[1167] For two different views on the consideration to be given to the effect of benefit increases on withdrawal liability, compare *North Texas Carpenters Pension Plan*, 2 EBC 2313 (Frost, Arb. 1981) with *Bay Area Painters Pension Trust Fund*, 2 EBC 1724 (McKay, Arb. 1981) *and Brick Masons' Pension Trust Fund*, 3 EBC 1345 (Drazin, Arb. 1982).

[1168] NLRA §8(a)(5).

[1169] *Twin City Pipe Trades Serv. Ass'n v. Frank O'Laughlin Plumbing & Heating Co.*, 759 F.3d 881 (8th Cir. 2014) (plumbing company must continue contributing to multiemployer benefit fund because two letters sent to union did not unequivocally terminate company's participation in collective bargaining agreement); *Labbe v. W.M. Heroman & Co.*, 521 F. Supp. 1017 (M.D. La. 1981) (deletion from lists and discussions not sufficient when reporting forms continued to be filed).

[1170] *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559 (1985).

[1171] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

[1172] *Dwyer v. Climatrol Indus., Inc.*, 544 F.2d 307 (7th Cir. 1976).

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Plant closings and shutdowns are complicated by two doctrines: (1) the *Pittsburgh Plate Glass* doctrine that a union does not represent retired employees,[1173] and (2) the doctrine that unions cannot waive the vested rights of employees. Thus, a settlement reached with a union may not be binding on vested participants.[1174] Also, federal law requires 60 days' prior notice of a plant closing, with a penalty that requires the payment of severance in lieu of notice.[1175]

Plan termination may be blocked by language in either the plan or the collective bargaining agreement. With welfare plans, in particular, ambiguous plan language, especially combined with oral promises, has been held to bar a cut or termination of medical benefits.[1176] Some cases even found a presumption that benefits vest upon retirement.[1177] In *M&G Polymers USA, LLC v. Tackett*,[1178] however, the U.S. Supreme Court rejected this presumption of vesting and instructed that a court may not infer, when a contract is silent as to the duration of retiree benefits, that the parties to a collective bargaining agreement intended those benefits to vest for life. The Court stated that collective bargaining agreements are to be interpreted using ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. The Court added that the principle that contractual obligations end when the bargaining agreement terminates does not preclude a court from deciding that the parties to the agreement intended to vest lifetime benefits for retirees. This decision accentuates the importance of including appropriate language in the plan document and the SPD indicating that the plan sponsor reserves the right to terminate the plan or modify or reduce its benefits at any time, if that is the plan sponsor's intent. For a discussion of litigation involving the right of employers to eliminate or reduce retiree medical benefits, see 330 T.M., *Tax and ERISA Implications of Employer-Provided Medical and Disability Benefits.*

E. Collective Bargaining Agreements

A collective bargaining agreement between a union and one or more employers satisfies the Taft-Hartley requirement that there be a written agreement that specifies the detailed basis on which the payments are to be made to the trust. In addition to labor matters unrelated to retirement benefits, a collective bargaining agreement establishes the obligation of the employer to contribute to the plan on behalf of its employees; identifies the class of employees covered by the plan and in a multiemployer plan sets the contribution rate. Collective bargaining agreements are negotiated between a local, regional, or national union and individual employers or an association bargaining for a group of employers. Contributing employers may each negotiate individual bargaining agreements, or they may sign a single agreement as a group. Collective bargaining agreements serve essentially the same purpose as corporate board resolutions adopting plans.

