

Partition of Multiemployer Pension Plans – Administrative Issues

The Role of the Pension Benefit Guaranty Corporation in a Partition

If one employer in a multiemployer plan goes bankrupt or otherwise fails to pay its share of the plan's unfunded benefits, responsibility to fund the accrued pensions for that employer's workers shifts to the remaining employers. When a significant number of employers fail to pay their share of unfunded benefits, the burden may become too great for the remaining employers to bear. In such a situation, ERISA allows the Pension Benefit Guaranty Corporation ("PBGC") to remove, or "partition" off, the obligation to pay benefits earned with bankrupt employers as a type of "surgery" to save the plan.

Under ERISA § 4233, the PBGC may sever from the plan liability for benefits "directly attributable" to service with certain bankrupt employers upon a finding that, among other things, doing so would significantly reduce the risk that the plan will become insolvent. These partitioned benefit obligations are combined in a new plan, technically a terminated plan, and the original multiemployer plan is no longer responsible for them. Instead, PBGC provides the partitioned, terminated plan financial assistance to cover the cost of PBGC-guaranteed benefits and reasonable administrative expenses (*see* ERISA §§ 4261, 4281, governing PBGC financial assistance and guaranteed benefit levels).

PBGC *need not* take over and administer a partitioned plan. Instead, the plan may continue to be administered in the private sector. Indeed, since Congress adopted the current multiemployer rules in 1980, PBGC has never, to our knowledge, taken over and administered a terminated or insolvent multiemployer plan (whether partitioned, or not). Rather, these plans have continued to be administered in the private sector, usually by the same board of trustees that administers the original plan. For this reason, in a partition, PBGC would have only the following, limited administrative responsibilities:

- Apply the statutory criteria to determine whether partition is appropriate.
- Approve the form of notice to participants and beneficiaries in the plan that is proposed to be partitioned.
- Consider any comments received from participants and beneficiaries in the plan that is proposed to be partitioned.
- Negotiate and sign a partition agreement with the trustees of the original plan.
- Sign an order finalizing the partition.
- Periodically send a check, or wire funds to cover the cost of guaranteed benefits and reasonable overhead.
- Monitor the financial assistance being provided to the partitioned plan in the same manner that it monitors the financial assistance provided to any of the 57 insolvent multiemployer pension plans that have received PBGC assistance. *See* Pension Insurance Data Book 2008, Table M-4 (number of insolvent multiemployer plans receiving assistance from PBGC).

In a partition, PBGC *need not*:

- Provide notice to plan participants. Rather, the plan administrator distributes the notice to plan participants and beneficiaries.

- Calculate the benefits and liabilities to be transferred to the partitioned plan. Instead, the original plan's actuaries perform the necessary calculations.
- Administer the terminated plan. Although PBGC provides the partitioned plan financial assistance (as it does for any insolvent multiemployer plan), the original board of trustees (or other party appointed to do so) continues to process claims, pay benefits, make required disclosures, file required reports, respond to participant inquiries, and oversee all day-to-day operation of the partitioned plan.

Additional Concern About Administrative Burden on PBGC

Under legislation proposed by Congressmen Pomeroy and Tiberi (H.R. 3936), in the event of a "Qualified Partition," as defined in the bill, PBGC would guarantee 100% of the benefits that are partitioned off. Some have suggested that this guarantee proposal could provide an incentive for the trustees of a plan to transfer to the partitioned plan benefits that are not eligible for partition under the statutory criteria and the PBGC's partition order, and that PBGC could be unable, at a reasonable cost, to prevent this potential abuse.

The concern that trustees (who already faithfully comply with hundreds of complex rules in a highly-regulated field) would violate the statutory requirements for partition and the PBGC's partition order may be readily addressed, in two, cost-effective ways.

- First, the statute could require certification by the plan's trustees or administrator that the data provided to the plan's enrolled actuary for the determination of benefits and liabilities to be included in the partitioned plan is correct and certification by the plan's enrolled actuary that the determination of the liabilities to be included in the partitioned plan is correct based on the data provided. We note in this regard that the enrolled actuary is an independent professional who, under federal law, already certifies a variety of important facts regarding the liabilities of a plan.
- Second, PBGC could audit a statistically significant sample of the benefit obligations transferred to the partitioned plan. We note in this regard that PBGC already successfully conducts such audits for terminated single employer pension plans, in two ways.
 - First, since 1987, PBGC has been required to conduct audits of benefit determinations in single employer plans that have been terminated in "standard" terminations (i.e., with assets sufficient to cover all benefit obligations). As a matter of course, PBGC audits all plans with more than 300 participants upon standard termination, as well as a number of selected smaller plans. For its 2008 fiscal year (the most recent reported), PBGC reported a total of 1,590 standard terminations. *See Pension Insurance Data Book 2008, Table S-3.*
 - Second, an even larger number of single employer plans have terminated with insufficient funds and, as a result, have been trustee and administered by PBGC. During its 2008 fiscal year, PBGC made more than \$4.2 billion in payments to more than 600,000 participants and beneficiaries in such terminated plans. Following a risk assessment of its own programs, PBGC concluded "that its payment processes are not susceptible to significant improper payments risks." 2008 Annual Report of PBGC, p. 17.