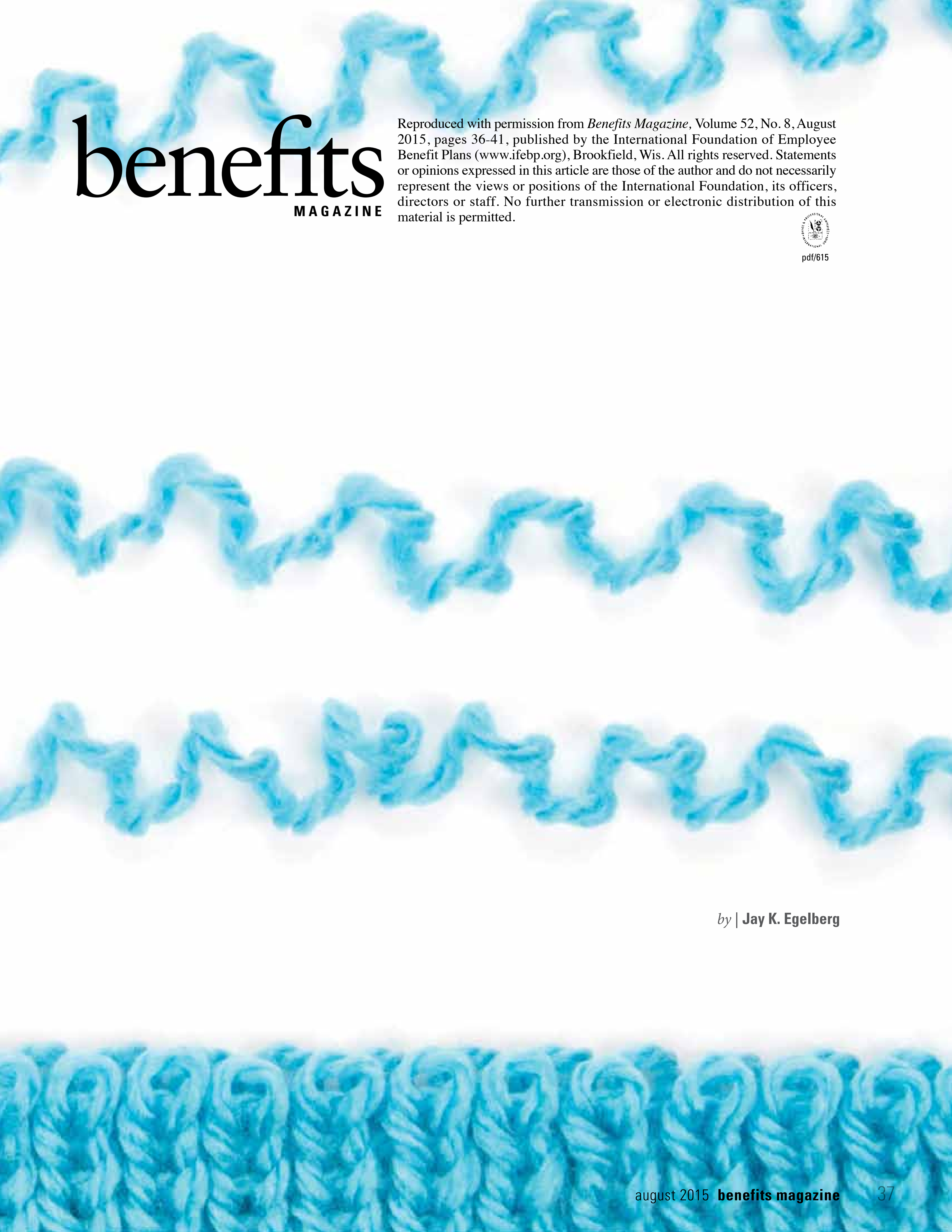
PPA Paradoxes Eliminated:

MPRA Offers Technical Corrections . . . and More

The Multiemployer Pension Reform Act (MPRA) ensures that provisions of the Pension Protection Act of 2006 (PPA) live on. It also fixes other puzzling aspects of PPA.



by | **Jay K. Egelberg**

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For participants under the age of 80, the possibility of reduced pension benefits may be the most notable feature of the Multiemployer Pension Reform Act (MPRA) that President Obama signed into law on December 16, 2014. The comprehensive law also includes provisions aimed at strengthening multiemployer pension plans and the Pension Benefit Guaranty Corporation (PBGC) program that insures them—for example, by raising PBGC premiums for multiemployer funds and encouraging mergers and partitions of seriously challenged funds.

This article focuses on a less-publicized aspect of MPRA—how it affects the Pension Protection Act of 2006 (PPA). MPRA extends PPA provisions that were due to sunset and also makes technical corrections to PPA. These MPRA provisions are effective now for the first plan year beginning in 2015.