Whether a collective bargaining agreement is bona fide is determined using an arm's-length standard.[1179] An organization will not be considered an employee representative if more than 50% of its membership consists of owners, officers, or executives of the employers covered by the plan. Additionally, the plan must be maintained pursuant to an agreement that also meets DOL's standards.[1180] The IRS has the authority to determine whether there is a collective bargaining agreement under the I.R.C., even if the DOL's standards are met and the union has been recognized as exempt from tax as a labor organization.[1181]

Collective bargaining agreements usually have a finite term, generally from one to five years. Termination of an agreement without renewal or replacement is generally considered a withdrawal by the employer from the plan for work performed after the termination. If the parties bargain to renew or replace a terminating agreement, the old agreement (including the obligation to contribute) remains in effect until the parties have bargained to an impasse. In some cases, a collective bargaining agreement or the trust may require an employer to continue contributing to the plan until the employer has notified the board of trustees of its intention to withdraw.

[1173] *Allied Chem. & Alkali Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

[1174] *See Adams v. Gould, Inc.*, 2 EBC 1874 (E.D. Pa. 1981) (settlement of dispute between union and employer over plan termination not binding on vested plan participants), *rev'd*, 687 F.2d 27 (3d Cir. 1982).

[1175] Worker Training and Readjustment Act of 1988, 29 U.S.C. §2101.

[1176] *Musto v. Am. Gen. Corp.*, 615 F. Supp. 1483 (M.D. Tenn. 1985), rev'd and rem'd, 861 F.2d 897 (6th Cir. 1988); *UAW v. Cadillac Malleable Iron Co.*, 3 EBC 1369 (W.D. Mich. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984); *United Steelworkers of Am. v. Crane Co.*, 605 F.2d 714 (3d Cir. 1979) (absent express contractual guarantee of pension, no obligation); *UAW v. H.K. Porter Co.*, 1 EBC 1277 (E.D. Mich. 1976) (employer must pay vested benefits even though collective bargaining agreement permits termination); *Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976). It has been held that liabilities under ERISA are not the limits of contractual pension obligations. *In re Alan Wood Steel Co.*, 1 EBC 2166 (E.D. Pa. 1978); *cf. Belland v. PBGC*, 4 EBC 1162 (D.D.C. 1983), *aff'd*, 726 F.2d 839 (D.C. Cir. 1984) (oral promises could not overcome agreement permitting termination); *UAW v. New Castle Foundry, Inc.*, 4 EBC 2455 (S.D. Ind. 1983); *UAW v. Robbin Indus., Inc.*, 561 F. Supp. 288 (W.D. Mich. 1983); *UAW v. White Farm Equip. Co.*, 5 EBC 2449 (D. Minn. 1984); *Hanson v. White Farm Equipment*, 42 B.R. 1005 (N.D. Ohio 1984), rev'd, 788 F.2d 1186 (6th Cir. 1986).

[1177] *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), abrogated by *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015); *Bower v. The Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984); *Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984). *See also Moore v. Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012) (retirees and their spouses vest in health benefits where later-issued summary plan description failed to state unilateral right to end retiree medical insurance benefits because terms of bargained-for CBA provided that it could be amended at any time by parties' mutual agreement), cert. denied, 568 U.S. 1250 (2013); *Temme v. Bemis Co.*, 622 F.3d 730 (7th Cir. 2010) (plant closing agreement read in tandem with collective bargaining agreement vested retiree medical rights). In some cases, the language of the agreement was strictly applied. *See United Steelworkers of Am. v. N. Bend Terminal Co.*, 752 F.2d 256 (6th Cir. 1985) (pension plan termination); *Struble v. N.J. Brewery Emps. Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984).

[1178] 574 U.S. 427 (2015), vacating 733 F.3d 589 (6th Cir. 2013). *See CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018) (where collective bargaining agreement contained a general durational clause that applied to all benefits unless the agreement specified otherwise, and no provision specified that health care benefits were subject to a different durational clause, the only reasonable interpretation of the agreement is that the health care benefits expired when the agreement expired); *Mich. Educ. Ass'n Family Retired Staff Ass'n v. Mich. Educ. Ass'n*, 856 Fed. Appx. 580 (6th Cir. 2021) (retiree health benefits were not vested under collective bargaining agreement where there was no "clear, affirmative language" of vesting in the plan documents, which also included reservation-of-rights clauses inconsistent with vesting).

