The Pension Benefit Guaranty Corporation (PBGC) has issued new guidance for multiemployer pension funds that want to adopt alternative withdrawal liability payment arrangements.

by | Jay K. Egelberg

WITHDRAWAL LIABILITY:
Alternative Payment Rules and the Role of PBGC
In April, the Pension Benefit Guaranty Corporation (PBGC) issued guidance to assist multiemployer pension plans that request PBGC review of alternative plan rules for satisfying employer withdrawal liability.

Under pension law, an employer that withdraws from an underfunded multiemployer plan is responsible for a share of the plan’s unfunded benefit obligations and generally pays withdrawal liability over a period of years. Employer withdrawal liability payments help to compensate plans for the loss of future contributions from the withdrawn employer if the vested benefits earned by its employees are not fully funded.

By issuing this guidance, PBGC appears sensitive to the pressures facing multiemployer pension funds in collecting withdrawal liability and to some contributing employers.

Funds in certain industries have seen the number of contributing employers and covered workers decrease almost unilaterally and have been unable to collect withdrawal liability from employers that leave. In some instances, these trends have been caused by deregulation, increased nonunion and foreign competition, financial manipulations rendering an employer bankrupt and the remnants of a major economic recession. PBGC seeks to assist funds and encourage looking for inventive ways in which to collect every possible dollar owed them.

Calculating Withdrawal Liability

An easy way to think of the withdrawal liability calculation process is to view it as three steps:

1. An actuary conducts a valuation and compares a value of fund assets against a best estimate of liabilities for vested benefits earned to date. The excess of liabilities over assets, if any, is referred to as unfunded vested benefits (UVBs).
This may be thought of as a large pie to be divided under step 2.

2. Using an allocation method—usually one of the methods described by law that is selected by the fund’s trustees or a method of the trustees’ own design—this pie is sliced up into pieces sized for each contributing employer so that, theoretically, the sum of all the pieces equals the amount from step 1.

3. A payment schedule is developed with which the withdrawing employer may satisfy its liability allocated under step 2. A required annual payment is calculated that is supposed to be not too different from the annual contributions the employer made to the fund during its contributory years. And then a payment period in years is determined (using logarithms!) over which the liability will be satisfied with the required annual payment, but it cannot extend beyond 20 years (unless, possibly, a mass withdrawal is declared, a subject beyond the scope of this article). Even though a lump sum may be paid up front, most withdrawing employers adopt the fund’s payment schedule.

While PBGC promotes creativity within the law under which funds can apply steps 2 and 3 above, the recent PBGC guidance mostly focuses on step 3—developing the payment schedule. PBGC encourages the innovative use of existing statutory and regulatory tools to reduce risk to employers while protecting promised benefits and securing income to the fund. While PBGC likes to be called upon to review alternate payment arrangements, it is not required. The guidance published explains the review process, information needed and the factors under consideration. Perhaps the biggest factor is that several large funds are in danger of insolvency, increasing the risk of PBGC insolvency. The Multiemployer Pension Reform Act (MPRA)—a 2014 law designed to forestall such events by allowing the reduction of retiree benefits for plans facing insolvency—is emerging as insufficiently effective.

Alternative payment rules can help troubled multiemployer funds by incentivizing employers to remain in the fund, particularly employers that might not be able to pay their withdrawal liability. Proposals have included incentives for employers to remain in a fund by providing discounted withdrawal liability that is conditioned on continued employer participation for a specified period of years or by allowing for smaller payouts over longer periods to be sensitive to an employer’s specific financial hardships. Proposals can be highly complex, involving analysis of funds’ future cash flows and underfunding under various scenarios. Great care is required to ensure that fund participants are not harmed and the PBGC multiemployer insurance program is not put at greater risk.

