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Pension Plans Should Prepare Now for Reporting the Number of Participants for Whom No Contributions Were Made

Last year the Pension Benefit Guaranty Corporation (PBGC) published Technical Update 2010-1 on how to complete Line 14 of Schedule R for Form 5500, which requires reporting the number of participants under the plan on whose behalf no employer contributions were made for the plan year and for each of the two preceding plan years. Because last year was the first year the disclosure was required, PBGC provided several options for determining the number of employees to report. Those options are not available for plan years beginning in 2010. For calendar year plans, Form 5500 is due (with extensions) in October. Now would be a good time to review the rules for determining the number of participants to include on Line 14 of Schedule R, and to make sure that plan records will allow for accurate reporting.

The instructions for Line 14 require the plan to count only those participants whose last contributing employer had withdrawn from the plan by the beginning of the relevant plan year. For this limited purpose, the plan is to disregard retired and deferred vested participants whose last contributing employer had not withdrawn from the plan by the beginning of the relevant plan year (even if the employer made no contributions for the plan year).[1] The instructions state that withdrawal liability payments are not to be treated as contributions for purposes of determining the number of participants on Line 14.

Clarification of Line 14 Instructions—Last Employer Rule

To reduce plans' recordkeeping burdens, the information required for Line 14 relates to the number of inactive vested participants (retired or deferred vested participants) whose last contributing employer had withdrawn from the plan. Technical Update 10-1 clarifies that, for purposes of completing Line 14, a plan is not required to review the status of any employers that made contributions on behalf of a participant for covered service prior to the participant's last contributing employer. The following example illustrates the counting for the 2009 Schedule R.

Example: Participant A is a deferred vested participant for the 2009 plan year. Employer X made contributions on Participant A's behalf from 1985 through 1989, and Employer Y made contributions on Participant A's behalf from 1990 through 2003. Participant A did not thereafter work for any employer that made contributions to the plan. To answer Line 14 of the 2009 Schedule R,

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[1] The definitions of withdrawal are those contained in section 4203 of ERISA.

In This Client Advisory

FASB Retreats from Multiemployer Pension Disclosure Rules: Tentatively Accepts More Workable Proposal

In response to an avalanche of negative comments, FASB has indicated that it will drop its original proposal for reporting an employer's obligation to any multiemployer plans in which it participates and tentatively endorsed a compromise along the lines suggested by the commenters. Under the revised standard, if adopted, the employer would be required to disclose:

1. Each multiemployer plan to which it contributed;

2. The zone status of each such plan under the Pension Protection Act of 2006, *i.e., whether the plan was classified as safe, endangered or critical presented in a comparable manner so balance sheets of different companies could be compared* (for public companies the zone status would be presented for the last two plan years.)

3. Contributions for the current year for each income statement that is presented (three years for public companies).

4. Whether the surcharge that applies to plans in critical status has been imposed; and

5. The expiration date for each collective bargaining arrangement for each individually material plan in which the employer participates (only for the end of the most recent year).

Although this may not be FASB's final word on disclosures regarding multiemployer plans, it greatly eases its originally proposed disclosure rules. FASB addressed quantitative disclosures at a later meeting. At that later meeting, FASB decided not to require disclosure of future contributions, but did vote to require a description of the nature and effect of any changes affecting comparability from period to period.

FASB met on remaining issues on July 27. The FASB staff is working on a final draft which we expect relatively soon. ■

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the plan limits its review to whether Employer Y had withdrawn from the plan by the beginning of the 2009 plan year (disregarding whether Employer X had withdrawn from the plan). The plan determines that Employer Y withdrew from the plan in 2005, and includes Participant A in the number of participants on whose behalf no contributions were made by an employer as an employer of the participant on Lines 14a through 14c for the 2009, 2008, and 2007 plan years.[2]

[2] "Technical Update 10-1: Multiemployer Plans - Clarification of Schedule R (Form 5500) Instructions and Partial Reporting Relief for 2009." PBGC.gov. 08 June 2010. <http://www.pbgc.gov/res/other-guidance/tu/tu10-1.html>.