[1179] §7701(a)(46) and Reg. §301.7701-17T.

[1180] §413(a).

[1181] §501(c)(5).

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The contribution rate may be a specified sum per hour or unit of time or work per employee that is deposited directly into trust. Alternatively, the required contribution for the retirement plan, along with contributions or payments for other purposes, such as employee welfare benefits, may be paid to a conduit trust, which then allocates its funds for several different purposes, including payment to the retirement trust.

As a general rule, an employer may not cease contributions to a plan solely because the contract requiring the contributions has expired. Instead, the employer must continue making contributions until negotiations with the union reach an agreement or impasse.[1182]

In determining effective dates for changes in the law, Congress usually permits plan sponsors to reach the next collective bargaining cycle before making the required amendments. When there are multiple agreements with staggered termination dates, the measuring date typically is the last termination date of the agreements in effect on the law's enactment date without regard to subsequent extensions of any of the agreements.

F. Taft-Hartley Act §302(c)(5)

The Labor Management Relations Act (LMRA), commonly known as the Taft-Hartley Act, was enacted in 1947 to regulate relations between unions and employers. Section 302(c)(5) of Taft-Hartley (29 U.S.C. §186(c)(5), as amended by the LMRA) governs the establishment of multiemployer benefit plans including retirement plans that are qualified under the Internal Revenue Code.

In general, Taft-Hartley strictly prohibits employers from making payments to union representatives. However, LMRA §302(c)(5) provides an exception for trust funds established by a union for the exclusive benefit of an employer's employees and their beneficiaries, if certain conditions are met.[1183] These conditions include: (1) as previously noted, the payments must be held in trust for the purpose of paying for employees' and their dependents' benefits (i.e., medical care, pensions, disability, unemployment, sickness, accident or life insurance); (2) the trust must be written and must provide for employers and employees to be equally represented in the administration of the trust fund;[1184] (3) arbitration must be provided in the case of deadlock;[1185] (4) audits must be conducted annually; and (5) payments for pensions must be paid to a separate trust that provides only pensions and annuities.[1186] The contract must contain these safeguards in writing.[1187]

The selection of trustees need not be made by one person, one vote.[1188] In fact, individual employers (or unions) may contract away their voting rights.[1189] LMRA simply requires equality in numbers of labor and management trustees. If a showing is made of union domination, however, even equality of numbers will not preclude a violation of LMRA §302(c)(5).[1190] The NLRB has taken the position that the method of trustee designation is a mandatory subject of collective bargaining.[1191] The requirement of a written agreement can be met even after the collective bargaining agreement expires, until negotiations reach impasse.[1192]

G. Role of Board of Trustees

Multiemployer plans are governed by joint labor-management boards of trustees with each side having equal voting power. All that is necessary is that labor and management have the same total voting power; there is no one-man/one-vote rule, i.e., there can be different numbers of trustees on each side so long as the voting power of each side is the same. Labor trustees usually are union officials and management trustees typically are officers of the employers.

Typically, the joint employer-union board of trustees establishes a multiemployer trust, adopts the plan associated with the trust, and sets the terms of the plan including the benefits to be provided. The trust document contains provisions governing the relationship of employers and the union to the plan. These typically include a statement that the board of trustees may reject a collective bargaining agreement providing for an employer's participation in the plan if the agreement contradicts plan provisions. This is important because any document augmenting the terms of the basic plan document (such as a collective bargaining agreement, side agreement with a participating

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[1182] Cessation of contributions violates NLRA §8(a)(5). *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982).

[1183] 29 U.S.C. §186(c)(5).

[1184] *See Associated Contractors of Essex Cty., Inc. v. Laborer's Int'l Union of N. Am.*, 559 F.2d 222 (3d Cir. 1977) (rival employer association trustees cannot be added without jeopardizing equal representation).

