

New PBGC Regulation Offers Multiemployer Plans Additional Options for Withdrawal Liability

Introduction

The PBGC has published a final regulation that implements changes made by the Pension Protection Act of 2006 (PPA) in withdrawal liability calculations. The new regulation also offers additional options to plans and changes the method of allocating liability following a mass withdrawal.

These final regulations will be of particular interest to Trustees of plans that use the presumptive or modified presumptive method and to administrators of plans that are terminated by mass withdrawal. Additionally, the final regulations implement the new rule exempting employers from making interim payments of withdrawal liability if the plan's assessment was based on an allegation that the employer engaged in a transaction to evade or avoid withdrawal liability.

1. Option to Re-start Under the Presumptive and Modified Presumptive Allocation Methods

The "presumptive" and "modified presumptive" withdrawal liability allocation methods were designed to protect employers that had recently joined a multiemployer plan from liability for unfunded vested benefits ("UVBs") that arose before they became contributors to the plan. Both methods began by allocating the UVBs that existed as of the last day of the plan year that ended before September 26, 1980 among those employers contributing to the plan when the Multiemployer Pension Plan

Amendments Act was passed. Those initial liabilities were amortized over time and no longer exist.

The presumptive method allocates any increase or decrease (change) in UVBs each plan year among employers contributing to the plan in the succeeding plan year. The change in UVBs for each year is reduced by 5% for each succeeding year so that an individual year's liability pool phases out over 20 years. The result is that plans must keep track of 20 years' worth of changes in UVBs and more than that for the employer contribution histories. By allocating changes in UVBs on a year-by-year basis, the presumptive method provides a degree of protection to newly entering employers.

By contrast, the modified presumptive method divides the UVBs into an initial pool and a subsequent pool. The initial pool was based on the UVBs as of the end of the plan year that ended before September 26, 1980. The initial pool was amortized over 15 years so it no longer exists. The result is that the modified presumptive method has become a one-pool method. Thus, the UVBs as of the end of each year are allocated among all employers contributing in the following year based on their proportion of contributions for the five plan years ending with the plan year for which the UVBs are calculated, e.g., *the UVBs as of the end of 2008 are allocated among all employers still contributing in 2009 based on their proportion of contributions for the years 2004 through 2008.*

Cheiron is a full-service actuarial consulting firm assisting Taft-Hartley, corporate and public plan sponsors manage their benefit plans proactively to achieve strategic objectives and satisfy the interests of plan participants and beneficiaries. To discuss how these PBGC regulations impact your plan, please contact your Cheiron consultant or email your request to speak to a consultant at info@cheiron.us.

Example of Withdrawal Liability Allocation Methods Before Restart

(all numbers in millions)

	Presumptive Method			Modified Presumptive Method		
	2008	2009	2010	2008	2009	2010
Vested Liability	100	107	115	100	107	115
Assets	50	50	54	50	50	54
UVB (Unfunded Vested Benefits)	50	57	61	50	57	61
New Base and Runoff*						
pre 2007	10	9	8	0	0	0
2008	40	38	36	50	0	0
2009	na	10	9.5	na	57	0
2010	na	na	7.5	na	na	61

***New Base** equals Total UVB less sum of prior year's runoffs. **Runoff** for each base is 1/20th per year.

The table above shows that an employer entering a plan in 2009 that is using the presumptive method will not be responsible for any liabilities (UVBs) created prior to 2009. By contrast, if the plan is using the modified presumptive method, the 2008 liability will roll over and become part of the 2009 liability so a newly entering employer will be responsible for its share of the total UVBs of the plan.

The amount allocable under the presumptive method to employers entering the plan in 2009 is \$10 million, which results from reducing the 2009 total UVB (\$57 million) by the unamortized changes in UVBs from prior plan years (\$9 million + \$38 million, or \$47 million). Under the presumptive method an employer that enters the plan in 2009 and withdraws in 2011 will be liable only for its share of the remaining balance as of year end 2010 of runoff UVBs from the years that it participated, or \$17 million (\$9.5 million from the 2009 base and \$7.5 million from the 2010 base). By contrast, under the modified presumptive method, an employer entering the plan in 2009 and withdrawing in 2011 will be liable for its share of the total

\$61 million UVB in 2010.