PPA Funding Rules Continue

Under MPRA, each multiemployer fund's actuary must certify annually whether or not a fund (1) is in endangered status for the plan year, (2) is or will be in critical status for the plan year or any of the succeeding five plan years or (3) is or will be in "critical and declining status" for the plan year.

Previously, actuaries had been telling multiemployer "green zone" fund clients that, under PPA, annual testing and certifying of funded status would end with the 2014 plan year; that is no longer the case. Of course, a fund in an endangered or critical status would continue to operate under its funding improvement plan (FIP) or rehabilitation plan (RP), as applicable, and the actuary will continue to certify whether those funds are making scheduled improvement or rehabilitation progress.

MPRA also introduces new statuses:

- *Green and clean*, similar to the previous green zone but not projected to be in critical status in the next five plan years
- *Green, but red in five*, indicating neither an endangered nor critical status now but projected to be critical within the next five years
- *Critical and declining*, a red zone fund expected to become insolvent in 15 to 20 years.

Because of MPRA, funds will continue to be able to apply to the Internal Revenue Service (IRS) for automatic and alternative extensions of amortization periods. That will give funds a chance to absorb unfavorable experience and the cost of amendments over an extended period. Also, because of MPRA, funds can still choose to use standard or shortfall methods of funding without having to apply to IRS to do so. (Shortfall funding is a different funding technique that may allow a multiemployer fund to show that it is in a better financial and actuarial position.)

Electing Early to Be in Critical Status

A fund that is certified to be green but is projected to be red in five years now can elect to be in critical status effective for the current plan year. The fund must make that election within 30 days after the actuary's annual certification. Within 30 days after making the election, the plan sponsor must notify the Secretary of the Treasury.

A plan that has elected to be in critical status must follow red-zone restrictions and activities. For example, it must develop an RP and collect contribution surcharges.

However, if a fund is expected to be "red in five" and the plan sponsor chooses not to elect to be in critical status for the current plan year, the plan sponsor must notify PBGC of its decision within 30 days after the actuary's certification. The Department of Labor has yet to issue guidance about how this affects the annual funding notice for the 2015 plan year to be distributed beginning during 2016 plan years, but the author believes the notice will have to state the fund expects to be red in the next five years.

Rule on Emerging From Critical Status Clarified

MPRA includes two new rules for emerging from critical status:

1. If a fund no longer meets PPA's four original multipronged tests for entering the red zone, it can emerge from the red zone if it also doesn't expect to have an accumulated funding deficiency for ten plan years (taking into account helpful amortization extensions) and is not projected to become insolvent for the next 30 plan years.
2. A new special emergence rule is available for a fund having an "automatic" five-year amortization extension if it is not expected to have an accumulated funding deficiency for ten plan years (taking into account helpful amortization extensions) and is not projected to become insolvent for the next 30 plan years. However, the fund could reenter the red zone in a subsequent plan year if it's projected to have an accumulated funding deficiency within ten plan years (reflecting amortization extensions) or is projected to become insolvent within the next 30 plan years.

The new rules fix a "revolving door" paradox that drafters of PPA, perhaps inadvertently, wrote into the law, under which a red-zone fund could emerge from and then immediately reenter critical status in the same plan year. Such emergence was enabled by reflecting helpful amortization extensions ("easy out") and a subsequent and immediate reentry was fostered by *not* being allowed to reflect those same helpful amortization extensions when testing for the current year's status ("easy in").

When Endangered Status Doesn't Apply

If a fund was in the green zone for a prior year and is now certified as being in an endangered status but is expected to be in the green zone as of the 11th plan year after the certification date without having to develop a FIP, it can escape endangered status and does not have to develop a FIP. The actuary should include these results with the annual certification, and the plan sponsor should notify bargaining parties and PBGC that the fund would have been endangered but for this exception.

Endangered Status FIP Target Funded Percentage Corrected

Previously, PPA required that the "starting" percentage for endangered funds occurred at the beginning of the FIP period. Unfortunately, the FIP period often began at least two years after the date of the actuary's first certificate that the fund was endangered, which made it difficult to project the starting percentage with certainty.

MPRA allows the plan sponsor to use the funding percentage that was known at the beginning of the plan year for which the actuary is certifying endangered status.

Conforming Endangered Status and Critical Status Rules

Under PPA, a number of restrictions applied during the FIP adoption period, the FIP period and the RP adoption period. Curiously, these restrictions didn't apply during the actual rehabilitation period.

For example, plan sponsors could not accept collective bargaining agreements (CBAs) or participation agreements that reduced contribution levels for any participants or suspended contributions with respect to any service. CBAs could not directly or indirectly exclude younger or newly hired employees from participation.