[1185] The arbitration requirement is more flexible than might be expected. *E.g., Souza v. Trs. of the W. Conference of Teamsters Pension Trust*, 663 F.2d 942 (9th Cir. 1981) (failure to arbitrate deadlock held not to violate LMRA §302(c)(5)).

[1186] LMRA §302(c)(5) (29 U.S.C. §186(c)(5)) also provides exceptions for vacation, holiday or severance pay funds (LMRA §302(c)(6)); scholarship funds and dependent care and school funds (LMRA §302(c)(7)); and legal services funds (LMRA §302(c)(8)).

[1187] *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482 (11th Cir. 1985). The writing may not need to be a collective bargaining agreement. *Bd. of Trs. of Plumbers, Pipe Fitters & Mech. Equip. Serv., Local Union No. 392 Pension Fund v. B&B Mech. Servs., Inc.*, 813 F.3d 603 (6th Cir. 2015) (employer was bound to pay delinquent employee fringe benefit contributions; although it did not sign collective bargaining agreement, it entered into written agreements setting out its obligation to contribute); *Seafood Workers Health Fund Union Trs. v. Seafood Workers Health Fund Mgmt. Trs.*, 571 F. Supp. 483 (D. Mass. 1983). It need not explicitly incorporate the trust terms, if it clearly refers to the trust document. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254 (9th Cir. 1984).

[1188] *See Sheetmetal Workers Int'l Ass'n Local 493*, 234 N.L.R.B. 1238 (1978), aff'd, 664 F.2d 489 (5th Cir. 1981); Goetz, *Employee Benefit Trusts Under §302 of the Labor Management Relations Act*, 59 N.W. L. Rev. 719 (1967).

[1189] *See, e.g., Jackson v. Smith*, 927 F.2d 544 (11th Cir. 1991) (supermajority vote requirement for benefit changes does not breach LMRA §302(c)(5)); *Culinary & Serv. Emps. Union Local 555 v. Haw. Emp. Benefit Admin., Inc.*, 688 F.2d 1228 (9th Cir. 1982) (acceptable if only one of two unions participating selects trustees); *Denver Metro. Ass'n of Plumbing, Heating, Cooling Contractors v. Journeymen Plumbers & Gas Fitters Union Local No. 3*, 586 F.2d 1367 (10th Cir. 1978) (employers not members of bargaining association, and therefore disenfranchised, could nevertheless contribute under LMRA §302(c)(5)).

[1190] *See, e.g., Quad City Builders Ass'n v. Tri-City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970).

[1191] *Sheetmetal Workers Int'l Ass'n v. Cent. Florida Sheetmetal Contractors Ass'n*, 234 N.L.R.B. 1238 (1978). *See also Licensed Div. Dist. No. 1 MEBA/NMN v. Defries*, 943 F.2d 474 (4th Cir. 1991) (interpreting phrase "administration of bargain agreements" to include power to appoint trustees).

[1192] *Producers Dairy Delivery Co. v. W. Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981); *Denver Metro. Ass'n of Plumbing, Heating, Cooling Contractors v. Journeyman Plumbers & Gas Fitters Union Local No. 3*, 586 F.2d 1367 (10th Cir. 1978); *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970).

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employer, or reciprocity agreement with another plan) must not conflict with the plan document or else the plan may not satisfy the definite written program or definitely determinable benefit requirements. Another key provision in the trust document is a requirement that employers allow the trustees access to records relevant to administering the trust and maintaining the qualified status of the plan.

In some cases, adherence to the trust agreement by an employer is prescribed by standard language that the trustees require to be added to any collective bargaining agreement providing for participation in the plan. In other cases, this is done through a participation agreement, between the employer and the union, which must be approved by the board of trustees. In most cases, the employer agrees to be bound by the trust agreement, by actions of the employer trustees, and by actions of the board of trustees pursuant to the trust agreement.