The table below shows the impact of restarting each method.

The reduction in withdrawal liability for an employer entering the plan in 2009 under a restarted presumptive rule is not dramatic, reducing the liability from an allocable share of \$17 million to an allocable share of \$16 million. However, restarting under the modified presumptive method will reduce the liability of an employer that enters the plan in 2009 from its allocable share of \$61 million to its allocable share of \$14.972 million.

Construction industry plans are required by law to use the presumptive method, and PPA only permits them to restart that method in a year for which the plan had no UVBs.

The fresh-start options are available for withdrawals that occur after January 29, 2009, subject to the rules

Example of Withdrawal Liability Allocation Methods After Restart as of 2008

(all numbers in millions)

	Presumptive Method			Modified Presumptive Method		
	2008	2009	2010	2008	2009	2010
Vested Liability	100	107	115	100	107	115
Assets	50	50	54	50	50	54
UVB (Unfunded Vested Benefits)	50	57	61	50	57	61
New Base and Runoff*						
pre 2007	na	na	na	na	na	na
2008	50	47.5	45	50	48.086	46.028
2009	na	9.5	9.025	na	8.914	0
2010	na	na	6.975	na	na	14.972

***New Base** equals Total UVB less sum of prior year's runoffs. **Runoff** for each base is amortized over 15 years at 7.5%.

requiring prior notice to an employer before the new allocation rule can be applied without the employer's consent. Note that the fresh-start can be effective for a year earlier than 2009 as in the example where the fresh-start took place in 2008.

2. Withdrawal Liability Following a Mass Withdrawal

The final regulation changes the basis for allocating withdrawal liability after a mass withdrawal. The original regulation allocates this liability in three steps:

- The first step is to determine the liability of each employer that withdrew in the year in which the mass withdrawal occurred using the regular withdrawal rules ("initial withdrawal liability"). Assuming a mass withdrawal occurs in 2008, the first step would be to allocate the UVBs as of the last day of the 2007 plan year using the plan's regular withdrawal liability allocation method.
- The second step is to allocate additional liability to any employers that were either exempt from the original allocation or had their liability reduced because of the *de minimis* rule or the 20-year cap ("redetermination liability").
- The third step is to calculate the plan's UVBs as of the last day of the plan year in which the mass withdrawal

occurs using the PBGC rates applicable as of that date. This amount less any outstanding collectible claims for withdrawal liability is the "reallocation UVBs," which is then allocated to employers that are still in business. Thus, any outstanding withdrawal liability allocated to employers in the first two steps that become bankrupt or insolvent before the allocation of reallocation liability becomes part of the reallocation pool. Reallocation liability applies not only to those employers that withdrew in the mass withdrawal but to any employer that withdrew during the two plan years preceding the plan year in which the mass withdrawal occurs.

The basis for allocating the reallocation UVBs in the original regulation was proportional based on the amount of liability determined in steps one and two. The final regulation changes the basis to the proportion of average contribution base units contributed by each employer as compared to the average contribution base units contributed by all employers for the three full plan years preceding the date the employer withdrew. The final regulation defines the contribution base unit as the unit on which contributions were due (e.g., hours worked) or, if there were no contributions required during any of the years in the allocation base, the unit on which contributions would have been due.

The following example might be helpful:

Mass Withdrawal Liability Illustration for "Company A"