MPRA now allows funds these exclusions during both the RP and FIP periods, but not during the RP adoption period or the period from the actuary's first certification of an endangered status until the trustees adopt a FIP (note that MPRA does not mention PPA's well-defined and generally longer FIP adoption period).

takeaways >>

- Because of MPRA, the annual testing and certifying of funded status—which was to end with the 2014 plan year—will continue.
- MPRA allows funds to continue to be able to apply to IRS for automatic and alternative extensions of amortization periods, giving them a chance to absorb unfavorable experience and the cost of amendments over an extended period.
- A plan sponsor now can use as a starting point the funding percentage that was known at the beginning of the plan year for which the actuary is certifying endangered status.
- Now, when a participant of an insolvent multiemployer fund dies on or after the date the fund becomes insolvent or terminates, the QPSA may be paid retroactively to January 1, 1985 unless the surviving spouse died before MPRA was signed into law.
- MPRA expands the scope of documents that plan sponsors must furnish when stakeholders in multiemployer defined benefit funds ask for them.

<< bio

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Corrective Plan Schedules When Bargaining Fails

Under PPA, a FIP or RP "default" schedule was to be imposed if bargaining parties failed to adopt a contribution schedule consistent with the FIP or RP within 180 days after expiration of a CBA that was in effect when the fund entered an endangered or critical status and required contributions.

But when bargaining parties already were operating under a FIP or RP when the CBA expired—for example, during the second or subsequent rounds of bargaining—PPA said nothing about a default schedule. MPRA clarifies that in this instance, as well, a contribution schedule is imposed after a 180-day impasse. The schedule will be the one under which the CBA was operating most recently as updated under the FIP or RP in effect on the date the CBA expires.

Repeal of Reorganization Rules

MPRA repeals reorganization rules that were cumbersome, unclear and inconsistent. Regulatory agencies had provided little guidance on these old rules that applied to the most challenged funds and predated red-zone rules. The rules, which were intended to rehabilitate the benefit security of funds, considered contribution increases, benefit reductions and additional reporting requirements.

Disregard of Contribution Increases for Withdrawal Liability Purposes

The present value of unfunded vested benefit liabilities attributable to a withdrawing employer generally is determined via a fraction of (1) the sum of a withdrawing employer's contributions for the most recent five years divided by (2) the sum of all employers' contributions for those five years. Under PPA, the allocation of the present value of unfunded vested liabilities ignored any contribution surcharges made by any contributing employers.

However, PPA wasn't clear whether the surcharge could be included when determining a withdrawing employer's highest contribution rate. That's the rate used for calculating the required annual payment and the payment schedule for settling withdrawal liability.

MPRA makes it clear that:

- A withdrawing employer's highest contribution rate will be determined without reflecting surcharges, even after the fund emerges from a critical or endangered status.
- Contribution increases required under a FIP or RP are to be ignored in determining the highest contribution rate. However, at the expiration of the CBA in effect when a fund emerges from an endangered or critical status, the higher contributions required under a FIP or RP can be considered when allocating withdrawal liability.
- While these rules apply to the most commonly used 20-pool ("presumptive") or one-pool ("rolling five") methods, exceptions are made for funds using the direct-attribution or other custom-made, PBGC-approved methods.

PPA was clear that the present value of unfunded vested benefit liabilities should not reflect reduced adjustable benefits in red-zone funds. PBGC issued regulations with a simplified approach (Technical Update 10-3). Similarly, when accrued or in-status benefits are to be reduced for critical-and-declining funds, the present value of unfunded vested benefit liabilities is not to be reduced for employers withdrawing during the next ten years.

Under MPRA, PBGC will issue regulations for simplified handling provisions that apply to benefit reductions, contribution increases and surcharges effective during plan years beginning after 2014.

Preretirement Survivor Annuities Guaranteed

For insolvent multiemployer funds, PBGC never guaranteed the qualified preretirement survivor annuity (QPSA) as it did for terminating single employer pension funds. Now, when a participant of an insolvent multiemployer fund dies on or after the date the fund becomes insolvent or terminates, MPRA states the QPSA may be paid. And benefit payments are payable retroactively to January 1, 1985, except in cases where the surviving spouse died before MPRA was signed into law. It is hoped that funds will still have the data they need to comply with this change.

Required Disclosure

PPA amended Section 101 of the Employee Retirement Income Security Act to allow stakeholders in multiemployer funds to request periodic reports from the plan sponsor. MPRA expands the scope of documents that sponsors of multiemployer defined benefit plans must furnish to include:

- The current plan document, including amendments
- The latest summary plan description
- The current trust agreement, including amendments
- The annual Form 5500 filing for any plan year
- The annual funding notice provided for any plan year
- For a request by a contributing employer, its participation agreement during the current or any of the five immediately preceding plan years.

MPRA adds that a fund does not have to provide periodic reports that have been in its possession for six or more years. It also clarifies retention of records for compliance and how stakeholders' interests are protected in the event of fund violations.

However, because directions as to which funds are covered under these two disclosure provisions are different in PPA and MPRA, some sponsors of multiemployer savings/annuity funds are unsure how to comply.

It is believed that technical corrections to some of these technical corrections are being discussed in Congress, and we might see relevant legislation during 2015.