Option

Instead of using the last employer rule, the plan may choose to count as participants on Lines 14a through 14c only those participants whose last contributing employer and all prior contributing employers had withdrawn from the plan by the beginning of the relevant plan year. Under this approach, the plan would review the list of all current contributing employers (employers that had not withdrawn from the plan by the beginning of the relevant plan year), and include on Line 14 only those inactive participants who had no covered service with any of these employers. The likely effect of this alternative will be to reduce the number of participants reported on Line 14. A plan using this approach must so indicate

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Third Circuit Grants Post-Petition Withdrawal Liability Priority Status in Bankruptcy Case

In a potentially landmark opinion, the United States Court of Appeals for the Third Circuit ruled that withdrawal liability attributable to work performed after a company filed for bankruptcy was a priority claim. Prior to this ruling, bankruptcy courts had generally held that withdrawal liability claims were only entitled to general creditor status.

The case, *In re: Marcal Paper Mills, Inc.,*[1] involved a company that petitioned for reorganization under the Bankruptcy Code. The company continued to operate as a Debtor-in-Possession (DIP) and continued to abide by the terms of the existing collective bargaining agreement, including making contributions to the Trucking Employees of North Jersey Welfare/Pension Fund. Marcal was sold to a new company, which ceased employing union members and was not obligated to contribute to the pension fund. The pension fund assessed withdrawal liability and argued that the portion of the liability that arose while Marcal was operating in bankruptcy should be allowed as an administrative expense and so granted priority status in the reorganization. The bankruptcy court rejected that argument, however, and ruled that none of the withdrawal liability was an administrative expense.

The District Court reversed the decision, holding that the portion of withdrawal liability attributable to contributions for work performed after Marcal filed its bankruptcy petition was an administrative expense entitled to priority over the general creditors. The District Court remanded the withdrawal liability claim to the Bankruptcy Court to determine how it should be apportioned between pre- and post-petition periods.

In its opinion affirming the District Court's decision, the Appeals Court noted that administrative expenses are those incurred to keep the bankrupt company operating and stated:

". . . it is clear that the covered employees were required to perform work post-petition in order to keep DIP Marcal in operation, unquestionably conferring a benefit to the estate. Pursuant to the continued-CBA and pension plan, Marcal promised to provide pension benefits in exchange for that post-petition work."[2]

The Appeals Court's opinion leaves unanswered the central question of how to apportion withdrawal liability between pre- and post-petition. At one point

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[1] Case No, 09-4574 (3rd. Cir., June 16, 2011.)

[2] Id. at p. 10.

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on an attachment to the Schedule R. Note that the additional relief allowed by Technical Update 10-1 is not available for 2010.

Conclusion

Plan administrators may wish to review their participant records now to make sure they can identify the last contributing employer for retirees and terminated vested participants so that they can generate the information needed to complete Line 14. Also, Trustees should decide if they wish to use the option of not reporting any retirees or terminated vested participants that ever worked for an employer that is still making contributions. Not only will this method of counting participants and retirees likely result in a lower number being reported, it may be easier to comply with depending on the state of the plan's records. ■

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in addressing Marcal's argument that withdrawal liability "is wholly subject to the whims of the market,"[3] the Appeals Court noted that Marcal "assumed those risks with open eyes."[4] Arguably this means that any increase in withdrawal liability that occurred after Marcal entered bankruptcy is an administrative expense because withdrawal liability flows directly from the DIP's decision to continue making contributions to the pension fund. Later, however, in discussing how to determine the post-petition portion of withdrawal liability, the Appeals Court opinion states: "To the extent that withdrawal liability includes new vested benefits that arose from the post-petition work of covered employees, one can determine the extent to which those benefits have become underfunded."[5]

[3] Id. at p. 12.

[4] Ibid.

[5] Id. at p. 14.

***Cheiron Observation:** Thus, one is not certain if the apportionment is to be made by: (a) subtracting the withdrawal liability if the employer had withdrawn on the date it filed for bankruptcy from the withdrawal liability as of the actual withdrawal date; (b) determining the portion of the new vested benefits that have become unfunded, by comparing the value of those benefits with the value of the employer's contributions and adjusting for any market losses; or (c) some other method.*

Conclusion

The Marcal opinion gives plans some hope of collecting more withdrawal liability from employers undergoing bankruptcy reorganization but leaves unanswered questions. Apart from continuing litigation over how to apportion withdrawal liability between pre- and post-petition periods, the mere existence of a potential administrative claim may cause reorganizing employers to petition the bankruptcy court to reject the current collective bargaining agreement that requires pension contributions, thereby possibly avoiding any priority claim for withdrawal liability. ■