	Prior Regulation	New Regulation
1. Initial Withdrawal Liability assessed to Company A	\$120,000	\$120,000
2. Redetermination Liability assessed to Company A	\$30,000	\$30,000
3. 12-31-07 Plan UVB (using regular Withdrawal Liability Assumptions)	\$2,000,000	\$2,000,000
4. 12-31-08 Plan UVB (using Mass Withdrawal Liability Assumptions)	\$3,000,000	\$3,000,000
5. Reallocated Liability for all Withdrawal Employers (4 - 3)	\$1,000,000	\$1,000,000
6. Company A's Reallocated Liability Allocation (Original Reg.) = (1 + 2) ÷ 3	0.075	—
7. Company A's Reallocation Liability (Original Reg.) = (5 x 6)	\$75,000	—
8. Company A's Contribution Base Units (e.g., hours)	—	8,500
9. Total Contribution Base Units	—	100,000
10. Company A's Reallocated Liability Allocation (Final Reg.) (8 ÷ 9)	—	0.085
11. Company A's Reallocated Liability (Final Reg.) (5 x 10)	—	\$85,000
12. Company A's Mass Withdrawal Liability (Original Reg.) = (1 + 2 + 7)	\$225,000	na
13. Company A's Mass Withdrawal Liability (Final Reg.) = (1 + 2 + 11)	na	\$235,000

The effect of this change is twofold. First, it allocates any reallocation liability based on the proportion of contribution base units made by employers in the three years immediately preceding the mass withdrawal. Thus, some employers that had large initial liability because of the presumptive rule and have over time become relatively smaller contributors will not get as large a piece of the reallocation liability as under the original regulation. Second, employers that participate in plans with different benefit levels for different contribution rates will be treated the same.

PBGC's revised method will allocate a greater proportion of the reallocation liability to those employers who currently have the most participants in the plan, presumably increasing collections. This might seem unfair to relatively new employers or employers participating at lower contribution rates whose employees represent a much smaller portion of the plan's liabilities. The final regulation, like the original regulation, retains the option for a plan to adopt a different allocation method for mass withdrawal. Plans wishing to use an alternative method must be careful to adopt it at least three years prior to a mass withdrawal because of the statutory rule that prohibits application of a new method without an employer's acquiescence prior to providing notice of the method to employees.

This change is effective for mass withdrawals that occur after January 29, 2009.

3. Modifications to Conform with PPA

The final regulation makes several modifications to comply with special rules added by the Pension Protection Act. These include:

- Changing the definition of a multiemployer plan to include plans such as union staff plans that made the special one-time election to be treated as multiemployer plans;
- Excluding the automatic employer contribution surcharge for plans in critical status from numerator and denominator for allocating UVBs, effective for plan years beginning after 2007;
- Modifying the definition of nonforfeitable benefits to include any adjustable benefits that were reduced or

eliminated by a plan in critical status so that UVBs will be calculated as if those benefits had continued to be provided by the plan. The PBGC has not yet prescribed a simplified method for making this adjustment, nor indicated whether benefit cuts that could have been made without infringing the anti-cutback rules also need to be restored (e.g., reductions in future accrual rates); and

- Eliminating the charge on late interim payments and the authority of a plan to prescribe rules for collecting interim payments for employers assessed withdrawal liability on the basis of a transaction the plan determines was designed to evade or avoid liability. PPA exempts such employers from the requirement to make interim payments while they contest the withdrawal liability assessment subject to certain conditions.

Conclusion

PBGC has taken the opportunity in this regulation to go beyond making changes needed to conform to PPA. It has extended to non-construction plans the option to restart the presumptive or modified presumptive rule as of any plan year regardless of whether the plan had UVBs in that year. This allows plans using the presumptive rule to clean up 20 plus years' worth of records and provide additional relief from pre-restart underfunding to employers that enter the plan after the restart year. Plans using the modified presumptive rule will be able to provide significant relief from pre-restart underfunding.

The changes to the reallocation rules following a mass withdrawal will shift more of any additional liability from the mass withdrawal revaluation onto those employers that have the contribution base units in recent years, regardless of the actual contribution rate for each employer. Plans that believe this result is unfair should adopt alternative mass withdrawal liability reallocation rules as soon as practicable because those rules must be applied uniformly to all withdrawing employers, may not be applied to an employer that withdrew before the amendment is adopted, and in a mass withdrawal, the reallocation applies to employers that withdrew during the two full plan years preceding the year of the mass withdrawal. This means that any plan reallocation variation must be adopted at least two full plan years before a mass withdrawal to comply with the uniformity rule.