New PBGC Guidance

In the guidance issued in April, PBGC refers to Section 4224 of the Employee Retirement Income Security Act of 1974 (ERISA) as amended, which states, rather simply, “A multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer’s withdrawal liability if such rules are consistent with this chapter [Title IV of ERISA] and with such regulations as may be prescribed by the corporation [PBGC].” PBGC has not issued a regulation under ERISA Section 4224, although it has authority to do so.

PBGC warns that a decision by fund trustees to modify and reduce an employer’s withdrawal liability is subject to the fiduciary standards prescribed by Title I of ERISA and that the U.S. Department of Labor Employee Benefits Security Administration is responsible for enforcing those standards. No mention is made of how vigorously that agency would pursue any trustee action, but PBGC wants trustees to remain aware of the standards of care they must exercise while being creative at the same time.
In the past, PBGC has reviewed proposals by multiemployer plans to adopt alternative terms and conditions to satisfy withdrawal liability in the context of the potential of a mass withdrawal. Such proposals have sought to deter continued withdrawals, extend fund solvency and avoid a potential mass withdrawal termination by offering incentives for employers to remain in the fund via some form of withdrawal liability relief. And in the current environment, in which the PBGC multiemployer program is attempting to stay afloat, issuing this guidance could be a signal to all funds to try their creative best to assist PBGC by proactively staying afloat themselves as much as possible.

Several proposals came from plans that were facing significant financial distress that, if not addressed, could have adversely affected participants, employers and the PBGC insurance system. These alternative proposals involve numerous contingencies and speculate how various stakeholders will behave in light of the alternative terms and conditions and/or in their absence. They also try to predict how a fund will be able to collect withdrawal liability under different scenarios after declaring the trustees’ assessment of employers’ ability to continue withdrawal liability payments and how the ability of employers to make contributions in the future may vary over different time frames.

Because each fund’s situation is different, PBGC expects significant variations in form and content in withdrawal liability proposals. Evaluating the impact of such a proposal on a fund’s future solvency and contribution and withdrawal liability income, as well as the impact on a fund’s participants and the PBGC insurance program, is highly complex. It involves analyzing the probability of various events and comparing the actuarial present value of a plan’s expected unfunded liability under various scenarios and at a variety of times in the future. And proposals submitted from funds in significant financial distress have the added dimension of weighing the costs and benefits to the various, and potentially conflicting, interests of all stakeholders.

Because of the potential impact on the PBGC insurance system, the agency is encouraging interactive dialogues with trustees to fully understand alternative withdrawal liability proposals. PBGC welcomes informal consultations with trustees and their advisors in advance of written requests. During these consultations, trustees and the agency can address questions and exchange information about matters including whether contributing employers have already been consulted about, or have agreed in principle to, the proposed alternative terms and conditions.

**The Review Process**

Once PBGC has the necessary information, the agency endeavors to complete a review as quickly as it can. For less complex alternative proposals, PBGC aims to complete a review within 180 days or sooner. For the most complex proposals, PBGC aims to complete a review within 270 days. During this waiting period, absent formal approval from PBGC, fund trustees will have to begin to collect withdrawal liability as statutorily required while depending on their own best interpretation of ERISA Section 4224 in applying any creative efforts to develop advantageous payment variations.

In evaluating proposals, PBGC will consider whether trustees have supported their conclusion that the proposed alternative terms and conditions would realistically increase and maximize the collection of withdrawal liability and projected contributions. Ultimately, PBGC should see that the proposed alternative terms are in the interests of participants and beneficiaries, do not create an unreasonable risk of loss to the PBGC insurance program, and are otherwise consistent with the statutory and regulatory framework. If PBGC finds that the proposed alternative terms and conditions may