Trustees are typically union officials and officers of the employers who meet to hear reports, discuss policies, and vote on matters requiring formal action. The minutes of these meetings are an excellent source of information on service crediting practices, benefit payments, partial termination events, employer or participant suits, and other matters that may relate to a plan's qualification. ERISA §3(16) states that the trustees are the plan sponsors and that, unless the plan document provides otherwise, they are also the plan administrator. Administrative duties may be performed by a joint labor-management committee or by a professional plan administrator. In larger plans, the board may empower committees of one or more trustees to make certain binding decisions or to oversee various ongoing activities. Examples include a retirement committee to act on retirement applications, or an investment committee to monitor the performance of trust assets in accordance with the full board's general investment policy.

H. Participation and Reciprocity Agreements

Multiemployer pension plans may cover employees who are not collectively bargained employees, such as employees of the union, of the retirement fund and affiliated funds, or of the signatory employers. Participation by noncollectively bargained employees must be provided for in the plan document. The plan terms enabling coverage of noncollectively bargained employees must require the employer of such employees to enter into a "participation agreement," or "side agreement," with the plan.

Multiemployer plans also may enter into "reciprocity agreements" with other multiemployer plans, typically ones in different locations that cover similar types of jobs, and with affiliated chapters of the home fund's union. The participating plan's terms could allow participants to aggregate their service under several plans to qualify for a benefit under a single plan or spell out how much of an employee's benefit is to be paid by each multiemployer plan.

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XIII. Alternatives to Defined Benefit Liabilities

A. *In General*

An employer contributing to an underfunded multiemployer plan is generally locked-in, i.e., it cannot leave the plan without paying withdrawal liability. It is possible, however, that a plan's unfunded liability can be curbed, if not cut, by an employer that does not withdraw.

Obviously, one way to hold liabilities down is to gain control over benefit increases. With some plans, this can be done at the bargaining table. With other plans, a revision of the trust agreement may be required. The key is to ensure that contribution increases (in plans that are not fully funded) go to reduce liabilities, not to increase benefits. As part of this effort, the plan administrator should keep a close watch over the actuarial assumptions used to calculate liabilities. Small adjustments in these assumptions can have major consequences in liability calculations.

Defined contribution plans provide a means to increase benefits without increasing withdrawal liability. In a defined contribution plan, "benefits" are simply the balance of an individual's account, and all defined contribution plans are fully funded. Some employers have converted their multiemployer plans from defined benefit to defined contribution plans. The change may be costly unless the defined benefit plan is fully funded. Other employers have placed all future service of current employees or future employees in a defined contribution plan. (Putting future employees in another plan will not create a complete withdrawal but could eventually create a partial withdrawal.)[1193]

B. *Multiemployer §401(k) Plans*

Multiemployer plans can be either defined benefit or defined contribution plans. Once rare, multiemployer I.R.C. §401(k) plans are now becoming increasingly prevalent, particularly among industrial unions (as opposed to trade unions) with employees who perform their work at specific employer facilities. Also, with improved technology, trade unions, whose members are often widely dispersed, have begun to adopt I.R.C. §401(k) plans. The improved technology has helped these plans cope with previously insurmountable logistical issues. In addition, the attitude of unions toward I.R.C. §401(k) plans is changing. Formerly, unions often took the view that each dollar that was won at the bargaining table as a contribution to an I.R.C. §401(k) plan was a dollar that otherwise would have gone toward funding a defined benefit plan or employee health and welfare benefit. Recently, unions have begun to feel pressure from their membership to bargain for I.R.C. §401(k) plans, even if those plans do not provide for employer or matching contributions, because I.R.C. §401(k) plans are a cost-effective way of helping workers save for retirement. In many cases, unions have converted old money purchase plans, commonly called "annuity plans," into profit-sharing/§401(k) plans. The employer contribution to a defined contribution plan, if the contribution is at least equal to 3% of pay and vesting is immediate, can help a plan satisfy the nonelective contribution safe harbor from nondiscrimination testing under I.R.C. §401(k)(12)(C), sparing the plan the expense and burden of testing.

Practice Insight: While collectively bargained plans are exempt from nondiscrimination testing under I.R.C. §401(a)(4) and §410(b),[1194] if employees covered by a collective bargaining agreement participate in an I.R.C. §401(k) plan, the elective deferrals must satisfy the actual deferral percentage (ADP) test,[1195] based on the IRS position that satisfying the ADP test is a condition precedent for the employee's contribution to be considered an elective deferral and exempt from taxation. For ADP testing purposes, a multiemployer plan is treated as a single plan.[1196]

The ACP test (applicable to after-tax employee contributions and matching contributions) is not required for collectively bargained employees.[1197]

A multiemployer I.R.C §401(k) plan is subject to virtually all the requirements applicable to any §401(k) plan. Section 401(k) plans are the subject of frequent legislative changes, including changes enacted as part of the SECURE 2.0 Act.[1198] Among the SECURE 2.0 changes, there are some that represent potentially significant administrative challenges for multiemployer plans.

First, a §401(k) plan that allows catchup contributions must provide that any participants earning more than $145,000 "from the employer sponsoring the plan" can only make catch up contributions as Roth contributions.[1199] Application of the provision to a multiemployer plan is unclear, since the plan sponsor is a joint board of trustees, not an employer paying compensation to participants. If the provision is interpreted to refer to all compensation earned from all contributing employers, that imposes reporting requirements on contributing employers and administrative requirements on the plan administrator. The IRS anticipates issuing guidance providing that a participant's wages for the preceding calendar year from multiple contributing employers would not be aggregated to determine the wage threshold.[1200] The Roth catch-up contribution provision applies to taxable years beginning after December 31, 2023, but the IRS provided a two-year administrative transition period.[1201]

Second, effective for plan years beginning after December 31, 2024, §401(k) plans must provide for automatic contributions by participants, with a minimum contribution of 3% and a maximum contribution of 10%, and an automatic escalation provision up to no more than 15% of compensation.[1202] This re-

[1193] PBGC Opinion Letter 82-2.

[1194] Reg. §1.401(a)(4)-1(c)(5), §1.410(b)-2(b)(7).

[1195] Reg. §1.401(k)-1(a)(5)(iii) and §1.401(k)-1(a)(5)(v).

[1196] Reg. 1.401(k)-1(b)(4)(v)(C).

[1197] Reg. §1.401(m)-1(b)(2).

[1198] SECURE 2.0 Act of 2022, Pub. L. No. 117-328, Div. T, enacted December 29, 2022.

[1199] §414(v)(7), added by Pub. L. No. 117-328, Div. T, §603(a).

[1200] *See* Notice 2023-62, §V.

[1201] Pub. L. No. 117-328, Div. T, §603(c); Notice 2023-62, §IV (delaying the Roth contribution catch-up requirement until taxable years beginning on or after January 1, 2026). During the administrative transition period, catch-up contributions are treated as satisfying §414(v)(7) requirements, even if contributions are not designated as Roth contributions and a plan does not provide for designated Roth contributions.

[1202] §414A(b)(3), as added by Pub. L. No. 117-328, Div. T, §101(a).

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quirement is limited to §401(k) plans established after December 29, 2022, the date of enactment for the SECURE 2.0 Act.[1203] The statute indicates that for a "plan maintained by more than one employer," with no reference to whether the plan is the subject of collective bargaining or not, the provision applies to each new employer as if it were a separate plan. Therefore, if a multiemployer plan is treated as a "plan maintained by more than one employer" for this purpose, employees of each new contributing employer must be subject to an appropriate automatic contribution provision, even though employees of contributing employers that previously joined the plan are not.

[1203] §414A(c)(2). Plans initially adopted before December 29, 2022, but not effective until after December 29, 2022, are considered established before the enactment of the SECURE 2.0 Act and thus satisfy the exception under §414A(c)(2)(A)(i) where the plan is not required to satisfy the automatic contribution arrangement requirements. Notice 2024-2, Q&A A-1.

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