### Takeaways

- An employer that withdraws from an underfunded multiemployer fund is responsible for a share of the unfunded vested benefit obligations and generally pays withdrawal liability over a period of years.
- Employer withdrawal liability payments help to compensate funds for the loss of future contributions from the withdrawn employer if the vested benefits earned by its employees aren’t fully funded.
- Recent guidance from the Pension Benefit Guaranty Corporation (PBGC) seeks to help funds that request PBGC review of individually designed alternative rules for satisfying employer withdrawal liability.
- The new guidance focuses mostly on how funds should develop an alternative withdrawal liability payment schedule with an eye toward improving benefit security for the fund and, indirectly, PBGC.
- Funds are not required to pursue PBGC approval of alternative withdrawal liability proposals, but informal conversations are encouraged as well as a more formal approval process with which trustees may feel more secure in pursuing alternative actions.
create an unreasonable risk of loss to stakeholders, it will dis-
cuss possible modifications to mitigate that risk.

PBGC finds it helpful to see support for an assertion that
any proposed alternatives would retain employers in a fund
over the long term and secure income that would be oth-
erwise unavailable to the fund. The agency also is looking
for information demonstrating that, absent the alternative,
employers would withdraw from the fund or significantly
reduce contributions, thus undermining benefit security.
PBGC will work with trustees to assess what kind of in-
formation a fund could most efficiently provide and what
would be most useful for PBGC’s understanding of the pro-
posal.

Supporting information typically includes:

- The determination of an alternative payment amount
  or alternative payment schedule
- Requirements that an employer must satisfy to be eli-
gible for alternative terms and conditions
- How expected cash flows, expected unfunded liability,
  expected recovery of withdrawal liability and projected
  insolvency dates compare under the current frame-
  work with the proposed alternative
- Actuarial assumptions underlying the comparison of
  existing and alternative rules (taking into account the
  fund’s historical experience), including explanations
  and substantiations of assertions for an employer’s
  ability to meet its pension obligations and the extent to
  which employers will elect to participate in the alterna-
  tive terms and conditions
- Participation history of contributing employers, espe-
cially significant employers.

This information will almost certainly be developed by
trustees working closely with the fund’s actuary and perhaps a
special financial consultant that can forecast the activity of an
industry and its members. Some funds have engaged the ser-
vices of an independent financial expert to study a repre-
sentative sample of their employers to help determine that their
expected net recovery of withdrawal liability under the alter-
native terms and conditions would be comparably favorable.

In reviewing proposed alternatives, PBGC asks:

- Are they in the best interests of all stakeholders?
- Do they create an unreasonable risk of loss to PBGC?
- Are they consistent with ERISA and PBGC regula-
tions?
- Would they realistically maximize projected contribu-
tions and the net recovery of withdrawal liability?
- Are they derived under assumptions that are reason-
able and supported by credible data?
- Do they feature terms and conditions that are reason-
able in scope and application and apply uniformly to
all employers (yet may also consider the creditworthi-
ness of individual employers)?

PBGC closes its guidance by noting that it represents their
current thinking on this topic and that if an alternative ap-
proach satisfies the requirements of the applicable statutes
and regulations, it can be used. It encourages trustees to con-
tact PBGC if they want to discuss an alternative approach but
emphasizes that trustees are not required to do so.

bio

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The agency evaluates all proposals on a case-by-case basis. As part of the guidance, PBGC encourages plan trustees and pension practitioners to discuss their proposals with PBGC in advance of application, since early consultation can shorten the time needed to review an application. PBGC, having traditionally “advertised” itself as a friendly agency, is certainly open to immediate contact as evidenced by its up-front inclusion of contact information for two high-level staff members in the guidance.

Troubled funds could do well to seek creative ways to encourage continued participation by troubled employers and by letting others withdraw under more favorable terms, by which the funds stand to collect comparatively more in withdrawal liability. Concerned trustees should look to the legal and actuarial talent available to them and explore whether creative alternatives could work better than current arrangements while further strengthening benefit security. Once solid proposals are identified, it could be useful to explore their viability via informal PBGC contact. And while formal PBGC review and approval appears not to be required, trustees can certainly feel more secure in pursuing alternative actions with PBGC support and approval behind them.